

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

**IN THE COMPETITION**

**APPEAL TRIBUNAL**

(T)

Case No: 1266/7/7/16

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 5th – Friday 28th July 2023

Before:

The Honourable Mr Justice Roth

Jane Burgess

Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Walter Hugh Merricks CBE

**Class Representative**

v

Mastercard Incorporated and Others

**Defendants**

---

**A P P E A R A N C E S**

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

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

Thursday, 13 July 2023

(10.30 am)

MR MICHAEL HAWKINS (continued)

Cross-examination by MS DEMETRIOU (continued)

MR JUSTICE ROTH: Yes, Ms Demetriou, morning.

MS DEMETRIOU: Thank you. Good morning, sir, members of the Tribunal. Good morning, Mr Hawkins.

A. Good morning.

Q. Could we please go to your witness -- first witness statement {A/7/14}, paragraph 48, if you've got the hard copy there.

MR JUSTICE ROTH: Just a moment, sorry.

MS DEMETRIOU: Of course. (Pause)

Mr Hawkins, paragraph 48. Your evidence is that during the period 1991 to '96, the MEPUK board used the EDC cost studies to formulate what you describe as reference rates; yes?

A. Yes.

Q. And you say that those reference rates could be used by members in their bilateral negotiations; correct?

A. Yes, they could be.

Q. And you say that the EDC cost studies were a starting point for consideration of the reference rates, but that the reference rates tended to be lower than the cost studies; correct?

1       A. The EDC studies were a starting point, yes.

2       Q. And the board would review the reference rates, you say,  
3       whenever there was a new cost study, which was about  
4       every two years.

5       A. That was the normal practice.

6       Q. And it's correct, isn't it, that the EDC cost studies  
7       would produce different costs? Each time, the cost  
8       would say go up and down. We've seen that.

9       A. I've seen that, yes.

10      Q. But you say that the reference rates didn't change very  
11      much; correct?

12      A. I don't think I said that. We noticed that over some  
13      years that we looked at yesterday, they didn't change.  
14      They remained stable.

15      Q. Alright. Now, we established yesterday that you were  
16      keen that these reference rates should be enshrined in  
17      the rules; correct?

18      A. Sorry, could you repeat?

19      Q. We saw -- we established yesterday -- we discussed it at  
20      some length -- that you were a proponent from early on  
21      of those reference rates being enshrined in the rules;  
22      correct?

23      A. Yes, I was.

24      Q. And you say you lost that battle initially, but then you  
25      won it in November 1997 when MEPUK did adopt a UK MIF;

1 correct?

2 A. Well, I wouldn't, sir, put it that way; I won the  
3 battle. I think it was just a sensible thing to do.

4 Q. Okay. Now, can we turn up {C5/218/84}, please. These  
5 are -- if you look at the top of the page, these are  
6 notes of a Rules & Conciliation Committee meeting in  
7 February 1998. Were they your notes, do you think? Do  
8 you recognise them?

9 A. I can't see them signed on the item that you have --

10 Q. Perhaps we can just scroll down --

11 A. -- in front of us here.

12 Q. -- and look at the end.

13 A. It sounds like me, but I'd like to see my name at the  
14 bottom of it.

15 Q. Okay, perhaps we can come back to that. If we go --  
16 does it go on over the page? I've forgotten. So  
17 somebody is going to help me with that, but let's  
18 just -- oh, it's up now.

19 A. Got it, yes.

20 Q. So it was, in fact, your note.

21 A. I see the --

22 Q. Sorry, I should have spotted that.

23 A. Yes, I see the --

24 Q. So this is February 1998 and the UK Domestic Rules were,  
25 of course, in force by this time; correct?

1 A. Correct.

2 Q. And the domestic rules were the rules set by MEPUK;  
3 correct?

4 A. Correct.

5 Q. And if we turn to page 87 {C5/218/87}, can you see the  
6 passage which says, near the top of the page, the  
7 second sentence:

8 "MEPUK is familiar with this issue of domestic rule  
9 status as we have a current ruling that EPI recognises  
10 and will enforce UK domestic rules, including  
11 interchange fees, so long as 90% of UK members measured  
12 by volume support them."

13 A. Yes, I see that.

14 Q. And you were aware, weren't you, because you're writing  
15 about it, of this 90% threshold? You were conscious of  
16 it at the time.

17 A. I think it was still 90% at the time it did change.

18 Q. It did change, you're correct, and --

19 MR JUSTICE ROTH: But you were aware of it at the time?

20 A. I was aware of it, sir, yes.

21 MS DEMETRIOU: And you knew that if MEPUK did not satisfy  
22 this threshold, it couldn't set a UK MIF, could it?

23 A. That's right.

24 Q. So the board of MEPUK wouldn't have wanted to lose  
25 confidence of more than 10% of members, would it?

1 A. Sorry, I don't think I understand that question.

2 Q. Yes. So MEPUK needed to retain the confidence of 90% of  
3 UK licensees; correct?

4 A. Yes.

5 Q. So it wouldn't have wanted to alienate or lose the  
6 confidence of more than 10% of licensees, would it?

7 A. It wouldn't have wanted to alienate the other 10%, if  
8 that's what you're saying.

9 Q. No. And, indeed it, wouldn't have wanted to alienate  
10 a chunk of its own membership, would it, because they  
11 could have resigned if they'd really not liked what  
12 MEPUK was doing; correct?

13 A. That's right. The 90% rule, sir, was there so that  
14 Mastercard and Europay could be sure that the body that  
15 contained those members was truly representative of the  
16 majority of banks or 90% of the banks in that country.

17 Q. So it was a matter that MEPUK -- the board of MEPUK was  
18 generally aware of when taking decisions; correct?

19 A. Yes, I'm not sure they're in front of mind all the time,  
20 but we -- we were aware that it was a rule, yes.

21 Q. So it follows, I think, that it was a matter that MEPUK  
22 would've been aware of and borne in mind when setting  
23 the UK MIF; correct?

24 A. It was, but it was never a factor; "Should we set this  
25 in mind because -- should we set this rate, because 90%

1           agreed but 10% don't?" Nothing like that. It was just  
2           in the back of our mind that that was the arrangement  
3           for MEPUK.

4       Q.   So can I explore that a little bit? So you've spoken  
5           then in your evidence about how net acquiring banks were  
6           particularly conscious of the overall rate of fallback  
7           interchange fees, so you said that yesterday.

8       A.   Yes, yes.

9       Q.   So if the MIF was set too high, then net acquirers would  
10          generally be unhappy, wouldn't they?

11      A.   Yes, I think I said the retailers would probably be very  
12          unhappy, because the charge would have to be passed on  
13          to them.

14      Q.   And they -- and they would put pressure on the  
15          acquirers; correct?

16      A.   They did. They're very good negotiators and they do put  
17          pressure on acquirers.

18      Q.   So had MEPUK set the MIF too high, then there was  
19          a risk, wasn't there, that net acquirers would withdraw  
20          support from MEPUK?

21      A.   Should be drawn to, sorry?

22      Q.   Could withdraw support from MEPUK.

23      A.   Yes. That, of course, never happened.

24      Q.   Now, it's right, isn't it, that for some -- so when you  
25          were -- before 1997, when MEPUK was discussing setting

1 UK Rules, it was aware at that stage too, wasn't it,  
2 that it needed to satisfy the 90% rule in order to have  
3 authority to do that?

4 A. That's right. It didn't have authority to -- prior to  
5 that, of course, to pass rules, which was why we worked  
6 throughout the 90s to ensure that that happened.

7 Q. So let's look at {C1/447/1}, please.

8 PROFESSOR WATERSON: Just before we go away from that  
9 document --

10 MS DEMETRIOU: Of course.

11 PROFESSOR WATERSON: -- if we could turn to the beginning of  
12 the document again. I noticed that it says {C5/218/84}:  
13 "The Committee had started on the Midland v Bank of  
14 Scotland arbitration case as I entered the room ..."

15 A. Yes.

16 PROFESSOR WATERSON: Do you remember anything about that?

17 A. No, sir, I was asked to leave the room because this was  
18 involving another -- two banks that I was not a member  
19 of, obviously.

20 PROFESSOR WATERSON: Thank you.

21 MR JUSTICE ROTH: But do you know what the arbitration was  
22 about?

23 A. Sorry, I don't. I can only speculate, sir. It would  
24 probably be about interchange, but that would be  
25 speculating.



1 MR JUSTICE ROTH: You don't know, yes.

2 MS DEMETRIOU: Do you think you would have been asked to  
3 leave the room because it would have involved  
4 confidential information -- information confidential to  
5 those banks?

6 A. Absolutely.

7 MS DEMETRIOU: Okay.

8 MR JUSTICE ROTH: Just one second. (Pause)

9 And then if we look at item 9 on page 85 of this  
10 document {C5/218/85}, there's another arbitration being  
11 reported to the committee, which is a chargeback  
12 arbitration.

13 A. Yes.

14 MR JUSTICE ROTH: What is a chargeback arbitration?

15 A. Well, chargeback is the process whereby a transaction is  
16 sent back to the acquirer and then to the retailer  
17 because it is disputed. So there were often chargeback  
18 disagreements and the ultimate arbitration -- they  
19 mostly settled, but ultimately, they would be arbitrated  
20 by this committee.

21 MR JUSTICE ROTH: I see. So if it's sent back, that may be  
22 that the issuer doesn't -- refuses to reimburse the  
23 acquiring bank; is that right?

24 A. That would seem to be the case. I see that this  
25 involved a horse betting programme, so it was nothing

1           about interchange per se.

2       MR JUSTICE ROTH: Yes. And if the issuer refuses to  
3       reimburse the acquiring bank, subject to arbitration  
4       overruling that, then the acquiring bank bears the loss  
5       unless they can recover it back from the retailer; would  
6       that be right?

7       A. Yes, the acquiring bank would recover it back from the  
8       retailer or bear the losses, but mostly recover from the  
9       retailer --

10      MR JUSTICE ROTH: Yes.

11      A. -- if there'd been a defective -- defective goods or  
12      something of that sort.

13      MR JUSTICE ROTH: Yes. Yes, thank you.

14      MS DEMETRIOU: Thank you, sir.

15           If we go to {C1/447/1}, now, please, and we can see  
16      that this relates to a task force and this document  
17      dates from July 1993.

18           And if we go to page 8 {C1/447/8}, can you see the  
19      second paragraph? And it says that:

20           "[MEPUK's] Board considers it is imperative that  
21      Operating Regulations, specific to the UK, are  
22      introduced to enable Members of MCI/EPI within the UK to  
23      do business together more efficiently."

24           So that's referring, isn't it, to MEPUK's desire to  
25      enact UK Domestic Rules?

1 A. Indeed so, yes.

2 Q. And then if we look at the subtitle a bit further down,  
3 so if we can scroll, please, we see the subtitle  
4 "Scope".

5 A. "Scope".

6 Q. And it says:

7 "The new domestic Operating Regulations will apply  
8 to interchange between UK Members ..."

9 And then it says that those will include fallback  
10 rates in relation to interchange fees. Do you see that  
11 at the very bottom?

12 A. Yes.

13 Q. So we can see, and this is consistent with your  
14 evidence, that back in 1993, the MEPUK board were hoping  
15 to establish fallback rates in relation to interchange  
16 fees that UK -- a UK MIF; correct?

17 A. Yes, it was, to some extent, an anomaly so that the  
18 MEPUK board didn't have the powers that it subsequently  
19 gained, but yes that's one of the things -- one of the  
20 items it wished to have.

21 Q. And if we go to page 9 over the page {C1/447/9}, we see  
22 "Proposal", and the proposal is that the board should  
23 pursue this issue as a matter of priority. Do you see  
24 that?

25 A. Yes, I do.

1 Q. And do you remember that being the case; that that was  
2 the desire?

3 A. Yes, I realise that that was the -- that was the desire  
4 of the board for some years, but it took a long time to  
5 get there.

6 Q. I understand that.

7 And then it says that -- do you see at the bottom,  
8 it says:

9 "... so long as the Company represents at least 90%  
10 of the UK member interests ..."

11 A. Yes, yes.

12 Q. So that's referring, isn't it, to the fact MEPUK would  
13 only have authority to do that if it represented at  
14 least 90% of UK member interest? So the board was aware  
15 of that at the time; correct?

16 A. Aware of that. It was the same, of course, in other  
17 countries, sir, for example, France, Germany. The  
18 national organisations had to represent at least 90% of  
19 their banks, their members.

20 Q. That's right. It was the same because the same rules  
21 applied; correct?

22 A. Yes.

23 Q. And then if we go to {C4/114/1}, please, this is  
24 a letter that you wrote to Mr Goosse on 25 March 1997  
25 and at the start of the letter, you say that you're

1 writing about an issue of considerable importance for  
2 the way Europay membership issues are managed in the UK.  
3 Do you see that?

4 A. Yes.

5 Q. And then we see what the issue is, and it's the  
6 understanding, in the next paragraph, between Europay  
7 and MEPUK that Europay will recognise MEPUK as the  
8 official representative body for the Europay membership  
9 in the UK, provided that MEPUK members represent more  
10 than 90% by value of Europay transactions.

11 A. Yes.

12 Q. So that's referring to the same rule; correct?

13 A. Yes.

14 Q. And then you see that -- you see below, MEPUK members  
15 are concerned -- let me just see where I'm looking. Can  
16 we go over the page {C4/114/2}? Yes. So if you look,  
17 first of all, under "Exclusion of non-MEPUK Members",  
18 you see that:

19 "... there is an increasing danger that differences  
20 of opinion will arise between MEPUK and non-MEPUK  
21 Members on matters concerning Europay business."

22 And then under "The 90% threshold", it says:

23 "MEPUK Members are concerned that if more large card  
24 issuing companies enter the UK market, and choose not to  
25 become Members of MEPUK, MEPUK will eventually no longer

1           satisfy the 90% [rule] (referred to above)."

2           So you were concerned that MEPUK would lose  
3           authority to set rules as a result of the 90% rule;  
4           correct?

5       A. I was. It was a characteristic of the inter-bank  
6           organisations that they on the whole work by consensus,  
7           and that's what the 90% rule applies to. The advent of  
8           monoline issuers, as they were called, brought that into  
9           question.

10      Q. And when you say "operate by consensus", you were aware  
11          that there were different incentives at play for  
12          different banks, so the monoline -- you've given the  
13          example of the monoline issuers; yes?

14      A. Yes, this is in anticipation that there may be some  
15          issues going forward.

16      Q. Yes, and so it was important to make decisions by  
17          consensus so that the 90% rule was not breached;  
18          correct?

19      A. Yes, and these were non-competitive matters that were  
20          being discussed because, obviously, competitive matters  
21          were not appropriate to be discussed at MEPUK.

22      Q. No. Mr Hawkins, and this issue, so the risk that the  
23          rule might not be -- the threshold might not be met at  
24          some point, you describe that here as being an issue of  
25          considerable importance to you and it was, wasn't it,

1           because --

2           A.   It was.

3           Q.   It was.   Thank you.   Now, if we go to --

4           MR JUSTICE ROTH:   Just before moving on, and why is it that  
5           you thought that the new monoline issuers might not join  
6           MEPUK?

7           A.   Well, I can't specifically recall that, but I think at  
8           the time they showed no signs of wanting to become --  
9           I hate it use the term "collegiate", but part of the  
10          consensus.   They were new members into the UK, mostly  
11          from America at the time.   They didn't necessarily share  
12          our ethos of how the system should work in the UK.   But  
13          I cannot specifically recall what my concern was.

14          MR JUSTICE ROTH:   Yes.

15          MS DEMETRIOU:   And can we just go over the page {C4/114/3}?

16          So here you say at the top, "The way forward":

17                 "The most sensible solution, as far as UK Members  
18                 are concerned, would be to ensure that all UK licensees  
19                 are automatically made Members of MEPUK.   [This] would  
20                 solve all the problems which have been identified in the  
21                 first part of [the] letter."

22                 So effectively, you're saying there that the  
23                 90% rule should be abolished; correct?

24          A.   I think I'm suggesting there so that new entries into  
25          the market would, as of right, be granted MEPUK

1 membership so they could take part in the debates.

2 MR JUSTICE ROTH: The 90% rule is that MEPUK membership  
3 should comprise 90% of those in the market.

4 A. Yes, and originally, sir, I think it was 100% --

5 MR JUSTICE ROTH: Yes.

6 A. -- but with the new entrants into the market, that was  
7 likely to change.

8 MS DEMETRIOU: Now, let's look at {C4/123/1}, please, and  
9 these are draft -- we can see they're draft minutes of  
10 the R&CC meeting of 14 May 1997.

11 A. Right.

12 Q. And if we go to page 7 {C4/123/7}, we can see the  
13 minutes recording your contribution to the meeting. Do  
14 you see that about a third of the way down?

15 A. Yes.

16 Q. And if we look below that paragraph, it says:

17 "Currently, EPI recognises MEPUK if it remains  
18 representative of at least 90% of total issuing and  
19 acquiring volumes of the UK Members. His concern ..."

20 I think this must be referring to you:

21 "... was that new members could decide not to join  
22 MEPUK and, thus, effectively disband it if the  
23 90% threshold was no longer met."

24 So failing to meet this 90% threshold was  
25 effectively existential for MEPUK, wasn't it?



1 A. Well, this is a worst case scenario, sir. MEPUK had  
2 worked very well up until then and it was convenient for  
3 Mastercard and Europay, and this was just anticipating  
4 that there may be problems in the future and how to  
5 address those problems.

6 Q. So we see that you go on to recommend that there should  
7 be 90 -- no 90% threshold and you see that near the  
8 bottom of the page:

9 "There should be no 90% threshold requirement."

10 Do you see that?

11 A. I see -- I see that, and, of course, it wasn't accepted,  
12 but it became the 75% eventually.

13 Q. It did, but you wanted to get rid of it. And your  
14 concern here was expressed in relation to new members  
15 choosing not to -- not to join the scheme, but it's  
16 correct, isn't it, that the 90% principle would also  
17 have applied if 10% of existing members felt that their  
18 interests weren't being looked after and withdrew from  
19 MEPUK? The rule would have applied in those  
20 circumstances too; correct?

21 A. I'm not sure that I follow that, sorry.

22 MR JUSTICE ROTH: I don't follow it either.

23 MS DEMETRIOU: So --

24 MR JUSTICE ROTH: It's 10% of the total licensees, not 10%  
25 of the members of MEPUK, isn't it?

1 MS DEMETRIOU: No, so -- so the figure is not going to be  
2 exactly 10%, but if a proportion of current members of  
3 MEPUK withdrew support, so resigned their memberships,  
4 that could result in the 90% threshold not being met;  
5 correct?

6 A. Sir, this is speculation. It never -- it never --

7 MR JUSTICE ROTH: That must -- I mean, that must follow --

8 MS DEMETRIOU: That must follow.

9 MR JUSTICE ROTH: -- because it's -- that's the rule.

10 A. It follows, but -- but it was -- it never came up.

11 MR JUSTICE ROTH: (Overspeaking). And did you see -- did  
12 that ever appear as a threat?

13 A. It's a potential threat, sir, but it never actually  
14 happened.

15 MR JUSTICE ROTH: Yes.

16 MS DEMETRIOU: Now, if we go back, please, to paragraph 52  
17 of your witness statement, so that's at {A/7/15}. We've  
18 already seen this, but let's just look at it again. You  
19 say:

20 "The reference rates ... were discussed at the  
21 meetings of the MEPUK RCC and MEPUK Board, but they were  
22 not recorded in the minutes of those meetings in this  
23 period, nor otherwise distributed to the UK members or  
24 enshrined in the MCI or Europay rules."

25 You say that was because MEPUK was being careful not

1 to discuss bilateral negotiations of interchange fees,  
2 which you say were strictly -- treated strictly as  
3 a competitive matter.

4 So the reason why -- is this a fair summary -- MEPUK  
5 didn't record the reference rates in the minutes was  
6 because you knew, MEPUK knew, that it shouldn't be  
7 interfering with bilateral negotiations; correct?

8 A. No, I think that's not strictly true, sir. The fact is  
9 that the MEPUK board was hypersensitive to competition  
10 law implications of actually setting any kind of  
11 fallback rate at that stage. The MEPUK board never  
12 interfered with or had anything to do with the bilateral  
13 arrangements.

14 Q. I think we're agreeing. So MEPUK never had anything to  
15 do with the bilateral arrangements and what you were  
16 keen not to do was to require banks to agree bilaterally  
17 at these reference rates, is that fair, because you were  
18 worried about the competition implications?

19 A. Banks were required to agree between themselves by  
20 Mastercard, so MEPUK had no authority to require banks  
21 to do that. That was a scheme requirement.

22 Q. Mr Hawkins --

23 MR JUSTICE ROTH: I think that wasn't quite the question.

24 I think what you were asked is: is it right that you  
25 were concerned that the individual banks in their

1           bilateral negotiations would not feel in any way bound  
2           to apply the reference rates because you weren't going  
3           to interfere with their bilateral negotiation?

4       A.   Yes, sir, they weren't bound to apply, no, but it was  
5           there for them to use.

6       MR JUSTICE ROTH:   Was that your question?

7       MS DEMETRIOU:   Yes.   Thank you, sir.

8           So you didn't want to write them down, is this  
9           correct, because you didn't want them to -- you didn't  
10          want to interfere unduly in the reference rates --  
11          sorry, in the bilateral rates that they individually  
12          negotiated; would that be correct?

13       A.   Well, that's right.   As time went on, we became less  
14          sensitive to some of the issues, and you'll see that  
15          reference rates were discussed and agreed at the MEPUK  
16          board.

17       MR JUSTICE ROTH:   I don't quite follow the difference  
18          between once you agree a reference rate -- and the board  
19          is comprised of representatives of the banks --

20       A.   Yes.

21       MR JUSTICE ROTH:   -- and they know the reference rate  
22          because it's there as a guide.

23       A.   Yes.

24       MR JUSTICE ROTH:   It's a reference, the point of reference.  
25          What's the difference between writing it down or not

1 writing it down?

2 A. Well, sir, I just think at this stage, in the very early  
3 90s, they were very sensitive to competition law issues  
4 and should it be written down or should it not be  
5 written down? In fact, I think we understood and  
6 discovered later on that there were no competition law  
7 issues in terms of arriving at a reference rate because  
8 the banks could either use that or not.

9 MR JUSTICE ROTH: Yes, it's just the point about why it  
10 makes a difference whether it's written down or not.  
11 Somebody suggested that it might make a difference, did  
12 they?

13 A. I believe so, sir. To the best of my recollection --  
14 it's a long time ago, but I think that was the  
15 sensitivity at that time.

16 MR JUSTICE ROTH: Yes.

17 MS DEMETRIOU: Do you remember whether there was discussion  
18 about not recording the reference rates in the minutes?  
19 Was that discussed? Presumably it would have been.

20 A. I don't recall -- I don't recall that.

21 Q. So you're not able to help us with whether that  
22 discussion -- whether any discussion about not recording  
23 rates was minuted anywhere?

24 A. Because I think I've answered eventually they were  
25 recorded in the board minutes.

1 Q. Mr Hawkins, if you can just stick to the questions,  
2 we'll go much more quickly. So I'm asking you about  
3 this stage in your witness statement, and you say here  
4 as well they weren't otherwise distributed to the  
5 UK members. So was there a discussion that you recall  
6 about not distributing them to UK members?

7 A. I don't recall that precise discussion. I think  
8 I've said all I really know on this subject.

9 MR JUSTICE ROTH: If you can't remember -- I mean, probably  
10 someone must have -- there must have been some  
11 discussion about, "Do we write these down or not?"

12 A. Yes.

13 MR JUSTICE ROTH: But you can't remember it.

14 A. And I think somebody obviously decided to be on the safe  
15 side not to do so.

16 MS DEMETRIOU: And it's right, isn't it, that not every bank  
17 seeking to conclude bilateral agreements was represented  
18 on the MEPUK board; that's correct, isn't it?

19 A. Every bank that was a member of MEPUK was, in one way or  
20 other, represented on the board, yes.

21 Q. But there were some banks that weren't members of MEPUK;  
22 correct?

23 A. Later -- later on, yes, sir, that's the case, the new  
24 members. They were free to join it, of course.

25 MR JUSTICE ROTH: So I think you said a moment ago initially

1           it was 100% --

2       A.   Yes.

3       MR JUSTICE ROTH:  -- of licensees and then it -- can you  
4           remember -- perhaps you can't, but can you remember, for  
5           membership, it started to be significantly less than  
6           100%?

7       A.   I can't put a precise date on it, sir, but I can see  
8           from my note here that we looked at a bit earlier that  
9           it was about this time, '93/'94.

10      MS DEMETRIOU:  That it started to be less than 90% -- sorry,  
11           less than 100% at that time; is that what you're saying?

12      A.   It was still 90%.

13      MR JUSTICE ROTH:  Yes, that we know --

14      MS DEMETRIOU:  Yes.

15      MR JUSTICE ROTH:  -- but it's how much less than 100%.

16      A.   It wouldn't have been 100% because the new entries into  
17           the market were not joining at that time.

18      MR JUSTICE ROTH:  So this was -- that was starting to happen  
19           in '93/'94?

20      A.   I believe so.

21      MR JUSTICE ROTH:  Yes.

22      MS DEMETRIOU:  Let's just look -- this may help.  If we look  
23           at {C4/190/1}, and this is a 1995 document.  Do you see  
24           exactly the middle of the page under the heading --  
25           before the heading "Issue", it says:

1            "To-date all UK licensees are members of MEPUK with  
2            the exception of ..."

3            And it names a number of banks.

4            Sorry, somebody is whispering very loudly.

5            MR JUSTICE ROTH: The date of this document --

6            MS DEMETRIOU: The date of the document, yes. No, no, no,  
7            that's -- I want to listen. (Pause)

8            Alright. I'm going to check it, but I'm told it's  
9            1997. I put the question on an incorrect basis. I was  
10           trying to be helpful because of the tribunal's question,  
11           but it's -- probably I wasn't being very helpful.

12           MR JUSTICE ROTH: Yes, the issue -- in their letter of  
13           25 March '97.

14           MS DEMETRIOU: 1997, so it must be 1997.

15           MR JUSTICE ROTH: It must be after 25 March.

16           MS DEMETRIOU: So that's -- there's a fax header as well,  
17           Mr Smouha says. So I'm sorry, I was trying to be  
18           helpful in relation to proportions.

19           MR JUSTICE ROTH: And it says:

20           "To-date all ..."

21           If you look on page 1 in the -- after the  
22           five numbered points.

23           MS DEMETRIOU: Yes.

24           MR JUSTICE ROTH: "To-date all UK ... are members of MEPUK  
25           with the exceptions of ... Of these only ... generates



1           a meaningful business ... and has plans to join MEPUK -  
2           as well as Halifax."

3       MS DEMETRIOU:   Okay.

4       MR JUSTICE ROTH:   So would that appear to be the position as  
5           at around mid-'97?

6       A.   That would appear to be the position, and I see that  
7           they all intended to join MEPUK, apart from only --  
8           well, they -- they all had plans to join MEPUK, I think  
9           it says here.

10      MR JUSTICE ROTH:   Well, some of them did.

11      MS DEMETRIOU:   Sir, I'm just asked to clarify.   So  
12           Mr Hawkins' note -- this time, this is not a mistake  
13           I made, fortunately, but Mr Hawkins' note that we looked  
14           at earlier, Mr Hawkins said that related to '93/'94,  
15           I think Mr Smouha is saying, but the note is dated '97,  
16           just so the Tribunal -- just so we have that on the  
17           transcript.

18      MR JUSTICE ROTH:   I see.   Yes, that was -- the letter to  
19           Mr Goosse was 1 April '97.

20      MS DEMETRIOU:   Yes.

21      MR JUSTICE ROTH:   Yes.   So we are really in '97.

22      MS DEMETRIOU:   We are really in '97 here.

23           Now, let's go to {C4/26/28}, and we've seen this  
24           document already.   It's Mr Turner's notes, but let's  
25           have a look at it again.   If we go to paragraph 3, that

1           says:

2                 "Edgar Dunn cost studies are 'signed off' by the  
3           MEPUK Board. The MEPUK Board agrees 'reference' rates.  
4           What purpose is served by these rates? A guide for  
5           bilaterals and for use by arbitrators in dispute  
6           situations?"

7                 So it looks from this note that Mr Turner wasn't  
8           sure what the purpose of these rates was; correct?

9           A. Well, that's Mr Turner's note, is it?

10          Q. Mr Turner -- Mr Turner was --

11          A. Yes. No, I'm just saying: is that Mr Turner's note?

12          Q. That's Mr Turner's note that we looked at yesterday.

13          A. Right.

14          Q. So the short question I'm putting to you is that he  
15          appears to be asking a question; "So what purpose is  
16          served by these rates?" So he doesn't seem to be clear  
17          about their purpose. Can we take it that that's  
18          correct?

19          A. So it appears. I obviously don't know why he's put  
20          question marks there.

21          Q. Well, the truth is that quite a few people weren't very  
22          clear about the purpose of the reference rates, were  
23          they? And that's not surprising in circumstances where  
24          they weren't written down and they weren't distributed  
25          to the banks.

1       A. I'm sorry, I haven't a comment on that because you said  
2       "quite a few people". I can only see Mr Turner's here.

3       MS DEMETRIOU: No, but --

4       MR JUSTICE ROTH: Well, that we can see. I think you're  
5       being asked: is it the case -- it's being suggested to  
6       you, but is it the case, as far as you recall, that  
7       there were quite a number of people who were involved in  
8       this at the time who weren't sure what the purpose of  
9       the reference rates was?

10      A. No, sir, I don't believe that's the case. I think  
11      everyone with whom I negotiated was absolutely clear  
12      what the purpose was, and we used it, as we've seen  
13      elsewhere, for our bilateral negotiations.

14      MS DEMETRIOU: Well, let's look at a document -- so that was  
15      February '97, Mr Turner's note. Let's look at  
16      a document from the previous year, so {C4/18/1}, please.  
17      And you see here that this is -- these are extracts of  
18      minutes from the R&CC meeting of 24 October 1996. Do  
19      you see that? And you see there's a reference to your  
20      name and so you were present at the meeting.

21             Is this a document you looked at when preparing for  
22      this hearing?

23      A. Yes.

24      Q. It is.

25             So this refers -- it says:

1           "Mr Warren referred to the following paragraph:

2           "'The majority agreed to add a note in the UK Rule  
3       Book ...'"

4           So this is dealing with the new UK Rules; correct?

5       A.   Yes.

6       Q.   "... to the effect that in the absence of the bilateral  
7       agreement, then the intra-regional rate would apply.  
8       Mr Hawkins wholly opposed, saying it was a recipe for  
9       chaos."

10          So you were opposed to this, weren't you, because --  
11       and we see that there in the next sentence. You were  
12       opposed to it because it contradicted the reference  
13       rates; correct?

14       A.   Yes.

15       Q.   And then if we look at the secretary's note, that says:

16          "The UK practice is for MasterCard to commission  
17       [EDC] to undertake the Interchange Studies. The results  
18       are presented to the MEPUK Board for noting, but MEPUK  
19       Board does not agree a fallback rate. If a Member fails  
20       to agree a bilateral rate, MasterCard will arbitrate, if  
21       requested, using the study as a key factor."

22          So, in other words, the secretary note is saying  
23       that the MEPUK board does not agree a UK fallback rate.  
24       So you were wrong, weren't you, to characterise the 1%  
25       and 3% figures as fallback rates? They weren't, were

1           they?

2           A. They were, sir. This is the secretary's note and I see  
3           that further on into that paragraph, there is reference  
4           to the reluctance of EPI to introduce a fallback rate on  
5           competition grounds.

6           Q. Well --

7           MR JUSTICE ROTH: What's being put to you is that you say at  
8           the meeting the figures agreed at the MEPUK board for  
9           fallback rates of 1% and 1.3% -- the secretary's note is  
10          to say, well, they aren't actually a fallback rate. Are  
11          you referring to the reference rate?

12          A. I am referring to the reference rate, yes, sir.

13          MR JUSTICE ROTH: And the reference rates are not --  
14          a fallback rate is a mandatory rate which applies if the  
15          parties can't agree.

16          A. It is, yes, sir.

17          MR JUSTICE ROTH: The reference rate wasn't a mandatory  
18          rate.

19          A. No, it wasn't, sir.

20          MR JUSTICE ROTH: Yes. So when you said this contradicted  
21          the figures agreed for fallback rates, you were using  
22          that term a bit loosely, aren't you?

23          A. A bit loosely, I'm afraid, yes.

24          MS DEMETRIOU: Thank you, Mr Hawkins. So the actual  
25          fallback rate -- if we use the term "fallback"

1           precisely, the actual fallback rate at that stage, we've  
2           agreed, was the intra-EEA MIF; correct?

3       A.   That was what had been put into the UK Rules, and  
4           I wholly objected to that because if that was mandatory,  
5           it bore no relationship whatsoever to UK costs.

6       MR JUSTICE ROTH:   I think we know why you didn't like it --

7       A.   Sorry.

8       MR JUSTICE ROTH:   -- but that was, I think, in the rules as  
9           the fallback rate.

10      A.   Sorry, my Lord.

11      MS DEMETRIOU:   So at this stage, you lost the argument,  
12           didn't you, Mr Hawkins?   So you very much wanted the 1  
13           and the -- the reference rates to be the fallback rate.  
14           You kept pressing the argument, but you were -- nobody  
15           agreed with you, or at least the majority didn't agree  
16           with you, did they?

17      A.   They didn't at that time, but I'm pleased to say that  
18           they did later.

19      Q.   Yes, so later on there was, as we know, a UK MIF.   So  
20           that's why, the following year, there was uncertainty,  
21           at least on the part of Mr Turner, as to what the  
22           purpose of the reference rates was at all, isn't it?

23      A.   He appeared to be uncertain about it.   I certainly  
24           wasn't and all the people -- all the banks with whom  
25           I negotiated had no difficulty in understanding it.

1 Q. Right. Well, let's look, please, at paragraph 57 of  
2 your witness statement, so {A/7/16}. This is where you  
3 give the evidence you're explaining now. So you say:

4 "In [your] experience of negotiating bilateral  
5 interchange fees at NatWest ... [the] reference rates  
6 ... acted as a practical fallback rate in the  
7 negotiations."

8 And I just want to ask you a few questions about  
9 that. So you've accepted, just now in response to the  
10 Chairman's question, that they weren't an actual  
11 fallback in the rules; correct?

12 A. I've accepted that. I use the term "practical" there.

13 Q. You do. So if no rate could be agreed in the bilateral  
14 negotiation, the reference rate would not apply by  
15 default, would it, in the absence of agreement? You  
16 agree with that?

17 A. Sorry, could you just repeat?

18 Q. Yes. So if banks negotiating bilaterally fail to reach  
19 agreement --

20 A. Yes.

21 Q. -- the reference rate would not automatically apply.  
22 I think we can agree that; correct?

23 A. Well, sorry, it would appear to under the -- the rules,  
24 MEPUK rules.

25 Q. I'm talking about before 1 November 1997.

1       A. Oh, right. Okay, yes, you're right.

2       Q. So I think we can agree it follows logically that a bank  
3       that's negotiating could not insist on the reference  
4       rate by walking away from the negotiating table;  
5       correct?

6       A. That's right.

7       Q. And it follows from that, doesn't it, Mr Hawkins, that  
8       the reference rate couldn't have given a bank any real  
9       leverage in negotiations; correct?

10      A. I don't think that was its purpose, sir. I think its  
11      purpose was to serve as a basis for the bilaterals.

12      Q. Alright. So it didn't give leverage, but that wasn't  
13      its purpose. Is that -- can we agree on that?

14      A. Yes.

15      Q. Now, we agreed, I think yesterday, that you can't speak  
16      to the bilateral negotiations of any other bank than  
17      NatWest; correct?

18      A. That's absolutely right, because it's a strictly  
19      commercial matter and confidential to each bank.

20      Q. So you had no way of knowing, did you, at the time  
21      whether the reference rates you discussed were being  
22      discussed by other banks in their bilateral  
23      negotiations; correct?

24      A. Well, that's not strictly true because I do know from  
25      all the bilaterals that I negotiated with all the other



1 banks what rates we used, and the reference rate was, in  
2 fact, very relevant.

3 Q. Well, Mr Hawkins, you can only speak to negotiations  
4 that you conducted and we know that for you, the  
5 reference rate was something which you say was  
6 important, but you can't speak, can you, to negotiations  
7 between other banks? So you can't speak to  
8 a negotiation between Bank of Ireland and Midland Bank,  
9 for example.

10 A. No, but I can say the other bank to the negotiation that  
11 I'm doing with, say, Midland Bank would have obviously  
12 agreed with me. So, therefore, they were agreeing with  
13 that reference rate.

14 MR JUSTICE ROTH: What you're saying is when you negotiated  
15 with Midland, they had regard to the reference rate,  
16 Midland.

17 A. Yes, sir.

18 MR JUSTICE ROTH: And when you negotiated with Bank of  
19 Ireland, Bank of Ireland would have regard to the  
20 reference rate; is that right?

21 A. Yes, sir. Otherwise, they might have gone to  
22 arbitration.

23 MR JUSTICE ROTH: Yes. So you're assuming that when  
24 Midland Bank and Bank of Ireland negotiated together,  
25 they would be taking a similar approach; is that what

1           you're saying?

2           A. Well, sir, that would be an assumption because I have no  
3           way of knowing. It's a confidential matter.

4           MR JUSTICE ROTH: Yes, but all you can say is that the other  
5           banks that you were negotiating with, and those were all  
6           the banks --

7           A. Yes.

8           MR JUSTICE ROTH: -- they were always -- also had regard to  
9           the reference rate.

10          A. Yes, they did, sir.

11          MR JUSTICE ROTH: Yes.

12          MS DEMETRIOU: But we know that for Midland Bank at least,  
13          they also used the actual default, the intra-EEA MIF, in  
14          their negotiations, correct, because Mr Warren told us  
15          that in the minute?

16          A. From what we've seen, that appears to be a case for  
17          a short period, yes.

18          Q. Now, when you say in your statement -- let's go back to  
19          paragraph 57, so page 16 {A/7/16}. When you say in the  
20          second sentence, "I mean that almost all bilaterally  
21          agreed interchange fees were agreed at the levels of the  
22          reference rates discussed by the MEPUK Board," can  
23          I take it that you mean there almost all bilaterals  
24          agreed by NatWest?

25          A. Yes, because there are other parties to the NatWest

1           agreements and all of those agreed with NatWest.

2       Q.   Yes, but you're not there -- because it looks like  
3           a much more general proposition, so -- and I was just --  
4           I just wanted to clarify what you mean, because the  
5           first sentence says:

6                 "In [your] experience of negotiating bilateral  
7           interchange fees at NatWest ..."

8                 So I appreciate you're going to know what all of  
9           those agreements say with other banks.

10      A.   Yes.

11      Q.   But then you say:

12                 "... almost all bilaterally agreed interchange fees  
13           were agreed at the levels of the reference rates  
14           discussed by the MEPUK Board."

15                 And can I take it that that sentence relates to  
16           NatWest agreements only?

17      A.   Yes.  It's perhaps an inference of others, but I can't,  
18           obviously, know.

19      Q.   Now, if we go to {B/55/2}, which is the table of  
20           bilateral agreements, and then this is -- so we've  
21           got -- these are NatWest agreements, NatWest by  
22           acquirer.  Do you see that?

23      A.   I see that.

24      Q.   And if we look at, for example, January to June 1994,  
25           can you see that most of the agreements are at 1.3, but

1           some are at 1; correct?

2       A.   Yes.

3       Q.   And I just want to the show you -- in terms of the  
4           inference you were just trying to draw, let's look at  
5           page 4 {B/55/4} and Midland Bank, and we see in that  
6           same period that there are -- so page 4, January to  
7           June 1994 we're looking at, and we can see there that  
8           most of the agreements are at 1; correct?

9       A.   Yes, I can see that.

10      Q.   And then if we go to Lloyds for the same period, so  
11         page 5 {B/55/5}, starting near the bottom of the page,  
12         so -- and then we can go over the page, if you just scan  
13         down. So looking we're at Lloyds and we've got a few  
14         there. And if we go over the page to page 6 {B/55/6},  
15         please, again, we can see that the majority are at 1;  
16         correct?

17      A.   Yes. I would point out, sir, that the -- I see that  
18         it's 1.3 in the case of the bigger banks.

19      Q.   Well, it is simply not right, is it? So if you were  
20         seeking to infer that all or nearly all the agreements  
21         were at the reference rate, that wouldn't be correct,  
22         would it?

23      A.   No, I know as a matter of fact what my rates were.  
24         I can only infer -- infer what the others were. But,  
25         sir, I do see that the 1.3s that the other banks agreed

1           were with the bigger banks, therefore with the bigger  
2           volumes.

3       Q.   Now, you've explained that the banks took  
4           confidentiality seriously, and I just want to look at  
5           one further point with you.  So if we go to C3/171,  
6           please, and this is a meeting of an R&CC sub-group on  
7           2 June 1998 and I just want to the check I've got the  
8           right reference, actually.  If you just bear with me for  
9           one second.  Actually, can we go to page 2?  That may  
10          assist me.

11   VC TECHNICIAN:  There's only one page.

12   MS DEMETRIOU:  Oh, there's only one page.  Then it's  
13           definitely the wrong reference.  Can everyone just bear  
14           with me for a minute while I find the right reference.  
15           (Pause)

16           Oh, so it's {C3/17/1}.  Yes, that was a wrong  
17           reference.  So we see here this is a meeting of  
18           18 October 1995.  It is an R&CC meeting and we see that  
19           you're chairing it.  Do you see that?

20   A.   Yes.

21   Q.   If we go to page 2 {C3/17/2}, there is a discussion here  
22           about whether or not there should be information sharing  
23           between EPI and MEPUK.  Do you remember that discussion  
24           at all?

25   A.   Not specifically, no.

1 Q. Alright. Well, if we go down the page, we see "CB". Do  
2 you see that? So three paragraphs up from the bottom:

3 "CB then raised a further point in defending ..."

4 So who was CB? Can you just remind us? Perhaps we  
5 can look on the first page to identify who CB was.

6 A. Is -- could I -- is it Christoph Baert?

7 Q. Let's go back to the first page {C3/17/1}.

8 MR JUSTICE ROTH: I think that's right.

9 MS DEMETRIOU: Let's go back to page 2 {C3/17/2}:

10 "CB then raised a further point in defending the EPI  
11 decision not to provide the requested information to  
12 MEPUK, which was that the UK Banks are dual members of  
13 both MCI and VISA. This was regarded as an outrageous  
14 comment since the Banks maintain 'Chinese walls' ..."

15 I think they're now called information barriers, but  
16 anyway. So:

17 "... and it prompted the observation from IS that it  
18 would make the UK members question what else was being  
19 kept from the UK."

20 And just to understand that, the banks regarded this  
21 as an outrageous comment. That goes back to  
22 confidentiality, does it, and the banks appreciated that  
23 they had to keep separate the information they knew  
24 about Visa from the information they knew about  
25 Mastercard; is that what that's getting at?

1 A. That's what that's getting at, yes.

2 Q. Okay.

3 A. Sorry, they're not Chinese walls but --

4 Q. I think information barriers --

5 A. -- information barriers.

6 Q. -- might be the term of the day. Thank you.

7 Now, if we go to {C5/107/1}, this is just a similar  
8 point, really. And we see here these are MEPUK board  
9 meeting minutes of 30 March 1998. Again, you're  
10 present, Mr Hawkins. Do you see that?

11 A. I see that.

12 Q. You were present at lots of meetings, it has to be said.

13 And if we go to page 7 {C5/107/7}, do you see that  
14 at the top of -- we see at the top of the page it talks  
15 about:

16 "This item commenced with discussion over the recent  
17 ... meeting ... Prior to the meeting, EPI had stated  
18 that the BMAC Chairman would not allow Mr Maddocks to  
19 attend ... Mr Perez advised that this arose from  
20 a decision taken at BMAC not to accept any  
21 representative who is a Visa Board Director in view of  
22 possible conflict of interest."

23 So then you express concern about that, because you  
24 think that the UK should have been able to propose  
25 whoever they wanted.

1 A. Yes.

2 Q. But I just want to ask you about the conflict of  
3 interest point. So is that getting at a similar point  
4 that you shouldn't be having representatives on BMAC who  
5 are Visa board directors because of these information  
6 barriers?

7 A. So the reality at that time was there's still quite  
8 a number of exclusive licensees and they felt that their  
9 information should not be passed to the opposing scheme.  
10 In the UK, we'd all been so-called dual. We'd been  
11 members of the Visa and Mastercard, and we handled that  
12 internally very carefully so that one did not infect the  
13 other.

14 Q. Alright. And then if we go to page 26 on this document,  
15 please {C5/107/26}. So under part 2, "Arbitration",  
16 just looking at the -- let's just look at the top,  
17 please, so we can locate it. So this is -- we're still  
18 in 1998 and this is talking about a meeting in Vienna in  
19 February 1998, and I just want to ask you about what's  
20 said about arbitration.

21 So there's a heading "Arbitration" and it is saying  
22 that:

23 "... a member Committee may not be the most  
24 appropriate forum for resolving interchange disputes ...  
25 it could bring competitors into contact with market



1 sensitive information."

2 So, again, that's a similar point, isn't it, about  
3 not sharing sensitive information?

4 A. Yes.

5 Q. And then it says that in principle -- so Europay seems  
6 to have taken legal advice and:

7 "... their steer was that a Committee of Europay  
8 would be more appropriate as an Arbitrator."

9 Do you see that?

10 A. Yes. By "a Committee of Europay", I'm not sure exactly  
11 what that refers to, but I believe it's Europay members.

12 Q. But it seems to be -- this seems to be -- it seems to be  
13 that legal advice was taken to set up a structure which  
14 wouldn't involve sharing sensitive information. That  
15 seems to be what's being said; do you agree?

16 A. Yes.

17 Q. And then if we go to page 27 {C5/107/27} and if we look  
18 just over -- just above halfway down:

19 "It is worth noting ..."

20 Do you see that?

21 A. Yes, I see that.

22 Q. So:

23 "It is worth noting that the rules for central  
24 acquiring, as valid at present, stipulate that the  
25 hierarchy of interchange rates ..."

1           And then we see what the hierarchy is.

2           And then there's a talk about there being a concern  
3           that any arbitration rates will impact on existing  
4           domestic fallback rates and -- a great concern. And  
5           presumably, the concern is that arbitration might  
6           result -- might put pressure on domestic rates; correct?  
7           Is that your understanding or do you not remember?

8           A. I don't specifically remember, but you can infer that.

9           Q. You can infer that.

10           And then you see that there was then a long debate  
11           about the costs of arbitration and so the arbitration  
12           costs were seen to be another reason why arbitration was  
13           not an ideal solution. Do you agree with that as  
14           a general proposition?

15           A. Yes. Obviously, there was a cost associated with  
16           arbitration, and it was usually set at a level which  
17           meant you really had to want to go to arbitration, thus  
18           pay for it, before you embarked on that route.

19           Q. Okay. Thank you very much, Mr Hawkins.

20           And then could we turn --

21           MR JUSTICE ROTH: The reference here "possibly the price of  
22           a cost study in order to arrive at cost figures for the  
23           Arbitrator", that was the -- I know there weren't any or  
24           hardly any domestic arbitrations. That was the  
25           understanding; that in an arbitration, what would be

1           very relevant is looking at actual costs.

2           A. That's right, sir, yes --

3           MR JUSTICE ROTH: Yes.

4           A. -- and that applied at a European level as well.

5           MR JUSTICE ROTH: At European level or a domestic

6           arbitration -- domestic costs.

7           A. Domestic and European.

8           MR JUSTICE ROTH: Yes.

9           MS DEMETRIOU: And then can we turn, please, to {C5/397/1},

10           and you can see this is a letter of 16 October 1997 and  
11           if we look at the first paragraph, you can see that that  
12           refers to the formalities for introduction of UK Rules.

13           Do you see that?

14           A. I see that.

15           Q. And then we see that under the heading "UK Domestic  
16           Fallback Interchange Rates":

17           "Board agreed that EPI be formally requested to  
18           incorporate UK Domestic Interchange Fallback Rates into  
19           UK Domestic Rules with effect from 1st November ... the  
20           rates being those currently in adoption ...

21           Standard 1.3% and Electronic 1% - as modified from time  
22           to time."

23           When that talks about the rates being currently in  
24           adoption, does that mean -- do you understand that as  
25           meaning the prevailing rates in bilateral agreements?

1 A. No, I understand that to be the reference rate.

2 Q. You understand that to be the reference rate, okay.

3 Now --

4 A. Sorry, if I can just explain. Mr Jukes, as company  
5 secretary, would not have any more information than  
6 anybody else about the bilateral rates, so it is the  
7 reference rate.

8 Q. Now, can we go to {C1/374/1}, please. This is a letter  
9 from Europay -- you see Mr Nelson -- to Aidan Tyndall at  
10 NatWest and it's dated 21 April 1993. Do you recall  
11 that Mr Tyndall was manager of the technical team at  
12 NatWest?

13 A. Yes, he was on my team, yes.

14 Q. Thank you.

15 And the letter states:

16 "I am pleased to inform you that, as from midnight  
17 ... 2 May 1993, Europay International will be able to  
18 support bilateral interchange arrangements for  
19 UK domestic clearing and settlement traffic. In  
20 practice, this will mean that any transactions received  
21 for clearing processing on Sunday 2 May will be treated  
22 using the new rates.

23 "A complete list of interchange agreements entered  
24 into by [NatWest] is attached for your reference.  
25 Please let me know if it does not match with your

1 records."

2 So this letter is identifying Europay's -- this is  
3 sending a list, a complete list, of interchange  
4 agreements entered into by NatWest and the idea is that  
5 any transactions cleared after 2 May will be processed  
6 at those rates; correct?

7 A. Yes.

8 Q. And NatWest, we've seen, is specifically asked to let  
9 Europay know if anything in the list doesn't accord with  
10 NatWest's records. And we see -- incidentally, we see  
11 that:

12 "... as a result of enquiries made into  
13 Europay/MasterCard rules last year, it was ascertained  
14 that there's no intra-UK or intra-European fallback rate  
15 applicable to cash advances or ATM transactions."

16 So we see for those things, the Mastercard rate  
17 applies, which is the inter-regional rate, correct, for  
18 ATMs and cash back?

19 A. Yes, that's what it says, yes.

20 Q. And that accords, doesn't it, with the order of  
21 precedence we saw in the EPI rules yesterday, which had  
22 a four-stage hierarchy? Do you remember that? So the  
23 hierarchy went first bilateral, if any --

24 A. Yes.

25 Q. -- second, domestic; third, intra-EEA MIF; and then,

1 fourth, intra-regional; yes? We saw that yesterday.

2 A. Yes.

3 Q. So here, the inter-regional rate is to apply to cash  
4 advance and ATM, but only because there's no bilateral,  
5 no domestic and no intra-EEA MIF; correct?

6 A. That's where that is the case, yes.

7 Q. Yes. So we can see that in this -- so for ordinary  
8 point of sale transactions -- for ordinary point of sale  
9 transactions, if there's no bilateral rate, then the  
10 intra-EEA rate would apply. We've established that.

11 A. No, I think this is talking about something quite  
12 different, which is cash machines. I think I explained  
13 yesterday, sir, that I also negotiated the inter-bank  
14 rates for cash machines and -- so we would have had  
15 a specific bilateral. They wouldn't be using this one,  
16 I don't think.

17 MR JUSTICE ROTH: Can I just ask? Cash machine -- what's  
18 the difference between cash advance and ATM?

19 A. Well, cash advance is where you are using your credit  
20 card and you are taking an advance. You are getting  
21 cash out of the machine and then you will pay it back in  
22 instalments later. Just cash on an ordinary card,  
23 a debit card, for example, doesn't attract that.

24 MR JUSTICE ROTH: And the ATM, is that -- oh, I see. So one  
25 is where you're using a credit card and the other one

1           you're using a debit card; is that it?

2           A. Yes. Effectively, if you are using a credit card, you  
3           are taking a cash advance and it's not particularly wise  
4           to do so.

5           MR JUSTICE ROTH: Yes, as I think many of us have  
6           discovered.

7           And the ATM is where -- so the ATM rate would only  
8           apply to a debit card; is that right?

9           A. The ATM rate that I negotiated --

10          MR JUSTICE ROTH: Well, the one here, they're just giving  
11          two different rates; one for cash advance, one for ATM.

12          A. I am not sure what the difference there is, sir. You  
13          could get cash back at this stage --

14          MR JUSTICE ROTH: Yes.

15          A. -- and that could be regarded as a cash advance, so that  
16          would be a point of sale transaction.

17          MR JUSTICE ROTH: Yes, I see. Thank you.

18          MS DEMETRIOU: Can we go, please, to {C1/375/1}. So this is  
19          the attachment to the letter that we've been looking at,  
20          and you can see that it's headed "Domestic Bilateral  
21          Agreement set up for NatWest Bank"; correct?

22          A. Yes.

23          Q. So if we go down the column, we see -- if we go to the  
24          ninth row, can you see NatWest is listed there?

25          A. Yes.

1 Q. So that must refer to transactions between NatWest as  
2 issuer and NatWest as acquirer; correct?

3 A. Yes.

4 Q. And it specifies an interchange fee applicable to those  
5 transactions, doesn't it?

6 A. It does.

7 Q. And if we look at {C2/255/1}, there's a similar table  
8 here set up for NatWest Bank bilateral agreements and if  
9 we scroll down a little bit, we'll see the date of that.  
10 So that's the 1st -- do you see that; 1.8.94,  
11 1 August 1994, towards the bottom right-hand corner?

12 A. Yes. Just to be clear, the previous one was '93?

13 Q. The previous one, yes, was the attachment to the letter,  
14 so that was '93, correct.

15 A. Yes, I --

16 Q. And if we can go back up to see the table. So it seems  
17 to be an updated version of the earlier table; correct?

18 A. Yes.

19 Q. And if you go down to the ninth row, again, we can see  
20 NatWest listed and so, again, those are transactions  
21 where NatWest is the issuer and NatWest is the acquirer;  
22 correct?

23 A. Correct.

24 Q. And we see that, actually, the rates have changed.  
25 They're now 1.3 and 1, whereas in the '93 table they



1           were 1 and 1. Do you see that?

2           A. Yes, I see that.

3           Q. So at some point between the April 1993 table and the  
4           August 1994 table, NatWest must have notified Europay  
5           about these updated rates.

6           A. Yes.

7           Q. And then if we go to {B/55/1}, please. This is back to  
8           the schedule of bilateral interchange agreements. Let's  
9           go to page 2 {B/55/2}. Those are NatWest's agreements  
10          and we've already looked at those.

11          If we look at page 3 {B/55/3}, this page is Coutts  
12          and, again, I'm just asking, insofar as you can help me,  
13          if we look down a few rows, we see Coutts again and do  
14          you see in the column for 1993 the rate of 1% as  
15          an interchange fee applicable in transactions between  
16          Coutts and Coutts?

17          A. Yes.

18          Q. So that must be the fee applicable where Coutts is the  
19          issuer and Coutts is the acquirer; do you agree?

20          A. Yes.

21          MR JUSTICE ROTH: And Coutts was part of NatWest?

22          A. Yes, Coutts -- indeed, I used to negotiate Coutts' rates  
23          for them.

24          MR JUSTICE ROTH: Yes.

25          MS DEMETRIOU: I'm not going to do this for the whole table,

1 but insofar as you can help me with these things, so if  
2 we go to -- well, let's do it in relation to Bank of  
3 Scotland, so if we go to page 6 {B/55/6}. So this is  
4 RBS and can you see in 1993, there's a rate specified  
5 for RBS and RBS transactions --

6 A. Yes.

7 Q. -- at the bottom of the page?

8 A. Yes.

9 Q. So where NatWest -- let's go back. We've seen the  
10 NatWest interchange fees. Let's go back to the first  
11 page -- to the second page {B/55/2}, and we see  
12 two-thirds of the way down the NatWest/NatWest  
13 transactions and we see how those fees move from 1 to  
14 1.3. We've seen that in the attachment.

15 So NatWest -- I think you can accept can't -- you  
16 can accept, can't you, that this reflects some kind of  
17 internal consideration on the part of NatWest as to what  
18 the appropriate interchange fee should be for  
19 on-us transactions?

20 A. Yes, but it wasn't specific to NatWest. This was  
21 a general reflection. You see that all the rates went  
22 from 1 to 1.3.

23 Q. If we look at {C3/51.1/1}, please, this is an internal  
24 Europay memorandum of 21 December 1995 and if we look at  
25 the -- so you're referred to in the first sentence as

1           being someone that works with Mr Harrison, who obviously  
2           called Mr Warner, who was unable to contact Mr Nelson.  
3           You see that in the first paragraph.

4       A.   I see that.

5       Q.   And then it says:

6           "I understand that Tony Lee has today decided to  
7           cease routing [NatWest] Bank acquired 'On-Us' traffic  
8           (authorisations and clearings) from EPS-Net preferring  
9           to interface directly with FDRL."

10          Now, clearing would generally involve the  
11          application of interchange fees; correct?

12       A.   Yes.

13       Q.   And we can see that the current position as of the date  
14           of this memo is that NatWest is currently, at this  
15           stage, routing its on-us transactions via Europay;  
16           correct?

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

18       Q.   And does that -- and you have got no reason to say that  
19           that's wrong.

20       A.   I've no reason to say that's wrong. I think I explained  
21           yesterday, sir, I was not an operations expert, and  
22           there were various acronyms available, the EPS-Net and  
23           others, but I take the point generally.

24       Q.   And if we go over the page, please {C3/51.1/2}, the  
25           heading here is "[NatWest] as Acquirer". Do you see

1           that?

2       A.   Yes.

3       Q.   And the left-hand column is headed "Issuer".  So where

4           we have NatWest, that's the counterparty.  Those are

5           on-us transactions, correct, because it's NatWest

6           acquirer and NatWest issuer, the first row?

7       A.   Yes, I haven't seen this before, so I --

8       Q.   You're just helping me with it, as far as you can.

9       A.   If you could just -- I don't know, could you enlarge

10          that, please?

11      Q.   Of course.

12      A.   Right.

13      Q.   So let's just take it in stages.  So the heading says

14          "[NatWest] as Acquirer".

15      A.   Yes.

16      Q.   And then we have in the first column the heading

17          "Issuer" and then we have NatWest as an issuer.

18      A.   Yes.

19      Q.   So those must be NatWest/NatWest on-us transactions;

20          correct?

21      A.   I suppose that is the case, yes.

22      Q.   And we see there that for 1995, the transaction routing

23          through EPS-Net is approximately 35% of 1995 volume.  So

24          that looks like it's a substantial number of

25          on-us transactions being processed by Europay, doesn't

1           it, on its face?

2           A. Does that also mean that the remainder are via FDR? As

3           I say, I've not seen this before.

4           Q. No. Well, they take -- so NatWest then -- as we saw

5           from the letter earlier, NatWest then takes business to

6           FDR later on.

7           A. Yes.

8           Q. But this is looking at the position then, but if you

9           haven't seen it and you can't help us further, then

10          that's fine.

11          A. No, I can't.

12          Q. Now, if we go over the page to page 3 {C3/51.1/3},

13          I think the position will be the same; that you haven't

14          seen this so you may not be able to help us. But if we

15          see "Breakdown of Nat West Acquired Transactions in

16          1995 - Clearings", again, we see NatWest as an issuer in

17          the second row in the first column and then we see the

18          total for 1995, in the second column from the end, is

19          nearly 30 million on-us transactions, so --

20          MR JUSTICE ROTH: This says NatWest/FDR, which is a bit

21          confusing, isn't it?

22          MS DEMETRIOU: So -- yes, so NatWest were using FDR for

23          one portion of their transactions, but because they

24          weren't using FDR entirely at that stage, they were

25          routed through EPS-Net.

1 A. It's a complicated table.

2 MR JUSTICE ROTH: I don't think Mr Hawkins can help us on  
3 this --

4 MS DEMETRIOU: I don't think Mr Hawkins can help us further.

5 MR JUSTICE ROTH: -- because this is supposed to be  
6 an EPS-Net document, isn't it?

7 MS DEMETRIOU: Yes.

8 MR JUSTICE ROTH: But yet it's dealing with NatWest from  
9 FDR --

10 MS DEMETRIOU: Well, I'm just wondering -- the reason  
11 I'm asking him is obviously Mr Hawkins was at NatWest  
12 and these relate to NatWest on-us transactions. But he  
13 hasn't seen these documents, so I don't think I can take  
14 it any further.

15 But what I do want to ask you is this: NatWest had  
16 both a large acquiring and a large issuing business;  
17 correct?

18 A. Yes, it did, yes.

19 Q. So presumably, is it right, at the end of each financial  
20 year the issuing part of the bank would prepare a record  
21 of its revenues and profits so that senior management  
22 could follow its performance?

23 A. Yes.

24 Q. And that would also be true of the acquiring part of the  
25 business; correct?

1 A. Yes.

2 MR JUSTICE ROTH: So it accounts separately, as it were?

3 A. Yes, sir, internally, yes.

4 MS DEMETRIOU: So presumably in relation to on-us

5 transactions, there would have been a fee that was

6 recorded internally, wouldn't there?

7 A. Yes, I believe so. They were subject to the same

8 interchange fee arrangements as anyone else.

9 MS DEMETRIOU: Alright. Thank you very much, Mr Hawkins.

10 MR JUSTICE ROTH: Would that be a sensible point?

11 MS DEMETRIOU: It would. I've finished asking questions to

12 Mr Hawkins, subject to one point, which I don't think is

13 for Mr Hawkins, but I wanted to raise with the Tribunal

14 in case you think it is. Can I just raise it now?

15 MR JUSTICE ROTH: Yes.

16 MS DEMETRIOU: Thank you. So it relates to the 75% rule

17 and, sir, you'll recall that you put two constructions

18 of the rule to Mr Hawkins. Do you remember? So

19 one construction was that members would have to leave

20 MEPUK entirely, 25% of members, and the other

21 construction was that 25% could object to a particular

22 rule.

23 And you put that point to Mr Hawkins and Mr Hawkins

24 said he agreed with the former interpretation of the

25 rule, and it rather looks from the transcript that

1 I'm conceding that that is correct and I don't want to  
2 make that concession. We'll deal with it in  
3 submissions, but I don't think that I can take it  
4 further with Mr Hawkins because he's -- he's given his  
5 evidence as to what the rule said and --

6 MR JUSTICE ROTH: Yes, I think he said that 75% replaced the  
7 90% --

8 MS DEMETRIOU: Yes.

9 MR JUSTICE ROTH: -- and that was the basis of the 90% and  
10 the basis of the 75%.

11 MS DEMETRIOU: That's right and he's -- in terms of --

12 MR JUSTICE ROTH: I think he said it was to make sure that  
13 MEPUK was sufficiently representative --

14 MS DEMETRIOU: Exactly --

15 MR JUSTICE ROTH: -- of the licensees and if it ceased to be  
16 sufficiently representative, it lost all of its  
17 authority.

18 MS DEMETRIOU: That's right and -- but there's another  
19 possible construction of the rule, which is what we say  
20 happened in Belgium, which is --

21 MR JUSTICE ROTH: Yes.

22 MS DEMETRIOU: -- but I can't pursue that --

23 MR JUSTICE ROTH: I don't think Mr Hawkins can help us with  
24 what happened in Belgium.

25 MS DEMETRIOU: No, I completely agree, but I wanted to raise



1 it.

2 MR JUSTICE ROTH: No, I don't think just the way you put  
3 your question amounts to a concession --

4 MS DEMETRIOU: No, I didn't want --

5 MR JUSTICE ROTH: -- but we have Mr Hawkins' evidence.

6 MS DEMETRIOU: Thank you.

7                    So, Mr Hawkins, those are my questions for you.

8 I don't have any more. Thank you very much.

9           A.    Thank you.

10 MR JUSTICE ROTH: Well, Mr Hawkins, there may be some more  
11 questions for you by way of re-examination and there may  
12 be questions that we have. So we'll take a break and  
13 we'll come back in -- I think if we come back at 12.00,  
14 give us a slightly longer break and give Mr Smouha  
15 slightly more time.

16 (11.45 am)

17 (A short break)

18 (12.10 pm)

19 MR JUSTICE ROTH: Yes, Mr Smouha.

20 Re-examination by MR SMOUHA

21 MR SMOUHA: Thank you, sir.

22           Mr Hawkins, I do have a few questions for you in  
23           re-examination. I know you've been in the witness box  
24           quite a long time, so what I'm going to do is where  
25           I'm asking you matters relating to questions that you

1           were asked yesterday, I will show you in the transcript  
2           so you can see the question is that I'm asking you about  
3           and the answer that you gave, just to take you back to  
4           those matters that I want to ask you about.

5       A.   I understand.

6       Q.   And, again, as I do, if I am showing you something in  
7           the transcript and you want to be reminded of a little  
8           more in terms of the topic and you want to read another  
9           part of the transcript, then please say so, but I hope  
10          I'll be able to show you what you need to see in order  
11          to remember what the issue was.

12      A.   Thank you.

13      Q.   You will recall yesterday morning, first thing, my  
14          learned friend Ms Demetriou was asking you questions  
15          about the MCI Rules.

16      A.   Yes.

17      Q.   If we can go, please, in the transcript for Day 5 to  
18          page 1 {Day5/1:25} and at -- you can see the transcript,  
19          Mr Hawkins? I want to show -- if we scroll down,  
20          please, to page -- sorry, to line -- if you look at  
21          line 25, Ms Demetriou was asking you about paragraph 62  
22          of your first statement, and do open that up as well.

23      A.   Yes, I have that.

24      Q.   And Ms Demetriou asked you:

25           "... in fact, Mr Hawkins, you refer to that part of

1 the rule there, do you see? So you see:

2 "'The MCI rules dated December 1993 ..."

3 Sorry, the question was then quoting, pointing out  
4 to you that you refer to the MCI Rules dated  
5 December 1993:

6 "... that have been shown to me similarly provided  
7 for the application of the 'international interchange  
8 [fee] applicable to transactions for such MasterCard  
9 region in which the country is located' ..."

10 A. Right.

11 Q. And then Ms Demetriou asked you about a series of  
12 documents and then asked you a few minutes later -- this  
13 is now on page 9 of the transcript {Day5/9:3} -- about  
14 a document from the previous year, from 1992. Do you  
15 see on page 9 at line 3:

16 "Question: And then at paragraph 15, you refer to  
17 some documents and at 15(a), you refer to minutes of a  
18 MEPUK board meeting of 28 May 1992 and you set out here  
19 the extract you rely on and that says, reading from the  
20 statement:

21 "... 'It was assumed that such a rate would apply  
22 once arbitration had taken place and that it would not  
23 have retrospective effect. It was further assumed that  
24 meanwhile, the 'fallback rate' to be applied in absence  
25 of bilateral agreement would be the MCI International

1 fallback rate'.

2 "And you then say:

3 "The 'MCI International fallback rate' was the  
4 interregional rate ..."

5 "Yes? That's your evidence.

6 "Answer: That's my evidence.

7 "Question: But we've seen, haven't we, that the MCI  
8 Rules provide that the fallback rate is the  
9 international rate that applies in the region in which  
10 the country is located, so here the EEA; correct?

11 "Answer: That was a global rule, yes."

12 Now, I'm sure my learned friend would readily accept  
13 that the question here to you unintentionally, but not  
14 quite accurately -- was put not quite accurately  
15 because, of course, in May 1992, the December 1993 rules  
16 weren't yet in effect, were they?

17 A. Right.

18 Q. So can I ask you, please, to look at the May 1992  
19 minutes and just ask you to explain to the Tribunal what  
20 was being referred to. The May 1992 minutes are at  
21 {C1/197/3}.

22 Can we look at the whole of that first paragraph.  
23 So under the heading "'Fallback' Interchange Rate to be  
24 Enshrined in MCI Rules - Minute 20/92":

25 "A number of issues had been raised at the

1 January 1992 Board Meeting where it was noted that  
2 failure by issuers and acquirers bilaterally to agree  
3 interchange rates would result in arbitration by MCI.  
4 It was assumed that such a rate would apply once  
5 arbitration had taken place and that it would not have  
6 retrospective effect. It was further assumed that  
7 meanwhile, the 'fallback rate' to be applied in absence  
8 of bilateral agreement would be the MCI International  
9 fallback rate. These issues had been raised with  
10 George Strachan of MCI so that they could be clarified  
11 and the Members advised in writing. In addition,  
12 Mr Strachan had been advised that the MCI Rules should  
13 be amended so as to recognise the differences between  
14 the international fallback rate and the rate MCI  
15 recognised should be used in the UK as the fallback  
16 rate. Comment on this view had also been requested."

17 When -- Mr Hawkins, when the MEPUK board was  
18 discussing or referring there to the MCI international  
19 fallback rate, what was being referred to, at least to  
20 your understanding?

21 A. That was the inter -- the inter-regional rate.

22 Q. Now, you said yesterday that these issues about the  
23 rules were discussed several times by the MEPUK board.

24 A. Yes.

25 Q. Are you able to say from your recollection of those

1           discussions what other board members considered was the  
2           fallback rate being discussed?

3       A.   As far as I was concerned, sir, all the other board  
4           members recognised that in the same way that I did.

5       Q.   These board meetings in the early 1990s were presumably  
6           in person, not by conference call.

7       A.   They were in person.

8       Q.   When you were having discussions about the rules in  
9           the -- in board meetings, would you or your colleagues  
10          usually have copies of the MCI and Europay Rules in  
11          front of you?

12      A.   No, not necessarily. They're voluminous and -- no. But  
13          we could refer to them afterwards, of course.

14      Q.   Thank you. I want to ask you --

15      MR JUSTICE ROTH: Before we move on --

16      MR SMOUHA: Sorry, sir.

17      MR JUSTICE ROTH: -- just helping us, if you can --

18      A.   Yes, sir.

19      MR JUSTICE ROTH: -- and it's a long time ago, a very long  
20          time ago. Just looking at the next sentences, those  
21          issues had been raised with Mr Strachan so they could be  
22          clarified. So does that -- because it says it was  
23          assumed the fallback rate would be the MCI international  
24          fallback rate. You explain what that is, but it says it  
25          was assumed that would be. And then there's a request

1           that Mr Strachan should clarify, number one.

2           Does that mean that there was some -- although that  
3           was the assumption, it wasn't entirely clear? Is  
4           that --

5       A. No, sir, it wasn't entirely clear. We're talking here  
6           about the application of the rules. We knew what we  
7           were doing in terms of the bilateral negotiations  
8           because we'd already had studies then --

9       MR JUSTICE ROTH: Yes.

10      A. -- but this is getting it into the rules so if there was  
11           a dispute, everybody would understand what the situation  
12           is.

13      MR JUSTICE ROTH: And then he goes on to say, or the minutes  
14           go on to say:

15           "... Mr Strachan had been advised that the MCI Rules  
16           should be amended so as to recognise the differences  
17           between the international fallback rate ..."

18           Which is the one you referred to:

19           "... and the rate MCI recognised should be used in  
20           the UK as the fallback rate."

21           What is that second rate being -- the rate MCI  
22           recognised should be used? Not MEPUK; MCI. What's that  
23           rate referring to?

24      A. Well, sir --

25      MR JUSTICE ROTH: Sorry.

1       A. MCI would -- were party, so they attended MEPUK board  
2       meetings. They were part of the discussion of what was  
3       going on. They would have been aware of the reference  
4       rates. If there was an arbitration and we had to  
5       fallback to the Mastercard international rate, it was 1%  
6       at that time, and the cost study showed that that wasn't  
7       a fair reflection of the true costs. So we would expect  
8       that in any arbitration, Mastercard would take on board  
9       the cost studies and the reference rates.

10      MR JUSTICE ROTH: Oh, I see. So the international -- the  
11      rate MCI recognised should be used, that is a reference  
12      to the reference rate, because MCI were part of the  
13      MEPUK discussions?

14      A. Yes, they are.

15      MR JUSTICE ROTH: Yes, I see.

16      MR SMOUHA: Sir, if it's helpful, I can give you the  
17      reference to -- I wasn't going to take Mr Hawkins to it  
18      or ask him about it, but the reference to Mr Strachan's  
19      letter is {C1/197/5}, the relevant parts at pages 5 to  
20      6.

21             Mr Hawkins, a different ... (Pause)

22             Sorry, {C1/192/1}. I can't read my own writing.

23             192, I'm told.

24      MR JUSTICE ROTH: It's looked as though it was the right  
25      bit.



1 MR SMOUHA: Yes. No, I'm getting contradictory instructions  
2 from the right, from behind.

3 MR JUSTICE ROTH: I think your reference was correct,  
4 I think.

5 MR SMOUHA: I'm told I'm wrong, now I'm told I'm right and  
6 now I'm told that, in fact, both are correct.

7 Mr Hawkins, help me out. It's getting tough here  
8 and I'm only taking a few minutes with you.

9 Mr Hawkins, Ms Demetriou also took you to some  
10 correspondence between Bank of Scotland and Europay and  
11 First Trust Bank and Europay.

12 A. Yes.

13 Q. Do you recall? So let's look at the Bank of  
14 Scotland/Europay letter, {C3/225/1}. Do you remember  
15 you were shown this letter?

16 A. Yes, I do, yes.

17 Q. And Ms Demetriou asked you what Europay would have  
18 understood the reference to "default rate" to mean. If  
19 we look at the transcript, please, for {Day5/104:11},  
20 Ms Demetriou asked you at line 12:

21 "So the question I'm putting to you, Mr Hawkins ...  
22 is that where that says 'current default rates should  
23 continue to apply' ... what Mr Nelson would have  
24 understood by that, what Europay would have understood,  
25 is the default rate in the Europay Rules, correct, which

1 was the intra-EEA MIF?

2 "Answer: Sorry, sir, I cannot speculate on that,  
3 because that's left blank. The reference is to default  
4 rates. My interpretation of default rates are the rates  
5 agreed by the MEPUK board. I can't really speculate as  
6 to what Bank of Scotland ..."

7 And there may have been some overspeaking there, but  
8 we get the gist of what you were saying there; that you  
9 couldn't speculate as to what Bank of Scotland may have  
10 understood, which is a perfectly fair response,  
11 I'm sure, Mr Hawkins.

12 Let me show you a document and ask you about  
13 NatWest's position at the time. Can we look at  
14 {C2/34/1}.

15 You'll recall that when Ms Demetriou started her  
16 cross-examination on this part of your witness statement  
17 and this topic, she said to you that she would ask you  
18 about some of the documents that you refer to. This is  
19 a document which you do refer to in your witness  
20 statement, but about which Ms Demetriou did not ask you  
21 questions.

22 It's a letter from NatWest to the treasurer of  
23 HFC Bank of 31 December 1993. If we go to page 2,  
24 please {C2/34/2}, just to see that it's signed by  
25 Mr Clements, Manager, Payment Scheme Management.

1           Mr Clements, do you --

2           A. Yes, he was one of my team, yes.

3           Q. He was one of your team. Thank you.

4                   Can we go back to the first page {C2/34/1}? Now, as  
5           we haven't looked at this before, can I ask you and the  
6           Tribunal -- I won't read the whole thing into the  
7           transcript -- just to read the whole of the first page  
8           and we'll go over to the second page to read the end of  
9           the section on point of sale transactions.

10                   So, Mr Hawkins, if you want to just -- I know  
11           you've --

12           A. Could it be enlarged please?

13           Q. If we maybe -- there we go.

14           A. Thank you.

15           Q. No, if we go back to the bit -- can we go back to the  
16           previous view? Yes, there.

17                   And, Mr Hawkins, if you just indicate when you've  
18           read to the bottom of that page.

19           A. Yes, right.

20           Q. Thank you. (Pause)

21           A. Yes.

22           Q. And then if we go over the page {C2/34/2} and read, if  
23           you would, the top paragraph just to the end of the  
24           section dealing with point of sale. (Pause)

25                   And at the end of that paragraph, Mr Hawkins,

1 Mr Clements says:

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

6 Which rate was Mr Clements referring to?

7 A. Yes, he was referring to the inter-regional rate.

8 Q. Thank you.

9 MS DEMETRIOU: Sorry, Mr Hawkins has said lots of times that  
10 he can't speculate about what other people were  
11 thinking, and the question was what was somebody else  
12 referring to.

13 MR SMOUHA: Well, I will repeat the question I asked you,  
14 Mr Hawkins, about Mr Clements.

15 MR JUSTICE ROTH: I think he said Mr Clements was on his  
16 team and, therefore, presumably -- I mean, would he be  
17 writing with your authority?

18 A. Yes, but he -- I would understand what he was writing  
19 about.

20 MR JUSTICE ROTH: And was he reporting to you?

21 A. He would report -- yes, he was reporting to me.

22 MR JUSTICE ROTH: Yes. Well, I think in a case like this,  
23 you don't expect every member of the team who writes  
24 letters to be called as a witness. I think that's  
25 reasonable. It's not as though it's another area of the

1 bank like processing. I mean, you can make submissions  
2 later about the weight of the answer, but I think it's  
3 a quite permissible question.

4 MR SMOUHA: Just while we're on that page, a different  
5 topic, but you see there is some manuscript on the  
6 left-hand side in relation to the section dealing with  
7 cash transactions, ATM transactions and manual cash  
8 advances, which says -- it looks as though it says  
9 "changed July 1996".

10 Mr Hawkins, just while we have that open, do you  
11 recognise the manuscript? If you don't, then please say  
12 so.

13 A. I think, sir, it may be David's writing, but I cannot  
14 tell you.

15 MR JUSTICE ROTH: Well, it's not yours anyway.

16 A. Not mine, no.

17 MR SMOUHA: And do you know what that is referring to that's  
18 changed in July 1996 in relation to ATM transactions and  
19 manual cash advances?

20 A. I could speculate, sir, but I can't say with absolute  
21 certainty.

22 MR SMOUHA: Okay, Mr Hawkins. Thank you very much --

23 MR JUSTICE ROTH: Do you know on that -- I mean, it says in  
24 the letter:

25 "Currently, we do not accept any domestically issued

1           MasterCard or Visa [cards] ... in our ATMs ... Whilst  
2           this NatWest policy is under regular review ... we are  
3           not able to give consideration to opening our ATM to  
4           cards ..."

5       A.   Yes.

6       MR JUSTICE ROTH:   Do you know: did that policy change?

7       A.   I think that did happen.   Whether it was in July 1996,  
8           sir -- but yes, sir, I imagine it refers to that.

9       MR JUSTICE ROTH:   Yes.

10      MR SMOUHA:   Sir, there are documents in relation to that we  
11           looked at yesterday.   We'll draw the threads together of  
12           that in closing submissions.

13      MR JUSTICE ROTH:   Yes.

14      MR SMOUHA:   Mr Hawkins, thank you very much.   I don't have  
15           any further questions.   The Tribunal may.

16      A.   Thank you.

17                               Questions by THE TRIBUNAL

18      MR JUSTICE ROTH:   Yes, Mr Hawkins, we do have some questions  
19           because you were so involved in this for a long time --

20      A.   Yes, sir.

21      MR JUSTICE ROTH:   -- and you can just help us understand how  
22           certain things happened, and, of course, you chaired the  
23           Rules Committee of MEPUK for about eight years, I think.

24           We know that UK Rules were first introduced in,  
25           I think, November 1996, but at that point, they didn't

1 include a UK multilateral interchange fee, a MIF. That  
2 came a year -- about a year later.

3 A. That's right, sir.

4 MR JUSTICE ROTH: So we wanted to just understand a bit  
5 about the other aspects of the rules. We've been  
6 hearing a lot about the MIF, and I don't know if this  
7 helps, because our question really is what were the main  
8 areas in the rules. The rules, as you just said, are  
9 voluminous and there will be lots of things that are  
10 pushy rules, but people don't get interested in and  
11 there are other rules that people get interested about.

12 So we wanted to get a sense what were the main  
13 areas, apart from interchange fee, which were of  
14 interest to bank members?

15 A. Well, sir, I've been lucky enough to -- with the  
16 evidence that's been provided to me to revisit the  
17 UK Rules, and they are very long. And, in fact,  
18 interchange fees occurred something like chapter 11,  
19 chapter 12, quite a small aspect. So the rest of it is  
20 given over to chargebacks, which were very -- and  
21 chargebacks, authorisations, a whole bundle of matters  
22 relating to operations.

23 And you'll have seen that there were acronyms  
24 associated with that and numbers and so on, all of which  
25 the operations people would understand. And so that

1           takes up most of the rules. Interchange is a relatively  
2           small section of it.

3       MR JUSTICE ROTH: Yes, and when you were drawing up the  
4           rules --

5       A. Yes.

6       MR JUSTICE ROTH: -- which of those were the things that, as  
7           it were, created most debate or discussion among the  
8           members of MEPUK, apart from interchange?

9       A. Well, I think it was chargeback rules which were  
10          particularly problematic because we, as I think  
11          I mentioned before, were a more developed credit card  
12          market in the UK than Europe generally and, therefore,  
13          there were reasons for specific UK chargeback rules.

14      MR JUSTICE ROTH: And that would be when the acquirer  
15          would -- when the issuer would be entitled to say,  
16          "We're not going to honour this transaction".

17      A. Yes, it's the disputes, indeed, and there were  
18          a significant number of them, because, of course, not  
19          all the goods are provided as they should be and so --  
20          or there may be all sorts of reasons for disputes.  
21          That's what the chargeback system exists for.

22      MR JUSTICE ROTH: So that would be of great concern to  
23          acquiring banks, the right of the -- what scope there  
24          was for the issuing bank to charge back.

25      A. It would indeed and, of course, it would be of great



1 interest to the issuing bank as well. Unfortunately,  
2 the people around the tail, the operations people who  
3 would be devising these, represented both sides, issuing  
4 and acquiring.

5 MR JUSTICE ROTH: Yes, so they both had to be satisfied,  
6 both sides, as it were --

7 A. Yes.

8 MR JUSTICE ROTH: -- that it was a fair rule in -- because  
9 it governed when a chargeback was allowed. Was that  
10 what the rules were dealing with?

11 A. Yes. To be perfectly honest, sir, I can't remember all  
12 the details.

13 MR JUSTICE ROTH: Yes.

14 A. In fact, indeed, that's what my operations manager would  
15 have been dealing with. But there would be a whole host  
16 of other things --

17 MR JUSTICE ROTH: It would set out the regime for  
18 chargebacks.

19 A. The regime for chargebacks yes. And also, of course, as  
20 you get into different classes of transactions such as  
21 electronic hard card files and all the rest of it, there  
22 had to be rules specifying exactly how that operated.

23 MR JUSTICE ROTH: Yes. Yes, thank you.

24 Then you say in your first witness statement, and we  
25 can go to it perhaps at paragraph 25 {A/7/7}, that when

1           you talk about the -- that Barclaycard obtained  
2           a licence for Mastercard, Lloyds, a licence to Visa and  
3           soon thereafter, all the relevant UK banks joined both  
4           the Visa scheme and the Mastercard/Eurocard scheme.

5           So when they joined the schemes, both schemes, how  
6           many of the main acquiring banks for Mastercard, which  
7           I think we saw were your bank, NatWest, Midland,  
8           Barclays, Lloyds, how many of them were also acquiring  
9           banks for Visa? Do you know?

10          A. I believe they all were, sir. We certainly were.

11          Barclays obviously were dual acquirers. Midland Bank,  
12          as it was then, also dual acquirers. Royal Bank of  
13          Scotland too, at that stage on a much smaller scale.

14          MR JUSTICE ROTH: In the period when you had bilateral fees  
15          before you got the UK MIFs --

16          A. Yes.

17          MR JUSTICE ROTH: -- and so bilateral negotiations of  
18          separate interchange fees, would retail merchants who  
19          dealt with -- had a contract with the acquiring bank --

20          A. Yes.

21          MR JUSTICE ROTH: -- would they switch services, their  
22          acquiring service that they took from one bank to  
23          another sometimes?

24          A. Yes. It was a very, very competitive market, especially  
25          towards the end of the 90s. The major retailers would

1 be, obviously, very cost conscious and if they could  
2 persuade one bank to offer them a better deal than the  
3 other -- for example, NatWest had moved up to  
4 a 50% share of the acquiring market from something like  
5 25%.

6 MR JUSTICE ROTH: And would that be then the pressure the  
7 retailer could put, part of it, at least, on the bank on  
8 the acquiring side? They could threaten to move to  
9 switch -- take the acquiring business somewhere else.

10 A. Yes, not only threaten to move, but they actually did  
11 move. And I like to think as far as NatWest was  
12 concerned, and maybe I'm prejudiced, it succeeded in  
13 getting business from Barclaycard, for example.

14 MR JUSTICE ROTH: Yes. And then you were involved in  
15 negotiating the bilaterals for NatWest --

16 A. Yes.

17 MR JUSTICE ROTH: -- and I think you just said a few moments  
18 ago also for Coutts; is that right?

19 A. Yes, I believe so, yes.

20 MR JUSTICE ROTH: So when you negotiated, say, a bilateral  
21 agreement with Barclays, that would be a big one,  
22 wouldn't it?

23 A. Yes.

24 MR JUSTICE ROTH: I -- would you cover in that negotiation  
25 both your interchange fee for Mastercard cards and for

1 Visa cards or would you have a separate negotiation for  
2 Visa cards?

3 A. We tended, sir, to put the two together.

4 MR JUSTICE ROTH: And as you were both acquirer and issuer  
5 of Mastercard and the Visa card --

6 A. Yes.

7 MR JUSTICE ROTH: -- and Barclays was an acquirer and issuer  
8 of -- would you be covering in the one negotiation both  
9 the interchange fee where you were acquirer and where  
10 you were issuer?

11 A. Yes, sir, just the one fee, yes.

12 MR JUSTICE ROTH: Yes, so you would be dealing with these  
13 different aspects in the negotiation.

14 A. Yes, it was a question of taking everything into account  
15 and arriving at a mean, I guess.

16 MR JUSTICE ROTH: So what you did on one could affect what  
17 you did on the other. Would it work like that?

18 A. Yes, I suppose so. The fact of the matter is the  
19 retailers would not have been interested in having  
20 a different merchant service charge for Visa and  
21 Mastercard. As far as they were concerned, they were  
22 all credit cards. So if they were dealing with  
23 Streamline, which is the NatWest acquiring arm, they  
24 would expect to negotiate a single rate for all  
25 transactions; tiered, of course, as we've discussed.

1 MR JUSTICE ROTH: Yes. And then we've just seen  
2 a few moments ago these two other categories of ATM and  
3 cash advance --

4 A. Yes.

5 MR JUSTICE ROTH: -- which, in the earlier part of the  
6 period, you weren't offering, but then at some point,  
7 maybe July '96, maybe slightly later, you did offer.

8 Once you did offer those would that also -- the fee  
9 for that also be covered in the negotiation?

10 A. Well, sir, at that stage, about '95/'96, the retail  
11 bank, we were divided into divisions. They felt it was  
12 more appropriate for them to be negotiating the ATM  
13 inter-bank fees; a scheme called Link, if you've come  
14 across it.

15 MR JUSTICE ROTH: Yes.

16 A. But -- so the retail bank got their way and --

17 MR JUSTICE ROTH: And the others were separate, yes,  
18 I understand.

19 A. Yes, yes.

20 MR JUSTICE ROTH: And you refer in your statement to these  
21 negotiations would cover -- take account of various  
22 things, and one is general commercial considerations.

23 A. Yes.

24 MR JUSTICE ROTH: Can you expand a bit on that? We're  
25 trying to get a flavour of the negotiation, really.

1 This is bilaterals we're talking about.

2 A. Yes, sir. Well, it is frankly what the market will  
3 bear. So as we've seen, for example, the costs --  
4 credit write-off costs in the '99 study had gone up  
5 considerably, and there was no question in our mind that  
6 that would mean a 30% rise in the merchant service  
7 charge. That certainly was not acceptable to retailers,  
8 and that is why we had to be realistic about it and  
9 apply a level that was acceptable in the market.

10 The cost studies were very important so that we had  
11 a basis from which to work, but thereafter, it was what  
12 was realistic.

13 MR JUSTICE ROTH: Yes, and then Visa. The Visa interchange  
14 fees -- clearly you could have bilaterals for Visa, but  
15 what was the -- what happened as regards -- are you able  
16 to help us? If there was no bilateral agreement, what  
17 was the default arrangement with Visa?

18 A. Well, sir, I haven't been reminded of that. I would  
19 have been aware of it at the time and I -- I'm sure that  
20 arbitration would have come in. Well, probably there  
21 would have been a rule in Visa to -- that you had to  
22 fallback to the Visa rate established under their  
23 separate methodology.

24 MR JUSTICE ROTH: Yes. And when you then moved to having  
25 a UK MIF in 1997 --

1 A. Yes.

2 MR JUSTICE ROTH: -- if it had been a higher MIF than the  
3 Visa MIF, would that have been a competitive benefit to  
4 Mastercard because you would attract more issuing banks  
5 who would get a higher interchange fee? How would it  
6 work?

7 A. Well, you'd certainly think so, but as I said, the  
8 pressures that the -- particularly the major retailers  
9 were able to exert meant that we had to offer a blended  
10 rate. I wasn't personally involved in the Streamline  
11 negotiations with the major retailers, but I know from  
12 discussions with my colleagues that that's how it ended  
13 up, with a blended approach.

14 MR JUSTICE ROTH: Yes. Moving on to another topic, you may  
15 remember there was that table seeking -- giving  
16 information -- I think it was to the OFT by Europay --  
17 of the proportion of bilaterals, and this was in the  
18 Europay system, cleared through Europay that everyone  
19 was puzzling over a bit.

20 As at 1995 to 1997 -- we can go to that big large  
21 A3 schedule -- I think it's right that NatWest had  
22 bilateral agreements with all the other major -- well,  
23 pretty much all the UK banks.

24 A. Yes, sir.

25 MR JUSTICE ROTH: And I think that was true of Coutts as

1 well.

2 A. Yes. They actually signed, obviously, their agreements  
3 themselves, but they relied on us to interface with the  
4 schemes. They had a much smaller team.

5 MR JUSTICE ROTH: Yes, and I think you said you negotiated  
6 the Coutts agreement as well.

7 A. Yes.

8 MR JUSTICE ROTH: And Barclays had a bilateral with NatWest.  
9 We've heard about that.

10 A. Yes.

11 MR JUSTICE ROTH: And I think, and someone will correct me  
12 if this is wrong, that these were being cleared through  
13 the EPSS system by about 1995.

14 A. Yes, it obviously varied according to what, I guess,  
15 deals were done by the operation people.

16 MR JUSTICE ROTH: Yes, but if we just look at the Europay  
17 response, which is {C7/198/1}, these were the questions.  
18 It's what's called a section 26 notice from Office of  
19 Fair Trading as part of its inquiry.

20 And then if we go to the next page {C7/198/2},  
21 you'll recall that there's the question 4:

22 "What percentages of transactions are made ... on  
23 the basis of the fallback ... (ii) by way of bilateral  
24 agreements ... Please provide this information by value  
25 and volume ... for the previous five financial years."



1 A. Yes.

2 MR JUSTICE ROTH: Answer:

3 "... Europay does not process all of the domestic  
4 traffic in the UK, Europay [can't] provide figures on  
5 the percentage of transactions processed under bilateral  
6 interchange and service fees as opposed to the total  
7 traffic."

8 A. Yes.

9 MR JUSTICE ROTH: And then they asked a follow-up in the  
10 questionnaire, almost anticipating that answer:

11 "In the event that Europay only has details of the  
12 bilateral agreements between Participants that do use  
13 the ECCSS ... what percentages of transactions are made  
14 ... on the basis of fallback interchange ... and (ii) by  
15 way of bilateral agreements ... Please provide this  
16 information by value and volume ... for the previous  
17 5 financial years."

18 They said they can only do it for three years.

19 And then on the next page {C7/198/3}, we have this  
20 table and it shows a decline from 1997 through to 1999.  
21 Well, in 1999, of course, we have the multilateral fee  
22 and I think you said, when asked about this, that you  
23 can't really reconcile these figures.

24 And if we look at '97, when NatWest was using the  
25 ECCSS system, is it possible that of the transactions on

1 the system, 0.01% could be bilateral and the rest would  
2 be fallback? Does that -- is that possible?

3 A. Well, sir, this table is a puzzle to me, and I think it  
4 was partially explained by the fact, as we heard  
5 yesterday, that the UK had been able to adopt the proper  
6 rate in its fallback and, therefore, in NatWest's case,  
7 for example, we no longer needed to go through all the  
8 business of exchanging bilateral agreements and we could  
9 use the fallback. So probably that explains some of  
10 that. It seems a very, very low figure to me.

11 MR JUSTICE ROTH: Yes. By the fallback in 1997, do you mean  
12 that the UK MIF was agreed?

13 A. When it was -- became the UK MIF.

14 MR JUSTICE ROTH: Yes. So NatWest then moved to the --  
15 using that UK MIF as opposed to having bilaterals.

16 A. Yes, yes.

17 MR JUSTICE ROTH: Then you gave some evidence about the  
18 reference rates and you were asked about that and you  
19 say -- talked about cost studies and so on.

20 If we look at paragraph 49 of your statement on  
21 page 14 {A/7/14} under the heading there "Reference  
22 rates", and then you say:

23 "The discussion of appropriate reference rates was  
24 market-centric and took into account factors such as the  
25 competition from Visa's credit card scheme."

1 Well, how did that work with the information  
2 barriers about Visa? How did that play out?

3 A. The fact is, sir, that we were both members of Visa and  
4 Mastercard and we knew what the rates were. We  
5 didn't -- I hesitate to use the word "Chinese", sir;  
6 I think it's "information barriers" -- in terms of  
7 detail and so, therefore, I took great care not to be  
8 discussing, when I became more Mastercard-orientated  
9 than Visa, the details of the schemes. But we were well  
10 aware of the rates.

11 MR JUSTICE ROTH: And would that apply to other board  
12 members as well?

13 A. That would apply to other board members as well. And  
14 there were other schemes that we were -- regarded as  
15 competitors. For a start, cash was a competitor,  
16 effectively, but so was American Express and JCB,  
17 Discover, other cards.

18 MR JUSTICE ROTH: So when you say "took into account",  
19 people would have in their mind what they're paying for  
20 Visa --

21 A. Yes.

22 MR JUSTICE ROTH: -- or what they were paying for Amex if  
23 they -- although the banks were not actually paying the  
24 Amex rates, were they? You didn't have an interchange  
25 fee really with Amex.

1       A. No, it worked differently with Amex. For example,  
2       NatWest did have a relationship with Amex and we did  
3       issue Amex-branded cards and they were accepted at Amex  
4       retailers. Were signed up by us, actually, but no  
5       interchange fee there.

6       MR JUSTICE ROTH: No, I'm asking specifically about Visa.

7       So you say you wouldn't disclose the bilateral  
8       arrangement you had with Visa?

9       A. Not the bilateral arrangements, but we knew what the  
10      Visa -- I hesitate to use the word -- fallback was. We  
11      knew what the applicable rate was and it would not have  
12      been sensible to go well out of line of that.

13      MR JUSTICE ROTH: Yes, I see.

14      And then last question from me. The retailer and of  
15      the acquiring bank, the large retailers, you said that  
16      the acquiring market was very competitive --

17      A. Yes, sir.

18      MR JUSTICE ROTH: -- and retailers would sometimes move  
19      their acquiring business to another bank.

20      Would other retailers keep their acquiring business  
21      with the bank that they did their major banking business  
22      with, their regular bank, or to what degree was this  
23      separate, or how did that -- do you understand my  
24      question?

25      A. Yes, I do understand your question, yes.

1 MR JUSTICE ROTH: So it was part of the overall banking  
2 relationship, or was it a separate thing?

3 A. That certainly came into it, there's no question about  
4 that, but they were very -- just -- they might move for  
5 just a few basis points, as it was called, because with  
6 the volumes that some of the major retailers were  
7 putting through the scheme, it all added up. But yes,  
8 the major banking relationship would have had a part to  
9 play as well.

10 MR JUSTICE ROTH: Yes, thank you. Just a moment.

11 Have you any questions arising out of that,

12 Mr Smouha?

13 MR SMOUHA: Sir, can I just raise one matter, which I hope  
14 is helpful, in relation to the first questions, sir,  
15 that you asked Mr Hawkins about, matters of importance  
16 to members and matters that were discussed in the rules?

17 MR JUSTICE ROTH: Yes.

18 Further re-examination by MR SMOUHA

19 MR SMOUHA: Could we look at a document that my learned  
20 friend took you to, Mr Hawkins, this morning, but only  
21 because it has another part that is perhaps relevant to  
22 this that may help the Tribunal and you. {C1/447/8}.  
23 This is the September 1993 task force report that you  
24 may remember you were asked some questions about.

25 A. Right.

1 Q. But just at the bottom of the page, under the heading  
2 "Scope":

3 "The new domestic Operating Regulations will apply  
4 to interchange between UK Members and will relate to  
5 non-competitive issues only; they will include but not  
6 necessarily be limited to ..."

7 Then there was a list of matters that will be  
8 covered and will already have been covered by the rules  
9 in some respects. You've mentioned in relation to the  
10 matters that were important and discussed, you mentioned  
11 to the Tribunal, chargeback.

12 Can I ask you -- you see three from the bottom:

13 "Risk Management Rules (including floor limits in  
14 special merchant categories)."

15 Can you just explain what floor limits were?

16 A. Yes, indeed. So that -- it was not necessary for every  
17 transaction to be referred back to the issuer for  
18 authorisation, and that would perhaps bring the whole  
19 system to a halt. Therefore, floor limits were applied  
20 as appropriate. Petrol, for example, would be lower  
21 than a department store, and so on. It depended on the  
22 retail category.

23 But this was to make the system workable. So it was  
24 a pragmatic approach to processing transactions.

25 Q. Which operated how? What did it actually -- what was

1 a floor limit in that respect?

2 A. Well, what it meant was -- let us take somebody going  
3 into a shop with a card, buying something for £29 and  
4 they have an effective floor limit of £30, it would not  
5 need to be referred to the issuer, the transaction could  
6 be accepted.

7 MR JUSTICE ROTH: And the issuer is bound to honour it?

8 A. And the issuer is bound to honour it because the issuer  
9 is part of the agreement that the floor limit is at £30  
10 for that particular retailer type.

11 MR SMOUHA: And was that an issue that was of interest to --  
12 discussed by the board?

13 A. Yes. Oh, yes, of course it was. And I am reminded that  
14 there were other issues, such as recurring transactions,  
15 which are effectively direct debits on credit card. So  
16 there were quite a lot of operational matters that went  
17 into the UK Rules.

18 Q. Operational matters of financial significance, of  
19 commercial significance?

20 A. Operational matters that made the scheme workable, sir.

21 MR SMOUHA: Thank you. That was all.

22 MR JUSTICE ROTH: Ms Demetriou, do you have any questions?

23 MS DEMETRIOU: No, I don't.

24 MR JUSTICE ROTH: Well, that takes us nicely to lunchtime,  
25 and concludes your evidence, Mr Hawkins. You've been

1           very patient with everyone. You've been here a long  
2           time. Thank you very much for your time and assistance  
3           and you're released as a witness.

4       A. Thank you very much.

5                               (Witness released)

6       MR JUSTICE ROTH: And that's a convenient moment obviously  
7           to rise and return at 2 o'clock.

8       (12.58 pm)

9                               (The short adjournment)

10       (1.58 pm)

11       MR JUSTICE ROTH: Yes, Mr Smouha.

12       MR SMOUHA: Sir, first of all, can I just apologise? The  
13           Tribunal having given us the opportunity to start  
14           earlier, I failed to make sure the message got through  
15           to our transcriber and the EPE operator.

16       MR JUSTICE ROTH: A mis-communication.

17       MR SMOUHA: We don't think there will be any difficulty on  
18           timing this afternoon.

19           Sir, can I call Mr Sidenius.

20       MR JUSTICE ROTH: Yes.

21                               MR PETER SIDENIUS (affirmed)

22                               Examination-in-chief by MR SMOUHA

23       MR SMOUHA: Mr Sidenius, good afternoon. You have a copy --  
24           a clean copy, I think, of your witness statements there.

25       A. Of both.



1 Q. You do,

2 {A/9/1}, if you can look, please, at your  
3 first witness statement first and if you would turn,  
4 please, to pages 20 and 21 {A/9/20}.

5 Could you please confirm that those are your  
6 signatures on the confirmation of compliance and  
7 statement of truth in your first witness statement?

8 A. Yes, they are my electronic signatures.

9 Q. Thank you. And then if you could look at your second  
10 witness statement, please, {A/13.3/1}, and turn to  
11 page 9 {A/13.3/9}. And, again, can I ask you to confirm  
12 that those are your signatures on the confirmation of  
13 compliance and statement of truth, signing the statement  
14 on 19 June 2023?

15 A. Yes, they are my electronic signatures.

16 Q. Now, I understand that there's one additional matter  
17 which you wanted to mention, which relates to  
18 paragraph 15 of your second statement, which I'll come  
19 to in a moment. But apart from the additional matter,  
20 which you're going to mention in a moment, can I ask  
21 you: are there any corrections or clarifications which  
22 you wish to make to either of your statements?

23 A. No, there is not.

24 Q. And can I ask you to confirm that the contents of your  
25 statements are true?

1 A. They are indeed.

2 Q. So if you would please turn to paragraph 15 of your  
3 second statement.

4 Sir, I should say straight away this is a matter  
5 Mr Sidenius wanted to raise, of which we've given notice  
6 to my learned friend and Mr Merricks' legal team.

7 MR JUSTICE ROTH: Yes.

8 MR SMOUHA: At paragraph 15 {A/13.3/4}, you are dealing with  
9 EDC's data collection from banks and, Mr Sidenius,  
10 I understand that you wish to add to what you have said  
11 here and to refer to a document you have in your  
12 possession which you wish to be made available to the  
13 Tribunal.

14 A. That is correct.

15 Q. So would you just explain what it is you want to add and  
16 explain what the document is and then we will provide  
17 it?

18 A. Yes.

19 Q. Perhaps, actually, let me do it the other way around.  
20 If we could pass up to the Tribunal -- sir, this isn't  
21 yet on Opus, but it will be. We're working on hard  
22 copies for the moment. (Handed)

23 Yes, do explain to the Tribunal what you wanted to  
24 add.

25 A. Okay. Well, this was in connection with the data

1 collection process and what I wanted to provide was the  
2 documentation that we provided to the participants in  
3 the cost studies. So one of the documents, which is the  
4 thicker of them, is the data definitions for our credit  
5 card and charge card study and it defines the data  
6 elements that we need in detail and was the reference  
7 document by which we referred to the data request we  
8 had.

9 And the second is an Excel spreadsheet in which the  
10 participants were to capture the information that they  
11 submitted to us and which also includes sections  
12 referring to the source of data, the description of the  
13 process to produce the submitted data and to identify  
14 the person in the organisation responsible for producing  
15 it in case there were follow-up questions from our side  
16 on either how the data was extracted or whether the  
17 result looked reasonable or not.

18 But I just felt that was helpful because I found  
19 when I reviewed the supporting documentation to my  
20 statements that, actually, they weren't in there. So  
21 I apologise for that.

22 MR JUSTICE ROTH: No, it is helpful. Thank you.

23 MR SMOUHA: Sir, I suppose we should probably -- as these  
24 aren't yet on the system, we should probably give these  
25 documents a reference or at least, for present purposes,

1           maybe call them -- call the "Mastercard branded pay  
2           later interchange cost study" reference materials  
3           exhibit A and the --

4       MR JUSTICE ROTH:   Why don't we call it PS1 and PS2?

5       MR SMOUHA:   Yes, PS1, and the questionnaire PS2.

6           And the witness, when referring to PS2, the  
7           questionnaire, was referring to the boxes on the  
8           right-hand side on the cover page that show the  
9           right-hand columns on this spreadsheet; source of data,  
10          description of process to produce data point and  
11          responsible person to produce data point.

12          Thank you, Mr Sidenius.   One other matter, and only  
13          because it was a matter raised this morning that the  
14          Tribunal asked about and I understand that you may be  
15          able to assist on.   There was a question that arose this  
16          morning as to what the difference is between ATM and  
17          cash advance.

18       A.   Yes.

19       Q.   Yes, and I understand you can assist us on that.

20       A.   We have undertaken ATM cost studies, not ATM cash  
21          advance cost studies, for a large number of years, and  
22          there are two forms of cash advances you can have.   One  
23          is over the counter in the branch and the second is  
24          through the automated teller machine outside.

25          Typically, the ATM will have a floor limit -- a cap

1 limit, rather, so maybe £100, £200. If you want larger  
2 cash advances, you would have to go into the branch and  
3 then process it there. So we called it a manual cash  
4 advance versus an automated cash advance.

5 MR JUSTICE ROTH: I see.

6 A. That was the differentiation between the two interchange  
7 rates that were being discussed.

8 MR JUSTICE ROTH: That's very helpful. Thank you.

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

11 A. Thank you.

12 Cross-examination by MS DEMETRIOU

13 MS DEMETRIOU: Good afternoon, Mr Sidenius.

14 You're currently the chief executive officer of EDC,  
15 aren't you?

16 A. Correct.

17 Q. And you joined EDC as a director in 1999.

18 A. Yes, correct.

19 Q. So the evidence that you give relates from the period  
20 1999 onwards primarily; correct?

21 A. Primarily. I am aware of the existence of studies  
22 undertaken before, but I have not reviewed them in any  
23 detail. They had been subpoenaed in a case in the US,  
24 so I had to collect all of those studies together.

25 Q. Thank you.

1           Now, in your witness statements, you explain the  
2           methodology that EDC applied when it carried out the  
3           cost studies and you also explain EDC's approach to data  
4           collection and you've pointed -- you've referred to  
5           these additional materials which we've just looked at.

6           Can we look, please, at paragraph 20 of your first  
7           statement, so {A/9/8}. That may be a wrong reference.  
8           {A/9/6}. In fact, it was the paragraph that's the wrong  
9           reference. So {A/9/8} is correct. It's paragraph 30,  
10          please.

11          And here, you're making a point about data. We just  
12          looked at paragraph 15 of your second statement, but  
13          here you're also making a point about who was invited to  
14          participate in the cost studies and you refer again here  
15          to the 2008 cost study as well, don't you?

16        A. Yes.

17        Q. And then if we look at paragraph 35, over the page  
18          {A/9/9}, you're talking there about the approach to  
19          quality control and, again, you say that:

20                "The approach to quality control is set out further  
21                in the 2008 ... cost study ..."

22          Which you say you quote for convenience as it  
23          reflects your recollection.

24          Now, you've given these examples in relation to  
25          2008, but I would be correct in saying, wouldn't I, that

1 EDC's approach to data collection and quality control  
2 evolved from the 1990s through to 2008? So it improved  
3 over that period, didn't it?

4 A. It was not so much our approach as it was the  
5 availability of data within the banks and their own  
6 management information systems that improved over time.  
7 We always required that there would be an audit trail of  
8 the data submitted and we always undertook the  
9 statistical analysis to identify outliers, which we  
10 would query with the banks, which is why in the example  
11 I've provided on PS2, you actually see the reference to  
12 source of data, description of process to produce the  
13 data point and the person responsible.

14 In the early studies that I was involved with, but  
15 I haven't reviewed the ones prior to '99, those records  
16 were maintained by the bank so that we could refer to  
17 them if we raised questions. We then subsequently, and  
18 I guess you could call that an improvement, required  
19 them to submit to us as well those records of where the  
20 data came from and who was responsible for extracting  
21 it.

22 Q. Alright. Thank you. So when you say that it wasn't so  
23 much your approach as it was availability of data within  
24 the banks, when you first started in 1999, you were  
25 aware, weren't you, that some of the data that the banks

1           were giving you was of quite poor quality?

2           A. No, then we -- if we were not satisfied with the  
3           quality, we would work with the banks to improve that,  
4           either through identifying a sampling methodology to  
5           allocate the costs.

6           I should perhaps ask the panel how familiar you are  
7           with activity-based costing, because this is -- my  
8           answer is based on understanding activity-based costing.

9           Q. Mr Sidenius, perhaps if you wouldn't mind trying just to  
10          give short answers to the questions --

11          A. Okay.

12          Q. -- and if there is anything else you want to elaborate  
13          on later, we can get to that.

14          A. Okay.

15          Q. Now, let me take you -- so yesterday, the Tribunal saw  
16          a letter from EDC dating from 1997, which I appreciate  
17          was before your time, but let me show it to you. It's  
18          at {C4/237/5}. So you can see here the date of the  
19          letter is July 1997, and I know it's before you started,  
20          but I want to get an idea of the data issues that were  
21          being faced at the end of the 1990s.

22          If we go to page 9, please --

23          MR JUSTICE ROTH: Is this a letter you've had a chance to  
24          read in preparation?

25          A. I have not seen this letter before, I believe.



1 MR JUSTICE ROTH: No. I don't know if you'd like to -- it's  
2 quite a long letter, but at least read the opening  
3 paragraph to yourself.

4 A. Yes.

5 MS DEMETRIOU: And then if we could go to page 9 {C4/237/9},  
6 please, and if you look at the second paragraph there,  
7 that says:

8 "During the last interchange study, the quality of  
9 the data responses from the participants was relatively  
10 poor. All participants but one responded after the  
11 deadline ... More importantly, the accuracy of the data  
12 submissions was mediocre and, during the course of our  
13 reconciliation activities, significant changes were made  
14 by many participants in their original ... submissions.  
15 This increased considerably the amount of time we spent  
16 on reconciliation. In addition, we again had difficulty  
17 in obtaining satisfactory data from FDR ..."

18 And this is about your cost, EDC's cost:

19 "The result was that our costs were substantially  
20 higher ..."

21 So it does seem at that stage that EDC was  
22 struggling to get robust data from the banks. It was  
23 having to undertake reconciliation to try and get to the  
24 bottom of what was going on. Do you see that?

25 A. Absolutely. This is the process that I described; that

1           we would analyse the data. If we weren't satisfied with  
2           the results, we'd go back and query it. So that  
3           resulted in this case, I guess, the professional fees  
4           being higher.

5       Q. And if we look, please -- let's go, please, to  
6           {C5/218/42}. This is from 1998. Again, if you just  
7           look at the first two bullets, again, you see a picture  
8           of banks not being very compliant or accurate in the  
9           data that they were submitting; correct? So you see the  
10          second bullet:

11                "Many responses were found to be inaccurate and we  
12                therefore had to make significant changes to the  
13                original data submissions."

14                So it looks like in 1998, obtaining accurate data  
15                was difficult; correct?

16       A. Correct.

17       Q. And then if we go to {C7/173/1}, this is EDC's  
18           1999 report, and you were in place then, weren't you,  
19           Mr Sidenius?

20       A. Yes, correct.

21       Q. You remember this report, and it's dated September 2000.

22                If you go to page 3 {C7/173/3}, at the bottom of the  
23                page, it explains that due to a lack of data, it wasn't  
24                possible to develop cost-based results for internet  
25                transactions, chip transactions or commercial card

1 transactions. So what EDC did was prepared estimated  
2 costs for those categories by developing a set of  
3 assumptions.

4 And then if we go over to page 4 {C7/173/4}. This  
5 is the second -- the first complete paragraph at the top  
6 of the page:

7 "A lack of robust data and comprehensive management  
8 information systems has led to difficulties in  
9 calculating the costs for the additional interchange  
10 categories."

11 So, again, it looks there -- these documents  
12 indicate that the banks weren't at that stage very good  
13 in terms of providing robust data or maintaining  
14 management information systems; correct?

15 A. It's not as simple as just saying yes, they weren't.  
16 Some of these categories were brand new. There were not  
17 a lot of transactions taking place and, therefore, the  
18 relevant statistics were a bit unreliable.

19 And, secondly, I would say that it is my general  
20 experience that management information systems tend to  
21 lag by two to three years after the introduction of new  
22 products to be able to capture the detail of those  
23 products. So yes, there is a delay and you have to try  
24 and work around that by building up analysis through  
25 sampling or other ways of getting to the information.

1 Q. Thank you. So when you say there's a delay, I think  
2 what you mean is these were new categories, correct, or  
3 some of these were new categories?

4 A. Correct.

5 Q. That transactions had been taking place within those  
6 categories, hence the need to carve-out separate  
7 categories, but there's a time lag in terms of the  
8 information gathering and so at that stage, you didn't  
9 have complete data; would that be fair?

10 A. The categories hadn't actually been introduced yet. So  
11 internet, for example, there were internet transactions  
12 taking place, but they were being classified as  
13 electronic transactions. So it was -- the difficulty  
14 was in finding out what proportion of electronic  
15 transactions were actually internet transactions.

16 Q. Thank you. That's very helpful.

17 So the transactions were taking place, but they  
18 hadn't been categorised in that way, so it was difficult  
19 to get to the bottom of the data, so you were making  
20 assumptions in order to calculate the rates.

21 A. We were sampling.

22 Q. You were sampling?

23 A. Yeah.

24 Q. Thank you.

25 And your evidence, I think, was that this process in

1 terms of the banks' ability or the banks' capacities to  
2 provide you with the data that you wanted improved over  
3 time. So it was better in 2008 than it was in 1999.

4 A. Yes, it continuously improved as they got used to  
5 participating in interchange studies.

6 Q. Now, you say at -- if we go to your second witness  
7 statement, please, so {A/13.3/5}, you say:

8 "The quality of the data collection and  
9 determination of weighted average unit costs were  
10 audited on a number of occasions by Ernst & Young ..."

11 Now, that didn't happen until 2004, did it; that's  
12 right?

13 A. That's correct.

14 Q. And if we --

15 A. It may have been 2002, because I think it came in after  
16 the Visa agreement. There was a requirement to have  
17 studies audited, but I can't recall exactly.

18 Q. I think you say in your statement it was 2004. I think  
19 that's what you say at paragraph 23.

20 A. Okay.

21 Q. If we just quickly look at that, {A/13.3/7}. So that is  
22 certainly talking about the intra-EEA cost studies  
23 audited by Ernst & Young from 2004.

24 A. Yes, I stand corrected. It was three studies; 2004, '06  
25 and '08, so you're correct.

1 Q. Thank you.

2 And if we look for a moment at the Commission  
3 statement of objections, so {C10/98/33}. So this  
4 statement of objections is dated 24 September 2003. Do  
5 you remember that landing -- was that shared with you at  
6 the time?

7 A. I -- I did see it, yes.

8 Q. You did see it.

9 And if we look at paragraph 126, one of the  
10 Commission's complaints or criticisms at that time was  
11 precisely that the cost studies were not audited;  
12 correct?

13 A. Correct.

14 Q. And, presumably, when EDC introduced auditing by  
15 Ernst & Young in 2004, presumably that was at least in  
16 part in response to what the Commission said here; would  
17 that be fair?

18 A. It actually, as I mentioned before, was a result of the  
19 Visa agreement in 2002, and I believe the Commission at  
20 the time said that Visa would not disclose their  
21 methodology and therefore required them to benchmark  
22 their results to cost categories similar to the  
23 Edgar Dunn proxy methodology and that those results  
24 should be audited. And so, by extension, this also was  
25 applied to our studies, even though Mastercard said that

1           we were an independent company and therefore gave  
2           an independent view on the cost.

3       Q.   So what's happening here is that Mastercard and EDC are  
4           responding to criticisms the regulator is making;  
5           correct?

6       A.   Correct.

7       Q.   Because part of the purpose of these cost studies is  
8           that the interchange fees should withstand regulatory  
9           scrutiny; correct?

10      A.   That is correct.

11      Q.   Now, let's just look at some of the other criticisms  
12           made in the statement of objections.  If we go back to  
13           page 32, please {C10/98/32}, and look at paragraph 118,  
14           we see there that's where EDC are referred to.  So  
15           Mastercard is saying, "Look, we employed EDC to use this  
16           method for calculating the weighted average results".

17           And then at 119, you see that the Commission said it  
18           has the following concerns with regard to  
19           representativeness of the data samples, and then the  
20           Commission makes five specific criticisms, if we just  
21           look -- if we just scan down the page, please.  And  
22           these criticisms are explained in turn.

23      MR JUSTICE ROTH:  Do you want Mr Sidenius to read it,  
24           because they're quite detailed?

25      MS DEMETRIOU:  Do you want to just have a look at them,

1 Mr Sidenius?

2 A. Yes. Paragraph 120, you say?

3 Q. To 124.

4 A. Okay.

5 Q. I'm not going to ask detailed questions about them, but

6 just so you get a flavour of what they were, and I know

7 that you knew them at the time. (Pause)

8 A. Okay, yes.

9 Q. Go over the page, please {C10/98/33}. (Pause)

10 A. Okay, yes.

11 Q. Thank you, Mr Sidenius.

12 Then we see at paragraph 125, the Commission says

13 that:

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

20 And my question is: we've seen already that EDC  
21 responded to things the Commission said about auditing  
22 and introduced auditing by Ernst & Young. Did EDC make  
23 any other changes to its approach in light of these  
24 criticisms that the Commission made?

25 A. The only changes were that we actually collected the



1           audit data that we otherwise required the banks to  
2           maintain themselves as part of the questionnaires, which  
3           would enable Ernst & Young to undertake an independent  
4           audit of the result.

5       Q.   Thank you.

6           And then if we go back, please, to paragraph 14 of  
7           your first statement, so that's {A/9/4}, you explain  
8           there that EDC used two methods, the proxy method and  
9           the Baxter methodology; correct?

10      A.   Yes.

11      Q.   And if we go to page 5 and paragraph 16 {A/9/5}, you  
12           explain that EDC used the proxy methodology for credit  
13           card cost studies for the UK and the EEA rather than  
14           carrying out end-to-end Baxter-style studies. And you  
15           say that's because:

16           "... the proxy methodology provided a good and  
17           reliable measure of the imbalance of costs that should  
18           be recovered through interchange fees and was considered  
19           to be less onerous and more proportionate than the  
20           Baxter approach."

21           So it's a question of proportionality; correct? You  
22           thought that the proxy method was robust enough, but  
23           would you accept that if money and time were no object,  
24           the Baxter approach is more rigorous?

25      A.   I would, yes.

1 Q. And you describe at paragraph 17, the next paragraph,  
2 the mini and maxi Baxter studies which EDC performed for  
3 the OFT investigation; correct?

4 A. Correct.

5 Q. And let's go to the OFT decision. That's at {B/6/1},  
6 and the decision is dated 6 September 2005. You can see  
7 that there. And if we go to page 185, please {B/6/185},  
8 so paragraph 626. So Mastercard says here that,  
9 second sentence:

10 "... issuers and acquirers will not supply a service  
11 unless they can recover their costs."

12 And just pausing there, it's correct, isn't it, that  
13 in a four-party interchange system, costs are borne by  
14 both issuers and acquirers?

15 A. To support the transaction of the two customer sides,  
16 yes.

17 Q. So just to take fraud as an example for a moment, the  
18 cardholder fraud element is a cost borne by the issuer;  
19 correct?

20 A. Not necessarily. The issuer bears some of the fraud  
21 cost.

22 Q. Yes.

23 A. Where the merchant hasn't complied with the obligations,  
24 and the transaction is therefore not valid, it will be  
25 charged back. So, for example, if it's a paper

1 transaction and you sign "Mickey Mouse", that has not  
2 been checked against the signature on the card, it can  
3 be charged back and then the merchant would be charged  
4 back the amount.

5 Q. That's very helpful.

6 So chargebacks, those are the costs that would be  
7 borne initially by the acquiring bank and then they  
8 would pass it through the merchant. Is that how it  
9 would work?

10 A. Yes, if it's upheld.

11 Q. If it's upheld.

12 So that's an example of a potentially significant  
13 cost that an acquirer might have to bear in the system  
14 to make the system work.

15 A. I don't think chargebacks in the realm of acquiring were  
16 necessarily a significant cost compared to other cost  
17 elements that might be there. The acquirer would be  
18 more nervous about a merchant going bankrupt and being  
19 liable for the transactions of undelivered goods, and  
20 that has brought down acquirers in the past.

21 Q. Thank you.

22 MR JUSTICE ROTH: But that would be also a chargeback,  
23 wouldn't it, if the merchant goes bankrupt, in that the  
24 cardholder would then --

25 A. That's correct --

1 MR JUSTICE ROTH: -- complain to the issuing bank and say,  
2 "I don't want to pay for this because I'm not getting  
3 the goods or the service"?

4 A. Correct, but when you assess -- credit risk assess, for  
5 example, an airline, you're buying a ticket six months  
6 out from now. The airline goes bankrupt during those  
7 six months. The acquirer has to assess the risk of the  
8 airline going bankrupt. That's the real big risk factor  
9 and that then leads to chargebacks. It's not the  
10 chargeback mechanism that led to that loss. It was  
11 an erroneous risk assessment.

12 MR JUSTICE ROTH: Yes.

13 MS DEMETRIOU: And I'm right in thinking, aren't I, that  
14 EDC's proxy cost studies didn't purport to assess  
15 acquirer cost; that's right, isn't it?

16 A. It did not, no.

17 Q. And, by contrast, the Baxter methodology looked at both  
18 issuer and acquirer cost; correct?

19 A. Correct.

20 Q. Now, if we go, please, back to the OFT and to  
21 paragraph 631, so on page {B/6/186}, we see at 631 that  
22 Mastercard are saying that:

23 "... the OFT's finding that the ... MIF agreement  
24 does not meet this condition (because the ... MIF is set  
25 with reference to and used to cover extraneous costs)

1 cannot stand."

2 We then see the heading "The OFT's response", and  
3 let's go to paragraph 633, please. So we see there that  
4 Mastercard's argument is that:

5 "... the ... MIF is set at a level that proxies the  
6 optimal MIF. This argument cannot be accepted as  
7 grounds for believing that a MIF set without reference  
8 to extraneous costs would lead to a significantly less  
9 efficient scheme for the following reasons ..."

10 And then the OFT sets out third -- three reasons,  
11 sorry, and I just want to go to the third, please, over  
12 the page {B/6/187}.

13 Sir, I keep saying Mastercard, but it's in fact  
14 MEPUK. MMF is MEPUK. My mistake. I'm grateful to my  
15 learned friend. You probably realised that,  
16 Mr Sidenius, but you were too polite to say.

17 Now, the third point over the page:

18 "The Parties have not demonstrated that the  
19 theoretical literature on the MMF MIF and in particular  
20 the Baxter framework did influence the setting of the  
21 ... MIF historically, and is not merely being used by  
22 the Parties as a way of seeking to justify the ... MIF  
23 ex post."

24 So there, the OFT is saying that there's no evidence  
25 that cost studies or the principle that UK MIFs should

1           be set by reference to cost was actually driving the  
2           level of UK MIFs; correct? That's what they're saying.

3       A. That is what they're saying, yes.

4       Q. And I'm going to come back to that point.

5           But then the second reason:

6           "There are serious flaws in the methodology  
7           underpinning the empirical EDC Baxter analysis which MMF  
8           relies on to argue that the current MIF approximates the  
9           optimal MIF."

10          And the flaws that the OFT identifies are summarised  
11          at 635 to 636, because you can see at 634 that says  
12          point (ii) is elaborated on below. Do you see that?

13       A. Yes.

14       Q. And if we go to 635 and 636 and look at 636:

15          "Notwithstanding the OFT's reservations over the use  
16          of the Baxter framework set out above, the OFT does not  
17          consider that the methodology underpinning the ...  
18          Baxter analysis is consistent even with Baxter's  
19          theoretical premise."

20          And it says that there's a detailed consideration of  
21          that at annex 11. Do you see that?

22       A. Yeah.

23       Q. I want to turn to annex 11 now. I just want to show you  
24       how the document fits together first.

25          If we go to page 261 {B/6/261} and look at

1 paragraphs 7 to 9. Could I maybe just ask you to read  
2 paragraphs 7 to 9 to yourself and also for the Tribunal  
3 please to read them?

4 MR JUSTICE ROTH: This is part of annex 11?

5 MS DEMETRIOU: This is part of annex 11. (Pause)

6 A. Yes.

7 Q. And then if we just go over the page {B/6/262}. (Pause)

8 So here at paragraph 9, the OFT is considering  
9 a benefit to cardholders which has no associated benefit  
10 to merchants, but which nevertheless results in  
11 an increase in the MIF; correct?

12 A. Can we go back to the beginning of the paragraph?

13 Q. Yes.

14 A. I thought you said paragraphs 6 to 8.

15 Q. Sorry, 7 to 9.

16 A. 7 to 9, sorry.

17 Q. Sorry if that's my fault. And, really, I'd just like to  
18 focus at the moment on paragraph 9.

19 A. Yes.

20 Q. I asked you to read 7 and 8 just because that's context.

21 (Pause)

22 A. Okay, yeah.

23 Q. And then we see at paragraph 11 where this reasoning  
24 ends up. So you see that the OFT says at 11 {B/6/262}:

25 "But if merchants' collective benefit is zero (i.e.

1       Baxter benefits do not increase), the benefits as  
2       measured in the ... Baxter Analysis would nevertheless  
3       still increase. The result would still inaccurately  
4       indicate that the new higher level of MIF was optimal  
5       and appropriate."

6             I think is the final word.

7             Now, it's true, isn't it? You agree that was  
8       a serious methodological flaw in the study?

9       A. Well, there are several points that are being made here,  
10      and I think the first is the criticism of the Baxter  
11      analysis being apportioned demand based on revealed  
12      willingness to pay --

13     Q. Yes.

14     A. -- which is an otherwise accepted method for finding  
15      a point on the demand curves, which we disagreed with  
16      between the OFT and ourselves.

17             And the second is that they have an imaginary  
18      situation, for example, that you double the interest  
19      free period, which in our methodology, if that were to  
20      happen, would have increased the interest free period to  
21      correct the cost of that.

22     Q. Yes, and do you agree with that part of the criticism?

23     A. Yes, I do, if that were to happen, but it didn't happen.

24     Q. But do you agree that it demonstrates that the  
25      methodology itself is unsound?



1 A. No, I do not.

2 Q. So you disagree with the OFT on that point?

3 A. I do.

4 Q. Now, let's go to the Commission decision at {A/27/198}.

5 So we looked at the statement of objections and now

6 we're going to the Commission decision, please, so

7 recital 702 under the Baxter framework, and we see:

8 "Notwithstanding the lack of evidence to bolster

9 MasterCard's efficiency claim the Commission has

10 moreover also assessed the theoretic underpinnings of

11 MasterCard's MIF, as well as MasterCard's methodology

12 for setting the level of the fees. These theoretic

13 underpinnings are problematic and the methodology

14 MasterCard applies has little in common with the

15 theory."

16 And then the Commission sets out a number of

17 criticisms of the economic theory at 703 to 708, but

18 it's the methodology rather than the theory I want to

19 focus on for present.

20 So if we go to page 119, please, and recital 709

21 {A/27/199}, and we see the heading just above 709, and

22 what is said there is:

23 "As MasterCard recognises, the Baxter framework is

24 theoretical and does not set out a practical way to

25 calculate an interchange fee. MasterCard has devised

1 two methodologies to apply the theory in practice,  
2 namely the MasterCard Standard Interchange Methodology  
3 and the Global MasterCard Debit Interchange Fee  
4 Methodology."

5 And then there's a description. But staying in this  
6 section for the moment and looking at 710, that's  
7 dealing with the Mastercard standard interchange  
8 methodology.

9 And if we go down to 712, please {A/27/200}, the  
10 Commission there finds that:

11 "MasterCard applies the Baxter framework by  
12 assessing which costs card issuing banks incur. The  
13 data collected in cost studies are said to serve as  
14 'proxy' for measuring the willingness to pay of  
15 merchants. This approach is not satisfactory."

16 So they find that at 712.

17 And then at 713 -- and perhaps I can just ask you,  
18 instead of me reading it out -- it's a long paragraph,  
19 but could I just ask you to read paragraph 713, please?

20 A. Yes. (Pause)

21 Yes.

22 Q. So we see the conclusion, so having gone through that  
23 reasoning, the conclusion we can see in the final  
24 sentence:

25 "Overall, the costs of issuing banks appear to be

1 a particularly poor indicator of merchants' willingness  
2 to pay for card services."

3 So do you agree or disagree with the Commission's  
4 conclusion there?

5 A. I disagree with this conclusion, and I would refer to  
6 the 2002 Visa agreement which actually stated that this  
7 was a fair comparison and that Visa should benchmark  
8 against these cost items.

9 Q. But here in a later decision, the Commission's finding  
10 is that it's a poor indicator, but your evidence is that  
11 you disagree with the Commission's conclusion there.

12 A. I do disagree with that, yeah.

13 Q. You disagree.

14 And if we go to recital 718, please, over the page,  
15 I think {A/27/201}, there the Commission found that:

16 "Mastercard therefore failed to establish  
17 a conceptual link between the problems allegedly  
18 addressed by interchange fee according to MasterCard and  
19 the methodology used in practice ..."

20 And we can see the problems identified by Mastercard  
21 in footnote 860, which I think is -- I'm not sure if  
22 it's on that page or the next page. Thank you. So:

23 "Cardholders and merchants will not be willing to  
24 pay a price higher than the benefits (which, on the  
25 merchant side, are not limited to simply transactional

1 benefits) they each derive from the transaction.

2 Similarly, issuers and acquirers will not be willing to  
3 supply the service if they cannot recover their  
4 costs ..."

5 So those are the problems identified by Mastercard.

6 And going back to 718, please, to the recital, where  
7 the Commission there says that -- where the Commission  
8 refers to the methodology used in practice, that's  
9 a reference to the Baxter methodology; correct?

10 A. I would assume it would be the proxy methodology.

11 Q. Okay, thank you.

12 And do you accept that the Commission is correct  
13 about that; that the proxy methodology doesn't actually  
14 provide a conceptual link between the costs reported by  
15 issuing banks and the economic problem that Mastercard  
16 reports in footnote 860?

17 A. In fact, I would correct my previous statement. I think  
18 the wording "the methodology used in practice for  
19 determining the level of intra-EEA fallback interchange  
20 rates" includes the Golden Rules, which is -- the cost  
21 study methodology is one part of it where you start and  
22 it effectively sets a cap for what the interchange can  
23 be and then you consider all the other issues of  
24 competitive item -- competitive issues --

25 Q. I hear your evidence, Mr Sidenius, but this part of the

1           decision is certainly dealing with the EDC methodology,  
2           so we read it -- if you could just --

3       A. Well, costs were only a part of what went into  
4           determining the level of intra-EEA interchange fallback  
5           rates. It did not set it.

6       Q. I understand it and we're going to come back to that  
7           particular issue.

8           Here, the Commission has gone through a number of  
9           flaws that it's identified in the methodology used to  
10          assess costs; correct? That's what we've been looking  
11          at.

12      A. Yeah.

13      Q. And it reaches a conclusion at 718 that there's no  
14          conceptual link or Mastercard hasn't established  
15          a conceptual link between the problems allegedly  
16          addressed, which we just looked at, and the methodology  
17          used. So is that something you agree with or disagree  
18          with?

19      A. I mean --

20      MR JUSTICE ROTH: Are those problems allegedly addressed?

21      MS DEMETRIOU: The ones in the footnote -- at footnote 860,  
22          sir?

23      A. But these are more related to the Golden Rules; the  
24          willingness of the consumers to pay, the users of the  
25          payment system versus the costs incurred.

1 Q. Can we look at 860 again, please, footnote 860. So the  
2 fundamental points being made by Mastercard are that  
3 cardholders and merchants are not willing to pay a price  
4 higher than the benefits which, on the merchant side,  
5 they derive and, similarly, issuers and acquirers won't  
6 be willing to supply the service if they can't recover  
7 their costs.

8 So what the Commission is saying is, well, that's  
9 the problem that Mastercard's identified and the cost  
10 methodology doesn't link conceptually to that problem.  
11 And my question is: do you agree with that or disagree  
12 with that?

13 A. Well, I think the statement they're making is different,  
14 because the footnote clearly relates to acquirers as  
15 well. Our proxy methodology does not measure anything  
16 on the acquiring side, so Mastercard must be thinking  
17 about the Golden Rules rather than the methodology.

18 Q. Do you mean the Commission must be thinking about --

19 A. The Commission. I stand corrected.

20 Q. Okay. Thank you very much.

21 Now, still in the Commission decision, if we go to  
22 page {A/27/61}, please, and we look at -- so starting at  
23 recital 172 through to 175. So could I just ask you  
24 again to read those recitals rather than me reading them  
25 out, if you don't mind?

1       A. Yeah. (Pause)

2               Yes.

3       Q. And if we go over the page, please. (Pause)

4       A. Yes.

5       Q. So the first question is: Mastercard recognised there

6               that the cost studies are a relatively simple analysis.

7               Would you agree with that statement?

8       A. It's a relatively simple analysis compared to do

9               an end-to-end issuing and acquiring cost study, yes,

10              because you're measuring a much more reduced number of

11              data points.

12      Q. And do you accept they were a tool, merely a tool, for

13              estimating the willingness of merchants to pay, which is

14              what we see at recital 17? Would you accept that?

15      A. That is correct. That's how it was derived.

16      Q. And do you accept they were effectively setting

17              a ceiling for interchange fees; that that's how the cost

18              studies were used?

19      A. Correct.

20      Q. Now, I want to show you what Mr Coombs, who is the

21              expert economist called by Mr Merricks -- I want to show

22              you what he says in his report. So if we go to

23              {A/14/33}, please, and if we look at paragraph 4.32. So

24              he says:

25              "... the EDC cost studies only accounted for

1 a subset of issuer costs.

2 "... It appears that EDC applied a 'proxy'  
3 methodology in all its credit card cost studies for the  
4 UK and the EEA. This methodology is based on the  
5 premise that, for credit card transactions, the  
6 imbalance in the costs incurred by issuers and acquirers  
7 in the payment card process can be assessed by measuring  
8 a subset of costs on the issuing side."

9 And then he refers to your first witness statement.

10 And I think we can take it that you agree with what  
11 he says there, at 4.32(a); correct?

12 A. Yes, that is correct.

13 Q. And then at 4.32(b):

14 "The methodology is based on a decision, by EDC and  
15 the relevant Mastercard decision-making bodies, that  
16 some costs should be paid by cardholders, and can  
17 therefore be ignored in the cost study and some costs  
18 should be paid by merchants (through MSCs), and should,  
19 therefore, be included in the cost study."

20 A. That I do not agree with.

21 Q. You don't agree with that?

22 A. I do not agree with that.

23 Q. Do you agree that Mastercard had made such a judgment?

24 A. No.

25 Q. You don't agree with that. Okay.



1       A. Can I explain why?

2       MR JUSTICE ROTH: Can you explain that? Yes.

3       A. Yes. So, first of all, the costs that we do measure is  
4       a weighted average of the cost in the marketplace. So  
5       if you have X participants, there will be a subset of  
6       those that will be above the average cost and there will  
7       be a subset of those that are below for each of the  
8       individual cost items.

9       So, therefore, some members will not pay or get  
10      refunded their full, for example, credit losses. If  
11      they're going for a more risky segment of the market,  
12      they will get reimbursed part of that, but they will  
13      also have to price on their APRs to recover the rest of  
14      the risk factor.

15      Secondly -- let me catch my mind as to where  
16      I wanted to go with that second point. Yes, we do  
17      not -- we did not make any decisions on what should be  
18      paid by cardholders and what shouldn't.

19      When, as an issuer, you looked at -- you knew you  
20      were going to get a given interchange, you knew what  
21      your cost structure is, you then set your prices on all  
22      the other services based on where you were compared to  
23      the competition, what segments you wanted to go after  
24      and what services you wanted to offer them.

25      It could be a premium card with maybe loyalty points

1 and an annual fee, like Amex has demonstrated very  
2 amply, very high fees, high costs to the cardholder, or  
3 it could be a basic card with no costs, free banking, as  
4 we've had in the UK for a long time, and therefore lower  
5 level of benefits so that they could offer that at  
6 a cheaper price.

7 So we did not decide what it was that should be paid  
8 by cardholders. We let the market decide that.

9 Q. Yes, so you say you let the market decide that, but then  
10 just looking at 4.33 of Mr Coombs, I think you've agreed  
11 that EDC examined issuer costs but not acquirer costs;  
12 correct?

13 A. Correct.

14 Q. So even though, according to how the market operated,  
15 acquirers were bearing costs such as chargeback costs,  
16 you weren't bearing those in mind in the assessment.  
17 They weren't factored in; correct?

18 A. Correct, the acquirer side, yeah.

19 Q. So we saw the finding and you've agreed -- we saw the  
20 finding in the Commission decision and you've also  
21 agreed that the cost study results operated as  
22 a ceiling. Do you agree that interchange fees could, as  
23 a matter of theory, be brought down substantially below  
24 the cost study ceiling and the scheme would not  
25 collapse?

1 A. I do agree with that and I think it's borne out in the  
2 evidence of some of the cost studies we've done. The  
3 economic cycles that the world has been going through  
4 and the economies have been going through have at times  
5 made lending products very expensive, and I think we're  
6 going through a period like that right now. And it is  
7 not feasible to introduce those level of costs that  
8 would guarantee the same level of profitability --

9 Q. Thank you.

10 A. -- without damaging your product.

11 Q. Thank you.

12 So I think it follows from that that the cost  
13 studies were not identifying a level of fees which had  
14 to be charged in order for the scheme to be economically  
15 viable; correct?

16 A. That's correct. That's why the Golden Rules were there.

17 Q. Now, in your role at EDC, you presented the results of  
18 EDC's UK studies to the Interchange Sub-Group of MEPUK's  
19 board, didn't you --

20 A. Correct.

21 Q. -- in the years during which MEPUK was responsible for  
22 setting UK MIFs; correct?

23 A. Correct.

24 Q. If we go to your first statement, please, {A/9/17},  
25 paragraph 62, you say there that based on your

1 attendance at those meetings, your understanding was  
2 that MEPUK used the results as a starting point in its  
3 MIF-setting process; correct?

4 A. Yes.

5 Q. And in your second witness statement at paragraph 25 --  
6 I'm not sure we need to turn it up; you will probably  
7 remember -- you acknowledge that there are sometimes  
8 differences between the results of the cost study and  
9 the level of the UK MIF; correct?

10 A. Correct.

11 Q. Now, can we go to {C7/43/2}, please, and these are the  
12 minutes -- we can see from the top right-hand corner  
13 they're the minutes of the Interchange Sub-Group of  
14 10 May 2000.

15 A. Yes.

16 Q. Have you looked at this document in the course of  
17 preparing to give evidence to the Tribunal; do you  
18 remember?

19 A. I think I may have seen it in the bundle that I had.

20 Q. Okay. And if we look at agenda item 5; do you see that?

21 A. Yes.

22 Q. That's the 1999 cost study, and then it says:

23 "Mr Sidenius referred to the preliminary draft of  
24 [EDC's] report on the cost study, which had been  
25 circulated previously."

1           And you stress that the figures were preliminary at  
2           that stage.

3           So just pausing there, this is you taking the  
4           Interchange Sub-Group through the preliminary results of  
5           the study; correct?

6       A.   Correct.

7       Q.   And is this, presumably, the first or one of the first  
8           sub-group meetings you attended, because it's in 1999  
9           and you joined in '99?

10      A.   It would have been.

11      Q.   It would have been.

12      A.   Actually, it would have been in 2000.   The '99 cost  
13           study was 1999 financial figures collated in 2000.

14      Q.   Yes.   In fact, we saw the date, which was May 2000.

15      A.   Yeah.

16      Q.   10 May 2000, so you're quite right.

17           And in the middle of the page, you're recorded as  
18           saying:

19           "Overall there had been a marked increase in the  
20           blended cost from 1.11% to 1.62%."

21           Yes?

22      A.   Yes.

23      Q.   And, in fact, you explain in your statement, if we go --  
24           can we go to your statement at {A/9/12}, your first  
25           statement, and if we start at paragraph 46.   You explain

1           that you'd found that the costs of credit write-offs had  
2           increased significantly, which was partly behind the  
3           1.62% figure; correct?

4       A.   Correct.

5       Q.   And the sub-group said that this increase would need to  
6           be offset by something else; is that right?

7       A.   That is correct.

8       Q.   And if we -- and then what happened was you prepared  
9           a memorandum, didn't you --

10      A.   Yes.

11      Q.   -- which explained that certain steps would be taken to  
12           reduce the cost calculated by the cost study; correct?

13      A.   If you're referring to substituting the credit losses  
14           with the previous study results, yes, we did do that.  
15           We would also undertake a study into whether anything  
16           could be done to look at the credit write-off  
17           methodology going forward.

18      Q.   So if we just go to that document, the memorandum, so  
19           it's at {C7/179/1}, and you see that that's a memorandum  
20           from you to Mr Hawkins.

21      A.   Yes.

22      Q.   And you see the purpose is:

23           "... to provide the Interchange Sub-Group with  
24           an overview of the calculated interchange costs from the  
25           1999 study using the write-offs from the previous

1 study."

2 Do you see that?

3 A. Correct.

4 Q. And then we see that you explain that the current cost  
5 study had found higher credit write-off costs; correct?

6 A. Correct.

7 Q. And then if we scroll down and if we go over to the next  
8 page {C7/179/2}, we see:

9 "At the Interchange Group Meeting [in] August ...  
10 2000, Members discussed the impact of the increase ...  
11 The Group concluded that there is no clear justification  
12 for including the full increase ... and ... there is a  
13 need to revisit ... Consequently, the Group recommended  
14 that the 1997 credit write-offs figure ... be applied to  
15 the 1999 interchange fee calculations ..."

16 Now, just pausing there, that doesn't really  
17 represent best practice, does it, to insert previous  
18 figures into your current analysis?

19 A. They were using the previous figures as a benchmark for  
20 their Golden Rules application. Our study did not  
21 change its results. Our study still had the correct  
22 measurement of the 1999 figures.

23 Q. So you used -- your study contained the 1999 figures  
24 because those were the most up-to-date figures you had.

25 A. Yes.

1 Q. And what you were being asked to do was to re-run your  
2 analysis using the 1997 figures to arrive at a lower  
3 cost result; correct?

4 A. To provide a different benchmark --

5 Q. To provide --

6 A. -- is how I would put it, yeah.

7 Q. A different benchmark which, according to you, didn't  
8 relate to the 1999 costs that you had found; correct?

9 A. Correct, but it assisted with the considerations they  
10 would do under the Golden Rules.

11 Q. And by that, you mean that the sub-group -- the  
12 sub-group didn't think that the higher cost figures --  
13 that they could charge the higher cost -- they could  
14 reflect those in interchange fees because the market  
15 wouldn't bear it. Is that what you mean by that?

16 A. That's correct.

17 Q. But it's odd, isn't it, Mr Sidenius, instead of just  
18 saying that, they asked you to go away and use the  
19 1997 figures instead to arrive at lower costs? It  
20 rather looks like they're trying to justify their  
21 decision not to reflect the costs by asking you to  
22 re-run the analysis, doesn't it?

23 A. My recollection of the debate -- and the group that were  
24 present was large and there were a sub-group of them --  
25 "sub-group"; I shouldn't use that word because it's the



1 Interchange Sub-Group.

2 There was -- there was an element of banks which  
3 would have preferred not to use the Golden Rules but  
4 just to be given a figure that they could say, "This  
5 should be the interchange", and they would prefer to  
6 have a methodology that would give them that figure.  
7 And as part of that, the suggestion was that we should  
8 use the lower credit numbers that were in existence from  
9 the previous study and apply them to the current study.

10 Q. Thank you. That's really helpful.

11 So what you're saying -- when you say that they  
12 would prefer to have a methodology that would give them  
13 that figure, what they've got is a commercial figure in  
14 mind, is it, but they want to show that that figure is  
15 somehow reflected in a methodology; is that correct?

16 A. I -- my personal impression at the time was that they  
17 wanted to avoid any risk of being accused of collusion  
18 in setting a rate through the debate amongst them and  
19 therefore preferred to be given a result that just had  
20 to be endorsed.

21 Q. Okay.

22 A. Whether that's the same as your question, I don't think  
23 so.

24 Q. I think it is. Thank you. It's very helpful. Thank  
25 you. It's very clear.

1           And could we look at the final figures for 1997,  
2           {C7/175/1}, and you can see this is the final report.  
3           If we go to page 3 {C7/175/3}, we can see that the  
4           blended costs are 1.49; correct?

5       A.   Correct.

6       Q.   So the figure has come down, hasn't it?

7       A.   It has.

8       Q.   And the reference to 1997 in the table is the last time  
9           EDC conducted a UK cost study for MEPUK; correct?

10      A.   Correct.

11      Q.   So we see there there's an increase of 0.38%.

12      A.   Correct.

13      Q.   So somewhat less than the preliminary results, but still  
14           a substantial increase; correct?

15      A.   Correct.

16      Q.   And for costs and transactions processed at the standard  
17           category, they're 1.6% -- well, you can see the figures  
18           and you've got increases in costs down the table,  
19           haven't we?

20      A.   Correct.  So to explain that in a little more detail --

21      MR JUSTICE ROTH:  Please.

22      A.   -- the credit write-offs were proportionate to the  
23           turnover in each category, whereas the fraud levels, for  
24           example, would change between standard, electronic and  
25           CAT and, therefore, when you added up those differences,

1           you would get different rates that resulted from  
2           different transaction categories.

3       MS DEMETRIOU: Thank you, Mr Sidenius.

4           And if we go to page 14 of this document  
5           {C7/175/14}, it says here:

6           "EDC was also asked to evaluate the interchange  
7           costs associated with the following types of  
8           transactions, for which separate categories were  
9           established in April 1999 ..."

10          So those are the new categories; correct?

11       A. Yes.

12       Q. So they were introduced after the '97 cost study,  
13       weren't they?

14       A. Correct.

15       Q. But EDC is using the data from the '97 cost study to  
16       determine what the costs were for those types of  
17       transactions; correct?

18       A. Correct.

19       Q. And the reason that that's useful is that it informs the  
20       reader how costs have changed between '97 and '99; is  
21       that right?

22       A. Yes. I should mention here that the establishment of  
23       these categories was prior to my joining and I actually  
24       didn't undertake any of the analysis that supported the  
25       introduction of --

1 Q. Thank you. That's fair and that's good to understand.

2 Now, if we look at page -- so we see what the  
3 categories are there, and if we go to page 15  
4 {C7/175/15}, you can see the analysis of CAT transaction  
5 costs, and it says that those have increased  
6 substantially from '97. And then you see the headline  
7 figures at the bottom in bold of the table. Do you see  
8 that? So in '97, it's 1.79 and then it goes up to 2.33,  
9 the bottom row of the table.

10 A. Okay, yes, yes.

11 Q. Yes. And then if we go to page 19 {C7/175/19}, you'll  
12 see it reads at the top of the table:

13 "Interchange costs for CNP transactions have  
14 increased 60% to 1.60% since 1997."

15 And that's reflected in the table too, if we just  
16 scroll down. Do you see that there?

17 A. Yes.

18 Q. And then if we go to page 20 {C7/175/20}, this is  
19 airline transactions, but there is no comparator because  
20 there aren't any previous estimates. Do you see that?

21 A. Correct, yes.

22 Q. And then if we go to page 22 {C7/175/22}, the  
23 first paragraph explains that there hasn't been reliable  
24 data on chip transactions, but that EDC has arrived at  
25 indicative figures, and that's something we discussed

1 a little earlier; correct?

2 A. Yes, and we did that with APACS' counterfeit team, which  
3 helped us with projected numbers.

4 Q. Thank you.

5 If we go over the page to page 23 {C7/175/23},  
6 you'll see that the analysis results in interchange fees  
7 ranging from 1.53, year 2000, to 1.44, 2005. So that's  
8 the indicative range that you've calculated; correct?

9 A. Correct, and that was based on the fraud predictions of  
10 migrating to chip that APACS had developed.

11 Q. Now, if we go to {C7/250/1}, please, these are the  
12 minutes of the Interchange Sub-Group of 4 October 2000.  
13 Do you see that in the top right-hand corner?

14 A. Yes.

15 Q. And do you see that you were attending?

16 A. Yes.

17 Q. And then on page 3 {C7/250/3} and we go to agenda  
18 item 5, "Chip-Based Transactions", this -- you can see  
19 there that -- you can see the discussion at (i) relating  
20 to the new chip category. If we go to the middle of  
21 that section of text, it says:

22 "Mr Sidenius advised that the projections made by  
23 [EDC] indicated that the total cost for chip  
24 transactions would be up to 50 basis points lower than  
25 non-chip transactions."

1           So you were advising the Interchange Sub-Group here  
2           as to EDC's final findings in the 1999 cost study  
3           regarding the costs associated with chip transactions;  
4           correct?

5       A.   Correct, our predictions.

6       Q.   And then if we go to the table at {A/18.1/1}, please,  
7           this sets out the different levels of UK fallback MIFs  
8           over time. And if we go to -- I'll have to find the  
9           page very quickly. It's the year 2000, so it's page 4  
10          {A/18.1/4}.

11          What you can see there is that in the year 2000 --  
12          do you see that the categories are down the side? So if  
13          you just locate "Chip" first in the left-hand column,  
14          just below halfway, and you read across the table,  
15          you'll see for the year 2000, there was no chip category  
16          and it was introduced in 2001. Do you see that?

17       A.   I see that, yes.

18       Q.   So at 0.9%.

19          And then let's just look a bit more generally at the  
20          2000 and 2001 MIFs, which were the MIFs to which the  
21          1999 cost study were relevant; correct?

22       A.   Correct.

23       Q.   So the 1999 study, we've just seen, found that the costs  
24          of standard transactions increased by 0.32%, but if we  
25          look at standard at the top of the page, in 1999, it was

1           1.3%, and it stayed that, didn't it, in 2000 and 2001?

2       A. Well, I was not party to the final decisions on the  
3       rates.

4       Q. No.

5       A. I did sit in on the preliminary discussions and I was  
6       available to answer questions on the cost study. But  
7       from this table, I can see it didn't change, but I have  
8       no personal experience of why or what caused that.

9       Q. That's fair, but you were there in the meetings and  
10      listening to some of the discussions.

11      A. That's correct, but not the decision-making.

12      Q. But not decision-making. So I think there may be  
13      a limit to how much you can explain now as to what went  
14      into the decision-making as a result of that.

15      A. That's correct. That's my --

16      Q. So I'm just going to show you, though, what actually  
17      happened, because then we see in the same table  
18      electronic again was -- in 1999, we see was 1%. Do you  
19      see that?

20      A. Yes.

21      Q. And then it stayed at 1% in 2000 and 2001, didn't it?

22      A. Correct.

23      Q. And that compares to an increase in costs that EDC found  
24      of 0.36%; correct?

25      A. Correct.

1 Q. And the same is true of CAT and CNP transactions,  
2 isn't it? So CAT costs, we've seen, had increased by  
3 0.54%, and if we look at those, they stayed at 1.3%  
4 across those years.

5 A. Correct.

6 Q. And the CNP costs were 0.6 -- had increased by 0.6%  
7 between 1997 and 1999, as we've just seen, but they  
8 remained at 1.1%. Do you see that too?

9 A. Yes, I see that.

10 Q. So just looking at the levels and appreciating that it  
11 wasn't your decision to take, Mr Sidenius, EDC's finding  
12 that costs had increased for every category between '97  
13 and '99 didn't have any tangible effect on the levels of  
14 MIFs at all, did it?

15 A. Not based on this, no, and I would put that down to the  
16 Golden Rules.

17 Q. To the Golden Rules, which gave flexibility.

18 A. Yes.

19 MS DEMETRIOU: Now, can we turn, please, to -- sir, is now  
20 an appropriate time to take a break or shall I go on?

21 I have about another ten minutes on -- I'm going to turn  
22 to a different document, which will take me ten minutes.

23 I don't mind which way we do it.

24 MR JUSTICE ROTH: Well, I think it's not just Mr Sidenius;  
25 it's also the transcriber. So I think we'll take



1 a short break --

2 A. Okay.

3 MR JUSTICE ROTH: -- for everyone's benefit and we'll come

4 back about 3.20.

5 (3.11 pm)

6 (A short break)

7 (3.25 pm)

8 MS DEMETRIOU: Mr Sidenius, I want to look at the 2002 cost

9 study next, please. That's {C9/140}, and we can see the

10 date there, November 2002, and that would have been the

11 next one after '99; correct.

12 A. Correct.

13 Q. And if we go to page 3 {C9/140/3}, we can see the

14 results set out in the table and, again, there's

15 a comparison, we see, between 1999 and 2002. And just

16 from a glance, we can see that no two numbers are the

17 same, are they? So there have been changes in every

18 category.

19 A. Correct.

20 Q. And we can see that blended costs have increased from

21 1.49 to 1.61. Standard's increased, electronic has

22 increased. And if we go down, we can see, I think, that

23 there's been a decrease for CNP and a decrease from

24 chip, but otherwise, everything has increased; correct?

25 A. Correct.

1 Q. And if we go to {C9/105/1}, please, these are the  
2 minutes of the Interchange Sub-Group held on  
3 20 September 2002 and, again, you're on the list of  
4 attendees. Do you see that?

5 A. Correct, yes.

6 Q. And if we go to page 3 {C9/105/3}, we can see the  
7 words -- we can see that:

8 "The Sub-Group considered the draft report ..."

9 Do you see that just under "Action" about a third of  
10 the way down?

11 A. Yes.

12 Q. Yes. And that draft report -- so that is the 2002 cost  
13 study; correct? And you then summarise the key  
14 findings. Do you see that --

15 A. Yes.

16 Q. -- in the next -- and they're the findings that we just  
17 had a look at in the table, aren't they?

18 A. Yes.

19 MR JUSTICE ROTH: Presumably they then saw the report in  
20 draft; is that right?

21 A. Yes.

22 MR JUSTICE ROTH: And then what we were just looking at was  
23 the final report, is it?

24 A. Actually, we need to go -- I guess that's correct. This  
25 is a draft report --

1 MS DEMETRIOU: It's a draft --

2 A. -- so it's prior to the final.

3 MS DEMETRIOU: That's prior to the final one. The figures,

4 actually, just looking at them, look --

5 MR JUSTICE ROTH: The same.

6 MS DEMETRIOU: -- the same.

7 A. They -- yeah, they may not have changed.

8 Q. And if we go to the schedule of MIFs again, so at

9 {A/18.1/5}. So the 2002 cost study would have fed into

10 2003 MIFs, would it?

11 A. Yes, that's correct.

12 Q. And we see that -- if we compare 2002 to 2003, we can

13 see that there isn't any change in any of the

14 pre-existing categories. Do you see that if you scan

15 down? So we've got standard in 2002 was 1.30. It

16 remains at 1.30. Electronic is 1 and remains at 1, and

17 we see that that's the case for all of the categories.

18 Do you see that there?

19 A. I do see that.

20 Q. And -- but that's despite the fact that, as we saw, the

21 costs did change in every single category; correct?

22 A. Correct.

23 Q. So, again, what we see here is the EDC's reported

24 changes in costs, its analysis, didn't actually lead to

25 any changes in the UK MIFs, did they?

1 A. That is -- that's the evidence I see here, yes. As  
2 I said before, I wasn't party to the MIF-setting  
3 discussions.

4 Q. Decisions.

5 A. Yeah.

6 Q. I understand that, but would you have known about where  
7 they ended up in terms of the MIFs that they adopted or  
8 not?

9 A. No. I would only learn that through other work we did  
10 with merchants; for example, sending out RFPs for  
11 acquiring contracts and stuff.

12 Q. I see. Is it -- now, just looking at this, is it  
13 a little demoralising to think all of that work wasn't  
14 reflected in any of the -- any changes in the MIFs?

15 A. No, I don't think so because the reason we did the work  
16 was because of the regulatory interactions that were  
17 going on and ...

18 Q. Okay. Thank you. And can we turn --

19 MR JUSTICE ROTH: Can you expound that a bit? You said:

20 "... the reason we did the work ..."

21 A. Well, the interchange studies started in -- well, about  
22 1990 were the first ones in the UK market, and that was  
23 due to early discussions with the OFT. And the schemes  
24 made a commitment to undertake cost studies in the  
25 markets at some stage. Whether they did it at the

1           outset, I don't know, because I wasn't involved in that,  
2           but there was an expectation that cost studies would be  
3           undertaken periodically, which we set at two years.

4       MR JUSTICE ROTH:   So Visa did it as well?

5       A.   Visa did it as well.

6       MR JUSTICE ROTH:   But not using your company.   They used  
7           someone else, or they used you as well?

8       A.   They -- no, they initially used Andersen Consulting,  
9           which has now become Accenture.

10      MR JUSTICE ROTH:   Yes.

11      A.   And I understand that Andersen Consulting developed  
12           a methodology in the US that was used in the UK market,  
13           similar to, actually, what Edgar Dunn had done with the  
14           proxy methodology.

15      MS DEMETRIOU:   Thank you, Mr Sidenius.   I think -- the  
16           1997 cost study, I think you've said, that was not  
17           something you were involved in because it predated your  
18           arrival.

19      A.   It pre-dates my arrival.

20      Q.   Now, if we go, please, to -- so you explained in your  
21           first witness statement that Mastercard Europe took over  
22           responsibility for setting UK MIFs from 2004; correct?

23      A.   Correct.

24      Q.   But that Mastercard Europe continued to commission cost  
25           studies for the UK domestic market.

1 A. Correct.

2 Q. And if we go to {C15/152/1}, please --

3 A. Perhaps I should clarify. I think prior to 2004, the  
4 cost studies were still -- I think the 2002 cost study,  
5 from memory, was co-ordinated with Mastercard, so it  
6 covered the intra as well as the domestic UK, and it was  
7 commissioned, from memory, by Mastercard, but they  
8 recharged MEPUK behind the scenes.

9 Q. I see, okay. But generally, there were cost studies for  
10 the UK and for the intra-EEA interchange fee too;  
11 correct? So you were analysing both things separately.

12 A. No, in the same study.

13 Q. Oh, the same study.

14 A. The same study --

15 Q. Okay.

16 A. -- because the same costs supported both groups of  
17 transactions.

18 Q. So --

19 A. So it was more efficient to do one study and allocate  
20 out the proportions of costs relevant to the individual  
21 sub-groups of transactions.

22 Q. I see. Thank you.

23 MR JUSTICE ROTH: And you did some separate ones for other  
24 European domestic markets, did you?

25 A. We did, and we often did them as well with the -- at the

1 same time as the intra. So if they were part of the  
2 intra study sample, it was easier, once you collected  
3 all their costs, also to connect -- collect the domestic  
4 transaction volumes, costs, write-offs, whatever.

5 MS DEMETRIOU: Thank you, Mr Sidenius. So there is  
6 a document up on the screen {C15/152/1} and these are  
7 minutes of Mastercard Europe's tenth European  
8 Interchange Committee dated 1 September 2005. We see  
9 that at the top of the page.

10 A. Yes.

11 Q. And if we go to page 4, please {C15/152/4}. So there in  
12 the table, that lists the current UK MIF categories in  
13 October 2005. Do you see that?

14 A. Correct, yeah, I see.

15 Q. And then in the "Proposed" column, you then have what's  
16 proposed and the changes are in bold; do you see? So  
17 everything stays the same in terms of proposal, but  
18 there's a change in that it looks like they're going to  
19 remove the PAN-key-entered category, remove the internet  
20 category, remove CAT and airline, and then the standard  
21 interchange fee is going to go down to 1.2. Do you see  
22 that?

23 A. I do see that, yeah.

24 Q. And then if we go back to {A/18.1/6}, please, and  
25 looking at 2006, can you see that these proposals were

1 all made? So you can see at the top that standard has  
2 gone down to 1.2 and that the categories we just looked  
3 at that were proposed to be removed were removed. Do  
4 you see that?

5 A. I do see that, yes.

6 Q. Thank you.

7 And then if we go back to the minutes we were just  
8 looking at, so {C15/152/6}, and then it's the bottom of  
9 the page, please. It's the passage below  
10 "Cost Considerations". So:

11 "The average MIF level which will result from the  
12 above changes ... will be well below the latest measured  
13 costs (1.63% in the 2002 UK domestic cost study)."

14 Do you see that?

15 A. Yes.

16 Q. And it then says:

17 "The 2005 ... cost study has currently not been  
18 finalized. Edgar Dunn is currently working on providing  
19 an indicative cost result, which will be exposed during  
20 the meeting."

21 So they don't have anything from Edgar Dunn at that  
22 stage, correct, in this meeting?

23 A. Correct.

24 Q. So the changes to the UK MIFs that were proposed and we  
25 then see ended up as having been adopted were agreed



1           without -- were adopted without reference to the updated  
2           2005 cost study; correct? They were basing  
3           themselves -- they were looking at 2002.

4       A. I can't recall if we had shared any draft results before  
5           then. It could have been that we'd done that. I --  
6           I was not party to the discussion. I can't say.

7       Q. You can't help us any further. It looks like --

8       MR JUSTICE ROTH: Do you know if you did provide  
9           an indicative cost result?

10      A. We often did with the studies, as we got the first  
11          results in from all the banks. We might provide  
12          a result that was missing two to three banks'  
13          submissions and we might still be going through the data  
14          quality checks, but provided an interim result, if  
15          requested. I can't recall in this instance whether we  
16          did that.

17      MS DEMETRIOU: Where it says "working on providing  
18          an indicative cost result", that would be a preliminary  
19          result, would it, "indicative"?

20      A. It could be. I wasn't party to the discussions.  
21          I don't know what led them to write "indicative".

22      Q. But it looks here, doesn't it, that when they talk about  
23          the latest measured costs that what they have in front  
24          of them is the 2002 domestic cost study and they're  
25          waiting for something from Edgar Dunn in relation to

1           2005? That's what it looks like on the face of these  
2           minutes.

3           A. I can interpret it to be that, yes, but I'm speculating.

4           Q. That's --

5           MR JUSTICE ROTH: These are -- sorry, if we go up a bit.

6           These are not minutes. I think you said minutes.

7           MS DEMETRIOU: I did and --

8           MR JUSTICE ROTH: This is not -- this is a report for agenda  
9           item 5 for endorsement at the meeting. That's what it  
10          says.

11          MS DEMETRIOU: So --

12          MR JUSTICE ROTH: So there's then a meeting on 1 September.

13          This would, therefore, be in advance of the meeting,  
14          I think. I think it's being put, and it's not  
15          something, unless -- and if we have the minutes of the  
16          meeting -- because what's indicated here in the item  
17          you've just taken us to on, is it, page 6, is that it's  
18          hoped that Edgar Dunn will provide an indicative cost  
19          result at that meeting.

20          MS DEMETRIOU: Sir, that's correct, and the point that

21          I was -- that I was exploring was the fact we have in  
22          this document, before the meeting, the proposals which  
23          were then indeed adopted.

24          MR JUSTICE ROTH: And we don't know what discussion, without  
25          minutes of the meeting, took place at the meeting,

1           whether Mr Sidenius or someone else attended and whether  
2           they were cross-checking it against costs or not;  
3           updated costs, albeit indicative.

4       MS DEMETRIOU:   I --

5       MR JUSTICE ROTH:   I mean, that's -- and we saw sometimes,  
6           Mr Sidenius, certainly with the domestic UK committee,  
7           you sometimes attended the meeting to explain your --

8       A.   To explain results, yes.

9       MR JUSTICE ROTH:   Would you do that sometimes at the -- this  
10           is the European level as well, or would it be one of  
11           your colleagues?

12      A.   No, I -- we would or I would present the results to the  
13           Interchange Fee Team and they would then query me on the  
14           results, etc. But when Mastercard took on the setting  
15           of interchange fees, they, probably quite correctly,  
16           limited Edgar, Dunn & Company to only undertake the cost  
17           study and no further attendance to any discussions  
18           relating to the interchange, and I think that was down  
19           to sensitivities about splitting the responsibility for  
20           data collection and the setting of the rates.

21      MR JUSTICE ROTH:   Yes. So you wouldn't have attended the  
22           meeting --

23      A.   I did not attend the meeting.

24      MR JUSTICE ROTH:   -- on -- (overspeaking) --

25      A.   I do also see now -- sorry. (Pause)

1 MR JUSTICE ROTH: So we -- and we don't have the minutes of  
2 the meeting?

3 MS DEMETRIOU: I don't. I'm just asking if anyone else  
4 does, but I -- we do have them? {C15/78/1}.

5 A. If I may observe one thing here; that I notice now that  
6 we scaled out again. I do recall the introduction of  
7 World Signia and World card, which were premium products  
8 that Mastercard wanted to introduce, and that brought me  
9 to remember that there was an early change of  
10 interchange because they had a time frame to introduce  
11 these globally. Whether that impacted this or what  
12 happened post that with setting other rates, maybe they  
13 took on board the results from the study, I don't know.  
14 But I believe this would have been caused by trying to  
15 introduce premium products in -- across the world,  
16 actually.

17 MR JUSTICE ROTH: Yes.

18 MS DEMETRIOU: Sir, I think may I now see why I wasn't  
19 focused on the minutes. If we go to {C15/78/1}.  
20 I think this is why I was not asking any questions about  
21 the minutes. If we go to the next page {C15/78/2},  
22 there's not very much we can take from the unredacted  
23 parts of the minutes.

24 MR JUSTICE ROTH: It doesn't seem to have discussion of the  
25 UK --

1 MS DEMETRIOU: Well, I don't know because -- we don't know.

2 MR JUSTICE ROTH: Because it's agenda item 5, I think,  
3 isn't it?

4 MS DEMETRIOU: Yes, I think it was agenda item 5 and then --  
5 but that seems to be blanked out. I'm not sure why.

6 MR JUSTICE ROTH: Yes. Perhaps someone on the Mastercard  
7 side can have a look at that. Anyway, we know  
8 Mr Sidenius wasn't -- wouldn't have been there.

9 MS DEMETRIOU: We know Mr Sidenius -- exactly.

10 Now, I just want to go back, please, to Mr Coombs'  
11 report at {A/14/49}. Can you see at table 14 he is  
12 looking at correlation coefficients between UK domestic  
13 weighted average interchange fees and costs? Do you see  
14 that's the --

15 A. I do.

16 Q. Have you looked at this report or not, Mr Sidenius?

17 A. I have not looked at this report.

18 Q. Okay.

19 A. It wasn't shared with me.

20 Q. That's helpful to know.

21 So his conclusion at 6.30, he says:

22 "The table shows negative correlation coefficients  
23 for each of the three metrics. These results do not  
24 support Mastercard's assertion that the UK Domestic  
25 [interchange fees] were influenced by the cost estimates

1 developed in the EDC cost studies."

2 And if we also go, just to show you, page 38 -- so  
3 sorry.

4 PROFESSOR WATERSON: Just before you do that, I notice,  
5 incidentally, that none of those is significant.

6 Otherwise, they would have had an asterisk against them.

7 MS DEMETRIOU: Professor, you're quite right. Let me -- in  
8 fact, I can take this quite shortly. So let's go to the  
9 agree/disagree statement between the experts. That's at  
10 {A/22/19}.

11 Mr Sidenius, this is a statement where the experts  
12 on each side have explained their views in relation to  
13 particular issues so that the Tribunal sees a summary of  
14 where they agree and where they disagree on certain  
15 points. And if we look at point 26:

16 "Was there a relationship between UK Domestic  
17 [interchange fees] and EDC cost studies?"

18 Mr Parker, that's the expert called by Mastercard in  
19 these proceedings, he says:

20 "In [his] econometric analysis, I do not find  
21 a statistically significant correlation between the  
22 level of the UK [interchange fee] and the level of  
23 costs ..."

24 Then he says:

25 "... this does not imply that the ... cost studies

1           were not ... relevant ... There is factual evidence that  
2           [they] were seen ... as indicating the maximum  
3           level ..."

4           Which is the point, I think, that you made. You  
5           said that they were seen as a ceiling.

6       A. Correct.

7       Q. And then Mr Coombs agrees about that. He agrees about  
8           the first point. He says:

9           "I do not find a statistically significant positive  
10          relationship between weighted-average UK Domestic  
11          [interchange fees] and the blended cost estimates ..."

12          And he says that he doesn't comment on factual  
13          matters.

14          So the experts agree that there's no correlation,  
15          correct, between the cost study results and the domestic  
16          MIFs as set or the domestic interchange fees as set?

17       A. Correct.

18       Q. And that's consistent with what we've seen, what we've  
19          been seeing, isn't it, when we've looked at cost study  
20          results and then we've gone to the table of MIFs and  
21          seen that they haven't changed?

22       A. Correct.

23       MS DEMETRIOU: Thank you very much, Mr Sidenius. Those were  
24          my questions for you. Thank you. It may be that Mr ...  
25          (Pause)

1           Oh, we have the unredacted minutes, which I haven't  
2           seen yet, but perhaps --

3       MR JUSTICE ROTH: Not relevant for Mr Sidenius, though,  
4           because he wasn't at the meeting.

5       MR SMOUHA: No, quite.

6       MR JUSTICE ROTH: But it's something useful to have.

7       MR SMOUHA: I'll just pull them up, sir, so you have you see  
8           them at the same time. And, of course, if my learned  
9           friend thinks there is a change in position, then please  
10          say so.

11          {C15/92/1}, and Mr Sidenius was not there and the  
12          agenda item 5 is dealt with at page 2 {C15/92/2}.

13          I'm told indicative costs were given or are at  
14          {C15/77/11}.

15       MR JUSTICE ROTH: Yes. Well, that's --

16       MR SMOUHA: 31 August, so the day before.

17          Mr Sidenius, at least in relation to that -- sorry,  
18          if we go to page 8 {C15/77/8}, indicating which  
19          countries were representative in the indicative results,  
20          including the UK. Page 19 {C15/77/19} and then look at  
21          the next page {C15/77/20}, and so on.

22          Mr Sidenius, I don't know whether that assists you  
23          with your recollection in relation to what was provided  
24          in advance of that meeting.

25       A. No, that would have been our report on the



1           intra-European study and the domestic studies we  
2           undertook at the time.

3       MR SMOUHA: This looks like it's in the form of a PowerPoint  
4           presentation.

5       A. It is, and I apologise for the formatting.

6       MR SMOUHA: In what form would that -- when you were  
7           providing indicative results --

8       A. That would often be in PowerPoint.

9       MR SMOUHA: Thank you. Mr Sidenius, just a few questions --

10      MR JUSTICE ROTH: Just one moment. Have you finished  
11           your --

12      MR SMOUHA: Oh, sorry.

13      MS DEMETRIOU: No. Well, it's just I haven't seen this  
14           document before, so I can deal with it after -- maybe  
15           it's better if I deal with it after.

16      MR SMOUHA: No, no, please. No, no, absolutely.

17      MR JUSTICE ROTH: Yes.

18      MR SMOUHA: It's in the bundle.

19      MR JUSTICE ROTH: I mean, it's not --

20      MS DEMETRIOU: No, sorry, the previous document.

21      MR SMOUHA: The unredacted version?

22      MS DEMETRIOU: The unredacted version.

23      MR SMOUHA: It's on --

24      MR JUSTICE ROTH: Oh, the unredacted --

25      MS DEMETRIOU: The unredacted version was in the bundle

1           unredacted. Okay.

2           MR JUSTICE ROTH: Yes, it's --

3           MS DEMETRIOU: I'd obviously only come across the redacted  
4           version. It's Alright. I will deal with those points  
5           in submission because I think Mr Sidenius has said he  
6           wasn't there.

7           MR JUSTICE ROTH: And he's not on the list of attendees.

8           MS DEMETRIOU: And he's not on the list of attendees.

9           MR JUSTICE ROTH: So I think we understand what happened.

10          It seems there was the report to the committee --  
11          a report of a committee. They didn't have indicative  
12          costs. They said that they're hoping EDC can provide  
13          indicative costs before the meeting.

14          On 31 August, EDC submitted in PowerPoint form this  
15          table of indicative costs, which includes the UK, based  
16          on a sample -- 60%, rather, of the sample. So they  
17          haven't finished the work, and that's what they had.  
18          That was before the meeting on 1 September when the  
19          proposal was endorsed.

20          MS DEMETRIOU: Sir, yes --

21          MR JUSTICE ROTH: But the minutes don't record any  
22          discussion --

23          MS DEMETRIOU: The minutes record no discussion, but then  
24          just one more question.

25          We saw from the document before that said that EDC

1           was going to provide indicative costs, so we saw from  
2           the agenda, that the proposed interchange fees were well  
3           below the 2002 costs, which were 1.61. Do you remember  
4           seeing that?

5       A. Yes.

6       Q. And I think what we see here is that costs in the cost  
7           study, the indicative figures, have gone up much more,  
8           haven't they?

9       A. They have.

10      Q. So the proposals were even further below the indicative  
11         costs; correct?

12      A. Correct.

13      MS DEMETRIOU: Thank you.

14      MR JUSTICE ROTH: Yes, Mr Smouha.

15                   Re-examination by MR SMOUHA

16      MR SMOUHA: Thank you, sir.

17           Mr Sidenius, you recall earlier you were shown  
18           various documents which referred to the initial data  
19           being poor and then EDC undertaking significant  
20           reconciliation work.

21           Can we look at the September 2002 cost study that  
22           you refer to, C17/173 -- no, that's a wrong reference.  
23           Sorry, {C7/173/1}.

24      MR JUSTICE ROTH: That's 1999. C7/173 is 1999 --  
25           September 2000 based on '99.

1 MR SMOUHA: Exactly so, sir.

2 And can we look at page 3, which you were shown.

3 Let me just remind you, Mr Sidenius, the passage in  
4 the -- at the last paragraph on the page {C7/173/3}:

5 "Due to a lack of data, it was not possible to  
6 develop cost-based results for Internet transactions,  
7 chip-read transactions or commercial card transactions."

8 And you said -- this is at page 87 of the [draft]  
9 transcript for today -- that some of these categories  
10 were brand new, there were not a lot of transactions  
11 taking place and you mentioned internet transactions at  
12 that time.

13 A. Yeah.

14 Q. Can we go, please, to page 22 {C7/173/22}.

15 A. I think I clarified internet transactions were taking  
16 place, but they were captured under a different category  
17 and the problem was to identify which transactions  
18 actually were internet.

19 Q. You did indeed. That's much more accurate. Thank you.  
20 Apologies.

21 On page 22, we see a section that deals with  
22 chip-read transactions:

23 "Given the fact that less than half of Members  
24 participating in this study have rolled out chip cards,  
25 and given that cards have been issued in small volumes

1 to date, Members have been unable to provide reliable  
2 data on chip-read transactions. Thus, it has not been  
3 possible to arrive at interchange fees for chip-read  
4 transactions based on quantitative cost-based methods."

5 For the cost studies that you were involved in,  
6 Mr Sidenius, at the end of the process, what was your  
7 view of the quality of the data that you were using?

8 A. I think it was very good. We went through rigorous  
9 activity-based costing quality checks. We challenged  
10 the participants where costs were outliers, be they  
11 either cheap or expensive, and at the end of the day, if  
12 a member couldn't justify a cost, be it on the high end  
13 or the low end, we would exclude it from the sample.

14 As a somewhat funny example, I challenged a member  
15 in Ukraine once on the very low chargeback costs.  
16 Chargebacks take a lot of manual work. And they said,  
17 "When you pay people \$150 a month, they don't cost  
18 much", and then I didn't challenge him any further.

19 MR SMOUHA: Thank you, sir. I have no further questions.

20 Questions by THE TRIBUNAL

21 MR JUSTICE ROTH: Yes. We just were curious, Mr Sidenius.

22 If one looks back -- take the document we just had  
23 {C7/173/19} of the -- and this is card not present, but  
24 the cost components you used, is funding cost -- is that  
25 the cost of the interest free period? Is that what

1           you're dealing with there?

2           A. That is correct. So that is driven by the average days  
3           that a transaction is funded. So typically, during the  
4           30 days of a statement period, that's 15 or 15 and  
5           a half days, plus a certain sample time from the  
6           statement goes out to payments received, and that  
7           normally you're given 15 days and average payments come  
8           in about 10.5, 11, 12.

9           MR JUSTICE ROTH: And we see here it's much the major  
10          component.

11          A. Credit write-offs are.

12          MR JUSTICE ROTH: Credit write-offs and fraud, yes, those  
13          three are the --

14          A. Yeah.

15          MR JUSTICE ROTH: Is that fairly typical; that those would  
16          be the three --

17          A. For CNP, the fraud losses being very significant was  
18          very typical and still today remains a big problem.

19          MR JUSTICE ROTH: And for the standard and the electronic,  
20          what would be the big cost component?

21          A. The electronic was safer than the standard. The  
22          standard was just a magstripe-read transaction and not  
23          authorised, but just processed through. It could be  
24          under floor limit, for example. And the electronic was  
25          you read the magstripe and you obtained an electronic

1           authorisation, so it went online and got authorised.

2           Now, the magstripe had the weakness that if a card  
3           number got compromised, it was very easy to code a hotel  
4           key or anything, and sometimes you had merchant  
5           collusion. They didn't mind taking hotel keys through  
6           there. Sometimes you had -- they made good covers to  
7           make them look like a Barclaycard or something, and  
8           those transactions would go through even authorised  
9           until the cardholder identified there was a problem.

10          So both of these two, standard and electronic,  
11          relatively unsafe. CNP, quite unsafe at the time, and  
12          that's why we went to chip first and chip and PIN  
13          second.

14       MR JUSTICE ROTH: One can see, if one goes to page 13  
15          {C7/173/13}, is it, of this document, the table there,  
16          we've got the electronic and standard. One sees the  
17          difference in the fraud element --

18       A. Correct.

19       MR JUSTICE ROTH: -- and the major share again being credit  
20          write-offs and funding once fraud is reduced.

21       A. Correct.

22       MR JUSTICE ROTH: And the funding cost, that would be  
23          an issuing bank cost, would it?

24       A. Yes, that would -- actually, we used LIBOR as a good  
25          measure for inter-bank costs of lending.

1 MR JUSTICE ROTH: Because they pay the acquirer on clearing  
2 straight away.

3 A. They do, exactly.

4 MR JUSTICE ROTH: But they get significant revenue for --  
5 after the interest free period from the APR  
6 (overspeaking).

7 A. If -- if the cardholder revolves as the -- it's called  
8 when you turn the balance over. As a rule of thumb,  
9 one-third of customers would revolve. Two-thirds  
10 wouldn't. And of transactional activity, it was more or  
11 less the opposite. The two-thirds -- sorry, more or  
12 less the same and even more, actually. So the  
13 two-thirds who paid off in full transacted more than the  
14 one-thirds -- proportionately more than the one-thirds  
15 who revolved, because if you think of the credit limit,  
16 a revolver goes somewhere up near, pays down a bit, and  
17 doesn't have that much space to transact, and someone  
18 who has the full credit limit available has more space  
19 for a transaction.

20 MR JUSTICE ROTH: So that's the sort of calculation --

21 A. We did --

22 MR JUSTICE ROTH: -- issuing banks would very much take into  
23 account, I suppose.

24 A. They would, and the two primary groups they wanted was  
25 transactors with high levels of transactions, and that's



1 typically the T&E sector that they were interested in,  
2 big ticket items, travel, hotels, etc, and then they  
3 were also interested in pure revolvers, which borrowed  
4 money and transacted a fair bit to maintain the balance,  
5 and they could then make money on the lending on them.

6 MR JUSTICE ROTH: "T&E" is travel and entertainment?

7 A. That's correct, yes. Sorry, that's our terminology.

8 PROFESSOR WATERSON: Just to add on this line of  
9 questioning, if I may. You weren't asked explicitly in  
10 these studies to offset those potential interest rate  
11 benefits for the issuer or --

12 A. No, we weren't, and it might be worth explaining then  
13 a little bit about why the proxy is what we defined, and  
14 it goes back to the NaBanco case. And in the NaBanco  
15 case, as Professor Baxter explained, they found that it  
16 was highly likely that a payment system would need  
17 a level of interchange. He said he couldn't even  
18 theoretically work out which way it should flow, but  
19 there should be a way of doing it.

20 And at the time of the NaBanco case, Bank of America  
21 Card, which is now Visa, was a California-only payment  
22 system run by Bank of America Card, but their clients  
23 travelled across the US. And due to bans on interstate  
24 banking, they couldn't support their customers in other  
25 areas, so they came up with the idea of an open banking

1 or open payment system that became Visa. And when they  
2 then looked at the payment system, which before operated  
3 like Amex does, as a three-party, and they said, "Okay,  
4 let's take this apart and let's define an interface  
5 between what is acquiring activities and what is issuing  
6 activities". And then they looked at the relative costs  
7 versus income and they said, "This doesn't work", so  
8 they put an interchange in place. But they didn't  
9 justify it. They didn't put a methodology in place.  
10 They didn't do anything.

11 And the NaBanco case said, "Well, okay, if you need  
12 to have an interchange in place, you have to define  
13 a cost-based methodology". And Edgar, Dunn & Company,  
14 Peter Dunn, one of the founding partners, looked at it  
15 and said, "Well, if there is more demand than costs on  
16 one side, there must be something on the issuing side  
17 that represents value". And then they identified and  
18 agreed with Mastercard that this was probably  
19 a reasonable proxy to use, which is why it's called  
20 a proxy methodology because it's between the imbalance.

21 And as far as I understand, on the Visa side, they  
22 defined a methodology which is much closer to the  
23 Baxter, which -- I know from the marketplace they  
24 definitely also measured acquiring costs and issuing  
25 cost, but what I don't know and which would be the

1           complexity is: how do you measure demand? We've tried  
2           to look at that several times and it's a moving beast  
3           and very difficult.

4       PROFESSOR WATERSON: Thank you. That's very helpful indeed.

5           Thank you.

6       MR JUSTICE ROTH: We have no more questions, unless anything  
7           out of that.

8           Well, thank you very much for coming, Mr Sidenius.

9           You're released as a witness.

10       A. Thank you.

11                               (Witness released)

12       MR JUSTICE ROTH: I don't think there is any -- you can  
13           leave the witness box -- well, we'll rise just for  
14           five minutes and then come back, please.

15       (4.03 pm)

16                               (A short break)

17       (4.10 pm)

18                               Housekeeping

19       MR JUSTICE ROTH: Yes, we've had the letter from Freshfields  
20           about witnesses and in particular then the question  
21           regarding experts. We agree that there seems no need to  
22           sit tomorrow and so we'll resume on Monday.

23           As regards the experts, we did have first  
24           one question on volume of commerce. We were told at the  
25           outset that, really, there's only one issue remaining,

1           which is how one should have regard to on-us  
2           transactions, which is not a question really for expert  
3           evidence. It's a question on the facts and then  
4           interpretation, perhaps, of what's being alleged.

5           So that's not something that concerns them, but we,  
6           I think, as part of this trial are supposed to determine  
7           volume of commerce. Their figures are very close.  
8           They're not identical. What is it proposed that we  
9           should do about figures because -- is there an agreement  
10          on the actual figures?

11       MS DEMETRIOU: I think -- somebody will tell me if

12          I'm wrong -- that the disparity that you've seen is to  
13          do with interest, but I think that there's now --  
14          subject to on-us, I think there is agreement on figures.  
15          Mr Cook is nodding, so I'm taking some comfort from  
16          that.

17       MR JUSTICE ROTH: Yes. It would be --

18       MS DEMETRIOU: Yes.

19       MR JUSTICE ROTH: And the figure for on-us is agreed as  
20          well, is it?

21       MS DEMETRIOU: That's right. I think that's correct.

22       MR COOK: There is -- I mean, sir, I think there is  
23          something of an issue in the sense that -- and it's not  
24          an issue that requires resolution, but a volume of  
25          commerce number that is just 500, whatever it is,

1 billion is not a particularly helpful one. What it  
2 actually is is the volume of commerce for each of  
3 the years --

4 MR JUSTICE ROTH: Yes.

5 MR COOK: -- because that is then the relevant one you would  
6 apply, whatever the overcharge is, if we ever get to  
7 that charge.

8 So some of the ones -- the way they've been quoted  
9 as being a compendious figure for a 16-year period isn't  
10 actually what the Tribunal needs to determine. There  
11 is, it must be said, much more on Mr Parker's analysis,  
12 the breakdown underlying that, which has each individual  
13 year, and that is what we would say is the relevant set  
14 of numbers.

15 That is not apparent on Mr Coombs' report at all.  
16 It is apparent in his data pack, which is not before the  
17 Tribunal. So we will be saying what should be in the  
18 tribunal's judgment, and it may be it doesn't need to  
19 because the numbers are agreed, is that annual breakdown  
20 rather than just simply a compendious headline number,  
21 which isn't terribly meaningful.

22 MR JUSTICE ROTH: Yes. What we're really concerned to  
23 establish is: is there any dispute or difference between  
24 the experts on those numbers that we are going to have  
25 to determine?

1 MR COOK: Well, that was the reason for making the point,  
2 sir, is to say that we have -- well, Mr Parker has that  
3 annual split, which appears to not be in dispute because  
4 Mr Coombs has it in his data pack. But nonetheless, it  
5 would be sensible for it to be clear common ground that  
6 Mr Parker's annual numbers are the right ones --

7 MS DEMETRIOU: That --

8 MR COOK: -- rather than just the headline ones.

9 MS DEMETRIOU: Sorry to speak across Mr Cook. That sounds  
10 like a sensible approach, so we will ask Mr Coombs just  
11 to extract that and do it by year in the same way so  
12 that the Tribunal has Mr Coombs' figures. I don't think  
13 there's going to be any dispute.

14 MR JUSTICE ROTH: So --

15 MR COOK: And I think, sir, there is a marginal adjustment  
16 needed to some of the earlier numbers just on the basis  
17 of Debit Mastercard, domestic has dropped out. It's  
18 a rounding error, essentially, but just to make sure the  
19 right set of numbers are being looked at for that.

20 MR JUSTICE ROTH: Yes. Well, we asked that because we don't  
21 feel in a position as a Tribunal to ask them questions  
22 going into the detail of the numbers and if there is  
23 that -- if there is any need, which we hope there isn't,  
24 to explore that, that will certainly have to be done by  
25 counsel.

1           Subject then only to that, we do think there is  
2           great merit in this case to having a hot tub. We think  
3           the issues are high level issues for the most part; that  
4           having the exchange between the experts and questioning  
5           from the Tribunal will assist and be more efficient and  
6           help us. And, of course, that does not exclude or  
7           preclude counsel asking supplementary questions  
8           afterwards. There's certainly time for that.

9           But we do feel, Mr Smouha, that given the nature of  
10          the reports here, it's a case where it actually may be  
11          quite helpful and we think we can, we hope, manage to do  
12          it, which is -- it's always a task for the Tribunal and  
13          we have to do that.

14          So we do think that that will work for everyone, in  
15          fact, and we certainly don't anticipate that that will  
16          last more than a day. And in the normal course, there  
17          shouldn't be extensive cross-examination afterwards. So  
18          that should mean that the experts certainly wouldn't  
19          need to come, is it, next Thursday, which is --

20       MR SMOUHA: Tuesday, sir.

21       MR JUSTICE ROTH: Well, depending quite when they start --

22       MR SMOUHA: (Overspeaking) --

23       MR JUSTICE ROTH: You're expecting, as Mr Langevin is not  
24          being cross-examined, that Mr Douglas and  
25          Mr van den Bergh will be completed on Monday.

1 MR SMOUHA: Yes, sir.

2 MR JUSTICE ROTH: So Tuesday, hot tub.

3 MR SMOUHA: Yes.

4 MR JUSTICE ROTH: Maybe Wednesday half a day for experts,  
5 but we would have thought then we wouldn't need to sit  
6 on Thursday of next week.

7 MR SMOUHA: Sorry, sir, just give me a moment.

8 MR JUSTICE ROTH: No, of course.

9 MR SMOUHA: Because it's going to be Mr Cook  
10 cross-examining. (Pause)

11 Well, sir, can we leave it on the basis that we'll  
12 invite the Tribunal not to pre-determine that  
13 cross-examination will be limited, but, sir, on the  
14 clear understanding that -- our clear understanding  
15 would be that the Tribunal is permitting  
16 cross-examination after the hot tubbing and on the basis  
17 of that, cross-examination should not be duplicative of  
18 what has come before.

19 MR JUSTICE ROTH: Yes. Well, we don't want you to go over  
20 again --

21 MR SMOUHA: Quite.

22 MR JUSTICE ROTH: -- matters that we've covered.

23 MR SMOUHA: Of course.

24 MR JUSTICE ROTH: Of course, if we've omitted something or  
25 there is something arising out of an answer that we



1 haven't followed up, it's perfectly legitimate for you  
2 to take that forward. Generally, it works quite  
3 sensibly. We're not placing a time limit on it, but  
4 there's now some experience of having hot tubs, and that  
5 tends to be the way that it works and we hope that will  
6 work successfully in this case.

7 MR SMOUHA: Very good, sir.

8 MR JUSTICE ROTH: Two other things that we wanted assistance  
9 on.

10 One is we're not sure we've got in one place a nice  
11 sort of table of the MCI inter-regional rate for each  
12 year 1992 to '97. In the big table, we've got various  
13 rates, including the EEA fallback rate, but we haven't  
14 got the inter-regional rate, which your case is was the  
15 fallback rate.

16 And could we, please, someone, prepare, ideally by  
17 Monday, but if not, as soon as possible, a table showing  
18 those rates year by year?

19 Secondly, if someone can give us a reference at some  
20 point to the arbitration rules, which we assume are in  
21 the -- I don't know if they're in both sets of rules,  
22 but there is obviously a rule about arbitration. And in  
23 particular, we just want to see what the provisions are  
24 and what's the position for -- if there is a reference  
25 to arbitration, what rate applies pending arbitration

1           and does the rate determined on arbitration then apply  
2           retrospectively from the date the arbitration was  
3           started and the notice for arbitration was given or  
4           quite how does it work?

5           We assume that's in the rules, so if we could be  
6           given those references.

7       MR SMOUHA: Sir, will you just give me one moment?

8       MR JUSTICE ROTH: Yes. (Pause)

9       MR COOK: Just me to explain something, sir. There are,  
10       I think, three documents in the bundle, two of which we  
11       were asked questions about by my learned friend's  
12       solicitors yesterday. If you recall they said there  
13       were a couple of documents that Mr Smouha did explain  
14       after lunch, and there were a -- I think there were two  
15       more, or three more they asked questions about and we've  
16       come back to them on those.

17       As a result of that process there are three  
18       documents that we found clearer copies of or, rather,  
19       they were all the existing copies, but we've now put  
20       clearer versions of those I think. Whether they've made  
21       their way into the bundle yet ... if they haven't, they  
22       will do so.

23       As a result of those clearer versions, it is now  
24       possible to add a bit more to the bilaterals table and  
25       we would intend to do so.

1 MR JUSTICE ROTH: Yes.

2 MR COOK: So, in particular, to the 1993 where it's now  
3 apparent, we say from those documents, that there was  
4 a comprehensive set of bilaterals for every single bank  
5 pair apparent from those documents. So the bilaterals  
6 table will be updated in relation to that, but we wanted  
7 to make sure my learned friend didn't say that came by  
8 surprise at some point. She may not like it but that is  
9 certainly our intention, sir.

10 MR JUSTICE ROTH: That's very helpful. Is there anything  
11 else either side would like to raise?

12 MR SMOUHA: Not from us, sir.

13 MR JUSTICE ROTH: Very well. 10.30 on Monday.

14 (4.21 pm)

15 (The hearing adjourned until Monday, 17 July 2023,  
16 at 10.30 am)

17

18

19

20

21

22

23

24

25