

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)

Tuesday, 11 July 2023

(10.30 am)

MR JUSTICE ROTH: Yes, Mr Smouha.

MR SMOUHA: Good morning, sir. May I call Mr Peacop.

MR GRAHAM MARK PEACOP (affirmed)

Examination-in-chief by MR SMOUHA

MR SMOUHA: Good morning, Mr Peacop. You should have in front of you copies of your two witness statements. Clean copies have been provided. Your first witness statement in the trial bundle is at {A/8/5}. You should see that coming up on the -- the cover of it, the cover page, coming up on the screen in front of you.

If you would turn, please, to page 25 of your first witness statement {A/8/25}, can you please confirm that those are your signatures on the confirmation of compliance and the statement of truth, signing on 17 March 2023?

A. Yes, they are both my signatures.

Q. If you turn, please, to page 4, which is bundle page -- internal page 4, but bundle page 8 {A/8/8}, in paragraph 10, you say:

"In addition to my role with the Board, I also represented NatWest/RBS on the following committees of MEPUK ..."

And I understand there is a clarification you wish

1 to make in relation to paragraph 10(c).

2 A. Thank you. Yes, sir. The -- on reflection, I remember
3 being a nominated representative on that group, but on
4 the evidence that I've seen, any minutes that might have
5 come before me, I can't actually remember having
6 attended the meetings or what they actually comprised
7 of.

8 But I -- I just want to say I didn't -- my
9 recollection is that I can't recall having been --
10 but -- or what they -- what they discussed specifically,
11 but I do remember being a representative. So I just
12 wanted to bring that before the Tribunal today.

13 MR JUSTICE ROTH: Specifically on the EOIG, is it?

14 A. Yes, it is.

15 MR JUSTICE ROTH: Yes.

16 MR SMOUHA: Thank you. Mr Peacop, just try to slow down
17 a little bit for the transcriber.

18 Thank you. Apart from that, are there any other
19 matters that you wish to clarify or correct in your
20 first statement?

21 A. None. Thank you.

22 Q. Thank you. If you can now turn to your second witness
23 statement at {A/13.2/1}. If you would go, please, to
24 page 10 {A/13.2/10}. Again, can I ask you to confirm
25 those are your signatures on the confirmation of

1 compliance and statement of truth, signing this
2 statement on 19 June 2023?

3 A. Yes, they are both my signatures.

4 Q. And are there any corrections that you wish to make to
5 this statement?

6 A. No, thank you.

7 Q. And are the contents -- can you please confirm that the
8 contents of your two statements are true?

9 A. I can, yes.

10 MR SMOUHA: Thank you, Mr Peacop. If you wait there,
11 Ms Demetriou will have some questions for you.

12 MR JUSTICE ROTH: Yes, Ms Demetriou.

13 Cross-examination by MS DEMETRIOU

14 MS DEMETRIOU: Good morning, Mr Peacop.

15 A. Good morning.

16 Q. Just on the correction you made on paragraph 10(c), so
17 do I take it from what you said that you don't actually
18 remember participating in the EOIG at all?

19 A. I remember being a representative -- a nominated
20 representative. I can't actually remember the meetings
21 themselves, so without having been prompted by having
22 seen any minutes from those meetings.

23 Q. So when this part of your statement was drafted, did you
24 volunteer your participation in the EOIG or was that
25 drafted for you?

1 A. No, that was my volunteered comment.

2 Q. Right, but you can't remember what was said at the
3 meetings at all.

4 A. No.

5 Q. Okay. Now, you started your involvement in the setting
6 of multilateral interchange fees in 1997, didn't you?

7 A. Yes.

8 Q. And you were -- that was in the role -- you were senior
9 relationship manager for the Royal Bank of Scotland,
10 that's right, isn't it, at the time?

11 A. Yes.

12 Q. And RBS took over NatWest in the year 2000. Have I got
13 that right?

14 A. Yes, yes.

15 Q. And then in 1998, you became RBS' alternate
16 representative on the board of directors for
17 Mastercard UK, so MEPUK; yes?

18 A. Yes.

19 Q. And you became MEPUK's chairman in 2005, didn't you?

20 A. Yes, correct.

21 Q. And you explain in your witness statement that later on,
22 between May 2010 and September 2012, you held a senior
23 position at Mastercard Europe.

24 A. Mastercard UK and Ireland, which was part of the Europe
25 region, yes.

1 Q. Now, you give evidence about the process by which MEPUK
2 set UK interchange fees from the second part of 1997
3 through to 2004, and in 2004, the function was taken
4 over by Mastercard, wasn't it?

5 A. Yes.

6 Q. And I'm going to come back to some of the detail in your
7 statement, but I want to look first at some of the
8 broader issues that you address.

9 So could we go to your first statement, {A/8/16},
10 please, paragraph 43.

11 MR JUSTICE ROTH: There seem -- yes, there are two different
12 numbers of this statement for reasons I don't quite
13 follow.

14 MS DEMETRIOU: Oh.

15 MR JUSTICE ROTH: I have paragraph 43 on A/12 --

16 MS DEMETRIOU: Yes.

17 MR JUSTICE ROTH: -- but I think electronically it's
18 a different number for some reason.

19 MS DEMETRIOU: Oh.

20 MR SMOUHA: Sir, there's a reason for that and, sorry, this
21 may be irritating. The reason for that is in the
22 electronic bundle, I'm not sure why, the list of
23 documents referred to, in other words the exhibit that
24 is four pages, has been put at the front.

25 MR JUSTICE ROTH: Right.

1 MR SMOUHA: So the internal page 1, the cover page of the
2 witness statement, is at page 5 of the bundle,
3 I'm afraid.

4 MR JUSTICE ROTH: So add four or something to --

5 MR SMOUHA: So you need to add four. It's only for this
6 statement. I'm sorry, but that's how it's been
7 assembled.

8 MR JUSTICE ROTH: We'll cope with that. Mr Peacop has
9 a hard copy of his statement --

10 A. Yes.

11 MR JUSTICE ROTH: -- and I think will help.

12 MS DEMETRIOU: That --

13 MR JUSTICE ROTH: If we use the internal pagination --

14 MS DEMETRIOU: I will use the internal pagination, which
15 I think matches the bundle pagination I have, and then
16 perhaps the operator can remember, if I don't remember
17 to say, to add four in order to get the page up. Thank
18 you.

19 So looking at paragraph 43, Mr Peacop, you say there
20 that:

21 "MEPUK would have perceived that it would be
22 unviable and potentially detrimental to the ... network
23 to introduce ... MIFs that could be considered
24 unreasonable, even if the EDC cost studies indicated to
25 us that costs had increased."

1 You say:

2 "As far as [you're] aware, MEPUK did not increase
3 the UK MIFs after they were introduced. There was
4 significant pressure from acquirers and large retailers
5 in the market to decrease the rates which ensured there
6 was always a downward pressure on the setting of the
7 UK MIFs."

8 You go on to say:

9 "MEPUK's members were under significant pressure
10 from their large merchant customers in relation to [the]
11 setting of [the] MIFs. Some merchants exerted pressure
12 on acquirers to lobby MEPUK to reduce the ... MIFs. In
13 [your] experience, the largest retailers (... tended to
14 be on interchange plus arrangements ...) were able
15 easily to discern, and ... scrutinise, the rate of
16 interchange fees ... [You] had particular experience of
17 this issue, as at that time RBS was the largest acquirer
18 in MEPUK, with some of the largest of retailers as its
19 clients."

20 So you say -- so pausing -- pausing there, the
21 reason that acquirers exerted that significant downward
22 pressure was because the interchange fees were a payment
23 from the acquiring banks to issuing banks; correct? And
24 that payment was being passed through, by and large, by
25 the acquirers to their retail customers, to the

1 merchants; is that right?

2 A. Yes.

3 Q. So the commercial incentives, I think you're saying, of
4 acquiring banks were to pay lower interchange fees.

5 That's generally what they wanted to do; correct?

6 That's where the pressure was coming from.

7 A. If I can modify that slightly.

8 Q. Well, first of all, can you tell me whether you agree
9 with it and then you can modify it?

10 MR JUSTICE ROTH: Well, I think you're saying you would like
11 to modify it before you answer.

12 A. Yes, thank you. The ultimate position or the primary
13 position is that the retailers are wishing to pay
14 lower -- lower fees to their acquirers and that
15 interchange being a part of, but just a part, of the
16 costs that are passed on as part of the merchant service
17 charge, it is the retailers that apply the pressure.
18 It's a pass-through in a sense for the acquirers and,
19 therefore, they are reflecting the interest of their
20 customers, i.e., the retailers.

21 Q. Thank you. So I think your position, just to clarify,
22 is that these interchange fees were almost always passed
23 on to the retailers; yes?

24 A. I -- that's my understanding, yes.

25 Q. And that the retail -- the retailers would then put

1 pressure on the acquirers to have lower interchange fees
2 because they wanted to pay less money.

3 A. Yes.

4 Q. Now, turning to your first witness statement at
5 paragraph 69, so I've got that as A/8/19, so it's going
6 to be {A/8/23}. We see that you explain there that, in
7 fact, changes to UK MIF rates for existing categories
8 were unusual because of this significant pressure
9 exerted by the large retailers through the acquirers;
10 yes?

11 A. Yes.

12 Q. And, in fact, you describe the pressure as coming both
13 from acquirers and large retailers; that's right,
14 isn't it?

15 A. Yes.

16 Q. And you explain elsewhere in your statement that in
17 2004, Visa decreased its UK MIFs and so the differential
18 between the MIFs paid by acquirers under the Mastercard
19 scheme and the MIFs they paid under the Visa scheme was
20 difficult to maintain. Do you remember you gave
21 evidence saying that?

22 A. Yes.

23 Q. And that's a point that would have been made by banks
24 with large acquiring businesses to MEPUK, isn't it? So
25 they would've said, "Look, look at Visa. That's gone

1 down. We want our rate to go down for Mastercard too."

2 A. Yes, I think that's fair.

3 Q. So I think it would be fair to say that you -- that the
4 evidence you're giving is that this significant downward
5 pressure exerted by acquirers and by retailers was
6 something that MEPUK was very conscious of.

7 A. Yes.

8 Q. And when there was debate about whether or not the
9 UK MIF should be increased, banks which were large
10 acquirers would have presumably spoken against this or
11 may have spoken against this.

12 A. I don't necessarily agree with that as a statement. If
13 I may, the -- I return to the context of, for example,
14 the interchange subgroups, which I have commented on
15 extensively, and then ultimately the MEPUK board
16 meetings. There was always a balance. There was always
17 objectivity. There was an awareness of different views
18 from issuers and acquirers, but they were taken in the
19 round, so there was always a balance adopted.

20 Q. Mr Peacop, sorry to interrupt you, but I think you're
21 reading much more into my question than was actually
22 there. So can we go back to my question?

23 So I said: when there was debate about whether or
24 not the UK MIF should be increased, banks which were
25 large acquirers would presumably have spoken against

1 this. Do you remember them speaking against increases
2 in MIFs?

3 A. It would have happened, yes --

4 Q. Thank you.

5 A. -- but not necessarily always.

6 Q. Sorry, not necessarily --

7 A. It would have happened --

8 Q. It would have happened --

9 A. It would have happened on occasion.

10 Q. Right, thank you.

11 Now, conversely, of course, so looking for now at
12 the incentives of banks with large issuing businesses,
13 their incentives, their commercial incentives, would
14 have been for interchange fees to be higher, right,
15 because they would have got more revenue?

16 A. In isolation, that's a fair assumption.

17 Q. All other things being equal, that would be their
18 commercial incentive; yes? Can we agree that?

19 A. Yes.

20 Q. And it's right, isn't it, that some large issuing banks
21 would from time to time seek to secure an increase in
22 the MIFs; that's correct, isn't it?

23 A. I can't remember that is the case, no.

24 Q. So you don't remember any upward pressure from MIFs from
25 the issuing banks?

1 A. No.

2 Q. Because you're talking about competing different
3 incentives --

4 A. Yes.

5 Q. -- so it seemed to me that inherent in what you were
6 saying was that the issuing banks might be exerting some
7 upward pressure.

8 A. I don't recall that upward pressure, no.

9 MR JUSTICE ROTH: Can we just get some sense, when we talk
10 about issuing banks, acquiring banks, of how many there
11 were of each and what the split is? Because, of course,
12 many banks were both issuers and acquirers.

13 A. Yes.

14 MR JUSTICE ROTH: And I think one starts with your own bank,
15 as it was, at RBS --

16 A. Yes.

17 MR JUSTICE ROTH: -- which was very big in Mastercard,
18 I think, had a large share of Mastercard. We've heard
19 the expression "net issuer" or "net acquirer", and
20 I think that's something you use, isn't it --

21 A. Yes.

22 MR JUSTICE ROTH: -- as an expression?

23 So what was the balance in NatWest/RBS? Was it
24 between the issuing side and the acquiring side?

25 A. In NatWest and RBS, both a large issuing bank and

1 a large acquirer. I stand to be -- I'm now going from
2 memory, so forgive me, but in an attempt to answer your
3 question, sir, NatWest, I remember for Mastercard -- as
4 far as I remember, sorry, was a net issuer of Mastercard
5 cards.

6 MR JUSTICE ROTH: And who would be the other big -- who
7 would be the big acquirers of Mastercard? Were there
8 any particular --

9 A. So the net -- the net acquirer of Mastercard --

10 MR JUSTICE ROTH: Net acquirer.

11 A. -- would be Barclaycard.

12 MR JUSTICE ROTH: Barclays?

13 A. Barclaycard as a business as part of Barclays Group,
14 yes.

15 MS DEMETRIOU: Perhaps we can look at some documents on this
16 issue, Mr Peacop.

17 Sir, I didn't mean to cut across --

18 MR JUSTICE ROTH: Sorry, I don't want to you take you out of
19 your course, but you --

20 MS DEMETRIOU: No, no. Sir, if you have any more questions
21 on this, please do.

22 MR JUSTICE ROTH: It's helpful to have a sense of who we are
23 talking about, as it were.

24 MS DEMETRIOU: Just on that last point that the Chairman put
25 to you, so RBS and NatWest were separate banks until

1 2000; is that right?

2 A. Correct.

3 Q. And you were working for RBS in 1997.

4 A. No, I was working for NatWest.

5 Q. You were working for NatWest in 1997, okay. It's
6 a little confusing in your witness statement because
7 I think you use "RBS" compendiously to refer to them
8 both.

9 Now, if we go to {C10/429/36}, please. So this is
10 a market review produced by EDC in September 2002.
11 Let's go to page 45 {C10/429/45} and here, EDC explains
12 where its data has come from. Do you see that? So if
13 we look at the top of the page, it says that:

14 "The sample represented around 90% of the MasterCard
15 acquiring volume in the UK and just over 55% of
16 transactions on the issuing side."

17 A. Yes.

18 Q. And then below, it says that the sample was increased to
19 includes monoline issuers. So can you just explain to
20 the Tribunal what monoline issuers are?

21 A. A monoline issuer is a bank or a payment company that
22 simply issues the cards with no acquirer.

23 Q. Thank you. And EDC say there that monoline issuers and
24 smaller issuers have been increasing their overall
25 market share over the past few years. Do you see that?

1 A. Yes.

2 Q. And then if we go to the table, so if we can scroll
3 down, please, we can see that the study includes
4 eight issuers and five acquirers and so that means that
5 those five acquirers represented 90% of the acquiring
6 volume. Do you see that?

7 A. Yes.

8 Q. And that the eight issuers represented 55% of the
9 issuing volume; yes? So is this -- does this reflect
10 your memory, your recollection, that the acquiring
11 market was concentrated in a smaller number of banks?

12 A. Yes, it does.

13 Q. And we can see of the banks listed in the acquiring
14 column, they're all listed in the issuing column except
15 for Girobank. Do you see that?

16 A. Yes.

17 Q. So you accept -- so we can see that there were more
18 issuers than acquirers in the market, so do you accept,
19 therefore, that acquirers generally had a higher market
20 share of the acquiring market than issuers had of the
21 issuing market? That must follow, mustn't it, as
22 a general matter? So we see that there's
23 a concentration in the acquiring market amongst a few
24 banks; that most of those, four of those five banks, are
25 also in the issuing market; that the issuing market

1 comprises a much larger number of banks.

2 So do you accept that generally, acquirers had
3 a higher market share of the acquiring market than
4 issuers did of the issuing market? Perhaps you can't
5 comment on that.

6 A. I am trying to draw the correlation to ensure I give
7 an accurate answer, because I can't -- could I trouble
8 you, sir, if we just went -- just the preceding
9 paragraph so I could just read the context --

10 Q. Of course.

11 A. -- if that's okay, please.

12 Q. So if we can scroll, please, so we can see the paragraph
13 ahead -- above. Did you want to see the bottom of the
14 previous page --

15 A. No --

16 Q. -- or this one?

17 A. Thank you. (Pause)

18 Thank you. Can I ask for the question to be
19 repeated?

20 Q. Yes, I'm being asked by Mr Smouha to show you the bottom
21 of the previous page, so let's have a look at that
22 {C10/429/44}.

23 A. Sure.

24 MR JUSTICE ROTH: It's under "Participation", I think.

25 That's the bit, isn't it?

1 MR SMOUHA: Yes, sorry, just so that the context for the
2 first sentence on the next page can be seen.

3 MR JUSTICE ROTH: No, I understand. (Pause)

4 A. Thank you.

5 MS DEMETRIOU: And then let's go back to the next page
6 {C10/429/45}. Thanks.

7 MR JUSTICE ROTH: So that's the sample, Ms Demetriou, so
8 I'm not sure quite that's how you put the question. As
9 I understand it, it's saying it's those four members --

10 MS DEMETRIOU: Well, the --

11 MR JUSTICE ROTH: -- that represented 90% and 55, not the
12 extended list in the table below. Isn't that what it's
13 saying?

14 MS DEMETRIOU: So -- well, let's just go back. Sorry, maybe
15 I've got that wrong. So those banks, Barclays, Lloyds,
16 HSBC and Royal Bank of Scotland, and if we go over the
17 page, they represented between them 90% of the
18 Mastercard acquiring volume, so those four banks had 90%
19 of the volume.

20 MR JUSTICE ROTH: Yes, and just over 55% of the issuing
21 side.

22 MS DEMETRIOU: And just over 55% of transactions on the
23 issuing side.

24 So I think it follows from that, doesn't it,
25 Mr Peacop, that those banks or at least some of those

1 banks would have had a proportionately higher volume of
2 the acquiring market than of the issuing market? Do you
3 agree? It just follows as a matter of logic.

4 A. Statistically I understand and yes, statistically,
5 I agree.

6 MS DEMETRIOU: Thank you.

7 MR JUSTICE ROTH: But it's those four that gives those
8 percentages, not the larger number in the table below,
9 no.

10 MS DEMETRIOU: No, it's those four. I understand and --

11 MR JUSTICE ROTH: I think you put it --

12 MS DEMETRIOU: I think I put it incorrectly and so
13 I'm grateful to Mr Smouha for drawing my attention to
14 that. It wasn't deliberate. But the point I am
15 making -- the point I was seeking to draw out really is
16 the same point.

17 And then if we go, please, to {C9/411/1} --

18 PROFESSOR WATERSON: Just before we do --

19 MS DEMETRIOU: Sir, sorry.

20 PROFESSOR WATERSON: -- can I ask what a Baxter study is?

21 A. A Baxter study is a version or a type, as I understand
22 it, of undertaking a cost study, which is an assessment
23 of the end-to-end costs taken into account when
24 undertaking the study. This, I believe, was, from
25 recollection, if I may, to try and help answer the

1 question, undertaken as part of work relating
2 to/responding to an OFT investigation at the time.
3 Edgar, Dunn & Co, for the interchange cost studies, did
4 it on a proxy basis.

5 If I may stop there, that's as far as my expertise
6 will take me and there are other experts who are able to
7 comment on that.

8 PROFESSOR WATERSON: Thank you.

9 MS DEMETRIOU: Thank you, Mr Peacop. I'm going just to take
10 you to another document that makes a similar point to
11 the document I just took you to. So if we go to
12 {C9/411/1}.

13 Do you see from the front page that these are joint
14 written representations from MEPUK, MCI and
15 Mastercard Europe in response to the OFT supplementary
16 rule 14 notice? Were you involved in responding to the
17 OFT? Were you involved in that regulatory matter?

18 A. Yes, I was. This is the first time I've been reminded
19 of this document since 2003.

20 Q. Okay. Did you help put this document together, do you
21 remember?

22 A. Yes.

23 Q. You did?

24 A. Yes.

25 Q. So if we go to page 10 {C9/411/10}, and do you see

figure 2.2 there which illustrates how Mastercard's four-party scheme operated?

A. Yes.

Q. And do you see the box in respect of issuers? It says that there's approximately 60 in the UK; yes?

A. Yes.

Q. And then in relation to acquirers, you can see that there are eight in the UK.

A. Yes.

Q. So just numerically, there are many more issuers than acquirers; correct?

A. Yes.

Q. And of the named acquirers, several of them are named as issuers. So we see that RBS Group, Barclays and HSBC are all listed as both issuers and acquirers. Do you see that?

A. Yes.

Q. And the issuing and acquiring volumes have to balance. That's an obvious point, but they do, don't they?

A. Yes.

Q. So given the fact that there are many more issuers than acquirers and that some of the issuers are monoline issuers who don't have any acquiring volume, it follows that at least some of these acquirers will be net acquirers, doesn't it, statistically?

1 A. Yes, yes.

2 Q. Now, while you were at MEPUK, the Mastercard scheme in
3 the UK was governed by domestic -- UK Domestic Rules,
4 wasn't it?

5 A. Yes.

6 Q. And I want to take you to some of the rules now to
7 establish your understanding of them, and let's start at
8 {C4/190/1}, please. So this is a memorandum produced by
9 Europay which dates from 11 June 1997. Can you see the
10 first section entitled "Current Situation" and the
11 first sentence --

12 MR JUSTICE ROTH: This dates from 11 June 1997, you say.

13 MS DEMETRIOU: That's right, yes.

14 And if we look at the first sentence, Mr Peacop, so
15 that says:

16 "At its meeting of 14 June '95, the Board mandated
17 the CEO to review and approve, on behalf of Europay, all
18 UK Eurocard/MasterCard Domestic Rules developed by
19 MEPUK, thus authorising them to be adopted as the rules
20 applicable to domestic transactions between all Europay
21 members in the UK. The UK Domestic Rules are
22 enforceable by Europay on all UK members of Europay, not
23 only those who are members of MEPUK."

24 Do you see that?

25 A. Yes.

1 Q. So Europay's board had mandated its CEO to approve
2 certain UK Domestic Rules and those were rules developed
3 by MEPUK; correct?

4 A. Yes.

5 Q. And the UK Rules were brought into force for the
6 first time in November 1996. I appreciate that was just
7 before your time, but when you started your position
8 there, do you remember that those UK Rules were in
9 force?

10 A. I -- I've been reminded from the papers.

11 Q. In preparing to give evidence --

12 A. Sure.

13 Q. -- today? So what is your independent recollection? Do
14 you remember -- thinking back to 1997, and I do
15 appreciate it's a very long time ago, do you remember
16 knowing then that the rules, UK Rules, had been
17 introduced for the first time in November 1996?

18 A. Candidly, I wouldn't have had unprompted recall of that,
19 no.

20 Q. Okay, thank you. That's very understandable.

21 And then just the next sentence, perhaps you can
22 help us with how this works. So what's being said is
23 that the UK Domestic Rules are enforceable by Europay on
24 all UK members, not only those who are members of MEPUK;
25 correct? That's what's said.

1 A. Correct.

2 Q. And below that, it says that that is subject to the
3 fulfillment of five conditions. Do you see that?

4 A. Yes.

5 Q. And the first condition is that:

6 "MEPUK must remain representative of at least 90% of
7 the total issuing and acquiring volumes of the
8 UK members."

9 So if MEPUK weren't representative of at least 90%
10 of issuing and acquiring volumes of UK members, Europay
11 wouldn't have approved the rules it developed; correct?

12 A. I -- I believe that's the case, yes.

13 Q. And the fourth condition is that:

14 "... MEPUK rules can be implemented on Eps-Net
15 without specific development of the system, unless such
16 development is paid for by MEPUK."

17 And just pausing there, EPS-Net is the system by
18 which Europay settled transactions between licensees;
19 yes?

20 A. I believe so. I don't have detailed recollection of
21 EPS-Net.

22 Q. Okay. Now, below the conditions is a heading which
23 reads "Issues", if we can scroll, please, and it says
24 that:

25 "MEPUK is concerned that it may, at some point in

1 the future, cease to satisfy the 90% test."

2 Now, do you have any recollection of that being
3 a concern for MEPUK from the time that you were working
4 there?

5 A. No, I don't.

6 Q. And that's because you don't remember that period of
7 time very clearly.

8 A. No, that's not the case.

9 Q. That's not the case?

10 A. I remember the 90% test and, as I understand it from
11 your question, was there a concern? And I don't
12 remember there being a concern.

13 Q. Right, so --

14 MR JUSTICE ROTH: If there had been, do you think you would
15 remember it?

16 A. Yes, I do.

17 MS DEMETRIOU: So whoever drafted this document thought that
18 there was a concern, but you're disagreeing with the
19 view expressed at the time, are you?

20 A. No, I'm not disagreeing.

21 Q. Well, what is your evidence then, Mr Peacop? Because
22 here, this says MEPUK is concerned that it may at some
23 point in the future cease to satisfy the 90% test, so
24 are you disagreeing? Do you say, well, that wasn't
25 a concern of MEPUK?

1 A. No, sorry, may I provide some clarity on my view of
2 interpretation of the question?

3 Q. Of course.

4 A. Thank you, sir. I -- I took up my duties in the card
5 business of NatWest in June, I think it was, or July of
6 1997, around the time of this being produced. From that
7 time, I was aware of the 90% requirement, of the test.
8 I was not aware of any concerns during my time post my
9 arriving.

10 If there were concerns of MEPUK at this time of
11 issuing this document, which I am referring to -- before
12 that, I think it referred to a period of -- the current
13 situation of 1995 -- that's something I wouldn't have
14 been aware of, but I wasn't aware of post my arrival in
15 1997.

16 Q. So your evidence is that MEPUK were completely
17 unconcerned, were they, by the 90% rule from the point
18 that you got there?

19 A. I've shared my recollection, if I may correct -- is that
20 I can't -- personally cannot remember there being
21 concern.

22 Q. Alright. Now, if we look at the passage -- if -- the
23 passage continues:

24 "If this were to occur, then the Board's mandate to
25 the CEO would no longer have effect because MEPUK would

1 no longer meet the first condition ..."

2 So you understand, don't you, that that's saying if
3 MEPUK ceased to meet the 90% threshold, then
4 Mastercard Europe would no longer -- EPI would no longer
5 recognise the UK Domestic Rules developed by MEPUK; yes?

6 A. Yes.

7 Q. And then it continues:

8 "Therefore, in their letter of 25 March '97 MEPUK
9 proposed that MEPUK membership be made an automatic
10 consequence of membership for all UK members of
11 Europay."

12 And then later on, they say that:

13 "... MEPUK are of the opinion ..."

14 This is at the bottom of the page:

15 "... that the 90% threshold has no relevance and, as
16 a consequence, should be abolished."

17 So MEPUK wanted to abolish the 90% threshold; yes?

18 And they'd written to Europay, it looks from here, but
19 I appreciate it's before your time, on 25 March asking
20 Europay to make membership of MEPUK automatic; yes?

21 A. Yes.

22 Q. And that would've had the effect of abolishing the
23 90% threshold, wouldn't it, because it would've meant
24 that MEPUK would be representative of 100% of
25 UK licensees automatically if that change had been made;

1 yes?

2 A. Yes, that's following from this and, of course, this is
3 before my time, so I can't comment on the background to
4 it.

5 Q. Alright. Then if we go to the next page {C4/190/2} --
6 sorry, this is page 2, is it? Ah, sorry. No, that's
7 right, page 2.

8 So if we look at page 2, we see -- in the middle of
9 the page, do you see under the heading "Potential
10 implication outside the UK" -- do you see that heading?

11 A. Yes.

12 Q. And then third paragraph down:

13 "Introducing automatic membership in local
14 organisations could have serious consequences for
15 Europay from a European but also domestic competition
16 law point of view as it would grant Europay a new role
17 at domestic level and add an additional condition for
18 getting a licence.

19 "By so doing, Europay could potentially be a party
20 to restrictive agreements ..."

21 Do you see that? So Europay thought it would be
22 problematic from a competition law perspective to make
23 membership of MEPUK automatic; yes? Do you remember
24 that?

25 A. No, I don't, because this is before my time.

1 MR JUSTICE ROTH: When you said, Ms Demetriou, this is
2 a memo of 11 June, but it says at the top of page 2:
3 "At its 11 June ... Board meeting, MEPUK will be
4 seeking ..."

5 So it rather suggests it's before 11 June.

6 MS DEMETRIOU: Sir, you are quite right. Let me see if
7 I can find out what the date --

8 MR JUSTICE ROTH: It might be helpful, particularly when
9 asking the witness to comment on this. I mean,
10 obviously he can see what is there, like we all can, but
11 it's before his time and I think he's fairly saying,
12 "Well, I wasn't aware of this and I can't remember it".

13 MS DEMETRIOU: No, that's fair enough. I just want to
14 establish -- I have one more question on this and
15 I'll establish whether or not Mr Peacop does remember it
16 and we will try to get to the bottom of the date. It
17 must be, obviously between 25 March and 11 June at some
18 point because it refers to correspondence on 25 March.

19 MR JUSTICE ROTH: Yes, it may be shortly before the meeting.

20 MS DEMETRIOU: It may be shortly before the meeting.

21 And then if we go slightly further down the
22 memorandum, do you see the second paragraph from the
23 bottom:

24 "... it is up to each of our UK licensees to
25 determine for itself the benefits of joining MEPUK. It

1 should not be a conditional requirement.

2 "Based on the above, the proposal to the MEPUK Board
3 could be to lower the threshold from the current [90] to
4 [80]."

5 Do you remember that particular issue; that there
6 was a discussion about lowering the 90 to 80?

7 A. No, I don't.

8 Q. But it's right, isn't it, from your recollection, that
9 some banks were not members of MEPUK during the time you
10 were there?

11 A. Correct. My -- my knowledge is that it was not
12 a prerequisite or requirement for or a condition that --
13 of issuing Mastercard or Europay -- yes, Mastercard--
14 would have to become a member of MEPUK. I believed it
15 was voluntary.

16 Q. Voluntary. And, also, it was open, always open, to
17 a bank to resign its membership if it wanted to; yes?

18 A. Yes.

19 Q. And from your -- do you remember that there were several
20 banks that weren't members of MEPUK during the time that
21 you were there?

22 A. I don't remember unprompted, but I could be reminded.

23 Q. Alright. That's fair enough. What I want to get at is
24 what you remember unprompted.

25 Now, perhaps --

1 MR JUSTICE ROTH: Have you finished with this document?

2 MS DEMETRIOU: Yes.

3 MR JUSTICE ROTH: Yes. But if you look at the end of it

4 {C4/190/3}:

5 "Should the above proposal be acceptable to the ..."

6 I don't know if it says "Management Committee":

7 "... and subsequently to MEPUK, it would need to be
8 submitted ..."

9 So it slightly has the sense, and I am looking at it
10 properly for the first time, of someone has drafted this
11 within the staff to be put forward. Whether it was
12 actually adopted by management committee and taken to
13 the board of MEPUK, whether the MEPUK board approved it
14 is not at all clear from this.

15 MS DEMETRIOU: Sir, I'm going to trace that through. Having
16 started this, I'm going to trace it through.

17 MR JUSTICE ROTH: Yes.

18 MS DEMETRIOU: So if we could turn up {C4/186/1}, please.

19 So these are the minutes of the board meeting held on
20 11 June 1997. Do you see that at the top of the page?
21 And do you see that Mr Bushby of EPI was in attendance?

22 And if we go to page 7 {C4/186/7}, there's a heading
23 at the bottom of the page, do you see that, "MCI/EPI ...
24 to receive automatic membership of MEPUK"? And what
25 Mr Bushby is saying that currently, EPI is unable to

1 provide for automatic membership. Do you see that?

2 A. Yes.

3 Q. So if we then turn over to page 8 {C4/186/8}, we see
4 what happened to the suggestion, because it says that
5 EPI proposed that the 90% criteria should be reduced to,
6 say, 75%. So the 80 has become 75%. So EPI was willing
7 to amend the 90% threshold, yes, and it was proposed to
8 lower it to 75%? Do you see that?

9 A. I can see that, yes.

10 Q. But it's rejected what MEPUK was asking for, which is
11 not to have a criterion at all; yes?

12 A. Yes.

13 Q. And then if we go to {C5/305/19}. So we're now into
14 1998 and you can see that this is -- it looks like
15 an agenda for Europay's -- sorry, for the Rules and
16 Conciliation Advisory Committee. And if we go to
17 page 20 {C5/305/20}, if we go towards the bottom of the
18 page, "Eligibility and Representation". So this is
19 under a heading "Establishment of Domestic Fallback
20 Interchange Fees", sorry, if we just go back to the
21 heading a little further up, "and Rules", and then we go
22 to "Eligibility and" -- where is that?

23 MR JUSTICE ROTH: "Eligibility and Representation".

24 MS DEMETRIOU: Yes, yes. So, sorry, if we go back to

25 "Eligibility and Representation", you see there it says:

1 "In most countries the members or organisations,
2 which responded to Europay and provided domestic fall
3 back interchange fees, do not represent 100% of the
4 Europay membership or business (issuing/acquiring
5 volume). This raises the question of eligibility and
6 representation criteria."

7 So this is referring to the fact that members --
8 that organisations such as MEPUK, which set domestic
9 interchange fee rules, are not representative of every
10 licensee; correct?

11 A. Yes.

12 Q. So Europay has to have some criteria for deciding how
13 representative a body needs to be, and we've seen in the
14 UK, that was the 90% threshold; correct?

15 A. I need to be reminded whether that 90% was a proposal or
16 was actually the rule at the time.

17 Q. Well, it was actually a rule, but don't worry about
18 that, Mr Peacop, because you weren't there.

19 And then the next sentence reads:

20 "It is proposed that Europay will accept and
21 implement domestic fallback interchange fees and rules
22 as communicated by Members or Member-owned associations,
23 provided that, for the full year preceding the
24 communication of the fees and rules, they represent at
25 least 75% of each of the issuing and acquiring volumes."

1 So Europay is proposing to lower the 90% threshold
2 to a 75% threshold; yes?

3 A. Yes.

4 Q. Do you remember that?

5 A. Not this paper, no.

6 Q. Well, we can see that in August 1998, it's still just
7 a proposal; yes? We can see that hasn't happened yet.

8 A. Yes.

9 Q. And, of course, what -- we know that what MEPUK actually
10 wanted was the abolition of the rule. That's what it
11 preferred; yes? That hasn't been accepted.

12 A. From the previous paper, yes, it said that.

13 Q. Yes. And then let's go to page 25 in this same
14 document, because here are the proposed changes to the
15 Europay Rule Book {C5/305/25}, and if we look at
16 rule 6.2.4, it says:

17 "Domestic interchange fees may be set by either of
18 the following two methods ..."

19 And the first method is bilateral agreement. Do you
20 see that?

21 A. Yes.

22 Q. And then the second method is multilateral agreement,
23 and it says that fees may be set multilaterally where:

24 "... a Member or group of Members representing,
25 during the year preceding the agreement, at least 75% of

1 each ..."

2 I think something has gone wrong either with my
3 grammar or the reading:

4 "... of the [Eurocard] issuing and acquiring
5 domestic volume in a country may jointly set a fallback
6 interchange fee that will apply to all domestic ...
7 transactions ..."

8 So do you see there that the proposed new text is
9 underlined?

10 A. Yes.

11 Q. And you see that -- I think what's happened is that --
12 I think that you see a scoring through of a couple of
13 words, so I think this represents the change to the rule
14 and so -- but it's clear in any event that the proposal
15 is that a multilateral fallback domestic interchange fee
16 can only be set where at least 75% of members,
17 representing both issuing and acquiring domestic volume,
18 agree; correct?

19 A. Correct.

20 Q. So the converse of that is that if more than 25% of
21 either the issuing or the acquiring business decide to
22 withhold their consent under this rule, they could
23 prevent a fallback domestic MIF from taking effect;
24 correct?

25 A. As a hypothetical possibility, yes.

1 Q. Well, you agree that that's how the rule would function?

2 A. It functions in the positive that at least 75%, yes,
3 I agree.

4 Q. Well, are you denying that the converse follows
5 logically from the positive?

6 A. The converse is possible, yes.

7 Q. Right. So I think you're agreeing with me, are you,
8 albeit reluctantly?

9 A. Yes.

10 Q. Thank you.

11 Now, if we look at "Order of Precedence" further
12 down the page, this says:

13 "Bilaterally agreed interchange fees always prevail
14 over fallback interchange fees.

15 "In the absence ..."

16 So this is showing how the rules apply in order of
17 precedence. So we have, first of all, bilaterally
18 agreed interchange fees always prevail over fallback
19 interchange fees, number one. Number two:

20 "In the absence of a bilaterally agreed interchange
21 fee, the fallback interchange fee for the country must
22 be applied to domestic ... transactions."

23 Yes? And then:

24 "In the absence of either a bilaterally agreed
25 interchange fee or a fallback interchange fee, the

1 intra-European interchange fee must be applied ..."

2 So that's the waterfall effect of the rules; yes?

3 A. Yes.

4 Q. Now, let's go to {C6/62/1}. This is a letter dated
5 19 March 1999. We see that at the top of the page. And
6 it's from Mr Goosse at Europay. Do you see that?

7 A. Yes.

8 Q. And it's advising the members of the Rules and
9 Conciliation Advisory Committee of Europay rule changes
10 and the letter says that those changes are going to be
11 released on 1 April 1999. Do you see that?

12 A. Yes.

13 Q. And then we see the changes at page 29 {C6/62/29} and
14 can you see -- you can see it all underlined under
15 "Domestic Rules" and you see there how the change has
16 been formulated, so:

17 "Any domestic rules applicable to all domestic
18 transactions in a country ... must be agreed by a group
19 of Members holding ... Licences [in] the country and
20 representing, during the year preceding the agreement,
21 at least 75% of each of the Eurocard-MasterCard issuing
22 and acquiring domestic point-of-sale volumes in the
23 country. Domestic rules will remain in effect until
24 changed or challenged. If domestic rules are challenged
25 because the group of Members agreeing to them no longer

1 meets the 75% threshold, the international rules will
2 apply in their place, as from the date when Europay has
3 determined that the 75% threshold is no longer met."

4 So the first point is that the point you reluctantly
5 agreed with me on is here in black and white, isn't it?
6 So it's talking here about rules being challenged if the
7 75% threshold is not met.

8 A. Yes.

9 Q. And it says that if that happens, international rules
10 will apply in their place; yes?

11 A. Yes.

12 Q. And just to be clear about what the international rules
13 are, if we go to the first three paragraphs on the
14 page --

15 MR JUSTICE ROTH: Just before you do that --

16 MS DEMETRIOU: Yes.

17 MR JUSTICE ROTH: -- can I just understand this 75% rule?

18 Is it saying that every rule -- how do you understand
19 it; that every rule must have at least 75% of issuers
20 and acquirers, or is it saying that for there to be
21 domestic rules, the rule-setting body -- there must be
22 a rule domestic body to which at least 75% of issuers
23 and acquirers belong?

24 A. It's the latter of those, sir.

25 MR JUSTICE ROTH: Yes. Otherwise, you won't have domestic

1 rules at all.

2 A. Yes.

3 MR JUSTICE ROTH: Yes.

4 MS DEMETRIOU: But, Mr Peacop, on that point, what it's
5 saying is that -- so I think we can agree that -- let's
6 just see the latter point -- there must be a domestic
7 body to which at least 75% of issuers and acquirers
8 belong, so I think that's a minimum, but then it's
9 actually more than that, isn't it? Because what it says
10 is that any domestic rules must be agreed by a group
11 that comprises at least 75% of each of issuing and
12 acquiring volume, but then it says:

13 "Domestic rules will remain in effect until changed
14 or challenged. If domestic rules are challenged because
15 the group of Members agreeing to them no longer meets
16 the 75% threshold, the international rules will apply in
17 their place ..."

18 So it is the position, isn't it, that if -- say you
19 have an acquiring bank, and I appreciate that you say --
20 you're going to say this is hypothetical, but I want to
21 get at how the rule works.

22 If you have an acquiring bank, a net acquirer that
23 has more than 25% volume, and let's say a rule is being
24 proposed, a MIF is being proposed which is very high and
25 which it doesn't like, it can withdraw its support,

1 can't it, by either voting down the rule or resigning
2 from the body?

3 MR JUSTICE ROTH: Well, they're two quite different things.
4 If it resigned from the body and the body no longer
5 meets the constituent conditions of having 75%, it loses
6 its competence. It loses its jurisdiction and all the
7 rules go set by the body, not just that one.
8 Everything.

9 MS DEMETRIOU: Correct.

10 MR JUSTICE ROTH: But if it stays in the body, it's got to
11 vote within the body, and I don't think what Mr Peacop
12 said -- indeed, the way I read it as well-- it's not
13 saying that every vote within MEPUK has to get this
14 75% support. It's the condition for having a domestic
15 rule-setting body.

16 MS DEMETRIOU: Sir, yes --

17 MR JUSTICE ROTH: That's, I think, what you said.

18 A. Absolutely correct, sir. Thank you.

19 MR JUSTICE ROTH: That's what --

20 MS DEMETRIOU: Alright. So, Mr Peacop, so that's your
21 evidence and -- but the upshot of that is that
22 an acquiring bank with -- just to clarify, an acquiring
23 bank with more than 25% volume could in theory withdraw
24 from the body, yes, and then the whole of the UK Rules
25 would collapse?

1 A. I think there's a process to go through. They were
2 perfectly entitled -- if I can, just at a hypothetical
3 level, to understand this rule. Yes, they could
4 withdraw. It would then have to be challenged and you'd
5 have to go through a process to arrive at that. It was
6 not a dynamic I ever experienced. It was not
7 a discussion I ever heard and, therefore, it remains as
8 a hypothetical discussion.

9 Q. Right, but you knew the possibility was there in the
10 rules. You were aware of that at the time we've
11 established?

12 A. Yes.

13 Q. Now -- and then going back to what's meant by "if this
14 happened", so if the group of members no longer meets
15 the 75% threshold, the international rules will apply in
16 their place.

17 And to be clear about what's meant by "international
18 rules", let's scroll up the page. We can see that the
19 rules are -- we see the first paragraph -- Mastercard
20 International Rules:

21 "The specific Eurocard Rules which differ from the
22 standard MasterCard Rules are described in this manual.
23 In all cases, the Eurocard Rules override the
24 MasterCard Rules.

25 "The above ... Rules are applicable to

1 intra-European Eurocard-MasterCard transactions and, by
2 default, to domestic transactions."

3 Yes? So those are the rules. That's what's meant
4 by "the international rules"; correct?

5 A. Yes.

6 Q. And then if we go down to -- if we go to page 30
7 {C6/62/30}, we see the order of precedence. So no
8 change is -- we've looked at that and no change was
9 proposed, so we have the same order of precedence that
10 if the 75% rule is triggered and so the UK Domestic
11 Rules collapse, then the fallback is the intra-EEA MIF;
12 yes?

13 A. Yes.

14 Q. Let's look at -- just to complete the picture of the
15 rules, let's look at the 2002 version of the
16 Eurocard Rules, which are at {C8/356/1}, and we can see
17 the date of these on page 2 {C8/356/2}. Do you see the
18 date at the bottom, March 2002?

19 A. Yes.

20 Q. And then on page 3 {C8/356/3}, you can just scan this
21 quickly because we've now looked at this in some detail,
22 but you can see under the heading "Domestic Rules",
23 there's reference to the 75% threshold and there's the
24 same provision that we've been reading; correct?

25 A. May I just read that?

1 Q. Of course.

2 A. Thank you. (Pause)

3 Yes, thank you.

4 Q. And if we turn to page 34 {C8/356/34}, provision
5 6.2.2.1, "Method of Establishment", is the same
6 provision and if we go -- because we have bilateral
7 agreements, multilateral agreements.

8 And if we go over the page {C8/356/35} -- actually,
9 it's 6.2.2.3 that I wanted to look at, my mistake -- we
10 see the provision "Order of Precedence" and we see that
11 the same provision applies; yes? It's the same order of
12 precedence and so if there's no bilateral agreement, no
13 domestic fallback MIF. The applicable interchange fee
14 is the intra-EEA MIF; yes?

15 A. Yes.

16 Q. Now, let's go to {C6/112/1}, please. So this is
17 a letter from Europay to MEPUK dated 31 May 1999 and you
18 can see at -- the reference at the top of the page to
19 changes to the Europay Rules approved by the Rules and
20 Conciliation Advisory Committee at its 1999 meeting, and
21 those were the rules we've just been looking at.

22 And you can see below, if we scroll, there's
23 a reference to the 75% rule; yes? So do you see in the
24 first bullet:

25 "Establish clear and objective representation

1 criteria."

2 Then you have, in the next full paragraph,
3 a reference to the 75% rule. Do you see that?

4 A. Yes.

5 Q. And then if we go to page 2 {C6/112/2}, at the top, you
6 see the sentence:

7 "Last April 1999, MEPUK and Europay implemented new
8 Domestic UK Interchange Fees. Even though we are aware
9 of what are the current UK interchange fee rates, we
10 would be grateful if MEPUK could submit to Europay
11 a copy of the 'Domestic Rules' by no later than the 28th
12 of June 1999, together with the questionnaire duly
13 completed to officialise what has been recently
14 implemented."

15 If we go to the questionnaire, it's on page 4
16 {C6/112/4}. So can you see at point 2 there's the
17 provision of the Europay -- of the Europay Rules quoted
18 which we've looked at before, so the 75% rule?

19 A. Yes.

20 Q. And then over the page at page 5 {C6/112/5}, again, you
21 can see the title "Order of Precedence"; yes? And we
22 have the same provision there which we've been looking
23 at, which states that the ultimate fallback fee is the
24 intra-EEA MIF; yes?

25 A. Yes.

1 Q. And if we go to page 7 {C6/112/7}, at the top of the
2 page, can you see the words:

3 "As mentioned above, failing to receive from members
4 the applicable domestic fallback or bilateral
5 interchange fees, Europay will apply their
6 Intra-European Interchange fees or the previously
7 applicable domestic fallback or bilateral interchange
8 fees ..."

9 And what you then see is that the intra-EEA fees are
10 set out as a reminder. Do you see that in the table?

11 A. Yes.

12 Q. And you would've been aware of these rules at the time,
13 of course.

14 A. Yes. Not in detail, but yes, I would've been aware of
15 their existence.

16 Q. But you would've known that MEPUK couldn't set UK MIFs
17 if it didn't meet the 75% rule.

18 A. Yes, I was aware of that.

19 Q. And were you aware that the 75% rule was triggered in
20 Belgium in 2002?

21 A. I can't remember that case, no.

22 Q. You can't remember hearing about that at the time?

23 A. No.

24 Q. Okay. Well, what happened in Belgium was that the rule
25 was triggered, the domestic rule was triggered,

1 resulting in a lower MIF. And the point that I want to
2 put to you is, in principle, the same thing could have
3 happened in the United Kingdom, couldn't it?

4 So if an acquirer or a group of acquirers with more
5 than 25% volume had thought that the UK MIF was too
6 high, then they could have withdrawn support from MEPUK,
7 knowing that the applicable rate would then be the
8 intra-EEA MIF. That could have happened, couldn't it?

9 A. If I may just slightly correct or modify my answer to
10 the question, so that it wouldn't necessarily be
11 acquirers. I mean, any member was entitled to withdraw
12 support from MEPUK. So the dynamic that a member could
13 withdraw support or a group of members could withdraw
14 support, issuer or acquirer, is perfectly true.

15 As to what would happen as to interchange rates,
16 again, it's a hypothetical. I can't comment on how that
17 would play out because I never saw it. It was never
18 contemplated.

19 Q. Well, the reason that you never saw it is presumably
20 because MEPUK was aware that it was a possibility and so
21 it sought to avoid that happening, didn't it? It was
22 trying to balance out the interests of acquirers and
23 issuers so as to avoid that rule being triggered.

24 A. There was absolutely the objective of seeking to balance
25 the interest of issuers and acquirers in the objective

1 of setting interchange rates; not with the sole
2 objective of maintaining 75%, but creating a balance in
3 the market.

4 Q. So that's, I think you say, not with the sole objective
5 of maintaining 75%, but you'd accept that's one of the
6 objectives; yes? That's in the rules. You don't want
7 to see that happen, do you?

8 A. I can't remember discussing with that in mind.

9 Q. But you would have had that in mind on MEPUK, wouldn't
10 you? You would have known about the rules and so you
11 would've wanted to avoid that happening.

12 A. I can only say it -- sorry, apologies, I can't recall
13 that being in mind when contemplating, no.

14 MR JUSTICE ROTH: Well, can you remember whether any
15 significant members of MEPUK threatened to withdraw from
16 MEPUK --

17 A. No.

18 MR JUSTICE ROTH: -- in your time there?

19 A. No, not at all. Not at all.

20 MR JUSTICE ROTH: And if they had, and clearly they have the
21 right to withdraw --

22 A. Sure.

23 MR JUSTICE ROTH: -- what's being put to you, of course, if
24 their withdrawal had reduced the share below 75%,
25 MEPUK's rule-setting authority would have gone. Is that

1 something you think you would remember?

2 A. I would remember, and I think also it would be very
3 heavily documented because there would have been some,
4 you know, very significant discussions held at not just
5 committee meetings, but mainly board meetings.

6 MR JUSTICE ROTH: Yes. I mean, does that mean you're fairly
7 satisfied it didn't happen in your time?

8 A. Absolutely.

9 MR JUSTICE ROTH: Thank you.

10 A. Thank you.

11 MS DEMETRIOU: So, Mr Peacop, it's correct, isn't it, that
12 during your time there, the consistent trend for UK MIFs
13 was downwards, wasn't it?

14 A. Yes.

15 Q. And let's look at, because this is a convenient place to
16 see them -- if we go to Mr Coombs. Mr Coombs is
17 Mr Merricks' expert economist. If we go to {A/14/43}
18 and look at table 10 and let's look at -- so I'm looking
19 at UK MIFs and let's look at the "Base" category, 1.3,
20 and then the "Electronic" category.

21 And then if we just go over the page {A/14/44}, do
22 you see those all stay pretty much constant at least
23 until 2004; yes?

24 A. If I -- sorry, if I may, we've lost the headings to the
25 table there in moving over. If -- could I just be

1 reminded of the headings of each column, please?

2 Q. Of course. So I want you to avoid -- ignore the
3 first column, which is the EEA MIF. I'm just looking at
4 the UK MIFs, which started in 1997 because that was --

5 A. Thank you.

6 Q. -- the first year it was set. Do you see that?

7 So you have "Base" in the first block column and
8 it's the second bit of that column --

9 A. Yes.

10 Q. -- is the UK MIF and then the second bit of the next
11 column is UK MIF for electronic.

12 A. Yes.

13 Q. Thank you for putting the pages side-by-side. I should
14 have thought about that.

15 And we see then -- we see then that they remain --
16 there's not much of a change, is really the point that
17 I'm putting to you. So they remained fairly stable,
18 didn't they?

19 A. They're the same or lower, yes.

20 Q. And when they did change, they went down.

21 A. Yes.

22 Q. And it's not the case, is it, that over that period, the
23 costs identified by EDC remained stable? Those -- on
24 the contrary, those costs tended to rise over the
25 period. Do you remember that?

1 A. I think a certain element of the costs rose in some
2 categories. Some processing costs also lowered. But
3 overall, they're -- certainly in later years, there was
4 an increasing trend in costs, yes, I do agree.

5 Q. Okay, and you've said in your evidence -- in fact, let's
6 just have a look at that. So let's look at table 8
7 because you can see how those are set out. That's at
8 A/1/38 -- oh, {A/14/38}, I'm so sorry.

9 So this is a table matching domestic interchange
10 fees and costs and if you look at the heading, you can
11 see the costs in the second part of each of the main
12 columns. So you've got -- the first main column is
13 average or blended and then "Base" and then
14 "Electronic".

15 And by and large, I think this supports what you've
16 just been saying, which is that, by and large, costs
17 rose over the period, but they certainly didn't remain
18 static, did they?

19 A. Agreed.

20 Q. And if MEPUK had tried to increase UK MIFs in line with
21 costs, the acquirers would have had something to say
22 about that; yes?

23 A. I would expect so, yes.

24 Q. Well, that's what you mean in your statement when you
25 say that they exerted significant pressure, isn't it?

1 A. Yes.

2 Q. And they had leverage, didn't they, Mr Peacop? And that
3 leverage derived from the 75% rule, because ultimately,
4 they could just not agree the MIFs. That was their
5 leverage in imposing the pressure.

6 A. I didn't interpret it as their primary leverage. It
7 was -- the discussion was always about a balance in the
8 market and ensuring that they were fair and reasonable,
9 and with a number of other market pressures and
10 regulatory pressures, that culminated in there typically
11 being a downward pressure on the rates.

12 MR JUSTICE ROTH: It would have had to do -- and I think you
13 put it, quite correctly, in line with Mr Peacop's
14 answer. The leverage was not because ultimately they
15 couldn't agree the MIFs. Ultimately, they could
16 threaten to walk out of MEPUK.

17 MS DEMETRIOU: Sir, yes.

18 MR JUSTICE ROTH: That's what they'd have to do.

19 MS DEMETRIOU: Sir, yes.

20 MR JUSTICE ROTH: I mean, they could -- obviously, there
21 could be a vote in MEPUK and they could -- if they had
22 a majority, it wouldn't have been agreed, but they would
23 have to threaten to walk out.

24 MS DEMETRIOU: Sir, yes, I take that point. That's
25 accurate.

1 So, Mr Peacop, let me just put the question again.

2 So we've agreed -- in fact, you've said this in your
3 statement -- that the acquirers exerted significant
4 pressure on MEPUK and that led it a downward trend in
5 the MIFs; yes?

6 A. One of the reasons for a downward trend, yes.

7 Q. Well, you've explained that it was significant pressure.
8 Do you stand by that?

9 A. Yes.

10 Q. You do, okay.

11 And the significant pressure -- part of the leverage
12 that they had under the rules -- do you accept this --
13 is that they could have collapsed the UK Rules by
14 walking out?

15 A. Hypothetically they could, yes.

16 Q. Well, it was something they could have done under the
17 rules. Do you agree with that?

18 A. I agree that they could, yes.

19 Q. Right. And that's something, knowing the rules at the
20 time, that you would have understood, wouldn't you?

21 A. Yes.

22 Q. So it's part of the leverage which you had in mind,
23 wasn't it? So when you say "significant pressure",
24 that's part of the backdrop against which that
25 significant pressure was being exerted, isn't it?

1 A. I'm happy to accept that it's part of. I think I said
2 it wasn't the only leverage and therefore it's part of,
3 yes, I agree.

4 MS DEMETRIOU: Alright. Let's leave that there.

5 Now, I want to -- I'm going to move on to
6 a different topic now. Shall I start or ...

7 MR JUSTICE ROTH: Well, that's more than five minutes?

8 MS DEMETRIOU: Yes, it's more than five minutes. I'm happy
9 to pause now if that's convenient.

10 MR JUSTICE ROTH: Perhaps we should take a ten-minute break.

11 You may know that we take a short break for your
12 benefit and for the transcriber's benefit. So -- and as
13 you also know, I expect, you mustn't discuss your
14 evidence with anyone else until you've finished giving
15 evidence.

16 We will come back at 11.50.

17 (11.39 am)

18 (A short break)

19 (11.53 am)

20 MS DEMETRIOU: Mr Peacop, you say in your statement, and I
21 think this is -- we've established this, that from 1997
22 to 2004, the UK MIFs were set by the board of MEPUK and
23 on occasion -- and they were assisted by the Interchange
24 Sub-Group; correct?

25 A. Correct.

1 Q. And your evidence is that when setting the UK MIFs, the
2 starting point for MEPUK was always the cost studies
3 prepared by Edgar, Dunn & Company.

4 A. Yes.

5 Q. And generally speaking, EDC produced its cost studies
6 every two years; correct?

7 A. Correct.

8 Q. And EDC studies estimated cost to issuers for credit
9 card transactions; correct?

10 A. Apologies, could you repeat the question?

11 Q. Yes. So they were estimating the cost to issuers of
12 credit card transactions.

13 A. Yes.

14 Q. And those costs were expressed in the report as
15 an average percentage of each transaction; that's right,
16 isn't it?

17 A. Yes.

18 Q. Now, I just want to look at the Commission statement of
19 objections. If we go to {C10/98/1}, please. This was
20 issued -- you see the date at the top of the document --
21 24 September 2003.

22 You've told us that you were involved in work
23 relating to the OFT investigation. Were you also
24 involved in the work relating to the Commission
25 investigation?

1 A. I'm trying to remember whether that would have been as
2 part of RBS or as part of ME -- MMF by then. I need to
3 be reminded.

4 Q. But you remember the Commission investigation?

5 A. Yes.

6 Q. And in some capacity, you had some involvement; correct?

7 A. Yes.

8 Q. If we go to page 33 {C10/98/33}, please, and let's look
9 at paragraph 125. So we see that what the Commission is
10 saying there is that:

11 "MasterCard has not provided any assurance that the
12 cost data used in its study have been gathered
13 consistently and correctly, checked against accounts or
14 otherwise verified or audited independently. It is
15 therefore not possible to verify whether the data used
16 correspond to actual cost and relevant cost categories."

17 And then we see at 126 that:

18 "MasterCard's issuing costs are currently calculated
19 by the consulting firm Edgar Dunn & Company. However,
20 MasterCard did not show that Edgar, Dunn & Company is
21 an independent auditing firm ... Nor did MasterCard
22 pretend that EDC's cost study was subject to a review by
23 an independent auditing firm."

24 Were you aware that the Commission had these
25 concerns about EDC and its cost studies?

1 A. Firstly, if I may answer and say I can't remember that
2 concern.

3 Secondly, sir, if I may, just for clarification, was
4 this relating to the European market generally rather
5 than the UK specifically?

6 Q. This was relating to European cost studies carried out
7 by EDC.

8 A. Yes. No, I -- that wouldn't have applied, I'm sure, to
9 the UK. But in this context, I don't remember those
10 concerns, no.

11 Q. And were you aware that the European cost studies
12 followed the same methodology as the UK ones; that EDC
13 was applying the same methodology? Did you know that or
14 do you not remember that?

15 A. I -- I'm just recalling, if I may. I believe that the
16 same methodology was adopted from 2000 by Europay as
17 that used by Mastercard International and very similar
18 to the UK. That was my understanding.

19 Q. Do you remember from your involvement in the
20 OFT investigation that the OFT also had concerns about
21 the EDC cost study? Do you remember that?

22 A. Unprompted, no, I don't remember.

23 Q. You don't remember, okay.

24 Now, I want to start by looking -- so one of the
25 issues that Mastercard has identified -- sorry, that the

1 Commission has identified here relates to data, and
2 I just want to look at that, first of all.

3 So let's go to {C4/237/1}, please. So you'll see
4 that this is a letter from Mr Hawkins dated 15 July 1997
5 and -- so he is chair of the R&CC Interchange Sub-Group
6 and it's being sent to members of that sub-group, do you
7 see at the top of the page?

8 A. Yes.

9 Q. And it says that it's circulating Edgar, Dunn & Co's
10 revised proposals. Do you see that in the body of the
11 letter?

12 A. Yes.

13 Q. And if we go to page 5 {C4/237/5}, you'll see attached
14 to this letter is another letter from EDC to Mastercard
15 International dated 14 July 1997. Do you see that?

16 A. Sorry -- thank you. Could I ask for the reference
17 again, please?

18 Q. So we're just looking now at a letter that's attached to
19 the previous letter and we can see -- I'm just asking
20 you to note the date, which is 14 July 1997.

21 A. Yes.

22 Q. And it's a letter from EDC to Mastercard International.

23 If we go to page 9 {C4/237/9}, so we can see the
24 words in the second paragraph:

25 "During the last interchange study, the quality of

1 the data responses from the participants was relatively
2 poor. All participants but one responded after the
3 deadline agreed by Rules and Conciliation. More
4 importantly, the accuracy of the data submissions was
5 mediocre and, during the course of our reconciliation
6 activities, significant changes were made by many
7 participants in their original data submissions. This
8 increased considerably the amount of time we spent on
9 reconciliation. In addition, we again had difficulty in
10 obtaining satisfactory data from FDR on behalf of the
11 banks. This added additional effort to our tasks ..."

12 Then a point is made about their costs.

13 But we can see here that EDC is talking about
14 deficiencies in the data. Were you aware of that at the
15 time, because you would have been looking at these cost
16 studies, wouldn't you, in setting the MIF? So were you
17 aware that there were these data issues; that responses
18 from banks were poor?

19 A. No, at the time, I was literally starting my new role,
20 so I don't recall being directly involved in -- at
21 this -- sorry, correct me, was it 11 July or 15 July?

22 Q. This is July 1997 and it's circulating a cost study.
23 But that cost study would have been used, wouldn't it,
24 the following year for setting the MIF? So you would
25 have been looking at this cost study, wouldn't you?

1 MR JUSTICE ROTH: Setting which MIF?

2 MS DEMETRIOU: The setting of the MIFs thereafter until the
3 next cost study. This is 1997.

4 MR JUSTICE ROTH: This is the UK MIF?

5 MS DEMETRIOU: The UK MIF.

6 MR JUSTICE ROTH: It's about the UK MIF cost study?

7 MS DEMETRIOU: It's about the UK MIF.

8 So you say you don't remember this letter, which is
9 fair because it's dated 15 July, but it relates to the
10 1997 cost study and you certainly would've been aware of
11 that cost study, wouldn't you?

12 A. I need to be reminded when that would have been
13 considered for the 1997. I think that would have been
14 on the 1996 data.

15 Q. Right, and what MIF would it have fed into, then? So
16 you have a report -- you have a cost study in '97 and
17 then the next one is 1999. So take 1998. So wouldn't
18 this cost study have been relevant to 1998?

19 A. Could I just seek some clarity, please, sir? The --
20 I'm not clear whether this is a final outcome of the
21 cost study from Edgar Dunn or whether there was further
22 work for remediation around some of the apparent
23 shortfalls that have been called out.

24 Q. Let me take it in stages. So you would have been -- you
25 would have used the 1997 cost study, wouldn't you, when

1 helping to set the UK MIF in 1998?

2 A. Yes.

3 Q. So you would have read the 1997 cost study.

4 A. Yes.

5 Q. And were you aware that there were issues with
6 deficiency in the data at the time? Do you remember?

7 A. I -- I can't remember directly, no.

8 Q. Alright.

9 Now, let's go to {C7/175}. So you see this is the
10 1999 final report for the cost study.

11 A. Yes.

12 Q. Do you see that?

13 A. Yes.

14 Q. And it's dated September 2000; yes?

15 A. Yes.

16 Q. So that's when it's -- that's when it's published.

17 And if we go to page 3 {C7/175/3}, at the bottom of
18 the page, EDC say this. They say:

19 "Due to a lack of data, it was not possible to
20 develop cost-based results for Internet transactions,
21 chip-read transactions, or commercial card transactions
22 ... we have prepared estimated interchange costs for
23 Internet and chip-read transactions by developing a set
24 of assumptions ..."

25 Then at page 4 at the top {C7/175/4}, we see:

1 "A lack of robust data and comprehensive management
2 information systems has led to difficulties in
3 calculating the costs for the additional interchange
4 categories."

5 So they've formulated recommendations about data
6 collection. Do you see that?

7 A. Yes.

8 Q. And the recommendations relate to what banks should do;
9 yes? So they say that members should conduct systematic
10 surveys to ensure it becomes possible to accurately
11 measure costs of internet transactions and then we see:

12 "Given the current regulatory environment and the
13 lack of quality data submitted, we recommend that
14 Members conduct sampling exercises ..."

15 That's for chip transactions. And then we see
16 something similar in 3 in relation to the areas of
17 credit write-offs.

18 So EDC are caveating their conclusions, aren't they,
19 by reference to the data they receive? They say that
20 the data was of insufficient quality and they've made --
21 they've made recommendations to improve that going
22 forward. Do you see that?

23 A. I see that, yes. I'd like to make some further
24 comments, sir, at some point on this.

25 Q. Well, that's something -- so you see those caveats. You

1 see what EDC are saying, and that's something that you
2 would have been -- that MEPUK would have been aware of
3 at the time because they would have read the report;
4 yes?

5 A. Yes. If I may, sir, provide some extra context.

6 MR JUSTICE ROTH: Yes, what do you want to say about it?

7 A. From the previous page {C7/175/3}, if we could go back,
8 please, the categories to which this refers are very
9 clearly the indicative interchange costs for three new
10 categories, and this was an evolving part of the market.
11 And I would say from my recollection and I think from my
12 interpretation, what have I have before me here:

13 "Due to a lack of data, it was not possible to
14 develop cost-based results ..."

15 And so on. Internet was a whole new phenomenon. We
16 were looking at introducing new categories. We were
17 looking at being dynamic with the industry and to --
18 with a view to ultimately delivering new -- new
19 categories of interchange rates for the evolving nature
20 of the market.

21 By definition, there wouldn't have been significant
22 data. Very possibly, and it's reflected here, I would
23 say, that the members of MEPUK wouldn't have had systems
24 in place to have been able to collect that data, hence
25 the encouragement by Edgar Dunn to suggest processes and

1 surveys and so on.

2 So the comments, in my interpretation, relate
3 specifically to the -- the additional new categories
4 that we were looking to put in place not to the
5 substance of the cost study for those existing
6 categories.

7 Q. Thank you, Mr Peacop, but there were internet
8 transactions taking place at that stage; right? That's
9 why you were introducing -- you wanted to introduce new
10 categories.

11 A. Yes.

12 Q. So there were transactions taking place.

13 A. Yes.

14 Q. And it's correct, isn't it, that EDC, having looked at
15 the data from banks, is saying, "Well, the data is
16 inadequate to use actual data and so what we're going to
17 do is make -- is operate on the basis of a set of
18 assumptions"? That's correct, isn't it?

19 A. It is -- so it's correct, yes, that internet
20 transactions existed, but to a large part in most
21 systems, they were being flagged or recognised in the
22 system as card not present transactions, which have
23 a different nature to internet and at that time would
24 have been mail order and telephone order. Internet was
25 a different type of transaction and it was about looking

1 to develop systems of an interchange category to
2 separate out those transactions.

3 Q. Alright. Let's look at {C8/377/3}, and you can see that
4 this is the Baxter -- EDC's Baxter analysis of the
5 UK credit card payment system. It's dated
6 13 March 2002.

7 And if we go to page 11 {C8/377/11}, do you see that
8 at the top -- so in the middle, "Sample":

9 "Due to the time constraints within which the study
10 had to be undertaken a limited sample had to be
11 selected."

12 And then if we go to page 12 {C8/377/12}, we can see
13 at the top of the page:

14 "For the issuing analysis the four participants in
15 the cost study together have a significant market share
16 in the UK, with just over 55% of transactions by volume.
17 However, the sample excludes significant players in
18 terms of transactions issued. The sample did not
19 include representatives of monoline issuers, smaller
20 issuers, or new entrants, which account for the nearly
21 half the volume of domestic MasterCard transactions in
22 the UK."

23 So here, EDC is saying for this Baxter study, its
24 sample was not representative of all the issuers. Would
25 you agree with that?

1 A. Yes, but the Baxter study was not the basis for
2 assessing the cost base for the UK interchange rates.

3 Q. Well, the Baxter study was the study you submitted to
4 the OFT, wasn't it?

5 A. As -- as further evidence, yes.

6 Q. So you were submitting the Baxter study as evidence to
7 the -- to the regulator to show how you were setting
8 interchange fees in relation relative to costs, weren't
9 you? That was the whole purpose of it.

10 A. If I may, sir, I think it's the outcome. The output of
11 this report is probably more substance than some of the
12 paragraphs, and I simply can't remember the context of
13 presenting that to the OFT at the time. But as far as
14 this report is concerned, this is not relevant to the
15 cost base for assessing UK MIFs.

16 MR JUSTICE ROTH: Did you use this report in calculating or
17 looking at costs when setting the rate?

18 A. When setting UK rates, no.

19 MS DEMETRIOU: Do you remember putting this forward to the
20 OFT in order to try and demonstrate that MEPUK was
21 setting MIFs in accordance with costs? Do you remember
22 that? Because you were involved in the
23 OFT investigation.

24 A. I -- I have been reminded as -- in preparation for this
25 Tribunal that a Baxter study was undertaken as part of

1 the work in the OFT investigation, yes.

2 Q. But you don't have any independent recollection of
3 that --

4 A. I didn't, no.

5 Q. -- until you started preparing for these proceedings?

6 A. Correct.

7 Q. So you don't remember that it was put forward in order
8 to try and persuade the regulator that your -- that
9 MEPUK was setting MIFs, UK MIFs, in accordance with
10 costs; that that was its purpose?

11 A. I have been reminded that this was put together to
12 underpin the credibility of the process, and from my
13 recollection, the -- the output of this report delivered
14 fairly close results to those of the EDC cost studies
15 used for setting the UK MIFs.

16 Q. Alright.

17 Now, if we just go back to this report, we see from
18 the third paragraph down that:

19 "As a consequence of the short timeframe available
20 for completion, participants were allowed to provide
21 data for the most recent 12-month period that would
22 require the least additional work for them. Overall
23 sample unit cost calculations are therefore not based on
24 comparative time periods for the four participants."

25 So just so we can establish what EDC are saying

1 here, they're saying that they only required
2 participants to provide data for the 12-month period
3 that would require least work for the bank concerned;
4 yes?

5 A. Yes, that's what it says.

6 Q. So that meant that the time periods weren't the same for
7 each participant, so they weren't comparing comparative
8 periods; correct? That's what it looks like.

9 A. Yes, that's what it looks like, yes.

10 Q. And you would agree, would you, that that's a real
11 limitation in terms of robustness of data?

12 A. I'm not a data specialist, so I can't make a comment on
13 that.

14 Q. Alright.

15 Let's look at {C10/327/1}. So this is EDC's
16 response to questions put to them by the law firm
17 Linklaters arising from the Commission statement of
18 objections. Do you see that? And the statement of
19 objections we've seen is 24 September 2003 and that's
20 the document we looked at a few minutes ago.

21 A. Yes.

22 Q. And if we go to page 28 {C10/327/28}, we see at the top
23 of the page paragraph 125 that I took you to in the
24 statement of objections itself; do you see?

25 A. Yes.

1 Q. And then Linklaters ask EDC:

2 "Please describe in full ...

3 "... [the] measures that were taken

4 "... the methodology to check consistency used; and

5 "... the impact that taking further measures as per
6 the above, would have on the cost data (and on MIF
7 level)?"

8 And then you can see EDC's response below and it
9 says that the guiding principle, you see at 40, has been
10 to obtain reliable data for a reasonable effort. And we
11 see that:

12 "The participating members submit their cost and
13 volume information and certify that the submitted
14 information reflects their underlying business."

15 So were you aware that it was up to member banks
16 themselves to confirm that the information they
17 submitted was reliable?

18 A. I can't remember specifically.

19 Q. You can't remember that, okay.

20 And then if we look at the middle of the
21 second bullet, we see what EDC does with the data. So
22 it says:

23 "In addition, unit cost figures are compared against
24 the rest of the study sample, as well as previous
25 submissions to earlier studies, to ensure data quality

1 in terms of accuracy, relevance and consistency."

2 And then if we go over the page {C10/327/29},
3 please, to paragraph 42:

4 "The data collection and validation process was
5 designed to enable frequent cost effective studies to be
6 undertaken while allowing for broad participation ... By
7 allowing for self certification of submissions with
8 EDC's independent verification of the submissions, the
9 sample size for studies has been significantly larger
10 than would otherwise have been possible ... Without
11 self-certification, EDC would have had to visit each
12 participating member individually and work with them to
13 extract the required data."

14 So presumably, EDC is saying here that it's working
15 on the basis of self-certification by the banks because
16 otherwise, it would be more expensive to conduct the
17 analysis. Do you agree?

18 A. Yes.

19 Q. And EDC is saying it does check the data which has been
20 submitted. It checks it against data submitted by other
21 members in the study sample and against previous years;
22 correct? That's what we saw in the previous page.

23 A. Yes.

24 Q. So EDC was confirming the accuracy of self-certified
25 data by cross-checking it against other self-certified

1 data, wasn't it?

2 A. Yes.

3 Q. And would you have understood that that was the process
4 at the time?

5 A. I don't recall.

6 Q. Okay. So I think it follows, doesn't it, that if
7 issuing banks had taken a generous view of their own
8 costs and the figures that they provided, then EDC would
9 have had no way of knowing that, would they?

10 A. I think this points to verification and validation. So
11 I think anything that would have been outside of a trend
12 they would have been able to validate, but, I mean,
13 again, it's hypothetical for me. I wasn't part of the
14 process of data collection or reporting it or
15 interrogated the parameters for doing so, so I can't
16 really speak to that directly, if I may put it that way.

17 Q. Alright.

18 Let's turn to {C5/70/1}. So this is a copy of EDC's
19 1997 domestic interchange study and it's the final
20 report dated March 1998. Do you see that?

21 A. Yes.

22 Q. And if we go to page 4 {C5/70/4}, so you'll see there --
23 do you see the heading "1997 Blended Interchange Costs"
24 at the top of the page?

25 A. Yes.

1 Q. And it says that that's based on cost data for the
2 12-month period to 30 September 1997.

3 A. Yes.

4 Q. And the blended interchange costs are 1.11%. Do you see
5 that?

6 A. Yes.

7 Q. And we see that actually at the bottom of the table too
8 for 1997. Do you see 1.11 --

9 A. Yes.

10 Q. -- in the very final row?

11 And then just to the right, there's the
12 1995 equivalent figure, which is 1.24%; yes?

13 A. Yes.

14 Q. So blended costs have actually reduced, haven't they,
15 across this two-year period by 0.13% since the last
16 study?

17 A. Yes.

18 Q. And if we go to page 10 {C5/70/10}, so here you'll see
19 a comparison of the costs between electronic and
20 standard transactions from 1995 to 1997. Do you see
21 that?

22 A. Yes.

23 Q. And let's look at the total interchange costs as
24 a percentage of the -- of ATV, of average transaction
25 value. So we're in the bottom row and we see that for

1 1997, electronic transactions were 1.03. Do you see
2 that?

3 A. Yes.

4 Q. And 1.09% in 1995.

5 A. Yes.

6 Q. So that's a reduction of 0.06%; correct?

7 A. Correct.

8 Q. And then for standard transactions, they were 1.28% in
9 1997, whereas they were higher in 1995. They were
10 1.45%, and so that's a reduction of 0.17%.

11 So the first UK MIFs were introduced in late 1997;
12 correct?

13 A. Sorry, I need to bear in mind whether it's '97 or 1998.

14 Q. It was 1 November 1997.

15 A. Okay.

16 Q. But I think you weren't closely involved in that because
17 you had just joined MEPUK; is that right?

18 A. Yes, correct. Thank you.

19 Q. But when they were introduced, when those MIFs were
20 introduced in late 1997, they couldn't have been based
21 on this cost study, could they, because that was only
22 published in March 1998, as we've seen?

23 A. Correct.

24 Q. So this cost study would have fed instead into the
25 1998 MIFs; yes?

1 A. Yes.

2 Q. Now, could we turn, please, to {A/18.1/3}. So this is
3 the schedule of UK MIFs that Mastercard has put
4 together, and can you see in 1997 -- so the very
5 right-hand side of the page, that -- so we've got the
6 large column for 1997 and then the very first sub-column
7 is Mastercard UK. Do you see that?

8 A. Yes.

9 Q. And then if we look at -- what we see for 1997 is that
10 electronic was set at 1% and standard was set at 1.3%;
11 yes?

12 A. Yes.

13 Q. And then let's go over the page to 1998, please
14 {A/18.1/4}, and let's look at the same equivalent
15 figures. So they were the same, weren't they? So we
16 have 1.3% for standard and 1% for electronic. Do you
17 see that?

18 A. Yes.

19 Q. So although there's been a reduction in costs between
20 the 1995 and 1997 EDC cost studies, that didn't lead
21 MEPUK to reduce the UK MIF, did it?

22 A. No.

23 Q. And in respect of the standard category, the 1997 cost
24 study we saw found that the costs were 1.28%. Do you
25 remember that?

1 A. Yes.

2 Q. But the fallback interchange fee was set above that at
3 1.3%; correct?

4 A. Yes.

5 Q. Now, you say at paragraph 42 of your witness statement
6 that UK MIFs normally were set at levels below the
7 levels of costs, but that wasn't always the case, was
8 it?

9 A. No.

10 Q. We can see -- we can see here an example where they
11 weren't.

12 A. Yes.

13 Q. So presumably when you say "normally", that's what you
14 mean; that there were exceptions.

15 A. There were exceptions, yes.

16 Q. Now, let's go please to {C7/43/2}. Let's start at
17 page 1 so we can see what the document is {C7/43/1}. So
18 these are the minutes of MEPUK's Interchange Sub-Group
19 and they're -- it's minutes of a meeting held on
20 10 May 2000. Do you see that at the top?

21 A. Yes. Excuse me.

22 Q. Do you want to drink some water?

23 A. No, it's fine. Thank you.

24 Q. If we go to page 2 {C7/43/2}, we've got agenda item 5,
25 the 1999 cost study; yes?

1 A. Yes.

2 Q. And it reads -- it says:

3 "Mr Sidenius referred to the preliminary draft of
4 [EDC's] report on the cost study, which had been
5 circulated previously. He stressed that the figures
6 were preliminary at this stage."

7 So this is MEPUK's Interchange Sub-Group looking at
8 the preliminary results of the EDC cost study; correct?

9 A. Correct, yes.

10 Q. And we see in the middle of the page that:

11 "Overall there [has] been a marked increase in the
12 blended cost from 1.11% to 1.62%."

13 Do you see that?

14 A. Yes.

15 Q. And these -- but these were preliminary figures; yes?

16 A. Yes.

17 Q. And you explain at paragraph 50 of your first witness
18 statement that a large contributor to this was the
19 increase in the cost of credit write-offs. Do you
20 remember saying that?

21 A. Yes.

22 Q. Now, if we go to the bottom of this page -- sorry, it's
23 a new document. If we go to {C7/135/1}, please, and we
24 look at page -- so these are the minutes of the
25 sub-group of 8 August and we can see that you were

1 present. Do you see that?

2 A. Yes.

3 Q. And then if we go to the bottom of page 2 {C7/135/2}, we
4 can see that:

5 "The Sub-group agreed that it would be appropriate
6 that, going forward, there should be an apportionment of
7 credit write-offs between the payment and credit
8 provision functions of the product. It was also agreed
9 that in any recommendation to Board concerning the
10 current study, there would need to be an adjustment to
11 offset the increased level of credit write-offs, as the
12 levels indicated by the study could not be mirrored by
13 similar increases in the fallback interchange fee in the
14 market."

15 So I think what's being said there is that you've
16 got this -- these preliminary results from EDC which
17 show a very large increase in costs; correct?

18 A. Correct.

19 Q. That's due to credit write-off costs increasing. That's
20 what they found; correct?

21 A. Yes.

22 Q. And what the sub-group is saying, "Well, what we need to
23 do is adjust -- make an adjustment in the current study
24 to offset that increase because we can't increase
25 interchange fees in the market by that much". That's

1 correct, isn't it?

2 A. That's correct, but if I may, sir --

3 Q. Well, can you wait until I've asked my questions and
4 then perhaps we can come back.

5 Then if we go to the next page {C7/135/3}, we see at
6 page 3 that there's an agreement -- so this is above the
7 "Action":

8 "The Sub-group agreed that the ... structure should
9 be reviewed ahead of the next study. The structure
10 should be revised to correctly reflect the risk and
11 hence the cost of different types of transaction as well
12 as to incentivise members and merchants to act in the
13 most beneficial manner."

14 So there's an agreement that this should all be
15 reviewed before the next meeting; correct?

16 A. Yes.

17 Q. Now, let's go to {C7/179/1}, please, and this is
18 a memo -- a memorandum prepared by EDC. Do you see
19 that? It's from Peter Sidenius --

20 A. Yes.

21 Q. -- for the sub-group and it follows the meeting. So we
22 see the date, 4 September 2000.

23 A. Yes.

24 Q. And it says:

25 "The purpose of this memorandum is to provide the

1 Interchange Sub-Group with an overview of the calculated
2 interchange costs from ... the 1999 study using the
3 credit write-offs from the previous study."

4 And if we go to page 2 {C7/179/2}, what we see is
5 that the group recommended, and we see this -- so under
6 the table, a few lines down:

7 "Consequently, the Group recommended that the
8 1997 credit write-offs figure of 36 basis points be
9 applied to the 1999 interchange fee calculations, in
10 lieu of the derived 1999 figure ... as an interim
11 measure to provide indicative interchange costs ..."

12 So the upshot is that the sub-group asked EDC to use
13 the 1997 figures instead, correct, for the credit
14 write-offs?

15 A. Correct.

16 Q. Because the sub-group didn't think it would be able to
17 increase interchange fees in the market to reflect this
18 additional cost, did it?

19 A. Correct.

20 Q. And that was in part because you were under a great deal
21 of pressure from large merchant customers who didn't
22 want you to increase interchange fees; correct?

23 A. Correct.

24 Q. So you asked -- the sub-group, rather, asked EDC to use
25 the old figures instead so that the interchange fees

1 wouldn't be out of sync with the costs that they'd
2 assessed; correct?

3 A. Yes.

4 Q. So it is really a clear case of reverse engineering,
5 isn't it, Mr Peacop.

6 A. No.

7 MR JUSTICE ROTH: Well, can you explain?

8 A. Thank you. Thank you, sir. Going back to the previous
9 screen, from memory, now --

10 MR JUSTICE ROTH: Would you like it back up?

11 A. Thank you. The one before that, I think.

12 MR JUSTICE ROTH: C7/135, I think. Is this the one?

13 A. I'm not sure now myself.

14 MS DEMETRIOU: I think it may be C7/197, is that the one, or
15 {C7/135/2}?

16 A. The -- at the time, some context, if I may, the
17 preliminary report from EDC did throw up what appeared
18 to be an anomaly to us and we -- it's quite clear, and
19 it's recorded in minutes of a number of meetings, we
20 tried to understand that better, but we couldn't get to
21 the bottom of it. It didn't seem to tie in with
22 anything happening in the economy at the time. Now --

23 MR JUSTICE ROTH: The anomaly being the increase in credit
24 write-offs?

25 A. Thank you. Yes, the increase in credit write-offs.

1 So what this alludes to here in this bottom
2 paragraph where it talks about apportionment of the
3 credit write-offs between the payment and the credit
4 provision, there were things happening in the market at
5 the time where credit cards were not only being used
6 transactionally for payments and therefore people taking
7 on unsecured credit on their credit card, but they also
8 had the opportunity to balance transfer. If you
9 remember, there are also things called credit card
10 cheques where you could write a cheque and that would be
11 debited to your credit card account and you could use
12 that for different purposes.

13 So it meant that there was a likelihood or I think
14 we got to a point of a high possibility, but we didn't
15 have the data to prove it, that a significant element of
16 what was leading to credit write-offs could well have
17 been transactional credit provision rather than
18 transactional payment activity, and that is what we were
19 trying to understand better there.

20 The reason that we elected to put in the data from
21 the previous cost study as it relates to write-offs is
22 that it was an anomaly. We couldn't get beneath it, but
23 we had greater faith in understanding the veracity of
24 the data from the previous cost study. So, therefore,
25 as a prudent measure, we believed, to underpin the

1 robustness of the process as far as we were concerned,
2 that it was far more credible to rely on the figure that
3 we had seen before and were familiar with, than to put
4 a figure and rely on a figure that we had -- we weren't
5 able to validate.

6 We believed at the time it was fair, it was balanced
7 and was completely consistent with the objective that we
8 set about when looking at setting the UK MIFs.

9 MS DEMETRIOU: Mr Peacop, you have given very, if I can say
10 it -- put it this way, comprehensive evidence on this
11 point. Do I take it that you've pieced that together by
12 looking at the documents and you don't have
13 a recollection of this amount of detail going back all
14 of that time?

15 A. With the documents having prompted my memory, I do have
16 a good recall of that, yes.

17 Q. Right, but not such a good recall of the
18 OFT investigation.

19 A. Well --

20 Q. Did you not look at the documents in relation to that in
21 the run-up to this --

22 A. I don't have recall of the OFT documentation, no.

23 Q. No.

24 And then just sticking on this page that we have on
25 the screen, {C7/135/2}, and let's look at what the

1 sub-group agreed. So they say that:

2 "... there would need to be an adjustment to offset
3 the increased level of credit write-offs, as the levels
4 indicated by the study could not be mirrored by similar
5 increases in the fallback interchange fee in the
6 market."

7 So certainly what they are saying there or what they
8 seem to be saying there is that, "We can't reflect --
9 the market wouldn't bear these increases, so we're going
10 to have to make an adjustment to the costs"; yes?

11 A. I don't think they're related or there's a cause and
12 effect there. If I may modify it --

13 Q. No, sorry, let me ask the question again --

14 A. So I don't -- I don't agree with that comment, no.

15 Q. So you don't -- well, let's, first of all, agree on
16 what's written and then let's see whether you agree with
17 what's written. So what's written here is that:

18 "... there would need to be an adjustment to offset
19 the increased level of credit write-offs, as [in other
20 words, because] the levels indicated by the study could
21 not be mirrored by similar increases in the fallback
22 interchange fee in the market."

23 So what's written is that the reason for having
24 an adjustment to offset the increased level of credit
25 write-offs is because that cannot be reflected in the

1 market in increases in the fallback interchange fee. So
2 can we agree that that's what's written?

3 A. I agree.

4 Q. And are you saying that although this is noted as being
5 an agreement by the sub-group, you personally do not
6 agree with how it's put here? Is that your evidence to
7 the Tribunal?

8 A. No.

9 Q. Right. So you do agree with what's written there?

10 A. I do agree with what's written there.

11 Q. Alright. Thank you very much.

12 Now, let's please look at the final figures for the
13 1999 cost study, so can we go to {C7/175/1}. So this is
14 the final report of the 1999 cost study and we can see
15 the date of publication is September 2000; yes?

16 A. Yes.

17 Q. And we can see it's the final report. It says that.

18 And let's go to page 3, please {C7/175/3}. So can
19 you see that the blended costs are now -- are said to be
20 1.49%, whereas in 1997 they were 1.11%. So that's
21 an increase of 0.38%; yes?

22 A. Yes.

23 Q. So it's less of an increase than we saw on the
24 preliminary figures, but there's still an increase,
25 correct?

1 A. Yes.

2 Q. And for costs in transactions processed in the standard
3 category, they're 1.6% in '99 up from 1.28% in '97; yes?
4 So that's an increase of 0.32%.

5 A. Yes.

6 Q. And for costs in transactions in the electronic
7 category, they're 1.39% in '99 up from 1.03% in '97. So
8 that's an increase of 0.36%; yes?

9 A. Yes.

10 Q. Now let's look at the report's findings as to the costs
11 in the additional categories, and if we go to page 14
12 {C7/175/14}, so we've got the heading "Additional
13 Transaction Categories" and we see that:

14 "EDC was also asked to evaluate the interchange
15 costs associated with the following types of
16 transactions, for which separate categories were
17 established in April 1999 ..."

18 And then we see what they are, so transactions at
19 cardholder activated terminals, CATs; card not present,
20 CNP, transactions; and airline transactions. So what
21 happened here -- see if I've got this right -- is that
22 these categories were introduced after the '97 cost
23 study; correct?

24 A. Correct.

25 Q. But EDC are using the data from the 1997 cost study to

1 determine what the costs for these types of transactions
2 are; correct?

3 A. Yes.

4 Q. And the reason that that's a useful exercise is that it
5 would inform the reader how costs have changed between
6 '97 and '99; that's right, isn't it?

7 A. Yes.

8 Q. And the study -- we've seen the three categories listed
9 and then let's go to page 15, please {C7/175/15}. So
10 here you can see the analysis of CAT transactions and it
11 says that -- at the top, you can see:

12 "Interchange costs for CAT transactions have
13 increased substantially from 1997."

14 And the headline figures are that -- at the bottom,
15 are that costs were 1.79% of the average transaction
16 value in 1997, but gone up to 2.33% in '99. So that's
17 an increase of 0.54%; yes? You see that?

18 A. Yes.

19 Q. And then let's turn to page 19 {C7/175/19}, and here you
20 can see the card not present, the CNP, transactions and
21 you can see at the top that interchange costs for
22 CNP transactions have increased 60% to 1.6% since 1997.
23 And then at the bottom of the page you see the
24 differential, so 1.6 up from 1.

25 A. Yes.

1 Q. And then let's go to page 20 {C7/175/20}. These are
2 airline transactions and you see there are no previous
3 estimates with which to compare 1999 costs comparing
4 them with airline transactions, so it wasn't possible to
5 calculate any change for those, was it?

6 A. No.

7 Q. And then if we go to page 22 {C7/175/22}, the
8 first paragraph on that page explains that members have
9 been unable to provide reliable data on the chip
10 transactions, but EDC has arrived at indicative numbers
11 using assumptions.

12 And if we go to page 23 {C7/175/23}, we can see that
13 the analysis results in interchange fees ranging from
14 1.53% to 1.44%, but this cost study is dated
15 September 2000 and it relates to costs in 1999; yes?

16 A. Yes.

17 Q. And if we go to {C7/250/1}, these are the minutes of the
18 Interchange Sub-Group meeting which you attended on
19 4 October 2000. Do you see that you're there?

20 A. Yes.

21 Q. And then if we go to page 3 {C7/250/3}, you'll see that
22 agenda item 5 concerned the 1999 study which we've just
23 been looking at. "New Categories", do you see that, the
24 heading? And presumably, because this meeting was in
25 October 2000, you were discussing the position for 2001,

1 would that be right, the MIFs for 2001?

2 A. Yes, they would have been applied early 2001, yes.

3 Q. Sorry, I didn't --

4 A. Sorry. They would have been applied in early 2001, yes.

5 Q. So when you were looking at the 1999 cost study which
6 was published in 2000 and you're discussing it in
7 October 2000, I think we're agreeing that that would
8 have related to the MIFs that you were going to bring in
9 for 2001.

10 A. I think that's right, yes.

11 Q. Alright.

12 Now, if we go back to the schedule of UK MIFs at
13 {A/18.1/4}. So let's look -- let's look at 2000 and
14 2001, so we're saying that they're relevant to 2001, and
15 the 1999 study we've seen found that the costs of
16 standard transactions increased by 0.32%. We've
17 established that. But if we look at standard
18 transactions -- let's start with 1999. There, do you
19 see, 1999 and we have Mastercard UK. It's at 1.30, yes,
20 1.3?

21 A. Yes.

22 Q. And then if we go across to 2000, it's still 1.3.

23 A. Yes.

24 Q. And if we go to 2001, it's still 1.3; right?

25 A. Yes.

1 Q. So the fact that EDC found that costs increased didn't
2 lead MEPUK's board to increase the standard rate, did
3 it? That's correct?

4 A. Correct.

5 Q. And then similarly, electronic was 1% in 1999. Do you
6 see that, the second row?

7 A. Yes.

8 Q. And then we can just trace over and we see it's exactly
9 the same in 2000 and 2001.

10 A. Yes.

11 Q. And, again, EDC's finding that the costs had increased
12 by 0.36% didn't lead to any change at all, did it?

13 A. No.

14 Q. And the same is true of the CAT and CNP transactions,
15 isn't it? So if we look at CAT, so cardholder activated
16 terminal, costs, we've seen that those increase by 0.54%
17 between '97 and '99. Then if we look at the category,
18 so about nine down, we see that it stayed, from 1999
19 through to 2001, at 1.3. Do you see that?

20 A. For CATs, yes.

21 Q. Yes. So, again, the -- even though there'd been -- EDC
22 had found a CAT cost increase of 0.54%, that just wasn't
23 reflected in any change to the MIF; correct?

24 A. Correct.

25 Q. And then CNP costs, so we see that just two above CAT.

1 Those, we saw, increased by 0.6% between '97 and '99,
2 but CNP, we see in 1999, is 1.1 and, again, that remains
3 static, doesn't it?

4 A. Yes.

5 Q. And, in fact, if we go over the page {A/18.1/5}, we can
6 see that those figures remain static going forwards. So
7 at 2002, it was the same figure as well.

8 A. Yes.

9 Q. So just looking at the levels of the UK MIFs, EDC's
10 finding that costs had increased for every category
11 between '97 and '99 had no tangible effect at all, did
12 it?

13 A. May I modify my answer rather than a "yes" or "no", sir?

14 MR JUSTICE ROTH: Well, you were asked whether it had any
15 effect, so if you can explain what the answer is.

16 A. Yes. The effect would be as a result of using it as
17 a base in assessing the costs, as the first place to go
18 to. Did that, as a result -- did the prices or the
19 MIF -- sorry, setting the MIFs as a result of the cost
20 base, did they reflect each other? It was a component
21 part of assessing what the UK MIF rate should be.

22 So did it have an effect? Yes, it had an effect,
23 because it's an integral part of assessing what the --
24 an important part of the process of setting UK MIFs.
25 There were other considerations; what the market would

1 bear, which has been referred to. Also, as part of the
2 market assessment is what are the competitive rates of,
3 in this case, Visa? So all of those things were taken
4 into account.

5 So my answer -- why I asked to qualify was simply
6 that the EDC studies absolutely had an effect, because
7 they were seriously taken account of and formed the
8 basis for our considerations.

9 MS DEMETRIOU: Well, let me try and explore that a little
10 bit, Mr Peacop, because I understand that you're keen to
11 toe the Mastercard line in terms of, well, there were
12 all sorts of things that were taken into effect, but
13 what you're telling the Tribunal now is that -- let me
14 just have a look at what you are saying.

15 So you are say that it was an integral part of the
16 process of setting the MIF and they formed the base.
17 And what we've just seen is that there were these cost
18 studies which were discussed in which, between 1997 and
19 1999, EDC found that there were significant changes in
20 costs and none of those changes were reflected in any
21 change whatsoever in the UK MIF. So how were they
22 an integral part of assessing the MIF?

23 A. The answer to that is that there was an integral part by
24 being the first place that we would go to. It was the
25 point where we started. We would consider the outcome

1 of the reports and gave us great insights into what was
2 happening in the market. We could see some trends. We
3 could see that in some -- in most cases, most
4 categories, fraud was increasing dangerously and
5 exponentially. That gave us information about how, as
6 an industry, we needed to respond to that.

7 But then when it came to setting the interchange
8 rates, it was just one of the considerations and what
9 the market would bear, being pressure brought by other
10 players in the market, including acquirers, and as well
11 as the market considerations and the pricing of Visa,
12 also a very important part.

13 That culminated in there -- there being downward
14 pressure on the rates. If -- if it was all about
15 reflecting the costs, those rates would have gone up,
16 but it wasn't possible to do that in terms of delivering
17 a balance of the costs in the market.

18 Q. Right. So let's just look at those -- some of those
19 things you've said in turn.

20 So you say -- so let's just start with the last
21 thing. So it wasn't possible to increase the rates in
22 line with costs, and I think we've established that's at
23 least in part because you were getting a lot of pressure
24 from acquirers and retailers; correct?

25 A. Correct.

1 Q. You said that in your statement.

2 A. Yes.

3 Q. And then you say, "We started with the costs". Now,
4 would it be fair to say that you started with them in
5 the sense that you looked at them and you discussed
6 them, but you didn't linger on them very long, did you,
7 Mr Peacop? Because, actually, you didn't make any
8 changes consequential on these cost studies, did you?

9 A. I don't agree with the comment that we didn't linger.
10 We -- we considered them very carefully, significant
11 debate, and that is reflected in a number of meeting
12 minutes.

13 Q. Mr Peacop, I agree that you looked at them and you
14 discussed them in the meetings, but they never actually
15 led to any changes, did they?

16 A. We considered them deeply and the changes were a matter
17 of other considerations, of which the cost base
18 exemplified by the EDC cost studies was one.

19 Q. Right. Now, let's look at the 2002 cost study, so
20 {C9/140}, please. So that's circulated or published in
21 November 2002. We see from the front page. And that
22 would have been the next study after 1999, correct, the
23 one that was published in 2000, the one that we've just
24 been looking at?

25 A. Yes. This -- just for clarification, this is on

1 2001 data, I think; is that right?

2 Q. Well, let's have a look. So if we go to page -- let's

3 go to the next page -- sorry, I think it's the page

4 after that {C9/140/3}. So we can see -- I think that

5 actually doesn't tell us what data it's based on.

6 So it's the 2002 cost study produced in 2002. So

7 you're saying, what, that it was -- your recollection is

8 that it was based on 2001 data?

9 A. As at the end of year 2001, I believe.

10 Q. Alright, but it was the next cost study after --

11 MR JUSTICE ROTH: I think it's on -- if we want it, it's on

12 page 5 {C9/140/5}.

13 A. Thank you.

14 MS DEMETRIOU: Thank you, sir.

15 MR JUSTICE ROTH: "Background".

16 MS DEMETRIOU: Oh, yes, that's quite right. So --

17 MR JUSTICE ROTH: The second paragraph.

18 MS DEMETRIOU: -- you're right about that, Mr Peacop. So

19 that's data --

20 A. Thank you.

21 Q. -- for the 12 months ending -- thank you, sir --

22 31 December 2001 and it was the next study after the one

23 we were just looking at; correct?

24 A. Yes.

25 Q. And if -- let's go back to page 3 {C9/140/3}. So here

1 we can see the table setting out EDC's findings and we
2 can see just from a glance that no two numbers from 2002
3 to 1999 are the same. Do you see that?

4 A. I do, yes.

5 Q. So costs have changed in every category, and just
6 looking at blended costs, they've increased from 1.49%
7 to 1.61%; yes?

8 A. Sorry, I don't have that figure in front of me. Is
9 that --

10 Q. Oh, that's in the table, Mr Peacop.

11 A. 1.49 to 1.61. My apologies, yes.

12 Q. Not at all.

13 And if we go down to look in detail at the various
14 changes, so standard has gone from 1.6 to 1.67.

15 A. Yes.

16 Q. And then just going down the table, electronic is
17 a 0.19% increase from 1.39 to 1.58.

18 A. Yes.

19 Q. CAT has gone from 2.33 to 3.03. Then CNP, we see, has
20 gone from 1.60, and that's actually the only one,
21 I think, that's gone down. So that's a 0.17% --

22 MR JUSTICE ROTH: Well, chip has gone down.

23 MS DEMETRIOU: Oh, chip has gone down too. I should have
24 read on.

25 So those have both gone down and airlines has moved

1 from 1.27 to 1.41.

2 So this study was completed in November 2002, we've
3 just seen, so it would have been discussed presumably in
4 the context of the UK MIF rates for 2003; correct?

5 A. Correct.

6 Q. And this, in fact, was the last cost study performed by
7 EDC on domestic interchange fees whilst MEPUK was
8 responsible for setting the MIF; that's correct,
9 isn't it?

10 A. Correct.

11 Q. Now, let's go back to the UK MIF schedule at {A/18.1/5}.
12 So now we're comparing 2002 to 2003 because we've
13 established that this cost study, which was produced at
14 the end of 2002, was relevant to the 2003 MIFs. And
15 we've just seen that the cost changed in every single
16 category, but looking at the Mastercard UK MIFs, they
17 stayed exactly the same, didn't they, in every single
18 category? Should I just give you a moment to
19 double-check that?

20 A. Yes. No, I'm happy, yes.

21 Q. They did say the same. You remember that?

22 A. Yes.

23 Q. So just looking down we see standard is still 1.3,
24 electronic is 1, and so on and so forth, and that's true
25 of all the other interchange categories. So CAT, CNP,

1 chip are all the same between 2002 and 2003.

2 So we've looked -- just to summarise, we've looked
3 at all of the results of the cost studies which were
4 produced whilst MEPUK was responsible for the UK MIFs,
5 yes, 1997, 1999 and 2002?

6 A. Yes.

7 Q. And all of those cost studies showed that there had been
8 variation in costs for every category compared with the
9 previous study; correct?

10 A. Correct.

11 Q. And yet no -- no UK MIF category was ever changed by
12 MEPUK in the year following the study. Every single
13 category was always identical to the year before, wasn't
14 it?

15 A. Sorry, specifically in terms of what I have in front of
16 me between 2002 and 2003, they've stayed the same, yes.

17 Q. Well, we've looked at the last ones too.

18 A. I need to be reminded of them on the screen.

19 Q. I don't think we need to go back. I think you do agree
20 with me that they were the same.

21 And the reality of all of this is that MEPUK didn't
22 actually place very much weight on these cost studies,
23 did it?

24 A. Yes, it did. I don't agree with that statement.

25 Q. Well, in your statement and now to the Tribunal, you've

1 described the cost studies as being the starting point
2 for the setting of the MIFs.

3 A. Correct.

4 Q. But we've established they didn't actually result in any
5 changes to the MIFs; correct?

6 A. They didn't -- there weren't changes as a result of
7 that, no.

8 Q. And if we look at what the experts say, if we go to
9 {A/22/19}, this is the agree/disagree statement of the
10 economists. Have you looked at this, Mr Peacop, at all,
11 or not?

12 A. I don't think I have seen this, no.

13 Q. Alright. So this is a table which sets out where the
14 respective expert economists for each party agree or
15 disagree. If you look at line 26, the heading is "Role
16 of EDC cost studies", "Was there a relationship between
17 UK domestic IFs and EDC cost studies?"

18 Mr Parker is the expert economist called by
19 Mastercard and Mr Coombs is the expert economist called
20 by Mr Merricks. And what you see is that Mr Parker, for
21 Mastercard, says that -- he conducts a statistical
22 analysis and he finds that -- he doesn't find
23 a statistically significant correlation between the
24 level of the UK interchange fees and the level of costs.
25 He says that doesn't imply they weren't a relevant

1 factor. There is factual evidence that the EDC cost
2 studies were seen by Mastercard as indicating the
3 maximum level at which interchange fees could be set.

4 So would you agree with that?

5 A. Yes. Yes, I would.

6 Q. So they were seen at most as a ceiling, weren't they?

7 A. I never looked at them as that. I can agree with that
8 comment broadly, but that's not necessarily our mindset
9 within the Interchange Sub-Group for the UK.

10 Q. So you didn't see them as a ceiling?

11 A. Not necessarily, because that wasn't necessarily the
12 case under the Golden Rules. But as it transpired, in
13 practice, they became that, yes.

14 Q. Right. Well, you mention the Golden Rule. If we go to
15 that at {C8/356/35}. So:

16 "Fallback interchange and service fees must bear
17 a close relationship with costs, while at the same time
18 allowing members to take commercial considerations into
19 account."

20 But if the MIFs never changed to reflect changes in
21 costs, that's not bearing a close relationship with
22 costs, is it, Mr Peacop?

23 A. In the context of considering it as the start point for
24 assessing the costs, the second element of the
25 Golden Rules is taking into account commercial

1 considerations, which is an integral part of what the UK
2 did when setting its rates.

3 Q. Yes, I understand. You've made that point several times
4 about commercial considerations, so let's just look at
5 the Golden Rules.

6 "Fallback interchange and service fees must bear
7 a close relationship with costs ..."

8 Now, they must bear a close relationship with costs.
9 Here they didn't, did they, because the MIFs never
10 changed to reflect changes in the costs?

11 A. Well, there was absolutely a relationship between the
12 costs and the rates, but there were other --

13 Q. Well, what sort of relationship, Mr Peacop? Because
14 when the costs went up, the rates didn't go up, and when
15 the costs came down, the rates didn't go down. So
16 that's a funny sort of relationship in my book. What
17 did you have in mind?

18 A. If I may answer that. Using it as the base and the
19 start point in assessing the costs, that is the
20 relationship between understanding what the costs are,
21 understanding what's going on in the market and using
22 that as one of the considerations and ending up at
23 a rate that you would recommend to be set for the UK.
24 So the relationship is precisely that. We understood
25 what was happening with costs and we understood what was

1 happening as part of the commercial considerations. So
2 that is my answer to what is -- to the relationship, to
3 my interpretation of relationship.

4 Q. Alright. So your answer is that it was a starting point
5 but then movement in costs, you didn't consider that
6 movement in costs had to be reflected in the MIFs. Is
7 that your evidence?

8 A. Sorry, could you repeat that question?

9 Q. So your answer is that the costs that were analysed by
10 EDC were a starting point for MEPUK in setting the MIFs.

11 A. Agreed.

12 Q. But you did not consider that the MIFs needed to change
13 if there were changes in costs.

14 A. The MIFs didn't necessarily need to change if there were
15 changes in costs, no, I agree with you.

16 Q. Alright.

17 Now, let's go to paragraph 33 of your first witness
18 statement please, at {A/8/9} and you say there that:

19 "MEPUK felt that it needed to be able to demonstrate
20 that its MIFs were set based on the underlying costs
21 base in order to pre-empt and respond to regulatory
22 pressure. We felt that our cost-based approach, relying
23 on an independently prepared cost study, was a rational,
24 clear basis for setting ... MIFs that would be robust in
25 the face of regulatory scrutiny. As I explain below,

1 however, the UK MIFs were typically then set at a level
2 below the levels in the ... cost studies ..."

3 Now, when you refer here to regulatory pressure,
4 you're talking, aren't you, about the OFT and the
5 European Commission's investigations, amongst other
6 things at least?

7 A. In latter days that would be true but in the early days
8 of setting the UK MIFs the regulatory framework was
9 a little less pressure. It was apparent, yes, but not
10 as intense as it was towards 2004, 2005.

11 Q. Well, before that. The OFT investigation had started
12 well before 2004/2005, hadn't it?

13 A. Yes, yes.

14 Q. So you were aware that the OFT was very interested in
15 all of this and that's what you mean by regulatory
16 pressure. That's one of the things you mean at least,
17 isn't it?

18 A. Sorry, I need to -- sorry your -- if I can just reset my
19 comments. So --

20 Q. Let me try and assist, Mr Peacop. Let me ask shorter
21 questions and then let's see how much we can agree.

22 MR JUSTICE ROTH: I think perhaps we can just put it this
23 way. If you read your next sentence in paragraph 33:

24 "We felt ..."

25 Do you see that? Just read that to yourself.

1 (Pause)

2 When you say there "in the face of regulatory
3 scrutiny", what are you referring to?

4 A. Well, the context of setting UK MIFs was in the
5 mid-1990s so it will have been in place and we continued
6 to think that the framework we had for using the EDC
7 cost studies as an understanding of the underlying
8 cost-base was robust in the face of regulatory scrutiny
9 and we had confidence that it would stand up.

10 MR JUSTICE ROTH: Yes, I'm just asking what you mean by
11 "regulatory scrutiny". Which -- what regulatory
12 scrutiny are you referring to?

13 A. From -- from directly the relevant regulator, sir. No,
14 it would have been the OFT from late '90s to early
15 2000s.

16 MR JUSTICE ROTH: Yes.

17 A. Thank you.

18 MS DEMETRIOU: Thank you. So when you say MEPUK needed to
19 be able to demonstrate that its MIFs were based on
20 underlying costs to pre-empt and respond to regulatory
21 pressure, that was a key function of these cost studies,
22 wasn't it? You would be able to show the regulator that
23 you were taking costs into account; correct?

24 A. It was an integral part of what we were doing, it wasn't
25 the primary reason for doing it, but it was

1 a reassurance to us that we were responding well and
2 believing that we had a robust framework in the
3 regulatory environment. I would expect any business to
4 be seeking to work well within a regulatory environment.

5 Q. So is this right: that the cost studies were useful
6 because you were able to tell the regulators -- you were
7 able to show the regulators that the MIFs were set below
8 costs by and large, although not always; correct?

9 A. Correct.

10 Q. But as we've seen, the costs in the cost studies weren't
11 otherwise used to determine the level at which MEPUK set
12 its MIFs, were they?

13 A. If I may disagree, they were used as the start point,
14 and a very extensive thought process to considering what
15 the rates were. So they absolutely were used in
16 considering the setting of the UK MIFs.

17 MS DEMETRIOU: Alright. Thank you, Mr Peacop. I think
18 we've taken that particular topic as far as we can.

19 MR JUSTICE ROTH: In which case, is that a sensible --

20 MS DEMETRIOU: It's a sensible time to break.

21 PROFESSOR WATERSON: Can I just put a question?

22 A. Of course.

23 PROFESSOR WATERSON: Were these cost studies used for other
24 things?

25 A. Primarily, it was for the purpose exactly of providing

1 the basis for assessing the UK MIFs. It had a broader
2 reach for those who participated as part of the
3 participation arrangements, contributing the data of the
4 individual members. There was some benchmarking which
5 was on a confidential basis as between Edgar Dunn and
6 each of the members. So you had the outcome of the
7 report, so averaging of the numbers. And then there
8 would be benchmarking for individual members to assess
9 how they were playing and coming out against each of the
10 categories so that they could then use that usefully,
11 otherwise they recognise that they were either efficient
12 against their competitors or that they could drive
13 greater efficiencies, which in turn would drive
14 more efficiencies in the numbers going forward. So they
15 had wider uses but still within the context of looking
16 at the costs of UK MIFs.

17 PROFESSOR WATERSON: Thank you.

18 MR JUSTICE ROTH: And we'll return at 2 o'clock, and you
19 will remember the warning I gave you.

20 A. Yes.

21 (1.02 pm)

22 (The short adjournment)

23 (2.03 pm)

24 MR JUSTICE ROTH: Yes.

25 MS DEMETRIOU: Mr Peacop, so we were looking at the schedule

1 of UK interchange fees and we saw that MEPUK didn't
2 change the fees from 1997 to 2004, but we've -- you do
3 explain in your evidence that MEPUK did introduce new
4 categories; that's correct, isn't it?

5 A. Yes.

6 Q. And let's turn to {C8/139/1}, please. So you can see
7 this is the OFT's rule 14 notice and it's dated
8 25 September 2001.

9 And let's go to page 11 {C8/139/11}, and I want to
10 focus on the table. So we can see that there's a table
11 which sets out different fallback interchange fees over
12 time; yes?

13 A. Yes.

14 Q. And you can see the single asterisk at the bottom of the
15 table and that says:

16 "As no separate category was defined for these
17 transactions, these would be classified as Standard
18 transactions."

19 And you can see there are a number of interchange
20 fees to which that's applied. Do you see that in the
21 table?

22 A. Yes.

23 Q. So you can see that there's a single asterisk above the
24 figures for the MIF categories card not present,
25 PAN-key-entered, cardholder activated terminals and

1 airline; yes?

2 A. Yes.

3 Q. For the years '95 through to '99, for all of those years
4 for those categories.

5 A. Yes.

6 Q. And that's because there weren't -- those categories
7 didn't exist in those years; correct?

8 A. Correct.

9 Q. So instead, those transactions would have gone into the
10 standard category; correct?

11 A. Yes.

12 Q. Which from '97 was 1.3%; that's right, isn't it?

13 A. Yes.

14 Q. So when the new MIF categories were created in 1999,
15 it's correct, isn't it, that they carved out certain
16 kinds of transactions which were previously part of the
17 standard category; yes?

18 A. Yes.

19 MR JUSTICE ROTH: Can I just check: the electronic category
20 is -- that's where --

21 A. It's data capture from the magnetic stripe.

22 MR JUSTICE ROTH: So just going back to what you were asked,
23 I mean, with some of the airlines, would they all have
24 been standard or would some -- before you had a special
25 airline category, would some have been electronic or

1 they would all have been standard or ...

2 A. I'm actually going to modify my answer, if I may,
3 because I'm now less certain that was the case. I can't
4 recall, so --

5 MS DEMETRIOU: If it helps, I'm looking at what the OFT
6 said.

7 A. Yes.

8 Q. So they said they were -- they were classified as
9 standard.

10 MR JUSTICE ROTH: I see. Yes, they do. Well, I've seen
11 that, then. Right, okay.

12 MS DEMETRIOU: And it's correct, isn't it -- so when the new
13 MIF categories were created in 1999, they were -- we can
14 see that the OFT's found that they were previously part
15 of standard and they were always set equal to or less
16 than the standard rate of 1.3; that's right, isn't it?

17 A. Yes.

18 Q. Now, you refer in your first witness statement to the
19 minutes of the meeting of MEPUK's Rules & Conciliation
20 Committee Interchange Sub-Group on 15 January 1998, and
21 that was the meeting where the sub-group considered the
22 introduction of new categories for card not present,
23 CNP, and CAT, cardholder activated terminal,
24 transactions; yes?

25 A. Yes.

1 Q. And let's turn to that document. That's {C4/500/3}. So
2 do you want to just have a look at what it says at the
3 top? So it's minutes of the sub-group, R&CC Interchange
4 Sub-Group, held 15 January 1998 and you can see that you
5 were present; yes?

6 A. Yes.

7 Q. Let's look at the CNP category first, so if we go to
8 page 5 {C4/500/5} and there's a table which sets out
9 Visa's comparable MIFs -- do you see that -- and the
10 updated EDC cost study figures; yes?

11 A. Yes.

12 Q. And for CNP, the updated EDC figures are 0.99%, but for
13 electronic, they're 1.01%; yes?

14 A. Yes.

15 Q. And the electronic MIF at that time was set at 1, wasn't
16 it, 1%?

17 A. Yes.

18 Q. Now, you'll see above the table, if we can just scroll
19 a little bit up, please, that Mr Hawkins states:

20 "... that regulators were worried about the fraud
21 implications of CNP transactions. He was concerned that
22 the CNP rate (0.99%) was lower than the electronic rate
23 (1.01%)."

24 So he seems to be saying that there's a higher risk
25 of fraud for CNP transactions than electronic

1 transactions; correct?

2 A. Yes.

3 Q. So he thinks it would be inappropriate from a regulatory
4 perspective for CNP transactions to be set lower than
5 electronic transactions; correct?

6 A. Forgive me, I'm trying to interpret the amendments
7 that -- where it's been -- can we agree what that
8 actually says:

9 "Mr Hawkins observed that from time to time
10 government officials ..."

11 Because some --

12 Q. "... regulators [seemed] concerned about the fraud
13 implications of CNP transactions ..."

14 A. Thank you. Thank you. Yes, that's what it says,
15 agreed.

16 Q. So his point -- he thinks it would be inappropriate from
17 a regulatory perspective for CNP transactions to be set
18 lower than electronic transactions; yes?

19 A. Yes.

20 Q. Despite the cost study figures suggesting that they
21 should be set very slightly lower. That's what we've
22 seen the cost figures say; correct?

23 A. I think at this stage, I may recall -- I'm not sure --
24 that that figure was later revised in a -- in an updated
25 cost study, which -- I may be wrong.

1 Q. Is this something that you're remembering from the
2 time --

3 A. No, no, from --

4 Q. -- or that you're remembering from preparation for this
5 hearing?

6 A. From -- yes.

7 Q. Okay. Now, if we turn to page 7 {C4/500/7}, you'll see
8 the rates that the Interchange Sub-Group submitted to
9 the board.

10 A. Yes.

11 Q. And CNP is set at 1.1% whereas electronic is 1%; yes?

12 A. Yes.

13 Q. So what's happened is that 0.1% has been added to the
14 existing electronic interchange fee to ensure that CNP
15 is set slightly above it, yes, in light of Mr Hawkins'
16 concerns?

17 A. Sorry, electronic was moved --

18 Q. 1.

19 A. -- was 1 and is now still at 1; is that right?

20 Q. Yes, electronic stays at 1 --

21 A. But CNP has moved to 1.1, yes.

22 Q. It's moved to 1.1, and we saw that the cost study showed
23 that the costs are slightly lower for CNP and then you
24 saw Mr Hawkins say, well, the fraud -- he was worried
25 about fraud implications of CNP and he expressed concern

1 that the CNP would be set -- he was saying there's
2 a higher risk of fraud for CNP transactions than
3 electronic transactions. So we've established that he
4 thinks from a regulatory perspective, it would be
5 inappropriate for CNP transactions to be set lower than
6 electronic transactions, and what we see now is that
7 they've been set slightly higher; correct?

8 A. Yes.

9 Q. So it's right to say, isn't it, that the CNP category
10 was set by reference to the electronic category?

11 A. I think as a consideration, not solely by reference to.

12 Q. Alright. It's a consideration.

13 Now, let's look at the CAT category. If we go back
14 to page 5.

15 Well, just a second, when you say it's
16 a consideration, let's go back to what is said about CNP
17 above the table. What's being said there is --
18 a comment's being made about the relative positioning of
19 CNP compared to electronic; correct?

20 A. Yes.

21 Q. So there's a debate about where CNP should stand in
22 relation to electronic and then a view is taken. So
23 I think it is correct to say that it's set by reference
24 to electronic, isn't it?

25 A. In my view, if I may, again, it's one consideration.

1 It's also taken account because there's also comparison
2 to the market conditions as it relates to the Visa
3 rates, and they're also part of the consideration.
4 You'll see there that electronic -- CNP for Visa is 1.1,
5 so that would also be taken into account.

6 There is also a comment from Mr Bowen who says that
7 there are a number of extra costs which would be
8 included if a new CNP category was to be introduced,
9 which is what we were considering.

10 So I can't recall whether -- how it's captured in
11 the meeting here, but one can deduce from that, I would
12 say, that there was discussion around extra costs and
13 how they could be taken account of, bearing in mind this
14 was a new category, so it was -- it was breaking new
15 ground.

16 Q. And this is your interpretation of the document now, is
17 it, or is it your direct recollection of the meeting?

18 MR JUSTICE ROTH: Mr Bowen is there, isn't it? That's the
19 comment in the minutes --

20 MS DEMETRIOU: Yes.

21 MR JUSTICE ROTH: -- I think, that the witness has just
22 drawn attention to.

23 MS DEMETRIOU: Yes, but I think the witness was making --
24 was giving evidence in general as to what considerations
25 were taken into account and I'm just asking whether

1 that's his direct recollection of how -- of the
2 considerations or whether you're deducing this from the
3 document.

4 A. I think I can't remember precisely how that discussion
5 went, but I can deduce it from the minutes.

6 Q. Alright. Thank you.

7 Now, if we go -- so we're on page 5 {C4/500/5},
8 I think, aren't we? So let's look at the "CAT" category
9 halfway down and you see that:

10 "Mr Griffin pointed to the huge value benefit to
11 retailers in CAT. He urged that a CAT category must be
12 set up now ..."

13 And then if we can scroll a little bit, please:

14 "The proposal to introduce a CAT category supported,
15 but that there should be no separate at this time.
16 A review on volumes should place in 12 months' time."

17 So the introduction of the CAT category, we can see,
18 was supported by the sub-group, but it was put on hold
19 in terms of there being a separate rate; correct?

20 A. That's the comment there, yes, as a proposal.

21 Q. So the proposal was to introduce a new category but keep
22 the standard rate of 1.3.

23 A. Yes.

24 Q. And then below the heading "Agreed Way Forward", you see
25 it says -- if we can again scroll, please, for CAT, it

1 says:

2 "... i.e. Standard 1.3% and revisit in 1 year (Visa
3 also to be encouraged to revisit) ..."

4 What does that -- is that -- does that envisage
5 discussions between Mastercard and Visa as to where best
6 to land, does it, do you think?

7 A. I -- I can't remember how that was discussed.

8 Q. Is that something you can't -- can you deduce what must
9 be meant from the document, Mr Peacop?

10 A. I can only deduce a number of options. It's not clear
11 to me, even reading that now.

12 Q. Well, do you think that one option would be that
13 Mastercard was going to encourage Visa to revisit that
14 same category and they were going to discuss the rates
15 between themselves?

16 A. I would say from the market conditions, that's highly
17 unlikely.

18 Q. You think that's highly unlikely. Well, what else do
19 you mean -- what do you think that means; "Visa also to
20 be encouraged to revisit"? What does that mean?

21 A. Well, one other option is that those members of MEPUK
22 could be encouraged to have discussions with other
23 providers that they work with, but it --

24 Q. It doesn't say that, does it, Mr Peacop?

25 A. No, it doesn't, and --

1 Q. Let's be fair about this.

2 A. No, it doesn't say that.

3 Q. It says "Visa to be encouraged".

4 A. Yes, and I can't remember the context of the discussion.

5 I can't be precise as to what that means now.

6 Q. Well, Mr Peacop, you're very -- very ready to interpret
7 the document when it supports Mastercard's case, but
8 I'm asking you what your view is of this document now,
9 and you've struggled to give a meaning to it. You said
10 it must mean other providers. It clearly doesn't. It
11 says, "Visa to be encouraged to revisit".

12 So what is your best assessment to the Tribunal as
13 to what that meant?

14 A. Can I just clarify I believe, sir, the question that
15 I was asked is: can I remember? And I can't remember
16 specifically. Can I deduce? And I think it includes
17 options.

18 By "provider", I meant Visa is a provider. So, in
19 other words, those issuers and acquirers in those
20 meetings that through their other -- commercial
21 relationships with provider. By that, I mean Visa.
22 That's an option. There may be others, but I simply
23 can't recall the nature of that discussion.

24 Q. Right. So you can't recall discussion about -- about
25 having discussions with Visa about what joint rate you

1 should be --

2 A. Categorically I can't remember that discussion, no.

3 Q. No, okay.

4 Well, let's go back to what else this says. So this
5 says that the CAT category was simply to be set at the
6 standard of 1.3%, but we saw that the cost study figures
7 for CAT were 1.76%; yes?

8 A. Yes.

9 Q. Now, if we go back to the UK MIF schedule at {A/18.1/4}
10 and let's look at 1999. So we can see that the card not
11 present category -- do you see that; six down -- in 1999
12 was introduced at the rate of 1.1?

13 A. Yes.

14 Q. Do you see that?

15 A. Yes.

16 Q. And then it stayed at that level -- if we can scroll
17 forward and look at 2000 and then go forward to the next
18 page, it stayed at that level until -- so if we can go
19 forward again {A/18.1/5}, thank you -- until 2004. So
20 in 2003, it was still 1.10 and then it dropped in 2004.
21 Do you see that?

22 A. Yes.

23 Q. And we also see that in 2004, just looking at those
24 figures, that the electronic category -- that's second
25 from the top -- that also dropped from 1, which it had

1 been at steadily, to 0.9. Do you see? So there's
2 a same drop of 0.1 of a percentage point.

3 A. Yes.

4 Q. And if we look at CNP, then we see that that also
5 decreased. So we've got it at 1.10, 1.10, and that also
6 dropped to 1 in 2004; yes?

7 A. Yes.

8 Q. So, again, by the same reduction.

9 And then if we look forward in the table, both
10 categories remained the same until 2010. Let's just
11 quickly skim forward. Just trace that through just to
12 check that you agree with me.

13 A. Yes.

14 Q. So as a matter of fact, CNP continued to move in tandem
15 with the electronic category, didn't it?

16 A. Yes.

17 Q. Even though the cost -- the costs varied. So CNP is
18 just the electronic category plus 0.1%, isn't it?
19 That's how it was -- that's how it was fixed by MEPUK
20 and then by Mastercard.

21 A. No, there wasn't a relationship in that way.

22 Q. There wasn't a relationship?

23 A. It wasn't fixed.

24 Q. Mr Peacop, I think we have to disagree with what you
25 mean -- what you understand by "relationship". So

1 you've said, on the one hand, that there is
2 a relationship between EDC costs and the UK MIFs, even
3 though they don't move at all. When one moves, the
4 other doesn't move at all.

5 A. Yes, yes.

6 Q. But you say here, when they're moving in precisely the
7 same way, there is no relationship.

8 A. I -- the comment you made, I think, is that they were
9 fixed in relation to each other as a result of that, and
10 they weren't.

11 Q. They tracked each other.

12 A. There --

13 Q. Can we agree on that word?

14 A. There were similar movements, but the --

15 Q. Well, the same movement, Mr Peacop.

16 A. -- the reason for the consideration of the change of the
17 rates in 2004 was directly and predominantly as a result
18 of other things happening in the market; regulatory
19 imposition against Visa of the European Commission. And
20 the change in the rates was MEPUK's, or MMF's by then,
21 reaction to a significant change in Visa's rates in the
22 UK.

23 Q. Let's just track a bit. So we've seen the CNP fee was
24 not set on the basis of costs, because the costs showed
25 it being under electronic, but it was set slightly over

1 electronic; correct?

2 A. It was set cognisant of costs, but not necessarily
3 reflecting costs.

4 Q. Right, so it doesn't -- okay. That's a subtle
5 distinction, which no doubt your barristers will pick up
6 in their closing submissions. But they did not -- it
7 did not -- let's look comparatively --

8 MR JUSTICE ROTH: Well, I think that's, I think, a slightly
9 unfair comment, Ms Demetriou.

10 As I understand it, what you're saying is they're
11 not directly related to costs and they don't track
12 costs, but you say costs were something that the group
13 took into account, along with other things.

14 A. Absolutely. Thank you, sir.

15 MR JUSTICE ROTH: So is that what you're basically saying?

16 A. It is, sir, yes.

17 MR JUSTICE ROTH: Yes.

18 MS DEMETRIOU: Alright, Mr Peacop, so going back to the
19 discussion in the sub-group and Mr Hawkins, clearly at
20 least some people on the sub-group thought about the
21 relationship between CNP and electronic; correct?

22 A. I can't remember discussions along those lines.

23 Q. So you don't think that anybody thought, well, how does
24 CNP fit in with electronic?

25 A. I think -- I think in the context of all the rates,

1 there was -- there was -- ensure there was some balance
2 to them, yes, but I can't remember -- I can't remember
3 specific discussions around that.

4 Q. Alright. Well, the minutes record Mr Hawkins at least
5 talking about the relationship between CNP and
6 electronic and then we see them moving precisely in
7 tandem. But is this right: that your evidence is that
8 that's just coincidence because of other factors and
9 they were never considered in relation to each other?
10 Is that your evidence?

11 A. I'm not sure I can say "yes" or "no" directly to that.
12 If I'm allowed to expand slightly ...

13 MR JUSTICE ROTH: Yes.

14 A. Thank you.

15 It was looking at the table of rates together and to
16 ensure that there was a balance to them. They would
17 never have been looked at completely in isolation.
18 There's some relativity, but not a hard fix or a hard
19 relationship between them. It's just looking at them in
20 the balance in the knowledge of all the things we've
21 considered, which is the cost base, which is the market
22 conditions, which are competitive pressures and
23 regulatory pressures.

24 MS DEMETRIOU: Well, the cost base didn't have much of
25 an impact on this one, did it, because the cost base

1 said that it was less costly, CNP was less costly, than
2 electronic --

3 A. Yes.

4 Q. -- but MEPUK set it above electronic; correct?

5 A. I think there's evidence from the minutes which suggests
6 that there was knowledge of other costs, which, as a new
7 category, we hadn't yet taken full account of. But from
8 our experience in the industry, we would expect there to
9 be additional costs to be included.

10 I think also from that document there was a comment
11 from Edgar Dunn to say that a rate at 1.1% is
12 justifiable. Forgive me if that's not the right word
13 that was in the minute. And I think there may have been
14 a revised version of that cost study, but I stand to be
15 corrected on that.

16 Q. Mr Peacop, you seem very keen to argue Mastercard's case
17 for it, if I can put it that way, because all I put to
18 you was a simple proposition, which is that the CNP and
19 electronic categories moved in tandem and that was
20 presumably at least in part because MEPUK saw there
21 being a relationship between the two. Do you agree or
22 disagree with that?

23 A. I can agree with that, yes.

24 Q. Alright.

25 Now, let's look at the cardholder activated

1 terminals category, so if we go to page 4 {A/18.1/4}.

2 So that was introduced at the standard rate of 1.3. Do
3 you see that? In 1999 I'm looking at, so that's the
4 first time that we have a CAT figure because it was
5 introduced in 1999.

6 A. Yes.

7 Q. It's at 1.3 and then it stayed at 1.3 until the category
8 was discontinued in 2006, and perhaps we can track
9 through so you can make sure that I'm right about that.

10 (Pause)

11 A. Yes.

12 Q. So am I right then in thinking, although the
13 Interchange Sub-Group suggested when the category was
14 first introduced that they would revisit the rate in
15 a year, they never did actually revisit it? It stayed
16 at the standard rate of 1.3% throughout.

17 A. It was revisited each year. We considered each year.
18 I can't recall -- I can be reminded, of course -- the
19 extent to which that was considered in isolation as it
20 related to CATs. But, yes, they would have been
21 considered each year, or each time we were considering
22 them as part of the cost study.

23 Q. But no change was made, as we've seen.

24 A. No, no change was made.

25 Q. Now, you explain in your first witness statement that

1 the airline interchange category was introduced at the
2 same level of CNP transactions because they were seen as
3 comparable. Should we look at that?

4 A. Yes.

5 Q. So that's paragraph 47. So here there is some
6 relativity, at least.

7 A. Yes.

8 Q. And that's at {A/8/13}, and I'm told we're back on track
9 in terms of the pagination. Yes.

10 So do you want to just remind yourself of what you
11 say at paragraph 47? (Pause)

12 A. Yes, thank you.

13 Q. And then can we turn to {XC22/23/1}.

14 Now, I think the position, but I'm just going to
15 check with my learned friend, that because it's not
16 highlighted, it's not actually confidential. Thank you.

17 So you can see that this is a response by MEPUK to
18 a request for further information from the OFT. Can we
19 turn to page 14, please {XC22/23/14}.

20 MR JUSTICE ROTH: I just lost the date. What's the date?

21 MS DEMETRIOU: So sorry, it's --

22 MR JUSTICE ROTH: There it is. 13 October.

23 MS DEMETRIOU: 13 October 2000.

24 MR JUSTICE ROTH: Yes, October 2000.

25 MS DEMETRIOU: So page 14 and if we look at point 13 -- do

1 you see that under question 5 --

2 A. Yes.

3 Q. -- you see that the OFT is asking for details of the
4 group of experts and how they're selected. So that's --
5 what they mean by that is the Interchange Sub-Group. We
6 see that below:

7 "The group of experts (the Interchange
8 Sub-Group) ..."

9 Yes?

10 A. Yes.

11 Q. And then if we turn over the page, please, to page 15
12 {XC22/23/15}, so at the top of the page, we see this:

13 "The MEPUK Board also decided, without reference to
14 the Interchange Sub-Group, to introduce a separate
15 category for Airline transactions to recognise that
16 these transactions had many of the characteristics of
17 'electronic' transactions despite not meeting the full
18 criteria for such transactions ..."

19 A. Yes.

20 Q. So this is saying that the airline category was seen by
21 the board of MEPUK as very similar to the electronic
22 category; correct?

23 A. Yes.

24 Q. And we've also seen that CNP and airline were both set
25 at a very similar level to electronic; correct?

1 A. Yes.

2 Q. So CNP and airline, we've seen, were 1.7% whilst
3 electronic was 1%.

4 A. Yes.

5 Q. So your recollection that CNP and airline were regarded
6 as comparable and thus set at the same level is
7 consistent with what MEPUK told the OFT; right?

8 A. Yes.

9 Q. And they were both set just above the electronic
10 category, weren't they?

11 A. Yes.

12 Q. Now, the fourth and final category of UK MIF which was
13 introduced in 1999 was the PAN-key-entered category. Do
14 you want to just explain to the Tribunal and in fact to
15 me what that is?

16 A. Thank you for the opportunity. I'll try.

17 This was, for those of us who might remember, where
18 the reading of the plastic card had failed in the point
19 of sale and the retailer would take it from you and
20 would then punch in the numbers into the -- so the data,
21 therefore, wasn't electronically captured. But what it
22 meant in the system was it was now defaulting to
23 a standard interchange rate, which was seen as -- if the
24 word "penal" is too harsh, but was seen as unfair to
25 retailers.

1 So through a number of meetings, it was concluded
2 that it was fair and reasonable that PAN-key-entered
3 transactions should be counted as a separate category,
4 not to go to electronic, because, actually, as a result
5 of them being manually punched into the point of sale
6 kit, they were pretty prone to fraud, so there were
7 additional costs involved.

8 I hope that helps.

9 Q. Thank you Mr Peacop.

10 Now, yes, I think what you're saying is -- if we go
11 back to your witness statement, it's unsurprisingly
12 consistent with what you say there at paragraph 48. So
13 you explain that this was for transactions where the
14 merchant manually entered the payment details in their
15 payment terminal and they would have previously been
16 part of electronic transactions, but they were carved
17 out; correct?

18 And then if we look at --

19 MR JUSTICE ROTH: Previously part of standard, I think,
20 isn't it?

21 A. Part of standard, yes.

22 MR JUSTICE ROTH: Standard, not electronic. That's the
23 point.

24 A. Okay. Sorry, I beg your pardon --

25 MR JUSTICE ROTH: Is that right?

1 MS DEMETRIOU: Under the new definition -- so --

2 MR JUSTICE ROTH: Is that right? They would have been

3 treated as standard and that was thought to be harsh.

4 MS DEMETRIOU: So under the new definition, they would have

5 qualified as standard rather than electronic.

6 MR JUSTICE ROTH: Because there's a new definition of

7 electronic.

8 MS DEMETRIOU: So prior to the new definition of electronic,

9 they would have been in electronic; that's right,

10 isn't it? And then there's a new definition of

11 electronic, which would have meant they were standard,

12 so they were carved out.

13 A. They would -- they would default into standard, yes.

14 Q. Then if we go to paragraph 49 of your statement

15 {A/8/14}, so you've explained that there is discussion

16 at board level and you say the board ended up adopting

17 a compromise, and the compromise was a rate of 1.1%,

18 which was in between electronic and standard; yes?

19 A. Yes.

20 Q. So it's right, isn't it, that in adopting that

21 compromise, the board was effectively reaching a middle

22 point between the two available rates?

23 A. An in between level rather than a middle, but yes,

24 between.

25 Q. An in between level. That's much more accurate. So

1 they were setting a new category by reference to the
2 two existing rates, that's right, isn't it?

3 A. Yes.

4 Q. Now, if we turn back to the UK MIF schedule at
5 {A/18.1/4}. So in 2000, there were no new categories;
6 that's right, isn't it? Because we would see those in
7 bold.

8 A. Yes.

9 Q. And in 2001, if we look at that, there was a new chip
10 category at 0.9% and a new internet category at 1.1%.
11 Do you see both of those?

12 A. Yes.

13 Q. And let's have a look at what you've said about those in
14 your statement, so that's at {A/8/16}, paragraph 60.

15 So the introduction of chips to payment cards was
16 intended to reduce fraud; correct?

17 A. Correct.

18 Q. And you explain at paragraph 62, so over the page in the
19 bundle {A/8/17}, that in determining the rate for chip
20 payments, the pre-existing UK MIFs were taken as
21 a starting point. We see that at the bottom.

22 A. Yes.

23 Q. And the exercise for MEPUK was to decide an appropriate
24 level below the pre-existing rates that would provide
25 the right level of incentivisation to retailers.

1 A. Yes.

2 Q. So, again, MEPUK wasn't working from a blank slate, was
3 it? It was making an adjustment to the existing MIF;
4 correct?

5 A. Correct.

6 Q. Now, let's look at the minutes of the Interchange
7 Sub-Group meeting you refer to at paragraph 62. So in
8 the first line, you say:

9 "... the Interchange Sub-Group recommended ..."

10 And that's at {C7/135/1} and these are the minutes
11 dated 8 August 2000 and you'll see that -- we've seen
12 this already. I think you're listed as present.

13 And if we go to page 3 {C7/135/3}, we see under
14 "Chip" that Mr Sidenius said there wasn't sufficient
15 data to calculate the actual costs involved with these
16 transactions. We've seen that already.

17 A. Yes.

18 Q. And the EDC had used projections to provide
19 an indicative rate, and the indicative rate was 1.54%
20 for '99 and 1.48% for 2000.

21 But those projections -- I think it's obvious just
22 from the level of the MIFs. Those projections didn't
23 form the basis for the new rate, did they?

24 A. No, they were considered as part -- as part of the rate
25 setting, yes.

1 Q. So was it -- again, was it a starting point?

2 A. A starting point.

3 Q. Right, a starting point. Okay.

4 And then below the subheading "Recommendations",

5 Mr Bowen -- he's from HSBC, or he was; right?

6 A. Yes.

7 Q. "... explained in more detail how the structure could be
8 used to incentivise action in the market. He considered
9 that a chip-rate should be introduced in April 2001 at
10 ... around 10 basis points below the current electronic
11 rate (i.e. 0.9%)."

12 Do you see that?

13 A. Yes.

14 Q. So the appropriate incentive was considered to be
15 10 basis points off the existing rate; yes?

16 A. Yes.

17 Q. So, again, what's happening here is that consideration
18 to the incentive is being given by reference to
19 an existing rate, so it's: how much off the existing
20 rate do we need to come in order to provide
21 an incentive? That's the way that everyone is thinking;
22 correct?

23 A. Yes.

24 Q. So had the existing rate been 1.1, the chip rate
25 presumably would have been set at 1, so 10 basis points

1 lower.

2 A. I can't comment on that. That wasn't --

3 Q. Do you think that's likely?

4 A. I -- I don't know.

5 Q. Alright.

6 Now, looking back at the UK MIF schedule at
7 {A/18.1/4}, we've seen that the other category that was
8 introduced in 2001 was the internet category.

9 A. Yes.

10 Q. And that was brought in at 1.1%, which was the same as
11 the CNP category and several others; correct?

12 A. Yes.

13 Q. And it stayed at that level until it was discontinued in
14 2005. Do you remember that or do you want to have
15 a look? Should we have a look?

16 A. Well, let's have a look. I don't doubt it.

17 Q. No. I'm sure you don't remember them all off by heart
18 or if you do, something would be quite wrong.

19 Let's move forward. Let's have a look at -- so you
20 can see that -- see if I've got it right. So 2002, the
21 next page, please {A/18.1/5}.

22 So we can see up to 2005 that it stays the same at
23 1.10%.

24 A. Yes. Thank you.

25 Q. And if we look -- if we go back to your witness

1 statement, please, at {A/8/18} and I'm looking at
2 paragraphs 66 and 67.

3 I think, fairly, you say you don't have any specific
4 recollections of these meetings; right? So you're
5 looking at documents.

6 A. Yes.

7 Q. But you do recall that prior to the introduction of the
8 internet category, transactions were treated as
9 CNP transactions.

10 A. Yes.

11 Q. And then you say- you then say, that:

12 "... in introducing a separate 'Internet' category,
13 we were recognising that these transactions were likely
14 to become different in the future ..."

15 And then you say at 67:

16 "The costs associated with internet transactions
17 were much higher than the 1.1% ..."

18 A. Yes.

19 Q. But 1.1% was the rate that applied to CNP transactions;
20 correct?

21 A. Correct.

22 Q. And internet transactions had previously been part of
23 CNP transactions --

24 A. Yes.

25 Q. -- so presumably the decision was taken to keep the fee

1 the same; is that right?

2 A. Yes.

3 Q. So, again, if the card -- if the CNP category had been
4 set at 1, the internet category would likely have been
5 set at 1 too; correct?

6 A. Again, I can't comment specifically because that wasn't
7 the situation.

8 Q. No, but I'm asking you what was likely.

9 A. I don't know.

10 Q. Alright. I want to ask you about -- I want to go back
11 to paragraph 43 of your statement, please, so that's on
12 {A/8/12}. And we've looked at this already, but I just
13 want to look at what you say about merchants here.

14 So you say, and this is towards the bottom of the
15 paragraph:

16 "In my experience ..."

17 Do you see where I'm reading from?

18 A. Yes.

19 Q. "In my experience, the largest retailers (which by the
20 2000s tended to be on interchange plus arrangements with
21 their acquiring bank) were able easily to discern, and
22 therefore scrutinise, the rate of interchange fees that
23 they were paying. I had particular experience of this
24 issue, as at that time RBS was the largest acquirer in
25 MEPUK, with some of the largest of retailers as its

1 clients."

2 Now, just to help the Tribunal understand what you
3 mean by "interchange plus", that's where the charges for
4 retailers vary according to the interchange fee paid --
5 payable on the underlying transaction; correct?

6 A. I might need to characterise that slightly differently,
7 if I understood your question. May I rephrase and
8 agree -- we agree from there or would you like me to --

9 MR JUSTICE ROTH: Well, why don't you just tell us in your
10 own words --

11 A. Thank you, sir.

12 MR JUSTICE ROTH: -- what internet plus is.

13 A. Thank you, sir, yes.

14 MR JUSTICE ROTH: And while you're about it, there's also --

15 A. Thank you.

16 MR JUSTICE ROTH: Sorry, interchange plus and interchange
17 plus plus.

18 A. Thank you. So a conventional method for charging
19 merchant fees between the acquirer and the retailer is
20 they would be charged a fee, which would include various
21 costs, which would include interchange and
22 scheme-related fees and other costs, and then the
23 acquirer would add their own margin on top of their own
24 core costs as well.

25 Over time, interchange plus was developed, which was

1 transparent to the retailers. It was typically large
2 retailers who had these arrangements. Interchange was
3 transparent in the charging and then all the other costs
4 were added to that, so that would be interchange plus.

5 And then subsequently evolved, again for the larger
6 merchants, interchange plus the -- plus the
7 scheme-related fees, so Mastercard's in this case, so
8 you would see transparent to the retailer would be the
9 interchange plus the scheme fees and then the acquirer
10 would add on their -- their costs and their margin.

11 I hope that helps.

12 MS DEMETRIOU: Thank you. That's very clear, Mr Peacop.

13 Can I just ask you one follow-up question? So where
14 you say in your statement that the largest retailers,
15 which by the 2000s tended to be on interchange plus
16 arrangements with their acquiring bank, so is it the
17 case that these interchange plus arrangements were taken
18 up or became more common in the 2000s? Is that what
19 you're saying?

20 A. Yes.

21 Q. So is it right that in the 2000s, because you talk about
22 larger retailers here, that small and medium retailers
23 still tended to be on standard pricing?

24 A. Yes.

25 MS DEMETRIOU: Okay. I think that's all I have for you,

1 Mr Peacop. Thank you very much. You have been very
2 patient. Those are my questions for Mr Peacop.

3 Mr Smouha will probably have some questions for you, or
4 may have.

5 Re-examination by MR SMOUHA

6 MR SMOUHA: Mr Peacop, you were asked this morning some
7 questions about the 75% rule.

8 A. Yes.

9 Q. And can I just remind you of a question from the Chair
10 and the answer you gave? It's in the [draft] transcript
11 for this morning, Day 4, [draft] page 45, [draft]
12 line 18. The Chair asked you -- can you see the
13 transcript?

14 A. Oh, sorry.

15 Q. I hope you can:

16 "... I think put it quite correctly in line with
17 Mr Peacop's answer. The leverage was not because
18 ultimately they couldn't agree the MIFs, ultimately they
19 could threaten to walk out of MEPUK.

20 "MS DEMETRIOU: Sir, yes.

21 "MR JUSTICE ROTH: That's what they'd have to do.

22 "MS DEMETRIOU: Sir, yes.

23 "MR JUSTICE ROTH: Obviously there could be a vote
24 in MEPUK and they could, if they had a majority it
25 wouldn't have been agreed. But they would have to

1 threaten to walk out.

2 "MS DEMETRIOU: Sir, yes, I take that point. That's
3 accurate.

4 "So, Mr Peacop, let me just put the question again.
5 So we've agreed -- in fact, you've said this in your
6 statement -- that the acquirers exerted significant
7 pressure on MEPUK and that led it a downward trend in
8 the MIFs, yes?

9 "A. One of the reasons for a downward trend, yes.

10 "Q. Well, you've explained that it was significant
11 pressure. Do you stand by that?

12 "A. Yes.

13 "Q. You do. Okay. And the significant pressure,
14 part of the leverage that they had under the rules, do
15 you accept this, is that they could have collapsed the
16 UK Rules by walking out?

17 "A. Hypothetically they could, yes.

18 "Q. Well it was something they could have done
19 under the rules, do you agree with that?

20 "A. I agree they could, yes."

21 Can I ask you, Mr Peacop, were interchange fees the
22 only matter of commercial and financial significance to
23 MEPUK members that were dealt with by the rules?

24 A. Categorically I can't remember specifically. No,

25 I'm not able to give a clear answer to that from my --

1 from my recollection.

2 Q. Can we look at {C8/310/1}. This is a version of the
3 UK Domestic Rules that -- 2002 that you refer to in your
4 witness statement.

5 If we go to page 4 -- sorry, page 3 {C8/310/3} and
6 we just see what the coverage was of the rules. Just
7 remind yourself, looking down there, what the areas were
8 that the rules dealt with.

9 A. Yes.

10 Q. And going over to page 4 --

11 MS DEMETRIOU: Sir, I'm so sorry to interrupt, but the
12 witness said he couldn't understand -- he couldn't
13 remember, and this really is just leading the witness to
14 an answer by showing him the documents. I don't think
15 it's appropriate re-examination.

16 MR JUSTICE ROTH: Well, I think what you can ask -- I think
17 it's fair to say look at the rules, and it's a question
18 we had in mind to ask. What are -- we've heard a lot
19 about the interchange setting. What were the other
20 important aspects of the rules for issuers and
21 acquirers?

22 A. Thank you, sir. I don't think -- I don't feel as though
23 I have been led, but I have been reminded that clearly
24 it was the dynamic of 75% of the market that enabled the
25 setting of the domestic rules per se.

1 MR JUSTICE ROTH: Yes, but there were a lot of rules. We
2 can see that. They cover all sorts of things. Which
3 ones, if you can recall -- if you can't you, you'll say
4 so -- were -- apart from setting the interchange fee,
5 what aspects of the rules were commercially important to
6 issuers and acquirers?

7 A. I think -- sorry, if I'm repeating, I apologise. The --
8 in effect, by having the 75% -- having met the
9 75% criterion, it enabled the setting of the domestic
10 rules, all of which, by definition, would be important
11 to -- to the members and some --

12 MR JUSTICE ROTH: Well, some might be more commercially --

13 A. I would have to consider each of --

14 MR JUSTICE ROTH: -- linear with rules for any kind of body,
15 including the courts.

16 A. Yes.

17 MR JUSTICE ROTH: And some rules are actually much more
18 frequently involved --

19 A. Yes.

20 MR JUSTICE ROTH: -- or generate more discussion in your
21 group or in the committees and others nobody pays much
22 attention to. Just some sense of what was significant
23 about it for people -- for the banks, such as your bank,
24 in the rules? If you can't help us on that --

25 A. Candidly, I didn't have an intimate knowledge of the

1 rules, so ...

2 MR JUSTICE ROTH: Right, okay.

3 MR SMOUHA: Mr Peacop, let me come at this in a different
4 way in relation to something you would have direct
5 experience of. In relation to matters that were
6 discussed by the board of MEPUK --

7 A. Yes.

8 Q. -- what kind of things would occupy the time of the
9 board in discussions? What were the focus -- what
10 matters were the subject of focus apart from
11 interchange?

12 A. A primary concern would have been the security and
13 integrity of the system, so looking at the evolving
14 nature of managing fraud generally.

15 I might -- I may have seen there for example,
16 "Address Verification Service" under 4.2. As
17 an example, that would have been an evolving nature of
18 applying a different level of security on to online
19 transactions. That would have been considered in detail
20 and the board generally around how to use the marketing
21 budget and what that meant for the brand, to the members
22 and how did that play out for the issuing portfolios of
23 those members; particularly issuing.

24 MR SMOUHA: Thank you. I have no further questions, sir.

25 Questions by THE TRIBUNAL

1 MR JUSTICE ROTH: Just one moment. (Pause)

2 Yes, we just had a question about -- do you remember
3 those cost studies which you were taken to, one after
4 the other, various EDC cost studies, and costs were
5 going up in various categories and -- which, in a sense,
6 a bit surprising because one might expect, with greater
7 automation, costs would come down. But the explanation
8 EDC gave, and one saw this is number of times, was the
9 reason costs were going up is because of credit
10 write-offs.

11 You may remember that in the document.

12 A. Yes, sir.

13 MR JUSTICE ROTH: Credit write-offs, would those costs fall
14 more on issuers or on acquirers?

15 A. The credit write-offs would fall on the issuers.

16 MR JUSTICE ROTH: So the increase in cost would be borne on
17 the issuing side rather than the acquiring side.

18 A. Yes.

19 MR JUSTICE ROTH: And I suppose they could seek to control
20 those costs by imposing lower credit limits on their
21 cardholders, for example, or being less generous in
22 issuing cards or something like that.

23 A. They -- they --

24 MR JUSTICE ROTH: They could take various steps.

25 A. They could. They could, yes, sir.

1 MR JUSTICE ROTH: Yes. The other thing I wanted to ask
2 about was on the pressure from acquirers to keep the
3 interchange fee low, and you said that it came through
4 the retailers, particularly the big retailers on the
5 acquirers, and I think you say somewhere in your
6 statement that you have direct experience of that
7 because NatWest acted for a number of major -- was
8 acquirer for a number of major retailers at the time.

9 A. Yes.

10 MR JUSTICE ROTH: Just to understand how they applied that
11 pressure, would a large retailer say to the acquiring
12 bank, your bank, on the acquiring side -- would they
13 refer to the fees they are paying to -- and I think you
14 said a lot of them came to be on the interchange plus
15 arrangement.

16 A. Yes.

17 MR JUSTICE ROTH: So they would know about the interchange,
18 the actual fee.

19 Would they refer to the Visa fee when putting
20 pressure on the Mastercard fee? Would they --

21 A. Yes --

22 MR JUSTICE ROTH: -- use the competition to argue for lower
23 fees or would they not refer to Visa?

24 A. So if -- we're talking now in terms of my role within
25 RBS, which is, therefore, primarily accountable to RBS

1 as opposed to -- or NatWest before, as opposed to my
2 role within the MEPUK group --

3 MR JUSTICE ROTH: Correct.

4 A. -- which meant that when I'm facing retailers, which
5 happened from time to time, not always a comfortable
6 experience, but more likely the acquirer was passing on
7 the messages. The message was across the market, so it
8 would typically include discussions or pressure about
9 interchange rates across the market, Mastercard and
10 Visa.

11 MR JUSTICE ROTH: And we know from common experience, some
12 retailers won't accept Amex, for example. Did you ever
13 have retailers saying, "Well, we may not continue to
14 accept Mastercard if the fee goes up"?

15 A. Yes.

16 MR JUSTICE ROTH: That did happen?

17 A. Yes.

18 MR JUSTICE ROTH: Any questions arising out of that?

19 MR SMOUHA: No, sir.

20 MS DEMETRIOU: No, sir.

21 MR JUSTICE ROTH: Well, thank you very much, Mr Peacop.

22 That concludes your evidence. You are now free to leave
23 court.

24 A. Thank you.

25 (Witness released)

1 MR JUSTICE ROTH: And we'll take a ten-minute break.

2 (2.57 pm)

3 (A short break)

4 (3.14 pm)

5 MR JUSTICE ROTH: Mr Smouha, Ms Demetriou, we have the
6 impression we're very much on schedule.

7 MS DEMETRIOU: We are.

8 MR JUSTICE ROTH: So if we can finish -- then there being no
9 reason to sit late, if we can finish about 4.15 today --

10 MS DEMETRIOU: Of course.

11 MR JUSTICE ROTH: -- that would be helpful to the Tribunal.

12 MR SMOUHA: Thank you, sir. May I call Mr Hawkins.

13 MR MICHAEL HAWKINS (affirmed)

14 Examination-in-chief by MR SMOUHA

15 MR SMOUHA: Good afternoon, Mr Hawkins. Just before I ask
16 you to look at and confirm your witness statements, can
17 you just tell the Tribunal what you have brought with
18 you into the witness box?

19 A. Yes, I brought my -- do I need to stand, sir?

20 MR JUSTICE ROTH: No.

21 A. I brought my two witness statements and a blank sheet of
22 paper in case I need to write to remind me of a question
23 that's been asked.

24 MR SMOUHA: Very good. And the witness statements are
25 unmarked, clean.

1 A. They're unmarked.

2 Q. Very good. Thank you.

3 If you -- Mr Hawkins, if you could take up your

4 first witness statement, {A/7/1}.

5 A. Yes.

6 Q. And if you would turn, please, to page 37 {A/7/37} --

7 A. Yes.

8 Q. -- could you please confirm those are your signatures on

9 the confirmation of compliance and statement of truth,

10 signing on 17 March 2023?

11 A. Yes, I affirm that.

12 Q. Are there any corrections or clarifications which you

13 wish to make to this statement?

14 A. No, there are not.

15 Q. Thank you.

16 Could you turn, please, to your second witness

17 statement, {A/13.1/1} --

18 A. Yes.

19 Q. -- and turn to page 28 {A/13.1/28}.

20 A. Yes.

21 Q. And, again, can I ask you to confirm that those are your

22 signatures on the confirmation of compliance and

23 statement of truth, having this statement on

24 19 June 2023?

25 A. Yes, I affirm that.

1 Q. And are there any corrections or clarifications which
2 you wish to make to this statement?

3 A. No, there are none, no corrections.

4 Q. And can I ask you to confirm that the contents of your
5 statements are true?

6 A. They are true.

7 MR SMOUHA: Thank you, Mr Hawkins. If you wait there,
8 Ms Demetriou will have some questions for you.

9 Cross-examination by MS DEMETRIOU

10 MS DEMETRIOU: Good afternoon, Mr Hawkins. So you were head
11 of card schemes at NatWest Bank from 1989 to 2002, you
12 say in your statement.

13 A. Yes, I was.

14 Q. And during that time, you represented NatWest at the
15 association of UK licensees, so of MCI and Europay, and
16 those bodies merged in 2002; correct?

17 A. Yes, I did, yes.

18 Q. And you've referred to those -- that association as
19 MEPUK in your statement.

20 A. Yes. It had various -- various initials, but that's
21 a convenient way of referring to it.

22 Q. Thank you. And you also represented MEPUK and NatWest
23 on Europay's Rules and Conciliation Advisory Committee;
24 correct?

25 A. I did, yes.

1 Q. And the Europay Rules were contractually binding as
2 between licensees, weren't they?

3 A. Well, that's -- sorry, I answer that by saying that we
4 were also members of Mastercard and Mastercard Rules and
5 Eurocard Rules combined were binding on us, yes.

6 Q. Thank you. And did -- your role on the Committee, so
7 the Rules and Conciliation Advisory Committee, did that
8 entail representing the interests of UK licensees in
9 respect of proposed rule changes?

10 A. Yes. When we were sitting at MEPUK committees or on the
11 board, we were there to represent the UK and, indeed,
12 when I attended European meetings or indeed
13 international meetings elsewhere, it was representing
14 the UK.

15 Q. Thank you. And the purpose of the rule -- the rules
16 provided certainty for the banks, for the licensees,
17 didn't they?

18 A. Yes, they did.

19 Q. And do you think it was important to have rules?

20 A. Very important to have rules, yes.

21 Q. Because?

22 A. Well, the scheme would not work without rules. There
23 were many, many thousands of members and millions of
24 cardholders. You had to have rules to bring them
25 together.

1 Q. Thank you. And you were on the Europay board, weren't
2 you, and one of your responsibilities was to keep
3 abreast of developments at Mastercard International and
4 Europay; correct?

5 A. Well, no. To clarify that, I was an alternate director
6 on the Europay board.

7 Q. Okay. And in these various roles, were you aware of the
8 Commission's investigation into Europay's rules?

9 A. I was aware, but I wasn't directly involved.

10 Q. So you were aware, were you, that in March 1992,
11 a complaint had been made to the European Commission in
12 relation to Europay's rules? Did you know that that had
13 happened?

14 A. I believe I remember that happening, yes.

15 Q. But are you saying that you weren't involved in
16 assisting in relation to the response to that
17 investigation?

18 A. I didn't personally write anything or get personally
19 involved in the reply.

20 Q. Okay. Now -- and just to clarify, so before you -- so
21 2002 was the year you retired; is that right?

22 A. At the end of 2002, yes.

23 Q. And before you retired, were you aware that the OFT was
24 also interested in interchange fees and was
25 investigating?

1 A. Yes, I was aware, but I had no personal involvement.

2 Q. So do I take it that you didn't see any -- at the time
3 you wouldn't have seen any of the submissions made to
4 the regulators?

5 A. Well, sir, I have been reminded of them in the materials
6 that I've read, but I don't recall being intimately
7 involved myself.

8 Q. Do you remember seeing any of them at the time, or you
9 just can't recall that far back?

10 A. I'm sure I must have done, but I can't specifically
11 recall that.

12 Q. Thank you. But you knew that members of MEPUK had to be
13 compliant with competition laws, so you knew about
14 competition law.

15 A. I did indeed. I had previously been with the Access
16 JCCC scheme and I was very aware of competition law.

17 Q. And did you take steps to familiarise MEPUK members with
18 the requirements of competition law?

19 A. Well, the answer is I'm not a lawyer, but yes, it came
20 up in meetings and we were conscious of it all the time.

21 Q. Thank you.

22 Let's look at your statement, please, at {A/7/6} and
23 if we go to paragraph 21. So you explain here in this
24 paragraph that:

25 "The Mastercard/Eurocard scheme operated on the

1 basis that different interchange fees applied depending
2 on location and the transaction and card type."

3 Yes?

4 A. Yes.

5 Q. Do you see that in the first sentence?

6 And you also explain that cross-border interchange
7 fees could either be intra-regional, so that would be
8 the -- an example would be the intra-EEA MIF, or
9 inter-regional; correct?

10 A. Yes.

11 Q. And it's correct, isn't it, that the intra-EEA MIF was
12 the rate published by Europay; correct?

13 A. Yes.

14 Q. Whereas the inter-regional rate was published by
15 Mastercard International.

16 A. Yes.

17 Q. Now, I'd like, first of all, to consider the period of
18 time before there was a UK MIF, and it's right, isn't
19 it, that in the period 1992 to November 1996, there were
20 no domestic rules?

21 A. That's right. There were no domestic rules.

22 Q. So the MCI and Europay Rules applied, and I think you
23 explained previously that you have to look at both in
24 combination.

25 A. That's right, MasterCard/Eurocard Rules.

1 Q. And then a domestic rule book was introduced with effect
2 from 1 November 1996; that's right, isn't it?

3 A. That's right.

4 Q. But a domestic MIF wasn't introduced until
5 November 1997; correct?

6 A. That's right.

7 Q. Now, if we go to paragraph 38 of your statement, please,
8 bundle {A/7/10}, you explain in this paragraph that
9 the -- sorry, paragraph 38, actually. So paragraph 38
10 at the bottom of page 10 and if we look at the
11 second sentence:

12 "The Mastercard/Eurocard scheme rules provided that
13 all licensees must 'honour' (i.e. accept) all ... cards,
14 irrespective of which bank issued them and/or which
15 merchant they were used at ..."

16 And that was known as the honour-all-cards rule,
17 wasn't it?

18 A. That's right.

19 Q. And that meant that every issuing and acquiring bank, as
20 you say here, needed to have an interchange fee in place
21 between them; correct?

22 A. Yes. Otherwise, the scheme would not work.

23 Q. And then you say in your statement that during the
24 period 1992 through to 1997, issuing and acquiring banks
25 would make bilateral arrangements for interchange fees;

1 correct?

2 A. Yes.

3 Q. And I want to look, first of all, at the rules that were
4 in place between 1992 and 1996; in other words, before
5 UK Domestic Rules were brought into effect. And you
6 refer to those rules in your witness statement, so if we
7 look at your witness statement first, please.

8 If we go to {A/7/18} and paragraph 62, do you see
9 there that you refer to the Eurocard Rules of
10 25 September 1991?

11 A. Yes, I see that.

12 Q. And then if we turn up the first document that you refer
13 to, that's at C1/197 and then let's look at page 1
14 first. So this is a letter dated 19 June 1992 attaching
15 the Eurocard -- sorry, I have the wrong reference. If
16 we go to -- so this is --

17 A. That --

18 Q. Can I just see what the reference is of this document?

19 I'm sorry. Can you scan out, please, operator?

20 MR JUSTICE ROTH: C1/197.

21 MS DEMETRIOU: C1/197/1. Can we try page 9 {C1/197/9}? It
22 may be that my reference is wrong. Ah, yes.

23 So these are the rules that you refer to. This is
24 the document that you refer to in this paragraph of your
25 statement and if we look at rule E7.02.4 -- do you see

1 that towards the bottom of the page?

2 A. Yes.

3 Q. You see that's entitled "Situation where no
4 intra-country interchange fee is in effect in a given
5 country".

6 And then if we go to page 10, please {C1/197/10}, at
7 the top, there's a reference to -- so it says:

8 "Upon notification to Eurocard International by one
9 of the Members involved in the dispute that the Members
10 are unable to agree during such 60 days, the
11 international fee will temporarily apply to the
12 intra-country transactions and a study will be
13 undertaken ..."

14 So there's a reference to the international fee as
15 the applicable fallback rate; yes?

16 A. Yes.

17 Q. And under (C), if we go down, it states that the rules
18 don't preclude bilateral arrangements; yes?

19 A. Yes.

20 Q. And then in your witness statement, you also refer, back
21 to paragraph 62, to the 1993 Mastercard International
22 Rules, don't you?

23 And let's turn those up. They're at {C3/411/7} and
24 11.09 we see at the top:

25 "In the event there is no intracountry interchange

1 [fee] applicable to all members doing business in the
2 country in effect at the time a dispute regarding
3 interchange fee(s) arises, the international interchange
4 fee(s) applicable to transactions for such MasterCard
5 region in which the country is located shall apply to
6 such intracountry transactions until the Regional
7 Authority, or Executive Committee ... makes a final
8 determination ..."

9 So consistently with the Eurocard Rules, the
10 fallback rate is described as the international
11 interchange fee; yes?

12 A. That's right.

13 Q. Now, I appreciate that there's a dispute about what
14 "international interchange fee" means, and I'm going to
15 come back to that particular point a bit later and ask
16 you some questions about it, but I want to ask you first
17 some more general questions about fallback rates and
18 we'll come on to what "international fee" means a bit
19 later.

20 So a fallback interchange fee is the rate which
21 applies to transactions in the absence of other
22 bilaterally or multilaterally agreed rates; that's
23 right, isn't it?

24 A. Generally speaking, that's right, yes.

25 Q. And as you've said, there has to be some fee that

1 applies in the absence of agreement because of the
2 honour-all-cards rule and, as you've said, otherwise,
3 the system would fall apart.

4 A. That's right.

5 Q. Now, if we go back to your statement, please, to
6 paragraph 61, which is {A/7/17}, and let's look at the
7 middle of the paragraph and you're saying that -- so
8 this is at a time where there's no agreed UK domestic
9 interchange fees and you say here that EDC carried out
10 cost studies which calculated indicative interchange
11 fees; yes? Do you see that in the middle of the
12 paragraph?

13 A. I see that, yes.

14 Q. And you say that MEPUK used those rates -- well, you say
15 MEPUK discussed appropriate reference rates; correct?

16 A. Yes.

17 Q. And you say that you recall, and this is the bottom --
18 towards the bottom of the page, you recall that it was
19 suggested that these -- that you ask Mastercard
20 International:

21 "... to include the MEPUK Board's reference rates in
22 its rules as the UK temporary fallback rate pending
23 arbitration."

24 Yes?

25 A. Yes, because that's the rate that we understood by when

1 we talked about the international rate.

2 Q. But -- I'm gonna come on to international rate, but
3 you're talking here about the reference rates that the
4 MEPUK board discussed, yes?

5 A. Yes. May I, sir, describe why it's thus called?

6 MEPUK was not a rule-making body, not at this stage,
7 and therefore, when the MEPUK board discussed
8 interchange fees and looked at the Edgar Dunn studies,
9 it could only arrive at a reference rate. It couldn't
10 actually determine what that rate -- impose that rate.

11 Q. Thank you, Mr Hawkins. So I think that -- I think we're
12 agreed, aren't we, that the reference rate was not
13 binding, so it couldn't be imposed, as you've just said,
14 but that there was a suggestion that you do remember
15 that it was suggested that you ask Mastercard
16 International to make it binding in the rules; correct?

17 A. Yes, this was the start, really, of UK Rules.

18 Q. But, in fact, as you say over the page, you don't recall
19 that occurring and so the reference rate --
20 a UK fallback rate was not actually introduced in rules
21 applicable to the UK until 1997; correct?

22 A. Yes, it took a very long time to actually arrive at
23 a set of UK Rules.

24 Q. Now, in fact, you were a proponent, weren't you, of
25 cost-based rates being included as a fallback in the

1 rules; that's right, isn't it?

2 A. I am, yes.

3 Q. And you were at the time.

4 A. I was, yes.

5 Q. And if we look at {C4/26/23}, so these are minutes of
6 a meeting, the Rules & Conciliation Committee meeting,
7 held on 31 January 1994.

8 A. Yes.

9 Q. And it was said -- so if we go, please -- is this
10 page 23? Yes.

11 So it was said -- at that meeting, it was agreed
12 that UK Rules be prepared -- do you see towards the
13 bottom of the page:

14 "... which, inter alia, would state:-

15 "'During the arbitration process and in the absence
16 of a fallback rate, the economic rate established by the
17 cost study should be used pending the outcome of any
18 arbitration.'"

19 And you chaired the R&CC meetings; correct?

20 A. Yes, I did.

21 Q. And this represented your view. You wanted a domestic
22 cost-based rate to be a fallback in the rules, didn't
23 you?

24 A. Yes, I wanted that, sir, to be the fallback, not
25 necessarily the reference rate.

1 Q. So going back to your statement just so I can
2 understand, at paragraph 61, you say that the MEPUK
3 board discussed appropriate reference rates, that those
4 weren't formally enshrined in the rules, but it was
5 recorded -- it was suggested that you did ask Mastercard
6 to include those reference rates as the UK temporary
7 fallback rate.

8 A. Yes, as I explain, MEPUK did not have the power. As it
9 was not a licensee of Mastercard or Eurocard, it did not
10 have the power at the time to pass rules.

11 Q. No, but you saw the reference rates as being cost-based;
12 is that right?

13 A. The reference rate is what the MEPUK board agreed was
14 an appropriate rate based upon the cost study, but other
15 factors came into consideration.

16 Q. Alright. And you were a proponent of rates that were
17 based on costs, perhaps amongst other factors, being the
18 fallback rate for the UK; correct?

19 A. Yes, I was a proponent of that.

20 Q. And if we go to {C3/203/1} and if we look at the title
21 of this document -- so it's to MEPUK board members and
22 the title is "1995 Domestic Interchange Fee Study Final
23 Report".

24 And if we go to page 2, please {C3/203/2}, we can
25 see that you wrote that report --

1 A. Yes.

2 Q. -- in June 1996; yes?

3 A. Yes.

4 Q. And if we go back to page 1 {C3/203/1}, to the bottom of
5 the page, please, we can see there that under the
6 heading "Adoption of 1997 Fallback [Rules]", you say:

7 "The practice in the past has been for these cost
8 studies, traditionally commissioned by MCI, to be noted
9 and merely used as a reference point for bilateral
10 negotiations, with the fallback of international
11 arbitration which would be undertaken, if requested by
12 the parties ... We are advised that there has only been
13 one such case which has gone to arbitration ..."

14 And then it says:

15 "However, the Committee felt that it was time for
16 the process to be incorporated in the UK Domestic Rules
17 enactment structure using the current technique of EPI
18 passing rules - in this case fallback interchange fees -
19 for the UK domestic market (under delegated powers). We
20 would propose to the MEPUK Board that such a change is
21 adopted for 1997."

22 So this is -- so where you talk -- so, first of all,
23 just a couple of points.

24 So in this document here, the summary -- so the
25 recommendation is that these rates that derive from cost

1 studies should be enacted in the rules as fallback
2 rates; correct?

3 A. As fallback rules, yes -- fallback rates, sorry.

4 Q. Yes. And if we go to {C3/222/1}, please, and we look at
5 page 1. So this is a meeting from June 1996 and we can
6 see that you were present.

7 A. Yes.

8 Q. And if we go to page 14 {C3/222/14} and if we go
9 three paragraphs up from the bottom, so we can see that
10 there's a:

11 "The paper recommended that Board guidance be sought
12 on the appropriate rates to be effective from
13 January 1997, which Europay International should be
14 requested to enact in the UK Domestic Rules as
15 arbitration fallback fees from the range of rates ... in
16 the paper."

17 And we see:

18 "Mr Hawkins's recommendation ..."

19 As to what the rates should be; yes?

20 A. Yes.

21 Q. And if we go to page 27 of this document {C3/222/27}, we
22 see again at the bottom of that -- so "Progress on Main
23 Issues", recommending fallback cost-based rates for
24 1997.

25 A. Yes.

1 Q. So we see the same thing. So what the board and you are
2 pushing for is for EPI to enact fallback rates for the
3 UK which relate to or at least are based on UK costs;
4 correct?

5 A. Yes, that's right. As I explained before, sir, MEPUK
6 did not have the power to pass rules itself, so what we
7 did was to ask Europay to pass them so they're binding
8 on all UK licensees.

9 Q. Now, let's turn to {C3/268/1}, please. So these are
10 minutes of MEPUK's board meeting which took place on
11 8 August 1996, and you'll see that Mr Godfrey is in the
12 chair, but that you're also present.

13 A. Yes.

14 Q. Do you see that at the top?

15 And if we turn to page 9 {C3/268/9}, under the
16 heading which has been highlighted, "Adoption of 1997
17 Arbitration Fallback Rates" --

18 A. Yes.

19 Q. -- we can see that:

20 "Mr Godfrey opened the discussion by stating that he
21 would resist any proposal for an increase in the
22 fallback rates as he did not believe they were
23 sustainable in the [market]."

24 A. Okay.

25 Q. And then it says:

1 "Following a lively debate, it was agreed not to ask
2 EPI to change the arbitration process and fallback rates
3 and that arbitration should continue to be handled by
4 MasterCard."

5 And then you were asked to convey the thanks of the
6 board to the sub-group.

7 A. Yes.

8 Q. So here, Mr Godfrey is saying that he doesn't agree with
9 the R&CC's proposal that the fallback rates and the
10 rules should be changed; that's right, isn't it?

11 A. That's right because -- sorry, did you want me to
12 elaborate on that?

13 Q. Well, if you want to say something about it, that's
14 fine.

15 A. Well, it is just that this demonstrates that setting the
16 reference rate was based upon the cost study plus market
17 considerations and, of course, what the competition were
18 doing; Visa, American Express and so on. So it was
19 a pragmatic way of coming to a reference rate.

20 Q. And with the reference to a lively debate in the
21 meeting, presumably you would have argued for changing
22 the fallback fees so that they reflected the cost
23 studies; yes?

24 A. I think I did, yes, to the best of my recollection
25 I would have been following the cost study itself, which

1 recommended a slight increase. But, of course, my
2 colleagues on the board there, having regard to facing
3 retailers, realised that you had to take account of
4 marketplace realities.

5 Q. So the upshot was that it was agreed not to ask EPI to
6 change the fallback rate. That was the upshot; yes?

7 A. That's the upshot, yes.

8 Q. And, in fact, as you explain in your statement, the
9 fallback rates under the Scheme Rules in 1997 were the
10 intra-EEA MIFs; correct?

11 A. Yes, they were, yes.

12 Q. If we go to {C3/363/24}, so this is 2 October. It's
13 difficult to see, but can you see it does say
14 2 October 1996?

15 A. Yes, yes.

16 Q. And it's a special meeting of the R&CC. That's better,
17 thank you. And you can see that it's regarding the
18 proposed UK Domestic Rule Book.

19 And if we go to page 27 {C3/363/27}, there's
20 a reference there. It says:

21 "This sparked off a discussion about the Fallback
22 Interchange rates used by EPI in the absence of
23 bilateral agreement. Mr Turner advised that EPI applies
24 the intra-regional rate, whereas Mr Hawkins argued
25 strongly that it should be the rate supported by the

1 independent UK Cost Study (Commissioned ... from [EDC]).
2 He felt it was illogical to apply EPI rates which had no
3 relevance to the UK and which were not cost-based."

4 Just taking that in stages, so Mr Turner is saying
5 that the current fallback is the intra-regional rate.
6 That's the EEA MIF; yes.

7 A. Yes.

8 Q. And you're arguing strongly that the fallback rate
9 should not be the intra-EEA MIF, but it should be the
10 rate supported by the UK cost study.

11 A. Yes. May I explain that, sir? It --

12 MR JUSTICE ROTH: Yes, please.

13 A. It is because the European rate bore no real resemblance
14 to the UK cost. It was a rate arrived at through costs
15 from banks all around Europe, many countries involved.
16 The UK rate was one that applied in the UK and
17 therefore, I thought it was illogical to be applying the
18 European rate. In any event, it was a fail-safe,
19 a fallback. It wasn't one that we actually applied.

20 MS DEMETRIOU: Alright. So your argument here -- so where
21 you strongly argued that it should be the rate supported
22 by the cost study, that's you effectively having another
23 go at the argument that you lost back in August;
24 correct?

25 A. Yes, I lost it then, but I think I won it later.

1 Q. Mr Hawkins, let's turn to page 28 of this document
2 {C3/363/28}, and what we see is that:

3 "The majority ..."

4 Do you see are under the redaction:

5 "... agreed to add a note in the UK Rule Book to the
6 effect that in the absence of bilateral agreement, then
7 the intra-regional rate would apply. Mr Hawkins wholly
8 opposed, saying it was a recipe for chaos."

9 So they were left in no doubt as to your view, were
10 they, Mr Hawkins?

11 A. Well, I did believe it was a recipe for chaos. I can
12 remember it as if it was yesterday. It was entirely
13 wrong to be applying a European rate that had no real
14 resemblance to the cost of the UK banks.

15 Q. But the fact was that the majority of the Committee
16 didn't agree with you then, did they?

17 A. They didn't then, but it was overturned subsequently.

18 Q. And we know that the board didn't agree with you either.

19 A. And it was overturned subsequently.

20 Q. I'm dealing at the moment -- we can get on to
21 subsequently, but I'm dealing with what happened then.

22 A. You're right. They didn't.

23 Q. Thank you. Now, I think we've established already that
24 you felt strongly about this, you've explained, because
25 you thought the fallback rate should be a rate which

1 reflected costs in the UK.

2 A. Yes, I did feel strongly about this. I think I had
3 a hand in introducing this EDC study approach to
4 interchange fees and I felt that it was a correct,
5 proper way to go about our business.

6 Q. So --

7 A. So yes, I felt strongly.

8 Q. Sorry to interrupt.

9 So your view was that if banks in the UK had not
10 agreed a bilateral rate, then the rate that ought to
11 apply should be a rate that could be justified in the UK
12 by reference to cost studies. That was your view.

13 A. I did. I did believe that.

14 Q. Now, let's turn to {C4/135/5}, please, and we can see
15 that these are minutes of a MEPUK Governance Sub-Group
16 meeting in April 1997 and you were chairing that
17 meeting; yes?

18 A. Yes.

19 Q. Do you see that at the top?

20 A. Yes.

21 Q. And if we go to page 5 and look at the bottom
22 two paragraphs, so you're saying there -- so:

23 "It was Mr Hawkins's understanding that the
24 'indicative rate' determined by the UK Interchange Cost
25 Study would be regarded as the UK 'fallback' rate once

1 endorsed by MEPUK Board, and as varied by Board's view
2 of market realities."

3 Now, presumably, "fallback" is in inverted commas
4 because you know at that stage you've lost the argument.
5 It's not the actual fallback, is it, under the rules?
6 You have lost that battle for the time being.

7 A. For the time being.

8 Q. And that's presumably why "fallback" is in inverted
9 commas, is it, because it wasn't the actual fallback
10 under the rules?

11 A. Well, I didn't write this minute.

12 Q. You didn't write this memo, but would you say that's
13 presumably -- is that a reasonable supposition; that
14 it's in inverted commas because it wasn't an actual
15 fallback under the rules?

16 A. Well, I -- well, I don't know that I'd like to suppose,
17 but if you say so.

18 Q. Alright, Mr Hawkins. I'm going to keep you to that
19 later, not wanting to suppose.

20 Then it says:

21 "Mr Warren said that in the past, the use of the
22 intra-regional rate as the fallback rate had worked to
23 Midland Bank's advantage, but that Midland was
24 uncomfortable with this rate."

25 Now, you explain in your first statement why you

1 think Mr Warren said that the EEA MIF fallback had
2 worked to Midland Bank's advantage, and let's have
3 a look at what you say. So that's at paragraph 76 of
4 your statement, which is at {A/7/22}.

5 A. Yes.

6 Q. And if we look halfway down the paragraph, you say:

7 "I suspect but do not know or recall that Midland
8 could have threatened not to agree interchange fees
9 bilaterally with other UK licensees and therefore to
10 apply the lower intra-regional rate pending arbitration
11 (which applied automatically in the absence of bilateral
12 agreement under the 1996 UK domestic rules) in order to
13 push issuers to accept lower bilateral interchange fees
14 and thereby improve its acquiring business."

15 So, in other words, you suspect that Mr Warren was
16 saying that Midland used the fallback rate as leverage
17 in negotiations with issuing banks; yes?

18 A. Well, that was my supposition. Obviously, I didn't know
19 because I wasn't party to Midland's internal decisions.

20 Q. No, and I'm asking about your supposition as you've
21 expressed it in your statement.

22 A. That is my supposition.

23 Q. So the supposition, the way that would have worked is
24 that Midland, as you say, could have threatened to walk
25 away from the negotiation if the issuing bank it was

1 negotiating with didn't agree a lower fee; correct?

2 A. I suppose that's the way that Midland Bank saw it, but
3 I know that Midland did not apply that rate generally
4 because we had a bilateral agreement with Midland and it
5 didn't reflect that.

6 Q. Right, but Mr Warren clearly meant something here, and
7 you're doing your best to explain to the Tribunal what
8 he would have meant; correct?

9 A. Yes, and I think he might have meant one or two of the
10 newer players in the -- in the business.

11 Q. Well, you don't know that.

12 A. But I don't know that.

13 Q. You don't know that.

14 So what you're saying here is that you suspect that
15 Midland could have used the intra-EEA -- the lower
16 intra-EEA MIF as leverage with issuing banks because
17 they could have threatened to walk away from the
18 negotiation if the issuing bank didn't agree a lower fee
19 and the upshot, if it had walked away, was that the
20 lower intra-EEA MIF would have applied; correct?

21 A. That's what I've written there and that's what I thought
22 at the time.

23 Q. Now, if we look at paragraph 37 of your first witness
24 statement, so at {A/7/10}, you explain there that you
25 recall negotiating bilateral interchange rates with

1 Barclays on behalf of NatWest; correct?

2 A. Yes.

3 Q. And you say that NatWest was the largest issuer of
4 Mastercard credit cards at the time and Barclays was the
5 largest issuer of Visa cards.

6 A. Yes.

7 Q. And you say at the end of that paragraph:

8 "Since the balance between NatWest as a [Mastercard]
9 issuer and Barclays as a Visa issuer was relatively
10 even, neither NatWest nor Barclays was in a stronger
11 bargaining position when it came to agreeing bilateral
12 interchange fees."

13 Yes?

14 A. Yes.

15 Q. Now, presumably, as a result, the negotiation was
16 relatively straightforward as the interests of the
17 two banks were more or less aligned.

18 A. I don't recall it being straightforward. I had some
19 interesting conversations with them, my opposite numbers
20 in Barclays. You do in the inter-bank world. But, yes,
21 we did arrive at an agreement.

22 Q. So sometimes those agreements would be hotly contested
23 and negotiated.

24 A. They would. I also -- not directly relevant, but I also
25 negotiated automatic teller machine -- that is cash

1 machine -- rates. So yes, you had interesting
2 discussions.

3 Q. And in general, it's correct, isn't it, that -- I think
4 this is just a question of logic -- but in any bilateral
5 negotiation, one of the counterparties would be a net
6 issuer vis-à-vis the other, and the other would be a net
7 acquirer vis-à-vis the first bank; correct?

8 A. You may say that, yes.

9 Q. Well, do you agree with me?

10 A. Well, I think it's self-evident that that is the case,
11 and NatWest for example would have been in relation to
12 Barclays on the Mastercard side a net issuer, and vice
13 versa.

14 Q. Yes, I thought it was a self-evident proposition, but
15 I just wanted to make doubly sure.

16 MR JUSTICE ROTH: Can I just ask: would you negotiate the
17 Mastercard and the Visa rates together when you were
18 negotiating with Barclays?

19 A. We did, yes. Yes, sir.

20 MR JUSTICE ROTH: So in respect of one, one is a net issuer,
21 and in respect of the other card, the other one is a net
22 issuer.

23 A. Yes, because in the end, we had the relationship with
24 the retailer. It could be a large retailer. We didn't
25 want different rates, we wanted a single rate to

1 cover -- a blended rate to cover the business, the
2 merchant service charge.

3 MR JUSTICE ROTH: Yes.

4 MS DEMETRIOU: And if you've got a bank that's a net
5 acquirer vis-à-vis the other bank then all other things
6 being equal the net acquirer would have an interest in
7 agreeing a lower interchange fee; correct?

8 A. Theoretically that is correct, but I don't recall it
9 actually being a factor in the negotiations.

10 Q. Well, Mr Warren thought it was a factor, didn't he?

11 A. It might have been a factor for him, but it was not
12 a factor for me.

13 Q. So it didn't matter to you whether you're a net issuer
14 or a net acquirer vis-à-vis the other bank.

15 A. Not really, no. It might have done in one or
16 two instances for new banks coming on the scene, new
17 issuers, but you'll have seen that by the mid-90s, the
18 rates which were negotiated bilaterally were pretty
19 consistent.

20 Q. But you agree -- I think you would agree, wouldn't you,
21 that all other things being equal the commercial
22 incentive of an acquiring bank would be to have lower
23 interchange fees and the commercial incentive of
24 an issuing bank would be to have higher interchange
25 fees? That's just a matter of logic.

- 1 A. That's theoretically the case.
- 2 Q. And going back to -- so just going back then to
- 3 Mr Warren and Midland Bank, and the explanation of his
- 4 observation that you give in your statement. Let's say
- 5 that Midland Bank were negotiating -- let's make it
- 6 easier. So if Midland Bank were negotiating with
- 7 a monoline bank that only did issuing, yes, then it
- 8 would be a net acquirer vis-à-vis that bank; yes?
- 9 That's self-evident.
- 10 A. Yes.
- 11 Q. And the monoline bank would have an interest in getting,
- 12 or might have an interest in getting a relatively higher
- 13 interchange fee agreed; yes?
- 14 A. Yes.
- 15 Q. And Midland Bank would have an interest in getting
- 16 a relatively lower interchange fee agreed; correct?
- 17 A. Correct.
- 18 Q. And what Mr Warren meant was that in that kind of
- 19 situation the fallback EEA MIF was useful to Midland
- 20 because Midland could have threatened to agree -- to not
- 21 agree a rate, correct, and the lower intra-EEA MIF would
- 22 apply; yes? That's what he meant.
- 23 A. I believe that's what he meant. I can only speculate.
- 24 Q. So the existence of the fallback fee put a downward
- 25 pressure on the rate.

1 A. No, I don't think that's the case. The fallback fee, in
2 fact, didn't apply in practice.

3 Q. Well, I'm just thinking about his -- what he said and
4 what you think he said. So he said it was useful to
5 him, to Midland Bank, and that's because he said it
6 was -- you say that that's because it might have been
7 useful to him vis-à-vis issuers because he could have
8 threatened to walk away from the negotiation. So
9 that -- that negotiation, that threat to default to the
10 intra-EEA MIF would logically have led to a lower
11 interchange fee. That's why it was useful to him,
12 wasn't it?

13 A. Well, sir, can I answer that in this way, that if that
14 had happened, it would probably have triggered off
15 an arbitration. And the reality is that no arbitrations
16 took place at that time. So we're talking theoretically
17 here, and I don't believe it ever happened, apart from
18 that one instance that Glyn Warren was talking about.

19 Q. Mr Hawkins, first of all, we'll come to arbitrations
20 later. But, secondly, Mr Warren doesn't say it was one
21 instance, does he? He says in the past it was useful to
22 him. It could have been lots of instances.

23 A. I think you're going to have to ask Mr Warren this.
24 I can only speculate as to what he was talking about,
25 and we can only do so.

1 Q. I know, and I'm asking you about your interpretation of
2 what he said, which you've given evidence to the
3 Tribunal on and what I'm asking you is that looking at
4 what you say he meant, which seems logical to us, the
5 reason it was useful is because threatening to default
6 to the intra-EEA MIF would have enabled him to achieve
7 a lower rate; yes?

8 A. That's right.

9 Q. And there would've been a similar dynamic, or there
10 could have been a similar dynamic, if the counterparty
11 had not been a monoline bank, so if it had engaged in
12 issuing and acquiring, but the balance of business
13 between the two banks was that Midland did more
14 acquiring and the counterparty did more issuing, yes, so
15 the incentives might have been the same in that
16 situation?

17 A. Theoretically, yes.

18 Q. So in that situation, too, the fallback MIF could have
19 been useful for Midland, could have resulted in a lower
20 agreed bilateral rate.

21 A. Well, it seems, sir, that that was the case as far as
22 Mr Warren is concerned, but it was a very temporary
23 thing as I understand it because they said that they
24 soon abandoned that position.

25 Q. But you say it's a temporary thing, but we just don't

1 know. We'll come back to that point, Mr Hawkins.

2 Let's turn for the moment to {C15/285/1}. You can
3 see the date of this document. It was after your time.

4 A. Yes.

5 Q. But it's Mastercard's notice of appeal to the
6 Competition Appeal Tribunal.

7 A. Yes.

8 Q. And I want to show you one paragraph in it to see if you
9 agree. And if we go to paragraph -- to page 24, please
10 {C15/285/24}. And do you see the heading at the top of
11 the page "Introduction of credit card schemes in the
12 [United Kingdom]"?

13 A. Yes.

14 Q. And I want to read paragraph 7.6 at the bottom of the
15 page. And let's just take it in stages. So:

16 "As a consequence of these changes ..."

17 The changes, if we just scan up, are the JCCC
18 breaking up, yes, and you've talked about that in your
19 statement.

20 "... it was necessary to establish domestic
21 interchange fees between Barclays Bank and the Access
22 banks -- ie NatWest ... Midland ... Lloyds ... RBSG --
23 as well as between the Access banks themselves.
24 A series of agreements was therefore negotiated between
25 the relevant banks."

1 Do you agree with that?

2 A. I do, yes.

3 Q. And then the third sentence:

4 "To provide a benchmark for those negotiations, MCE
5 commissioned a cost study by [EDC] ..."

6 I think you agree with that, don't you?

7 A. Yes, it's got "MCE". I think they mean "MCI", actually.

8 Q. Okay. Thank you for that clarification. And later it
9 became MCE, didn't it?

10 A. Yes. Yes.

11 Q. And then what we see next is Mastercard saying that:

12 "The agreements were negotiated bilaterally,
13 but ..."

14 And if we go over the page {C15/285/5}:

15 "... but against the backdrop of a fallback MIF
16 under the European Regional Rules."

17 And that's consistent with what Mr Warren said,
18 isn't it?

19 A. I'm sorry, I didn't quite get that. Would you like
20 to --

21 Q. No, let's go back again. So they're talking --
22 Mastercard here -- this is Mastercard's submissions to
23 the Tribunal.

24 A. Yes.

25 Q. They're saying that agreements between the banks were

1 negotiated bilaterally but against the backdrop of
2 a fallback MIF under the European Regional Rules, and
3 that's correct, isn't it? That's consistent with what
4 Mr Warren said.

5 A. They were negotiated bilaterally against the backdrop of
6 the cost study, the market conditions, the competition,
7 all the things that I've said before.

8 Q. Well, those are things which are not in the rules but
9 they were also negotiated bilaterally as against the
10 fallback fee in the rules; correct?

11 A. I'm just saying that when we negotiated -- and I know
12 because I negotiated with the other banks -- when
13 I negotiated bilaterally, I used as a base the
14 cost-based study, then the market conditions and the
15 competition. Those are the factors that came into
16 effect, as far as I was concerned.

17 Q. And as a general matter, those factors may have been
18 relevant to you, but as a general matter these
19 negotiations all operated against a fallback in the
20 rules; correct?

21 A. The fallback in the rules was there as a fail-safe. It
22 had to be there. It had to be Mastercard International
23 had to have one otherwise the scheme would not have
24 worked.

25 Q. Well, that's not what Mr Warren was saying, was he; he

1 was saying the fallback in the rules was useful to him
2 in the negotiation?

3 A. He did say that at the meeting and I believe that it was
4 a very temporary -- he almost apologised for doing it
5 actually.

6 Q. Oh, do you remember that?

7 A. I do, yes.

8 Q. You remember the apology for saying it?

9 A. Well, he said it in a -- in a shame-faced way.

10 Q. Now, it stands to reason, doesn't it, that the amount of
11 leverage provided by the fallback fee, so the amount of
12 leverage that Midland Bank could have gained from the
13 fallback fee, depends in part on its level; correct?

14 So if the fallback fee -- let's test this out -- had
15 been the same as the offer made by the issuing bank,
16 then it wouldn't have made a difference to the
17 negotiation, it wouldn't have represented any leverage;
18 correct?

19 A. No.

20 Q. But if it had been lower then -- if it had been lower
21 than the offer made by the issuing bank then it could
22 have been useful in the way Mr Warren was describing;
23 correct?

24 A. Theoretically, yes.

25 Q. And if it was much lower than the offer made by the

1 issuing bank then that would have increased Midland's
2 leverage; correct?

3 A. Yes, but where does this stop? The fact of the matter
4 is that they, as it were, gained the system for a short
5 period of time but then realised it was not appropriate
6 for the health of the scheme going forward.

7 Q. But I think you're agreeing with the proposition I put
8 to you, that if it was much lower than the offer made by
9 the issuing bank that would have increased Midland's
10 leverage, correct, because it could have walked away?

11 A. Theoretically, that is the case.

12 MS DEMETRIOU: Now, I do now want to ask you some questions
13 about what the rules meant.

14 Sir, I'm very happy to embark on this, but it's
15 going to take longer than ten minutes and we're not
16 struggling for time. I just wonder whether it might be
17 better just to stop now, rather than jumping
18 backwards --

19 MR JUSTICE ROTH: If you're comfortable that we're not --
20 because the aim is -- just a moment. (Pause)

21 Yes, you've got actually a lot of time allowed for
22 Mr Hawkins.

23 MS DEMETRIOU: We have a lot of time.

24 MR JUSTICE ROTH: So I think in that case, if there's no
25 pressure, I think it's much preferable that we should

1 stop early rather than in the middle.

2 MS DEMETRIOU: I think it might be more helpful for the
3 witness too because --

4 MR JUSTICE ROTH: Yes. Yes, well let's do that then.

5 So, Mr Hawkins, we're going to, you'll be pleased to
6 know, rise a bit earlier today. As you know, once
7 you've started giving evidence you mustn't talk about
8 the case or your evidence with anyone else.

9 A. I understand, yes.

10 MR JUSTICE ROTH: Always difficult overnight because it's
11 uppermost in your mind, but you can talk about anything
12 else.

13 A. I will certainly do that. Thank you.

14 MR JUSTICE ROTH: But not about this case.

15 We'll resume at 10.30 tomorrow.

16 (4.03 pm)

17 (The hearing adjourned until 10.30 am on
18 Wednesday, 12 July 2023)

19

20

21

22

23

24

25