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IN THE COMPETITION

APPEAL TRIBUNAL

(T)

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 5th – Friday 28th July 2023

Before:

The Honourable Mr Justice Roth

Jane Burgess

Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

Class Representative

v

Mastercard Incorporated and Others

Defendants

A P P E A R A N C E S

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

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

Wednesday, 12 July 2023

(10.30 am)

(Proceedings delayed)

(10.39 am)

MR MICHAEL HAWKINS (continued)

Cross-examination by MS DEMETRIOU (continued)

MR JUSTICE ROTH: Yes, Ms Demetriou.

MS DEMETRIOU: Thank you, sir.

Good morning, Mr Hawkins.

A. Good morning.

Q. I want to think back. We looked at the wording of the Mastercard Rule 11.09 yesterday, do you remember that, and it said that the international interchange fee -- it referred to the international interchange fee applicable to transactions for such Mastercard region in which the country is located? Do you remember seeing that when we looked at the rules?

A. Yes, I believe I do, unless you want to call it up and then I would --

Q. If you remember it, that's okay. We looked at it yesterday.

And just to clarify, the Mastercard region in which the UK was located is the EEA; correct?

A. It was, yes.

Q. So if we go to paragraph 62 of your first statement,

1 please -- that's {A/7/18} -- in fact, Mr Hawkins, you
2 refer to that part of the rule there, do you see? So
3 you see:

4 "The MCI rules dated December 1993 ... that have
5 been shown to me similarly provided for the application
6 of the 'international interchange [fee] applicable to
7 transactions for such MasterCard region in which the
8 country is located' ..."

9 So you accept that that could refer to the Europay
10 intra-regional rate, so the EEA MIF; correct?

11 A. No, I don't accept that.

12 Q. Oh, you don't?

13 A. I don't, no.

14 Q. So when you say there "it could refer to the Europay
15 rate", do you mean --

16 A. It could -- sorry.

17 Q. Well, why don't you explain, sorry, Mr Hawkins?

18 A. It could, but it didn't. We always regarded the
19 Mastercard International rate as the fallback at this
20 period of time.

21 Q. Alright. So you're saying it could refer to the rate
22 because it's talking about the region in which the
23 country is located, which is the EEA. Is that what you
24 mean by that sentence?

25 A. I'm saying that it didn't in the case of the UK.

1 Q. I know that's what you're saying elsewhere, but I want
2 to understand why you're saying it could refer to the
3 intra-EEA MIF. Is that because -- are you recognising
4 that it could refer to the EEA MIF because of the
5 reference to the region in which the country is located,
6 which is the EEA?

7 A. Well, that's hypothetical. I'm telling you that the
8 reality is that we regarded the Mastercard rate as the
9 fallback rate.

10 MR JUSTICE ROTH: I think, Mr Hawkins, counsel is just
11 trying to understand what you said there when you say
12 "which could refer". Do you mean on a literal reading,
13 one could read it that way and you're saying, but in
14 reality that was not the way it was read? Is that the
15 point you're --

16 A. That's exactly right, sir.

17 MS DEMETRIOU: Thank you. So when you say on a literal
18 reading, one could read it that way, are you
19 particularly thinking about the reference to the region
20 in which the country is located being the EEA?

21 A. Yes. Obviously, the UK was located in the EEA region.

22 Q. Okay. Now, I want to go back for a moment to
23 {C4/135/5}.

24 And before I -- before I look at this again, we can
25 take it -- you accepted yesterday and you accept in your

1 statement that for the period November 1996 to
2 November 1997, the fallback fee was the intra-EEA MIF;
3 correct?

4 A. Yes, that had been written into the rules, yes.

5 Q. Right. Now, if we go back to this document, so this is
6 back to Mr Warren and looking at what Mr Warren says --
7 is noted as saying at the bottom of the page, he said:

8 "... in the past, the use of the intra-regional rate
9 as the fallback rate had worked in Midland Bank's
10 advantage ..."

11 And if we go to the top of the document, please, we
12 can see that the date of this meeting is 28 April 1997.
13 So just to locate this comment in terms of timing, on
14 Mastercard's case, the rules had been changed to
15 introduce the fallback -- the EEA MIF as the fallback
16 fee in November 1996; correct? And this is April 1997,
17 so by this stage, there have been just a few months, on
18 your case, of the EEA MIF operating as the fallback;
19 correct?

20 A. That is correct.

21 Q. Now, if we go back to paragraph 76 of your statement,
22 please. Perhaps we can have the bottom of this page --
23 so two documents on the page; the bottom of this page
24 {C4/135/5} and then paragraph 76, which is {A/7/22}.

25 MR JUSTICE ROTH: Although Mr Hawkins has it in hard copy as

1 well, his statement, so whichever works.

2 MS DEMETRIOU: Yes. So, Mr Hawkins, we're going to
3 paragraph 76 of your statement, which is {A/7/22}, and
4 you can either look at it in hard copy or on the screen
5 in front of you.

6 And we did look at this yesterday and what you say
7 here is you say that you suspect that:

8 "... Midland could have threatened not to agree
9 interchange fees bilaterally with other UK licensees and
10 therefore to apply the lower intra-regional rate pending
11 arbitration (which applied automatically in the absence
12 of bilateral agreement under the 1996 ... domestic
13 rules) in order to push issuers to accept lower
14 bilateral interchange fees and thereby improve
15 its acquiring business."

16 So you're speculating here, are you, Mr Hawkins,
17 that Mr Warren was talking only about the position from
18 November 1996? Is that what you're saying?

19 A. I am saying that he's talking about that period and I am
20 saying that I suspected that, though I did not know it.

21 Q. Right. So you're -- so when you say you are saying that
22 he was talking about that period, I think you're
23 clarifying that that's your suspicion. You didn't know
24 that at the time.

25 A. My position is as recorded in my statement.

1 Q. Yes, so you suspect, but do not know. So I understand
2 that, but does the "suspect and do not know" also apply
3 to the qualification you make about 1996; that he was
4 talking about the position from 1 November 1996?

5 A. Sorry, could you clarify that, please?

6 Q. Yes. So you seem to be saying here that Mr Warren -- so
7 in your explanation, you seem to be saying that he must
8 have been talking about the position from
9 1 November 1996; yes?

10 A. Yes.

11 Q. And is that -- that's also subject to the caveat at the
12 beginning of the sentence, is it; that you suspect but
13 do not know that that's the case?

14 A. That is right.

15 Q. Thank you.

16 Now, it's right, isn't it, that there's nothing in
17 the minutes that indicates that Mr Warren's comment was
18 limited to the very recent position from November 1996;
19 that's correct, isn't it?

20 A. That is correct, though he did say he was uncomfortable
21 with the rate -- that Midland were uncomfortable with
22 the rate.

23 Q. He did say that. And, in fact, it's not the natural
24 reading of this minute, is it? Because the meeting took
25 place in April 1997 and on Mastercard's case, the

1 EEA MIF had only been in place since 1 November 1996 and
2 it was still a fallback in April 1997. So if
3 Mastercard's case were correct, it would've been more
4 natural for Mr Warren to have said, "Well, now the
5 EEA MIF is the fallback, that's working to our
6 advantage". But he didn't say that, did he?

7 A. No, he didn't say that.

8 Q. He's referring to the past, isn't he, and he's referring
9 to the past in general terms?

10 A. In general terms, but it could only apply to the period
11 from 1996 to '97.

12 Q. Well, that's your position, but, of course, our position
13 is that the EEA MIF was a fallback MIF from long before
14 that. You understand that's our position in this
15 litigation?

16 A. Well, I understand that, but I absolutely refute that.
17 That was not the case.

18 Q. No, but the way Mr Warren expressed himself is much more
19 consistent with the EEA MIF having been the fallback for
20 a considerable time, isn't it, not just the past
21 five months?

22 A. That is wrong. Had that been the case, then my
23 bilateral arrangements with Midland would have been
24 different, and they weren't.

25 Q. Mr Hawkins, I appreciate that you're keen to bring in

1 extra points, but I'm asking you a narrow point about
2 the language of what Mr Warren is noted as saying. So
3 my narrow point is this: that if he was just talking
4 about the current position that had been in place for
5 a few months, he wouldn't have said, "In the past, the
6 use of the intra-regional rate as the fallback had
7 worked to Midland Bank's advantage". He would have
8 said, "It's working to Midland Bank's advantage now",
9 wouldn't he? It had only been -- on your case, it had
10 only been in place for a few months.

11 A. Well, sir, my answer to that is I have no idea what
12 Mr Warren was thinking or what period he was referring
13 to. I can only recount what he actually said and what
14 was in the minutes.

15 Q. Alright. Now, I want to have a look at the documents
16 you refer to in your witness statements in support of
17 your understanding that it was the inter-regional fee
18 that applied as a fallback, and you summarise these.
19 You set out in your second witness statement at
20 paragraph 15.

21 So if we could go electronically to {A/13.1/5},
22 please, and we see above that at 14 you reiterate
23 that -- you say that:

24 "... the reference to 'international fee' ... was
25 a reference to the MCI ... (inter-regional) rate."

1 Do you see that at paragraph 14?

2 A. Okay.

3 Q. And then at paragraph 15, you refer to some documents
4 and at 15(a), you refer to minutes of a MEPUK board
5 meeting of 28 May 1992 and you set out here the extract
6 you rely on and that says, reading from the statement:

7 "... 'It was assumed that such a rate would apply
8 once arbitration had taken place and that it would not
9 have retrospective effect. It was further assumed that
10 meanwhile, the 'fallback rate' to be applied in absence
11 of bilateral agreement would be the MCI International
12 fallback rate'."

13 And you then say:

14 "The 'MCI International fallback rate' was the
15 interregional rate ..."

16 Yes? That's your evidence.

17 A. That's my evidence.

18 Q. But we've seen, haven't we, that the MCI Rules provide
19 that the fallback rate is the international rate that
20 applies in the region in which the country is located,
21 so here the EEA; correct?

22 A. That was a global rule, yes.

23 Q. So the international rate referred to in the MCI Rule is
24 in fact the intra-EEA MIF; correct?

25 A. No. I was absolutely clear, sir, from the very start

1 that the reference was to the Mastercard international
2 rate.

3 Q. Well, this document doesn't really take things any
4 further, does it, because it refers to the
5 MCI international fallback rate, but when we looked at
6 that, the MCI international fallback rate is expressly
7 said to be the rate of the region in which the country
8 is located.

9 A. You want me to comment on that? I tested this a number
10 of times, sir, by asking Mastercard themselves, and this
11 is recorded in my witness statement, and they affirmed
12 that it was the Mastercard international rate that would
13 apply as fallback.

14 Q. Mr Hawkins, we'll come to those points.

15 Now, the -- at paragraph 15(b) of your second
16 witness statement, you refer here to some minutes of the
17 R&CC of 8 January 1993 and you say there that:

18 "The minutes note that "SR" (Serena Romano, a Senior
19 Legal Adviser at Europay International, who [you] recall
20 working with well) explained: 'For any dispute which
21 arose during a period in which a cost study was
22 underway, the international fallback rate would apply.
23 Where no domestic fall back existed, only the
24 international fee could apply'."

25 And what you say in your witness statement is that

1 this must mean the inter-regional fee-- and you say
2 because otherwise:

3 "... if Serena had meant to refer to the EEA MIF,
4 [you] would have expected her to say so explicitly ..."

5 So that's your evidence; correct?

6 A. That's my evidence.

7 Q. Now, this meeting took place in 1993; correct? That's
8 30 years ago.

9 A. Yes.

10 Q. And do you have an independent recollection of this
11 meeting or are you essentially relying on these written
12 minutes to reconstruct what happened?

13 A. I remember Serena Romano well and the position that she
14 took, but, of course, I have been reminded of what
15 occurred by reading the documentation at the time.

16 Q. So is it right -- would it be fair to say that you don't
17 have an independent recollection of what words were used
18 verbally at the meeting?

19 A. I was absolutely clear and certain that it was the
20 international rate that applied.

21 Q. Mr Hawkins --

22 A. I never had any doubt about that --

23 Q. -- I know that --

24 MR JUSTICE ROTH: I think what counsel asked you was

25 a slightly different question. Given how long ago this

1 meeting, do you remember, other than looking at the
2 minutes or the record, what was actually said at the
3 meeting? I think that's all she --

4 A. Well, sir, as you point out, it is 30 years ago, and
5 I have a general recollection. I couldn't remember word
6 by word, but a general recollection, and I know the
7 thrust of where this was going.

8 MR JUSTICE ROTH: Yes.

9 MS DEMETRIOU: So your recollection, is this fair, doesn't
10 extend to recollecting the words used at the meeting?
11 You're really reconstructing those on the basis of the
12 minutes; is that fair?

13 A. I think I probably have, sir, as good a recollection of
14 things that happened 30 years ago of this sort as most
15 people. I can't say that I remember every word that was
16 said. I have been reminded by looking at the minutes of
17 the meeting.

18 Q. Mr Hawkins, I have no doubt that your recollection going
19 back is very good, but I think most people or almost
20 anyone would be hard pressed to remember details of
21 conversations going back 30 years ago. So is it fair to
22 say that you don't remember everything that was said and
23 the way that people expressed themselves at this meeting
24 30 years ago?

25 A. I think, sir, I have already said, and I stand by that,

1 that I remember the thrust of the discussion, how it
2 went.

3 MR JUSTICE ROTH: I think that's answered your question.

4 MS DEMETRIOU: Now, focusing on the words "international
5 fee", which is what you talk about here, you accept in
6 principle, don't you, that that term could refer in
7 principle to the intra-EEA MIF; correct? You've
8 accepted that in your statement. I know you disagree
9 with it, but you accept it could refer in principle to
10 the intra-EEA MIF.

11 A. As you say, I disagree with it.

12 Q. Now, let's turn up {C1/153/1}, please. And if we look
13 at what this is, first of all, you'll see that it's
14 a letter dated 23 December 1991 to Mr Hook of the OFT.
15 Do you see that?

16 A. Yes.

17 Q. And it's sent from Ms Cobb of Eurocard. Have you looked
18 at this letter in the course of preparing your evidence?

19 A. I'm not sure that I have.

20 Q. Okay. Would you agree that in sending a letter to the
21 regulator, Ms Cobb is likely to have taken care in what
22 she said?

23 A. Yes. I knew Anne Cobb. She would have done.

24 Q. And if we go to page 2, please {C1/153/2}, you'll see
25 under the heading there that Ms Cobb states:

1 "An international interchange reference fee for all
2 Eurocard-MasterCard transactions within Europe (... is
3 defined by ECI ...)"

4 Now, pausing there, she's referring, is she not, to
5 the EEA MIF, isn't she? She's not referring there to
6 the inter-regional fee.

7 A. She does appear to be saying that, yes.

8 Q. So just as a matter of language, she's calling the
9 intra-EEA MIF the international interchange reference
10 fee, isn't she?

11 A. She is, and she's of course talking about the whole of
12 Europe, the whole of --

13 Q. She is. I accept that. She's talking about the
14 intra-EEA MIF, but she's referring to it as
15 an international interchange reference fee, isn't she,
16 as a matter of language?

17 A. That is her language.

18 Q. But it's perfectly plausible that Ms Romano might have
19 done the same thing, isn't it?

20 A. No, I don't believe so.

21 MR JUSTICE ROTH: Just on language, I mean, the EEA MIF is
22 an international fee, isn't it, because it's across
23 different nations?

24 A. Yes, sir, it is, I mean, because, of course, it's across
25 all European countries.

1 MR JUSTICE ROTH: Yes. So on any view, it's not a national
2 fee; it's an international fee.

3 A. No, but as far as the UK was concerned, the
4 international rate that was relevant was the
5 Mastercard --

6 MR JUSTICE ROTH: I understand that. I'm just thinking as
7 a matter of ordinary language.

8 MS DEMETRIOU: I'm being asked -- I'm not sure why.
9 I'm being asked to show you a paragraph on the previous
10 page, which I'm happy to do.

11 So -- and if we scroll down, please {C1/153/1}. So
12 under "Interchange Fee Concept", I think the point
13 that's being made -- if you just read that first bit as
14 far as credit cards are concerned. I think the point
15 that is being made by my learned friend is that this is
16 talking about cross-border transactions, which I made
17 clear in the question that I put to you. I was just
18 making a linguistic point about reference -- that these
19 fees are referred to as an international fee, but
20 I'm happy to point out --

21 MR JUSTICE ROTH: Well, as Mr Hawkins just said, of course
22 it's an international fee.

23 MS DEMETRIOU: Yes.

24 MR JUSTICE ROTH: It's not a national fee, and as the letter
25 starts, ECI is an international organisation.

1 MS DEMETRIOU: Yes, exactly.

2 MR JUSTICE ROTH: So you can't describe the EEA MIF as

3 a national fee.

4 MS DEMETRIOU: No, and so it is described as

5 an international fee.

6 MR JUSTICE ROTH: Well, that's what it is.

7 MS DEMETRIOU: So the point I was putting to Mr Hawkins is

8 it's perfectly plausible that Ms Romano might have

9 referred to the EEA MIF as an international fee; that's

10 right, isn't it?

11 A. Well, sir, my point has been consistently that it was

12 the Mastercard fee that had been referred to. If she

13 meant the Europay fee, then she was mistaken.

14 Q. Mr Hawkins, I really do appreciate --

15 MR JUSTICE ROTH: Could we go to those minutes? Because, of

16 course, it's -- I don't quite follow all this, to jump

17 from what one person used in one letter to what somebody

18 says a couple of years later in a different context.

19 I don't see how that takes one anywhere. But if we're

20 going to do that, we better look at the 8 January '93

21 R&CC minute.

22 MS DEMETRIOU: Sir, it's -- sorry, let me just find the

23 reference, so sorry. I had it a moment ago. (Pause)

24 So it's {C1/305/95}.

25 MR JUSTICE ROTH: C1, yes.

1 MS DEMETRIOU: It's {C1/305/97} and it's the
2 second paragraph up from the bottom:

3 "SR advised that EPI was working with MCI to resolve
4 this issue. For any dispute which arose during a period
5 in which a cost study was underway, the international
6 fallback rate would apply. Where no domestic fallback
7 existed, only the international fee can apply."

8 Sir, where I was going with that is that Mr Hawkins'
9 evidence --

10 MR JUSTICE ROTH: Yes.

11 MS DEMETRIOU: -- is that the reference to "international
12 fee" must be a reference to the inter-regional fee and
13 I put to him that surely it's quite possible that
14 Ms Romano, in using the word "international fee", was
15 referring to the EEA MIF because it is an international
16 fee. That was the point I was putting to him.

17 MR JUSTICE ROTH: Yes. Well, I understand that. I don't
18 see how the way someone else explains what the
19 EEA interchange is to the OFT is going to inform
20 an interpretation of what Ms Romano meant when talking
21 to the banking members of the R&CC.

22 MS DEMETRIOU: No.

23 MR JUSTICE ROTH: I mean, we might use expressions when
24 talking to fellow lawyers in a quite different way than
25 when we talk to people outside. I mean, it doesn't help

1 one with definitions. It's not about definitions; it's
2 about really an interpretation of what Ms Romano meant.
3 But you've made your point --

4 MS DEMETRIOU: Sir, yes and I'm going to make --

5 MR JUSTICE ROTH: -- that looking at it on its face, it's
6 not clear.

7 MS DEMETRIOU: That's right. So I've put that to
8 Mr Hawkins.

9 And if we then -- the final document you rely on in
10 support of your view is the one at 15(c) of your witness
11 statement, so that's at {A/13.1/6}, and you also rely on
12 this document at paragraph 63 of your first witness
13 statement.

14 But looking at 15(c), you talk about a May 1996
15 meeting of the MEPUK R&CC and you say that James -- is
16 it pronounced "Strachan" or "Strachan" in this case? Do
17 you know?

18 A. George.

19 Q. George "Strachan" or "Strachan"? It doesn't matter.
20 I'm going to say "Strachan".

21 George Strachan of Mastercard International stated
22 that the international fallback rate would apply pending
23 any arbitration, and you say that you understood that to
24 refer to the international rate set by Mastercard
25 International.

1 Well, let's look at that document. So that's
2 {C3/160/1}. So these are the minutes that you refer to,
3 Mr Hawkins. Do you see at the top of the page it says
4 it's the R&CC meeting of 7 May 1996?

5 A. Yes, yes.

6 Q. And do you see that you were chairing it?

7 A. Yes.

8 Q. And if we turn to page 3 {C3/160/3} and at the bottom of
9 the page under "Arbitration Issues", this is the section
10 you refer to in paragraph 15(c) of your witness
11 statement and you see there:

12 "Mr Hawkins stressed the importance of the above
13 point, i.e. that Members seek to negotiate bilateral
14 agreements. The cost-based rate would be used as part
15 of the relevant data should a Member invoke the
16 arbitration procedure."

17 And then Mr Strachan advised that under the
18 Mastercard Rules, there was a 90-day period during which
19 the international fallback rate would apply, but -- and
20 if we go over the page, we can see what he says
21 {C3/160/4}.

22 But he doesn't say there, does he, that the
23 international fallback rate which would apply is the
24 inter-regional rate, does he?

25 A. Sir, I'm absolutely clear he meant that.

1 Q. Well --

2 MR JUSTICE ROTH: Why are you so clear that he meant that?

3 A. Well, if I could explain, sir, the fact is that the UK
4 was the second most developed credit card market in the
5 world at that time after America, and the European
6 market was quite different. Many exclusive licences
7 still remained. Germany, for example, largely relied on
8 Eurocheques. So the UK was, in a sense, a pioneer.

9 And we followed the Mastercard route of going down
10 the cost studies, and that's why I'm saying that I knew
11 that the Mastercard international rate was the fallback
12 rate. The Eurocard rate had no bearing on UK bank
13 costs.

14 MS DEMETRIOU: Mr Hawkins, I know that that's your view and
15 you've said it very firmly, but in terms of what's
16 recorded here, actually, these minutes don't take things
17 any further, do they, because they just refer again to
18 "international rate"? They don't actually say whether
19 it's the inter-regional rate or the EEA MIF; that's
20 right, isn't it?

21 A. It says that, sir, but I think everybody at that
22 meeting, including me, knew exactly what that meant.

23 Q. Well, hang on. You didn't know what other people
24 thought, did you, at that meeting? You can't speak for
25 other people at the time.

1 A. I think in all the discussions that we held, and we
2 talked ad nauseam about this issue, I think we all had
3 a pretty good idea what we were talking about.

4 Q. Well, let's have a look at some of the other documents.
5 Let's go to {C1/404/1}, please. So this is
6 a notification to the European Commission of -- from
7 EPI. It's a notification of the Europay -- of the
8 Eurocard-MasterCard system and we can see, I think if we
9 scroll down, it has the date. I may be misremembering.
10 The date of it, and I'll find out where we get that
11 from, is May 1993.

12 Now, if we turn to page 9 {C1/404/9}, do you see
13 under the first heading, just before the second heading,
14 it explains that:

15 "The present notification concerns all activities of
16 Europay relating to the Eurocard-MasterCard card
17 system."

18 Do you see that?

19 A. I see that.

20 Q. And then let's go to page 48 {C1/404/48}. You'll see
21 a section titled "Interchange Fee". Do you see that at
22 the bottom -- towards the bottom of the page? And
23 there's a reference to section E7.02.3.

24 A. Yes.

25 Q. And that's a reference to the Eurocard Rules which we

1 looked at yesterday; correct?

2 A. That's right.

3 Q. And the section says:

4 "... E7.02.3 expressly allows acquirers and issuers
5 to conclude bilateral or multilateral agreements
6 regarding the interchange fee to be paid between them
7 for cross-border transactions within Europe ..."

8 And then that's called the inter-country exchange
9 fee; correct? It's what it says.

10 A. Yes.

11 Q. "In the absence of such an agreement ..."

12 MR JUSTICE ROTH: Inter-country interchange fee.

13 MS DEMETRIOU: Sorry, I am misreading. You're quite right,
14 sir. The inter-country interchange fee.

15 And then it says:

16 "In the absence of such an agreement, the reference
17 interchange fee established by Europay applies between
18 them."

19 Now, the reference fee established by Europay must
20 refer to the EEA MIF, mustn't it?

21 A. I assume so, though I cannot say.

22 Q. Well, perhaps you can say that Europay never set the
23 inter-regional fee, did it?

24 A. Europay -- certainly Europay set the inter-regional --
25 sorry, the intra-regional fee.

1 Q. It set the intra-regional fee, but it didn't set the
2 inter-regional fee, because you accepted yesterday that
3 was set by Mastercard International; correct?

4 A. That's right, yes.

5 Q. So where it's saying here that in the absence of
6 a bilateral or multilateral agreement, the reference
7 interchange fee established by Europay applies, do you
8 accept that that must be the EEA MIF?

9 A. Certainly, sir, that's the inference, but it didn't
10 apply to the UK.

11 MR JUSTICE ROTH: Well, just focusing on the question,
12 what's said here, that statement, "the reference
13 interchange fee established by Europay", I think you
14 accept that's speaking of the EEA MIF.

15 A. That's the wording that they used.

16 MR JUSTICE ROTH: Yes, that's what they mean, yes.

17 MS DEMETRIOU: If we go on to page 49 and look near the top
18 of the page {C1/404/49}, that says:

19 "If members established within the same country are
20 unable to agree on an interchange fee for domestic
21 transactions (intra-country interchange fee), the
22 inter-country reference interchange fee will temporarily
23 apply ..."

24 And, again, we've seen from the previous page that
25 the inter-country fee is the EEA MIF; correct?

1 A. That's what they're saying, yes.

2 Q. So Europay's interpretation of its rules was that the

3 fallback was the intra-EEA MIF back in 1993; correct?

4 A. Yes. If I may say so, sir, we always regarded

5 Mastercard as the superior body for rule-making.

6 Q. Well, hang on. Hang on, Mr Hawkins, because we see --

7 we've seen throughout the rules -- indeed, you said

8 yesterday that both sets of rules applied; correct?

9 A. Yes.

10 Q. And, in fact, where there was a divergence, it was the

11 Eurocard Rules that took precedence; correct?

12 A. Not in this case, no.

13 Q. What, because you don't like it; is that why?

14 A. That's not right. It is because that was the fact.

15 Q. Right. Now, let's look at another document, so let's go

16 to {C6/477/1}. Now, this is -- do you remember the

17 Cruickshank report into the UK banking system?

18 A. Yes, I remember it coming out.

19 Q. And that was published in 2000. Were you involved in

20 the review?

21 A. Not that I recall. Closely involved, no.

22 Q. So let's turn, please, to page {C6/477/278}. If we look

23 at the passage next to D3.51:

24 "Europay provided the following information of how

25 interchange fees have changed over the past five years.

1 The fallback interchange fees for intra European
2 transactions have remained constant over the period
3 under consideration. The UK domestic fallback
4 interchange fees were set at the same level as the
5 Intra-European fallback fees until ... 1997, when higher
6 specific UK cost related fallback fees were introduced.
7 These fees remained at the same levels until April 1999,
8 when reduced fallback fees were introduced ..."

9 So, first of all, that's -- just taking things in
10 stages, that's consistent with your evidence, isn't it,
11 that a UK MIF was first introduced in December -- in
12 late 1997; correct?

13 A. Yes, that's correct.

14 Q. And it also states categorically, doesn't it, that
15 before that time, the UK domestic fallback interchange
16 fees were set at the same level as the intra-European
17 MIF; correct?

18 A. That's what it says there, yes.

19 Q. But, again, you don't agree with what was submitted to
20 the Cruickshank review?

21 A. No, I do not agree with that. It implies that
22 UK Rules -- fees followed the intra-European ones, and
23 that is not what happened.

24 Q. Alright. Now, let's look at {C15/134/18}, please, so if
25 we take it from the top of the document, we see here

1 that this is a response to -- it's the first page of
2 a response from MEPUK to a request for further
3 information from the OFT, and we see the date is -- the
4 date of the request is 3 August 2000 and the date of the
5 response is 8 September 2000. Do you see that, first of
6 all, at the top of the page?

7 A. Yes, I see that.

8 Q. And then could we turn, please, to page 29 {C15/134/29}
9 and do you see that there's -- at the top of the page
10 there's a request for details of level of fees for the
11 previous five years? Do you see that?

12 A. Yes, I see that.

13 Q. And then do you see that there is -- for the years 1996
14 to '97 in the top row and '95 to '96, they have a double
15 asterisk? Do you see the double asterisk?

16 A. Yes.

17 Q. And then if we go and look at what that means, that
18 says:

19 "No specific UK fallback fee was set during this
20 period. The figures shown in the table are the
21 Intra-European fallback [interchange] Fees, which would
22 have been applied in the absence of agreement between
23 the issuing and acquiring members."

24 So what we see here is that MEPUK told the OFT in
25 2000 that in 1995 to 1997, which is what -- which is the

1 data that's being requested, the relevant fallback was
2 the intra-EEA MIF. Do you see that?

3 A. I see that.

4 Q. And you agree, do you, that MEPUK would have been very
5 careful in formulating responses to the OFT's request
6 for information, wouldn't it?

7 A. It would have been, yes.

8 Q. And what we see is that well before the period of
9 November '96 to November '97, where you accept that the
10 intra-EEA MIF applied, so going back to 1995, MEPUK is
11 saying that the fallback is the intra-EEA MIF; correct?

12 A. That's what is being said, yes.

13 Q. So its position here, MEPUK's position here to the OFT,
14 is the same as the position EPI put forward to the
15 European regulator, to the European Commission, in 1993
16 that we've just seen; correct?

17 A. Yes. Sir, may I comment on this?

18 MR JUSTICE ROTH: Yes.

19 A. The fact is in that period, the '96/'97 period, the
20 European rate was -- was put into the rules as fallback,
21 and that's something I personally disagreed with because
22 it was not based on UK costs and it was remedied later.

23 MR JUSTICE ROTH: Yes. I think we're looking at the period
24 '95/'96 and MEPUK in 2000 told the OFT that in that
25 period, the fallback applied was the EEA, the

1 intra-European fallback rate, which is not what
2 you've -- not your recollection or your evidence, and
3 that's what's being drawn to your attention.

4 A. Yes, sir, I'm talking about the period when the UK Rules
5 were brought in.

6 MR JUSTICE ROTH: Yes.

7 A. And the reality is that this was a fail-safe mechanism
8 in any event. It didn't bear direct relevance to the
9 rates that were agreed.

10 MS DEMETRIOU: So, Mr Hawkins, are you now saying that you
11 accept that before November 1996, the EEA MIF was the
12 fallback, but you're saying that was a fail-safe?

13 A. Fallback rates are always a fail-safe and the rule is
14 that member banks should agree bilateral rates, and
15 that's exactly what happened.

16 Q. Mr Hawkins, I'm asking you a slightly different
17 question. We're exploring the position where there
18 wasn't agreement of a bilateral rate. And what we've
19 been debating so far is what the fallback was before
20 1 November 1996 and I'm asking you whether you now
21 accept that it was, in fact, the intra-EEA MIF.

22 A. Sorry, you're asking me about a situation where there
23 wasn't an agreement, and the fact is there were
24 agreements.

25 MR JUSTICE ROTH: Yes, but there was provision -- even

1 though you've got agreements in practice, but the rules
2 provided for a fallback just in case.

3 A. There had to be a set of rules, yes, sir.

4 MR JUSTICE ROTH: Yes, and the question is what the fallback
5 was in the period 1995 to '96.

6 A. And we were in a transition period --

7 MR JUSTICE ROTH: Yes.

8 A. -- from having no UK Rules to having UK Rules.

9 MR JUSTICE ROTH: Yes, and the question is: in 1995 to '96,
10 what actually was -- a question of fact, really.

11 A. Yes, yes.

12 MR JUSTICE ROTH: What was the fallback? And here, MEPUK,
13 which I think you were chairman of at the time --

14 A. Yes.

15 MR JUSTICE ROTH: -- told the OFT the fallback in '95 to '96
16 was the intra-European, the EEA rate. And what you're
17 being asked is: is that correct?

18 A. That is the document that we submitted. It's -- it is
19 correct.

20 MS DEMETRIOU: Thank you. And if we look -- going back
21 a bit further, so if we look at {C2/321/1}. This is now
22 1994 and do you see that there's an email exchange from
23 December 1994? You can see the date in the bottom
24 email, 15 December 1994.

25 And the first email is from Mr Jenkins. That's the

1 second email. And Mr Kevin Jenkins, he worked for
2 Eurocard, didn't he? Did you know him?

3 A. I think I recall him, yes.

4 Q. And the reply is from Mr Patrick Nelson, and he also
5 worked at Eurocard, didn't he?

6 A. Yes, he did.

7 Q. He was the regional business manager for the UK and
8 Ireland; correct?

9 A. Yes, that's right.

10 Q. So does that mean he had responsibility at Europay for
11 the UK?

12 A. As far as I'm aware, that is the case.

13 Q. And if we look -- Mr Jenkins was emailing with
14 a question, so he says:

15 "As you know, the scheme rules on domestic
16 interchange are such that where a domestic agreement
17 isn't in place, cross-border rates apply."

18 So he is saying there in -- at the end of 1994 that
19 the EEA MIF is the fallback; correct? That's what he's
20 saying.

21 A. That's what he's saying.

22 Q. And then he says that his understanding for the UK is
23 that -- and we see this in the next paragraph:

24 "... that bi-lateral interchange agreements operate,
25 and ... our cross-border rates never apply for the

1 domestic processing we operate through ECCSS."

2 Then he says:

3 "However, I am beginning to question this as I now
4 hear that the UK have a 'petrol' category in operation.
5 Andy, do you sit on the domestic interchange contracts?"

6 And he's asking -- he says:

7 "Do the UK have a petrol rate under their normal
8 bi-lateral interchange agreements, and if so, is it
9 because they are using our cross-border rates by
10 'default'."

11 And then we see Mr Nelson's reply and he says:

12 "The UK domestic interchange situation is a mixture
13 of bilaterally negotiated deals, plus fallbacks to EPI
14 cross-border defaults."

15 He says:

16 "I believe ... the majority is now bilateral, and
17 this OVERRIDES any EPI special deal such as petrol
18 rates.

19 "However, there are some defaults still in
20 place ..."

21 Now, taking this in stages, by EPI -- "fallback to
22 EPI cross-border default", Mr Nelson is referring there
23 to the EEA MIF; correct?

24 A. Yes, he is, yes.

25 Q. And he's saying that there's a mix of bilaterally agreed

1 rates and fallbacks to the EEA MIF and he's saying that
2 the EEA MIF will apply unless overridden by
3 a bilaterally agreed rate; correct?

4 A. Yes.

5 Q. So where he's talking about fallbacks to the
6 intra-EEA MIF, he's saying that some transactions were
7 directly processed at the intra-EEA MIF; correct?

8 A. So he is saying, but he also says the majority are
9 bilateral.

10 Q. He does and we'll come to that, but I'm at the moment
11 dealing with the fallback position.

12 So what he's saying -- can we agree this -- is
13 completely consistent -- so what he's saying about the
14 EEA MIF being the fallback in December 1994 is
15 completely consistent with what EPI told the Commission;
16 correct?

17 A. Yes, that's their view.

18 Q. And with what MEPUK told the OFT; correct?

19 A. About the following year?

20 Q. Yes. They're consistent.

21 A. That was not this -- this year.

22 Q. No. So you're right that the OFT is talking about '95
23 to '96, because that's what they were asked about. They
24 were asked for data for the last five years. But what
25 they said there is consistent. They said the fallback

1 is the intra-EEA MIF, and this is exactly what Mr Nelson
2 is saying at the end of 1994; correct?

3 A. Well, I can't accept that that is the case because it's
4 a different year.

5 Q. Alright. So you're saying -- so your position is now,
6 is it, that you accept that in 1995 the fallback was the
7 intra-EEA MIF?

8 A. Yes.

9 Q. You've accepted that. And what's your position on 1994?
10 Do you accept that that was the EEA MIF too or not?

11 A. As I've said consistently, sir, the fallback that we
12 regarded as the correct one was the Mastercard
13 international rate.

14 MR JUSTICE ROTH: Well, when did it change, given that in
15 1995 it was the EEA MIF? When did it change?

16 A. It changed at that period when Mastercard gave full
17 licence to Eurocard/Europay to grant licences,
18 Mastercard licences. Up to that time, Mastercard had
19 directly granted licences and Europay granted Eurocard
20 licences.

21 MS DEMETRIOU: But when that authority happened, the rules
22 didn't change, did they, Mr Hawkins? The rules about
23 defaults didn't change at some point in time, did they?

24 A. I'm not sure what you're saying there. The rules
25 remained in place for both Mastercard and Europay.

1 Q. Yes, and they were the same rules. So when Europay --
2 this point you're saying about Europay gaining
3 authority, the rules didn't change, did they, about the
4 default? The rules were exactly the same.

5 A. Though I received a letter from George Strachan --
6 you've already referred to him -- in 1996 to say that
7 the Mastercard rate was the applicable one in fallback.

8 Q. Well, Mr Hawkins, we saw what the Commission said --
9 what EPI said to the Commission in May 1993. They said
10 at that stage that the fallback was the intra-EEA MIF.
11 So what's being painted is a consistent story, isn't it,
12 that the intra-EEA MIF was, from those early days, the
13 default in the rules?

14 A. They might have regarded that as the case, but in the
15 UK, we did not regard that as the case.

16 Q. Well, Mr Hawkins, could it be that you felt strongly
17 about it personally and so you didn't want to regard it
18 yourself as being the fallback fee? Could that be
19 actually the position?

20 A. No, it's not a personal thing. This was the
21 UK collectively. When you sit at the MEPUK board or
22 MEPUK committees, you're acting for Mastercard community
23 in that country. So it's not just my views; it's the
24 views of all the banks involved.

25 Q. Well, MEPUK clearly thought in 1995 that the

1 intra-EEA MIF was the default MIF; correct? We've
2 established that.

3 A. I think we've established that that came into the rules
4 and I certainly thought wrongly so, and that was
5 corrected later.

6 Q. Well, you don't say in your witness statement that there
7 was a change in 1994 to 1995, do you?

8 A. If you say so. I -- I haven't the reference to that.

9 Q. No, you don't. You don't, Mr Hawkins. You say that the
10 first time the intra-EEA MIF became the default was in
11 November 1996. You're wrong about that, aren't you?

12 A. According to the letter that was sent to the OFT, yes.
13 But as I say, we were in a transition period.

14 Q. So it's a bit grudging, but are you accepting that
15 you're wrong about that in your witness statement?

16 A. No. I -- I had a good reason for putting it in my
17 witness statement.

18 Q. So you're saying the MEPUK were wrong in -- when they
19 submitted this information to the OFT, are you?

20 A. I think, sir, that this comes back to the fact that the
21 fallback fee was really a theoretical fee. It was there
22 as a fail-safe and, actually, it didn't apply in the
23 case of UK members.

24 Q. Mr Hawkins, that's a different point and we're going to
25 come on to it. You've spent a lot of time in your

1 witness statement talking about what the default fee was
2 and I want to discuss that.

3 In your witness statement, you've said that the
4 first time the default fee was the intra-EEA MIF was
5 1 November 1996 and I'm asking you whether or not you
6 accept that that is now mistaken.

7 MR JUSTICE ROTH: Well, Mr Hawkins, if you just look at your
8 second witness statement at page 9 of the statement,
9 paragraph 23 {A/13.1/9}, you say:

10 "Notwithstanding that there were discussions at the
11 time about which interchange fee applied pending
12 arbitration under the rules applicable to the UK,
13 I clearly recall that until November 1996 I (and as far
14 as I am aware all the other UK member banks represented
15 on the MEPUK Board) considered that the MCI
16 inter-regional rate applied pending arbitration in the
17 event that interchange fees were not agreed
18 bilaterally ..."

19 A. Yes.

20 MR JUSTICE ROTH: What I think you have accepted, having
21 been shown what MEPUK told the OFT, that, in fact, it
22 wasn't -- it was before November 1996 that the EEA
23 intra-regional fee or intra-European fee was the
24 fallback and not the MCI inter-regional rate. So what
25 you're being asked is do you accept, therefore, it

1 follows that you're saying until November 1996, that
2 can't be right, can it?

3 A. No, sir, it must have been mistaken in the year here,
4 yes.

5 MR JUSTICE ROTH: Yes. Well, that's what I think you're
6 being asked to --

7 MS DEMETRIOU: Thank you.

8 A. If I may say so, sir, later in that year, 1996,
9 I received a letter from the Mastercard executive vice
10 president to confirm that the Mastercard interchange --
11 intra-region -- sorry, inter-country rate was the one
12 that applied.

13 MS DEMETRIOU: Mr Hawkins, thank you. Going back to
14 Mr Nelson's email, we saw that was December 1994. So we
15 see clearly at that stage that he considered that the
16 fallback was the intra-EEA MIF. Now, he was, as we've
17 established, a senior figure at Europay with direct
18 responsibility for the UK; correct?

19 A. As far as I'm aware, yes.

20 Q. So it would be very surprising, wouldn't it, if he was
21 confused about the basic structure of UK interchange
22 fees?

23 A. It would be quite surprising. I can't recall him
24 attending too many MEPUK meetings, though. He may have
25 attended some, but --

1 Q. But he would have been well aware of the rules.

2 A. I can only assume that. I can't actually say it as
3 a matter of fact.

4 Q. Alright. Now, let's have a look at your second
5 statement at paragraph 17, please {A/13.1/6}. Thank
6 you. And that refers to minutes of a meeting in
7 January 1994. Do you see that in your statement? And
8 we can see that document at {C2/59/1}.

9 So just so that you can just remind yourself of
10 this, presumably you've looked at this, have you, in
11 preparing to give evidence? You're familiar with it.

12 A. Yes, I am.

13 Q. Yes. And we can see the date of that is January 1994
14 and that you were chairing the meeting. Do you see
15 that?

16 A. Yes.

17 Q. And you, in fact, as we've seen, discuss this document
18 in your statement.

19 And if we go to page 19 {C2/59/19}, this is a flow
20 chart that was produced by Europay; correct?

21 A. Yes.

22 Q. And you discuss it in your evidence and you follow the
23 flow chart through in your witness statement, and if we
24 go back -- could we put, please, Mr Hawkins' second
25 witness statement, {A/13.1/6}, side-by-side with this

1 document. That would be very helpful.

2 So we can see there that you discuss this flow chart
3 and if we go to the sort of punchline, which is on the
4 next page of your witness statement {A/13.1/7}, the way
5 you follow this through, you end up -- if we go to
6 subparagraph (e), you say:

7 "This ... leads to the outcome that 'Europay sets
8 the Interchange Fee' ..."

9 And that's -- if we look at the flow chart
10 {C2/59/19}, that's the bottom box; correct? "Europay
11 sets [the] Interchange Fee"; correct?

12 A. Correct.

13 Q. And we've established, haven't we, that Europay sets the
14 EEA MIF; correct?

15 A. Well, if I may say, the very top of the chart there is,
16 "Can all Members agree [an] Interchange Fee?"

17 Q. Mr Hawkins, I'm going to come to that. I'm just asking
18 you a simple question at the moment.

19 So you accept that Europay sets the EEA MIF;
20 correct?

21 A. Yes. Don't forget that this applies to all countries
22 within the Europay region.

23 Q. It does.

24 And you accept, don't you, that Europay does not set
25 the inter-regional fee; correct?

1 A. The inter-regional fee?

2 Q. Inter-regional fee. That's not set by Europay.

3 A. Right.

4 Q. Do you accept that?

5 A. Yes. We're getting our "inter" and "intra" -- we need

6 to be clear --

7 Q. It is. I know. I need to --

8 A. -- about what we're talking about.

9 Q. -- be clearer in what I'm saying.

10 The inter-regional fee was set by Mastercard

11 International.

12 A. Yes.

13 Q. Now, let's look at the flow chart again, and we had

14 followed it around in a slightly different way. Let me

15 briefly take you through that, although I'm not sure it

16 makes much difference in the end.

17 So the starting box is, "Can all Members Agree on

18 Interchange Fee?" So the starting point is that if all

19 members have agreed on an interchange fee, this flow

20 chart doesn't apply; correct?

21 A. That's right.

22 Q. So, for example, if member banks have agreed a bilateral

23 arrangement, that bilateral arrangement takes

24 precedence, so you don't get into this; correct?

25 A. That's right.

1 Q. But assuming that there is no agreement, the next box
2 from that is, "Are the Members allowed to agree
3 an intra-country Interchange Fee?" Do you see that
4 diamond shape?

5 A. I see that. Can I comment, sir, on the first box, "Can
6 all Members agree [an] Interchange Fee?" The MEPUK
7 board, in fact, did agree reference rates, and those
8 reference rates were important to us individually in
9 deciding how we should negotiate our bilateral
10 agreements.

11 Q. Mr Hawkins, I am going to come on to reference rates, so
12 you'll get your chance to speak about those. I can
13 promise you that.

14 Now, "Are the Members allowed to agree
15 an intra-country ... Fee?" Now, we know that the UK
16 did, in the end, set an intra-country rate, didn't it?
17 So they were allowed to set an intra-country interchange
18 fee, weren't they?

19 A. Yes. I think I started off by saying that the answer to
20 the very first box is yes, UK members could agree.

21 Q. Okay.

22 A. So the rest of the chart doesn't follow.

23 Q. Alright. Well, let's follow through "Yes". So then we
24 see "Yes":

25 "Does any Member (or combination of Members) with

1 10% of volume wish to refer a dispute?"

2 So if a member has enough volume, they can decide to
3 arbitrate; that's right, isn't it?

4 A. Yes, you're in the realms of the hypothetical realms
5 here because as I started by explaining, the UK members
6 effectively did agree an interchange fee, so the chart
7 didn't apply.

8 Q. Well, Mr Hawkins, just bear with me. Humour me for
9 a minute, because we're in 1994 here. This is 1994.

10 So "Does any Member ... wish to refer [a] dispute?"
11 Now, let's say a member doesn't decide to arbitrate and
12 the answer is "No", then we get to a diamond which says:

13 "Is there an effective intra-country Interchange Fee
14 in place?"

15 And the answer -- until 1997 when the UK fallback
16 MIF was introduced, the answer in the UK was no; that's
17 right, isn't it?

18 A. Sorry, sir, I come back to the point even in 1994, "Can
19 all Members agree [an] Interchange Fee", effectively, we
20 had a mechanism for that, which was the reference rate.

21 Q. Well, that --

22 MR JUSTICE ROTH: But even if one looks at your statement
23 where you introduce the flow chart, Mr Hawkins, which is
24 your second statement at page 6 --

25 A. Yes.

1 MR JUSTICE ROTH: -- you follow it through in explaining the
2 answers, and I think that's what -- you make the point
3 about the first question that -- you say {A/13.1/6}:

4 "... it is not clear to me that [it] is applicable
5 to the UK."

6 For the reason you have just given again about
7 reference rates, but you do make the assumption: well,
8 if the answer is no, then what? And counsel is just
9 following through that assumption --

10 A. I understand, yes, sir.

11 MR JUSTICE ROTH: -- so if you please answer her questions.

12 MS DEMETRIOU: Thank you, sir.

13 So then we see -- so I'm on the diamond that says
14 {C2/59/19}:

15 "Is there an effective intra-country Interchange Fee
16 in place?"

17 Now, say you're wrong about the reference fee and on
18 the assumption you're wrong about that, then in 1994,
19 there wasn't an effective intra-country interchange fee
20 in place, was there?

21 A. Well, I'll take that as the hypothetical situation,
22 bearing in mind what I've already said.

23 Q. Okay. So you're agreeing with me on the assumption that
24 you're wrong about the reference fees being an effective
25 intra-country interchange fee?

- 1 A. I'm following you.
- 2 Q. Are you agreeing with me, Mr Hawkins? So if you're
3 wrong -- there's going to be a dispute, an argument,
4 about whether or not you're right that the reference
5 rate could constitute in the rules an effective
6 intra-country interchange fee. But say you're wrong
7 about that, then am I right to say that in 1994, there
8 wasn't an effective intra-country interchange fee
9 because the UK MIF was only introduced in November '97?
- 10 A. Sorry, I repeat, sir, that we did have an agreed
11 interchange fee in the UK by reference to the reference
12 rate that the MEPUK board used to pass. I don't want to
13 keep labouring that because I will follow the chart, but
14 that is my basic position.
- 15 Q. I know that that's your basic position and I'm asking
16 you to imagine a world in which you're wrong about that,
17 Mr Hawkins, and if you're wrong that the reference rate
18 was -- could be -- was an effective intra-country
19 interchange fee --
- 20 A. Yes.
- 21 Q. -- then am I right in saying that until 1 November 1997,
22 there wasn't an effective inter-country -- intra-country
23 interchange fee in place if you discount the reference
24 fee?
- 25 A. I'll accept that as a premise.

1 Q. Okay. Then where we get to in the chart is, "The
2 intra-country Interchange Fee will apply", and I think
3 we can agree that that is the EEA MIF; correct?

4 A. That's what that is saying.

5 Q. I'm so sorry, it's "No". So I'm saying it's "No":

6 "The intra-region Interchange Fee will apply."

7 So if there's no effective intra-country interchange
8 fee, the answer is no, we say, and then we get to "the
9 intra-region Interchange Fee will apply", intra-region
10 interchange fee, and that is the EEA MIF; correct?

11 A. Yes, even at this -- the writing is quite small,
12 actually, so --

13 Q. It is. Do you want -- we can enlarge it.

14 MR JUSTICE ROTH: Yes, I don't think we need the witness
15 statement because we've got --

16 MS DEMETRIOU: Yes, we can take the witness statement away.

17 So I think you've accepted my premise that on the
18 basis you're wrong about reference rates --

19 A. Yes.

20 Q. -- and there was no effective intra-country interchange
21 fee in place, then we follow up "No" and then we get to,
22 "The intra-region Interchange Fee will apply", and
23 that's -- we can see that's the EEA MIF; correct?

24 MR JUSTICE ROTH: How do we get -- I'm lost. You then get
25 to:

1 "Are the Members allowed to agree ..."

2 And what --

3 MS DEMETRIOU: That was at the beginning and we established
4 that they were allowed to agree, so Mr --

5 MR JUSTICE ROTH: Is that right?

6 MS DEMETRIOU: Well, Mr Hawkins said "yes" when I asked him
7 that question, and we think they were because they then
8 did agree.

9 MR JUSTICE ROTH: Well, later.

10 MS DEMETRIOU: Yes.

11 MR JUSTICE ROTH: But were they rule -- were you allowed to
12 make rules in MEPUK at that point?

13 A. Sir, what I've explained is the MEPUK board considered
14 cost studies. We took other factors into consideration
15 and then we came up with the reference rates.

16 MR JUSTICE ROTH: Yes.

17 A. So as far as I'm concerned, that is the setting of
18 the -- a UK rate.

19 MR JUSTICE ROTH: Well, that's a reference rate.

20 A. Yes.

21 MR JUSTICE ROTH: But subsequently, you actually issued,
22 a few years later, a UK rate which was not a reference
23 rate. It was actually -- it became a rule, didn't it,
24 effectively?

25 A. Yes, sir, that's when we worked out how we could have

1 UK rules in place. It was very important to have those.

2 We started discussions --

3 MR JUSTICE ROTH: Yes.

4 A. -- years before and eventually we got there.

5 MR JUSTICE ROTH: Yes. And were you allowed to have rules?

6 Did you have authority back in 1994 to make rules under

7 the -- by MCI or Europay for the UK?

8 A. We -- we weren't allowed to licence. We were not

9 a licencing authority. We, at that stage, were not

10 a rule-making body, but what we did do was to discuss

11 many things that were relevant to the UK market --

12 MR JUSTICE ROTH: Yes.

13 A. -- and make decisions on them, actually.

14 MR JUSTICE ROTH: Yes.

15 MS DEMETRIOU: So --

16 MR JUSTICE ROTH: I'm just trying to understand --

17 I appreciate the reference rate and the value, but was

18 there a distinction when you became a rule-making body?

19 A. Yes, there was a distinction because at that stage, we

20 actually could put in the UK rate into the rules. So

21 the Europay rate, which was not relevant to the UK,

22 could then be got rid of and the UK rate put in its

23 place where it belonged.

24 MR JUSTICE ROTH: Yes. Well, I'm just looking at the second

25 box:

1 "Are the Members allowed to agree an intra-country
2 Interchange Fee?"

3 I mean, there may be a distinction between agreeing
4 it as a reference rate and actually making it a rule.

5 A. Well, I've accepted the premise that counsel has come up
6 with --

7 MR JUSTICE ROTH: Yes.

8 A. -- and, yes, following that, the answer would be "no".

9 MR JUSTICE ROTH: Yes.

10 MS DEMETRIOU: So, Mr Hawkins, whichever way you go on this
11 flow chart, there's no reference at all to the
12 inter-regional rate, is there?

13 A. Not as far as Europay were concerned, no.

14 Q. And looking at the question of arbitration, which we'll
15 come back to, there's nothing in this flow chart that
16 indicates that arbitration is compulsory, is there?

17 A. It is compulsory to the extent that there has to be
18 a rate between banks because otherwise, as
19 I've explained before, the system simply wouldn't work.

20 Q. I understand that there has to be a rate, Mr Hawkins,
21 but our position in this litigation, which I'm sure you
22 understand, is that if there wasn't an agreed rate, the
23 default rate would apply, and what we see here is
24 Europay's understanding of that position. So whichever
25 way you go in the flow chart, the default rate is the

1 EEA MIF set by it.

2 And the point I'm now putting to you is that there's
3 nothing in this flow chart that indicates that
4 arbitration is compulsory before you get to the default
5 rate; that's right, isn't it?

6 A. According to this flow chart, yes.

7 Q. Alright.

8 A. If I may explain, sir, that the UK -- may I ...

9 MR JUSTICE ROTH: Well, I think you're just being asked
10 about the flow chart at the moment, so I think if we
11 stick with that and then come back to the UK.

12 MS DEMETRIOU: Now, could we turn, please, to the document
13 that you refer to at -- well, let's turn up your second
14 witness statement at paragraph 18. So that's at
15 {A/13.1/7}.

16 A. Yes.

17 Q. And you refer here to a paper sent to Eileen Hall. Do
18 you see that?

19 A. Yes, I see.

20 Q. And you refer to a letter, and the letter from Mr Turner
21 to Ms Hall that's referred to there is -- let's turn
22 that up. It's at {C4/26/3} and it's dated
23 30 October 1996.

24 And Ms Hall, I think you've said in your statement,
25 was working on the UK Rule Book; correct?

1 A. Yes.

2 Q. And this -- this timing-wise is just shortly before the
3 UK Rules are adopted and brought into force; correct?

4 A. Yes, that's what she was working on, yes.

5 Q. And Mr Turner is -- if we go -- are we on page 3, sorry?
6 Yes.

7 So Mr Turner is here explaining that -- he's
8 identifying what the current rules are and so if you
9 look at -- let's read it through from the beginning and
10 we just skip the first few lines, it says:

11 "Once agreed, it would be ..."

12 Well, let's take it from the beginning so we see the
13 context:

14 "At last Thursday's R&C meeting, there was further
15 discussion on UK interchange but more particularly the
16 arbitration procedures to be followed where a member is
17 unable to agree on the fee for intra-country
18 transactions. It was further agreed at that meeting
19 that I should, on behalf of the Committee, write to you
20 seeking your involvement in defining the UK arbitration
21 process. Once agreed, it would be the intention that
22 these would be incorporated in the Domestic Rule Book at
23 a future date. The matter of the moment is, however, to
24 determine what the current rules are for the UK and to
25 help things along it was suggested that I make available

1 to you what papers I had pulled together over the years
2 on the subject (now enclosed)."

3 And he's there identifying -- you then see that he
4 identifies what the current rules are, and those are the
5 rules that you've referred to in your statement too;
6 correct? So he's got the right rules.

7 A. Yes.

8 Q. And then he refers to an internal discussion note, so he
9 says at the end of this section:

10 "It is difficult to look at arbitration to the
11 exclusion of interchange. In this connection you may
12 like to cast your eye over an internal discussion note
13 I prepared highlighting the need for clarification on
14 'fallback' and arbitration."

15 And we can see that at page 26 {C4/26/26}. You see
16 the heading of the note, and you talk about it in your
17 statement. And he says that -- under the heading
18 "Interchange", he says:

19 "[At] the present time there are 'fallback' rates
20 for inter-region transactions (agreed by MCI) and
21 European inter-country transactions (agreed by Europay).
22 There are no such 'fallback' rates for intra UK
23 transactions and individual UK members are expected to
24 negotiate interchange fees between one another. In the
25 absence of a bilateral arrangement ... Europay has ruled

1 that the European inter-country [rate] will apply."

2 So, first of all, first question is you agree that
3 that refers to the EEA MIF; correct?

4 A. Yes, it does.

5 Q. And the application of the inter-country rate in the
6 absence of a bilateral arrangement means that it is
7 a fallback; correct?

8 A. Sorry, are you carrying on reading?

9 Q. No, I'm asking you a question, which is if the
10 intra-EEA MIF applies where there's no bilateral
11 agreement, then it means it's operating as a fallback;
12 correct?

13 A. It's there for fail-safe purposes, yes.

14 Q. Well, can we agree it's a fallback?

15 A. Fallback.

16 Q. Now, let's go back to your second witness statement and
17 see what you say about that. If we could put them
18 side-by-side again, please, that's {A/13.1/8}. And
19 let's look at paragraph 22 and you say -- so you're
20 explaining this paper here and you say that:

21 "... this paper was written in the context of the
22 formulation of a UK domestic rule book in 1996, which is
23 the project that Mrs Hall was working on. I note the
24 reference in the paper to Europay having 'ruled' on the
25 fallback. Having been referred to the notes I made ...

1 [in] February 1997 ... I recall that towards the end of
2 1996 Europay became the sole licensor of
3 Mastercard/Eurocard in Europe and was granted full
4 delegated authority for the Mastercard/Eurocard scheme
5 in Europe ... by MCI. As a result, although I do not
6 recall specifically, I would infer that Europay felt it
7 had the authority to rule that going forwards the
8 EEA MIF should apply to UK domestic transactions in the
9 absence of bilateral agreement, whereas previously there
10 had been a lack of clarity under the rules and we had
11 understood that the MCI international inter-regional
12 rate applied."

13 So what you are saying here is towards the end of
14 1996, you're saying Europay became the sole licensor in
15 Europe of Mastercard; correct? That's what you're
16 saying. So there was a change at the end of 1996.

17 A. That's right.

18 Q. And you're saying that that perhaps, although you don't
19 recall, explains why there's the reference in the paper
20 to Europay ruling that the fallback rate is the
21 intra-EEA MIF.

22 A. Yes.

23 Q. And you're saying that having gained this authority in
24 late 1996, its ruling was a prospective, forward-looking
25 ruling; is that your evidence?

1 A. Sorry, I didn't quite understand that.

2 Q. No, let me take it again. So you're explaining here in
3 this witness statement, in paragraph 22 --

4 A. Yes.

5 Q. -- the reference to -- in this paper that we see --

6 A. Yes.

7 Q. -- to Europay having ruled that the EEA MIF is the
8 fallback; correct?

9 A. Yes.

10 Q. You're addressing that in paragraph 22.

11 A. Yes.

12 Q. And you're seeking to explain it by reference to
13 a change that happened at the end of 1996; correct?

14 A. Yes.

15 Q. And that change was that Europay was granted full
16 delegated authority for Europe.

17 A. That's right. Yes, I've accepted that.

18 Q. So you're saying that the inference that you make --
19 although fairly, you say you don't recall this
20 specifically, you say the inference is that from that
21 point at the end of 1996, Europay felt it had the
22 authority to rule going forwards that the EEA MIF would
23 apply as a default; correct?

24 A. Correct.

25 Q. But, first of all, Mr Hawkins, we've seen, haven't we,

1 and you've accepted, that prior to the end of 1996, the
2 EEA MIF applied as a default?

3 A. We -- we have seen that, but my reference to 1996 is
4 echoed by the -- Mr Turner's references and everything
5 that was happening at that time.

6 Q. Mr Hawkins, let's just -- perhaps if you could just
7 answer my question. So you're trying to explain this
8 reference to Europay having ruled by reference to
9 a change that took place in structure of Mastercard at
10 the end of 1996.

11 A. Yes.

12 Q. You're saying Mastercard got authority, and that's
13 why -- you're inferring -- to be fair to you, you're not
14 recalling; you're inferring --

15 A. Yes.

16 Q. -- that it felt it had authority from that stage, from
17 the end of 1996, to rule going forwards; correct?

18 A. Yes.

19 Q. Europay, I'm sorry. Thank you. Europay.

20 I -- I got confused, Mr Hawkins.

21 So going back to your statement, you're saying that
22 Europay got authority at the end of 1996, full delegated
23 authority, to take decisions.

24 A. Yes.

25 Q. And that you're saying that -- you're inferring,

1 although you don't remember, that Europay would have
2 felt it had authority because of that delegation to rule
3 going forwards that the EEA MIF should be the default;
4 correct? That's your evidence.

5 A. That's my evidence.

6 Q. And do you now accept that that inference must be
7 mistaken because we've seen that prior to 1996, the
8 EEA MIF was the default?

9 A. That was the -- the report to the OFT and it was
10 asterisked to that -- to that extent, yes.

11 Q. Well, Mr Hawkins, it's not just the report to the OFT,
12 is it? We've also seen Europay's notification to the
13 Commission dated May 1993 where it said exactly the same
14 thing, haven't we?

15 A. Yes.

16 Q. And we've also seen the flow chart attached to the
17 minutes from January 1994 showing that Europay thought
18 at that stage too that the intra-EEA MIF was the
19 fallback; correct?

20 A. Yes.

21 Q. So to be fair to you, you say you don't specifically
22 recall why it was said that Europay ruled, but would you
23 accept that the inference you draw here must be
24 mistaken?

25 A. No, I infer that they believe they had the -- now the

1 authority to do so.

2 Q. But, Mr Hawkins, let's look carefully at what you say.

3 You say that you would infer that Europay felt it had
4 the authority to rule that going forwards, going
5 forwards from the end of 1996, the EEA MIF should apply
6 to UK domestic transactions, but we've seen very clearly
7 that Europay was saying back in 1993 that the EEA MIF
8 applied as a default to domestic transactions. It said
9 that to the Commission.

10 A. Well, that's what they said, but it was not the case in
11 the -- in the UK.

12 Q. So you disagree with what Europay said to the
13 Commission. You say that that must be faulty, do you?

14 A. Yes, because in the UK at that time in 1993 you're
15 talking about, the Mastercard international rate applied
16 as fallback.

17 Q. Well, that's not what -- we've seen -- you accept that's
18 not what Europay told the Commission. That wasn't its
19 view at the time.

20 A. Europay were talking about the entire European region.
21 The UK was always slightly different from the other
22 European countries in terms of its credit card
23 development.

24 Q. Well, Mr Hawkins, the Europay Rules applied to the whole
25 region, didn't they, alongside the Mastercard Rules?

1 A. Alongside the Mastercard Rules.

2 Q. Yes, and we've seen that the Europay Rules and the
3 Mastercard Rules refer to an international fee as the
4 fallback; yes?

5 A. Yes.

6 Q. And we've seen that the way that Europay -- what Europay
7 think back in 1993 -- not only what they think; what
8 they told the regulator -- was that that was the
9 intra-EEA MIF. We've seen that, haven't we?

10 A. That's what they said.

11 Q. And you're saying that they were mistaken.

12 A. I am just saying they are, sir, mistaken in terms of
13 what the UK did in practice.

14 Q. Mr Hawkins, the UK was subject to exactly the same rules
15 as the other European countries in the EEA, wasn't it?

16 A. It was subject to Mastercard and Europay Rules, yes.
17 But we did at this time, sir, if I may say, look at
18 forming a Mastercard -- a separate Mastercard region
19 because we were such a differently developed market.

20 Q. But you didn't do that, did you? That didn't happen.

21 A. No, we didn't in the event.

22 MS DEMETRIOU: Now, let's go back to Mr Turner's notes.

23 Sir, I'm looking at the time. I only have a couple
24 of questions on this note and then I can pause, if that
25 would be Alright.

1 MR JUSTICE ROTH: Yes, let's finish.

2 MS DEMETRIOU: Thank you.

3 If we go back to Mr Turner's note at {C4/26/26} on
4 the screen, we see that he notes that -- I'm looking at
5 the bottom of the page here. He says both sets of
6 rules, so that's the Mastercard Rules and the Eurocard
7 Rule Book, which both apply:

8 "... both rules refer to dispute situations it could
9 be argued that it would be more appropriate for the
10 international rate to be used in the UK where there is
11 no bilateral agreement in existence."

12 Now, when he refers to "international" there,
13 I think he must have in mind the inter-regional fee
14 because he's then comparing it to the current intra-EEA
15 MIF; yes? Do you agree with that? I think you would
16 agree with that.

17 A. Those are the rates that are quoted underneath, yes.

18 Q. Yes. So when he says that it could be argued it would
19 be more appropriate for the international rate to be
20 used in the UK, rather than -- he says this compares
21 with current intra-European rates. He says:

22 "... the international rates will be 1.51% plus
23 US\$0.10 for standard transactions and 1.10% for
24 electronic."

25 So when he's referring to "international" there, he

1 must have in mind the inter-regional fee; yes?

2 A. Oh, he's very definitely talking about international
3 rates. He's quoting them. Dollars, for example,
4 10 cents --

5 Q. Yes, I think we're agreeing --

6 MR JUSTICE ROTH: It's the inter -- he's clearly not talking
7 about the EEA rate, is he? He's talking about the
8 MCI --

9 A. That's right.

10 MR JUSTICE ROTH: -- international rate.

11 MS DEMETRIOU: Yes. So we agree on that, Mr Hawkins.

12 Then on the next page, he says -- page 27

13 {C4/26/27}, he says:

14 "As an acquirer, I know which rates I would wish to
15 apply in the absence of a bilateral agreement!"

16 And what he means there is that he would want the
17 lower EEA MIF to apply; correct?

18 A. I assume that that may be the case. He doesn't actually
19 say so.

20 MR JUSTICE ROTH: But that's what -- well, he says -- he
21 writes on the basis that one would understand what he
22 means.

23 A. Yes, he does it with an exclamation mark and that was
24 tongue-in-cheek.

25 MR JUSTICE ROTH: And you would understand him to be

1 referring to the lower rate.

2 A. Yes.

3 MS DEMETRIOU: And the reason for that is that as

4 an acquirer, he would generally want interchange fees to
5 be lower; correct?

6 A. Theoretically that is the case, but this is theoretical.

7 Q. Well, it doesn't seem very theoretical. He is saying he
8 knows which rates he would wish to apply and he's
9 then -- he's saying it in a way, as the Chairman has
10 noted, which assumes that everybody would know what he's
11 talking about.

12 And the position is, isn't it, Mr Hawkins, is that
13 like Mr Warren, he would be able to use the lower
14 EEA MIF as leverage in bilateral negotiations, wouldn't
15 he --

16 A. Well --

17 Q. -- as an acquirer?

18 A. Sorry. I can't impute what his views were, but I see
19 that it has an exclamation mark at the end there and
20 therefore, as I said, I think it's a bit tongue-in-cheek
21 because he's not going to actually do that in practice.

22 Q. Mr Hawkins, it's actually just logical, isn't it, that
23 as an acquirer, he would prefer lower rates?

24 A. It's not logical. The interchange fee structure didn't
25 work in that way. Nobody gamed the system consistently,

1 as far as I am aware. We certainly did not in NatWest.

2 Q. Well, Mr Hawkins, throughout the evidence, all of the
3 Mastercard witnesses are saying that there was pressure
4 from acquirers and retailers, downward pressure, on
5 rates and so I didn't think it was controversial that,
6 generally speaking, acquirers would want lower rates.

7 A. That is downward pressure on the overall interchange
8 fees. That is not as between issuer and acquirer, which
9 is I think what you're implying; that there is a game to
10 be played whether you are a net issuer or net acquirer.

11 Q. Well --

12 A. That didn't happen, as far as I'm aware.

13 Q. So is this your evidence: that an acquirer would have
14 an interest in there being a downward pressure generally
15 on interchange fees but would have no commercial
16 interest in its own interchange fees being lower? Is
17 that your evidence, because it seems unlikely?

18 A. I think you said "its interchange fee" and it's not "its
19 interchange fee"; it is "the interchange fee".

20 Q. The interchange fee applicable to -- so it would not be
21 self-interested; is that your evidence? So no acquirers
22 would have a commercial interest in interchange fees
23 applying to their transactions being lower. I don't
24 think that is what you're saying, is it, Mr Hawkins?

25 A. They might have an interest in that, but that's not the

1 way it worked in practice.

2 MS DEMETRIOU: Right, sir, I think that might be
3 a convenient place to stop. In fact, could I just
4 ask -- could I just go to one more document? It's very
5 brief, and then I can move on to a different topic after
6 the break.

7 MR JUSTICE ROTH: Yes.

8 MS DEMETRIOU: So I want to look quickly at
9 Mr van den Bergh's evidence. So this is {A/13.5/7} and
10 let's look at paragraph 25. So he says that his
11 recollection -- so you understand that Mr Van den Bergh
12 is a witness called by Mastercard in these proceedings?

13 A. Could I just say I don't think I've seen this?

14 Q. You haven't seen this. Okay, that's fair. Let's have
15 a look at what he says. So he says --

16 MR JUSTICE ROTH: Do you know who he is?

17 A. I -- I didn't know him personally, no. No, sir.

18 MS DEMETRIOU: He says at paragraph 25 that his recollection
19 is that:

20 "... the interchange fees that applied from
21 a systems perspective to transactions processed through
22 ECCSS would be determined as follows: first, any
23 bilaterally agreed interchange fee; second, if there was
24 no bilateral rate, then any domestic MIF; third, if
25 there was no bilateral or domestic MIF, then the

1 regional cross- border rate (i.e. the intra-EEA MIF).
2 Finally, if there was no cross-border rate, then the
3 inter-regional rate."

4 And then let's look at paragraph 28 as well. So he
5 says:

6 "Mr Dhaene ..."

7 That's Mr Merricks' witness:

8 "... is correct in theory that if an operator or
9 support engineer failed to input an agreed bilateral
10 interchange fee, then the transactions between those
11 two banks might in some circumstances have been subject
12 to the next level of default MIF in the system. In the
13 first instance, this would be the domestic MIF. If no
14 domestic MIF was in place, then the intra-EEA MIF would
15 apply."

16 So Mr van den Bergh's evidence is that on the
17 system, the default was the intra-EEA MIF if there was
18 no bilateral agreement. And you're not in a position to
19 dispute that evidence about the system, are you?

20 A. Can I ask what year this refers to, what period, please?

21 Q. He's referring to the position throughout this claim
22 period, so from -- certainly from when ECCSS -- there
23 may be a debate as to when they first started processing
24 domestic transactions, but let's say from 1993.

25 A. You're asking me to comment on what he's said?

1 Q. I'm asking -- what I'm saying to you is that you're not
2 in a position to say that he's wrong about that, are
3 you?

4 A. Well, I am in a position to say that that didn't apply
5 to the UK traffic, or certainly not NatWest's.

6 Q. So you disagree with his evidence?

7 A. I haven't seen this evidence before. That applies to
8 the whole of Europe.

9 Q. Alright.

10 A. There must be exceptions and I'm talking about the UK.

11 MS DEMETRIOU: Alright, sir. I think that is a convenient
12 time to take a break. I'm sorry, I've gone slightly
13 over.

14 MR JUSTICE ROTH: Yes, I think we'll take our ten-minute
15 break and return at 12.15.

16 (12.05 pm)

17 (A short break)

18 (12.19 pm)

19 MS DEMETRIOU: I'd like to show you another document now,
20 Mr Hawkins. Let's go to {C1/242/1}, please. So you can
21 see this is dated, at the bottom of the page,
22 October 1992 and it's a response by Europay to a request
23 for information from the European Commission. Do you
24 see that?

25 A. Yes.

1 Q. And if we go -- is this a document you've looked at in
2 preparing to give evidence or is it the first time
3 you're looking at it?

4 A. I haven't seen this, no.

5 Q. Haven't seen it.

6 Let's go to page 11 {C1/242/11} and if we look at
7 question -- the second question, 2.2.2.1.2, and that
8 says -- the question is:

9 "On what elements did Eurocard/MasterCard reach the
10 conclusion that the competitive reality required
11 an interchange fee below the cost-based International
12 Interchange Fee of 1.37% + [8] cents ..."

13 So that international fee, first of all, is
14 referring to the inter-regional fee, isn't it, the --

15 A. Yes.

16 Q. Yes. Then if we read what is said, so it's said:

17 "The decision regarding the establishment of 1% as
18 the MasterCard interchange fee for transactions
19 involving European and non-European licensees was made
20 by the MCI Board of Directors in 1986. The decision was
21 made after consideration of several competitive issues,
22 including the following:

23 "Firstly, the area of Southern Europe has always
24 been more of a tourist destination area. In order to
25 ensure maximum merchant coverage in this area and

1 elsewhere in Europe for MasterCard cardholders
2 travelling there from outside of Europe, it was believed
3 that a 1% international interchange fee would be
4 required to ensure the broadest merchant acceptance.

5 "Secondly, Visa, our primary competitor, has long
6 had an international interchange fee of 1% and this was
7 a particular problem in MCI's attempts to expand its
8 merchant coverage in Europe."

9 Now, this is talking about a 1% fee as the
10 interchange fee for transactions involving European and
11 non-European licensees; correct?

12 A. So it appears, yes.

13 Q. And transactions involving European and non-European
14 licensees attracted the inter-regional rate, didn't
15 they?

16 A. Yes.

17 Q. But that inter-regional rate was reduced, wasn't it, for
18 transactions between European and non-European
19 licensees; correct?

20 A. So it appears, yes.

21 Q. And it was set at 1%. We see that.

22 A. That's what it says, yes.

23 Q. Well, do you recollect that?

24 A. Not specifically, no.

25 Q. And that decision, we can see there, was taken in 1986,

1 and that rate was well below the usual inter-regional
2 fee, wasn't it?

3 A. I see that, yes.

4 Q. Now, if we go -- but you don't recollect this; that
5 there was a reduction in the inter-regional fee for
6 international transactions between European and
7 non-European banks?

8 A. Not in 1986, no.

9 Q. Well, do you recollect it in the early 1990s?

10 A. I'm aware of the 1% fee, yes.

11 Q. You are aware of it?

12 A. Yes, yes. I thought you meant, sorry, the action --
13 action of the Mastercard board of directors.

14 Q. No. No, but you were aware of the reduction in the
15 inter-regional fee for transactions involving European
16 and non-European licensees, so you knew that was 1%.

17 A. I'm aware that the fee was 1%, yes, sir.

18 Q. And that that was lower than the normal inter-regional
19 fee, which was -- you can see there at that stage was
20 1.37% plus 8 cents; correct?

21 A. Yes.

22 Q. Now, let's go to {C1/255/60}, please, and we can see
23 from the top of the page that these are minutes of --
24 or, rather, it may be an agenda, but in any event, we'll
25 see that in a second when we scroll down. But it's

1 a meeting of 29 October 1992 of the Rules & Compliance
2 Committee and we can see that you're in the chair;
3 correct?

4 A. Yes. Yes, that's right.

5 Q. And we see -- if we go to page 75, please {C1/255/75},
6 we can see about halfway down the page there's
7 a paragraph marked "International Interchange Fees -
8 European Exception". Do you see that?

9 A. Yes.

10 Q. And you there comment, if we go down -- so Mr Dicken
11 says something and then we see:

12 "Mr ... Hawkins commented that Intra-European
13 transactions benefited from the 1% rate but that
14 transactions outside Europe would attract the full
15 international rate of 1.44% from 1993."

16 And it says that -- so, first of all, just pausing
17 there, when you said intra-European transactions
18 benefited from the 1% rate, you were referring there to
19 the EEA MIF; correct?

20 A. I'm referring to the European countries, yes.

21 Q. Yes, so that's the intra-EEA MIF.

22 A. Well, it says 1% there.

23 Q. Yes, but when you comment that intra-European
24 transactions benefited from the 1% rate, the rate that
25 would have applied -- the rule -- the interchange fee

1 that would have applied to intra-European transactions
2 was the intra-EEA MIF; correct?

3 A. Well, sorry, I don't specifically say so.

4 Q. Well, no, but --

5 MR JUSTICE ROTH: But is that what you mean?

6 A. I'm trying to recall what I meant at that time, sir, but
7 I suppose yes.

8 MS DEMETRIOU: Alright. Now, then you say that -- then you
9 were saying after that that transactions outside Europe
10 would attract the full international rate of 1.44% from
11 1993, and what you meant by "the full international
12 rate" was the undiscounted inter-regional fee; correct?

13 A. That's right, yes.

14 Q. And you say that this would be -- going back to the
15 text, you say that you felt:

16 "... the net acquirers - France, etc., - would
17 strongly resist any attempt to increase the 1% exception
18 rate and, therefore, ECI were considering a 'buffer'
19 arrangement."

20 So the position is, as I can understand it from
21 here, that there was a 1% exception rate in -- which was
22 applicable to transactions between Europe and outside
23 Europe, correct, and that was a discount from the higher
24 inter-regional fee; correct?

25 A. Yes.

1 Q. So we know that at least until 1993, the inter-regional
2 rate for transactions involving European licensees was
3 1%; correct?

4 A. It certainly seems the case from that, yes.

5 Q. And we know that the intra-EEA rate was also 1%;
6 correct?

7 A. Yes.

8 Q. So if, as you say in your statement, you thought at the
9 time that the inter-regional fee was the default, that
10 confusion could well have been because the rates were
11 exactly the same; correct?

12 A. No. I was quite clear that it was the inter-regional
13 rate.

14 Q. But you agree that the inter-regional rate at that point
15 in time was exactly the same as the intra-EEA rate?

16 A. So it would appear, coincidentally.

17 Q. Alright. Now, let's go to your first witness statement
18 at paragraph 63 to 64, so this is {A/7/18}. And what
19 you say here -- your evidence here is that prior to the
20 adoption of the UK Domestic Rule Book, which was in
21 November 1996, the default international fee only
22 applied pending arbitration and you say there were no
23 arbitrations or nearly no arbitrations; correct?

24 A. So I understand, yes.

25 Q. And if we look at paragraph 68 of your statement at

1 page 19 {A/7/19}, you say that in 1996 to 1997, you
2 accept that the EEA MIF applied as a default and that
3 there was no mention of arbitration. We see that in 69
4 {A/7/20}. You say that this version of the rules was
5 silent in relation to arbitration, but you say
6 arbitration continued in practice always to be available
7 as an option and you say that the only -- the EEA MIF,
8 even in that year, only applied in the absence of
9 a bilateral agreement and until any new rate was decided
10 through arbitration.

11 So your evidence, if I could summarise it in this
12 way, is because few, if any, arbitrations were
13 initiated, the fallback rates applied rarely, if ever;
14 yes? That's your evidence.

15 A. That's my evidence, yes.

16 Q. Now, let's look at {C6/149/1}, and we can see that this
17 is a response from Europay, so 20 July 1999, to the
18 Treasury's banking review and that's from Mr Bushby.
19 Did you know him?

20 A. I remember Mr Bushby, yes.

21 Q. You know Mr Bushby.

22 And if we go to page 7 {C6/149/7} and we look at the
23 bottom of the page, please, I just want to read this
24 passage. So it says:

25 "In order to provide efficient clearing and

1 settlement services, Europay established a company
2 called EPSS (Europay Payment Systems Services), which is
3 85% owned by Europay and 15% owned by MasterCard. EPSS
4 has developed a data communication network (EPS-Net) and
5 designed the Europay Common Clearing & Settlement System
6 (ECCSS). ECCSS can be used to settle domestic,
7 intra-regional and inter-regional transactions on all
8 Europay products ... The exchange of clearing data on
9 eurocheque paper cheques is performed bilaterally ..."

10 And if we go over the page {C6/149/8} and look at
11 the second and third paragraphs, so:

12 "When a cardholder uses a Europay-branded card in
13 a European country other than that in which the card was
14 issued - and in the UK in the case of UK domestic issued
15 cards where the acquirer has chosen to use Europay's
16 systems for the authorisation, clearing and settlement
17 of UK domestic transactions - the merchant's
18 authorisation request and the authorisation ... by the
19 issuer are routed via EPS-Net."

20 Then it says:

21 "The clearing (handling of transaction data
22 exchanged between the acquirer and the issuer) and
23 settlement (exchange of funds ...) are performed by EPSS
24 and Europay at the EPSS Central Site in Waterloo,
25 Belgium. "

1 Then we see:

2 "When a Europay product is used for domestic
3 transactions, authorisation, clearing and settlement are
4 processed either via a national network established and
5 run by the banks of the country in question or by EPSS.
6 EPSS only participates in the processing of domestic
7 transactions if requested to do so by ... licensee(s).
8 The major users of EPS-Net for domestic transaction
9 processing services are the UK, Ireland, Germany and
10 Italy. A national sub-network is operated by EPSS in
11 the UK on behalf of some acquirers who choose to submit
12 transactions directly to EPS-Net for authorisation,
13 clearing and settlement ..."

14 And I just want to ask you some questions, having
15 read now those paragraphs. So the first question is
16 that it's -- EPS-Net was used for cross-border
17 transactions, wasn't it?

18 A. Yes, I'd have to preface what I say by saying that I was
19 not an operations person. We had an operations division
20 that dealt with all that and I had an operations manager
21 who interfaced with them. So I have a general knowledge
22 of this, but not a detailed knowledge.

23 Q. That's very fair, Mr Hawkins, and we'll bear that in
24 mind.

25 Now, EPS-Net, to the best of your recollection and

1 from what we see here, it was used in some countries for
2 domestic transactions-- or for some domestic
3 transactions, and that was true of the United Kingdom;
4 correct?

5 A. So I understand.

6 Q. Do you remember that to be the case?

7 A. Yes, I suppose I do remember it, yes.

8 Q. Okay. And then if we turn up {C1/226/3}, please. So
9 this is an agenda for a MEPUK board meeting to be held
10 on 3 September 1992. And let's turn, please, to page 19
11 {C/226/19} and if we go to the highlighted section, it
12 says:

13 "It had been suggested that arrangements be made for
14 the UK 'fallback' rate to be incorporated into the EPSS
15 system in order that where two UK members have failed to
16 submit details of a bi-lateral arrangement, the system
17 would automatically default to the UK fallback rate as
18 opposed to the international fallback rate."

19 Now, we've already established yesterday that, and
20 you explained this to the Tribunal, you and others were
21 keen to have a UK cost-based rate operating as
22 a fallback in the rules; correct?

23 A. That's right, yes.

24 Q. And if we can go back to paragraph 61 of your
25 first statement on {A/7/17}, you discuss here -- and we

1 looked at this yesterday. You say that the reference
2 rates that you've been talking about were not formally
3 enshrined in the rules, but:

4 "... it was suggested that we ask MCI to include the
5 ... reference rates in its rules as the UK temporary
6 fallback ... pending arbitration."

7 And that's what we were looking at in that document;
8 yes? There was discussion about including those
9 reference rates as a formal fallback in the rules;
10 correct?

11 A. Yes.

12 Q. And you also explain that this never happened, in fact;
13 correct?

14 A. Not at that stage it did not, no.

15 Q. No, that's fair. So there was obviously a UK MIF from
16 the end of 1997.

17 A. Yes.

18 Q. And if we look at the end of that paragraph, at the end
19 of paragraph -- sorry, the end of page 17 of the bundle,
20 so it's the end of paragraph 61 of your witness
21 statement, you say:

22 "... I recall that it was suggested that we ask MCI
23 to include the MEPUK Board's reference rates in its
24 rules as the UK temporary fallback rate pending
25 arbitration."

1 But going back to {C1/226/19}, if we may, the
2 proposal here doesn't mention arbitration, does it? The
3 proposal here is that the system would automatically
4 default to the UK fallback rate; correct?

5 A. That's the implication, but arbitration was always
6 an option.

7 Q. It was always an option --

8 A. Yes.

9 Q. -- but here what's being said is that the reference rate
10 would be put into the rules so that where UK members
11 have failed to submit details of a bilateral
12 arrangement, the system would automatically default to
13 the UK fallback rate; correct? So there wouldn't be
14 a need for arbitration to take place.

15 MR JUSTICE ROTH: Well, is that a trick question? Well, let
16 the witness answer it, yes. If you're asking about
17 what -- how the system needed to operate, it may be
18 that's more appropriate to take up with Mr Van den
19 Bergh.

20 MS DEMETRIOU: Well, sir, at this point, I'm asking -- what
21 I'm asking is about the proposal back at that stage in
22 1992 to incorporate reference rates in the rules.

23 And the proposal at that stage was that there would
24 be an automatic default; that's right, isn't it,
25 Mr Hawkins?

1 A. The proposal at that stage was, sir. Had the UK been
2 able to -- had MEPUK been a fully delegated body to pass
3 its own rules, then we wouldn't have had any of this,
4 but we were very conscious of the competition law
5 issues, which is why we had the arrangements we did
6 have.

7 Q. So just going back to my question, is your
8 recollection -- so you were very keen on this proposal,
9 weren't you, Mr Hawkins, to enshrine the reference rates
10 in the UK Rules as a fallback?

11 A. Well, I was --

12 Q. In the Mastercard Rules, I'm so sorry.

13 A. Yes. I beg your pardon. I was keen because it was
14 properly based. It was based upon the cost studies and
15 the consideration market realities and, of course, the
16 competition. Those are the three planks the MEPUK board
17 would have considered and, therefore, the reference rate
18 was the appropriate rate and, yes I thought it was
19 appropriate, if possible, for that to be put into the
20 rules, but it wasn't at that stage.

21 Q. No, but what we see here in terms of the suggestion or
22 the proposal is that that reference rate would operate
23 as an automatic default in the absence of a bilateral
24 agreement; correct?

25 A. That would be for the system to -- so the system simply

1 did not collapse, yes, in the event of a dispute.

2 Q. Alright. Now, let's turn to {C2/488/1}, please. So
3 this is a letter from Teresa Grimes of First Trust Bank
4 to Europay and in fact to Mr Nelson, who we've heard
5 about, and it's dated 21 September 1995. And do you see
6 at the top Ms Grimes notes the introduction of a new
7 interchange fee type called secured electronic? So in
8 the first line above the capital letters:

9 "We refer to the... operations bulletin and to the
10 new Interchange Type - Secured Electronic - transaction
11 code 84."

12 Do you see that?

13 A. I see that. I've not seen this letter before.

14 Q. No.

15 And you see that:

16 "From the bulletin, we understand that the new
17 interchange rates were to apply to 'cross-border
18 Eurocard-Mastercard intra-regional transactions ..."

19 That means non-domestic transactions, obviously;
20 yes?

21 A. Yes.

22 Q. So Ms Grimes is referring to one of the intra-EEA MIF
23 categories, isn't she? So the transaction code 84 must
24 refer to the processing code for that intra-EEA MIF
25 category; correct?

1 A. Yes.

2 Q. And then if you look down the page, she has a query
3 about certain UK transactions. So she's talking about
4 errors and then she says:

5 "The transactions in question were all UK
6 transactions and we confirmed... they were all secured
7 electronics."

8 A. Sorry, could you just point me to the --

9 Q. Yes, of course. So if we look down the page -- so
10 there's a sentence:

11 "These changes were implemented ..."

12 Then there's another paragraph and I'm in the
13 paragraph under that.

14 A. Right, yes.

15 Q. "The transactions in question were all UK transactions
16 and we confirmed that they were all secured
17 electronics."

18 A. Yes.

19 Q. "We then contacted Rene DeCreme in Waterloo and he
20 stated that transaction code 84 had not yet been defined
21 for UK domestic transactions."

22 Right? So we're talking about an EEA category:

23 "Consequently we returned to the outgoing file in
24 order to extract the rejected transactions under the
25 assumption that all secured electronic transactions

1 under a UK BIN would in fact have rejected.

2 "However, it appears that several UK BINs have
3 accepted secured electronics ..."

4 And she gives a couple of examples.

5 Now, the BIN, first of all, stands for bank
6 identification number; correct?

7 A. Yes.

8 Q. So what she appears to be saying here is that the
9 transactions of several UK banks are being processed at
10 the intra-EEA MIF secured electronic rate; correct?

11 A. I'm not sure. This is a deeply operational letter, this
12 one. I think I established at the outset that I was not
13 an operational person, and we have reference in here to
14 BINs, to IDs, to errors and so on. This is what my
15 operational manager would have understood.

16 Q. Well, Mr Hawkins, you know that BIN stands for bank
17 identification number.

18 A. Yes, I know that.

19 Q. You know that. That's pretty basic.

20 And what she's saying here is -- I'm just asking you
21 to read the letter in the same way we're reading it and
22 you can just assist us insofar as you are able to assist
23 us.

24 So she seems to be saying that several transactions,
25 several UK BINs, have accepted secured electronics, this

1 being an EEA MIF category. That's what she seems to be
2 saying.

3 A. Yes.

4 Q. And then if we go to the reply, so {C3/23/1}. This is
5 the reply from Mr Dunn back to First Trust Bank and you
6 can see that he says:

7 "The UK members have, in the past, decided upon what
8 rules and charges apply domestically. When the new
9 interchange code (84) came into force they did not
10 update the scope of the existing agreement to include
11 it."

12 So we've agreed that in 1995, there was no
13 UK fallback MIF; correct?

14 A. Yes.

15 Q. So references to "existing agreement" here must be to
16 bilateral agreements; correct?

17 A. I cannot --

18 Q. You can't help us on that?

19 A. I can't help on that.

20 Q. Well, let's look at what he then says. He says:

21 "If our system knows of a bilateral agreement then
22 it will reject transactions with IRI 84. However, if
23 two UK members do not have a bilateral then IRI 84 will
24 be accepted by the system."

25 So what he seems to be saying there -- do you

1 agree -- is that where two UK members don't have
2 a bilateral agreement, then the EPS-Net system will
3 process the transaction according to the EEA MIF
4 category; correct?

5 A. Well, if you look through all the jargon, the
6 operational jargon here, you're probably right about
7 that.

8 Q. Alright. Now, let's turn up, please, {C3/352/1}, and
9 you can see that these are -- this is a meeting,
10 a Europay Business and Marketing Advisory Committee
11 meeting, held in Madrid over two days at the end of
12 October 1996.

13 And if we stay on this page for a moment, can we
14 just scroll down -- it's at the bottom of the page. So
15 yes, under "Long Term Approach". Do you see that,
16 Mr Hawkins?

17 A. Yes.

18 Q. "... important to have a long term approach to
19 interchange. A reimbursement fee to the issuer for
20 guaranteeing that a transaction will be honoured is
21 fundamental to the stability of a payments system.
22 Banks therefore expect to see stability in the way in
23 which this system develops."

24 And we heard you say yesterday that you
25 wholeheartedly agree with that, don't you?

1 A. Yes.

2 Q. And if we go to page 4 {C3/352/4}, under "Complexity of
3 Interchange", can you see the passage that says -- so we
4 see:

5 "A reference interchange rate is the scheme
6 'fall-back' level that applies when an issuer and
7 acquirer have not bi-laterally negotiated and agreed
8 a specific interchange between one another."

9 A. Sorry, which paragraph are you --

10 Q. Sorry, it's now at the top of the screen.

11 A. Oh, right.

12 Q. So under "Complexity of Interchange".

13 "A reference interchange rate is the scheme
14 'fall-back' level that applies when an issuer and
15 acquirer have not bi-laterally negotiated and agreed
16 a specific interchange between one another. In
17 practice, banks negotiate interchange fees between one
18 another at a local/domestic basis. However, due to the
19 sheer number of parties/banks involved at
20 an international level, some form of scheme i.e. fall
21 back interchange is needed. This reference interchange
22 rate applies where a specific agreement is not in place
23 between banks. It is Europay's role to define this
24 reference interchange rate for transactions within
25 Europe."

1 So, first of all, the reference here to Europay's
2 reference interchange rate for transactions within
3 Europe is the intra-EEA MIF; yes?

4 A. Yes.

5 Q. And Europay is saying that the intra-EEA MIF applies in
6 the absence of bilateral arrangements; correct?

7 A. That's correct.

8 Q. And they're certainly not saying, are they, that it only
9 applies if an arbitration has been initiated and pending
10 the outcome of an arbitration?

11 A. No. If I may comment, sir, the fact is that the UK
12 obviously accepted the European rate for European
13 transactions; that is to say between the UK and other
14 European countries. We accepted that rate, of course.

15 Q. Now, the reference to "sheer number of parties" refers
16 to the impossibility of every bank having a bilateral
17 with every other bank; correct?

18 A. Yes.

19 Q. So there are always going to be some banks who don't
20 have a bilateral arrangement in place with each other;
21 correct?

22 A. I suppose so. I can only speculate.

23 Q. But I think you accept, because I think you've said now
24 several times, that some interchange fee has to apply
25 and so where you don't have bilateral agreement, you

1 need a default rate; correct?

2 A. That's right. If you take Europe, for example, there
3 would be many, many hundreds of banks. You couldn't do
4 bilaterals with all of them. You had to have a European
5 rate that applied, yes.

6 Q. So what it does is it plugs the gaps that exist in
7 bilateral arrangements; correct?

8 A. But in countries where -- for example, in the UK --
9 there's a much smaller, more manageable number of
10 issuers and acquirers, then you can do interchange and
11 that's -- do bilateral arrangements, and that's what we
12 did.

13 Q. Well, we'll have a look at that shortly.

14 But let's turn up {C2/321/1}, please. This is the
15 email chain we looked at already from December 1994 --

16 A. Yes.

17 Q. So where Mr Nelson in the top email says that, "The
18 UK domestic interchange system is a mixture of
19 bilaterally negotiated deals, plus fallbacks to EPI
20 cross-border defaults", he is saying that some banks
21 don't have bilateral arrangements; yes?

22 So he says "I believe ... the majority is ...
23 bilateral", but he's saying not all of them are;
24 correct? That's what he's saying there.

25 A. He seems to be saying that, yes.

1 Q. And he's saying that for those banks, the EEA MIF
2 applies directly to their transactions; correct?

3 A. He seems to be saying that.

4 Q. Well, he doesn't mention arbitration either, does he, so
5 he doesn't say for banks that don't have a bilateral,
6 the EEA MIF applies but only pending arbitration?

7 A. I cannot know what banks he is referring to. Certainly
8 it didn't apply to NatWest, who had agreements with
9 everyone.

10 Q. And you can only really speak directly to NatWest's
11 position, can't you, Mr Hawkins?

12 A. I can only speak for the NatWest position, but we did
13 have a very substantial part of the market, both issuing
14 and acquiring.

15 Q. Now, in his email, Mr Nelson states that there are some
16 defaults still in place, and he says:
17 "... Andy - is this 'UC00' ..."
18 Do you see that?

19 A. Yes.

20 Q. And he says {C2/321/1}:
21 "... is this UC00' ..."
22 And he says:
23 "... there are some defaults still in place (Andy -
24 is this 'UC00'?) where [petrol] could potentially come
25 into play."

1 Now, petrol was an EEA-MIF category at this time,
2 wasn't it?

3 A. So I believe. I have no idea what UC00 means.

4 Q. So you don't know what UC00 is; no?

5 A. There was a lot of jargon in this business.

6 Q. There's certainly a lot of jargon. We can agree on
7 that, Mr Hawkins.

8 Now, if we go to {C2/405.2/1}, please. It may be --
9 let's see how much you can help me with this. Perhaps
10 you can help me interpret it.

11 Now, what we see is we know from the metadata for
12 this document, well it suggests that it's dated
13 May 1995. And we see a heading that says "Domestic
14 agreement fees" and then there are subheadings. And it
15 says -- do you see it says "Resulting agreement UC00"
16 and then below that we have "Resulting agreement UC02"?
17 Do you see that in the table?

18 A. Yes, it's not very clear without being expanded, but
19 I have no idea what the UC references are.

20 Q. I think maybe what we can do is put -- if the operator
21 could please put this document side-by-side with the
22 schedule of UK MIFs, please.

23 MR JUSTICE ROTH: What is this document?

24 MS DEMETRIOU: Sir, this is a -- can I just take it in
25 stages because I think it may be clearer if I take it in

1 stages. I'm just going to go to a few documents.

2 MR JUSTICE ROTH: Well, it just would be helpful to know

3 what this is before we go beyond to anything else.

4 Obviously it's a table, but whose table, from where?

5 You say it's May 1995.

6 MS DEMETRIOU: Yes.

7 MR JUSTICE ROTH: But whose is it?

8 MS DEMETRIOU: Sir, we don't know that. So that's in the

9 disclosure. We know -- as far as we've been able to see

10 it's from May 1995, but I want to try and piece --

11 MR JUSTICE ROTH: It's not described in the disclosure.

12 MS DEMETRIOU: Not that we've been able to ascertain. It

13 may be -- I just want to see how far I can get with

14 Mr Hawkins in piecing some of these points together.

15 MR JUSTICE ROTH: So you have no idea who produced it?

16 MS DEMETRIOU: We don't know who produced it.

17 MR JUSTICE ROTH: Or where it comes from.

18 MS DEMETRIOU: No.

19 And if we could put this document side-by-side with

20 the consolidated interchange fee schedule, please, at

21 {A/18.1/3}. This is going to be quite small,

22 Mr Hawkins, and I won't be able to see it either, so

23 I'm going to ask in a minute for it to be enlarged.

24 I think what we're going to do is provide you with

25 a hard copy of the schedule. (Handed)

1 Could we have it side-by-side for everybody else.
2 If we zoom in on Mastercard EEA for 1995 and if we
3 compare the UC00 to Mastercard EEA 1995.

4 First of all, Mr Hawkins, you should have a hard
5 copy of MIF schedules and if you go to page 3 of the
6 table. So in the left-hand corner it should say
7 {A/18.1/3}. Could you please find that page?

8 A. Yes. I have, yes.

9 Q. Do you see the second main column is 1995?

10 A. Yes.

11 Q. And then if you look that main column is subdivided into
12 separate columns, and if you look four along you see
13 Mastercard EEA. Do you have that?

14 A. Yes.

15 Q. Thank you. And if we look at the figures first of all
16 in the schedule. So we see standard is 1.15%.

17 A. Yes.

18 Q. Electronic is 0.9%.

19 A. Yes.

20 Q. And secured electronic is 0.75%.

21 A. Yes.

22 Q. And then if we look -- compare that to the UC00, what we
23 see is that standard -- I have to look -- thank you. We
24 can see that it's called non-electronic or non-point of
25 sale. So non-electronic, if we go down, is 1.15. Do

1 you see that?

2 So there are several items in the second row showing
3 non-electronic, towards the bottom, and those are 1.15,
4 and then secured electronic is similarly 0.75. Do you
5 see that?

6 A. Yes.

7 Q. Thank you. And then electronic is 0.9% in both the
8 schedule and for UC00, where it's described as
9 electronic point of sale. Do you see that?

10 A. Yes, I see that. Could I just ask: is this
11 an operations document to enable the operational people
12 to effect --

13 Q. I can't help you on that.

14 A. No, and I can't either because I've not seen it.

15 Q. At the moment, I'm just establishing that for this year,
16 for 1995, these categories match up with the Mastercard
17 intra-EEA MIF.

18 And if we now go to {C2/405.1/1}, again, sir, I'm in
19 the same position. This does say domestic agreements
20 for NatWest and the metadata indicates it was created in
21 May 1995 as well.

22 Mr Hawkins, you will see that this says domestic
23 agreements for NatWest and there's then a subheading for
24 agreements with the transaction code UC00. Do you see
25 that?

1 A. Yes.

2 Q. And there are six agreements with five different banks
3 with that transaction code UC00. Do you see that?

4 A. I see that.

5 Q. And that refers, as we've seen, to agreements which are
6 at the level of the intra-EEA MIFs; correct?

7 A. I'm not sure that I make that inference. It just has
8 82600011 against it.

9 Q. No, when we looked at the last document, which was
10 produced at the same time, we saw that the UC00 rates
11 were the same as the intra-EEA MIF rates; correct? We
12 just established that on the basis of the last document.

13 A. So you're saying that those six banks there had that
14 UC00 rate that you saw in the last document applied?

15 Q. Yes, that's our supposition, and I'm asking if you can
16 help me with that. So the documents were produced at
17 the same time and these I think it's five banks, because
18 Bank of Ireland is there twice. They're labelled
19 "agreement UC00" and those UC00 rates that we saw are
20 the same as the intra-EEA rates.

21 A. Well, sir, I have to say at this point this is the
22 first time I've seen these documents, so what I have to
23 say about them will be on the basis -- on a limited
24 knowledge basis.

25 MR JUSTICE ROTH: I think you are asking the witness to

1 speculate. I mean, we can all see what the documents
2 say and we can see the references are the same.

3 MS DEMETRIOU: Yes.

4 MR JUSTICE ROTH: And everything else that you're asking
5 Mr Hawkins to say is pure speculation. He doesn't know,
6 and I'm not sure that he can -- that's really helpful
7 evidence then.

8 MS DEMETRIOU: Sir, that's fair. We obviously have to --
9 I don't know exactly what each witness knows and we want
10 to put our case to a witness. So if I find that
11 Mr Hawkins doesn't know, I'll move on swiftly. But
12 there are some points that I do want to put, and if he
13 can't help us, he can't help us.

14 MR JUSTICE ROTH: No, but I think you can ask Mastercard, if
15 they disclosed this document -- that could be done not
16 in the hearing but out of hearing -- what this document
17 is and what it purports to be. They should explain it.
18 You shouldn't have to try and sort of guess what it
19 might be and who has produced it. What it tells one is
20 another question, but you shouldn't be left in a state
21 of uncertainty of what this is.

22 The other page of it, if it's indeed the second
23 page -- although I think they're both labelled page 1,
24 aren't they? If we go back to {C2/405.2/1}, please, the
25 document we had just before. I think that's also said

1 to be a page 1, isn't it? So they're both page 1 of
2 something.

3 MS DEMETRIOU: Yes.

4 MR JUSTICE ROTH: This one seems in part to be some, it
5 looks like, dollar fees -- I don't know if that's
6 right -- for the ATMs. It looks like a dollar sign.
7 I don't know if it is a dollar sign.

8 MS DEMETRIOU: Sir, that's because -- if I just may help
9 interpret that. That's because there is no EEA MIF for
10 ATM, that's cash advance on ATMs which are --

11 MR JUSTICE ROTH: Yes, but why is it in dollars if this is
12 a European document?

13 MS DEMETRIOU: Because the inter-regional rate applied in
14 relation to those transactions.

15 MR JUSTICE ROTH: I see. Yes, I see.

16 MS DEMETRIOU: Sir, if that's a convenient time to break for
17 lunch, what I will do is -- there are a couple more
18 documents I just want to see if Mr Hawkins can help us
19 with, but if he can't, then I'll take it quite shortly.
20 And I take on board -- I'll do that just immediately
21 after the lunchtime adjournment.

22 MR JUSTICE ROTH: Yes.

23 But I think -- Mr Smouha, if you've disclosed this
24 document, I think it's only fair you should say what
25 your client's understanding is, and what it is.

1 MR SMOUHA: I'll see what I can find out, sir.

2 MR JUSTICE ROTH: So we don't have to have that sort of
3 extracted laboriously in cross-examination. It's not
4 appropriate. Yes, you can't be asked to guess of
5 a document of this nature you've not seen before.

6 Mr Hawkins, we break for lunch. As you may have
7 heard me say to the previous witness, you can have lunch
8 with someone else but you mustn't discuss the case or
9 your evidence. 2 o'clock.

10 (1.02 pm)

11 (The short adjournment)

12 (2.01 pm)

13 MR SMOUHA: Sir, just if I may tell the Tribunal what I can
14 on the basis of where we've got to over --

15 MR JUSTICE ROTH: On those documents.

16 MR SMOUHA: -- the short break in relation to those
17 documents.

18 So the two documents are {C2/405.1/1} and
19 {C2/405.2/1}. The disclosure statement reference for
20 those documents is {B/23/7}, paragraph 36. Perhaps we
21 can call that up.

22 And, sir, you'll see from that these are hard copy
23 documents, not electronic. Therefore, not dated --
24 they're not dated and no metadata of the document in
25 terms of the original form. We are not sure yet, sir,

1 what the basis is on which they were given a May 1995
2 date in their description, but as will become apparent
3 in a moment, we think that that is probably wrong.

4 MR JUSTICE ROTH: I'm sorry, which paragraph are we on?

5 MR SMOUHA: 36 of the disclosure statement.

6 MR JUSTICE ROTH: Oh, I see. Yes, just --

7 MR SMOUHA: I am just identifying where the documents have
8 come from in terms of disclosure in terms of original
9 source. (Pause)

10 As I say, as I understand it, what's being referred
11 to there in the disclosure statement in terms of
12 retrieval of hard copy documents is actually retrieval
13 that was done by Jones Day in relation to previous
14 proceedings.

15 Perhaps if we can go over the page {B/23/8}. If
16 I can ask you, sir, to read paragraphs 38 and 39.

17 (Pause)

18 MR JUSTICE ROTH: Yes.

19 MR SMOUHA: Sir, we understand the two documents to have
20 been attachments to an email, {C3/51.2/1}. You will
21 see, sir, this is an email from Jean Marie Viroux to
22 Janet Bangs, copied to Patrick Nelson, of
23 22 December 1995. And we believe that the two documents
24 are of four -- I say "attachments". You'll see what
25 Mr Viroux says at the end of the first paragraph:

1 "Within the scope of the request, you will find in
2 your in-tray the following material ..."

3 So suggesting that those documents have been either
4 sent separately or along with this email. And we think
5 that the two documents, 405.1 and 405.2, are
6 documents -- the ones numbered 2 and 3.

7 Yes, thank you. Mr Cook points out, penultimate
8 paragraph of the email:

9 "Therefore, I would suggest that Mr Terrazzano gets
10 our help in clarifying the actual situation with regard
11 to bilateral agreements. I hope very much that you can
12 find in the two attached sheets (respectively above
13 items 3 and 4) all the information you need to
14 consolidate your answer to the bank."

15 So, sir, we -- and we are looking for -- just for
16 completeness, to see whether we can find the other
17 two documents, 1 and 4, but for present purposes --
18 Sorry, did I say 2 and 4? I said 2 and 3. I mean 3 --
19 sorry, sir, just give me a moment. (Pause)

20 3 and 4 are -- if we go to the bottom of the email,
21 3 and 4 are the file attachments. (Pause)

22 Yes, right. Let me start again, sir, sorry. The
23 four documents referred are, number 1:

24 "1. one copy of the original request.

25 "2. one copy of the request asking to concentrate on

1 the NatWest ICA 2515.

2 "3. the consolidation of bilateral issued members
3 per agreement for the particular ICA.

4 "4. the consolidation of fee values corresponding to
5 the specific resulting agreements."

6 And we think that -- and then those are attached.
7 They were attached to that email, as we see from the
8 bottom, and we think those are the two documents,
9 C2/405.1 and 405.2, that my learned friend was referring
10 to.

11 It appears, therefore, that what this email is about
12 is seeking to ascertain -- and this is at the end of
13 1995, seeking to ascertain what the agreed rates were of
14 bilaterals, including of the agreed rates of NatWest's
15 bilaterals with the five banks that we saw on 405.1.

16 Sir, there is evidence that those queries were
17 resolved shortly afterwards, early in the new year of
18 1996.

19 If we go to {C3/77/1}, this is with disclosure
20 reference MAST3964. This is a letter from Europay of
21 30 January 1996 to NatWest:

22 "Dear Mr Terrazzono ..."

23 We've just seen him referred to in the email:

24 "I refer to your letter addressed to
25 Jean-Marie Viroux on the above subject.

1 "I am attaching a list of bilateral agreements held
2 by National Westminster Bank and, as you will see, our
3 respective files appear to be in harmony.

4 "Should you require any additional information,
5 please do not hesitate to contact me."

6 And the attachment to that letter is at {C3/55/1}.
7 This has disclosure reference MAST3965 and the reason
8 I draw attention to that, sir, is those are, in other
9 words, consecutive disclosure numbers, 3964 and 3965.

10 The reason they don't -- these two documents don't
11 appear consecutively on Opus, we think, is because if
12 you look at the bottom of -- bottom right of the table,
13 the attachment to the letter, the attachment -- this
14 table has a date of 1 January 1996 and so we think
15 what's happened on Opus is that Opus has separated the
16 two and put this on Opus earlier.

17 MR JUSTICE ROTH: Yes.

18 MR SMOUHA: You will see, sir, from that table that all of
19 NatWest's bilaterals for 1996 were at 1.3 and 1.

20 MR JUSTICE ROTH: Well, the one or two -- one or two -- they
21 were all at 1.3 and 1, but not always consistently,
22 but --

23 MR SMOUHA: No, no, sorry. Sorry, I misspoke. I didn't
24 mean they are all at 1.3 paper and 1 electronic.
25 I meant that all of the rates --

1 MR JUSTICE ROTH: Yes.

2 MR SMOUHA: -- for whatever category and for whichever bank
3 are either 1.3 or 1; in other words, not EEA MIF rates.

4 And, sir, that is all reflected in the bilaterals
5 table, {B/55/2}, and is the case for -- so for the
6 five banks that were identified in the document raising
7 this query at the back end of December, which I will
8 just remind you this was -- sir, this is from
9 {C2/405.1/1}. The five banks were Allied Irish, Bank of
10 Ireland, Signet, Frizzell and Robert Fleming.

11 MR JUSTICE ROTH: Yes, thank you. That's very helpful.

12 MR SMOUHA: I'm not sure about Signet. I can't see that.

13 It may be that's just a name change, but in any event,
14 so -- but it appears, in other words, that the query as
15 to what the bilateral rates were that had been agreed
16 from NatWest for those five banks was resolved in that
17 way.

18 MR JUSTICE ROTH: Yes.

19 MR SMOUHA: Sir, if there is any more information,
20 obviously, that we find out overnight that's of
21 relevance, we will let my learned friend and team know,
22 and the Tribunal.

23 MR JUSTICE ROTH: Thank you.

24 MS DEMETRIOU: Sir, we're grateful to my learned friend for
25 clarifying that. We've also written over the lunchtime

1 adjournment in respect of another couple of documents
2 which we are unclear about, which I was going to explore
3 with Mr Hawkins, but I think, on reflection, we're
4 better off waiting to hear the explanation, which I hope
5 we'll get swiftly, and we will also take away what we've
6 just been told and see whether or not we want to put any
7 questions in relation to those documents.

8 MR JUSTICE ROTH: That sounds very sensible.

9 MS DEMETRIOU: Mr Hawkins, good afternoon.

10 A. Good afternoon.

11 Q. Could we turn, please, to {C3/225/1}. And we see here
12 that this is a letter enclosing -- so it's to Mr Nelson
13 and it's from Mr Turner. Do you see that? And it's
14 enclosing a bilateral interchange agreement between Bank
15 of Scotland as acquirer and Beneficial Bank as issuer
16 and it's being lodged with Europay. Do you see that?

17 A. I see that.

18 Q. And you can see the sentence -- it says that:

19 "The rate quoted ... replaces the current bilateral
20 established 1st October, 1995. For those other
21 transactions for which the fee structures have been left
22 blank, current default [rules] should continue to
23 apply."

24 Yes?

25 A. Did you say "rules"? I think it's "rates".

1 Q. "Rates". You're quite right, Mr Hawkins.

2 So what's being said there, we see, is that where
3 transactions -- where fee structures for transactions
4 have been left blank, the default rate applies, which is
5 the intra-EEA MIF; correct?

6 A. I don't know. I don't know what he's referring to.

7 Q. Right. Well, let's look at the agreement. So it's
8 {C3/209/1}.

9 MR JUSTICE ROTH: This is the enclosure?

10 MS DEMETRIOU: This is the enclosure and so we see the
11 acquiring bank and the issuing bank at the bottom, sir.

12 And do you see that the only rate specified is £2.50
13 for ATM transactions; correct, Mr Hawkins?

14 A. I see that, yes.

15 Q. So the other interchange rates have been left blank. So
16 according to the letter we've just seen, the default
17 rate applies to those transactions; correct?

18 A. I obviously don't know that. I have not seen this
19 before.

20 Q. No, but I'm asking you how you interpret the document.

21 A. I see what I see. I -- I'm not going to interpret it.

22 Q. Well, Mr Hawkins, the trouble is that we've got lots of
23 documents in this case and only so many witnesses from
24 Mastercard and so I'm asking you to do your best.

25 Looking at this letter, it says for transactions

1 where there's a blank, the default rate should apply,
2 and our position is that must mean the intra-EEA rate.

3 Do you agree?

4 A. I agree, sir, that that is your position, but I equally
5 might think that it would be the default rates which
6 refer to those agreed at the MEPUK board.

7 Q. Oh, so do you mean the reference rates?

8 A. Reference rates.

9 Q. But those were never in the rules, were they,
10 Mr Hawkins?

11 A. They became in the rules, but they became the benchmark
12 from which we -- we certainly negotiated.

13 Q. Well, Mr Hawkins, can we go back to the letter,
14 {C3/225/1}. So this is a letter to Mr Nelson, so he was
15 at Europay.

16 A. Yes.

17 Q. And he is being told that the current default rate
18 should continue to apply. Now, we know --

19 MR JUSTICE ROTH: Can I just interrupt you for a moment? It
20 may be that it's just not clear. The way the first
21 sentence is written suggests the agreement is for
22 ATM transactions.

23 MS DEMETRIOU: Well, it says for -- this is the agreement
24 for ATM transactions:

25 "For those other transactions for which the fee

1 structures have been left blank ..."

2 Then when we go to the agreement, sir, if we see
3 that at {C3/209/1} -- if we can have them side-by-side,
4 please. So the only figure is for ATMs and the
5 transactions that have been left blank are paper
6 merchant transactions, electronic merchant transactions
7 and cash advance.

8 MR JUSTICE ROTH: Yes. So I think that's what he means. So
9 it's for all transactions, but it's only agreed for
10 ATMs.

11 MS DEMETRIOU: Yes.

12 So the question I'm putting to you, Mr Hawkins, is
13 what Mr -- is that where that says "current default
14 rates should continue to apply" {C3/225/1}, what
15 Mr Nelson would have understood by that, what Europay
16 would have understood, is the default rate in the
17 Europay Rules, correct, which was the intra-EEA MIF?

18 A. Sorry, sir, I cannot speculate on that, because that's
19 left blank. The reference is to default rates. My
20 interpretation of default rates are the rates agreed by
21 the MEPUK board. I can't really speculate as to what
22 Bank of Scotland --

23 Q. Well, Mr Hawkins, let me ask you this. Did you ever
24 communicate the reference rates to Mr Nelson? Because
25 we haven't found any record of Mr Nelson being told

1 about the reference rates. Do you remember writing
2 those down and sending them to Mr Nelson or to Europay?

3 A. Europay would have been aware of the reference rates
4 because they attended the board meetings. So yes, they
5 would have been well aware of it and he, as a result,
6 should also have been aware.

7 Q. But you agree, Mr Hawkins, that those reference rates,
8 much as you wanted them to be the rules, they weren't in
9 the rules, were they, until November 1997?

10 A. They weren't in the rules, but they acted as a reference
11 point for us to agree bilateral agreements.

12 Q. Well --

13 MR JUSTICE ROTH: I think we can understand that they played
14 an important role in bilateral -- negotiations of
15 bilateral rates, but where no bilateral rate was agreed,
16 I mean, they weren't, under the rules, the default rate,
17 because you couldn't set a default rate at that time.
18 You explain why not.

19 We know that at some point, at least in '96, maybe
20 in '95, the default rate was the EEA rate anyway, not
21 the reference rate, although you had a reference rate.
22 So here where -- this period -- well, this is, in fact,
23 '96.

24 When one is talking about a default rate in this
25 period in '96, this is a period, I think, covered by the

1 response to the OFT enquiry where the default rate, you
2 agreed, was the EEA rate, and where they refer here to
3 a default rate or it's left blank and the letter says
4 "current default rates should continue to apply",
5 wouldn't that be the default rates that MEPUK told the
6 OFT were the default rates as at 1995/96?

7 A. Well, yes, sir, that is the case but what Bank of
8 Scotland means by that is something that I do not know.

9 MR JUSTICE ROTH: Yes. I mean, you can't say for certain
10 what they necessarily meant.

11 A. No.

12 MR JUSTICE ROTH: It's not a letter to which -- from anyone
13 at NatWest. But what's being put to you is that clearly
14 Bank of Scotland thought that Europay would understand
15 the reference to "current default rates" and what's
16 being put to you: well, that would appear to be the
17 default rate that was then operating as MEPUK said to
18 the OFT it was, which was the EEA rate. So that seems
19 the most likely default rate as at June '96.

20 A. I would agree it seems the most likely, but I could not
21 be certain, sir.

22 MR JUSTICE ROTH: Yes.

23 MS DEMETRIOU: Thank you. Thank you, sir.

24 Now --

25 MR JUSTICE ROTH: But I think we have -- I mean, we can

1 spend time on this letter, but the witness, Mr Hawkins,
2 agreed with you earlier on the basis of the response to
3 the OFT --

4 MS DEMETRIOU: Yes.

5 MR JUSTICE ROTH: -- that as of '95/'96, that was the
6 default rate, so we don't really need this letter to
7 help us on that.

8 MS DEMETRIOU: Thank you.

9 Let's just look at this document if we can, so
10 {C2/204/1}. And this is a letter from Europay to
11 Northern Bank. Do you see that? And that's dated
12 June -- 23 June 1994. And that says that it's attaching
13 a complete list of bilateral interchange agreements
14 entered into by Northern Bank and it's said that:

15 "It is important that Europay and FDR have matching
16 details on interchange arrangements ..."

17 And if we look at the attachment, that's at
18 {C2/205/1}, and you can see the heading "Domestic
19 bilateral agreements set up for Northern Bank". Can you
20 see as between Northern Bank and Midland -- so if we go
21 down, you can see Midland just about -- just under
22 halfway down.

23 A. Yes.

24 Q. That there's a cash advance fee that's been agreed. Do
25 you see that; £3.75?

1 A. Yes.

2 Q. But then there's -- then you see "not applicable" or
3 "not available" for paper, electronic and ATM; yes?

4 A. Yes, I see that.

5 Q. So that means that, as far as you can see, there's no
6 bilateral arrangement between Midland and Northern Bank
7 for paper and electronic transactions; correct? So
8 Europay would apply the applicable fallback rate
9 automatically, wouldn't it, in those circumstances?

10 A. I'm sorry, sir. I can't speculate on that because
11 I wasn't party to that agreement. I don't know what
12 they meant.

13 Q. Well, Mr Hawkins, I'm asking you to do your best. So
14 you do, with respect, speculate about what other people
15 thought in relation to other matters. And you are one
16 of the key witnesses put forward by Mastercard and we're
17 doing our best to help -- to understand these documents.

18 So what we've seen is a letter saying, "This is
19 a complete list of bilateral interchange agreements",
20 and we see here that there is no rate for paper and
21 electronic. So is your -- so I'm asking you to
22 speculate.

23 Do you think the most likely position is that the
24 applicable fallback rate would have applied to those
25 transactions automatically between those two banks?

1 A. Well, when I -- when I say that I speak on behalf of the
2 UK banks in certain matters, it's a collective through
3 the MEPUK board. I never had any speculation as to what
4 on -- what went on bilaterally. I had no idea what the
5 bilateral arrangements were.

6 Q. I'm asking you to look at this document now.

7 A. I can see that document. I have no -- no comment on it.

8 Q. Right. Well, can you comment on this? If there's not
9 a bilateral -- if I'm right or if this document is
10 telling us that there was no bilateral agreement between
11 Midland and Northern Bank in relation to paper or
12 electronic transactions, then those transactions would
13 have been processed according to the fallback fee;
14 correct?

15 A. I don't know that. It may be that there's
16 an arbitration taking place.

17 Q. Well, there's no reference, is there, to any
18 arbitration? We haven't seen any documents. You say
19 there were no arbitrations taking place in that period
20 of time. You say no or few arbitrations. We haven't
21 seen any arbitration between Northern Bank and Midland.

22 A. But I'm not in a position to comment on that because
23 I wasn't involved in those negotiations.

24 MR JUSTICE ROTH: Can I just ask you this? Whether there's
25 an arbitration or not, transactions are being made.

1 A. Yes.

2 MR JUSTICE ROTH: People are buying things for which
3 Northern Bank may have issued their card and the
4 retailer may have Midland as an acquiring bank. It's
5 got to go through the system --

6 A. Yes.

7 MR JUSTICE ROTH: -- even if there is an arbitration. If
8 they haven't agreed a bilateral, as I understand it, the
9 point of the default or fallback is the system will
10 process the transaction, as you said.

11 A. Yes.

12 MR JUSTICE ROTH: You have to have an interchange fee.
13 Otherwise, it can't work. And if they haven't agreed
14 a bilateral, then it has to use the fallback. That's
15 what the fallback means, as I understand it; is that
16 right?

17 A. Yes, that's what the fallback means, but in NatWest's
18 case, we'd have understood the fallback to be the
19 Mastercard rate, as I explained --

20 MR JUSTICE ROTH: I appreciate you don't know what the
21 fallback -- you're not being asked about that, but just
22 here, if, as appears, Northern Bank has not agreed, for
23 whatever reason, which you don't know, of course,
24 a bilateral fee with Midland, then any transactions
25 where Northern is issuer and Midland is acquirer would

1 go at a fallback rate; is that right?

2 A. I suppose that -- I'm very surprised to see that there,
3 actually.

4 MR JUSTICE ROTH: Well, that may be, but the answer to the
5 question is yes, it would go at the fallback because it
6 has to be processed --

7 A. I can only speculate that is the case, yes, sir.

8 MR JUSTICE ROTH: Because otherwise, it can't be processed
9 at all.

10 A. That's right.

11 MR JUSTICE ROTH: Yes.

12 So I think what Mr Hawkins is saying is he's very
13 surprised to see that there isn't an agreed bilateral.
14 He has no idea what was going on, but if there wasn't,
15 then it would have to be processed at the fallback rate.

16 MS DEMETRIOU: Thank you, sir.

17 MR SMOUHA: Sir, I'm sorry, can I just check so this isn't
18 proceeding on a false basis. So there were bilaterals
19 between Midland and Northern and as I understand it,
20 this line of questioning is in relation to -- well,
21 I don't know. Perhaps my learned friend should clarify.
22 This is in relation to the "not applicable" being in
23 relation to a category; in other words, the suggestion
24 is not specifically identified a separate or different
25 rate for that category.

1 MR JUSTICE ROTH: Well, there's supposed to be a complete
2 list, I think. That's what the cover letter says. But
3 you say on the bilaterals table between --

4 MR SMOUHA: {B/55/4}.

5 MR JUSTICE ROTH: And Northern is on page 8 {B/55/8}. And
6 Midland -- well, it says -- no, we've got -- if you look
7 at page 8, Northern/Midland, for some reason, for those
8 six months, January to June, there isn't one.

9 MR SMOUHA: There isn't a record of one, so --

10 MR JUSTICE ROTH: Well, it says "n/a" which is the same as
11 in this table, but it's not blank, as I understand it.

12 MR SMOUHA: No, sir, there's record of a bilateral for
13 1993 --

14 MR JUSTICE ROTH: Yes.

15 MR SMOUHA: -- and record of one from July to December '94.

16 MR JUSTICE ROTH: Yes. So just for this period --

17 MR SMOUHA: Yes, I mean, again, sir, remember the basis on
18 which this table has been done is in relation to the
19 evidence there is of the bilaterals, not necessarily
20 complete. Sir, I'm not going to speculate --

21 MR JUSTICE ROTH: I don't know how far we can take this,
22 but --

23 MR SMOUHA: Sir, I completely agree with that, but I think
24 it's important and in fairness to Mr Hawkins, in
25 circumstances, sir, I haven't objected or intervened

1 earlier. But I don't accept that it is appropriate to
2 ask Mr Hawkins to speculate about documents that relate
3 to matters of which he has no knowledge just because he
4 is a Mastercard witness for the trial and --

5 MR JUSTICE ROTH: Well, I think it's not unreasonable for
6 Ms Demetriou to ask him if he can help on this matter,
7 but if he says he can't and it's not something he can
8 assist on, well, that's that.

9 MR SMOUHA: Well, sir, with respect, he said that
10 three times and where Ms Demetriou then went -- and,
11 again, I didn't intervene -- was to say, "Well, you're
12 the only witness I can ask that sort of comes anywhere
13 near this, so even if you have no knowledge, please
14 speculate and please interpret". And that's not going
15 to be of assistance to you, sir.

16 MR JUSTICE ROTH: No, I accept that, but I'm not clear --
17 and if that's something you could clarify, if possible,
18 by tomorrow. Generally when information is not
19 available, as I understand it, there's a blank in the
20 table --

21 MR SMOUHA: Sir, yes.

22 MR JUSTICE ROTH: -- and you explain the blank.

23 MR SMOUHA: Yes.

24 MR JUSTICE ROTH: But for some reason, someone has put for
25 this particular entry -- they haven't left it blank.

1 They've put "n/a", which normally means not applicable,
2 I thought.

3 MR SMOUHA: Not available.

4 MR JUSTICE ROTH: Right. Well, I thought all the blanks
5 were because it's not available.

6 MR SMOUHA: Sir, Mr Cook is saying the reason why that has
7 been used there is because that -- the document which
8 we've been looking at records it as "n/a".

9 Sir, for example, again -- now I will be
10 speculating, but one can think of a number of
11 explanations as to what was happening in that period
12 which could have been a new bilateral was being
13 negotiated and that in that period, the rate from the
14 previous bilateral continued to be applied until a new
15 agreement was reached.

16 MR JUSTICE ROTH: Yes. Well, we don't know.

17 MR SMOUHA: No.

18 MR JUSTICE ROTH: I see. So that's where the "n/a" comes
19 from. It's from the document which we're seeing.

20 MR SMOUHA: Indeed.

21 MR JUSTICE ROTH: I understand.

22 MR SMOUHA: As I say, the important point is -- I hope it's
23 not unfair of me to suggest that it's not fair to put
24 this line of questioning --

25 MR JUSTICE ROTH: Yes.

1 MR SMOUHA: -- to Mr Hawkins on the basis that there was no
2 bilateral between Northern and Midland.

3 MR JUSTICE ROTH: Yes.

4 Well, the short point, Ms Demetriou, is Mr Hawkins
5 agrees that if the bilateral was not agreed, then there
6 would be the default, because that's what the default
7 means.

8 MS DEMETRIOU: That's the short point, sir.

9 MR JUSTICE ROTH: That's the short point and that's just
10 inherent in the concept of there being a default.

11 MS DEMETRIOU: Yes.

12 MR JUSTICE ROTH: Whether there actually was a bilateral
13 between certain banks that are not Mr Hawkins' bank,
14 he's in no better position than you or -- to tell us and
15 he can't, obviously, help us on that.

16 MS DEMETRIOU: Sir, correct, and whether or not there was
17 a bilateral and how the document is to be interpreted
18 obviously we'll address in submissions in due course.

19 MR JUSTICE ROTH: Yes.

20 MS DEMETRIOU: Could we have a look, please -- and mindful
21 of what Mr Smouha has just said, could we have a look,
22 please, at {C2/469/1}. So this is a matter, I think,
23 Mr Hawkins may be able to assist on.

24 We see here it's a letter from Barclays to Europay,
25 Mr Hawkins, dated 2 August 1995. Do you see that in the

1 first paragraph, it says:

2 "Please find attached UK Domestic Bilateral
3 Interchange Forms, which set out the terms of our
4 agreement with [NatWest]."

5 Do you see that?

6 A. Yes.

7 Q. So -- and then it says:

8 "Can you please ensure the fee between Barclays as
9 an acquirer and [NatWest] as an issuer, is applied to
10 both MasterCard and Cirrus cards issued by [NatWest].

11 "... [can you] confirm [that] in writing ... [by]
12 7th October 1995."

13 A. Yes.

14 Q. So is this usually how banks would register their
15 bilateral agreement with Europay? They'd write in with
16 the relevant form and Europay would add all the details
17 they submitted into its settlement system? Is that
18 normally what happened?

19 A. Yes. I think they would obviously check with the other
20 bank involved that those rates matched.

21 Q. And then if we go to {C3/1/1}, please, this is the form
22 that Barclays attached to its letter, and we can see
23 an ATM transactions fee, but everything else is blank;
24 correct?

25 A. Yes.

1 Q. But Barclays' letter was clear that these were the
2 bilateral rates Barclays wanted Europay to input into
3 its system, and so it looks like there was no bilateral
4 agreement, at least at that moment in time -- bilateral
5 agreements for paper and electronic transactions;
6 correct?

7 A. I don't accept that. This relates to ATM transactions.

8 MR JUSTICE ROTH: Can I ask this? You were both very --
9 Barclays and NatWest were very big players.

10 A. Yes.

11 MR JUSTICE ROTH: Was there a period, from your knowledge of
12 NatWest, when you didn't have -- before you got the
13 UK MIFs, when you didn't have the bilaterals agreed?

14 A. No, sir. We had bilateral agreements more or less from
15 the start.

16 MR JUSTICE ROTH: Yes, I mean, that would -- I would find
17 that astonishing if you didn't, but --

18 A. May I say, sir, that I also, as I said, for a time
19 negotiated the ATM arrangements, and this, I think, is
20 what that relates to.

21 MR JUSTICE ROTH: Yes, I see. That makes sense.

22 MS DEMETRIOU: Can we go to {C3/165/1}, please. You'll see
23 that this is internal correspondence within EPI between
24 Mr Nelson and Mr Goosse. Do you see that?

25 A. Yes.

1 Q. And it's dated May 1996.

2 A. Yes.

3 Q. And if you see what's said there by Mr Nelson, he says:

4 "As you probably know, there has never been a formal
5 fallback or default rate in the UK up till now. Anyone
6 who does not agree a domestic bilateral effectively
7 works on OUR international rates."

8 So can we agree that "our international rates" are
9 a reference to EPI's EEA MIF?

10 A. Well, it certainly did not apply in the years before
11 that, not to the UK.

12 MR JUSTICE ROTH: Well, no, just the question you're asked
13 is: in this letter, when Mr Nelson says "our
14 international rates", he would be -- that's to be
15 understood, is it, as the Europay international rate?

16 A. Well, sir, Europay also by this time looked after
17 Mastercard. So when they use the term "our", it could
18 be -- it could be referring to both.

19 MR JUSTICE ROTH: I see.

20 MS DEMETRIOU: Mr Hawkins, you're getting yourself in
21 a muddle now because you've already accepted, haven't
22 you, that at this stage in 1996, the fallback fee was
23 the EEA MIF? You accepted that before lunch; yes? So
24 it's really not a trick question. I thought it was
25 going to be common ground that when Mr Nelson talks

1 about "our international rate", he must mean the
2 EEA MIF, ie the international rate set by Europay.

3 A. Well, it says here:

4 "... there has never been a formal fallback or
5 default rate ... [Anybody] who does not agree ... works
6 on OUR international rates."

7 That seems to imply for some years beforehand, and
8 that's not the case; not the Europay rate.

9 Q. Mr Hawkins, I'm not asking you a wider question about
10 the arguments in this case or about what happened years
11 before. I'm asking you about the meaning of "our
12 international rates" in this letter, and can we agree
13 that it means the EEA MIF, please?

14 A. It might mean the EEA MIF only for a short period of
15 time. As I say, that implies that it has always been
16 the case.

17 Q. Well, because it was, Mr Hawkins, always the case.

18 A. No, it wasn't.

19 Q. And we see that EPI said it was in 1993, didn't they?
20 They told the regulator that, didn't they, Mr Hawkins?

21 A. Well, they were mistaken as far as the UK was concerned,
22 as I produced evidence to show. Mastercard rate in
23 those early 90s was always the fallback fee.

24 Q. Mr Hawkins, you keep saying "as far as the UK was
25 concerned", but can we agree precisely the same rules

1 applied to the UK as to the rest of the EEA?

2 A. I think, sir, we've tried to -- I have tried to
3 establish that the UK was in a different market
4 condition than the rest of Europe. It was a much more
5 developed credit card market and, therefore, we were
6 pioneering, a word I've used before. And, therefore, it
7 was important to us that we looked to Mastercard in the
8 USA rather than to Europe at that time in establishing
9 default fees.

10 Q. Mr Hawkins, can you try and just answer my question,
11 please? So my question was: were the same rules applied
12 to the UK -- to licensees in the UK as to licensees in
13 the rest of the EEA?

14 A. At this time?

15 Q. Yes, at this time.

16 A. Yes.

17 Q. Thank you.

18 Now, the reference here to MEPUK wanting to set
19 a fallback -- yes, so we see that {C3/165/1}, "MEPUK
20 would now like to set a fallback", refers to MEPUK's
21 desire to set a fallback UK MIF; correct?

22 A. Yes.

23 Q. Now, there's no mention of arbitration here, is there,
24 Mr Hawkins? So what's being said is that, "Anyone who
25 doesn't agree a domestic bilateral effectively works on

1 our rates". They don't say "only works on our rates
2 pending arbitration", do they?

3 A. Well, there's reference, I can see here, to, in their
4 terms, a renegade member appealing all the way to the
5 Mastercard board and then getting a fallback which does
6 not suit them. Now, that's arbitration.

7 Q. Yes, but my question is a bit different. So they're not
8 saying here that, "Anyone who doesn't agree a domestic
9 bilateral works on our international rates if they've
10 instituted an arbitration". So there's no requirement,
11 is there, to institute an arbitration in order for the
12 default to bite? That's the point I'm putting to you.

13 A. There is no requirement, but there is a requirement that
14 bilaterals are negotiated and that if they are not
15 negotiated, that there is a fallback arrangement --

16 Q. Alright.

17 A. -- which could include arbitration.

18 Q. Now, let's go, please, to -- just one moment, please.

19 (Pause)

20 So let's go -- can we, please, go to paragraph 52 of
21 your first witness statement, so that's {A/7/15}. And
22 you say here that reference rates were discussed at the
23 meetings of the MEPUK R&CC and MEPUK board; yes? And
24 I'm going to come on a little bit later to ask you about
25 reference rates, but I want to pick up on one point for

1 the moment.

2 You say in that paragraph that the reference rates
3 were not recorded in the minutes of those meetings in
4 this period or distributed to banks and you say that
5 that was because MEPUK was being careful not to discuss
6 bilateral negotiations of interchange fees. You say
7 that those negotiations were treated strictly as
8 a competitive matter; correct?

9 A. That is right.

10 Q. So you appreciated, didn't you, at the time that banks
11 should not be disclosing details of their bilateral
12 agreements with other banks?

13 A. And they didn't do so, to the best of my knowledge.

14 Q. Because you saw that as being a competitive matter and
15 competitors shouldn't discuss that kind of confidential
16 information with each other; correct?

17 A. Yes, the bilateral rates were a competitive matter.

18 Q. Yes.

19 Now, let's have a look at your second statement at
20 {A/13.1/3}, please, and paragraph 9(b) is what I want to
21 look at briefly. So you refer here to a meeting between
22 the OFT and representatives of certain UK banks,
23 including NatWest, and you represented NatWest at that
24 meeting, didn't you?

25 A. Yes, I did, yes.

1 Q. And you've set out a point here that was made to the
2 Director General of the OFT at that meeting, namely --
3 so you say there:

4 "Interchange rates were individually negotiated but
5 the spread either side of the fall-back rate was
6 a competitive issue which could not be discussed in open
7 forum. Furthermore, in some schemes (Switch and EPI)
8 there is no fall-back rate but provision instead for
9 arbitration in the event that a bilateral agreement
10 cannot be reached."

11 So just pausing there, it's right, isn't it, that
12 when, for example, you were negotiating a bilateral
13 agreement with Barclays, you wouldn't disclose the rate
14 you'd agreed with Barclays to, say, Midland when you
15 were negotiating with Midland?

16 A. No, no.

17 Q. So you're agreeing with me; yes? You agree?

18 A. I agree.

19 Q. Thank you.

20 And let's just look, just to be clear on this
21 point -- so if we go to {B/55/2}, you can see here the
22 paper -- the standard bilateral interchange fee
23 agreements that NatWest concluded as an acquirer with
24 various issuing banks; yes? So let's take 1993 as
25 an example.

1 A. Yes.

2 Q. So NatWest agreed a rate of 1.3 with Bank of Scotland.

3 Do you see that?

4 A. Yes.

5 Q. And then -- and agreed a rate of 1 with most of the

6 other banks.

7 A. Yes.

8 Q. And, in fact, 1.1 with Barclays; yes?

9 A. Yes.

10 Q. So 1 is better for NatWest as acquirer than 1.3;

11 correct?

12 A. That is true, but it's not the reason that it's there.

13 Q. But it's true.

14 And 1 is worse for the issuer than 1.3; correct?

15 A. We never looked at it that way --

16 Q. Well --

17 A. -- so the answer is no. Sorry, the answer is we never

18 looked at it that way.

19 Q. But do you agree that it's commercially worse for the

20 issuer?

21 A. You could interpret it that way, sir, but we never

22 looked at it that way, not -- not when setting

23 interchange fees.

24 Q. So NatWest, who you are speaking for, would not have --

25 so these are NatWest's agreements as acquirer. So

1 NatWest would not have thought, "Well, commercially
2 speaking, we'd rather have the rate at 1 than 1.3".

3 A. Well, you'll have noticed that the following year, we
4 went up to 1.3. This was a gradual process because
5 initially, there having been no cost studies in place,
6 we adopted the Mastercard international rate.

7 Q. Mr Hawkins, with respect, it feels like you're trying to
8 anticipate where my questions are going and trying to
9 argue the case for Mastercard, but I'm just asking you
10 a simple question at the moment.

11 So as acquirer, it's correct that commercially,
12 an agreement at 1 would have been commercially better
13 than an agreement at 1.3; correct?

14 A. That is not the way we looked at it, actually.

15 MR JUSTICE ROTH: Can I just ask you: when you negotiated,
16 you were both issuer and acquirers.

17 A. Yes.

18 MR JUSTICE ROTH: When you would negotiate -- these are the
19 NatWest as acquirer and you negotiate with Bank of
20 Scotland --

21 A. Yes.

22 MR JUSTICE ROTH: -- would you, in that negotiation, deal
23 with the converse situation where you're the issuer and
24 Bank of Scotland the acquirer? Would you negotiate, as
25 it were --

1 A. Yes --

2 MR JUSTICE ROTH: -- in one go or would you have a separate
3 negotiation for the acquiring rate and then agree that
4 and on another occasion, negotiate the situation where
5 Bank of Scotland is acquirer, or would you deal with
6 them together?

7 A. We dealt with them together. It would have been very
8 elaborate to have separate ones in that way, so we dealt
9 with them together.

10 MR JUSTICE ROTH: Yes, thank you.

11 MS DEMETRIOU: So, Mr Hawkins, going back to the commercial
12 confidentiality point, so you wouldn't have discussed --
13 you wouldn't have said to Barclays, "Oh, well, we've
14 negotiated a rate of 1.3 with Bank of Scotland";
15 correct? Because that was a commercially confidential
16 matter.

17 A. That's correct. We wouldn't have done that.

18 Q. And, equally, you wouldn't have asked other banks what
19 they were doing in their negotiations.

20 A. No. These were confidential matters.

21 Q. And then going back to what you say about the meeting
22 with the OFT and let's think about what's meant by
23 "spread either side of the fallback rate" --

24 A. Yes.

25 Q. -- that's acknowledging, isn't it, that the fallback

1 rate would have been relevant to the negotiation of
2 bilateral agreements?

3 A. You're talking about the reference rate?

4 Q. No, I'm talking about what's said -- that's your
5 interpretation, but I'm talking about what's said here
6 in the minutes. So the minute in your witness statement
7 says that:

8 "Interchange rates were individually negotiated but
9 the spread either side of the fall-back rate was
10 a competitive issue which could not be discussed in open
11 forum."

12 MR SMOUHA: Are you referring to a document?

13 MS DEMETRIOU: I'm referring to his witness statement
14 I looked at before. We can pull it up. It's
15 {A/13.1/3}.

16 So this is a minute from the meeting with the OFT.
17 We looked at it a minute ago before we went to the
18 schedule:

19 "Interchange rates were individually negotiated but
20 the spread either side of the fall-back rate was
21 a competitive issue ..."

22 Now, this is acknowledging, isn't it, that the
23 fallback rate would have been relevant to the
24 negotiation of bilateral agreements? It was the
25 backdrop against which bilateral agreements were

1 negotiated.

2 A. This minute, sir, was written by a solicitor who
3 attended along with the banks, and that terminology that
4 he used there had no relevance to the Europay fallback
5 rate, as far as I know. He was aware of the
6 UK methodology and method of arriving at a reference
7 rate. That is what I think he was referring to.

8 Q. Well, you don't know what he was referring to.

9 A. I do know that he was not referring to --

10 Q. Well, how do you --

11 A. Well, I don't believe he was referring to the European
12 fallback rate.

13 Q. Well, that is speculation, isn't it, Mr Hawkins? You're
14 keen not to speculate when things are tricky, but that
15 is speculation, what somebody else was referring to by
16 the fallback rate.

17 A. This was purely in a UK setting. We're talking to the
18 Director General of Fair Trading in the UK and this was
19 a solicitor who accompanied us. And, sir, you know, the
20 use -- the terminology that he used there was -- might
21 have been loose, actually, but it was not the Europay
22 rate. I'm quite certain of that.

23 MR JUSTICE ROTH: What does the second sentence mean?

24 MS DEMETRIOU: Sir, can we go to {C2/92/3}. Mr Smouha has
25 asked me to pull it up.

1 So "Fall-back Interchange":

2 "The DG accepted that the card payment systems
3 needed an honour all cards rule and also a fall-back
4 interchange rate. What he was interested in was the
5 extent to which the fall-back rate was relied upon ...
6 The DG said that he had been told that departures from
7 the fall-back rate were rare.

8 "It was pointed out to him by the card companies
9 that Interchange rates were individually negotiated but
10 the spread either side of the fall-back rate was
11 a competitive issue which could not be discussed in open
12 forum. Furthermore, in some schemes (Switch and EPI)
13 there is no fall-back rate but provision instead for
14 arbitration in the event that a bilateral agreement
15 cannot be reached."

16 That's the same passage that's in the witness
17 statement.

18 I'm going to check with my learned friend. Is there
19 another part you want me to go to? Is that it? Okay.

20 And let's just look at the following paragraph:

21 "The other dimension that needed to be borne in mind
22 is that the provision for a fall-back rate did give
23 protection to the smaller issuer and it was in these
24 cases that the fall-back rates were normally applied.
25 Bilaterally negotiated rates applied in respect of the

1 mass of transactions conducted between the larger
2 players in the market."

3 So I was just focusing on the words, "Interchange
4 rates were individually negotiated but the spread either
5 side of the fallback rate was a competitive issue".

6 (Pause)

7 Alright. I'll come to that point.

8 So we accept that there was a fallback rate in the
9 Europay Rules; right? We've established that.

10 A. We've established that, but this, I don't believe,
11 refers to that.

12 Q. Well, this seems to say, and I think this is the point
13 made by my learned friend, that in some schemes, Switch
14 and EPI, there is no fallback rate, but that can't be
15 right because we've seen the rules and there was
16 a fallback rate in the Europay Rules; correct?

17 A. Well, it demonstrates whoever wrote these minutes didn't
18 have maybe all the terminology correct.

19 Q. Well, can you just please just answer my questions,
20 Mr Hawkins? So we know that in the Europay Rules, there
21 was a fallback rate; correct?

22 A. We do know that, yes.

23 Q. And would you accept -- do you agree that in bilateral
24 negotiations, there was a spread either side of the
25 fallback rate, but that was a competitive issue which

1 couldn't be discussed?

2 A. Sir, can I explain something about this spread that may
3 illuminate or otherwise?

4 MR JUSTICE ROTH: Well --

5 MS DEMETRIOU: Can I take it in stages? Can I break it
6 down?

7 MR JUSTICE ROTH: Yes, if we can just deal with the
8 question. I'm not sure -- I mean, if they're not all
9 the same, there will be a spread either side of it,
10 but -- so I'm not being asked whether that-- correct;
11 but that there would have been a spread in the
12 individually negotiated rate. Is that the question?

13 MS DEMETRIOU: Well, let me ask it this way.

14 That banks negotiating bilateral agreements would
15 have been aware that there was a fallback rate and their
16 negotiation would have operated against that backdrop;
17 correct?

18 A. Yes, but this fallback rate was the reference rate.

19 Q. Alright. So can we agree that -- I think the position
20 is that we agree that negotiations would have taken
21 place with a fallback rate in mind, but we're
22 disagreeing with what that fallback rate is; is that
23 accurate?

24 A. That's accurate.

25 Q. Thank you.

1 A. Sir, am I at liberty to --

2 MR JUSTICE ROTH: Just a second. (Pause)

3 I'm not sure this really takes anyone anywhere, this
4 document, but what is it you wanted to say?

5 A. The Edgar Dunn studies included producing a draft --
6 a graph which indicated where, on that graph, various
7 banks were who had undertaken -- who had taken part in
8 the scheme, and you were able to determine from that
9 where you lay on that graph. So the spread was
10 something that was visible to you alone, not the other
11 banks. You knew whether you were efficient or not
12 efficient. And that was, I think, in relation to the
13 UK interchange studies.

14 MR JUSTICE ROTH: Yes.

15 MS DEMETRIOU: So can we turn up {C7/198/1}, and this is
16 a response to the OFT by Europay pursuant to a statutory
17 request for information and it's dated -- somewhere
18 there's the date. It's 11 September 2000. We'll find
19 where the date is, but I think, for the moment, you can
20 take it from me.

21 And let's look at the first question:

22 "Please provide details of the names of the
23 Participants that have agreed to clear and settle
24 transactions in the UK through the ... ECCSS ..."

25 And then if we look at the answer, the

1 first paragraph of the answer:

2 "Europay International offers all member banks the
3 option to clear and settle domestic transactions using
4 the [ECCSS] System ... for both [point of sale] and ATM
5 generated transactions. A major part of the UK domestic
6 traffic is processed by ECCSS. Depending on their
7 position as issuer or acquirer and the identity of the
8 other issuing or acquiring bank involved in the
9 transaction, almost all UK member banks rely on ECCSS.
10 Certain pairs of banks do however clear and settle
11 outside of ECCSS. Europay International does not
12 however have this information."

13 Now, let's just take that in stages. So it's
14 correct, isn't it, that Europay offered all member banks
15 the option to clear and settle domestic transactions
16 using ECCSS?

17 A. Yes.

18 MR SMOUHA: At what date?

19 MS DEMETRIOU: 2000. This is information given in 2000.

20 And at that point in time, so when this answer was
21 being provided, the answer says that a major part of the
22 UK domestic traffic is processed by ECCSS, and you don't
23 have any reason to think that that response was false or
24 misleading, do you?

25 A. No. Can I just check: did you say that's 2000?

1 Q. It is.

2 A. 2000. No, I don't have any reason.

3 Q. Now, in fact, if we look at Mr van den Bergh's evidence,
4 so if we go to {A/13.5/6}, he says -- if we look at
5 paragraph 22, he says that Europay started clearing
6 NatWest transactions in 1993 or 1994, and that's
7 correct, in your view, isn't it?

8 MR JUSTICE ROTH: Well, he may not know.

9 A. No.

10 MS DEMETRIOU: You don't remember?

11 MR JUSTICE ROTH: Well, I don't think -- there's no reason
12 to say it's incorrect, but I'm not sure Mr Hawkins is in
13 a position to confirm it either.

14 MS DEMETRIOU: Alright. Okay.

15 Let's go back to {C7/198/1}. Now, the next
16 paragraph talks about FDR, and FDR stands for First Data
17 Resources; correct?

18 A. That's right, yes.

19 Q. And some of the banks used FDR to process their
20 transactions, and what's being said in this
21 second paragraph, in this paragraph here, is that
22 where -- is that for transactions where both banks used
23 FDR, the clearing and settlement would have been carried
24 out by FDR. Do you see that?

25 A. Which paragraph is that, sorry?

1 Q. So:

2 "Some members who process transactions using the

3 services of FDR as a third party ... have taken the

4 decision to truncate the [FDR] traffic ... to clear and

5 settle the transactions between members who also process

6 with FDR."

7 A. Yes.

8 Q. So where both banks used FDR, clearing settlement would

9 have been carried out by FDR; correct?

10 A. Yes.

11 Q. And then if we look at question 2, here the OFT asked

12 EPI to confirm whether it has information concerning the

13 bilateral arrangements between member banks; correct?

14 Do you see that at the beginning?

15 A. Yes.

16 Q. And EPI's response is that it does only -- it only does

17 part of the domestic processing. Do you see that?

18 A. I see that, yes.

19 Q. And then it says:

20 "For that part of the transactions processed through

21 ECCSS, [it] needs to be informed of the bilateral ...

22 fees that apply between the member banks ..."

23 Correct?

24 A. Yes.

25 Q. And I think you'd agree with that.

1 A. Yes.

2 Q. And then, in addition -- and so -- yes, so pausing
3 there, so we've agreed with that, and then you see that
4 they're informed of all domestic fallback fees in Europe
5 regardless of whether the transactions are processed
6 through ECCSS or not. So are you aware of that or not?

7 A. Yes, I think we advised Europay what the rates were.

8 Q. And they obviously needed the rates that applied for
9 transactions they were processing so that they could
10 calculate the sums, correct, and clear the transactions?

11 A. Yes. Absolutely, yes.

12 Q. And then if we go to page 2 {C7/198/2}, please, you'll
13 see in response to question 4 -- so the question is:

14 "What percentages of transactions are made (i) on
15 the basis of fallback interchange and service fees; and
16 (ii) by way of bilateral agreements ... Please provide
17 this information by value and volume of transactions
18 made for the previous five financial years."

19 You've looked at this, haven't you, because you've
20 dealt with it in your statement, Mr Hawkins?

21 A. Yes.

22 Q. Yes. And then it says -- the response is that EPI says
23 it doesn't process all the domestic traffic in the UK,
24 so Europay is not in a position to provide figures on
25 the percentage of transactions processed under bilateral

1 interchange and service fees as opposed to total
2 traffic; yes?

3 A. Yes.

4 Q. And then at question 5, the OFT has anticipated that,
5 because they say:

6 "In the event that Europay only has details of the
7 bilateral agreements between Participants that do use
8 the ECCSS ..."

9 MR JUSTICE ROTH: Do -- yes, sorry.

10 MS DEMETRIOU: "... what percentages of transactions are
11 made (i) on the basis of fallback interchange and
12 service fees; and (ii) by way of bilateral
13 agreements ..."

14 And then, again, EPI is asked to provide this
15 information by value and volume of transactions for the
16 previous five years, yes?

17 A. Yes.

18 Q. And the answer is -- so the response you can see there;
19 that they've only been able to calculate the information
20 for the past three financial years.

21 And then if we go over the page {C7/198/3}, we'll
22 see a table, and you're familiar with this, I know,
23 because you've discussed it in your witness statement.
24 And it shows that for 1997, for point of sale, we have
25 a percentage, a volume, of transactions which occurred

1 pursuant to bilateral arrangements, which is very tiny,
2 0.01%; correct?

3 A. Yes.

4 Q. Now, let's just see what you say about that in your
5 witness statement, please. It's your second witness
6 statement at {A/13.1/17}.

7 MR JUSTICE ROTH: Well, you said that -- the percentage is
8 very small in the table.

9 A. Yes.

10 MR JUSTICE ROTH: And I think you put the question, "We have
11 a percentage which occurred pursuant to bilateral
12 agreements".

13 MS DEMETRIOU: Yes.

14 MR JUSTICE ROTH: But do we know that's the percentage --

15 MS DEMETRIOU: Sir, that's what I'm coming to in my next
16 questions.

17 MR JUSTICE ROTH: Well, we have a small percentage, very
18 small percentage. They've been asked to give
19 percentages for both 1 and 2.

20 Mr Hawkins, if you go back to the question on the
21 previous page, question 5, or if we kindly scroll, you
22 see the question {C7/198/2}.

23 A. Yes, sir.

24 MR JUSTICE ROTH: "What percentages of transactions are made
25 (i) on the basis of fallback interchange and service

1 fees; and (ii) by way of bilateral agreements between
2 issuers ... Please provide this information by value and
3 volume of transactions made for the previous five
4 financial years."

5 Well, they say, first of all, "We can't do
6 five years", so they do three. They then produce
7 a table which has only one percentage figure. So
8 they're not answering 1 and 2 and, so far as I can see,
9 they're not giving value percentages either, although
10 they've been asked to. They're only giving volume
11 percentages.

12 A. Yes.

13 MR JUSTICE ROTH: But are these percentages, in your view,
14 if you can help us -- if you can't, please say so -- are
15 they what has been asked for at (i) or what's been asked
16 for at (ii)? In other words, are they the percentage
17 done on fallback or are they the percentage done on
18 bilaterals?

19 A. Well, sir, I have to confess I was mystified by this,
20 because you'll see that -- the 0.001% and 0.003%, I just
21 had no idea what this might refer to. It didn't seem to
22 bear any relation to reality.

23 MR JUSTICE ROTH: And there's no follow-up from the OFT
24 saying --

25 MS DEMETRIOU: Sir, I was going to go to the decision. If

1 we go to {B/6/22} --

2 MR JUSTICE ROTH: Well, I mean, follow-up in terms of once

3 they got this answer saying, "Can you clarify what you

4 mean?"

5 MS DEMETRIOU: Well, what we see in the decision is they

6 have interpreted it that's the percentage of bilateral

7 agreements.

8 MR JUSTICE ROTH: Well, how have they got value?

9 MS DEMETRIOU: Yes, and my learned friend, and he's quite

10 right, says processed through the ECCSS. Yes, I hope

11 I made that clear. That's --

12 MR JUSTICE ROTH: Yes, but where do they get the value

13 figure from?

14 MS DEMETRIOU: Yes, because the point you are making, sir,

15 is that the previous figure was a volume figure?

16 MR JUSTICE ROTH: Yes.

17 MS DEMETRIOU: I will look at that. I don't know, is the

18 answer. So they have a value figure here and you're

19 right that the data given before was -- can we have them

20 side-by-side?

21 MR JUSTICE ROTH: They were asked for value, I think.

22 MS DEMETRIOU: They were asked for both.

23 PROFESSOR WATERSON: I was just noticing the footnote says

24 data provided on 11 September in response to an OFT

25 information request. So is that the date at which --

1 25 August, is that the date in which the first response
2 was sent?

3 MS DEMETRIOU: I think it is, yes.

4 PROFESSOR WATERSON: So in that case, there doesn't appear
5 to have been a follow-up, unless it was by telephone or
6 something.

7 MS DEMETRIOU: I think can you leave us to double-check
8 that, Professor.

9 PROFESSOR WATERSON: Certainly.

10 MS DEMETRIOU: So we will have a look to see if we can find
11 anything else in the documents.

12 In fact, perhaps we can also just, while we're on
13 this, you say, Mr Hawkins, that you think -- you say in
14 your second statement that you think that the OFT --
15 there must have been a lack of data from EPI. And do
16 you mean there -- so is the point you're making -- when
17 you say "a lack of data by Europay", do you mean that
18 Europay was not processing many transactions in the UK
19 in 1997? Is that the point that you were making?

20 A. Could you point me to that, please?

21 Q. Of course I can, yes. So if we go to your second
22 witness statement at -- just give me a moment --
23 {A/13.1/17}, and it's paragraphs 55 and 56. And you,
24 first of all, make the point in 55 that it's not clear
25 to you whether the percentages refer to transactions

1 using fallback or bilaterally agreed fees, which is the
2 point that was being canvassed by the Chairman
3 a few minutes ago.

4 A. Yes.

5 Q. And then you say if the table means bilaterals, then you
6 say it's either wrong or merely reflects a lack of data
7 by Europay, given that it didn't process a significant
8 volume of UK domestic transactions by around 1997.

9 So on that point, if we look at the OFT's Rule 14
10 notice, so {C8/135/14}, we can see the tables again
11 there. Here, in fact, they say -- so value and volume
12 are separated out, so it does rather look like there
13 were data relating to both.

14 My learned friend fairly asks whether that's
15 a question. I think I'm just -- it may be time for
16 a break. Anyway ...

17 MR JUSTICE ROTH: Shall we do that, and you can try and work
18 out quite what you're asking.

19 MS DEMETRIOU: Let's do that.

20 MR JUSTICE ROTH: I have to say, I find that table rather
21 mystifying, speaking for myself.

22 So we'll take ten minutes and come back at 3.25.

23 (3.14 pm)

24 (A short break)

25 (3.25 pm)

1 MS DEMETRIOU: I'd like to go back, Mr Hawkins, to EPI's
2 response to the OFT just to see if we can get a little
3 bit more assistance from it. So {C7/198/1} and if we go
4 to page 2 --

5 MR JUSTICE ROTH: Can I just stop you one second, because it
6 is a bit confusing? If one is -- I quite understand why
7 you want to explore it, but it may be that as it's all
8 about EPI processing and proportions on, that Mr Van den
9 Bergh would be in a much better position to clarify this
10 for us --

11 MS DEMETRIOU: Well, sir --

12 MR JUSTICE ROTH: -- and he does come -- I think, as
13 I understand it, he was working on the processing side
14 at ECCSS.

15 MS DEMETRIOU: Sir, I think two points on that. One is that
16 Mr Hawkins does squarely deal with this document in his
17 witness statement.

18 MR JUSTICE ROTH: Yes.

19 MS DEMETRIOU: And the second is that it does relate to --
20 the questions that we've got relate to bilaterals, which
21 Mr Van den Bergh wasn't really in a position to comment
22 on and so --

23 MR JUSTICE ROTH: Well, he may know the proportions of
24 different things that went through the system --

25 MS DEMETRIOU: Well, he may --

1 MR JUSTICE ROTH: -- which is, I think, what Europay is
2 giving information on.

3 MS DEMETRIOU: Sir, he may, but Mr Hawkins does squarely
4 deal with this in his second statement --

5 MR JUSTICE ROTH: Yes.

6 MS DEMETRIOU: -- and he does say he thinks that the OFT has
7 made a mistake and he does talk about, as you have seen,
8 whether or not the percentages relate to defaults or
9 bilaterals. So I do want to explore what he said in his
10 statement. It's not going to take me much longer, if
11 that helps.

12 So if we go to C7/198, please. We're going back to
13 the response, and if we go to page 2 {C7/198/2}. We've
14 seen -- so we saw the table and we're discussing whether
15 the small percentages relate to bilaterals or to default
16 transactions.

17 If we just go back to the table again just so you
18 can remind yourself what it says. I think it's on the
19 next page {C7/198/3}, and it's a table for 1997, 1998
20 and 1999.

21 So, Mr Hawkins, the first point is in 1998 and 1999,
22 the domestic MIF was in place; correct?

23 A. That's right, yes.

24 Q. So you wouldn't expect to see many bilaterals then.

25 I think you say in your statement that bilaterals really

1 dropped off, didn't they, once the --

2 A. That is right, yes.

3 Q. Okay. And if we go back to the previous page {C7/198/3}
4 and we look, please, at question 3, that's asking
5 Europay to provide details of the number of existing
6 bilateral agreements that are in place, and this is in
7 the year 2000, and we see that there are very few
8 agreements that are listed. Do you see that? You can
9 just scan down. So you see from (i) three relate to
10 point of sale transactions and 12 for ATM and cash
11 advance transactions. (Pause)

12 Mr Smouha wants to make the point, which he's made
13 before, which is this relates to domestic traffic
14 processed through the ECCSS, and I hope I've made it
15 clear that we do understand that.

16 So in relation to that traffic, there are
17 three arrangements which relate to point of sale
18 transactions; correct?

19 A. Yes, that's on (i), yes, (i).

20 Q. Yes. Then we see at (ii):

21 "As far as [point of sale] transactions are
22 concerned, the following banks have concluded one or
23 more bilateral agreements ..."

24 And then if we go down to (iv) --

25 MR JUSTICE ROTH: This is as at -- sorry, just to be clear,

1 this is a response sent on -- in September 2000.

2 MS DEMETRIOU: It is.

3 MR JUSTICE ROTH: So this is saying -- are you putting the
4 question that as at September 2000, there are
5 three bilaterals for point of sale transactions; is that
6 right?

7 MS DEMETRIOU: Yes, and then we have at (ii):

8 "... the following banks have concluded one or more
9 bilateral agreements ..."

10 But then if we look at (iv):

11 "The [point of sale] bilateral interchange fee
12 agreements provide for a Standard rate of 1.10% (in
13 two cases) and 1.20% (in one case). The rates for the
14 other categories of transactions do not differ from the
15 UK domestic fallback interchange fees."

16 So this is the year 2000, Mr Hawkins.

17 A. Yes.

18 Q. The information is being given then and it does relate
19 to the domestic traffic processed through ECCSS.

20 A. Yes.

21 Q. But this is consistent, I think, that -- the relative
22 small number of bilateral agreements is consistent with
23 your evidence that when the UK MIF was brought into
24 force, they really fell away; that's right, isn't it?

25 A. Certainly as far as NatWest was concerned, yes.

1 Q. Okay. And then if we go back to the table on the next
2 page {C7/198/3} and going back to this question of
3 whether these small percentages relate to the number
4 of -- the proportion of bilaterals or the proportion of
5 default transactions, and if we focus on 1999, for
6 example, we see that a very tiny -- there's a very tiny
7 proportion.

8 You would expect for 1999, once the default MIF is
9 in place, that that tiny proportion relates to
10 bilaterals rather than transactions going through at the
11 new UK MIF; correct?

12 A. Well, I can see in relation to how you have expressed
13 it, yes, although I think still three banks were
14 offering bilaterals at that time. Nevertheless, I can
15 see that it would go down. It just seems to be a very
16 low figure.

17 Q. Alright, but I think if one is choosing between looking
18 at '98 and '99 when the UK MIF was in place --

19 A. Yes.

20 Q. -- if one -- you've got a very small figure, as you say,
21 and is your evidence that that small figure for those
22 years is more likely to reflect the transactions going
23 through at bilateral rates rather than the UK MIF?

24 A. I assume so.

25 Q. Okay. Now, if we go back, please, to the OFT's Rule 14

1 notice, so this is {C8/135/14}. We've seen the table
2 there again.

3 And if we go back a page to page 13, please
4 {C8/135/13} and look at paragraph 48. Could we please
5 zoom into that:

6 "EPI provided details of the percentage of
7 transactions in its scheme that are made on the basis of
8 bilateral/fallback interchange and service fees."

9 And then it explains:

10 "EPI offers to all member banks the option to clear
11 and settle [via] the [ECCSS] system ..."

12 And then it says:

13 "A major part of the UK domestic traffic is
14 processed by ECCSS."

15 Now, this relates to -- I think the OFT's Rule 14
16 notice is dated 2001. Does this accord with your
17 recollection that in 2001, a major part of the
18 UK traffic was processed by ECCSS?

19 A. I have no reason to dispute that, sir.

20 Q. And then if we look at the Commission decision, please,
21 at {A/27/46} and if we look at footnote 134. I think we
22 will need to zoom:

23 "According to Mastercard ... the association
24 processes 0.1% ..."

25 And talks about Austria. And we see for the UK --

1 A. Yes.

2 Q. -- 97.25% of domestic transactions.

3 And Mastercard explains that those figures, that

4 those percentages, derive from figures in 2001 and 2002.

5 A. Right.

6 Q. So, again, that's consistent, isn't it, with what the

7 OFT found in relation to that period of time? Does that

8 accord with your recollection too?

9 A. It certainly seems to be, yes.

10 Q. Now, let's have a look at a document from 1995. So this

11 is {C2/458.1/1} and this is an internal memorandum from

12 Mr Van den Bosch to Mr Nelson of Europay.

13 A. Yes.

14 Q. And it's dated 5 July 1995. Have you looked at this

15 document before, do you remember?

16 A. I believe I have.

17 Q. Okay. And we see there an explanation as of that date

18 in '95 of the current situation. So it says:

19 "Firstly, we don't process:

20 "authorisations or clearings from intra-FDR traffic

21 (except RBS ...)"

22 And intra-FDR traffic means traffic where both banks

23 are using FDR; correct?

24 A. Yes.

25 Q. And then:

1 "... we don't process ...

2 "clearings where Barclays/Bank of Scotland are the
3 acquirer and (an) FDR (bank) is the issuer."

4 Yes?

5 A. Yes.

6 Q. And then it says:

7 "which means that currently, we process through
8 EPS-Net just about everything else on domestic
9 [Mastercards], both in terms of authorisations and
10 clearings. The FDR issuer banks are:- NatWest, Midland,
11 Lloyds, RBS ..."

12 And you see the list.

13 And then he explains that:

14 "Another way of looking at it is bank by bank for UK
15 acquirers ..."

16 So let's look at what he says and see if this
17 accords with your recollection. So he says there are
18 four distinct groups. So:

19 "Barclays/[Bank of Scotland] - we process all
20 authorisations, plus clearing transactions that are for
21 non-FDR issuers."

22 Are you able to comment from your recollection on
23 that or not?

24 A. I accept that.

25 Q. Okay. And then:

1 "NatWest - we process ALL authorisations and
2 clearings, including 'on us' as the FDR acquirer system
3 is 'in house', and the issuer system is at FDR."

4 I think that must mean that the acquirer system is
5 in-house; is that right? So you had in-house acquiring
6 and FDR was the issuer system.

7 A. Yes. I think I've explained, sir, that I am not
8 an operational expert, but I was aware that our first
9 effort in taking in-house from FDR was on the acquiring
10 side, so yes.

11 Q. So at that stage, do you recall in 1995 that Europay
12 were processing all NatWest authorisations and
13 clearings? You have no --

14 A. Including, yes.

15 Q. Did you say "yes"?

16 A. That's what it says, yes.

17 Q. Yes. And as far as you're concerned --

18 A. I have no reason to dispute that.

19 Q. Okay. And then:

20 "RBS - we process all authorisations, and we also
21 process clearings which are for non-FDR issuers.
22 Clearings for FDR issuers are 'intra FDR'."

23 Again, you don't have any reason to disagree with
24 that, do you?

25 A. No. At that time, RBS was a different bank.

1 Q. Yes, and so you're not able to comment.

2 A. No.

3 Q. And then if we go over the page {C2/458.1/2}:

4 "Midland/Lloyds/National Australia (FDR processed
5 banks) - we process authorisations and clearings for
6 non-FDR issuers."

7 Can I take it you're not in a position to --

8 A. No.

9 Q. Thank you.

10 Then in terms of volumes, he says:

11 "... I have also attached to this email the latest
12 information from PMI which is current to the end of
13 May 1995. Bottom line - we have processed 37.4 million
14 domestic authorisations ... this year, and 49.5 million
15 domestic clearing transactions. If you wanted this bank
16 by bank, we could [do] it ..."

17 So that is a sizeable number of transactions, isn't
18 it, in the scheme of things?

19 A. So it would appear.

20 Q. Can we please go to submissions that were made by
21 Mastercard to the Competition Appeal Tribunal back in
22 2006? I appreciate you weren't involved in this, but
23 I just want to see if you agree with what was said --

24 MR JUSTICE ROTH: Just before that --

25 MS DEMETRIOU: Yes.

1 MR JUSTICE ROTH: -- can I just interrupt?

2 Mr Hawkins, what do you understand about -- this is
3 authorisations and clearings and they've distinguished
4 between them sometimes. What do you understand by
5 authorisations?

6 A. Well, this is when the retail -- well, a point of sale
7 transaction needs authorisation, so it goes from the
8 retailer to the acquirer and then via the Europay system
9 to the issuer bank and back again. So that's that, and
10 the other is the clearing of the transaction.

11 MR JUSTICE ROTH: And what's that?

12 A. Well, that will be the settlement of the amount
13 involved.

14 MR JUSTICE ROTH: So clearing means settlement?

15 A. Yes.

16 MS DEMETRIOU: So just before we leave this, Mr Hawkins, so
17 we've seen the position in 2001 where EPI was processing
18 the vast majority of transactions; yes?

19 A. Yes.

20 Q. And we've seen here that it looks like ECCSS was
21 clearing a substantial number of UK transactions in
22 1995; correct?

23 A. Yes.

24 Q. So it's likely, isn't it, that in 1997, they would have
25 been clearing a substantial number of transactions too?

1 A. Yes.

2 Q. Now, I want to take you to {C16/41/1}, and this is
3 a transcript of a case management conference. It's
4 a hearing before the Competition Appeal Tribunal in
5 March 2006 and you'll see that the proceedings involved
6 MEPUK and Mastercard. And you'll see from page 2
7 {C16/41/2} that MEPUK was represented by
8 Mr Nicholas Green QC.

9 And I just want to go to page 8 {C16/41/8}, please,
10 to see what was said on behalf of MEPUK there to see
11 whether or not you agree. So can you see the line
12 numbers at the left-hand side of the page?

13 A. Yes.

14 Q. And if we go to line 24, you see there:

15 "The documents encourage bilaterals with a fall back
16 MIF ..."

17 I think he must mean -- by "documents", he must mean
18 the rules:

19 "In the early part of the '90s there were some
20 bilaterals. As the system evolved they became less
21 practicable but the rules did not change, but it is
22 still possible for bilaterals under the rules to be
23 concluded."

24 So he's saying here that they were less practicable
25 as the scheme expanded. That's what he meant, isn't it?

1 A. I assume so. He does say the early part of the 90s,
2 there were some bilaterals, whereas I think
3 I've demonstrated, in NatWest's case, we had
4 a considerable number of bilaterals.

5 Q. Let's just go back to the schedule of bilateral
6 arrangements, so let's look at bilaterals relating to
7 electronic credit card transactions. If we go to
8 {B/55/13} and let's take the column for 1997.

9 So you're quite right, Mr Hawkins, that NatWest has
10 bilaterals in place in 1997 as NatWest is acquirer. But
11 if we scroll down the pages, please, if we go to the
12 next page and look at 1997 {B/55/14}, once you get on to
13 other banks, there aren't many bilaterals in place at
14 all. If we go to the next page and if we go on, we see
15 that there were actually very few, according to this
16 table, bilateral agreements in place for 1997.

17 Mr Hawkins, are you aware of what bilaterals were in
18 place for other banks in 1997?

19 A. No, no.

20 Q. Alright. I'll leave it there.

21 Now, I'm going to move on to a different topic now,
22 Mr Hawkins. Can we go to {C1/410.1/1}, and you see that
23 this is a letter from Mr Nelson of Europay to Barclays
24 dated 13 May 1993. And do you see there --

25 MR JUSTICE ROTH: 31 May.

1 MS DEMETRIOU: Of course, sir, sorry. Yes, 31 May 1993.

2 And the first paragraph of this letter refers to the
3 pan-European interchange research; correct? And then it
4 says -- the second paragraph says:

5 "Edgar, Dunn and Co ... were contracted back in
6 January ..."

7 So that's January 1993:

8 "... to conduct an interchange study in several
9 European markets ..."

10 We know, don't we, that EDC conducted studies in
11 relation to the UK? You talk about those in your
12 statement.

13 A. Yes.

14 Q. If we go to the fourth paragraph -- actually, sticking
15 on that paragraph, it says that these studies are to
16 provide a framework and rationale within which
17 interchange fees could be determined. So do you agree
18 that that's an accurate description of what they were
19 seeking to do?

20 A. Sorry, did you say the fourth paragraph?

21 Q. No, I made a mistake. You're quite right, it's the
22 second paragraph.

23 A. The second, sorry.

24 Q. Yes.

25 So what's being said there is that EDC were

1 contracted to carry out an interchange study in several
2 European markets in order to provide a framework and
3 rationale within which interchange fees could be
4 determined. Is that how you saw it?

5 A. Yes.

6 Q. And then it says:

7 "In addition, the rationale determined must be
8 defensible before the various competition authorities
9 (OFT, DG ...)"

10 What became DG COMP; yes?

11 A. Yes.

12 Q. And that was, in addition, an important reason for
13 having cost studies, wasn't it, Mr Hawkins? There was
14 quite a great deal of regulatory scrutiny and it was
15 thought that it was important to have these cost studies
16 to help interchange fees stand up to that regulatory
17 scrutiny. Would you agree with that as a proposition?

18 A. Well, it was one of the reasons, certainly. I agree
19 with that.

20 Q. And then if we go, please, to {C2/59/1}, these are
21 minutes from MEPUK's board meeting held on
22 31 January 1994 and we see that you were in the chair
23 for this meeting; yes?

24 A. Yes.

25 Q. And if we go to page 17 {C2/59/17}, we see that this is

1 a message that is -- from EDC which is annexed to the
2 minutes, and it sets out the preliminary results of the
3 EDC cost study --

4 A. Yes.

5 Q. -- which are costs of 1.33% plus 4p, equating to 1.44%
6 for paper transactions, and 1.10%, equating -- plus 10p,
7 equating to 1.2% for electronic transactions.

8 A. Yes.

9 Q. And if we go to page 8, please {C2/59/8}, these are
10 where the EDC's cost study is discussed by MEPUK and if
11 we look towards the bottom of the page:

12 "There was some discussion over the narrowness of
13 costs between electronic and paper which, prima facie,
14 did not provide a sufficient incentive to acquirers to
15 invest in electronic terminals. However, subsequent to
16 the meeting, Mr Griffin ..."

17 Was he of EDC, do you remember?

18 A. Yes. I remember Mr Griffin.

19 Q. "... provided figures which showed the different level
20 of ATV ..."

21 That's average transaction value, isn't it?

22 A. Yes.

23 Q. "... for each delivery type which showed a significant
24 incentive to acquirers."

25 So is it right to take from this that the board was

1 initially concerned about the cost study figures?

2 A. No, it wasn't concerned about the cost study figures.

3 What it, I think, was aiming at was incentivising
4 retailers to invest in technology more efficiently to
5 process transactions and guard against fraud.

6 Q. So it was a concern, wasn't it, in the sense that the
7 narrowness of the delta, as it were, between electronic
8 and paper wouldn't provide a sufficient incentive to
9 acquirers to invest; correct?

10 A. That was the concern, yes.

11 Q. And it was --

12 MR JUSTICE ROTH: It's the retailers who have to invest, is
13 that right, not the --

14 MS DEMETRIOU: The --

15 A. I beg your pardon?

16 MR JUSTICE ROTH: The investment has to be by the
17 retailers --

18 A. Yes.

19 MR JUSTICE ROTH: -- not by the acquirers.

20 A. By the retailers.

21 MS DEMETRIOU: Yes.

22 A. In terminals and -- in terminals and acceptance
23 equipment.

24 MR JUSTICE ROTH: Yes.

25 MS DEMETRIOU: So the upshot, we can see from the next part,

1 is that it was agreed that EDC would go away and
2 research that some more; correct?

3 A. Yes.

4 Q. And if we go to {C3/80/1}, this is an extract from the
5 minutes of the MEPUK board meeting of 5 December 1995.
6 Do you see that in the top?

7 A. Yes.

8 Q. And your name is mentioned in the first substantive
9 paragraph below:

10 "Mr Hawkins advised ..."

11 Do you see that?

12 A. Yes.

13 Q. It says:

14 "Mr Hawkins advised that the preliminary results of
15 the study by [EDC] had been reviewed at a recent meeting
16 of the R&CC ... Task Force. These results were
17 deficient in that, firstly, not all Members had supplied
18 data and, secondly, that some of the data required
19 validation. A further Task Force meeting would take
20 place in early-January ... following which, it was
21 proposed that a presentation would be made by [EDC] at
22 the Annual Board Away Day. This was agreed."

23 And you see that at the bottom:

24 "It was further agreed that the Reports circulated
25 by [EDC] should be withdrawn and destroyed."

1 Correct?

2 A. I see that, yes.

3 Q. So in addition -- so the data -- the reports circulated
4 by EDC were considered not to be good enough because the
5 data wasn't very good; is that the position?

6 A. EDC cost studies relied upon the supply of data from the
7 member banks, and it was an iterative process because,
8 as you can see, a great deal of discussion took place,
9 and Edgar Dunn were asked to go away and refine the data
10 and the results.

11 Q. So the reports that they produced were destroyed. Is it
12 fair also to assume that the results of those reports
13 weren't minuted?

14 A. I can't -- I can't draw the connection between those
15 two, but I think it would have been destroyed because it
16 was not relevant.

17 Q. Not relevant because you didn't agree with the results.

18 A. Well, no, I think there was a great deal of debate about
19 the data that had gone into it. You can see what has
20 been questioned. Edgar Dunn were asked to go away,
21 effectively do it again, and we were asked to go away to
22 our banks and get them to supply more accurate data.

23 Q. So the position, is this right, that when the MEPUK
24 board was unhappy with the preliminary results of an EDC
25 report, it could just arrange for that report to be

1 withdrawn and destroyed and so cost studies were always
2 subject to MEPUK board's approval; correct?

3 A. They were always subject to MEPUK board approval, but
4 they did stand on their own. MEPUK arrived at
5 a reference rate using other criteria, but this is the
6 only case that I am aware of where the report was asked
7 to be taken away and destroyed.

8 Q. It seems quite extreme to ask for the report to be taken
9 away and destroyed, so there wasn't any engagement with
10 the figures. You just didn't like them and so you
11 didn't want any record of the results; is that the
12 position?

13 A. I cannot recall why that was asked to be done. All I do
14 know is it would have been a very, very rare occurrence.

15 Q. Now, we've agreed that the first UK fallback MIF was
16 introduced in November 1997; correct?

17 A. Yes.

18 Q. And because it was introduced on that date, it would
19 presumably have been agreed in principle some time
20 before that date.

21 A. Yes.

22 Q. And if we go to {C4/463/1}, this is a meeting of the
23 R&CC Interchange Sub-Group on 11 December 1997. Again,
24 we see that you are in the chair.

25 A. Yes, yes.

1 Q. If we go to page 2 {C4/463/2}, you have here the
2 preliminary results of the EDC cost study. Do you see
3 that?

4 A. Yes, I see that.

5 Q. So you can see the EDC have found that the blended --
6 just underneath the heading, the blended interchange
7 costs have reduced from 1.24% in '95 to 1.08% in '97.
8 Do you see that?

9 A. Yes.

10 Q. And then the electronic and standard interchange costs
11 have both reduced, and we see that for electronic,
12 they've gone from 1.09 to 0.98 --

13 A. Yes.

14 Q. -- and standard, 1.45 to 1.25.

15 Now, this report post-dates, doesn't it, the
16 agreement on the level of the UK fallback MIFs
17 introduced in November, because this is December;
18 correct?

19 A. Sorry, could you just --

20 Q. Yes. So we've seen this is -- this meeting was on
21 11 December 1997.

22 A. Yes.

23 Q. So this preliminary report post-dates the introduction
24 of the first UK MIF in November.

25 A. Yes, I see that, yes.

1 Q. So this couldn't have been taken into account when those
2 rates were agreed; correct?

3 A. It could not have, no.

4 Q. But when the UK fallback MIF was next updated, then
5 these results could have been taken into account;
6 correct?

7 A. That would have been the normal process, yes.

8 Q. And if we have a quick look at the schedule of UK MIFs,
9 please, so this is B/12 -- no, it's not B/12. It's
10 {A/18.1/1} and it's page 3 -- in fact, if we start with
11 page 2 {A/18.1/2}.

12 We can see 1997. The rate for 1997 is 1% for
13 electronic. I'll just give you a moment to find that,
14 Mr Hawkins. So do you see the last column is 1997 on
15 that page. Do you have that?

16 A. Yes.

17 Q. And do you see the first column of the last big column
18 says "Mastercard UK"?

19 A. Yes.

20 Q. And you've got 1.3 for standard and 1% for electronic.

21 A. Yes.

22 Q. And then if we go over the page to look at 1998
23 {A/18.1/4}, it's the same; correct?

24 A. Yes.

25 Q. So even though EDC said costs had reduced, that

1 wasn't -- that didn't filter through into the level of
2 the MIFs; correct?

3 A. It maintained a steady pace, the agreed reference rates,
4 yes.

5 Q. And very steady, didn't it, because they didn't change
6 really at all, did they?

7 A. That's right. This recognised market realities and the
8 competition.

9 Q. But you accept that the cost studies did vary
10 considerably.

11 A. Oh, yes, the cost study varied. The whole purpose --
12 that was the base of the reference rates, but there were
13 other considerations.

14 Q. And, in fact, the interchange fees, the MIFs, didn't --
15 really didn't vary at all, depending on how costs moved,
16 did they? They stayed the same.

17 A. Well, I can see that that is the case up to 2001 there.

18 Q. Let's go back to the minutes of the Interchange
19 Sub-Group meeting at {C4/463/3}. This is the meeting of
20 11 December 1997, and if we look at the final paragraph
21 on page 3, do you see that says:

22 "Credit write-off costs are down from 0.50% to 0.36%
23 due to members having put a lot of effort into
24 collection routines."

25 So that's an explanation for why the cost figures

1 are down; correct?

2 A. Yes.

3 Q. And then the next sentence is:

4 "Mr Hawkins suggested that Bad Debts were, to some
5 extent, cyclical and asked what happens when the
6 'downturn' arrives. Credit write-offs and funding costs
7 were both likely to rise over the next two years."

8 And what you're doing here, Mr Hawkins, is you're
9 trying to find some reason, aren't you, for not
10 reflecting the reduction in costs in the rates; correct?

11 A. No. No, sir, that's not the case. What I'm doing here
12 is saying -- is looking at market realities and, in
13 fact, it turned out to be correct.

14 Q. Well, we'll look at that in a moment, but you accept
15 that what EDC were doing was purporting to analyse the
16 market realities; correct?

17 A. They were -- they were providing a very useful input
18 into the whole process, which was the cost basis.

19 Q. And then if we look at what you then said, you then --
20 it says you then asked -- so credit write-offs both
21 likely to rise:

22 "He [that's you] then asked how the investment in
23 risk reduction projects were recovered and Mr Griffin
24 stated that members were expected to factor in any
25 capital costs."

1 So what you seem to be doing here is trying
2 a different tack to suggest why the indications in the
3 cost study of a fall in costs shouldn't be reflected in
4 a fall in interchange fees; correct?

5 A. This was part of a debate that always took place about
6 what market conditions were after every interchange fee
7 study was published.

8 Q. But what you're suggesting on a specific point is you're
9 saying -- you're suggesting that because issuers have
10 managed to reduce their costs through investment in
11 projects, perhaps those investment costs would justify
12 maintaining fees at their current levels; correct?

13 A. That's certainly what -- sorry.

14 Q. Sorry. That's what you're saying there.

15 A. That's certainly what Mr Griffin said, yes.

16 Q. Well, no, it's you, I think, because it says -- oh, you
17 asked the question. That's fair. So that's what
18 Mr Griffin said.

19 A. Yes.

20 Q. That's your understanding of the debate.

21 And then down at the bottom, Mr Bowen -- so a bit
22 further on:

23 "Mr Bowen pointed out that merchants would expect
24 a lower rate because of fraud reductions. If rates were
25 to reduce now he asked what would happen when CHIP rolls

1 out and merchants request even lower CHIP rates."

2 So he seems, doesn't he, concerned about further
3 pressure from merchants to reduce interchange fees in
4 due course; correct?

5 A. I think he did. Theoretically, of course, the fallback
6 or the reference rate could go up or down, but in
7 practice, that wasn't going to happen because merchants,
8 retailers are not likely to accept that; not going up,
9 anyway.

10 Q. And then we see:

11 "Ms Smith suggested that if the study indicated
12 costs marginally lower than the fallback rate, the
13 justification for not lowering the fallback rate would
14 be the incidence of CHIP costs."

15 So here, Ms Smith is trying to find a reason not to
16 lower the fallback MIF too, isn't she?

17 A. Well, it is true that we wanted to incentivise, and
18 eventually did incentivise, chip.

19 Q. Well, what you've got are EDC saying that, "Here are
20 some costs that have reduced", and rather than actually
21 reducing the interchange fee, everybody seems to be
22 finding lots of reasons not to take that cost reduction
23 into account, aren't they?

24 A. We were facing the reality that costs were going to
25 fluctuate. I've mentioned downturns, cyclical downturns

1 and upturns, and we wanted to keep the rate fairly
2 consistent, because that's what retailers, and they were
3 the end-users, would have expected.

4 Q. So is it your evidence that regardless, really, of what
5 costs EDC came up with, you wanted to keep the rates
6 consistent because of pressure from retailers; is that
7 your evidence?

8 A. It's not regardless, no. I've mentioned before and
9 I'll mention again that the cost studies produced a rate
10 that we used as a reference rate to begin with, but then
11 we applied market realities to it, and that included
12 cyclical pressures and retailer pressures.

13 Q. And, in fact, you're not able to point to a single
14 example, are you, of the MIF changing because of
15 anything EDC said?

16 A. I -- I don't accept that, but I can't offhand go right
17 through -- in my head go right through all the EDC
18 studies over the years.

19 Q. Well --

20 A. We certainly took a lot of notice of what they said.

21 Q. Can we turn to page 4 in this document {C4/463/4}. Can
22 you see at the top of the page this refers to
23 a reduction:

24 "Electronic and Standard Interchange costs have both
25 reduced - with the main decreases being in Direct Risk

1 and Funding Costs."

2 A. Yes.

3 Q. And then if we skip down a bit, it says:

4 "Mr Hawkins expressed concern on the preliminary
5 results for Standard and Electronic and, indeed, stated
6 that any potential problems should be resolved before
7 any proposal was submitted to MEPUK Board for
8 endorsement."

9 And then you see Mr Griffin saying -- he said he
10 saw:

11 "... no difficulty in including an element of the
12 costs, for example, of the long-term Risk Control
13 investment made in CHIP. This would require additional
14 data ..."

15 Here again, Mr Hawkins, what you seem to be doing,
16 you and Mr Griffin, is working out how you can push
17 these costs up.

18 A. No, I do not accept that. This was a healthy debate and
19 the whole purpose of having subgroups of committees of
20 the board is to thrash out these problems before it goes
21 to the board for approval, because the board may not
22 agree with what is being proposed.

23 Q. Well, what we say you're doing is trying to find ways to
24 push the cost results up, trying to find ways not to
25 reflect the reduction in costs in the interchange fees,

1 trying to find ways not to bring the interchange fees
2 down.

3 A. That is not correct. What we were looking at is to find
4 a proper way of including the costs that were properly
5 included in the cost study. When chip came in --

6 Q. Well --

7 A. When chip came in, that was part of the costs.

8 Q. And when it came to updating the UK fallback MIF in
9 1998, we see that no change was made to the levels at
10 all, despite these costs having reduced; correct?

11 A. Yes.

12 Q. And we've just seen that you pushed back against the
13 reduction of credit write-off costs in December 1997,
14 saying that these were likely to rise, in your view, and
15 so no reduction in the MIFs was warranted. But in
16 relation to the 1999 cost study, you did the opposite.

17 Were you in court yesterday, Mr Hawkins, when
18 I asked Mr Peacop some questions about this?

19 A. Yes.

20 Q. So let's go to {C7/135/1}, and these are the minutes of
21 the Interchange Sub-Group dated 8 August 2000 and you
22 are in the chair, and agenda item 4, if we scroll down,
23 is the 1999 UK cost study.

24 And we see, if we go to page 2 {C7/135/2}, at the
25 bottom of the page, the minutes read:

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

11 So here what's being said is, "Well, those costs
12 have now increased, but we can't increase -- we don't
13 want to increase the interchange fees, so we need to
14 find some sort of offset to balance it out". That's
15 what's being said; correct?

16 A. Well, I think, sir, that what this shows is that I was
17 correct two years earlier and that there were
18 fluctuations and credit write-offs were now much higher
19 than they had been and it was a right decision to leave
20 it where it was two years previously.

21 Q. And on my question, Mr Hawkins, what's being said here
22 is that those write-off costs have increased, according
23 to EDC --

24 A. Yes.

25 Q. -- but you don't want to increase the interchange fees

1 and so you need to find some sort of way of offsetting
2 those increases when you make the recommendation to the
3 board relating to the current study; correct?

4 A. Well, I heard what Mr Peacop said yesterday and I say
5 the same thing and that is that we could not get to the
6 bottom of why those credit write-offs had increased to
7 such an extent. It was unjustified therefore to simply
8 include them in the interchange fee.

9 Q. And, in fact, we saw from the memorandum from EDC, that
10 you will have heard me explore with Mr Peacop yesterday,
11 that the upshot of all of this is that the group
12 recommended that the 1997 credit write-off figures were
13 applied instead; correct?

14 A. That's right, yes.

15 Q. So it's right, isn't it, that in each case MEPUK took
16 the view that it didn't want to reflect EDC's analysis
17 of credit write-off costs in a change to the MIF;
18 correct?

19 A. That's not right. The reality is that MEPUK did not
20 want to suddenly impose a higher fee on retailers,
21 knowing that they wouldn't accept it anyway. It had to
22 deal with market realities.

23 Q. Well, why isn't what I've said right then? I think it
24 is right, isn't it? So you didn't want to reflect the
25 increased credit write-off costs identified by EDC in

1 a change to the MIF.

2 A. I don't think I'm disagreeing with you, I think I said
3 the same thing.

4 Q. Okay, I think so too, Mr Hawkins.

5 Now, were you alive to the fact that there were data
6 problems with EDC, or that EDC was finding it hard to
7 get robust data from banks?

8 A. I've refreshed my memory with some of the minutes from
9 the time and, yes, that was an -- an iterative process,
10 a continuing process. This was very hard work for the
11 bank finance departments to drop everything and do these
12 fee analyses, and Edgar Dunn needed to get the precise
13 numbers that they needed, and often that was quite
14 a difficult process.

15 Q. And if we look, for example, at {C4/237/5}. You'll see
16 this is a letter from EDC and it's dated 14 July 1997.
17 Do you see that at the top?

18 A. Yes.

19 Q. And then if we turn to page 9 {C4/237/9}, we see here,
20 second paragraph on the page:

21 "During the last interchange study, the quality of
22 the data responses from the participants was relatively
23 poor."

24 Have you seen this document before? Are you aware
25 of it?

1 A. I have, yes.

2 Q. When you were preparing for this hearing?

3 A. Yes.

4 Q. "All participants but one responded after the deadline
5 ... the accuracy of the data submissions was mediocre
6 and, during the course of our reconciliation activities,
7 significant changes were made by many participants in
8 their original data submissions ... we again had
9 difficulty in obtaining satisfactory data from FDR on
10 behalf of the banks for which they process."

11 So just pausing there, it's correct, isn't it, that
12 the banks weren't obliged to provide data to EDC?

13 A. There was an ultimate obligation to do this. The
14 finance department, as we have seen, sir, were often
15 a bit reluctant or slow in providing the data. But in
16 the end, they had to do that because, well, their bosses
17 would have said so.

18 Q. Well, it wasn't in the rules, was it? They weren't
19 contractually obliged.

20 A. If we were part -- well, it's not a question of what's
21 in the rules. The fact of the matter is that if the
22 general manager said you have to do it, you have to do
23 it.

24 Q. And would it be fair to say that some banks were better
25 at producing the data than others?

1 A. I can't really comment on that, sir.

2 Q. Well, I think it is fair to say that this letter doesn't
3 really give a glowing picture of the robustness of data
4 provided at that stage in 1997; would you agree with
5 that?

6 A. What I think it does is to demonstrate that a great deal
7 of thought and effort goes into these interchange
8 studies and the collection of data so that Edgar Dunn
9 didn't simply accept the data that was there, but they
10 questioned -- they dug into what was being provided to
11 them until they got to the correct solution.

12 MR JUSTICE ROTH: Well, I think -- two points. One is
13 they're trying to do -- I think the point you made --
14 they're trying to do a thorough professional job.

15 A. Yes.

16 MR JUSTICE ROTH: That's right, Edgar Dunn, but also they're
17 complaining here that in order to do that, of course,
18 like any analysis of data, they need the data to do it.

19 A. Yes.

20 MR JUSTICE ROTH: And they're complaining about -- was this
21 the -- interrupting myself. Was this the first time
22 they did the cost study? When was the first one?

23 A. No, I think this was the --

24 MR JUSTICE ROTH: This was the second one, is it?

25 A. This would have been about the third, '97.

1 MR JUSTICE ROTH: '97, the third one, I think, about the
2 response from banks both delay and quality, they say
3 this is -- therefore, mean that -- I think they seem to
4 be saying therefore we've had to spend much more time
5 and now it's going to cost you rather more.

6 A. Yes. They didn't have direct control, of course, over
7 the finance departments providing the data. All they
8 could do was to apply pressure by bringing it to the
9 attention of the MEPUK board, who would escalate it so
10 that those in charge would make sure that the data was
11 provided.

12 MR JUSTICE ROTH: And it would be through the MEPUK board
13 that you could lean on the banks.

14 A. Yes, it was. Yes.

15 MS DEMETRIOU: Sir, thank you. I'm about to embark on
16 a different topic and I don't know whether you want
17 to --

18 MR JUSTICE ROTH: It's been a very long day for the witness
19 and, as I understand it, we're on schedule; is that
20 right?

21 MS DEMETRIOU: We're certainly on schedule, and perhaps
22 I can just explore offline with my learned friend how we
23 take things forward.

24 MR JUSTICE ROTH: Well, I certainly don't think Mr Hawkins
25 should go on any longer today. He's been all day --

1 MS DEMETRIOU: No, I think that's a good idea.

2 MR JUSTICE ROTH: -- and it's quite tiring for a witness.

3 So we'll stop now.

4 PROFESSOR WATERSON: Can I just ask a question, since we're
5 moving on to a different topic.

6 My understanding from what you've been saying is
7 that there are in fact a variety of considerations that
8 go into determining the interchange fees.

9 A. That's right, sir.

10 PROFESSOR WATERSON: And the EDC studies are one of those.

11 A. Yes.

12 PROFESSOR WATERSON: But there may be others that override
13 those?

14 A. Not override them, if I may say. They're taken into
15 account as well as them.

16 PROFESSOR WATERSON: Okay, so we're talking about the
17 relative weights to which the various factors are
18 applied.

19 A. I couldn't give you an apportionment of that but, yes,
20 you're right that it is a very important part of the
21 consideration, but there are others.

22 PROFESSOR WATERSON: Yes.

23 A. Thank you, sir.

24 MR JUSTICE ROTH: So we'll resume at -- 10.30 is Alright?

25 We don't need to come earlier, so 10.30, if you could

1 please return tomorrow morning. And as you know well,
2 you mustn't discuss your evidence overnight.

3 So 10.30 tomorrow.

4 (4.14 pm)

5 (The hearing adjourned until 10.30 am on
6 Thursday, 13 July 2023)

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