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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

(T)

Case No: 1266/7/7/16

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 5th – Friday 28th July 2023

Before:

The Honourable Mr Justice Roth

Jane Burgess

Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Walter Hugh Merricks CBE

**Class Representative**

v

Mastercard Incorporated and Others

**Defendants**

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

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

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

Monday, 17 July 2023

(10.30 am)

(Proceedings delayed)

(10.35 am)

Housekeeping

MR JUSTICE ROTH: Sorry, I have not been signed in,

apparently. (Pause)

Yes, there are a number of matters, I think, before we return to the witness evidence. One is we were told, I think, that the table of bilateral interchange fees has been updated, that some further ones have been found.

MR SMOUHA: Yes, there have.

MR JUSTICE ROTH: Are we being supplied with the updated table?

MR SMOUHA: Sir, it is being updated, but we're not yet in a position to provide that.

MR JUSTICE ROTH: Right. When will we get that, do you know?

MR SMOUHA: I will check.

MR JUSTICE ROTH: Yes.

MR SMOUHA: I hope as soon as possible --

MR JUSTICE ROTH: Well, yes, we would have hoped for it this morning.

MR SMOUHA: For obvious reasons.

1 MR JUSTICE ROTH: Secondly, we asked for two things. One  
2 was the inter-regional MIFs, and we saw there was some  
3 correspondence about that as to what should be included.  
4 Is that now resolved between the parties?

5 MS DEMETRIOU: I think that we're currently reviewing the  
6 document and it will be with you certainly today, but  
7 we'll obviously do what we can to expedite that process  
8 too.

9 MR JUSTICE ROTH: Yes. We hope it's not a controversial  
10 matter as to what those inter-regionals were.

11 And then the second thing we asked for was about the  
12 arbitration --

13 MR SMOUHA: Yes, sir.

14 MR JUSTICE ROTH: -- the rules dealing with arbitration.

15 MR SMOUHA: Yes, sir.

16 MR JUSTICE ROTH: Where are we with that?

17 MR SMOUHA: On our side, there's a draft document that's  
18 been prepared which sets out quotations from the  
19 relevant rules, together with also identification of  
20 correspondence which answers the question, sir, you  
21 asked as to when -- as to what the position is -- sorry,  
22 as to when the decision of -- the outcome of the  
23 arbitration applies from.

24 MR JUSTICE ROTH: Yes.

25 MR SMOUHA: And, sir, that, I hope, either has been or will

1           be provided to my learned friend and the Merricks team  
2           to review and see if we can agree that before providing  
3           it to you.

4       MR JUSTICE ROTH: Yes, and that's all happening today, is  
5           it?

6       MR SMOUHA: Yes.

7       MS DEMETRIOU: Sir, that hasn't come to us yet, but we hear  
8           what Mr Smouha says.

9       MR JUSTICE ROTH: Right. So that's, as it were, on our  
10          side. Then we've seen, I think, two matters that  
11          emanate from Mr Parker. One is he wants to add a note  
12          about the 1994 weighted average and by way of a sort of  
13          short supplemental report, and the other is just  
14          an updating of some references in his existing evidence  
15          to account for the bilaterals table that we've got.

16      MR SMOUHA: Exactly, sir.

17      MR JUSTICE ROTH: Yes. So we deal with them in that order.

18      MR SMOUHA: Sir, in relation to those, I understand my  
19          learned friend would like an opportunity just to  
20          consider that during today, and we were going to suggest  
21          that we come back to that during -- later in the day.

22      MR JUSTICE ROTH: Yes. I mean, it obviously has to be  
23          resolved today because --

24      MR SMOUHA: Yes, of course.

25      MR JUSTICE ROTH: -- they're coming tomorrow.

1 MR SMOUHA: Yes.

2 MS DEMETRIOU: Yes. So, sir, the position is obviously  
3 I saw the note, so I can deal with that, but the other  
4 amendments which relate to bilaterals I think literally  
5 came in 20 minutes or half an hour ago and so I just  
6 haven't been able to look at them at all.

7 MR JUSTICE ROTH: Yes. Well, that's fairly-- relatively  
8 minor. I think it's just making it correspond to the  
9 table that we've been working off, as far as we can  
10 understand it.

11 MS DEMETRIOU: Sir, yes.

12 MR JUSTICE ROTH: So do you want to deal with them both  
13 together at a convenient point later on? Is that what  
14 suits people?

15 MS DEMETRIOU: I don't mind. I'm in the Tribunal's hands.  
16 We can deal with them together or we can deal with the  
17 note first. It's whatever you would find more  
18 convenient.

19 MR JUSTICE ROTH: I think we might as well deal with them  
20 together as they both concern Mr Parker. So we'll put  
21 that back till at least probably 2 o'clock, I expect.

22 MR SMOUHA: Yes, sir. My learned friend anticipates that  
23 Mr Douglas' evidence may be completed by the lunch break  
24 and so it may be convenient to deal with those between  
25 the two witnesses for today.

1 MR JUSTICE ROTH: Yes, and if we can take a slightly longer  
2 lunch break, I doubt that Mr Van den Bergh is going to  
3 be all afternoon, is he?

4 MS DEMETRIOU: I think probably not, but perhaps a couple of  
5 hours.

6 MR JUSTICE ROTH: Well, then let's get on.

7 MS DEMETRIOU: Yes.

8 MR JUSTICE ROTH: I just wanted to give you time to look at  
9 the new material, which you can't obviously while in  
10 court.

11 Very well.

12 MR SMOUHA: Very good, sir. So may I call Mr Douglas.

13 MR KEITH DOUGLAS (affirmed)

14 Examination-in-chief by MR SMOUHA

15 MR SMOUHA: Good morning, Mr Douglas. Can I just check: do  
16 you have a copy there of your witness statement which is  
17 unmarked?

18 A. I do.

19 Q. Very good. Mr Douglas' witness statement is at  
20 {A/10/1}.

21 Mr Douglas, can you just turn, please, to  
22 paragraph 1. I understand that there's a small  
23 correction which you wish to make to that paragraph.

24 A. Yes, there is. I am now the permanent chief executive  
25 officer rather than the interim chief executive officer,

1 as in my statement.

2 Q. Thank you. And then if you would turn, please, to  
3 page 17 {A/10/17}.

4 A. Yes.

5 Q. Can you please confirm that those are your signatures on  
6 the confirmation of compliance and on the statement of  
7 truth, signing the statement on 16 March 2023?

8 A. Yes, they are both my signatures.

9 Q. And are there any other corrections or clarifications  
10 which you wish to make to this statement?

11 A. No.

12 Q. And can you confirm, please, that the contents of your  
13 statement are true?

14 A. They are indeed. They are true.

15 MR SMOUHA: Thank you. If you wait there, Mr Douglas,  
16 Ms Demetriou will have some questions for you.

17 Cross-examination by MS DEMETRIOU

18 MS DEMETRIOU: Good morning, Mr Douglas.

19 A. Good morning.

20 Q. You joined NatWest in October 1998; correct?

21 A. That is correct.

22 Q. And NatWest was acquired by Royal Bank of Scotland in  
23 the year 2000.

24 A. That is correct.

25 Q. And you stayed at RBS until 2005; correct?

1 A. That is correct.

2 Q. And you say at paragraph 10 of your statement {A/10/5}

3 that throughout your time at NatWest and RBS, you worked

4 in the issuing part of the business; correct?

5 A. That is correct.

6 Q. And you also say that whilst you were working at NatWest

7 and RBS, you were not involved in the setting of

8 interchange fees.

9 A. That is correct.

10 Q. And you joined Mastercard in 2005 and worked there until

11 2022, until quite recently; correct?

12 A. I -- yes, and I still work within the Mastercard

13 organisation, albeit within Vocalink, which is

14 a wholly-owned subsidiary.

15 Q. And you've just explained that you are now not interim

16 CEO, but permanent CEO of Vocalink.

17 A. That's correct.

18 Q. In the period covered by this claim, so from -- so

19 obviously that pre-dates you, but until 2008, you were

20 responsible for the relationship between Mastercard and

21 Barclaycard; correct?

22 A. Yes, I was.

23 Q. And during your time at Mastercard, you also weren't

24 involved in the setting of interchange fees; correct?

25 A. No, I wasn't involved in the setting of interchange



1 fees.

2 Q. And you say at paragraph 11 of your statement that  
3 you -- while you were at NatWest and RBS, you were aware  
4 that cost studies were being carried out for the  
5 Mastercard scheme by Edgar Dunn & Company.

6 A. I --

7 Q. So you were aware of that.

8 A. I was.

9 Q. But because you weren't involved in setting interchange  
10 fees, you don't know whether the fees were set on the  
11 basis of those cost studies or not; correct?

12 A. That is correct.

13 Q. Now, one of the main issues that you discuss in your  
14 statement is the significance of default interchange  
15 rates to banks; correct?

16 A. That is correct.

17 Q. And you explain in your statement how banks might react  
18 to a divergence in the interchange fees offered by  
19 Mastercard and other schemes; correct?

20 A. I do indeed.

21 Q. And in particular, you give evidence about switching  
22 between schemes, and I want to ask you some questions  
23 now about this area of your evidence.

24 Now, if we look at paragraph 30, so that's  
25 {A/10/13}, but I think you have it in hard copy in front

1           of you -- it will also come up on the screen,  
2           Mr Douglas.

3       A.   Yes.

4       Q.   You say there that:

5                 "The near demise of Maestro in the United Kingdom  
6                 provides a clear illustration of what is likely to  
7                 happen to a scheme in the UK market if it is no longer  
8                 competitive."

9                 Do you see that?

10      A.   I do indeed.

11      Q.   And let's have a look at what you say about that and  
12             then I'm going to ask you some questions about it once  
13             we've established what you say.   Okay?

14      A.   Okay.

15      Q.   So if we look at paragraph 34, you say there that:

16                 "In the early to mid-2000s, [Maestro's] interchange  
17                 fees ... were significantly lower than Visa's and were  
18                 therefore uncompetitive when issuers were deciding which  
19                 debit card to issue to their customers."

20                 Do you see that?

21      A.   I do.

22      Q.   Then at paragraph 35, you say:

23                 "... it was common knowledge in banks at that time  
24                 that Mastercard was in a very unfavourable position ...  
25                 due to ... interchange issues."

1 Yes?

2 A. Yes, I see that.

3 Q. And then at paragraph 36, you say that {A/10/14}:

4 "While Mastercard and Visa were able to offer  
5 issuers roughly equivalent financial incentives, the  
6 Maestro interchange rates were substantially lower than  
7 Visa's. This gave issuers a clear incentive to switch  
8 from issuing Maestro cards to Visa debit cards."

9 Then we see at 37, you say in the second sentence:

10 "... the main problem with Maestro was its  
11 interchange fees."

12 You see that?

13 Then at 38, you say:

14 "As a result, Mastercard started to lose major  
15 issuer debit customers."

16 Then at 39, you say:

17 "The effect ... was dramatic: from a 39% share of  
18 the UK debit market in 2003, Maestro's market share  
19 dropped to 30% in 2006 and to below 3% by 2013."

20 So we can see that your evidence is that the Maestro  
21 scheme lost its market share in the UK because its  
22 interchange fees were lower than Visa's debit card  
23 interchange fees; correct? That's the gist of what  
24 you're saying here.

25 A. Yeah, I'm saying that interchange played a key role in

1           its demise or lack of favourability with other issuers  
2           in the marketplace.

3       Q.   And you gave evidence about this issue, didn't you, in  
4           the Sainsbury's v Mastercard litigation in 2016?

5       A.   I did indeed.

6       Q.   And I want to show you the witness statement you filed  
7           in those proceedings, Mr Douglas.  It's at {H/4/1}, and  
8           perhaps if we could put the two witness statements  
9           side-by-side.  So if we go to {H/4/7} and if we could  
10          put it -- if we could screen share, please, and could  
11          put it next to the paragraphs we were just looking at  
12          {A/10/13}.  If we can go back one page in the current  
13          statement, that would be helpful.  Thank you.

14               Now, we can see that the statements are very similar  
15               and I just want to take you through that.  So if we look  
16               at paragraph 29 of the Sainsbury's statement {H/4/7}, do  
17               you see that's on the left-hand side of the screen?

18       A.   I do.

19       Q.   And if we compare that to paragraph 32 of your current  
20           statement, it's very nearly the same.  Do you just want  
21           to read them both?

22               There's one difference I can see in the last  
23               sentence.  So the word "interim" has been added in the  
24               new statement, in the current statement, in the last  
25               sentence before "default".  Can you see that?

1 A. Yes.

2 Q. And then if we look at paragraph 30 in your Sainsbury's  
3 statement, that is the same as paragraph 33 in your  
4 current statement. Do you just want to read those just  
5 to double-check that I'm right about that?

6 A. Indeed. They are the same.

7 Q. And then if we look at paragraph 31, if we can go over  
8 the page in the Sainsbury's statement in the left-hand  
9 document {H/4/8}, please, can you see -- and if we  
10 scroll a little bit so we see 34 and 35 of the current  
11 statement, please {A/10/13}. So in the right-hand  
12 document, the current statement, A/10, yes, exactly.

13 So if you look, please, at paragraph 31 of the  
14 Sainsbury's statement, what we see is that's effectively  
15 been split between 34 and 35 of this statement. So do  
16 you see the last part of paragraph 31 says {H/4/8}:

17 "Even though I worked in the credit card  
18 businesses ..."

19 That's now 35 of the current statement.

20 A. Yes. If you just give me a second to read it,  
21 I'll confirm.

22 Q. Of course. (Pause)

23 A. Yes, that is correct.

24 Q. And if we look at paragraph 31 of the Sainsbury's  
25 statement, we see that one difference is that statement

1           refers to a pre-read for Mastercard's 15th European  
2           Interchange Committee agenda item 1, dated 3 July. So  
3           there's a document referred to there which has been  
4           taken out of the current version. Did -- your  
5           solicitors took that out, did they?

6       A. When I was preparing my statement with the help of my  
7           solicitors, yes, it's obviously been taken out.

8       Q. Did you ask them to take that document out or did they  
9           just do that?

10      A. Well, I would have agreed as I worked with them on this  
11          statement or they transcribed my statement.

12      Q. Well, that doesn't quite answer my question. Did you  
13          ask them to take the document out or did they suggest  
14          it?

15      A. I don't believe I asked them to take it out and I cannot  
16          recall if they suggested it.

17      Q. Alright. Moving on and comparing paragraph 32 of your  
18          Sainsbury's statement to paragraph 36. So if we can  
19          just go over the page to {A/10/14} of the current  
20          statement. Do you just want to look at those? We can  
21          see that they're very similar.

22      A. So 32 versus --

23      Q. 32 versus 36.

24      A. Okay. Let me just read them and I'll come back to you.

25          (Pause)

1 Yes.

2 Q. So what you've done in the current statement is you've  
3 added a sentence at the end, haven't you? You've said:

4 "This gave issuers a clear incentive to switch from  
5 issuing Maestro cards to Visa debit cards."

6 So you're really emphasising the point that you're  
7 making in relation to the divergence in interchange  
8 fees; correct?

9 A. I am indeed.

10 Q. And then we also see in your Sainsbury's statement at  
11 paragraph 32 that what's being -- that what's said  
12 there -- we see a reference to Maestro "default  
13 interchange rates". Do you see that? But in  
14 paragraph 36 of your current statement, the reference to  
15 "default" has come out. Do you see that?

16 A. In 32 of my current statement?

17 Q. 36 of your current statement.

18 A. Sorry.

19 Q. So if we can go back to -- thank you. So in terms of  
20 looking at the differences, we see the reference to the  
21 Maestro "default interchange rate".

22 A. Yes, I can see --

23 Q. And then the word "default" has come out. Do you see  
24 that?

25 A. I see that, yes.

1 Q. And did you ask for that word to come out or did that  
2 come out in the draft that your solicitors sent you?

3 A. I don't recall whether I asked for it to be removed or  
4 not. It didn't seem important at the time that I was  
5 drafting my statement.

6 Q. Right. Well, let's look at paragraph 33 in the  
7 Sainsbury's statement, please, and that's exactly the  
8 same as paragraph 37 in the current statement except,  
9 again, the word "default" is missing. Do you see that?

10 A. I do.

11 Q. And then if we look at paragraph 34 of the Sainsbury's  
12 statement, that's identical to paragraph 38 of your  
13 current statement. Do you just want to take a minute to  
14 look at that? (Pause)

15 A. Yes, that's correct.

16 Q. And then if we compare paragraph 35 of Sainsbury's with  
17 paragraph 39 of this statement, you can see it's nearly  
18 the same, but the word "dramatic" has been put in  
19 instead of "obvious". Do you see that?

20 A. Yes.

21 Q. And whoever carried over the change didn't carry it over  
22 properly because what we see in the current statement  
23 is, "The effect of was dramatic", and so that doesn't  
24 make grammatical sense, so they probably should have  
25 carried over the words "of this disparity"; correct?



1       A. Perhaps. I was very clear in my mind, given my time in  
2       Mastercard and indeed Royal Bank of Scotland, that it  
3       was a dramatic drop in our share of Maestro cards.

4       Q. Alright.

5       A. So I feel "dramatic" was a reasonable word to use.

6       Q. Yes, and we'll come back to that, but at the moment  
7       I'm just looking at the differences or similarities,  
8       rather, between the two statements.

9       And if we go to paragraph 36 of Sainsbury's, we can  
10      see that that's similar to paragraph 40 of your current  
11      statement. Do you want to just have a look? And when  
12      you finish reading paragraph 36, because it's split  
13      between two pages, if you just say and we can go over  
14      the page. (Pause)

15     A. Okay, you can go over the page, please. (Pause)

16      And, sorry, what am I comparing it to on my current  
17      statement?

18     Q. So you are comparing 36 with 40. They look the same to  
19      me.

20     A. Yes, they are.

21     Q. And then if we look at 37 of Sainsbury's, so over the  
22      page on the left-hand document, thank you, we see that  
23      that's the same as paragraph 41 of the current  
24      statement, so if we could please scroll {H/4/9},  
25      {A/10/14}.

1       A. Yes, it is.

2       Q. And then there's a new paragraph 42 that's been added to  
3       the current statement. Do you see that?

4       A. Yes.

5       Q. Now, I want to look at paragraph 4 of your current  
6       statement, at {A/10/2}, please, and you say here that:  
7       "This statement has been prepared following  
8       discussions with Freshfields. Freshfields prepared the  
9       first draft of this witness statement ..."

10       You then reviewed it and revised it in an iterative  
11       process before signing the statement of truth.

12       So just to understand, we've seen from the  
13       comparison that we've just been making that Freshfields  
14       must have prepared this section of your statement on the  
15       basis of your Sainsbury's statement; correct?

16       A. Yes, I believe so.

17       Q. So Freshfields presented you with that draft for review,  
18       did they?

19       A. My recollection from the process was we discussed it  
20       first and then we reviewed a draft secondly.

21       Q. Right, but these are not your words -- your current  
22       statement, the sections I've just shown to you, those  
23       are not your words in interview, are they, because we  
24       can see they're your words from your previous statement?

25       A. Yes. Well, they are my words.

1 Q. Right. So you were -- is this right? You were  
2 interviewed by Freshfields; correct?

3 A. Yes, we had a discussion.

4 Q. A discussion, and during the course of that discussion,  
5 you discussed Maestro, did you?

6 A. We did --

7 Q. So --

8 A. -- or I did, actually.

9 Q. -- the section of the witness statement I've just shown  
10 you, that's -- is that -- we've seen that it's taken  
11 from your Sainsbury's statement, but are you also saying  
12 that it reflects the words you used in the discussion  
13 with Freshfields?

14 A. Broadly speaking, yes.

15 Q. Well, I'm not interested in broadly speaking,  
16 Mr Douglas. I want to understand how this statement was  
17 produced. So you had a discussion with Freshfields.  
18 It's highly unlikely, isn't it, that in that discussion,  
19 you're just going to be using exact the same words that  
20 you used in your Sainsbury's statement? The reality of  
21 the matter is you were presented with a draft that was  
22 adapted from your Sainsbury's statement, adapted very  
23 closely; that's correct, isn't it?

24 A. Certainly my Sainsbury's statement was reflected in the  
25 current statement, as you've pointed out, but obviously

1 as part of my discussion with Freshfields, we were  
2 talking about this particular case and obviously my  
3 experience, my knowledge and indeed my previous  
4 assertions around what happens in the UK credit card  
5 market while I was at Royal Bank, NatWest and indeed  
6 Mastercard.

7 MR JUSTICE ROTH: Did you -- in your discussions, did you  
8 refer to the fact that you'd made a statement about this  
9 before in the Sainsbury's litigation?

10 A. Yes, I did. I referred to the fact that I had made  
11 comments about my market experience both at Royal Bank  
12 and indeed at Mastercard, sir.

13 MR JUSTICE ROTH: In the Sainsbury's --

14 A. In the Sainsbury's.

15 MR JUSTICE ROTH: Yes.

16 MS DEMETRIOU: And when you had your discussion with  
17 Freshfields, did you have -- did they send you in  
18 advance of that discussion your statement from  
19 Sainsbury's?

20 A. They certainly provided me with a copy of my statement,  
21 yes. I also had a copy of it in my own possession in  
22 any case.

23 Q. So when you were having your discussion with  
24 Freshfields, were you referring to the statement, the  
25 copy of the statement, from Sainsbury's?

1 A. Yes, I was certainly looking at it as part of my  
2 discussion with Freshfields.

3 Q. And do you know why that statement is not listed as  
4 a document to which you referred during the course of  
5 preparation of your statement? Because it's not. Do  
6 you know why it's not listed?

7 A. No, I --

8 Q. But you did have reference -- you did make reference to  
9 it, you're saying.

10 A. I did make reference to it, yes.

11 Q. So can we agree that the section that I took you to that  
12 we compared very closely to the Sainsbury's statement  
13 does not reflect your words spoken at interview  
14 verbatim? Instead, they reflect the previous statement  
15 you'd made in the Sainsbury's case.

16 A. What the statement reflects is my understanding, my  
17 experience and my knowledge of the UK credit card market  
18 during the period in question from 1998 to 2008.

19 Q. Mr Douglas, I understand that, but I'm asking you  
20 a slightly different question, and the question  
21 I'm asking you is this. We have a section of your  
22 statement that we've gone through and I'm asking you:  
23 does that reflect the verbatim words you used in  
24 interview with Freshfields or does it instead -- was it  
25 instead adapted from your Sainsbury's statement?

1 I'm asking you a procedural question about how this was  
2 made. My question is: does it reflect your verbatim  
3 words in an interview with Freshfields?

4 A. I cannot categorically state that it reflects my  
5 verbatim words, but what I can state is it reflects my  
6 knowledge and my experience and, indeed, the situation  
7 as I saw it in the conversation that I had with  
8 Freshfields.

9 MR JUSTICE ROTH: Well, did you say to -- you say you made  
10 reference to the statement that you had made previously  
11 in the Sainsbury's case. Did you have that with you  
12 when you had the discussion with Freshfields, your  
13 previous statement?

14 A. I did.

15 MR JUSTICE ROTH: Yes, and did you say something like,  
16 "Well, I've dealt with that in this part of my earlier  
17 statement", or something?

18 A. Yes, I would have made reference to components of it, as  
19 I said -- for example, "As I said in my statement in  
20 Sainsbury's, X, Y, Z".

21 MR JUSTICE ROTH: Yes.

22 A. Does that make sense, sir?

23 MR JUSTICE ROTH: Yes.

24 MS DEMETRIOU: Mr Douglas, I showed you in a couple of  
25 paragraphs the references to a "default interchange fee"

1           had been removed. Yes? We saw that.

2       A. Yes, we did.

3       Q. And I'm going to ask you again: did you ask for those

4           words to be removed?

5       A. No, I didn't ask for those words to be removed.

6       Q. You didn't. So Freshfields removed those words, then;

7           correct?

8       A. Well, the way I would look at it is it's a reflection of

9           the conversation I had with Freshfields.

10      Q. Well, hang on, Mr Douglas. Did you say in your

11          conversation -- so is it your position that the word

12          "default" is irrelevant?

13      A. In the context of the conversation I had with

14          Freshfields, I was talking about interchange rates.

15          I wasn't necessarily specifically talking about

16          particular types of interchange rates.

17      Q. Well, I don't think you're answering my question. We've

18          seen that your statement almost precisely reflects your

19          previous statement. There has been a deliberate change

20          in two paragraphs. The word "default" has been taken

21          out. You've said you didn't ask for that word to be

22          taken out; correct? That wasn't your request; is that

23          right?

24      A. No, it wasn't my request to take that word out, in part

25          because I didn't -- it wasn't part of the conversation

1           that I had with Freshfields. I was talking about  
2           interchange rates, so I thought it was clearly a fair  
3           and accurate reflection of the conversation that we had.

4       Q.    Alright. So is the position this: you didn't ask for  
5           them to be taken out, those words, the reference to  
6           "default", but you noticed they had been taken out in  
7           the draft, correct, or did you not notice?

8       A.    I didn't notice.

9       Q.    You didn't notice, okay.

10           Do you appreciate that the purpose of this trial is  
11           to determine how important default interchange rates  
12           are? Do you know that that's really one of the purposes  
13           of this trial?

14       A.    I do, yes.

15       Q.    And it rather looks like whoever took them out wants to  
16           de-emphasise the default element of the interchange  
17           fees. Do you see that? Do you agree with that?

18       A.    I'm not sure that I agree with it, no.

19       Q.    You can't comment on it; is that right?

20       A.    I -- that would be a fair reflection of my position,  
21           yeah.

22       Q.    Alright. Now, you recall, don't you, that this Tribunal  
23           in the Sainsbury's case didn't accept your evidence that  
24           the disparity in Maestro and Visa interchange fees was  
25           the prime reason for the collapse of the Maestro scheme;



1 correct?

2 A. No, I don't recall that.

3 Q. You don't recall that. Well, let's have a look at it,  
4 Mr Douglas. Let's have a look at the Tribunal's  
5 judgment in Sainsbury's v Mastercard. It's at {G/13/1}.

6 A. May I add I don't recall it because I didn't read the  
7 judgment.

8 Q. You didn't read the judgment. I'll take you through it,  
9 so if you have any questions we can clarify them as we  
10 go along.

11 Now, let's look at G/13. That's the front page of  
12 the -- the first page of the judgment and if we go to  
13 page 33, please {G/13/33}, this is the judgment and  
14 I'm looking at the heading -- do you see the heading  
15 two-thirds of the way down "MasterCard's witnesses"?

16 A. I do.

17 Q. If we go over the page, please {G/13/34}. So:

18 "(2) Keith Douglas ..."

19 That's you, and then we see this. We see that it  
20 explains what your experience was at that stage.

21 A. Yes.

22 Q. It says that you gave one statement and you were called  
23 to give evidence on Day 8:

24 "In relation to the industry practice of issuing  
25 payment cards, Mr Douglas was authoritative and

1           impressive. He was less so in relation to the  
2           significance of the interchange fee and its effect on  
3           Maestro - a topic we consider in some detail below - but  
4           that was because he had only been involved on the  
5           periphery of the debit-card competition between the Visa  
6           debit card, the Maestro debit card and the MasterCard  
7           debit card. At all times, he did his best to assist the  
8           Tribunal."

9           Do you accept that you were on the periphery of the  
10          debit card competition between Visa and Maestro?

11        A. Yeah, I think I do in the context that my experience was  
12          more on the credit card side of the UK payments market,  
13          given the relationships that I was managing. However,  
14          I was part of the wider Mastercard organisation and  
15          therefore was familiar and had some understanding of  
16          what was playing out in the marketplace, including the  
17          fact that I managed the customer, who was also  
18          cognisant- aware of some of the issues that were playing  
19          out in the marketplace in the context of debit.

20        Q. So --

21        A. Anyway, I think my statement -- if I go back to my own  
22          witness statement, I think I do make that clear.  
23          I can't recall which paragraph it is, but I certainly  
24          make it clear that -- I think it's around 30 or  
25          thereabouts -- of my role in debit versus credit in the

1 payments market.

2 Q. Yes, Mr Douglas, I'm not trying to catch you out here.  
3 I'm just trying to ascertain whether you would accept  
4 the description of "periphery" is fair, and I think  
5 you've said "yes".

6 A. Yeah, "periphery" is a broad word, but, you know,  
7 I think that is -- or at least my position in my current  
8 statement is consistent with the fact that my experience  
9 was more on the card -- the credit card market, but  
10 nonetheless, I had knowledge of what was happening in  
11 the debit card market in the UK at that time.

12 Q. Now, we've seen that at paragraphs 38 to 39 of your  
13 witness statement in these proceedings, you've said that  
14 the reason for the dramatic loss of Maestro's market  
15 share was that HSBC and RBS switched their debit card  
16 portfolios from Maestro to Visa; correct?

17 A. That's correct.

18 Q. And if we go -- in this judgment, if we could go to  
19 page 160 {G/13/160}, please, and paragraph 251 of the  
20 Tribunal's judgment. The Tribunal says:

21 "The evidence of the witnesses called by MasterCard  
22 was firmly that HSBC and RBS had flipped their  
23 portfolios to Visa Debit primarily as a result of the  
24 interchange fee differential between Maestro and Visa  
25 Debit."

1           And then you see a calculation of the differential:

2           "Mr Douglas stated that '[i]t was common knowledge  
3           in banks at that time that MasterCard was in a very  
4           unfavourable position in the UK debit market due to its  
5           interchange issues ...'"

6           We've seen the statement in your statement in these  
7           proceedings:

8           "... The effect of this disparity in rates was  
9           obvious ..."

10          Well, here you've said it's "dramatic" instead of  
11          "obvious"; yes? We saw that.

12       A. Yes.

13       Q. "... from a 39% share of the UK debit market in 2003,  
14       Maestro's market share dropped to 30% in 2006 and to  
15       below 3% [in] 2013."

16          Then we see Mr Perez giving similar evidence and  
17          then we see Mr Willaert giving similar evidence.

18          And then if we go over the page, please {G/13/161},  
19          you can see the rest of the paragraph there and we've  
20          seen that -- if we just go back to the footnote, you can  
21          see the reference to the paragraphs in your statement in  
22          the Sainsbury's case, Douglas 1/31 to 35, that we've  
23          looked at, that are in nearly identical form to your  
24          current statement; correct?

25       A. Yes, although I can't exactly remember what was in

1 31-35.

2 Q. Don't worry about that.

3 Now, if we then go to paragraph 252 on page 161  
4 {G/13/161}, the Tribunal says this. They say:

5 "We consider that this evidence sits uneasily with  
6 the contemporaneous documentary evidence, which was put  
7 to these witnesses in cross-examination. We do not  
8 accept the 'doomsday' picture painted by MasterCard's  
9 witnesses, whereby they contended that the only reason  
10 for the collapse of Maestro in the UK was the level of  
11 its Interchange Fee.

12 "The reality is incontestably more complex. The  
13 immediate cause of the collapse of Maestro was the  
14 decision of two major ... Banks - RBS and HSBC - to  
15 'flip' their card portfolios from Maestro to Visa Debit.  
16 The key question is why they elected to do so."

17 And then if we look at 254:

18 "Two of the most important documents that shed light  
19 on the thinking of RBS and HSBC are analyses conducted  
20 by MasterCard itself, as part of an assessment as to why  
21 the RBS and HSBC procurements had been lost to Visa.  
22 The first document, dated 14 January 2008, is a document  
23 entitled 'UK debit strategy'. The second document is  
24 a set of slides dated 31 August 2009 entitled: 'UK  
25 Strategy Development'. We consider these documents in

1 turn."

2 Now, I'm going to go to what the Tribunal says about  
3 those documents, but I first, Mr Douglas, want to take  
4 you to the Tribunal's conclusion so we can see where  
5 we're heading, and that's on page 165 {G/13/165} and  
6 it's paragraph 259. So:

7 "The evidence relating to Maestro was described by  
8 Mr Hoskins in opening as the 'prize evidence' in the  
9 case. We find the contention that it was ..."

10 MR JUSTICE ROTH: Just to interrupt you, Mr Hoskins was  
11 the --

12 MS DEMETRIOU: He was Mastercard's counsel.

13 MR JUSTICE ROTH: Yes.

14 MS DEMETRIOU: Thank you, sir:

15 "We find the contention that it was the Interchange  
16 Fee differential between Visa and Maestro that was the  
17 main cause of the collapse of the Maestro market in the  
18 UK to be unsubstantiated by the facts, and we reject it.  
19 Helpful although we found the evidence of MasterCard's  
20 witnesses in general, we do not accept their evidence on  
21 this point, preferring the analysis in MasterCard's own  
22 contemporaneous documents. We find that MasterCard has  
23 established no more than that Maestro's lower  
24 Interchange Fee was one of a number of factors which led  
25 to the decision of HSBC and RBS to reject MasterCard's

1           bid in the procurement processes. Taking the evidence  
2           as a whole, we consider that the combined Maestro/Debit  
3           MasterCard offering was unattractive to these banks  
4           compared with the simplicity of the well-established  
5           Visa Debit offering."

6           Now, you don't refer in your witness statement to  
7           the fact that the Tribunal in Sainsbury's rejected your  
8           evidence on Maestro, do you, Mr Douglas?

9           A. I don't.

10          Q. And you haven't referred in your witness statement to  
11          either of the two contemporaneous documents that the  
12          Tribunal considered were important and which led it to  
13          reject your evidence, do you?

14          A. I don't, and I'm not sure I'm aware of what those  
15          two contemporaneous documents contain.

16          Q. Well, Mr Douglas, you were cross-examined about them at  
17          length. Do you not remember that?

18          A. I do remember being cross-examined, but not about every  
19          specific document.

20          Q. Well, those documents formed a significant part of your  
21          cross-examination, so you were definitely aware of them  
22          at the time. Are you saying you now can't remember  
23          them?

24          A. No, what I'm saying is that when I was giving evidence  
25          then, a large number of documents were placed in front

1 of me that I had no understanding of or had no  
2 visibility of at the time of the case, and I made that  
3 point clear in relation to some of those documents at  
4 that point in time. So this could have been one of  
5 those documents or not. I just can't recall.

6 Q. Right. So is this correct? You remember being  
7 cross-examined about contemporaneous documents. You  
8 must remember that, Mr Douglas.

9 A. Well, not necessarily focusing on the word  
10 "contemporaneous". I do remember being cross-examined  
11 on documents.

12 Q. About documents.

13 A. About documents, yes.

14 Q. And do you remember being cross-examined about documents  
15 relevant to the Maestro issue, do you?

16 A. Of course I do.

17 Q. And yet when you were putting your witness statement  
18 together for these proceedings, did you not say to your  
19 solicitors, "Well, actually, there are some documents  
20 relevant to this because I was cross-examined at length  
21 about them"?

22 MR SMOUHA: Sir, this is slightly unfair because the premise  
23 of the question, I think, is that these are documents  
24 which would have been appropriate for Mr Douglas --  
25 would have seen at the time and would have been



1 appropriate to discuss in his witness statement.

2 I understand from Mr Cook that is not the case. Those  
3 two documents are not documents which Mr Douglas would  
4 have seen at the time and therefore would not have been  
5 appropriate for him to be showing or discussed in his  
6 witness statement.

7 MR JUSTICE ROTH: Yes, though I think what is being said is:  
8 well, they were put to you when you last gave the  
9 evidence in the statement that was before everyone in  
10 the discussion and that Mr Douglas could have mentioned  
11 that, "Well, there were various documents relating to  
12 this that were shown to me when I gave pretty much the  
13 same evidence".

14 MR SMOUHA: If the suggestion is that he has omitted to  
15 refer to documents which he should have referred to,  
16 then they would have to be identified as documents which  
17 it would have been -- that he would have known of at the  
18 time and would have been appropriate to refer to. Sir,  
19 I haven't objected earlier to questions in relation to  
20 this judgment and there is obviously -- first of all,  
21 there's a question of admissibility, and that will be  
22 a matter of submission.

23 Secondly, this is not the only judgment in  
24 proceedings in which Mr Douglas gave evidence, and  
25 I understand that the findings of this Tribunal are not,

1 in material respects, the same as those in -- of the  
2 court in the other proceedings, in the Asda proceedings.

3 So, sir, as I say, I didn't object earlier, but  
4 perhaps there is a limit to what is appropriate to ask  
5 Mr Douglas about the judgment, and the basis of the  
6 question which -- where my learned friend started, which  
7 was, "You see, Mr Douglas, the basis upon which your  
8 evidence was rejected", again, one might question  
9 whether that's appropriate for -- to debate with the  
10 witness, whether his evidence was or wasn't rejected, as  
11 opposed to asking about documents that he did or did not  
12 see at the time.

13 MR JUSTICE ROTH: Yes. Well, I think Ms Demetriou is  
14 entitled to say, "Well, various documents were put to  
15 you", including on the Maestro matter, which Mr Douglas  
16 does remember, and did he mention, when having the  
17 discussion when he wanted to give the same evidence,  
18 that there are apparently various documents that  
19 Mastercard has about this, but he himself doesn't have  
20 them. But I don't know how far you want to go into the  
21 documents.

22 MS DEMETRIOU: A little bit further, sir, because -- I do  
23 want to go a bit further and you'll see it's not going  
24 to take much longer, but it obviously is important  
25 because the witness has given identical evidence and

1           just hasn't referred to what the Tribunal made of that  
2           evidence.

3       MR JUSTICE ROTH: Well, he said very candidly he didn't read  
4           the judgment --

5       MS DEMETRIOU: Well --

6       MR JUSTICE ROTH: -- and the idea that all the witnesses in  
7           the trials that one conducts avidly wait for the  
8           judgment of the court and then read through long  
9           judgments is -- I think the lawyers do, but I think in  
10          many cases the witnesses don't, and I see no reason to  
11          doubt that evidence that Mr Douglas didn't read it and  
12          was busy with other things when it came out some months  
13          after he'd given evidence.

14       MS DEMETRIOU: No. Well, perhaps let me ask this question,  
15          then.

16                So, Mr Douglas, we've established that when you were  
17                working on your current statement with Freshfields, you  
18                did that by reference to your statement in the  
19                Sainsbury's case.

20       A. That's correct.

21       Q. Did you not think that it was important to look at  
22          what -- and, sorry, and then you recall being  
23          cross-examined on that statement in the Sainsbury's  
24          case.

25       A. Sorry, I recall being cross-examined, obviously, at the

1           Sainsbury's case on my statement, yes.

2           Q. And you've said that you never read the judgment, so you  
3           never saw what the Tribunal made of your statement; is  
4           that correct?

5           A. I never read the judgment, no, that's correct.

6           Q. Did you not think when you were effectively reproducing  
7           your Sainsbury's evidence in this case that it would  
8           have been right to have read the judgment to see what  
9           the Tribunal made of your evidence last time around?  
10          Did you not think that that was a relevant thing to do?

11          A. I guess where -- I was thinking in the context of my  
12          experience, both at Royal Bank and NatWest and indeed at  
13          Mastercard, my experience of what was happening in the  
14          marketplace, my experience of being an issuer and the  
15          various things that I took into account, whether that  
16          was in relation to revenue or costs. I honestly did not  
17          think about referring to the judgments that had been  
18          previously given.

19          Q. Well, Mr Douglas, that might be reasonable if you were  
20          starting with a blank sheet in these proceedings, giving  
21          evidence about your recollection of the market, but you  
22          very much weren't starting with a blank sheet, were you?  
23          You were starting with your Sainsbury's statement.

24                 Do you accept now that it was inappropriate for you  
25          not to enquire of whether or not the evidence accepted

1           your Sainsbury's statement? Did you not think it was  
2           relevant to look at the judgment?

3       MR SMOUHA: I'm sorry, sir --

4       MR JUSTICE ROTH: Well, I think the answer is clearly  
5           Mr Douglas didn't think it was relevant to look at the  
6           judgment, because he didn't look at it, and he felt --  
7           he gave evidence he thought was correct last time and he  
8           hadn't seen the judgment not accepting it. So that's  
9           that, isn't it?

10      MS DEMETRIOU: Alright.

11      MR JUSTICE ROTH: It's more a comment rather than  
12           a question.

13      MS DEMETRIOU: Alright.

14      MR SMOUHA: Sir, can I just add I don't accept that it would  
15           have been appropriate to show Mr Douglas the judgment  
16           and to ask him whether, in the light of that, he wanted  
17           to change the evidence that --

18      MR JUSTICE ROTH: Well, whether it would or wouldn't, that's  
19           not a question for him.

20      MR SMOUHA: No --

21      MR JUSTICE ROTH: Not a question for Mr Douglas. So I think  
22           we've exhausted that line and it's a matter for  
23           submission later.

24      MS DEMETRIOU: Sir, I do want to look at the two documents  
25           referred to by the Tribunal and see what, if anything,

1 Mr Douglas can do to help us with those.

2 So if we go to paragraph 161. And these documents  
3 don't seem to have been disclosed by Mastercard in these  
4 proceedings, so the judgment really is the only place  
5 I can take them from. If we go --

6 MR JUSTICE ROTH: Well, you could have asked for them.

7 MS DEMETRIOU: Yes, this point only became -- the importance  
8 of this point only became apparent very recently, but  
9 yes, we will now ask for them. If we go to page --

10 MR JUSTICE ROTH: Well, I'm a bit concerned we are putting  
11 documents that have not been -- taking documents out of  
12 a previous judgment, and if you're going to put  
13 documents, we should put the documents. This is  
14 a public judgment. If you think they're relevant, you  
15 could have asked for them at any point.

16 MS DEMETRIOU: Well, sir, I'm going to do what I can on the  
17 basis of the description, because we don't have them and  
18 I have Mr Douglas in the box now and I want to see if he  
19 can help me with them and if he can't, he can't. But he  
20 was cross-examined at length on this issue. If we go to  
21 page --

22 MR JUSTICE ROTH: Ms Demetriou, if you're going to ask him  
23 about a document which is -- unless it's quoted at  
24 length --

25 MS DEMETRIOU: It is quoted, sir.

1 MR JUSTICE ROTH: Well, show me the paragraph.

2 MS DEMETRIOU: Yes. So if we go to paragraph 255 on

3 page 161, I'm going to ask him about the substance of

4 what's quoted {G/13/161}.

5 MR SMOUHA: Sir, I'm afraid this is not an acceptable way to

6 proceed. This document could have been asked for.

7 Clearly from the line of questions, it would be

8 important to see the whole document and for Mr Douglas

9 to be able to see whether it's a document he saw at the

10 time.

11 MR JUSTICE ROTH: Let me just see what 255 says.

12 MS DEMETRIOU: Sir, it's really not --

13 MR JUSTICE ROTH: Just a moment, please. (Pause)

14 Ms Demetriou, why was the document not asked for?

15 MS DEMETRIOU: Sir, it hadn't been disclosed. The

16 importance of this document only very recently came

17 clear to me over the weekend and so there hasn't really

18 been time. I've had my hands full, as you can imagine.

19 We will ask for it. I'm not going to ask unfair

20 questions and it really isn't appropriate for Mr Smouha

21 to continually interrupt me.

22 MR JUSTICE ROTH: I mean, it may be that you were only aware

23 of it at the weekend. You have a team of juniors and

24 a large team of solicitors. Here is a public judgment

25 involving Mastercard, something you would self-evidently

1 look at in the course of the extensive preparation for  
2 time-- for this hearing, not necessarily you personally,  
3 but your team. To see whether any of the same witnesses  
4 gave evidence is a fairly standard procedure.

5 It's deeply unsatisfactory where you have an extract  
6 from the document of how long, we have no idea, to then  
7 put those parts, and Mr Douglas is unable to respond to  
8 any questions by saying, "Yes, but in the paragraph  
9 below, it says this ..."

10 MS DEMETRIOU: Sir, I understand what you are saying, but  
11 the position, our position, is that it's deeply  
12 unsatisfactory from our perspective, because what's gone  
13 on here is that Mastercard is relying on a witness  
14 statement which is identical nearly to evidence which  
15 they adduced in previous proceedings. They had a duty  
16 not to mislead and so these documents obviously should  
17 have been disclosed because the Tribunal in the  
18 Sainsbury's proceedings rejected the very evidence that  
19 is being put forward now on the basis of these  
20 documents.

21 MR JUSTICE ROTH: You can obviously rely in submission on  
22 the conclusion of the Tribunal in Sainsbury's and it's  
23 not inadmissible to draw attention to that -- well, it  
24 may not be binding, but it's not inadmissible -- and the  
25 conclusion that they have reached. You are also



1           entitled to draw attention to the differences between  
2           this statement and the previous statement, such as the  
3           reference to "default".

4       MS DEMETRIOU:   Yes.

5       MR JUSTICE ROTH:   But to actually seek to cross-examine on  
6           a document by reference to an extract from it in another  
7           judgment seems to me quite unfair to Mr Douglas.

8       MS DEMETRIOU:   Well, sir, can I do it this way?  I want to  
9           ask substantive questions based on the extract and we'll  
10          see where we get to.

11      MR JUSTICE ROTH:   I mean, if you want to put any sort of  
12          factual point --

13      MS DEMETRIOU:   I do.

14      MR JUSTICE ROTH:   -- not by reference to the document, sort  
15          of, "Wasn't the reason for demise this --"

16      MS DEMETRIOU:   Yes, I'll do it like that --

17      MR JUSTICE ROTH:   -- (overspeaking) --

18      MS DEMETRIOU:   I'll do that.

19      MR JUSTICE ROTH:   -- in other words, challenging what he  
20          said in the current witness statement.

21      MS DEMETRIOU:   Yes.

22                So it's correct, isn't it, Mr Douglas, that Visa was  
23                generally putting forward attractive financial  
24                proposals, aside from the question of interchange fees;  
25                correct?

1 A. As I said in my witness statement, there were generally  
2 two areas that were of interest to issuers when  
3 considering a payment scheme; financial proposals that  
4 the scheme offered, such as marketing funds or rebates  
5 or discounts, as well as interchange. So I think, yes,  
6 there's more than interchange.

7 Q. And it's correct, isn't it, that Visa Debit was better  
8 established in the market?

9 A. Which market are you referring to?

10 Q. In the debit card market. So Visa Debit was better  
11 established than Maestro; correct?

12 A. I don't necessarily agree with that. At the time -- at  
13 one point, obviously, Visa Debit had 60% market share  
14 based on my statement and Maestro had 40%.

15 Q. So Visa Debit was established first in the market,  
16 correct, and Maestro entered later?

17 A. I can't recall.

18 Q. And in the UK market, there was a lower international  
19 acceptance of Maestro outside Europe, correct,  
20 particularly in the United States?

21 A. Sorry, could you rephrase that question or repeat?

22 Q. There was a lower international acceptance of Maestro  
23 outside Europe, particularly in the USA.

24 A. Yes, Maestro did not have the same acceptance level in  
25 some jurisdictions as Visa outside of the UK.

1 Q. And do you accept that that was a key factor in terms of  
2 its competitiveness vis-à-vis Visa Debit?

3 A. I accept that that was one consideration, but also, as  
4 my statement purports, is the level interchange was  
5 another factor. And if you think about the issuer, the  
6 issuers, the vast majority of the transactions that they  
7 manage are in the UK. Therefore, the vast majority of  
8 revenue that will flow from the debit card will be  
9 UK-based and hence that is a serious and important  
10 consideration for them.

11 Q. Do you accept that multiple factors influenced HSBC and  
12 RBS's decisions to migrate their debit portfolios from  
13 Maestro?

14 A. Yes, I think the two factors that you have outlined,  
15 interchange and perhaps acceptance outside of the UK.

16 Q. And marketing as well. There were different marketing  
17 propositions and that also had an effect; do you accept  
18 that?

19 A. What do you mean by "marketing proposition", sorry?

20 Q. Well, Maestro would have been marketed differently to  
21 Visa Debit. Both companies, both schemes, would have  
22 had different marketing strategies; correct?

23 A. I can't -- I can't speak to Visa's strategy --

24 Q. Presumably it wasn't the same strategy, Mr Douglas.  
25 They weren't colluding on their marketing strategies.

1           They had different marketing strategies.

2       A.   Well, I suspect there were differences, but I'm not  
3           quite clear what you're asking me to answer.

4       Q.   I'm asking you to accept that differences in marketing  
5           may well have had a bearing on which scheme was more  
6           attractive to banks.

7       A.   I'm not in a position to answer that question because  
8           I don't know Visa's marketing strategy.

9       Q.   So you don't know one way or another.  You can't --

10      A.   In relation to that particular point about marketing  
11           strategy, no, I'm not able to answer that question.

12      Q.   Alright.

13               Now, we established that you -- I showed you that  
14           one of the changes your current statement makes is to  
15           delete the reference to the interchange committee  
16           meeting agenda of 3 July 2006.  Do you remember?  And  
17           I think you couldn't help me on whether you asked for  
18           that to be removed.

19      A.   Yes.

20      Q.   And if we go to {C16/225}, we can see that document.

21           Now, this is a document you would have seen when you  
22           were preparing your Sainsbury's statement because you  
23           refer to it, Mr Douglas; yes?

24      A.   I'm not sure whether I referred to it or I was  
25           cross-examined on it from Sainsbury's.

1 Q. No, you refer to it. We saw that in your first  
2 statement. We can go back to that, if you like. So  
3 that's at -- let's have a look. That's at H/4. It's  
4 paragraph 31 {H/4/8}.

5 Can we take it that if you refer to a document in  
6 that statement, you would have looked at that document  
7 at the time?

8 A. Yes, you can.

9 Q. Okay. So let's have a look at the document now. It's  
10 at {C16/225/1} and we can see from the title that this  
11 relates to the introduction of Debit Mastercard. Do you  
12 see that?

13 A. I do.

14 Q. And you say in your witness statement for these  
15 proceedings that Debit Mastercard was introduced as  
16 a result of the decline of Maestro; correct?

17 A. Yes, I did.

18 Q. And if we go to page 2 {C16/225/2}, under "Background",  
19 we see this. So:

20 "Recent experience has provided a clear indication  
21 that debit card segmentation is needed in the UK to  
22 provide member banks with the tools to;

23 "differentiate their product across different  
24 customer groupings

25 "broaden card acceptance within, and beyond, the

1 domestic market

2 "leverage increased value from their investment in  
3 debit.

4 "Debit MasterCard is the solution that fills this  
5 space and, at the same time, enables [Mastercard Europe]  
6 to compete more effectively in the UK."

7 So these were the objectives, correct, that  
8 Debit Mastercard were designed to serve?

9 A. Yes.

10 Q. And then if we look at "Market Characteristics" just  
11 below that and "Situation Analysis", that says that:

12 "The transition from Switch to Maestro in the UK has  
13 been successful yet brand strength, acceptance reach and  
14 a single debit product offering has limited the appeal  
15 of the card program to market participants ..."

16 So what we're seeing there is that at that stage,  
17 Mastercard considered that a range of factors were  
18 limiting Maestro's appeal; correct?

19 A. Sorry, could you repeat that question?

20 Q. Yes. So that says that the transition from Switch to  
21 Maestro has been successful and then there's  
22 a qualification to that. It says "yet". Do you see  
23 that:

24 "... brand strength, acceptance reach and a single  
25 debit ... offering ..."

1           So lack of differentiation:

2           "... has limited the appeal of the [Maestro] card  
3           program to market participants and has placed MasterCard  
4           at a competitive disadvantage."

5           Yes?

6       A.   Yes, I see that.

7       Q.   So do you agree that what Mastercard is saying there is  
8           that it considered that a range of factors were limiting  
9           Maestro's appeal?

10      A.   I do accept that. It was a range of factors.

11      Q.   Were a range of factors.

12           And if we look at the next paragraph, in the  
13           following paragraph, we can see that there is  
14           a reference there to interchange fees. Do you see that?  
15           So:

16           "The UK is characterised by a mature card payments  
17           environment where for credit card, product  
18           differentiation and segmentation has proliferated. The  
19           same has not been the case for debit card where Maestro  
20           now exists as the only immediate debit product of the  
21           'MasterCard family' with the interchange fee structure  
22           and rates managed by the S2 Board."

23           So there's a reference to "the interchange fee  
24           structure and rates" in relation to Maestro, but do you  
25           agree that this document is not putting forward the

1           disparity in interchange fee rates with Visa as being  
2           the only reason for the lack of popularity of Maestro?  
3           Can we agree that?

4       A.   Could I ask you to go back to your first page where you  
5           had the interchange table? I think it was the first  
6           page in this document.

7       Q.   Sure {C16/225/1}. (Pause)

8       A.   Okay.

9       Q.   So go back, please, to page 2 {C16/225/2}.

10           So my question is: we see the reference to  
11           "interchange fee structure and rates" in the last  
12           paragraph on the page, but can we agree that the  
13           disparity in interchange fee rates with Visa is not  
14           being put forward as the only reason for the lack of  
15           popularity of Maestro in this document?

16      A.   I can agree that it's not the only reason.

17      Q.   Or even the main reason, is it? It's not even the main  
18           reason that's being put forward, is it, Mr Douglas?

19      A.   Albeit what I would have -- and one of the reasons  
20           I asked to go back to the previous page is looking at  
21           Visa's debit interchange rates.

22      Q.   Well, I know you're now trying to piece something  
23           together, but I'm asking you to look at what it says  
24           here in terms of "Situation Analysis" and what's being  
25           described, and do you agree that in terms of the



1 description, the disparity in interchange fee rates --  
2 in fact, "disparity" is not even mentioned here, but the  
3 disparity in interchange fee rates with Visa is not  
4 being put forward as the main reason for the lack of  
5 popularity of Maestro, is it?

6 A. In what sense do you mean "main reason"?

7 Q. Well --

8 A. How are you determining "main", may I ask?

9 Q. Well, Mr Douglas, we see the first paragraph expresses  
10 a view as to why the Maestro brand has limited appeal.  
11 Do you see the words "limited appeal" and "has placed  
12 MasterCard at a competitive disadvantage"? And what is  
13 being said is the factors are brand strength, acceptance  
14 reach and a single debit card offering.

15 So there are a range of factors being put forward  
16 and so nobody here is saying, "Well, it is the disparity  
17 of interchange fees that's the key problem", are they?

18 MR SMOUHA: Can you show him the next page please?

19 MS DEMETRIOU: I'm being asked to show you the next page.

20 What part of the next page {C16/225/3}?

21 MR SMOUHA: Under the heading "Competitive Review".

22 MS DEMETRIOU: So under the heading "Competitive Review",  
23 you see there the rates that are put forward. Do you  
24 want to just have a look at that and I'll go back and  
25 ask my question again? (Pause)

1 A. Okay.

2 Q. And if we go back, please {C16/225/2}.

3 Let me rephrase my question, Mr Douglas. When your  
4 statement for these proceedings was being adapted from  
5 your Sainsbury's statement, why did you delete reference  
6 to this document? Because this document shows that  
7 there are a range of factors that were relevant to the  
8 demise of Maestro, so don't you think that this would  
9 have been a relevant document to have kept in?

10 MR SMOUHA: Sir, can I just say -- sorry, this is not  
11 a matter for Mr Douglas and there's no reason why my  
12 learned friend should be aware. But, sir, my position  
13 is -- rightly or wrongly, my understanding is and my  
14 instructions are that Freshfields took the view that  
15 because this was not a document that Mr Douglas saw at  
16 the time, under the new rules, it would not have been  
17 appropriate to discuss it with him or for him to refer  
18 to in his witness statement.

19 MS DEMETRIOU: Well, we'll obviously have to deal with that  
20 in submissions. It is very troubling, and I will say in  
21 submissions that it is very troubling that a document  
22 has been removed which doesn't support the main case  
23 that is being put forward in the evidence. But  
24 I'll rephrase my question to Mr Douglas.

25 Mr Douglas, when you had the Sainsbury's -- your

1 draft of the Sainsbury's statement in front of you, did  
2 you notice that this document had been removed?

3 A. No, I can't recall noticing it.

4 Q. So you can't have reviewed your statement very closely;  
5 would that be fair?

6 A. I don't think you can say I haven't reviewed my  
7 statement very carefully by pointing out the fact that  
8 one reference was removed.

9 Q. Well, Mr Douglas, you had your Sainsbury's draft in  
10 front of you and then you were provided with the new  
11 draft. Did you not carry out a comparison? This was  
12 evidence you'd given before. Would you not want to know  
13 what had been changed in the draft presented to you?

14 A. When I read the draft that was presented to me, I felt  
15 that was an accurate reflection of the conversation that  
16 we had --

17 Q. So --

18 A. -- and indeed my experience in the marketplace at that  
19 point in time.

20 Q. I know, Mr Douglas, but you were working off your  
21 Sainsbury's statement, and this was a document you had  
22 referred to. So did you not notice when you were  
23 working off your Sainsbury's statement that this had  
24 been removed? Is that your evidence?

25 MR JUSTICE ROTH: Well, I think Mr Douglas answered that

1 question. He didn't, and he didn't do a side-by-side  
2 comparison.

3 As I understand your evidence, you've got the new  
4 statement. You read it through and you felt you were  
5 happy with it; is that right?

6 A. Yes, sir.

7 MS DEMETRIOU: Alright. Sir, I was about to move on to  
8 something related but a little different. Is this  
9 a good time?

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

11 MS DEMETRIOU: Yes.

12 MR JUSTICE ROTH: Yes, Mr Douglas, we take a short break --

13 A. Of course.

14 MR JUSTICE ROTH: -- for your benefit and for the benefit of  
15 the transcribers. You can obviously leave the witness  
16 box, go to the toilet, whatever, but you mustn't discuss  
17 the evidence you are giving with anyone over the break.

18 A. Okay.

19 MR JUSTICE ROTH: So we'll come back at just after ten to.

20 (11.41 am)

21 (A short break)

22 (11.55 am)

23 MS DEMETRIOU: Thank you, sir.

24 Mr Douglas, just one final question on the reasons  
25 for the Maestro demise. You haven't put this forward as

1 a reason in this statement, but do you accept that  
2 Maestro was less suitable for online transactions than  
3 Visa Debit?

4 A. Yes, it was.

5 Q. Thank you.

6 Now, you discuss the Maestro Rules at paragraphs 32  
7 and 33 of your statement. I'm going to look at your  
8 evidence on that in a moment, but can we just look at  
9 the rules to put it in context, so {C15/456/539}.

10 And you can see at the top of the page these are the  
11 UK Maestro intra-country rules; yes?

12 A. Yes.

13 Q. And then 10.6 -- do you just want to read 10.6 to  
14 yourself? (Pause)

15 A. Yes.

16 Q. And we can see that the PGCs are not set by the  
17 Organization, and by "Organization", what's meant is  
18 Mastercard; correct?

19 A. I believe so.

20 Q. And, in fact, we can see that. Just to show you, if we  
21 go to page 82 {C15/456/82}, you see there there's the  
22 definition toward the bottom of the page of  
23 "Organization". Do you see that?

24 A. I do indeed. Thank you.

25 Q. And then if we go back to page 539, please

1           {C15/456/539}, we can see Mastercard has nothing to do  
2           with setting the domestic fees, correct, either the  
3           bilateral fees or the PGCs?

4       A.   Yes, that appears to be what it's saying.

5       Q.   And then if we go -- I think that's consistent with what  
6           you say in your statement; yes?

7       A.   It is indeed.

8       Q.   And then if we go to page 603 {C15/456/603}, this  
9           relates to arbitration and so you see at (a) that:

10           "A Principal Member is able to invoke arbitration  
11           procedures by notifying S2 whenever it considers that  
12           its bilateral negotiations relating to PGCs with another  
13           Principal Member have become deadlocked for whatever  
14           reason."

15           And then if we go down to (c), we see:

16           "The arbitrator must render a decision within four  
17           ... months from the time he is appointed."

18           And we see that:

19           "Until the arbitrator has rendered his decision, the  
20           Acquirer must recompense the Issuer at Interim PGC rates  
21           as from the day after either the expiry date of any  
22           pre-existing agreement on PGCs ..."

23           So that would be a bilateral; yes?

24       A.   Yes.

25       Q.   "... or the date a notification referred to in

1 paragraph a. above, whichever is the later. Interim  
2 PGCs are amounts determined by independent consultants  
3 using their own cost-based methodology."

4 And then if we go to your statement at {A/10/13},  
5 you explain how these rules operated in practice, and  
6 let me just take you through what you say. So you say  
7 that -- at 32, you say that:

8 "The domestic rules ... provided that interchange  
9 fees would be set bilaterally ... but in the event that  
10 an agreement could not be reached, the level would be  
11 determined by arbitration, with a default interchange  
12 fee applying in the interim."

13 Which is what we've just seen, correct, in the  
14 rules?

15 A. That's correct.

16 Q. Then you say:

17 "I understand, however, that in practice bilateral  
18 rates were generally agreed at around the level of the  
19 interim default rate since this was expected to be the  
20 outcome of any arbitration."

21 And then you go on at paragraph 33 to say -- if we  
22 look at paragraph 33, you see that:

23 "... Mastercard did not have the right to set  
24 default interchange rates ... Responsibility for setting  
25 default ... [fees] remained with S2 ..."

1           Again, we've seen that in the rules; correct?

2       A.   That's correct.

3       Q.   And then you say:

4           "S2's board was dominated by the major banks, some  
5           of whom were 'net acquirers' (i.e., they generated more  
6           income from card acquisition than card issuing). There  
7           was, therefore, resistance to higher interchange fees."

8           Now, just to unpack a little bit what you've said in  
9           those two paragraphs, where you say -- so you say that  
10          arbitrations didn't generally take place; correct? So  
11          at paragraph 32, generally -- you said in practice,  
12          bilateral rates would generally be agreed at the level  
13          of the interim default rate.

14       A.   That's right.

15       Q.   The interim default rate, we've seen, is set by the  
16          rules; correct? So that's mentioned in the rules. So  
17          you see there's a reference to "interim default rate" in  
18          the rules and so --

19       MR JUSTICE ROTH:  When you say it's set by the rules, the  
20          rules don't prescribe --

21       MS DEMETRIOU:  It's defined by the rules, I'm so sorry.

22           It's defined by the rules, Mr Douglas.  The Chairman  
23          is quite right.

24           So generally, you're saying, as I understand your  
25          evidence, that the banks assumed that the results of the



1 arbitration would be the default -- the default rate  
2 specified in the rules, so the default rate defined by  
3 the rules; yes?

4 A. That's correct, yes.

5 Q. So it wasn't really -- is this your evidence: that it  
6 wasn't really worthwhile for a bank to go to the time  
7 and cost of an arbitration, so they tended not to?

8 A. Well, I wasn't implying that in my statement. I was  
9 just laying it out as I understood.

10 Q. And are you able to help on that point? So is your  
11 understanding that generally banks didn't arbitrate?

12 A. Yeah, it's my general understanding. That's obviously  
13 how I reflected --

14 Q. Okay.

15 A. -- but I can't give the specific reasons as to why they  
16 generally didn't arbitrate.

17 MR JUSTICE ROTH: Were there some arbitrations, as far as  
18 you know?

19 A. I believe there was, yes. Yes, sir.

20 MS DEMETRIOU: Now, in paragraph 33, you're explaining, as  
21 we saw in the rules, that the default rate -- the  
22 default interchange fee rates were set -- were  
23 a domestic rate set by the board of S2 Card Services,  
24 not by Mastercard; correct?

25 A. That is correct, yes.

1 Q. And you've explained at paragraph 33 that net acquiring  
2 banks were able to resist setting the domestic default  
3 rate any higher; correct?

4 A. Yeah, what I was saying in that paragraph is net  
5 acquirers had a voice in setting those rates and,  
6 therefore, given the dynamics in the marketplace and  
7 obviously the cost/revenue profile, they typically  
8 resisted higher interchange rates.

9 Q. When you say, just looking at your answer, thinking  
10 about your answer now, so when you say "the cost/revenue  
11 profile", what you mean is, presumably, that interchange  
12 fees were a fee paid by the acquirer to the issuer and  
13 so an acquirer would have a commercial incentive to  
14 resist higher interchange fees; is that what you mean?

15 A. No, what I was saying is that obviously interchange is  
16 a flow from the acquirer to the issuer reflecting the  
17 costs associated with issuing those cards, be they  
18 debit, in this case, or credit or indeed, you know,  
19 charge in other markets.

20 So yeah, a net acquirer would clearly -- given they  
21 are a commercial organisation would want to resist  
22 paying higher fees than -- higher fees, yeah.

23 Q. I think you've probably -- I think we agree on that,  
24 Mr Douglas. I think you've just -- what you've said is  
25 the same as the question I put to you, so I think we're

1 in agreement on that point.

2 And you explain in your witness statement earlier on  
3 that your first job at NatWest was to manage the profit  
4 and loss of the non-premium consumer card portfolios;  
5 correct?

6 A. That's correct.

7 Q. So presumably -- and you were on the issuing side, and  
8 so presumably, at the end of the financial year, the  
9 department of the bank which worked on the issuing side  
10 would produce an analysis of how profitable the issuing  
11 business was.

12 A. Yes, it was more than an end of year exercise; it was  
13 quite a frequent exercise.

14 Q. Thank you.

15 A. We had to produce management accounts, yes.

16 Q. And interchange fees were a source of revenue for the  
17 issuing business; correct?

18 A. Interchange fees were a revenue line in the P&L, yes.

19 Q. And I appreciate you didn't work in the acquiring part  
20 of the business, but presumably they would have done the  
21 same thing. They would've been carrying out profit  
22 analyses for senior management.

23 A. Yes, they would.

24 Q. And, similarly, interchange fees were a cost for the  
25 acquiring part of the business; correct?

1 A. Yes, they were.

2 Q. So just looking at that last sentence in your witness  
3 statement in paragraph 33, so where you talk about the  
4 S2's board being dominated by major banks, some of whom  
5 were net acquirers and there was therefore resistance to  
6 higher interchange fees, you're talking here about  
7 a multilateral negotiation, aren't you, with lots of  
8 banks on a board?

9 A. Yes, there were multiple banks on that board.

10 Q. And in the example you have given here, you've said that  
11 the major banks dominated the board and within those  
12 banks, the net acquirers resisted higher interchange  
13 fees. And Barclaycard is an example of a net acquirer;  
14 correct?

15 A. Barclaycard --

16 Q. With the Mastercard scheme.

17 A. With the Mastercard scheme, absolutely.

18 MR JUSTICE ROTH: Are we talking about the Maestro cards now  
19 specifically in relation to the S2 board?

20 A. We are indeed.

21 MR JUSTICE ROTH: Yes.

22 MS DEMETRIOU: And in relation to the S2 board and Maestro,  
23 would you -- is your recollection that Barclaycard had  
24 about a 30% share of the acquiring market?

25 A. I can't recall specifically, but my recollection it was

1 in and around that level, yeah, 30s, high 30s.

2 Q. And the same incentive, so the incentives of --  
3 commercial incentives of acquirers to resist increases  
4 and the commercial incentives of issuers to achieving  
5 increases in interchange fees, those would have  
6 played -- those incentives would also be at play -- in  
7 play in bilateral negotiations; correct?

8 A. I would have thought so, yes.

9 Q. Now, you also discuss in your witness statement the  
10 differences between the UK market and some other  
11 European domestic payment card markets, don't you?

12 A. I do.

13 Q. And presumably, because you weren't involved in setting  
14 interchange fees, you don't know whether those market  
15 differences were raised in discussions regarding the  
16 setting of interchange fees; is that fair?

17 A. Could you repeat the question?

18 Q. Yes. So those market differences that you refer to,  
19 because you weren't involved in setting interchange  
20 fees, you don't know whether those market differences  
21 were discussed by the people who were setting the  
22 interchange fees --

23 MR JUSTICE ROTH: Where? Are we talking about people in the  
24 UK or people in these other markets? What's the  
25 question?

1 MS DEMETRIOU: Well -- so either in the setting of the  
2 UK domestic interchange fees. You weren't involved in  
3 that, were you, Mr Douglas?

4 A. No, I wasn't involved in the interchange rate setting.

5 Q. So you wouldn't have been party to any discussions, if  
6 they took place, as to whether market differences  
7 between the UK and other markets were relevant to the  
8 setting of domestic interchange fees.

9 A. So as an issuer, while working at Royal Bank and  
10 NatWest, I would've been asked to contribute or  
11 consulted by the relevant department in Royal Bank or  
12 NatWest, which I think I refer to as the payment scheme  
13 management team, for inputs on the costs of running the  
14 card portfolio that I was responsible for, because,  
15 obviously, interchange in its broader sense is about  
16 managing the costs of running a card ecosystem in  
17 a relatively fair and equitable way.

18 So I would have been pointing out to that department  
19 the changes or the -- sorry, the dynamics of the  
20 UK marketplace and how they -- and perhaps how they  
21 differed, were relevant, to the broader European  
22 marketplace.

23 So, for example, you know the growth of the MOTO  
24 transactions, e-commerce transactions in the UK was  
25 considerably higher than elsewhere in Europe, and there

1           were multiple reasons for that, which I think my  
2           statement refers to or covers.

3       MR JUSTICE ROTH: Sorry to interrupt you.

4           MOTO transactions?

5       A. Sorry, sir. MOTO is mail order transfer -- mail order  
6           telephone order. So this was the precursor to  
7           e-commerce as we know it today. So you would ring up  
8           and would you book your concert tickets over the phone  
9           by giving your card details to the merchant in question.

10       MR JUSTICE ROTH: Yes, and the phrase in the trade was MOTO?

11       A. MOTO back in the early 90s, yes, early noughties.

12       MS DEMETRIOU: So I think what you are saying is that you  
13           would have made those points internally to the relevant  
14           department in NatWest; correct?

15       A. I would have absolutely done so. As I'm looking at my  
16           issuing P&L, I'm looking at the expenses, I'm looking at  
17           the revenues, I'm looking at the value that we're  
18           driving for our consumers and indeed cardholders and  
19           obviously wanting to ensure that the costs of running  
20           those scheme -- of running that portfolio is reflected  
21           in interchange.

22       Q. Okay. Thank you.

23           Now, you say in your witness statement that the  
24           UK credit market developed earlier than some other  
25           European markets and you say that UK banks had to invest

1 heavily in infrastructure throughout the 1990s and  
2 2000s; correct?

3 A. That's correct.

4 Q. And you say also that credit card costs themselves were  
5 higher in the UK than in other European markets. You  
6 say that at paragraph 18, if you just want to remind  
7 yourself of it. And is it -- so that's at {A/10/6}.

8 And is it fair to say that you're focusing there on  
9 a comparison between UK domestic transactions and  
10 domestic transactions in other countries?

11 A. What I was referring to in the paragraph was the  
12 UK market and the fact that, as the statement says,  
13 a more mature credit card market, which was very  
14 different to Continental Europe at that time, which was  
15 largely a -- in the terms of payments was originally  
16 a debit or charge card market.

17 There's various other references in my statement  
18 around what drove the growth of the credit card market,  
19 but as this paragraph indicates, things like MOTO and  
20 then subsequently e-commerce, things like consumer  
21 protection, enabling individuals to buy goods over the  
22 internet and have protection on a credit card versus  
23 a debit card --

24 Q. Mr Douglas --

25 A. -- all of these factors drove the growth of the credit



1 card market in the UK, yes.

2 Q. And the question that I'm asking you is just  
3 a clarificatory question. So when you're looking at  
4 those factors and you're comparing, we see here, costs  
5 in the UK being higher than in other European markets,  
6 the question I'm putting to you is: are you comparing  
7 the UK domestic market with Continental European  
8 domestic markets? Is that the comparison you're making?  
9 You're not really saying that UK domestic costs were  
10 significantly higher than cross-border transaction  
11 costs, are you?

12 A. Well, I was talking about the levels of costs that  
13 UK card -- credit card issuers had to take into account.  
14 So things like the interest free period, things like  
15 higher credit limits, things like fraud, things like the  
16 growth and explosion of MOTO to e-commerce, all of those  
17 factors were big drivers of cost, as well as ultimately  
18 consumer benefit in the context of lines of credit and  
19 growth of consumer credit.

20 So they were considerable costs. Whether  
21 I'm referring in context of cross-border or domestic  
22 wasn't really my lens in the sense 90-plus percent of  
23 the volume of credit cards that I was managing, so  
24 a large, large portion of the P&L, was relating to  
25 domestic transactions.

1 MR JUSTICE ROTH: Presumably some of those costs would be --  
2 they don't differ hugely whether the UK cardholder is  
3 buying -- making the purchase in the UK or from  
4 a supplier in France.

5 A. No, those costs don't differ greatly.

6 MR JUSTICE ROTH: No.

7 MS DEMETRIOU: And if we -- you mention in paragraph 50 of  
8 your witness statement the introduction of  
9 Mastercard World Card {A/10/16}. Do you remember that?

10 A. I do.

11 Q. And that occurred whilst you were employed by  
12 Mastercard; correct?

13 A. That is correct.

14 Q. And do you recall that this was a new card which didn't  
15 exist at all in the UK or in any other jurisdiction?

16 A. It certainly didn't exist in the UK.

17 Q. Is it that you don't know whether it existed in other  
18 jurisdictions?

19 A. The World card that I refer to here, which was a mass  
20 affluent card -- that's how it's referred to, sir, in  
21 the marketplace -- was unique to the UK at that time,  
22 but Mastercard had a broader set of premium card  
23 products also.

24 Q. Now, if we go to paragraph 51, A/10 -- let's just have  
25 a look at -- I'm just going to clarify something. If

1           you go to {A/10/16}, so this is where you talk about  
2           World Card and you say just about -- under halfway down,  
3           you say that it offered 50-plus base points premium over  
4           standard UK MIFs resulting in average MIFs of between  
5           138 and 150 base points; yes?

6           A. Yes, I see that.

7           Q. And just pausing there, you've referred to the average  
8           MIF and it's right, isn't it, that when issuers were  
9           looking at their interchange fee revenues, they would  
10          focus on the weighted average interchange fees; yes?

11          A. Yes, they would -- they would focus on interchange fees  
12          in a toll(?) and obviously weighted average would be one  
13          of those, yeah.

14          Q. You say at paragraph 51 you weren't involved in setting  
15          the interchange fees for World Card, but I just want to  
16          show you the proposals just to ask you a couple of  
17          questions insofar as you can help us.

18                 So if we go to {C15/152/1}. So if you look at the  
19          top -- I appreciate you weren't involved. I'm going to  
20          ask you just a couple of questions to see whether you  
21          can help us, but you can see this is a meeting on  
22          1 September 2005.

23                 And if we go to page 4 {C15/152/4}, you see there  
24          there's a proposal to introduce Worldcard. Do you see  
25          that, 3.2.2?

1 A. I do.

2 Q. And then if we look at page {C15/152/5}, please, the  
3 final paragraph of the page, it says:

4 "Both the structure and rates of the Worldcard  
5 program will be aligned on the intra-European ones."

6 So for this new product, there's a plan, at least at  
7 this stage, to launch with the same interchange fees for  
8 the UK and for intra-EEA cross-border transactions;  
9 correct?

10 A. That's what the paragraph states, yes.

11 Q. And that would indicate, wouldn't it, that the cost base  
12 in the UK market can't be very different from the cost  
13 base for intra-EEA cross-border transactions?

14 A. To be honest, I can't speculate what they meant by that  
15 particular paragraph.

16 Q. Alright.

17 Now, you confirmed earlier that one of your jobs at  
18 NatWest was to manage the profit and loss of consumer  
19 card portfolios for the issuing part of the business.  
20 We've talked about that. And it's correct, isn't it,  
21 that as well as revenue for interchange fees, issuing  
22 banks also received revenue from interest payments from  
23 cardholders; correct?

24 A. That's correct.

25 Q. And I'd like to remind you about the evidence you gave

1 at the Sainsbury's trial on this. If we can go to  
2 {H/5/1}, this is a transcript of your evidence,  
3 a transcript of 8 February, which is the day that you  
4 gave evidence. And if we go to page 7 of this document  
5 {H/5/7}, please, and can you see the bottom right-hand  
6 corner, you see page 22?

7 MR JUSTICE ROTH: Can I just ask you: 8 February of which  
8 year?

9 MS DEMETRIOU: 2016, sir.

10 MR JUSTICE ROTH: Thank you.

11 MS DEMETRIOU: And you can see page 22 of the transcript.

12 Do you see that in the bottom left-hand corner?

13 A. Yes.

14 Q. And if we look -- do you see the line numbers down the  
15 side that go from 1 to 25?

16 A. I do.

17 Q. If we start at line 23, we see a "Q" for question:

18 "We have seen figures, and we may come to it a bit  
19 later on, where the revenue from interest payments far  
20 exceeds the revenue from interchange fees. Would you  
21 accept ..."

22 And if we go up the page to page 23:

23 "Would you accept that?

24 "Answer: Yes, the revenue from interest income far  
25 exceeds."

1           One must assume that you're saying interchange fees.  
2           So you can see your answer there; correct?  
3       A.   Sorry, I've lost your train of thoughts because the  
4           document kept moving in front of me.  
5       Q.   Of course. That happens to me too. Let's go to the  
6           bottom of page 22 --  
7       A.   22?  
8       Q.   -- and line 23, and you see the question.  
9       A.   Yes, I do.  
10      Q.   So you're being asked whether you accept that revenue  
11           from interest payments far exceeds revenue from  
12           interchange fees and it looks like you accept that at  
13           the top of the next page.  
14      A.   Okay, this is in reference to my statement, yeah --  
15      Q.   This is your cross-examination, so these are the  
16           questions that are being asked to you when you were  
17           cross-examined in that case.  
18      A.   Yeah, I haven't seen this document before, so I'm just  
19           double and triple checking --  
20      MR JUSTICE ROTH: What it is is, rather like there is  
21           a transcript being made now of your evidence here, in  
22           the previous trial, similarly, there was a transcript,  
23           and this is an extract from the transcript where you are  
24           giving the answers and some other barrister is asking  
25           the questions.

1 A. Understood. Yeah, that is obviously my answer from --

2 MS DEMETRIOU: And if we go, just to show you --

3 A. -- that particular case, yeah.

4 MS DEMETRIOU: Sorry. If we go to page 11 of this document  
5 {H/5/11} and then we see at page 39, which is the top --  
6 if we just expand page 39, please. So we see there that  
7 a question from paragraph -- from line 11 and, actually,  
8 at line 12:

9 "We know that, as you have accepted, interest  
10 payments far outweigh interchange fees."

11 And then the question is:

12 "Why is it that in this two-sided platform or  
13 two-sided market, whatever you want to call it, that the  
14 schemes, both Visa and MasterCard, do not factor in the  
15 substantial amounts of revenue that issuers earn on the  
16 credit cards?"

17 And you say:

18 "I don't know the answer to that question, in part  
19 because -- or in large part because I was not involved  
20 in calculating or setting interchange rates. That was  
21 done by a separate team in MasterCard, so [you] can't  
22 answer that question ..."

23 So I'm not going to ask you that question again  
24 because you've told us again that you aren't responsible  
25 for setting interchange fees, but it would be helpful

1           for the Tribunal if you could explain the extent to  
2           which interchange -- interest payments -- revenues from  
3           interest payments exceeded interchange fees. So are we  
4           talking about double the amount, triple the amount,  
5           a factor of five? What's your evidence on that,  
6           Mr Douglas?

7           A. I would be speculating if I tried to give you what the  
8           difference was and, of course, you can look at it in  
9           a variety of different ways. There's the total  
10          portfolio level, and to that point, I think the  
11          statement I made back in, I think it was, 2016 is one  
12          that I felt was true and accurate; that issuers on the  
13          whole generate interest from the fact that cardholders  
14          revolve a balance on their card.

15                 If you look at some cards, people don't borrow.  
16          They pay them off and, therefore, the issuer is  
17          generating potentially costs of which there's not  
18          a substantial amount of revenue to offset, but that's  
19          where interchange plays a role because it helps the  
20          issuer fund the cost of running that credit card based  
21          on receiving a small amount of income per transaction  
22          from the cardholder, and that is obviously paid by  
23          the -- by the acquirer.

24                 So in that sense, you know, an issuer is managing  
25          a blended portfolio with some cardholders using their



1 products just to buy goods and services, other  
2 cardholders using it to borrow money or to revolve  
3 a balance. So there's different dynamics going on.

4 And to your point about Worldcard, you know, that  
5 was deemed a premium product and consequently, you were  
6 going to have a mixture of people using that card --

7 Q. So --

8 A. -- and those who just wanted to buy goods and services  
9 and those who may have wanted to have borrowed.

10 Q. So what you're saying is some people pay off their  
11 balances very quickly, so they're not really generating  
12 interest income for the bank; correct?

13 A. That's correct.

14 Q. But others don't, so they are. And when you look at it  
15 in an overall level, you have accepted that that income  
16 far exceeds the interchange fee income.

17 And if we go perhaps, just to help -- so let's go to  
18 the Asda judgment. So you also gave evidence in the  
19 Asda proceedings, didn't you, Mr Douglas?

20 A. I did.

21 Q. And can I take it that you haven't read that judgment  
22 either?

23 A. I haven't actually, no.

24 Q. So if we go to G14, please, page 125. (Pause)

25 MR COOK: G/14 is not in everyone's bundle.

1 MS DEMETRIOU: Oh, I see. I'm going to --

2 MR JUSTICE ROTH: I'm not sure we have it.

3 MS DEMETRIOU: Can I just read you -- it may be that I can  
4 just read what it says and we can see -- Mr Smouha can  
5 see if he objects. So it says --

6 MR JUSTICE ROTH: What paragraph?

7 MS DEMETRIOU: It's paragraph 408 {G/14/125}. It says:

8 "Mr Douglas gave an estimate of 10% to 40% for  
9 issuers' margins which he estimated would vary from  
10 issuer to issuer. Both suggested [that's you and  
11 another witness] that interchange fee might account for  
12 about 20% of an issuer's UK card related income. The  
13 FCA November 2015 report suggests that issuer profit on  
14 credit cards is not significantly driven by interchange  
15 revenue, but rather by interest payable by revolvers on  
16 credit balances."

17 So it does seem that you suggested in those  
18 proceedings that the interchange fee might account for  
19 about 20% of an issuer's UK card-related income. Does  
20 that sound right to you, sitting here today in these  
21 proceedings?

22 A. Yeah, it doesn't sound out of line, no, but it can vary  
23 by issuer and vary by portfolio within an issuer's  
24 overall credit card portfolio.

25 MS DEMETRIOU: Okay. Thank you very much, Mr Douglas.

1           Those are all my questions for you. Thank you.

2                       Re-examination by MR SMOUHA

3       MR SMOUHA: Thank you, sir.

4           I was only going to ask Mr Douglas the same question  
5       that my learned friend has just asked in relation to  
6       your giving evidence, Mr Douglas, in the Asda  
7       proceedings. You say you are not familiar with that  
8       judgment.

9           Sir, I stand by my earlier position that it's not  
10      appropriate for Mr Douglas to be asked about questions  
11      in relation to the findings of the CAT or in other court  
12      proceedings in relation to the matter on which he was  
13      cross-examined, sir. But what I will do, if I may, is  
14      just to give the Tribunal the reference in the Asda  
15      judgment to the court's -- Mr Justice Popplewell's  
16      conclusion on the same issue on which my learned friend  
17      cross-examined Mr Douglas; paragraph 249. I should say  
18      that -- and this will be in {G/14/1}, but I don't have  
19      the exact page reference.

20           This is in a section that starts -- on Maestro, that  
21      starts on paragraph 236 and paragraph 249 -- and, sir,  
22      the reason I do this is only in case the Tribunal takes  
23      a different view and wants to ask Mr Douglas about this.

24           Mr Justice Popplewell's conclusion at paragraph 249  
25      {G/14/81}:

1           "My conclusion on the evidence before me is that  
2           Maestro's uncompetitive interchange fee pricing was  
3           a very significant factor in the issuers' decision to  
4           switch away, quite possibly the single most influential  
5           one, whilst not being the only significant one."

6           And then goes on to say that's in line with  
7           Mr Dryden's evidence.

8           Paragraph 250:

9           "This is similar to the conclusion reached by the  
10          CAT but perhaps with a difference of emphasis which  
11          accords the fee differential more influence in the  
12          outcome."

13          Mr Justice Popplewell's findings in relation to  
14          Mr Douglas' evidence and credibility is at  
15          paragraph 110(6) saying, after recording what  
16          Mr Douglas' position was being {G/14/33}:

17          "He was the only witness on either side who had  
18          personal experience working for an issuer or acquirer,  
19          but this was prior to the claim period ... He had the  
20          greatest experience of any of the witnesses which was  
21          relevant to an assessment of how issuers or acquirers  
22          would behave in a counterfactual world, but he was not  
23          involved, save on the periphery, with the events leading  
24          to the Maestro decline. He was an impressive witness."

25          Sir, apart from drawing that to the attention of the

1 Tribunal, as I say, I don't think it's appropriate for  
2 me to ask Mr Douglas any more about that. (Pause)

3 Ah, thank you. Mr Cook tells me that Mr Dryden, who  
4 is referred to in that paragraph, 249, of the judgment,  
5 was the claimant's expert.

6 Sir, I have no further questions for Mr Douglas.

7 MR JUSTICE ROTH: Yes, thank you.

8 Questions by THE TRIBUNAL

9 MR JUSTICE ROTH: Mr Douglas, can you just -- a couple of  
10 things to clarify just to help me.

11 A. Of course.

12 MR JUSTICE ROTH: Looking in your statement on page 7 at the  
13 top of the page {A/10/7} -- it's paragraph 18(b) -- you  
14 talk about the internet and you say:

15 "The UK was consistently Europe's largest e-commerce  
16 market: from 2000 until 2015, UK online sales  
17 consistently comprised more than 25% of all European  
18 e-commerce transactions since 2000."

19 I was just trying to clarify, are you -- is this --  
20 are you saying it's -- when you say "consistently", it's  
21 more than 25% each year between 2000 until 2015, or are  
22 you saying -- taking that period as a whole?

23 A. I think I was referring to taking that period as  
24 a whole. So when you look at the total number of  
25 e-commerce transactions across Europe, the UK market

1           accounted for that percentage or higher during that  
2           period.

3       MR JUSTICE ROTH: You say "consistently". That's what I was  
4           trying to understand. When you say "consistently", do  
5           you mean year by year or can you remember -- and then  
6           you say "since 2000" at the end, so it's slightly  
7           confusing.

8       A. Yeah, no -- sorry. In that sense, I think the -- my  
9           perspective on that is essentially the UK market was  
10          driving e-commerce in Europe full stop, for some of the  
11          reasons that I go on to explain in my statement,  
12          including the growth of consumer credit more broadly,  
13          the Consumer Protection Act that I reference there.

14                So yes, I think if I was to look at those statistics  
15          again, then you would find that each year, the UK would  
16          be accounting for a large percentage, 25% plus, in my  
17          statement. I hope that clarifies my position, sir.

18       MR JUSTICE ROTH: Yes. And then a similar kind of question.

19                If you go on in your statement to page 12 {A/10/12},  
20          this is the section where you talk about the decision of  
21          issuing banks deciding -- and this is credit cards, not  
22          debit cards -- which card to issue, whether to have  
23          a Mastercard or a Visa card or -- and you talk about  
24          interchange fee.

25                And then in 29, you say:

1           "Two non-financial factors have ... always been of  
2           importance in the card issuing decision process, albeit  
3           of lesser significance than revenues ..."

4           And then the first one, the performance of  
5           portfolios, can you just -- I didn't quite understand  
6           what you meant by the first one.

7       A.   Yes.   There were a number of issuing banks in the UK  
8           who -- in fact, the vast majority of banks in the UK  
9           issued both Visa and Mastercard and some issued  
10          American Express as well.   So they would look at which  
11          brand or which proposition was performing better than  
12          others and based on that performance, which would take  
13          into account any number of factors, including that  
14          broader proposition from the payment scheme, whether  
15          that was Mastercard or Visa, would make decisions on  
16          what payment scheme to promote or to issue for that  
17          particular campaign or that particular segment of  
18          customers.

19       MR JUSTICE ROTH:   So when one talks about the  
20          decision-making, have I understood this properly?  It's  
21          not so much, "Should we, X Bank, issue as our credit  
22          card Mastercard or should we issue Visa as our credit  
23          card?"  For some banks that might have been the  
24          decision, but for the major banks, they would have both.  
25          They'd have a licence for both.  It's, "Which one are we

1           going to promote? Which are we going to feature in our  
2           campaign to a customer segment and whatever?"

3       A. That's right. Most banks could issue both and,  
4           therefore, in a position to determine based on the  
5           overall value proposition, and that would have included  
6           things, like I go on to say in (b), acceptance, as well  
7           as things like the interchange revenues, what was the  
8           most optimal proposition for them.

9       MR JUSTICE ROTH: Yes. And as far as the revenue from the  
10           cardholders paying interest, the APR revenue, which is,  
11           as you've just been reminded, very significant, which is  
12           a feature of the number of revolvers, and, of course,  
13           the APR rate -- the APR rate is determined by the  
14           issuing bank itself, isn't it?

15      A. It is indeed.

16      MR JUSTICE ROTH: Yes. It's not set centrally.

17      A. It's not set centrally, no.

18      MR JUSTICE ROTH: And the decision of what credit limit you  
19           give to the cardholder is a decision for the issuing  
20           bank.

21      A. That is correct.

22      MR JUSTICE ROTH: The decision about what customers you'll  
23           grant a card to, based on credit risk, would be  
24           a decision for the issuing bank.

25      A. That is correct.



1 MR JUSTICE ROTH: So you will be taking the same sort of  
2 decisions whether you're promoting, is this right,  
3 a Visa or a Mastercard to your customers?

4 A. Yes, the issuer would be taking into account any number  
5 of things, but when it comes to the scheme, they would  
6 be looking at acceptance, they'd be looking at the  
7 strength of the brand in the marketplace and they would  
8 be looking at things such as interchange revenue, the  
9 value --

10 MR JUSTICE ROTH: Yes, between the schemes.

11 A. Yeah, between schemes, yeah.

12 MR JUSTICE ROTH: Yes, but in determining the expected  
13 revenue from revolvers, which scheme you choose is not  
14 going to make much difference, is it, because the APR,  
15 the credit limit, the decision to issue a card you can  
16 determine yourself anyway?

17 A. My apologies, sir. I didn't understand the question.  
18 You're correct, yes. That was a decision for the  
19 issuing bank, irrespective of the payment scheme.

20 MR JUSTICE ROTH: Yes.

21 A. What I will say about APRs, if you don't mind, is that  
22 obviously there's another dynamic at play in the UK  
23 credit card market that was less at play elsewhere, and  
24 that was this concept of balance transfers where issuing  
25 banks were able to offer cardholders who use a different

1 bank's credit card to move their balance from that  
2 credit card to the issuer who was competing for it. And  
3 in many cases, you know, that interest rate was very  
4 low, sometimes 0% for a period of time.

5 So, therefore, what you had was issuers not only  
6 generating revenue from revolved balances and interest  
7 rates, but in many cases, those issuers were not able to  
8 generate credit interest from a revolved balance on  
9 a balance transfer if that balance transfer was priced  
10 at 0% for six months or nine months, which could often  
11 be the case.

12 So there's a -- there were periods of time that  
13 an issuer was either generating very little interest  
14 income, even though they were providing a revolved  
15 balance facility to the cardholder, or was generating  
16 a smaller amount of interest income, based on the  
17 interest rate that they offered in order to compete, if  
18 that makes sense.

19 MR JUSTICE ROTH: And did I hear you to say this was  
20 particularly in the UK --

21 A. Yes.

22 MR JUSTICE ROTH: -- or was this in other European countries  
23 as well, this balance transfer phenomena?

24 A. Yeah, it was a concept imported or a feature of credit  
25 cards imported from the US, and it was predominantly in

1 the UK. Predominantly. (Pause)

2 And my point there really was, in those  
3 circumstances, you know, the interchange revenue was  
4 an important component of revenue for the bank in those  
5 circumstances, for those types of cardholders on that  
6 proposition.

7 MR JUSTICE ROTH: Yes, I understand.

8 PROFESSOR WATERSON: Just to carry on on that same topic,  
9 which is interesting, this was by way of a sort of open  
10 offer, if you like, by the issuer. In seeking to gain  
11 business they would hope to keep that customer once the  
12 interest -- once they were paying interest in the normal  
13 way?

14 A. Yes.

15 PROFESSOR WATERSON: And following on from that, I suppose  
16 that this was a means of attracting people that were  
17 likely to revolve, because they'd built up a credit  
18 balance previously?

19 A. That's correct.

20 PROFESSOR WATERSON: Thank you.

21 MR JUSTICE ROTH: Any questions arising out of that?

22 Further re-examination by MR SMOUHA

23 MR SMOUHA: Sir, one matter, if I may.

24 Mr Douglas, just arising out of the Chairman's  
25 questions in relation to paragraph 29, and in particular

1           29(b) {A/10/13} of your witness statement, where you are  
2           were identifying the two non-financial factors have  
3           always been of importance, and you say in 29(b):

4           "The usability and utility of the particular  
5           scheme's product is also important, for instance the  
6           acceptance rate both domestically and on cross-border  
7           transactions ..."

8           Was there a material difference between the  
9           acceptance rate for Visa and for Mastercard?

10          A. No, there wasn't.

11          MR SMOUHA: Thank you.

12          MR JUSTICE ROTH: Any questions?

13                 Mr Douglas, that concludes your evidence. You're  
14                 released as a witness. At some point we will produce  
15                 a judgment. You're under no obligation to read it.

16          A. Thank you.

17          MR SMOUHA: Sir, I can give you now the bundle reference,  
18                 the Opus reference for the paragraph in the Asda -- in  
19                 Mr Justice Popplewell's judgment in the Asda, for  
20                 paragraph 249: {G/14/81}.

21          MR JUSTICE ROTH: Thank you.

22                         (Witness released)

23          MR JUSTICE ROTH: We can either move straight to Mr Van den  
24                 Bergh, the question is at what stage we deal with the  
25                 question of Mr Parker's report? Given that the experts

1           are coming tomorrow, one wants to give them as much  
2           notice of what they can say as possible. One  
3           possibility is that we rise early and come back at  
4           quarter to 2 and deal with it then. Is that more  
5           sensible for everyone?

6       MS DEMETRIOU: I think so, because I think there's also just  
7           a practical set-up issue for Mr Van den Bergh because he  
8           is giving evidence remotely.

9       MR JUSTICE ROTH: Yes, let's do that. We will resume at  
10          1.45. I hope the connection is tested first, so at  
11          least it should be ready when we return.

12       (12.42 pm)

13                       (The short adjournment)

14       (1.46 pm)

15       MR JUSTICE ROTH: Are we going to deal with the application  
16          first or are we going to go straight to the witness, who  
17          I see is available?

18       MS DEMETRIOU: With the application first, sir, I think, for  
19          the reason which you gave, which is --

20       MR JUSTICE ROTH: Yes.

21       MS DEMETRIOU: Yes.

22       MR JUSTICE ROTH: So has anyone explained to Mr Van den  
23          Bergh what is happening? No.

24       MR COOK: No, sir.

25       MR JUSTICE ROTH: Mr Van den Bergh, can you hear me?

1 THE WITNESS: Yes, I can hear you.

2 MR JUSTICE ROTH: Good afternoon. I'm Mr Justice Roth.

3 I'm chair of the Tribunal here and I'm sitting, as  
4 I think you can perhaps see, with the two other members  
5 of the Tribunal, Ms Burgess on my left,  
6 Professor Waterson on my right. And I think your camera  
7 will show the Tribunal when we are -- one of us is  
8 speaking and then the relevant lawyer, the barrister,  
9 when they are asking questions.

10 You will, in a moment, be sworn in as a witness, but  
11 we have a procedural application to hear first. So bear  
12 with us and we will deal with that and it won't take  
13 more than ten/fifteen minutes and then we'll proceed to  
14 take your evidence.

15 Yes, Mr Cook.

16 Application by MR COOK

17 MR COOK: Sir, thank you. There are obviously two sets of  
18 documents I need to deal with. My learned friend had  
19 helpfully indicated that there is no objection to the  
20 amendments that came in this morning.

21 MR JUSTICE ROTH: Yes.

22 MR COOK: And those are the -- I don't want to use the word  
23 "correction" because they're not corrections in the  
24 sense the report was correct when produced --

25 MR JUSTICE ROTH: It's just updating --

1 MR COOK: -- but they are updating to reflect more data.

2 And certainly, on my reading of it, it makes no  
3 difference to any of the conclusions that Mr Parker  
4 reaches.

5 MR JUSTICE ROTH: Yes.

6 MR COOK: So, sir, there is no objection taken to that, so  
7 we are grateful for that. What there is objection taken  
8 to is the three-page note that Mr Parker has produced,  
9 which was sent to the other side on Friday.

10 So just to remind the background to this; that  
11 obviously, Mr Coombs carries out various forms of  
12 correlation analysis in relation to weighted averages  
13 for the EEA MIF and the UK MIFs or UK interchange fees  
14 that was done at his -- I think it's -- well, his  
15 first report for this part of the proceedings. It might  
16 be his fifth report overall.

17 Having -- in the course of preparation for this  
18 trial, Mastercard realised that some of the weighted  
19 average figures that were present in our defence, and  
20 Mr Coombs had relied on some of those figures but had  
21 corrected a number of them, were not correct. So we  
22 amended those in serving our re-re, I think it was,  
23 amended defence.

24 There was a dispute about those amendments and, in  
25 particular, should we be allowed to make those

1           amendments purely for the purpose of some later set of  
2           arguments or whether we should be allowed to do so for  
3           the purpose of this hearing. That was before the  
4           Chairman sitting alone.

5           And I confirmed -- it was me on that occasion --  
6           that we weren't going to rely upon the '92 and  
7           '93 figures because the amendments were, so far as  
8           relevant or as far as disputed, the '92 and '93 figures  
9           for both the EEA MIF and the UK interchange fees, but  
10          also the 1994 figure for the EEA interchange fees.

11          So I confirmed that because Mr Coombs had made clear  
12          that the '92 and '93 figures were questionable -- he'd  
13          done his primary analysis without including them -- and  
14          so we were happy not to rely upon those updated figures  
15          for the purpose of this hearing; that we would do for  
16          future hearings if necessary. And, sir, you were happy  
17          with permission being granted on that basis.

18          There was a more substantive dispute in relation to  
19          the updated 1994 EEA MIF figure, which we did make clear  
20          was something that we suggested did undermine Mr Coombs'  
21          correlation analysis that he put forward. There was  
22          argument about, sir, and you granted permission, so  
23          expressly on that basis that that figure would be  
24          a relevant matter to be addressed at this hearing.

25          MR JUSTICE ROTH: That was on 22 June; is that right?



1 MR COOK: I will check with those behind me. Yes, it was,  
2 sir.

3 MR JUSTICE ROTH: Yes.

4 MR COOK: So as part of that, sir, you granted Mr -- you  
5 granted Mr Coombs or granted Mr Merricks permission to  
6 have Mr Coombs produce a supplemental report addressing  
7 that figure and you gave him until 3 July to do so, and  
8 that report is in the bundle at {A/22.1/1}. If that  
9 could come up on the screen, it's the supplementary  
10 expert report -- I think it's the 12th or so -- of  
11 Mr Coombs.

12 And in particular, sir -- so what Mr Coombs does in  
13 this report, and I don't want to go through it in much  
14 detail, but look at his analysis again in the light of  
15 the amended 1994 EEA MIF weighted average figure that  
16 Mastercard had then pleaded with your permission, sir.

17 And one point we noted in particular with that, sir,  
18 when we received it, and that was on 3 July, was that --  
19 and it's paragraphs 1.5 and 1.6, which are the summary  
20 of his conclusions -- is that he, Mr Coombs, makes  
21 various comments about whether the figure that we put  
22 forward, which we made clear was an indicative number,  
23 which was 0.9, makes various comments about whether that  
24 figure is correct or not.

25 But then he said at paragraph 1.6 {A/22.1/4}:

1           "There is consequently some uncertainty on the level  
2 of 1994 weighted-average Intra-EEA MIF due to the lack  
3 of comprehensive data. Therefore, I do not conduct  
4 a new correlation analysis based on the Updated  
5 [figure] ..."

6           Nor does he attempt to calculate it.

7           So we say in relation to that, it's quite clear  
8 Mr Coombs -- or we will be submitting that Mr Coombs has  
9 not done analysis because it was obvious that doing that  
10 analysis based on lower figures would undermine the  
11 correlation that he had previously identified.

12           So Mr Parker has simply tested that whether or not,  
13 with the 0.9 figure we put forward, the correlation  
14 identified in Mr Coombs holds good and where the sort of  
15 the tipping point would rise -- would arise. So as you  
16 come down from the previous average, which was 1%  
17 towards 0.9, where you get to the point where the  
18 correlation is no longer present. I think it comes in  
19 at 0.96.

20           So that is, in simple terms, what Mr Parker has  
21 done. Mr Coombs has explicitly chosen not to do a piece  
22 of analysis, we say because it was unhelpful to his  
23 client, so we have simply done that analysis. I would  
24 realistically think Mr Coombs had had his model set up;  
25 that it would be the work of minutes for him simply to

1       plug in a different number to a model that is already  
2       set up. And, simply, the conclusions are as Mr Parker  
3       says; that we would say it was obvious beforehand, but  
4       doing the analysis makes the point that as soon as you  
5       bring that average down, the correlation identified by  
6       Mr Coombs is no longer there.

7               So we say it's a relatively short -- it's  
8       three pages of a note, sir. It involves substantively,  
9       essentially, two bits of analysis, admittedly on the  
10      basis of the three correlation measures used by  
11      Mr Coombs, but one is simply plugging in the 0.9. The  
12      other one is testing where the tipping point comes,  
13      which is progressively stepping down, 0.99, 0.98, and  
14      then you get to the tipping point.

15             But it's a matter, with respect, sir, that is --  
16      Mr Coombs had the opportunity to do the analysis. He  
17      specifically decided not to do it and the reason why he  
18      did or certainly the outcome and what we're urging upon  
19      the Tribunal the reason why he didn't is because he knew  
20      it would undermine the correlation that he'd previously  
21      found.

22             So, sir, we say it's a very short point. It arises  
23      out of a deliberate choice not to do a bigger analysis  
24      and Mr Coombs should be in no difficulty in either doing  
25      it himself, either confirming that it's correct, or if

1 he disagrees with it, saying why. But it's a point we  
2 would put in cross-examination to Mr Coombs; that he's  
3 chosen not to do analysis because the analysis doesn't  
4 support his client's case.

5 But we say there's absolutely no prejudice for  
6 something which is such a short point, sir, for this  
7 stage.

8 MR JUSTICE ROTH: And you have Mr Coombs' short  
9 supplementary report on 3 July and this -- given the  
10 imminence of trial, why was it -- couldn't this have  
11 been done within a week?

12 MR COOK: Sir, it's regrettable it wasn't done faster. As  
13 you will appreciate, sir, the reality is that we were  
14 focused on a lot of other things during the course of  
15 that week, like all the other aspects of the trial, sir.  
16 So that's all I can say. Yes, it would be nice if, you  
17 know, there was the scope to sort of focus on one thing  
18 to the exclusion of everything else, but there has been  
19 a lot going on during the course of it, sir, and in  
20 terms of Mr Coombs' ability to respond, there should be  
21 no difficulty at all.

22 MR JUSTICE ROTH: Yes.

23 MR COOK: So, sir, I do seek -- I think I formally have to  
24 seek permission to rely upon it --

25 MR JUSTICE ROTH: Yes.

1 MR COOK: -- because it's obviously not -- it's late in  
2 terms of the timetable laid down by the Tribunal, but we  
3 say it's a very small point. It's the kind of point  
4 that one could legitimately put to Mr Coombs,  
5 particularly without the numbers, in cross-examination  
6 in any event, and this is -- simply provides a little  
7 bit more material so Mr Coombs knows where we're coming  
8 from in advance. It's to his advantage, one might say,  
9 to know the argument that is going to be put to him,  
10 sir.

11 MR JUSTICE ROTH: Yes.

12 Yes, Ms Demetriou.

13 Submissions by MS DEMETRIOU

14 MS DEMETRIOU: Sir, there is prejudice to us. Mr Coombs has  
15 looked at the note that -- the addendum of Mr Parker and  
16 the additional analysis that he has carried out and has  
17 carried out some preliminary work, and he does not agree  
18 with the P values that Mr Parker has arrived at, so he  
19 would have to do additional work, additional analysis of  
20 his own, to address the question of statistical  
21 significance, which is a matter that Mr Parker  
22 addresses. So he would have to do further analysis to  
23 address that and he would have to put in a further  
24 responsive report.

25 And we say that it's entirely unreasonable that he

1           should be put to the burden of doing that at the very  
2           time when he is preparing for the hot tub to be held  
3           tomorrow. That does constitute prejudice.

4           And with respect to my learned friend, there is  
5           absolutely no good reason at all why this has come so  
6           late and there has, again with respect to him, been  
7           a certain rewriting of what went on before the CMC  
8           because, sir, you'll recall that at the CMC on 22 June,  
9           all of the figures were presented. So applications were  
10          made to amend the defence to include amended figures for  
11          1992, 1993 and 1994, and they were primarily advanced as  
12          being amendments that were going to be relevant to the  
13          question of overcharge down the line.

14          And when I said, "Well, we accept -- we won't  
15          contest the amendments so long as they're not made now  
16          and they don't prejudice us in relation to this trial",  
17          at that point, Mr Cook said, "Oh, we might want to put  
18          these figures to Mr Coombs in cross-examination". So  
19          there was then a debate as to whether the amendment  
20          should be allowed now, which you'll recall I resisted.

21          And where we ended up, sir, was that you said -- you  
22          granted permission for the 1994 figure to be amended on  
23          the basis that that could be put to Mr Coombs and on the  
24          basis that he had a chance to put in a supplemental  
25          report, which, as you've seen, he's done, and that

1 report addresses the question of whether or not the  
2 1994 amended figure is accurate or not.

3 That's what it goes to, because that's what we  
4 understood Mastercard were going to do. They were going  
5 to put to him in cross-examination, "Your 1994 -- the  
6 1994 figure you used, despite the fact we gave it to  
7 you, is inaccurate". So that's what he addressed in his  
8 supplemental report.

9 Now, if Mastercard at that stage had been  
10 anticipating using the 1994 amendment to put forward  
11 additional analysis, then obviously they should have  
12 asked for permission. Obviously they should have asked  
13 for permission to put in a supplemental report following  
14 through what they say the implications are of the  
15 amendment to the 1994 figure, but they didn't make any  
16 such application. Had they made an application, then  
17 Mr Coombs would have had the benefit of that analysis  
18 before responding, but no such application was made and  
19 so we proceeded on the basis that this was going to  
20 be -- form a small part of the cross-examination of  
21 Mr Coombs. It was going to be put to him, "Well, we  
22 think this 1994 figure is better". That's the point  
23 that he's addressed.

24 He then produced his supplemental report, as you've  
25 heard, on 3 July. Again, nothing, absolutely nothing,

1 from the other side as to, "Well, why haven't you run  
2 a further correlation? We want to run a further  
3 correlation analysis."

4 And, with respect, it's not good enough to say, "Oh,  
5 well, a lot has been going on", because they have a very  
6 large and well equipped legal team and not a lot has  
7 been going on for Mr Parker. He hasn't been involved in  
8 any of these proceedings.

9 So what we get on Friday is a further substantial  
10 piece of analysis run on the basis of different  
11 hypotheses, with -- which is not something that is  
12 a question simply of running the figures in the model  
13 because Mr Coombs has looked at it and he says, "I don't  
14 agree. I'm going to have to do some work to respond to  
15 it."

16 And we say that it is prejudicial to require him to  
17 do that work now effectively the day before the hot tub  
18 when he's preparing for the hot tub, and that's why  
19 permission should not be granted. No good reason has  
20 been put forward for the delay and it is prejudicial and  
21 too late.

22 MR JUSTICE ROTH: Yes.

23 Do you want to --

24 Reply submissions by MR COOK

25 MR COOK: Very briefly, sir.



1           My learned friend seems to be saying there's  
2           a disagreement about the P value. I mean, in this  
3           context, it's the coefficient which is the rather more  
4           important bit of this on the basis this -- on the  
5           P value is basically the sort of range of uncertainty of  
6           that outcome. It's the coefficient which is -- or shows  
7           as a starting point whether or not there is the  
8           correlation or there is correlation there or not. In  
9           some sense, P values only sort of show how uncertain  
10          that result is, but it's the coefficient which my  
11          learned friend seems to be saying Mr Coombs agrees with,  
12          which demonstrates as the starting point there is no  
13          correlation there.

14       MR JUSTICE ROTH: Thank you. We'll take just a few moments.

15       (2.04 pm)

16                               (A short break)

17       (2.10 pm)

18               (Ruling handed down orally, excerpted for approval)

19       MR JUSTICE ROTH: So we turn to Mr Van den Bergh.

20               Mr Cook, you are calling Mr --

21       MR COOK: I am calling Mr Van den Bergh, sir. Sorry,

22               I don't know what the arrangements are for him to give  
23               an affirmation first, sir.

24       MR JUSTICE ROTH: Yes, indeed. If Mr Van den Bergh can be  
25               sworn, please.

1           So, Mr Van den Bergh, you will be either sworn or  
2           affirmed as a witness and that will be done remotely  
3           through the associate here in the Tribunal, just as if  
4           you were present physically in the Tribunal. (Pause)

5           Have you received the card with the text of the  
6           affirmation?

7       THE WITNESS: Yes, I have it.

8           MR PATRICK VAN DEN BERGH (affirmed)

9       MR JUSTICE ROTH: Can I ask, Mr Van den Bergh, who is in the  
10          room with you?

11       A. Here in the room there are Ghazzal Maydanchi -- I hope  
12          I pronounce it right -- trainee solicitor at  
13          Freshfields. There's Nikolaos Tsiaras, desktop support  
14          analyst of Freshfields, and we have  
15          Friederike Hammwöhner, associate at Willkie Farr.

16       MR JUSTICE ROTH: Right, thank you. I hope you have  
17          a screen where you will be able to see documents that  
18          may be brought up. Do you have --

19       A. Yes, there is a screen. Yes, there is a screen for the  
20          documents.

21       MR JUSTICE ROTH: Thank you.

22          So Mr Cook.

23                 Examination-in-chief by MR COOK

24       MR COOK: Yes. Mr Van den Bergh, do you have a copy of your  
25          witness statement there in front of you?

1       A. Yes, I do.

2       Q. We have it in the bundle at {A/13.5/1}.

3       A. Yeah, that's correct.

4       Q. And could I ask you to turn to page 11 of that document

5       {A/13.5/11}, which will hopefully be a page with

6       two signatures on it, one in relation to the statement

7       of truth and one in relation to compliance or the

8       requirements. Are those both your signature?

9       A. Yes, these are both my signatures.

10      Q. And are there any changes or clarifications you'd like

11      to make to the contents of your witness statement?

12      A. No, no changes.

13      Q. And can you please confirm that the contents of your

14      witness statement are true?

15      A. Yes, I do confirm.

16      MR COOK: Thank you. Ms Demetriou will have some questions

17      for you.

18                   Cross-examination by MS DEMETRIOU

19      MS DEMETRIOU: Good afternoon, Mr Van den Bergh. Can you

20      hear me and see me?

21      A. Yes, I can hear and see you.

22      Q. Good. Thank you.

23                   Now, you explain at paragraph 25 of your witness

24      statement -- can I just check: do you actually have

25      a hard copy of your witness statement there too?

1 A. I have a hard copy, yes.

2 Q. Okay. So you'll have the choice of looking at the hard  
3 copy or looking at it on the screen.

4 So at paragraph 25 of your witness statement, so  
5 that's {A/13.5/7}, you explain that the Europay computer  
6 system was programmed with an automatic hierarchy;  
7 correct? So, first of all, bilateral fees notified to  
8 Europay; secondly, if there was no bilateral fee, then  
9 any domestic MIF; thirdly, intra-EEA MIFs; and,  
10 fourthly, the inter-regional MIF; correct?

11 A. Correct.

12 Q. And then at paragraph 28 of your statement, you agree  
13 with Mr Dhaene that if a bilateral interchange fee was  
14 not put on to the system, the next level of default  
15 would apply, and that was the EEA MIF; correct?

16 A. Sorry, can you repeat the question?

17 Q. Yes, of course. So at paragraph 28 of your statement,  
18 you agree with Mr Dhaene -- you say in theory that if  
19 there was no bilateral interchange fee on the system,  
20 then the next level of default would apply, and when  
21 there was no UK MIF, that would have been the  
22 intra-EEA MIF; correct?

23 A. If there was no UK MIF, in that case, it would fall back  
24 to the regional one, correct.

25 Q. And there was no UK MIF until 1 November 1997; correct?

1       A. I do not recall with that. As far as I remember, we  
2       always had all those boxes filled in with the different  
3       interchange agreements.

4       Q. So do you mean that -- you're talking about the  
5       bilateral rates, are you?

6       A. Bilateral and domestic.

7       Q. Okay. And you can't recall when the domestic MIF came  
8       into force?

9       A. No. As I recall it, it was always there.

10      Q. Okay. Now -- so when you say at paragraph 26 that, and,  
11      indeed, as you have said now, that your recollection is  
12      that the UK had domestic rates in force in the 1990s and  
13      did not use the fallback, by that statement you must  
14      mean -- for the period of time before there was  
15      a UK MIF, you must mean that there was complete coverage  
16      of bilateral agreements, that you had a rate for every  
17      transaction; is that right?

18      A. That's, yeah, how I remember it.

19      Q. Okay. Now, I just want to ask you briefly about  
20      paragraph 20 of your witness statement. So paragraph 20  
21      is on page 6 {A/13.5/6} and you refer to here -- you  
22      refer here to paragraph 19 of Mr Dhaene's statement  
23      where he talks about a crash of the system.

24             And just a short point, but do I understand your  
25      evidence to be that you recall a crash taking place, but

1           you just don't remember it being when Mr Dhaene says it  
2           was? So you think it might have been in '93 or '94; is  
3           that correct?

4       A. No, it's not -- it's not about the crash of the system.  
5           What I am referring here to is that if Mr Dhaene is  
6           referring to, yeah, some capacity issues, that this was  
7           related to the authorisation system and certainly not to  
8           the -- the clearing and the settlement system.

9       Q. So is it that you can't recall a crash taking place  
10          at all or do you recall a crash taking place but you're  
11          disputing as to what part of the system it's on?

12      A. I do not recall a crash having taken place, so it's more  
13          like -- yeah.

14      MR JUSTICE ROTH: Sorry, more like what, sorry?

15      A. So it was more like, okay, that, yeah, I heard some  
16          discussions about the authorisation network, that they  
17          might have some capacity issues in those days.

18      MS DEMETRIOU: Okay. So you think that he may be right that  
19          there was a crash of the system, but you think it  
20          related to the authorisation system; is that the point?

21      A. I do not recall any crash. I just recall discussions  
22          about the capacity of the system.

23      Q. Okay. Now, you explain in your witness statement at  
24          paragraph 17 {A/13.5/5} -- you say that when you joined  
25          EPSS in 1992, you say that to the best of your

1 knowledge, domestic UK transactions were generally  
2 cleared by First Data Resources, FDR.

3 And at paragraph 37 of your statement {A/13.5/9}, so  
4 that's on page 9, you say:

5 "As I explained above, when I joined EPSS in 1992,  
6 EPSS did not generally clear domestic transactions."

7 You see what you said there; yes?

8 A. Yes.

9 Q. And then if we go to paragraph 19, please {A/13.5/6}, so  
10 page 6, you say:

11 "Over the course of the 1990s, however, ECCSS  
12 processed an increasing share of UK ... transactions."

13 And I just want to ask you about that. And if we  
14 can turn, please, to {C2/458.1/3}. So this will come up  
15 on the screen, Mr Van den Bergh. We can see that this  
16 is an internal memorandum labelled "Urgent". Do you see  
17 that?

18 A. Yes. Yes, I see that.

19 Q. And do you see that it's sent to Mr Nelson of Europay  
20 and it's sent by Mr Van den Bosch, do you see that, also  
21 of Europay?

22 A. Yes, I see that.

23 Q. And do you see the date is 5 July 1995?

24 A. Yes.

25 Q. And the question that's being asked -- so Mr Nelson is

1           being asked:

2           "Can you please fax ..."

3           Fax, that dates things:

4           "... fax - urgently - a description of what  
5           [exactly] we are processing in the UK.

6           "What kind of transactions, for whom or between  
7           whom, what are the volumes.

8           "Could you also indicate which alternatives are  
9           available to the banks in question."

10          So you see what's said there.

11          And the response is on page 1 of the same document  
12          {C2/458.1/1} and Mr Nelson says:

13          "... we don't process:

14          "authorisations or clearings for intra-FDR traffic  
15          (except for RBS ...)"

16          So pausing there, that means traffic where both the  
17          acquirer and the issuer use FDR; correct?

18       A.   Yes.

19       Q.   And then he says:

20          "... we don't process ...

21          "clearings where Barclays/Bank of Scotland are the  
22          acquirer and (an) FDR (bank) is the issuer."

23          Do you see that?

24       A.   Yes, I see that.

25       Q.   And then he says:



1           "which means that currently, we process through  
2       EPS-Net just about everything else on domestic  
3       [Mastercards], both in terms of authorisations and  
4       clearings."

5           So this reflects your evidence, doesn't it, Mr Van  
6       den Bergh, that through the 90s an increasing amount of  
7       UK traffic was being processed on the ECCSS?

8       A. Yes, indeed.

9       Q. And he then explains the position by reference to groups  
10      of banks, and if we look at the first group,  
11      Barclays/Bank of Scotland:

12           "... we process all authorisations, plus clearing  
13      transactions that are for non-FDR issuers."

14           Then let's look at the second group, NatWest:

15           "... we process ALL authorisations and clearings,  
16      including 'on us' as the ..."

17           I think that must mean:

18           "... as the ... acquirer system is 'in house', and  
19      the issuer system is at FDR. NatWest have just signed  
20      to keep their issuer processing at FDR until 2001."

21           So does that match your recollection, Mr Van den  
22      Bergh, that in 1995, EPI was processing all transactions  
23      for NatWest?

24      A. Yes, this reflects my recollection. NatWest was one of  
25      the first UK banks that I remember, yeah, coming to the

1 systems.

2 Q. And those transactions also included, as we see here,  
3 on-us transactions, so transactions where NatWest was  
4 both the issuer and the acquirer.

5 A. Yes, that's what stands there -- what's put there.

6 Q. And an interchange fee, therefore, would have applied to  
7 those on-us transactions; correct?

8 A. Yes, if we did not have any specific bilateral for that,  
9 indeed it would be the interchange fee.

10 Q. Okay. So stepping back, Europay is processing  
11 a significant slice or significant portion of  
12 UK transactions in 1995; correct?

13 A. Sorry, what do you mean; with domestic transactions or?

14 Q. Of UK domestic transactions. So we've seen here  
15 a description of the UK domestic transactions that are  
16 being processed by Europay, and my question is that's  
17 quite a significant proportion of UK domestic  
18 transaction; do you agree?

19 A. Well, I do not know the UK market that well to tell --  
20 to tell if this was significant or not. Yes, for  
21 a stage, I was processing for the majority of the banks,  
22 so yeah, it's hard to tell if, yeah, just those -- those  
23 banks which are mentioned there reflect a significant  
24 portion of the -- of the market.

25 Q. Well, let's see if we can help you with that. Let's

1 look at page 2 of this memorandum {C2/458.1/2}. So  
2 Mr Nelson says there, do you see, the second paragraph:

3 "In terms of volumes, I have also attached to this  
4 email the latest information from PMI which is current  
5 to the end of May 1995. Bottom line - we have processed  
6 37.4 million domestic authorisations so far this  
7 year ..."

8 This is in July and that's authorisations:

9 "... and 49.5 million domestic clearing  
10 transactions."

11 So that's just over or just about half the year, and  
12 so it's a fair assumption, isn't it, because this is  
13 5 July, that Europay would have cleared around  
14 100 million domestic transactions by the end of 1995?

15 A. Yes.

16 Q. And then if we turn, please, to {XC22/10/54}, this is  
17 the Commission statement of objections against Europay.

18 Were you involved, Mr Van den Bergh, in helping  
19 Europay respond to the Commission's statement of  
20 objections? Do you remember?

21 A. No, I was not involved in that.

22 Q. Okay. So you probably haven't seen this document  
23 before, or have you seen it?

24 A. No, I've never seen that.

25 Q. Okay. I'm just going to show you part of it. So if we

1 look at paragraph 152, that states that in -- if we go  
2 halfway down the paragraph or just before halfway down,  
3 it says:

4 "This compares with respectively 11.4 million  
5 MasterCard ... [or credit] cards (327 million national  
6 transactions) ... in 1995."

7 Do you see that? So 327 million domestic  
8 transactions processed on Mastercard credit and charge  
9 cards in the UK in 1995.

10 A. Yes, I see that.

11 Q. So drawing these points together, would that suggest to  
12 you that around a third of domestic transactions were  
13 cleared by Europay in 1995?

14 A. Yes, that shows that it is around a third.

15 Q. And then can we please turn to {C10/268/1}, please.

16 This is a letter dated 3 December 2003 and it's from  
17 Mastercard's solicitors to the European Commission.

18 And if we look on page 2, please {C10/268/2}, this  
19 is a table -- you see the heading -- showing the  
20 percentage of domestic Mastercard pay later card  
21 transactions processed by Mastercard Europe in EU member  
22 states, and then you have the various member states in  
23 the left-hand column.

24 And we've got data for 2001 and 2002 and if you go  
25 to the very bottom, you see the United Kingdom. And do

1           you see there that the percentage of domestic  
2           transactions processed by Europay has increased from  
3           around the third that we saw in 1995 to 95.57% in 2001  
4           and 97.25% in 2002?

5       A.   Yes, I see that.

6       Q.   And, again, that reflects your evidence, doesn't it, Mr  
7           Van den Bergh that there was in the 90s an increasing  
8           proportion of UK domestic transactions that were  
9           processed via ECCSS?

10      A.   Yeah.  No, that's -- that's correct.

11      Q.   So would it be fair to say -- we've looked at 1995 and  
12           we've looked at 2001 and 2002.  Would it be fair to say  
13           that it seems likely that in 1996 and 1997, Europay was  
14           processing somewhere between a third of transactions and  
15           95% of transactions?  Does that seem realistic to you?

16      A.   Yeah.  No, that seems to be, yeah, realistic.

17                Just I see that the screen where the documents are  
18           showed that there is a message that the battery is  
19           running low.

20      Q.   Ah, we better pause.

21      A.   Sorry.

22      Q.   Somebody better help you with that, Mr Van den Bergh.  
23           Thank you for drawing it to our attention.  Is there  
24           somebody in the room that can assist?  I see somebody is  
25           doing

1 A. Yes, somebody is coming, I see. (Pause).

2 Yeah, I think they've fixed it.

3 Q. Thank you very much. Now -- let's please turn to  
4 {C7/198/1}. Now, this is a document, I think, that you  
5 were shown when you prepared your statement. It's  
6 listed as one of the documents you were shown. Do you  
7 remember looking at this? It's Europay's response to  
8 the Office of Fair Trading in the United Kingdom, their  
9 response to a request for information. Do you remember  
10 looking at this or not?

11 A. No, this does not ring a bell.

12 Q. Okay.

13 A. I don't believe I saw that document.

14 Q. Don't worry.

15 I asked Mr Hawkins some questions about this  
16 document. Did you watch any of his evidence?

17 A. No, I did not do.

18 Q. You probably had better things to do, Mr Van den Bergh.  
19 That's understandable.

20 Now, let's look, please, at question 1., and this  
21 question asks for details of the names of the  
22 participants that have agreed to clear and settle  
23 transactions in the UK through the ECCSS. Do you see  
24 that?

25 A. Yes.

1 Q. And the first paragraph of the response, the response  
2 from Europay, comes under that, and it says:

3 "Europay ... offers all member banks the option to  
4 clear and settle domestic transactions using the  
5 [ECCSS] ..."

6 Now, that's correct, isn't it? That offer was made  
7 to all member banks; correct?

8 A. Yeah, correct. They had the choice to use directly the  
9 Mastercard systems or go via a local processor.

10 Q. Thank you.

11 And we see next, it says:

12 "A major part of the UK domestic traffic is  
13 processed by ECCSS."

14 The date of this document is September 2000 and from  
15 the other documents we've seen, I think you would agree  
16 that that's correct.

17 A. Yeah, correct.

18 Q. And then it says though:

19 "Certain pairs of banks do however clear and settle  
20 outside of ECCSS."

21 And, again, is that something that you recollect as  
22 being the case?

23 A. Yeah. No, that is something that I recollect; that some  
24 banks, yeah, opted to process amongst themselves or  
25 outside of ECCSS.

1 Q. Thank you.

2 And then we see:

3 "Some members who process transactions using the  
4 services of FDR ..."

5 So FDR is mentioned here and so some of the banks  
6 used FDR to process their transactions; correct?

7 A. Correct.

8 Q. And what's being said in this paragraph here is that --  
9 so if you just read that third paragraph down, so:

10 "Some members who process transactions using the  
11 services of FDR as a third party processor have taken  
12 the decision to truncate the 'on-FDR' traffic using  
13 FDR's transaction processing system to clear and settle  
14 the transactions between members who also process with  
15 FDR."

16 So what's being said there is that where both banks  
17 used FDR, the clearing and settlement would have been  
18 carried out by FDR; correct?

19 A. Correct.

20 Q. And that again reflects the memorandum we saw written by  
21 Mr Nelson; correct?

22 A. Sorry, which memorandum were you referring to?

23 Q. So it was the memorandum where Mr Van den Bosch asked  
24 Mr Nelson some questions and he said intra-FDR traffic  
25 is processed by FDR. So that's consistent with this --



1 A. Yeah, correct. Yes.

2 Q. Now, if we go to page 2 {C7/198/2} and let's look at  
3 question 4, please, so:

4 "What percentages of transactions are made (i) on  
5 the basis of fallback interchange and service fees; and  
6 (ii) by way of bilateral agreements between issuers and  
7 acquirers ... Please provide this information by value  
8 and volume of transactions made for the previous  
9 five financial years."

10 And what Europay says there is that -- it says that  
11 it doesn't process all of the domestic traffic, so it's  
12 not in a position to provide figures on the percentage  
13 of transactions processed under bilateral interchange  
14 and service fees as opposed to the total traffic. Do  
15 you see that?

16 A. I see that, yes.

17 Q. So it can't answer questions about the total traffic,  
18 but we see at question 5 that OFT anticipates that and  
19 says:

20 "In the event that Europay only has details of the  
21 bilateral agreements between Participants that do use  
22 the ECCSS ... what percentages of transactions are made  
23 ... on the basis of fallback interchange ... and ... by  
24 way of bilateral agreements between issuers and  
25 acquirers ... Please provide this information by value

1 and volume of transactions made for the previous  
2 5 financial years."

3 And if we go over the page, we'll see a table  
4 {C7/198/3}, and this shows -- if we just look at the  
5 table, please, it shows that in 1997 for point of sale,  
6 the figures are very low. Do you see that?

7 A. I see that, yes.

8 Q. And then they're similar but even lower in 1998 and  
9 1999. Do you see that too?

10 A. I see that too, yes.

11 Q. And if we turn back to page 2 {C7/198/2}, we can see at  
12 the top of the page that Europay is being asked for  
13 details in 2000, in the year 2000, of the number of  
14 existing bilateral agreements that are in place and they  
15 say at (i):

16 "On the domestic traffic processed through ECCSS, we  
17 have been informed of fifteen special bilateral  
18 arrangements, of which three relate to POS transactions  
19 and twelve for ATM and cash advance transactions."

20 So it's clear, isn't it, from that answer that in --  
21 as of the date of this document, which is  
22 September 2000, there are only very few bilateral  
23 arrangements between banks relating to point of sale  
24 transactions; correct?

25 A. I would not agree with that. If I look at the names of

1           those banks, on top of my head, yeah, these were the  
2           majority of the banks that we -- we used to have in the  
3           system, yeah. I think it's only at a later date that we  
4           really get a lot more UK banks. So I think, yeah, '95  
5           until 2000 must be something like 50 UK banks that we  
6           had in the systems.

7       Q. So let's try and separate out two things. So this is  
8       looking at the year 2000, and what Europay is being  
9       asked is not how many banks are on the system, but how  
10      many bilateral agreements are in force --

11     A. Okay.

12     Q. -- because as of that date in 2000, there was  
13      a UK multilateral interchange fee, which we've heard  
14      from the other witnesses tended to be used by the banks.  
15      So the question here was: how many banks were not using  
16      the UK MIF, but instead had specific bilateral  
17      arrangements? And it looks in the year 2000 that very  
18      few banks had specific bilateral arrangements. Do you  
19      see that?

20     A. Yeah, I see that.

21     Q. And does that accord with your recollection, or perhaps  
22      you can't remember?

23     A. I can't remember that exactly.

24     Q. Okay.

25     A. It was my memory that we used to have bilateral

1           agreements with UK banks.

2       Q.   So going back, please, to the next page {C7/198/3},  
3           assuming that it's correct that there were very few  
4           bilateral agreements in the year 2000, it looks like  
5           these low figures -- so Europay was being asked for the  
6           proportion/percentage of transactions that took place  
7           according to bilateral arrangements or according to the  
8           default interchange fee. It looks like these low  
9           figures relate to the proportion that took place on the  
10          basis of bilateral transactions; correct?

11       A.   Well, these figures looks -- look very, very low. If  
12          you look at the banks on the previous page, I would  
13          expect higher figures here.

14       Q.   Well, the banks on the previous page -- what we've seen  
15          on the previous page is that there were three bilateral  
16          agreements. Mr Van den Bergh, just to be clear, we're  
17          not talking about how many banks were on the Europay  
18          system, because I think we all agree that there were  
19          lots of UK banks on the Europay system at this stage.  
20          The question is: for the banks on the Europay system,  
21          what proportion were clearing transactions on the basis  
22          of the default MIF and what proportion were clearing  
23          transactions on the basis of bilateral arrangements?  
24          But it may be that you can't help us on that matter.

25       A.   No, I do not believe that I can help here.

1 Q. Okay. Now, if we go to the OFT decision itself, if we  
2 go to {B/6/22}. So this is the OFT's decision and you  
3 see in the middle that there is again -- I think the  
4 reason the numbers are slightly different and it uses  
5 the 'less than' symbol is because -- for confidentiality  
6 reasons.

7 But we see very similar figures and we see the  
8 heading in the table "Percentage of purchase  
9 transactions made on the basis of bilateral agreements  
10 between issuers and acquirers". So, again, we see that  
11 what's said is that a very small proportion of those  
12 transactions are taking place on the basis of bilateral  
13 arrangements as opposed to the default MIF. But  
14 I think -- I think your position is you can't really  
15 help us on those figures; is that correct?

16 A. I don't know these figures, sorry. I can only say that  
17 they seem to be small.

18 Q. Alright. Thank you.

19 Now, let's go to {C16/41/1}, please. This is  
20 a transcript of a hearing before the Competition Appeal  
21 Tribunal that took place in March 2006. And if we look  
22 at page 2, we can see -- thank you. We can see that  
23 Mr Green QC was instructed for MasterCard UK Members  
24 Forum.

25 And if we go to page 8, please, do you see line 24

1 down the left-hand side margin {C16/41/8}? We see

2 Mr Green says:

3 "The documents encourage bilaterals with a fall back  
4 MIF. In the early part of the [1990s] there were some  
5 bilaterals. As the system evolved they became less  
6 practicable but the rates did not change ... it is still  
7 possible for bilaterals under the rates to be  
8 concluded."

9 So here, Mr Green is saying that in the early part  
10 of the '90s, there were some bilateral agreements  
11 between banks, but as time went on, they became less  
12 practicable, less easy to conclude. Do you agree with  
13 that? Does that accord with your recollection?

14 A. Yes, I agree that it is -- indeed a lot more difficult  
15 to make bilateral agreements if there are a lot more  
16 participants in the system.

17 Q. Thank you.

18 And if we go to {B/55/13}, please, this is  
19 a schedule put together by Mastercard of bilateral  
20 arrangements and we can see at the top that it's headed  
21 "UK bilateral interchange fees for consumer credit  
22 cards: electronic". Do you see that?

23 A. I see that.

24 Q. And if we take the column for 1997, we can see that  
25 NatWest as acquirer had lots of bilateral agreements in

1 place. Do you see that? Because you have NatWest as  
2 acquirer and then you have, in the second column, the  
3 issuer. Do you see that?

4 A. Yes.

5 Q. And then -- but then if we scroll down to the next page  
6 {B/55/14} and if you just keep your eye on 1997 and then  
7 scroll down again, please, to page 15 {B/55/15} and then  
8 to page 16 {B/55/16} and then to page 17 {B/55/17}, we  
9 see that there are actually very few bilateral  
10 agreements in place in 1997.

11 MR COOK: We've had this issue before, sir, which is that  
12 this is not what the document shows. It just simply  
13 shows there is no new bilateral notified in that year  
14 and we say previous ones continued. So it can't be put  
15 on the basis this shows an absence of bilaterals.

16 MR JUSTICE ROTH: And this is not -- you've asked Mr Van den  
17 Bergh what his recollection/understanding is of what --  
18 number of bilaterals in the UK.

19 MS DEMETRIOU: Yes --

20 MR JUSTICE ROTH: So I don't see how this can help his  
21 evidence.

22 MS DEMETRIOU: I will move on.

23 Now, let's, please, go to {C3/225/1}, and you can  
24 see that this is a letter enclosing -- so it's a letter  
25 to Europay, to Mr Nelson -- do you see that -- dated

1           21 June 1996? And it's enclosing an agreement form  
2           completed by the Bank of Scotland as acquirer for ATM  
3           transactions and Beneficial Bank as issuer. It says:

4                 "The rate quoted therein replaces the current  
5           bilateral established 1st October 1995. For those other  
6           transactions for which the fee structures have been left  
7           blank, current default rates should continue to apply."

8                 And that -- this agreement is being lodged with  
9           Mr Nelson at EPI. Do you see that?

10          A. Yes, I see that.

11          Q. And if we look at the agreement itself, it's at  
12             {C3/209/1}. Can you see that, as the covering letter  
13             indicated, the only rate specified is £2.50 for  
14             ATM transactions and the other interchange rates have  
15             been left blank? Can you see that?

16          A. Yes, I can see that.

17          Q. So if we go back to the letter again, {C3/225/1}, the  
18             letter -- thank you -- says:

19                 "For those other transactions for which the fee  
20           structures have been left blank, current default rates  
21           should ... apply."

22                 Now, we've discussed that under Europay system,  
23           wherever bilateral rates were not inputted to the  
24           system, the default rates would apply automatically;  
25           correct?



1       A. Well, I -- I think you should see that at different  
2       levels because we could only set up the agreements on  
3       the member level. So it would still -- look like  
4       a bilateral or a domestic fallback agreement, but most  
5       likely the actual fee amounts would be the same than in  
6       the implementation.

7       Q. So when you say the same as in the implementation -- so  
8       here what's being said is, "Well, we've left some fee  
9       structures blank, yes, and so the current default rates  
10      should apply".

11      A. Yeah.

12      Q. That would be the default rate under your system; right?  
13      So if there was no bilateral, it would be the domestic  
14      multilateral. If there's no domestic multilateral, it  
15      would be the EEA MIF; correct?

16      A. No, that's not what I mean. I mean that if you look at  
17      it from a systems point of view, you would still have  
18      a bilateral agreement in place, but most likely, let's  
19      say, if your -- if your domestic multilateral rate would  
20      be 1%, then you would also implement a 1% in your  
21      bilateral agreement.

22      Q. I see.

23      A. So systems-wise, it would be a bilateral agreement, but  
24      the value of that bilateral agreement would be the 1%,  
25      which is also equal to what we had on the domestic

1 fallback.

2 Q. I see. Thank you. So what you're saying, just so I can  
3 understand -- make sure I have understood you correctly,  
4 is that on the system, it would look like you've got  
5 bilateral agreements in place; correct?

6 A. Correct.

7 Q. But if the bilateral agreement didn't specify  
8 a particular rate, then what the system would do would  
9 be to apply the rate specified by the system, so the  
10 UK fallback or the EEA fallback if there was no UK --

11 A. No, you should -- no, in -- in this scenario, you should  
12 really implement a bilateral rate with the values of  
13 the -- of the domestic fallback. So based upon this  
14 document, somebody would make an analysis, most likely  
15 from our Interchange Team looking at that date, and so  
16 they would have implemented that and what we put in the  
17 system or the agreement codes.

18 So you could not -- so if you had an agreement code,  
19 there was a compatibility. So in that case, the  
20 fallback did not -- did not occur. So you always had to  
21 have a rate in place.

22 Q. Okay. So you always have to have a bilateral rate in  
23 place is what you're saying.

24 A. Yes, exactly so.

25 Q. So if those rates have been left blank, then the

1           system -- then the system would treat -- would populate  
2           the bilateral with the fallback values; correct?

3       A. No, it was not that -- that automatically. So you  
4           really had to put in -- those rates in the system. If  
5           there was something left blank --

6       Q. Yes.

7       A. -- the system would -- would abnormally -- and so it  
8           would raise an event in that case. So you really had to  
9           have once, you know, you -- so you put on the member  
10          level the bilateral agreement and under that bilateral  
11          agreement, you have to have all those rates in place.

12      MR JUSTICE ROTH: Just so I can understand it, if we go to  
13          the document that was attached, which is {C3/209/1},  
14          here -- this is the standard form, as I understand it,  
15          that the banks would use to submit their rates; is that  
16          correct?

17      A. Correct. That's correct, yes.

18      MR JUSTICE ROTH: Yes, and here we see there's a rate  
19          specified of 2.50 for ATM signed by both the issuing  
20          bank and the acquiring bank, so you'd get that, and for  
21          ATM transactions between those two banks, they were put  
22          into the system. The fee is £2.50.

23      A. Yes.

24      MR JUSTICE ROTH: Now, the other three rates that are in  
25          the -- on the form, paper merchant, electronic merchant

1           and cash advance, there's nothing here, but, of course,  
2           the system would have to have a rate.

3       A.   Correct.

4       MR JUSTICE ROTH:   The covering letter that we saw said

5           "continue with what was there before".   So what would  
6           the rate be in the system for these other  
7           three elements?

8       A.   So -- so what will happen based upon this form is that  
9           you -- if you want -- the implementation in the system  
10          cannot have the blanks, so somebody would look in the  
11          system what the current rates were and would implement  
12          those current rates for paper, for electronic and for  
13          cash advance.   So that is how it would be done.

14          So what we would implement is we had an agreement  
15          for Bank of Scotland, we had an agreement for  
16          Beneficial Bank and then with those two agreements, you  
17          make a compatibility, so which came down to a resulting  
18          agreement, and under that resulting agreement, you filed  
19          the fees for all those components.

20          So if it was blank here on the form, the person who  
21          implemented it would look into the system and would  
22          implement the rates that -- yeah, that were there  
23          already before or the rates that were, yeah, under the  
24          bilateral agreement.

25       MR JUSTICE ROTH:   Yes, thank you.

1 MS DEMETRIOU: So if there is no agreed rate on the  
2 bilateral, so if it's been left blank and they say --  
3 then the operator has to input some rates; correct?

4 A. Correct, yes. So it was the Interchange Team that  
5 received this form and they, yeah, completed it into  
6 instructions to the operator so that he had all the  
7 records that were required to properly input that in the  
8 system.

9 Q. Yes, and if there were no agreed rates for, say, point  
10 of sale transactions, then the operator would put in the  
11 rates that -- the fallback rate in the system, so the  
12 UK rate; correct?

13 A. Correct.

14 Q. And if there was no UK rate, the EEA rate; correct?

15 A. Yeah, whatever he received from the -- from the  
16 requester to make that implementation.

17 Q. But -- and by "the requester", you mean the banks, do  
18 you?

19 A. No, so the banks sent this one to the -- to the  
20 Interchange Team or later the -- and the customer  
21 implementation team, and they make then a request to the  
22 operators to enter that in the system. So there is  
23 an analysis done based upon this form and then it's been  
24 translated in a technical request which goes to the --  
25 yeah, to the applications support team.

1 Q. Okay. Let's just look at -- just to make sure that  
2 I'm clear about this, let's just look at another  
3 document, so {C3/228/1}. And this is a similar  
4 notification enclosing a different bilateral agreement,  
5 this time between Royal Bank of Scotland as an acquirer  
6 and MBNA International Bank as an issuer. Do you see  
7 that?

8 A. I see that.

9 Q. And it says:

10 "The rate quoted therein replaces the current  
11 bilateral ... For those other transactions for which the  
12 fee structures have been left bank, current default  
13 rates should continue to apply."

14 Then if we look -- so is this correct: you get  
15 a bilateral agreement that sets a rate for some types of  
16 transaction, like here this is what's happened --

17 A. Yes.

18 Q. -- and says that for other transactions, the fee  
19 structures have been left blank; correct?

20 A. Correct.

21 Q. And it says the current default rate should continue to  
22 apply. So the operator needs to input the bilateral  
23 agreement on to the system; correct?

24 A. Correct.

25 Q. And some of the -- some of the fees will have been

1 specified, so that's no problem. So those fees go into  
2 the system; correct?

3 A. Correct.

4 Q. And then other fees have been left blank and the banks  
5 have said current default rates should apply. So those  
6 rates are populated by the -- the operator puts those  
7 rates into the system, so I think you've said that will  
8 be the UK -- the UK fallback; correct?

9 A. Yeah, so that's -- and I was not part of the Interchange  
10 Team, so I don't know exactly how they did it, but what  
11 we received to be implemented were all those rates, so  
12 if -- we implemented a complete set of bilateral rates  
13 and the values of those rates were, of course, provided  
14 to us, so this was done by the interchange.

15 So my assumption is if there is something in the  
16 form which says the default rate, then, yeah,  
17 Interchange Team know what is meant by the default rate  
18 and they could provide with us the correct values to be  
19 entered into the system.

20 Q. Okay, thank you. And what they would understand by  
21 "default rate" is the default rate in the system;  
22 correct? So if there's no bilateral, that's the  
23 domestic fallback rate; correct?

24 A. I assume that that is the case, so -- but, yeah, you  
25 should probably ask somebody who was closer with these

1 forms than I was.

2 Q. And just to look at one more document on this in case it  
3 helps, go to {C2/204/1}. And this is a letter again to  
4 Europay to -- from Europay, actually, to Northern Bank  
5 and what's said here is:

6 "I am attaching ... a complete list of all  
7 bi-lateral interchange agreements entered into by  
8 Northern Bank.

9 "It is important that Europay and FDR have matching  
10 details on interchange arrangements ... Could you please  
11 notify both FDR and Europay directly whenever enter into  
12 a new bilateral agreement."

13 So you see that this is a complete list of all  
14 bilateral interchange agreements entered into by  
15 Northern Bank. And if we look at the attachment, it's  
16 at {C2/205/1} and you can see the heading at the top and  
17 you can see that -- you can see, for example, that --  
18 look at Midland. So if you go down the page and you see  
19 Midland Bank, so Northern Bank and Midland Bank, you can  
20 see there's been a figure agreed for cash advance of  
21 £3.75. Do you see that?

22 A. Yes, I see that.

23 Q. But then the other rates say "n/a", so not applicable or  
24 not available. So that means that the operator has to  
25 input some rate for those transactions; correct?



1 A. No, for ATM, it might be that it's not applicable since  
2 perhaps they were not an -- an ATM acquirer.

3 Q. Right.

4 A. So that can be the case as well.

5 Q. That's a fair point, but let's look at paper and  
6 electronic transactions. So some rate, so some  
7 interchange rate, would have to be put on the system for  
8 those types of transactions; correct?

9 A. If they were processing those transactions, yes.  
10 Otherwise, you would (inaudible) an event.

11 Q. And so if they were processing those transactions, and  
12 if they hadn't agreed a rate for those transactions,  
13 then the operator would look at what the default was in  
14 the system; correct?

15 A. Sorry, I'm not following you here.

16 Q. So if these parties -- so if Northern Bank and  
17 Midland Bank were processing paper and electronic  
18 transactions --

19 A. Yes.

20 Q. -- and if they had not agreed a specific fee, the  
21 operator would still need to put a fee into the system,  
22 wouldn't it -- wouldn't they?

23 A. Yeah, correct. If they would process it, they should --  
24 well, we should have put in a fee in the system.  
25 Otherwise, the system would -- yeah, would eventually

1 crash.

2 Q. And if the parties hadn't agreed what that fee was, then  
3 we go back to what you explain in your system is the  
4 default in the system; correct? So the operator would  
5 look, first of all, to see whether there was a domestic  
6 fallback interchange fee and if there was, the operator  
7 would put that in; correct?

8 A. Sorry, because these are fees and how do you see that  
9 the operator is putting it in?

10 Q. Well, I thought that you said that if there were  
11 transactions that were being processed --

12 A. Yes.

13 Q. -- and if there was no fee that had been agreed in  
14 a bilateral negotiation, the operator would have to put  
15 some fee into the system for those transactions.

16 A. No, no, no. So if you do not have a bilateral  
17 agreement, in that case, you have the record on the  
18 member level. So in this case, what was it?  
19 Northern Bank, and so Northern Bank would not have  
20 a member agreement in the bilateral box. If there is no  
21 bilateral -- a member agreement in the bilateral box,  
22 then it goes to the next level, which would be the  
23 domestic -- domestic multilateral fee. If there is no  
24 domestic multilateral fee, that's where it goes to the  
25 intra-regional and then inter-regional. So that is how

1           it is working.

2       Q.   Thank you.

3       A.   But if you have in the domestic box a member agreement,  
4           then you had another table where you had the  
5           compatibility, so you had Northern Bank in combination  
6           then, in this case, with Midland, if you did not find  
7           a record there, in that case, yeah, it would -- it would  
8           crash.

9       Q.   Alright.   So there had to be a record for it not to  
10          crash.

11      A.   Yes, exactly.

12      Q.   So you can't have a -- what you can't have in the  
13          system -- if you've got every type of transaction, you  
14          can't have a bilateral in the system that only covers  
15          some transactions because otherwise, it would crash.  
16          There needs to be a figure for every type of transaction  
17          that's being processed; correct?

18      A.   Yeah, but you have this distinction between -- between  
19          the brands.   So we had Eurocard, we had -- and we had  
20          Maestro and I think ATM was a -- was a third record.   So  
21          we had three records per member.

22      Q.   Okay.   Thank you very much, Mr Van den Bergh.

23           I want now to look, please, at {C2/321/1}.   This is  
24          an email from Mr Nelson dated -- if you look at the  
25          second email, you can see the date, 15 December 1994.

1 And he is -- Mr Nelson is the top email. He's answering  
2 a question, and let's just look at the context. So we  
3 can see the question is in the second email.

4 I'm looking at the second paragraph:

5 "My [understanding] for the UK has been that  
6 bi-lateral interchange agreements operate, and that our  
7 cross-border rates never apply for the domestic  
8 processing we operate through ECCSS. However, I am  
9 beginning to question this as I now hear that the UK  
10 have a 'petrol' category in operation."

11 And then if we look above at the response, Mr Nelson  
12 says:

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

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

19 "However, there are some defaults still in place  
20 (Andy - is this 'UC00'?) ..."

21 Do you see that?

22 A. I see that, yes.

23 Q. Now, petrol was an EEA MIF category at this time, wasn't  
24 it?

25 A. I assume so, yes.

1 Q. And UC00 is a transaction code, is it, for a bilateral  
2 arrangement at a particular rate; is that correct?

3 A. I believe UC00 was the domestic fallback code. I think  
4 if you look at the bilaterals, they would have  
5 a different number than 00.

6 Q. Okay --

7 A. So you would have -- for every member, you see 01, 02,  
8 etc.

9 Q. I see. So where you say 00 is the domestic fallback  
10 code --

11 A. Yes.

12 Q. -- if there was no domestic fallback, would that then  
13 escalate to the next level down, which would be the  
14 intra-EEA MIF code?

15 A. If there was no bilateral code and there was no domestic  
16 code, in that case, it would fallback to the  
17 intra-European rate.

18 Q. Okay.

19 So then if we go, please, to a letter which we've  
20 just received from Mastercard's solicitors, I think,  
21 today at {D/272/1}. And this refers to this UC00 code  
22 and they say that -- if we can go to page 3, actually,  
23 first {D/272/3}, we see that the UC00 code is said to be  
24 1% in 1993. That's what's being said.

25 We can go back to the first page {D/272/1}. So:

1           "Based on these documents, we have prepared the  
2 enclosed matrix ..."

3           This is paragraph 3:

4           "... of UK domestic bilateral agreements as at  
5 May 1993."

6           And what they say at paragraph 2 is:

7           "... we ... understand that the term UC00 relates to  
8 the interchange fees applied to transactions between  
9 a particular bank pair."

10          And I think what you've just explained is that the  
11 UC00 reflects the default fee in the system, so either  
12 the domestic fallback, if there was one, or if there  
13 wasn't one, the EEA fallback; correct?

14       A. Well, UC00 was always domestic. So in that case, it was  
15 not the intra-regional. In that case, you had  
16 a different code because it was also standing in  
17 a different box.

18       Q. Well, in 1993, Mr Van den Bergh, there wasn't a domestic  
19 fallback, and we see from page 3 {D/272/3} that what's  
20 being said there is that in 1993 the UC00 rate was 1.

21           Do you see that? And if we go to --

22       A. I see that.

23       Q. And if we go to {A/18.1/2}, this is a schedule of  
24 interchange fees --

25       A. Sorry, sorry, can you go back to the one, please?

1 Q. Of course.

2 A. Because I think -- I think what we're confusing here is  
3 the difference between the member agreements and the  
4 resulting agreements, because I see that there were  
5 a couple of other UC values, on the previous page it  
6 was. So -- so what I think is that these are the  
7 resulting agreements that you are referring to.

8 MR JUSTICE ROTH: So can we go back to {D/272/3}? Thank  
9 you.

10 A. So what I think here, what you see here when you see  
11 UC00, UC01, UC02, UC03, that these are what we call  
12 resulting agreements, so these are the agreements that  
13 are linked to the fees. So all your member level, you  
14 had a member agreement and you had the member agreement  
15 of the issuer, you had the member agreement of the  
16 acquirer, and those two agreements together were in  
17 a compatibility table, came to a resulting agreement,  
18 and that was pointing them to one of these fees,  
19 resulting in those tariffs.

20 MS DEMETRIOU: So the resulting agreement would be the  
21 interchange fees applicable to a particular bank pair,  
22 correct, once you'd looked at the agreements in place?

23 A. Yes, exactly. So -- so this resulting agreement was  
24 actually to get to a specific set of fees.

25 Q. Okay.

1       A. So you should go one level up to see which are the  
2       member pairs that were pointing to these resulting  
3       agreements.

4       Q. Okay, and when you say "the member pairs", you're  
5       talking about the agreements in place between those  
6       banks.

7       A. Exactly. So if you had the set-up of the system, so you  
8       had the configuration of your issuer, you had the  
9       configuration of your acquirer, each had a member  
10      requirement, which were four boxes. So you had the  
11      bilateral box. You had the domestic box. You had the  
12      European box. You had the inter-regional box.

13             So you'd look, first of all, in the bilateral box,  
14      see if there was a compatibility between those two  
15      members which was pointing to one of those rates. If  
16      not, it goes to the domestic. If not, it goes to the  
17      intra-regional and then it goes to the inter-regional.

18      Q. Okay, thank you. And here -- so here you're having the  
19      resulting -- these are the resulting interchange fees  
20      that apply, you're saying.

21      A. Yeah, these are the resulting, yeah, agreements or  
22      which -- or, actually, it's a code and a collection of  
23      fees that, yeah, can be applied.

24      Q. And if we look at -- so we see that for UC00, the fee is  
25      1; correct?



1 A. Yes, correct.

2 Q. And if we go to {A/18.1/2}, this is the schedule of  
3 interchange fees put together by Mastercard's solicitors  
4 and if we look at the last box on the right, 1993, and  
5 if we look at the fourth column within that box, what we  
6 see for Mastercard EEA is that the undiscounted rate for  
7 both standard and electronic, because I think it was  
8 just one rate then, was 1. Do you see that?

9 A. I see that, yes.

10 Q. So --

11 A. It also says 0.6 for the -- for the electronic.

12 Q. No, that's Visa's. That's Visa's. That's a separate  
13 column.

14 A. Okay, sorry. What is then the column for Mastercard?

15 Q. So if you look at four of the sub-columns, it says  
16 "Mastercard EEA". Do you see that?

17 A. Yes.

18 Q. And then we see a range 0.5% to 1%.

19 A. Yes.

20 Q. That reflects the fact that 1% was the MIF, but then  
21 there could be discounted rates; correct?

22 A. Yeah, it was a minimum fee and then the 1%.

23 Q. Alright.

24 Now, let's go to {C3/51.2/1}. This is an internal  
25 Europay email dated 22 December 1995. Do you see the

1           date at the top?

2       A.   Yes.

3       Q.   And you can see that the title of the email is

4           "Bilateral agreements NatWest" and you see that --

5       A.   I see that.

6       Q.   -- this refers to an internal review at NatWest for the

7           application of the correct interchange rate indicators.

8           Do you see that?

9       A.   Yes.

10      Q.   And we're going to look at two of the documents which

11           accompanied this email.  So the first is {C2/405.2/1},

12           and this document is headed "Domestic agreement fees"

13           and then there are subheadings.  Do you see that?  And

14           the first subheading is "Resulting agreement", which is

15           what you were just talking about --

16      A.   It's -- yeah, it's quite small.  Can you enlarge the

17           view?

18      Q.   Of course.  Is that better?

19      A.   Yeah, that's better.

20      Q.   So this is -- you were referring a minute ago to

21           resulting agreement and you've explained what that is.

22      A.   Yes.

23      Q.   And we can see "Resulting agreement UC00".  Do you see

24           that?

25      A.   Yes, I see that.

1 Q. And then looking at the figures there, this is 1995  
2 remember, so the letter was 1995.

3 A. Yeah.

4 Q. I don't know if it's going to be too small, but if the  
5 operator could please put this document side-by-side  
6 with the consolidated interchange fee schedule at  
7 {A/18.1/3}. It may be too small, but we can zoom in and  
8 out. It's definitely too small for me.

9 So we're looking at 1995. If we zoom in to 1995 and  
10 look at the figures for the Mastercard EEA MIF, the top  
11 row is 1.15. That's standard transactions.

12 And then if we look at back to the other document  
13 {C2/405.2/1}, UC00, you can see non-electronic. Do you  
14 see that partway down, 1.15?

15 A. Sorry, I'm lost -- on what document? Which? The left  
16 or the right side?

17 Q. So if you look first of all at the right side {A/18.1/3}  
18 and we see for 1995 --

19 A. Yes.

20 Q. -- the standard point of sale rate was 1.15 for the  
21 EEA MIF. Do you see that?

22 A. Yeah, I see. I see what column you are in, yeah.

23 Q. And then if we go back to the left-hand column, UC00  
24 {C2/405.2/1} --

25 A. Yeah, yeah.

1 Q. -- then what we have if we count -- if we look at  
2 four rows down, you see non-electronic, so in other  
3 words, standard --  
4 A. Yes.  
5 Q. -- and that's the same fee, do you see, 1.15?  
6 A. Yes.  
7 Q. And then if we go back to the right-hand document and  
8 look at the electronic rate --  
9 A. Yes.  
10 Q. -- that was 1-point -- that was 0.90. Do you see that?  
11 A. Yes, I see that.  
12 Q. And then if we look at the electronic point of sale rate  
13 on this document, it's 0.9 as well. So the UC00 rate is  
14 the same as the EEA MIF. Do you see that?  
15 A. The amount -- the percentages are the same, yes.  
16 Q. So UC00 is referring, isn't it, to the bilateral  
17 arrangement with the same rates as the EEA MIF; correct?  
18 A. Sorry --  
19 Q. So --  
20 A. So those two fees seem to be the same, yeah. Should we  
21 review every one of those fees? Is that what you want  
22 to do?  
23 Q. No, I'm just taking you to -- I took you to the  
24 1993 document --  
25 A. Yeah.

1 Q. -- where we saw the UC00 rate was 1 and the EEA MIF was  
2 1.

3 A. Yeah.

4 Q. And then I'm taking you to this document where, in 1995,  
5 the EEA MIF has gone up to 1.15 for standard  
6 transactions and gone down to 0.9 for electronic  
7 transactions. And, again, that's reflected in a change  
8 for those categories for the UC00 rates; correct?

9 A. I see that the amounts are the same, but, yeah, the UC00  
10 is then bilateral or domestic agreement. So, yeah, you  
11 can have the same rates but with different agreements,  
12 if you want.

13 Q. But the UC00 rate appears to be referring to the  
14 fallback rate, the EEA MIF. So you explained at the  
15 beginning that UC00 was referring to a domestic  
16 fallback; correct?

17 A. Yeah, correct, that was how I ...

18 Q. And there was no domestic fallback in place in the UK in  
19 1993 and 1995, so the way that your system operated is  
20 that you then move on to the intra-regional, the  
21 intra-EEA fallback; correct? So you can see here that  
22 UC00 is tracking the intra-EEA MIF because there is no  
23 domestic fallback. Do you see that?

24 A. Yeah, but you say there is no domestic fallback.  
25 I remember always having implemented a UK domestic

1 fallback as well. So it's quite possible that on the --  
2 on this side, the teams who implemented these fees, that  
3 they use indeed the same rate. But from my point of  
4 view in the system, we had a domestic fallback which  
5 might have the same rates than what we had for the  
6 intra-European fallback rates, but if I looked into the  
7 system, I could see that we had a domestic fallback in  
8 place.

9 Q. Alright. Let's go back to the Freshfields letter,  
10 please, at {D/272/2} this time. If we can make that  
11 bigger, please. We don't need two documents  
12 side-by-side. Thank you.

13 So this is a matrix produced by Mastercard's  
14 solicitors and it relates to 1993. You can see that at  
15 the top. And they say this is a matrix of UK domestic  
16 bilateral agreements.

17 And just scanning the document, you can see that  
18 there are a significant proportion, can't you, which are  
19 agreed at this UC00 code; correct?

20 A. Yeah, correct, and this is indeed in line with how  
21 I just explained it. So I guess what you see on the top  
22 are the member agreements of the acquirers. Then on the  
23 left column is the member agreements of the issuers and  
24 if you combine those both, then you come to a resulting  
25 agreement. So, yeah, if you looked at the

1 implementation of the member, you had bilateral  
2 agreements which were pointing them to those rates.

3 Q. And then if we go, please, to {C2/311.1/1}. So this  
4 dates from 2 December 1994 and you can see that date in  
5 small type at the very top right. Do you see that?

6 A. Yes.

7 Q. And it's the clearing and settlement report for  
8 Lloyds Bank.

9 And if we go to page 4, please {C2/311.1/4}, you can  
10 see Lloyds Bank at the top. Do you see that? And you  
11 can see they have a code, UK07. That must be  
12 Lloyds Bank's code; correct?

13 A. Yes, correct.

14 Q. And then you can see the list of different banks' names,  
15 and every bank has its own UK code. Do you see that?

16 A. Yes, correct.

17 Q. And then you can see at the top of the page the words  
18 "Resulting Agreement: UC00". Do you see that?

19 A. I see that, yes.

20 Q. So that's the transaction code which applied to Lloyds'  
21 bilateral arrangements with all of these banks; correct?

22 A. Correct.

23 Q. So all of those arrangements were at the level of the  
24 EEA MIF; correct? We've seen how the level was the  
25 same.

1 A. Yes, if you say that it is the same then yes, but we --  
2 from my point of view, this was still the UK domestic  
3 agreement, yeah, the UC00 then.

4 Q. Okay. Well, let's go back to Mr Nelson's email, so  
5 {C2/321/1}, and so you see that he has said:

6 "The UK domestic interchange situation is a ..."

7 This is in, just to recall, December 1994:

8 "The UK domestic interchange situation is a mixture  
9 of bilaterally negotiated deals, plus fallbacks to EPI  
10 cross-border [rates].

11 "I believe that the majority is now bilateral, and  
12 this OVERRIDES any EPI special deal such as petrol  
13 rates.

14 "However, there are some defaults still in place  
15 (Andy - is this 'UC00'?) where [petrol] ..."

16 Which is an EEA MIF category:

17 "... could potentially come into play."

18 So he seems to be saying here, consistently with the  
19 questions I have been putting to you, that UC00 reflects  
20 the EEA MIF; correct? That's why he's saying there are  
21 still some defaults to the EPI cross-border rate and  
22 he's saying, "Is this UC00?" So he seems to be thinking  
23 that the rate that UC00 refers to is the intra-EEA MIF  
24 rate; correct?

25 A. Well, we saw that the rates are the same, but still from



1 a systems point of view, this was a different resulting  
2 agreement than the intra-European agreement, yeah. So  
3 yeah, I don't have those codes anymore on top of my  
4 head, so perhaps you have some documents like the ones  
5 you just showed me, but UC00 was a different resulting  
6 agreement.

7 So, for example, if we would have implemented on the  
8 European fallback resulting agreement something specific  
9 for petrol, then it's normal that this would not be  
10 applied automatically to UC00. So it was -- you had  
11 a completely separate implementation for UC00 than what  
12 you had for intra-European.

13 MR JUSTICE ROTH: So I understood this, if it's UC00, that  
14 reflects a resulting agreement of a UK bilateral?

15 A. Exactly. So that is how -- so that table, where you had  
16 all those members with their member agreements, issuer  
17 and acquirer, and this came to UC00, okay, I agree the  
18 rates that have been implemented under UC00 seems to be  
19 the same rate than what we had for intra-European  
20 fallback, but it was a completely separate  
21 implementation. And if there was a European  
22 implementation, let's say, for petrol, which seems to be  
23 referred hereto, then yeah, we should also implement  
24 that in UC00 or you did not have it.

25 MR JUSTICE ROTH: And if there is no UK bilateral agreed

between a pair of banks and you have to apply, under the hierarchy you explained, the EEA default, would it show up then as a different rate, a different code, even though --

A. Yeah, it would have a different --

MR JUSTICE ROTH: -- (overspeaking) same, but the code that's entered if you're applying the EEA default, is it a different code?

A. Yes, exactly. It would be a different code because that would be the European fallback rate and it's a code which is used by all the European members, so had you -- this UC is coming from UK, so this was a code which was specific for the UK.

MR JUSTICE ROTH: Would that be a sensible moment? We've  
been going for quite a long time on this.

MS DEMETRIOU: I think that would be a sensible moment.

MR JUSTICE ROTH: Yes. So, Mr Van den Bergh, we take a short break for your benefit and for the benefit of the lady transcribing and everyone. So we'll come back in ten minutes. So if you want to have a break and leave the room in Brussels, you are free to do that. If you could be back in ten minutes, please.

A. Thank you.

(3.24 pm)

(A short break)

1 (3.38 pm)

2 MS DEMETRIOU: Mr Van den Bergh, can you hear me?

3 A. Yes, I can hear you.

4 Q. Thank you. Just on -- just finally on the UC00 code, so  
5 do you know is the U -- is that because it was UK,  
6 a UK agreement?

7 A. Yes, I -- I guess it was the case.

8 Q. And you called -- you said that the UC00 code referred  
9 to a domestic default rate; yes?

10 A. Yes, that's how I remember it.

11 Q. And could it be that when the systems operator was  
12 putting these domestic default rates into the system,  
13 they were using the EEA MIF rates? Because we've seen  
14 that the UC00 rates tracked the EEA MIF rates. Could  
15 that be the case?

16 A. Well, we should be making a distinction between what the  
17 operator or the application support engineers were  
18 entering into the system and what was already in the  
19 system. So if you want this UC00 resulting agreement  
20 together with the EEA rates, that was something that was  
21 delivered to us as part of the software releases, and  
22 what we were putting in the system were these member  
23 agreements and these compatibilities pointing to the  
24 resulting agreement.

25 So it was not that we had to enter each time those

1 rates under the UC00 resulting agreement. No, this was  
2 part of a release and was being delivered to us, yeah,  
3 as part of the release schedule.

4 Q. Yes. So just going back to the fact that UC00 refers to  
5 a domestic default rate, correct, so it refers to  
6 a domestic default rate, and where there was no domestic  
7 default rate before 1997, so there was no UK MIF before  
8 1997, something had to be put into the system, correct,  
9 where there was not some specific rate agreed between  
10 banks?

11 A. If you did not have a rate agreed between banks, I guess  
12 this is pointing then to this UC00 agreement with those  
13 rates that you showed.

14 Q. Okay, thank you.

15 Now, can we go, please, to {C1/374/1}. This is  
16 a letter from Europay to Mr Tyndall at NatWest and you  
17 can see there that Europay is saying that:

18 "... as from midnight ... 2 May, Europay ... will be  
19 able to support bilateral interchange arrangements for  
20 UK domestic clearing and settlement traffic."

21 And then he says:

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

1                   Do you see that?

2       A.   I see that.

3       Q.   And then if we go to the attachment, so that's at  
4            {C1/375/1}, and you can see the heading. That's headed  
5            "Domestic bilateral agreements set up for NatWest Bank".  
6            And you then have a list of banks. Do you see that?

7       A.   I see that, yes.

8       Q.   And then just below halfway down the list, you see that  
9            one of the banks is NatWest, the ninth row, and this  
10           specifies interchange fees, bilateral interchange fees,  
11           between NatWest and NatWest. Do you see that?

12      A.   I see that, yes.

13      Q.   So it's 1% paper and 1% electronic. So those must  
14           relate to on-us transactions; correct?

15      A.   Correct.

16      Q.   And then if we go to {C2/255/1}, please, we then see  
17            an updated schedule. We can see the date, 1 August '94.  
18            We see that in the bottom right-hand corner, if we could  
19            just zoom out again. Thank you. So do you see the  
20            date, 1 August 1994?

21      A.   Yes, I see that.

22      Q.   And, again, you see that there are NatWest/NatWest on-us  
23            transactions and here a different fee has been agreed  
24            for paper. Do you see that's gone up to 1.3%?

25      A.   I see that, yes.

1 Q. And at this stage, we've seen that ECCSS was processing  
2 NatWest transactions. We saw that from the earlier  
3 documents; correct?

4 A. Correct.

5 Q. So it would have processed -- ECCSS would have processed  
6 these on-us transactions at these specified rates;  
7 correct?

8 A. Well, if there were on-us transactions, it would have  
9 been processed by these as -- by these rates. So you  
10 should see that, like, each of those lines is pointing  
11 to a resulting agreement and, as I said before, you  
12 could not have no resulting agreement on the system with  
13 events. So in that case, we played it safe and we would  
14 enter a rate for NatWest on us, but if you did not have  
15 any transactions, it would never have been used.

16 Q. No, but if there were transactions, then that rate would  
17 have been used; correct?

18 A. If there were transactions, then that rate would have  
19 been used and, yeah, looking at that rate, it seems to  
20 be the same rate for every other UK bank. So yes, in  
21 that case, that rate would have been used.

22 Q. And then if we go back to your witness statement,  
23 please, at {A/13.5/10}, paragraph 42, please, and there  
24 you quote from Mr Dhaene's statement. So he says --  
25 Mr Dhaene said:

1            "... if the on-us transaction went over the European  
2            network and there was no specific arrangement in place  
3            with regards the applicable interchange fee, from  
4            a technical systems perspective, the intra-EEA fee would  
5            have also applied to those transactions ... If, however,  
6            the transaction did not go over the European network,  
7            whether or not an interchange fee was applied to the  
8            transaction was a matter for the bank in question to  
9            decide."

10           And you say at paragraph 43:

11           "My recollection is that banks generally did not use  
12           ECCSS to clear their on-us transactions."

13           Now, can we take it from this statement that you  
14           agree with Mr Dhaene that if the on-us transaction went  
15           over ECCSS, then an interchange fee would have been  
16           charged absent a specific arrangement to the contrary?

17           A. Correct, but as you just showed me, there was  
18           an agreement in place for NatWest on-us transactions.  
19           So in the unlikely case that there were NatWest on-us  
20           transactions, then this would have been that rate that  
21           was specified there in the table --

22           Q. Oh, I see. So --

23           A. -- so again --

24           Q. Sorry, you carry on Mr -- I didn't mean to cut across  
25           you. You can continue.

1       A. Yeah, so I don't believe that we had any on-us  
2       transactions for NatWest, but we -- we played it safe  
3       and we always had this -- this bilateral agreement  
4       already in place so that the system would not event.  
5       Q. Well, just to clarify that, Mr Van den Bergh, you have  
6       agreed already that in the mid-1990s, ECCSS -- we saw  
7       that from the document earlier on -- was processing all  
8       of NatWest's transactions, so that would have included  
9       NatWest/NatWest transactions; correct?  
10      A. I do not recall that, so ...  
11      Q. Let me just find the document again. If you just bear  
12      with me for a moment.  
13      A. Sure. (Pause)  
14      Q. So if we go, please, to {C2/458.1/1}. So we see the  
15      date of this is 5 July 1995, and if you look at  
16      paragraph 2:  
17                "NatWest - we process ALL authorisations and  
18                clearings, including 'on us' ..."  
19                Yes, do you see that?  
20      A. Yeah.  
21      Q. So -- and you've got no reason to think that that  
22      document is wrong, have you?  
23      A. No, that seems to be correct, yeah --  
24      Q. So --  
25      A. -- even the reason.



1 Q. Thank you. So going back to the schedule that we saw,  
2 those on-us transactions would have been cleared at the  
3 rate specified in the list of bilateral agreements,  
4 which we saw was 1 and then went up to 1.3 for standard  
5 transactions; correct?

6 A. Correct.

7 Q. Okay. And then I want to ask you about something else  
8 now. Can we go back to the schedule of the interchange  
9 fees at {A/18.1/2}. We looked at this briefly and we  
10 saw earlier that for electronic -- do you remember we  
11 looked at 1993, but the same is true for the other years  
12 in this schedule. So let's look at -- on this page,  
13 rather.

14 Let's look at 1993 again and do you see that the  
15 second -- you see electronic is said to be 0.5 to 1% and  
16 then also the same for standard, so it's 0.5 to 1%. So  
17 there's a range.

18 A. Just a moment. You are looking at the right box, which  
19 column?

20 Q. Yes, so I'm looking at 1993, which is on the right-hand  
21 side of the page --

22 A. Yes.

23 Q. -- and then the fourth column within that is the  
24 Mastercard EEA MIF.

25 A. Okay.

1 Q. Do you see that?

2 A. Yes.

3 Q. And it says both for standard and electronic that -- it  
4 gives the rate as being 0.5 to 1%. Do you see that?

5 A. I see that. Is that -- is that -- because the first  
6 figure, is that a 0.5% or is it a flat fee or a minimum  
7 fee of 0.5?

8 Q. It's 0.5%, and we understand it concerns -- the reason  
9 that Mastercard has given a range here is because  
10 certain reductions were available for the EEA MIF,  
11 correct, certain discounts?

12 A. Yeah, I don't -- I don't have any idea of how it was  
13 exactly set. Yeah, what I remember is that we had  
14 several ways of calculating interchange and you could  
15 have a flat fee, you could have a minimum fee, you could  
16 have a maximum fee and you could have a percentage or  
17 a combination of those. So, yeah, the 0.5 can be £0.5  
18 minimum and 1% of the transaction amount or it can be  
19 0.5 maximum. So you probably need to check in the  
20 footnotes what is it exactly -- what it exactly means.

21 Q. Right. Do you remember that certain reductions were  
22 permitted, certain discounts --

23 MR JUSTICE ROTH: I think the footnotes make clear, although  
24 you're quite right, Mr Van den Bergh, it should have  
25 been clearer in the table. It should read as 0.5%.

1 A. Okay.

2 MS DEMETRIOU: And we see, for example, if we have a look at  
3 footnote 7, so 1991 -- can we please zoom into  
4 footnote 7 because I really can't read it? Footnote 17,  
5 sorry, Mr Smouha is right.

6 Footnote 17 is for 1993:

7 "There was a reduced electronic interchange fee of  
8 0.50% provided that authorisation requests were  
9 generated for 100% of the electronic transactions."

10 So that was a discount that was available.

11 A. Okay.

12 Q. And if we just for completeness go over the page to the  
13 next page {A/18.1/3}, we can see that in '94, there's  
14 also a range and then in 1995, there's just a fixed  
15 figure. So those reductions ended for standard and  
16 electronic categories in 1995; correct?

17 A. Yes.

18 Q. Do you remember that or are you just putting together  
19 the table --

20 A. No, I don't remember -- I don't remember those tables.

21 MR JUSTICE ROTH: I don't think Mr Van den Bergh was  
22 involved in setting --

23 A. Exactly.

24 MR JUSTICE ROTH: -- any of these MIFs, so all he can agree  
25 with is what -- the figure you've shown him --

1 MS DEMETRIOU: What the documents say.

2 MR JUSTICE ROTH: -- but not from his independent knowledge.

3 MS DEMETRIOU: I do need to ask somebody about the way the  
4 discounts were set, so I'm going to see what I can --

5 MR JUSTICE ROTH: Well, it may be that can be done,  
6 actually, by correspondence rather than by  
7 cross-examination. I mean, there is a brief explanation  
8 of the basis of the discount.

9 MS DEMETRIOU: Yes.

10 MR JUSTICE ROTH: If your question is: what was the discount  
11 for and what was the criterion for the discount?

12 MS DEMETRIOU: Can I try some questions?

13 And, Mr Van den Bergh, if you don't remember and you  
14 can't help, please just say and I won't take it any  
15 further, but let me try and just establish some basic  
16 facts about how this operated.

17 And can I take you to the rules, so {C1/394/1}, and  
18 these are the Eurocard Rules from May 1993. And do you  
19 see there it says "Interchange Fee Reductions" and then  
20 it says "Paper-Based Reductions" and says:

21 "Eurocard-MasterCard acquirers are entitled to  
22 a reduced interchange fee on intra-European transactions  
23 performed at merchants belonging to a category where the  
24 local floor limit is lower than the intra-European floor  
25 limit for that category."

1                   Do you remember what's meant by "floor limit"?

2       A. Yes, a floor limit is in a transaction amount under  
3       which the merchant or the acquirer were not obliged to  
4       do an authorisation request.

5       Q. Thank you.

6                   So what's being said here is that if the local floor  
7       limit for a particular category of transaction is lower  
8       than the intra-EEA floor limit, the acquirers get  
9       a discount on the interchange fee; correct?

10      A. That's what it says, yes.

11      Q. And presumably, do you know, was the purpose to  
12      incentivise lower floor limits, which would in turn  
13      encourage more authorisation requests? Do you think  
14      that was the purpose of this or do you not know?

15      A. I do not know, but I would say more authorisation  
16      requests make it more secure because issuers can online  
17      decide if a transaction can go through or not.

18      Q. And did Europay receive fees for each authorisation  
19      request?

20      A. Yes, I guess. I'm not sure at what time these fees  
21      started, but yes, we typically get authorisation fees,  
22      although, let me think, authorisation fees in those days  
23      were only charged to issuers. So I do not believe that  
24      it would make it different for a merchant or  
25      an acquirer, but I may be wrong.

1 Q. Do you know -- is it right that the applicable domestic  
2 floor limit was something that issuing and acquiring  
3 banks could agree between themselves?

4 A. I do not know that.

5 Q. Okay. Now, if we go back to -- bear with me for one  
6 moment. (Pause)

7 So where we see here -- looking at the same  
8 document, you then have the calculation of the reduced  
9 interchange fee; correct? Do you see that?

10 A. Yes, I see that.

11 Q. It then explains the conditions for the application of  
12 this. So can we go over the page, please {C1/394/2}.  
13 So looking at "Electronic Transactions", so let's take  
14 electronic transactions:

15 "For individual transactions performed at merchant  
16 outlets using EPSS certified ... terminals, acquirers  
17 ... are entitled to a flat 0.50% interchange fee only."

18 Then it says:

19 "To qualify for the 0.5% interchange fee reduction,  
20 electronic transactions must generate authorization  
21 requests for 100% of the transactions."

22 So if you generate authorisation requests for 100%  
23 of transactions, that means you have a zero floor limit;  
24 correct?

25 A. That's correct, yes.

1 Q. So this -- the qualification of -- the qualification for  
2 this discount, for this reduction, would depend on the  
3 specific arrangements that banks had reached between  
4 themselves regarding floor limits; correct?

5 A. Sorry, can you clarify what you mean?

6 Q. Yes, so banks --

7 A. Because the floor limit is more something, yeah, on the  
8 acquirer side than on the merchant side, so how do you  
9 see that as an agreement between the banks?

10 Q. So the banks could agree floor limits between  
11 themselves, could they not, or are you saying that's not  
12 the case? So the acquiring bank would agree floor  
13 limits with merchants, is that how it would work?

14 A. Yes, that's -- well, I'm not a specialist in this  
15 material, so -- but yeah, typically, I know that in our  
16 rules, we had minimum floor limits that -- that banks  
17 should take and, yeah, it's something between the  
18 acquirer and the merchant, how I see it. But I'm not  
19 a specialist in that material.

20 Q. Okay. And as far as you understand, the acquiring banks  
21 had some flexibility in agreeing floor limits with  
22 different merchants.

23 A. Yes, I believe they do have that, although, yeah, there  
24 were some minimums that they should -- should respect.

25 Q. Okay. So whether or not they would qualify for this

1 interchange fee reduction would depend on those  
2 arrangements that they had reached with the merchants;  
3 correct?

4 A. Correct.

5 Q. And then if we go to -- then if we look at the petrol  
6 outlets, which is further down the page, we see there  
7 that the first paragraph says:

8 "The interchange fee on transactions performed at  
9 petrol outlets is reduced to a minimum of 0.50%."

10 So this shows that a reduced rate for transactions  
11 performed at petrol outlets is also available; correct?

12 A. Correct, yes.

13 Q. And then you see the conditions for that reduced rate to  
14 apply, and let's just look at one of them, for example.  
15 So look at (c):

16 "The Member has to provide figures to prove his  
17 coverage has reached a minimum of 50% of all main petrol  
18 outlets. Failure to reach this target will mean  
19 resumption of the standard interchange fee."

20 So, again, whether or not a bank could benefit from  
21 this discount would depend on whether or not they had  
22 met this condition; correct?

23 A. Sorry, what was -- what condition is this referring to?

24 This is ...

25 Q. So looking at condition (c), that they have to provide



1 figures to prove that their coverage has reached  
2 a minimum of 50% of all main petrol outlets.

3 A. And what does "coverage" mean? Sorry, I'm not familiar  
4 with this document.

5 Q. So -- well, it may be -- it's okay, Mr Van den Bergh.  
6 I'll -- I won't ask you any more about that because  
7 I think you've been helpful with what you've told us so  
8 far and I do appreciate that you weren't involved in  
9 setting the interchange fees.

10 I want to just see if -- do you remember that banks  
11 had to proactively apply for discounts, for reductions?  
12 Do you remember that?

13 A. Not as far as I remember. This is '92 which is even  
14 before -- and January '92. I started in February '92 in  
15 Mastercard, so it seems to be --

16 Q. Let's look at {C2/176/1} and just see if this jogs your  
17 memory at all. So this is a letter from Mr Nelson and  
18 it's 1994. Do you see that?

19 A. Yes.

20 Q. And it's to Mr Duffy of RBS. And then you see the  
21 first paragraph, Mr Nelson thanks Mr Duffy for his  
22 letter of 4 May and the accompanying list of reduced  
23 interchange fee applications.

24 So it looks like what is going on is that banks --  
25 this bank, RBS, is applying for reduced interchange

1 fees; correct?

2 A. Yes.

3 Q. And then Mr Nelson says:

4 "As I understand it, the applications are effective  
5 against paper-based transactions acquired by the  
6 Royal Bank where the issuer is either ... another UK  
7 bank and no bilateral agreement exists or ... a European  
8 bank."

9 Just pausing there, the reason he is saying that is  
10 because the applications for a reduced intra-EEA MIF  
11 would be effective where the issuer is a European bank,  
12 in other words, there's a cross-border transaction;  
13 correct?

14 A. Yeah, correct, or if there is no bilateral agreement.

15 Q. Or if there is no bilateral agreement and so you  
16 understand -- you agree with that? Does that match your  
17 recollection?

18 A. Well, I don't recollect anything of this. I'm just  
19 reading this -- this letter, what I see there, and  
20 I'm seeing that more from: okay, how do we implement  
21 that in the system? Then I would link that more to  
22 the -- to the intra-European fallback rate. So if you  
23 do not have a bilateral agreement or domestic agreement  
24 and you come back to the intra-European fallback- and  
25 that is what you have with European banks or with

1 UK banks for which you do not have bilateral agreements  
2 in place.

3 Q. Alright. Thank you.

4 A. It is more: how should you implement this?

5 Q. From a systems perspective, I understand.

6 A. Yes.

7 Q. And just to complete the story, we see that, at the  
8 bottom:

9 "I note that you have no MCC's with zero floor  
10 limits. Consequently, reduced interchange will not be  
11 applicable for electronic transactions."

12 So it looks like the application for electronic  
13 transactions -- or they may not have made one, but it  
14 looks like they're not entitled to any discounts for  
15 electronic transactions because they do not have any  
16 zero floor limits. Do you see that?

17 A. I see this, yes.

18 Q. And that corresponds to the rule we just looked at.

19 I'm just going to see if you can help me with one  
20 more document on this topic and please say if you can't.  
21 Can we go, please, to {C2/289.1/1}.

22 This is entitled "Reduced Interchange Fee Table" and  
23 you'll see from the first paragraph that it lists the  
24 Europay members and associated merchant categories  
25 benefiting from reduced interchange fees and then it

1           says "Update Frequency", so it's updated each time  
2           a member is granted reduced interchange fees. Do you  
3           see that?

4       A. I see that, yes.

5       Q. And we can see from the very bottom of the page,  
6           I think, yes, the date is October 1994.

7           And if we turn over the page {C2/289.1/2}, we can  
8           see a table format, and I just want to look at a couple  
9           of the items, so this is the format of information  
10          contained in the table that we're going to look at.

11          So item 3 is the ICA number. Do you see that?

12       A. I see that.

13       Q. And that's the number which designates a particular  
14          bank; yes? Do you remember?

15       A. Yeah, correct. Yeah, there's --

16       Q. Then item 5 -- sorry, Mr Van den Bergh, were you going  
17          to say something?

18       A. Yeah, wondering what this table is. Yeah, it's probably  
19          something from -- yeah, from Mastercard which -- because  
20          typically, if you were looking at Mastercard data, it  
21          had an ICA number while with European files, we  
22          typically had a member ID. So yeah, wondering if this  
23          is linked to global or if it was European. But okay,  
24          fine.

25       Q. Okay, but as far as you remember, ICA is the number

1           which designates a particular bank.

2       A.   Yes, that's correct.  There is a one-to-one relationship

3           between an ICA and a member ID.

4       Q.   Okay.  And item 5 is the MCC.  That stands for merchant

5           category code; correct?

6       A.   Correct.

7       Q.   And that would identify the specific merchant; correct?

8       A.   It's, yeah, a group of merchants, so the MCC code is

9           actually an ISO standard where you have, yeah, codes for

10          merchant category.

11      Q.   Okay.  And then item 7 relates to the currency.  Do you

12          see that?

13      A.   Yes.

14      Q.   And then if we go to page 3 {C2/289.1/3}, so here we

15          have the table populated and if we look at the

16          first column, we know that ICA is the bank; yes?

17      A.   Yes.

18      Q.   And the currency code is FRF, so that's French francs;

19          yes?  I'm looking at the first row.

20      A.   Yeah, I guess so.  I guess so, yeah.

21      Q.   And then we see 0.5.  The fee is 0.5.  We have the floor

22          limit and then we have the maximum floor limit and then

23          we see the fee is 0.5% --

24      A.   Yeah.

25      Q.   -- and the merchant description is service stations and

1           then we have the MCC code earlier on.

2           So -- and then if we -- so this looks like there's  
3           a reduced petrol rate for a French bank, correct, in  
4           relation to service stations? Would that have been all  
5           service stations or a subcategory of service stations?

6       A. No, that will be -- well -- because the second line is  
7           saying "Automated Fuel Dispense", so I guess there is  
8           a difference between, yeah, a petrol station where it  
9           was still manual --

10       Q. Yes.

11       A. -- and one where it's automatically. So -- but, yeah,  
12           these are -- you should see the MCC code. So if  
13           a transaction was sent in by the acquirer, they would  
14           have used one of those MCC codes, together with the  
15           actual merchant.

16       Q. Okay.

17       A. It was up to the acquirer to determine under what MCC  
18           code, yeah, a specific merchant was -- was falling.

19       Q. Thank you. And if we go through to page 15  
20           {C2/289.1/15}, I think this is the first page, I think  
21           you can take it from me, that refers to pounds sterling.  
22           If you go towards the bottom of the page, do you see  
23           a few rows up it says "GBP"? So we have something for  
24           service stations there relating to a particular bank.  
25           Do you see that?

1       A. Yeah, I see that, yes.

2       Q. And there are four GBP entries on this page and the  
3       first two are for the same bank, correct, because it's  
4       the same ICA number?

5       A. Yeah, correct. I see that it's each time service  
6       stations and then "Automated Fuel Dispense".

7       Q. Exactly. Then the final two have a matching ICA number  
8       too, 3268, so that would be for the same bank, and the  
9       merchant codes are again the same. So that's also in  
10      relation to service stations. Do you see that?

11      A. Yes.

12      Q. And then over the page, there are four more entries, if  
13      we can turn to the next page {C2/289.1/16}. So there  
14      are four more GBP entries and there's one bank at the  
15      top with a -- with the ICA of 3269 has, again, a service  
16      station reduction and then another bank has a reduced  
17      interchange fee for shoe stores. Do you see that if we  
18      go down? And the interchange fee is 0.74%.

19      A. I see that.

20      Q. And then, finally, there's a reduced rate of 0.5% for  
21      petrol stations, again for a different bank. Do you see  
22      that as well just below? That's the immediately below  
23      row.

24      A. Yeah. Yeah, I see that one.

25      Q. So I think we can agree, can't we, that reduced EEA MIFs

1           were specific in that they applied to particular banks  
2           for particular types of transactions; correct?

3       A.   For this programme, I would say yes. I remember, but  
4           that's probably at a later date, that on the -- that it  
5           was also done on the -- on the actual implementation of  
6           the interchange, so ...

7       Q.   And at least at this time when this table was produced,  
8           there were only a tiny number of reduced rates agreed in  
9           pounds sterling; correct so? We saw --

10      A.   That's correct, but --

11      Q.   Yes, so we saw --

12      A.   Yeah, I would say this looks like a very old table, so  
13           I'm thinking that this table might even precede the  
14           introduction of ECCSS. Perhaps we still kept it for  
15           historical reasons. But how I remember it, at a later  
16           stage, we would also implement this on the actual  
17           interchange programmes that were implemented in ECCSS.

18      Q.   Well, this was 1994. We saw the date, and so there were  
19           already a substantial number of transactions for UK  
20           going through ECCSS.

21      A.   Yes. Yeah, but what I mean, if I look at this table,  
22           and I don't recall this table, I also see ICA numbers.  
23           So for me, this is giving me the idea that this is  
24           an old table which precedes the ECCSS system, which is  
25           probably kept for historical reasons that we have to



1           be -- to keep that as those agreements were in place.

2       Q.   Well, if we go back -- let's just see if this helps us.

3           If we can go back in the document, please, to page 1

4           {C2/289.1/1}, you can see that:

5                 "The Reduced Interchange Fee Table ..."

6                 Which is the table we're looking at:

7                 "... lists the Europay Members (ICA Number) and

8           associated merchant categories benefiting ..."

9                 So benefiting at that time:

10                "... from reduced interchange fees."

11                And then we see that it's updated each time a member

12           is granted reduced interchange fees. So it does look

13           like it's current as of that date, doesn't it?

14       A.   Yeah. No, exactly. But then if you look at your

15           example, I'm not sure what the latest update was in that

16           table. You have those dates there at the end.

17       Q.   So the table is from October 1994.

18       A.   Yes, but if you look at the individual records, what was

19           the latest update there?

20       Q.   So do you want to go back to page 15 {C2/289.1/15}?

21       A.   Yes, please. So if you look at the last column, it says

22            >Date Last Change".

23       Q.   Yes. So it's only updated --

24       A.   (Overspeaking) --

25       Q.   Sorry, Mr Van den Bergh. Do go on.

1 A. Yes, what I see, I see '91 there are some updates.

2 Nothing later on this page than '91.

3 Q. Yes. So I think the position must be that they haven't  
4 changed since that point in time.

5 A. Exactly, and that's my point. This -- this is '91 which  
6 was -- ECCSS only started in '92 because when I started,  
7 ECCSS was not yet in production. So my point is again  
8 that this seems to be an old table that, yeah, was taken  
9 over by ECCSS for historical reasons.

10 Q. Well, I think because the first page says that it's  
11 updated every time there's a change, one would assume  
12 that if, for example, there were a new discount being  
13 applied for a UK bank in 1994, that would be captured by  
14 this table. Do you agree?

15 A. If this was the mechanism that was used for that  
16 specific reduction. Also, again, I do not recall this  
17 programme, not even recall this table, so ...

18 Q. Alright. Thank you very much. Just bear with me for  
19 a moment, please, Mr Van den Bergh. (Pause)

20 Mr Van den Bergh, I want to just ask you about  
21 something else. We talked earlier about FDR.

22 A. Yes.

23 Q. And if we go, please, to {C4/376/1}, this is a letter  
24 dated 24 October 1997 and it's a letter from Europay to  
25 Mr Stephens, who is senior manager at FDR. Do you see

1           that?

2           A. I see that.

3           Q. And then first paragraph:

4                 "As you are aware UK Domestic Interchange Fees are  
5                 established between Acquirers and Issuers on the basis  
6                 of Bi-lateral agreements. Currently, failure to reach  
7                 a Bi-lateral agreement results in interchange fees  
8                 falling back to Intra-Regional interchange rates."

9                 The next paragraph says:

10                "I am writing to formally advise you that with  
11                effect [from] November 1st 1997 a UK Domestic  
12                Interchange fall-back rate will be implemented into  
13                Europay Systems. These new rates which follow a cost  
14                based study undertaken by a firm of International  
15                independent consultants are 1% electronic and  
16                1.3% standard."

17                So this is Europay informing FDR that the fallback  
18                rates have changed; right? So they were intra-EEA MIFs  
19                and now they're UK MIFs; yes?

20           A. Yes.

21           Q. And then if we go to {C4/480/1}, this is a fax message  
22                from the same Mr Stephens of FDR to Europay and it's  
23                sent on 18 December 1997, just after the UK MIFs have  
24                been implemented. And he says, second paragraph:

25                "I therefore enclose a snapshot report of

1 transactions processed in our overnight cycle of  
2 Wednesday 17 December where a combination of the  
3 merchant location and/or country code indicates ...  
4 UK transactions."

5 So this is FDR sending Europay a snapshot of the  
6 transactions FDR is processing; correct?

7 A. Yes. I see also something on -- in the subject line  
8 about central acquiring, so I'm not sure what exactly  
9 the context was here because, of course, central  
10 acquiring is where you have an acquirer who's acquiring  
11 in a different country.

12 Q. That's a fair point.

13 A. Because interchange fees are calculated on the  
14 merchant -- or should be calculated on the merchant  
15 location and the issuer location, and so with central  
16 acquiring, you also have an acquirer location.

17 Q. Mr Van den Bergh, I think that's a fair point, so  
18 I'm going to leave this document because you may well be  
19 right about that.

20 So let's look at another document. Can we turn up  
21 {C4/232/1}, please. So this is an implementation plan  
22 for Woolwich plc -- do you see that -- to operate as  
23 an issuer through FDR, and it's dated 11 July 1997. Do  
24 you see that?

25 A. Yes, I see that.

1 Q. So if we go to page 4 {C4/232/4}, under "Project  
2 Overview", the second paragraph, it says:

3 "... FDR will operate the authorisation, clearing,  
4 reconciliation, chargeback handling and will be  
5 responsible for cardholders back-office processing ...  
6 while Woolwich ... will be responsible for marketing."

7 So FDR is going to be responsible for the processing  
8 of transactions on behalf of Woolwich; yes?

9 A. Yes.

10 Q. And if we go to page 14, please {C4/232/14}, at the  
11 bottom of the page, the very bottom, it says:

12 "The international interchange fees are also  
13 applicable to domestic transactions unless a specific  
14 domestic agreement exists. If Woolwich ... wish to  
15 establish domestic agreements, they must negotiate these  
16 with the participating Europay members ..."

17 So this is saying, isn't it, that Woolwich can, if  
18 it wishes, negotiate bilaterally and agree interchange  
19 fees bilaterally; correct?

20 A. Correct. This is, I guess, standard wording that we  
21 had. So it says unless a domestic agreement exists, it  
22 would fallback to the international interchange fee and  
23 you can establish bilateral agreements, yeah, to -- with  
24 others.

25 Q. Yes. And then slightly further up, it says:

1           "The appendix A-3 of the present document describes  
2           the Interchange Fees applicable between 04 April 1997  
3           and 31 March 1998."

4           Do you see that?

5           And if we go to that appendix, so page 33, please  
6           {C4/232/33}, in the -- what you see in the table is you  
7           see the column "Intra-regional" fee. Do you see that?

8       A. Yes.

9       Q. And then further across to the right, it says  
10       "Inter-regional" fee.

11      A. Yes.

12      Q. And it's accepted by everyone that the relevant fallback  
13       fee for domestic transactions, at least from  
14       November 1996 until November 1997, was the intra-EEA MIF  
15       and so this --

16      A. Well, I tend not to agree with that. So what I see  
17       here, it's a standard document that is used for all  
18       European implementations, not only UK, all European  
19       implementations. So just as the text was saying, unless  
20       a domestic agreement exists or a bilateral agreement  
21       exists, the intra-regional and the inter-regional  
22       fallback rates are applied, and these are the  
23       intra-regional and inter-regional rates as were  
24       applicable during that period, which was giving -- yeah,  
25       for information and later you find that in the

1 interchange manual.

2 I do not believe that if you did a UK implementation  
3 that domestic rates would have been shown in this table.  
4 This is a table that was used for all members in Europe,  
5 so we would not specify anything specific domestic here.

6 Q. I understand. Thank you, Mr Van den Bergh, for that  
7 clarification.

8 So what you're explaining is that this was used for  
9 all European transactions and so it reflects the  
10 hierarchy you talk about in your witness statement, yes,  
11 where you say --

12 A. No, what -- what I'm saying is that this appendix was  
13 included in all implementation plans for implementations  
14 for European members.

15 Q. Yes.

16 A. So we were only giving the intra-regional and the  
17 inter-regional rates. Domestic rates or bilateral rates  
18 were not included in this implementation plan, and  
19 I believe they refer to the -- to the technology account  
20 manager to -- if a member wanted to have more details  
21 about those rates.

22 Q. Okay, thank you. And the reason why the intra-regional  
23 and inter-regional fees -- one of the reasons why they  
24 might be relevant, going back to your hierarchy that you  
25 explain in your witness statement, is that if there is

1           no bilateral or no domestic fallback, then you would go  
2           to the intra-regional and if there's no intra-regional,  
3           you go to the inter-regional; yes?

4       A.   Yes, correct.

5       Q.   And do you have any reason to think that FDR's system  
6           operated differently to ECCSS's system or did it operate  
7           in the same way?

8       A.   I have no view of how the FDR system was working.  It  
9           can be completely different.  I know in my market, for  
10          example, that domestic was a single message system, so  
11          which was completely different than the ECCSS system.

12      Q.   But do you -- this is a joint implementation plan with  
13          FDR and so is your understanding that FDR applied the  
14          same hierarchy?  So if no bilateral, then domestic  
15          fallback.  If no domestic fallback, then intra-EEA  
16          fallback.  If no intra-EEA fallback, then inter-regional  
17          fallback.

18      A.   I don't know how they are implemented.  This document is  
19          specifying the implementation on the Europe-based side  
20          for that specific -- specific project and it is, yeah,  
21          not saying anything on how FDR does that internally for  
22          domestic transactions or -- yeah.

23      MS DEMETRIOU:  Alright.  Thank you, Mr Van den Bergh.  Those  
24          are all my questions.  Thank you for your patience.

25                               Re-examination by MR COOK



1 MR COOK: Mr Van den Bergh, can I ask the EPE operator to  
2 bring up on the screen bundle {C5/72.1/58}. This is  
3 a document from 1997 and it has a series of what's  
4 called settlement group identification codes.

5 And if we go down to line 9, you were asked various  
6 things about codes. Can you explain or does that help  
7 you at all in remembering which codes apply to different  
8 types of transactions?

9 A. Well, what we see here are the settlement group codes,  
10 which is something different. So if you process  
11 a transaction, it has to be settled and settlement is  
12 typically in a specific currency or if you want to  
13 settle in Europe, then it was also -- what you see here  
14 are the different settlement group codes.

15 So, for example, if you see ER01, this is the  
16 inter-European Eurocard, so this was what was used for  
17 inter-European transactions, how they settled. So that  
18 was typically multi-currency. But then, for example,  
19 domestic UK transactions, EDUK that you see in line 7,  
20 they were settled in British pounds because those were  
21 the domestic transaction.

22 So this is settlement related and not really  
23 clearing or interchange related.

24 Q. Thank you very much, Mr Van den Bergh.

25 And there was just one point on the [draft]

1 transcript. You were asked some questions about the  
2 document {C7/198/3}, and if we could possibly put that  
3 up, but also show the [draft] transcript for today,  
4 [draft] page 106.

5 This is just a point where I think the [draft]  
6 transcript mis-records what certainly on our side we  
7 heard Mr Van den Bergh say, so I wanted to make sure  
8 it's corrected.

9 So you were asked some questions, we see -- if we go  
10 higher so we can see the start of the questions. It  
11 says on the page -- at [draft] line 17.

12 "So going back, please, to the next page  
13 {C7/198/3} ..."

14 So that is the document we are looking at here and  
15 these are the tables that had what were described as  
16 very low percentages. And the question was put to you:

17 "Assuming that it's correct that there were very few  
18 bilateral agreements in the year 2000, it looks like  
19 these low figures, so Europay was being asked for the  
20 proportion, percentage of transactions that took place  
21 according to bilateral arrangements or according to the  
22 default interchange fee. It looks like these low  
23 figures relate to the proportion that took place on the  
24 basis of bilateral transactions; correct?"

25 And you answered:

1 "Well, these figures looks -- look very, very low."

2 So we're talking about the numbers there, the 0.01  
3 and 0.003.

4 And then you said:

5 "... if you look at the banks on the previous  
6 page ..."

7 And the [draft] transcript records:

8 "... I wouldn't expect higher figures here."

9 Did you mean "I would expect higher figures here" or  
10 "I wouldn't expect higher figures here"?

11 A. I would expect higher figures, so the [draft] transcript  
12 should be corrected.

13 Q. Yes. So I think that's what we heard, but we just  
14 wanted to make sure it was corrected, sir.

15 A. Thanks.

16 MR COOK: Oh, I'm told that's because there's a little --  
17 the fact that there's a little hat means there's  
18 a correction pending, but we thought we'd check it  
19 before it happened.

20 Sir, no further questions from me.

21 Questions by THE TRIBUNAL

22 MR JUSTICE ROTH: Yes, just one moment. (Pause)

23 Mr Van den Bergh, we just wanted to clarify one  
24 thing, if you're able to help us with that. If you go  
25 to your statement on page 9 at paragraph 38, in the

1 second sentence, you say {A/13.5/9}:

2 "As I explained above, I had extensive experience  
3 between 1992 and 1999 with ECCSS and was heavily  
4 involved throughout that period in setting up new banks  
5 on ECCSS."

6 And we know from what you said it was over this  
7 period that more and more UK banks came on to the system  
8 for domestic -- clearing of domestic transactions;  
9 that's right, isn't it?

10 A. Yes, that's right. Well, we implemented more and more  
11 UK banks and indeed they also processed domestic  
12 transactions over our ...

13 MR JUSTICE ROTH: Yes. And then you say:

14 "I recall clearly that the UK banks that cleared  
15 their transactions through ECCSS had bilaterally agreed  
16 interchange fees in place."

17 And then you explain -- go on to say why, and you  
18 say at (c):

19 "I configured the UK banks on ECCSS for the UK  
20 between 1993 and 1999, which included inputting  
21 bilateral interchange agreements for domestic  
22 transactions."

23 What we're just trying to get a sense of is to what  
24 extent, when you were putting all these banks on, were  
25 there instances where, for the standard or the

1       electronic credit card transactions, they did not have  
2       bilaterally agreed interchange fees and you had to apply  
3       the fallback to the default? Can you give us any sense  
4       of to what extent they wouldn't have bilateral  
5       interchange fees agreed?

6       A. When I'm referring to that in particular, I was talking  
7       about the implementation of -- (a) of new members in the  
8       system, and so when you implemented a UK bank, one of  
9       the directors was this table with the member agreements  
10      where you had the four columns, one column for a -- one  
11      column for the bilateral agreement, another one for  
12      domestic fallback, another one for inter-regional  
13      fallback and the other for intra-regional fallback.

14             So while for other European members you only filled  
15      in the column of the inter-European and inter-regional,  
16      for the UK, you also filled in the columns for the  
17      domestic agreement and the domestic fallback rate.

18             And the table was also ordered on member IDs, so per  
19      country. So if you would implement a UK bank without  
20      a bilateral agreement or without a domestic agreement,  
21      it would be immediately visible because you had spaces  
22      in the table, which is not the case. And that's what  
23      I'm talking there.

24             So it's only at the lower level that you specify  
25      those fees and, yeah, if it was done electronic or

1 paper-based.

2 MR JUSTICE ROTH: When you say "at the lower level", you  
3 mean -- what do you mean exactly?

4 A. I mean in the calculation, in the programming. So when  
5 we implemented a member, we had a member agreement and  
6 then we had this table which was combining the issuer  
7 agreement with the acquirer agreement resulting in the  
8 resulting agreement and on the resulting agreement,  
9 there you had all those different fees.

10 Now, in the system was implemented how an acquirer  
11 submitted a transaction. So when an acquirer submits  
12 a transaction, inside the transaction, they are  
13 providing this interchange rate designated, which is  
14 a two-digit code, which is specifying the type of  
15 transaction, whether it's paper-based or electronic, and  
16 the ECCSS system is using that then to make -- to make  
17 the calculations and to apply the correct rates.

18 MR JUSTICE ROTH: Yes, and for the -- when you implemented  
19 the UK bank into the system, you populated those  
20 four columns from the resulting agreements.

21 A. Yes.

22 MR JUSTICE ROTH: And can you recall how often there wasn't  
23 a resulting agreement so that you had to use the default  
24 rate to populate the column?

25 A. I do not recall that. As I remember it for UK banks, we

1 always had a column "Bilateral" and we always had  
2 a column "Domestic". So that is how we did it, and so  
3 it never ran to the -- to the intra-European for  
4 domestic transactions. Of course, intra-European was  
5 still the column. Intra-European was still used if  
6 a member was outside of the UK, but not if it was a UK  
7 member.

8 MR JUSTICE ROTH: Yes.

9 A. And so I guess, also based on the table that was shown,  
10 perhaps a lot of those were pointing to this UC00  
11 agreement, yeah, which was a kind domestic fallback.

12 MR JUSTICE ROTH: Any questions arising out of that?

13 Further cross-examination by MS DEMETRIOU

14 MS DEMETRIOU: Just very quickly.

15 Mr Van den Bergh, so when you talk about the  
16 four columns and you had a "Bilateral" column and  
17 a "Domestic fallback" column, are you saying that there  
18 was also a "Bilateral" column in 1999? Because you're  
19 talking about 1992 to 1999 here. So do you remember  
20 there being a "Bilateral" column that was populated in  
21 1999 as well?

22 A. Yes, certainly in 1999. As -- so, let's say, I started  
23 in 1992 as an operator. It was only around '93/'94 that  
24 I became part of the applications support team, so doing  
25 the actual member implementations. But certainly in

1           1999, yeah, we had for all those UK banks the bilateral  
2           and domestic agreements in place.

3       Q.   And I think you said earlier that -- we looked at the  
4           table and we saw that quite a lot of the tables were  
5           pointing to UC00.  So when those columns, "Bilateral"  
6           and "Domestic fallback", were populated, they may have  
7           been populated with UC00; that's correct, isn't it?

8       A.   That's correct.  It might be the case.

9       MS DEMETRIOU:  Thank you very much.

10      MR JUSTICE ROTH:  Mr Cook, anything?

11      MR COOK:  No, sir.

12      MR JUSTICE ROTH:  Thank you very much, Mr Van den Bergh.

13           That concludes your evidence.  Thank you for coming in  
14           to give your testimony remotely.

15      A.   Thanks.  My pleasure.

16                               (Witness released)

17                               Housekeeping

18      MR JUSTICE ROTH:  Yes, Mr Smouha.

19      MR SMOUHA:  Sir, that concludes Mastercard's factual  
20           evidence.  Sir, conscious of the time --

21      MR JUSTICE ROTH:  Yes.

22      MR SMOUHA:  -- could I just ask, sir, if we could just have  
23           a few minutes with you and the Tribunal for housekeeping  
24           purposes and one particular matter I want to mention.

25      MR JUSTICE ROTH:  Yes.  Well, I think Mr Van den Bergh is no



1 longer with us.

2 MR SMOUHA: Sir, just in relation to the various documents  
3 which are coming your way --

4 MR JUSTICE ROTH: Just before that, the agreed, as it were,  
5 updating of Mr Parker's report, is it sensible if we  
6 just substitute these pages for the existing -- the  
7 pages attached to Freshfields' letter of today, if we  
8 just put them in the bundle instead of the pages that  
9 we've got and can you arrange that that is -- that  
10 Mr Parker can be told he can substitute those in his  
11 report that he will have with him.

12 MR SMOUHA: Certainly.

13 MR JUSTICE ROTH: And I'm not sure we will be using it  
14 specifically on Opus, but equally for the Opus system,  
15 they can be substituted. They haven't got the Opus  
16 pagination on them.

17 MR SMOUHA: We'll work that out, sir.

18 Sir, on the inter-regional MIFs table, that has been  
19 agreed, and so will be -- if it hasn't already will be  
20 sent to the Tribunal.

21 MR JUSTICE ROTH: Yes, thank you.

22 MR SMOUHA: The arbitration rules document I think, I don't  
23 know if my learned friend --

24 MS DEMETRIOU: I think we only got it today so we're  
25 reviewing it. I haven't been able to see it, for

1           obvious reasons.

2           MR SMOUHA: So, sir, could that come to you tomorrow?

3           MR JUSTICE ROTH: Yes.

4           MR SMOUHA: So I think that completes in terms of --

5           MR JUSTICE ROTH: And then the updated bilaterals table.

6           MR SMOUHA: Yes, that is also still with --

7           MS DEMETRIOU: That's right, I think that came to us today  
8           as well so we'll get that to you tomorrow.

9           MR JUSTICE ROTH: Yes, thank you.

10          MR SMOUHA: Sir, one further matter which I need to mention  
11          as we have concluded the factual evidence.

12          MR JUSTICE ROTH: Yes.

13          MR SMOUHA: Sir, our understanding from the  
14          cross-examination and from the matters put to Mastercard  
15          witnesses and more particularly the matters not put is  
16          significant parts of Mr Merricks' case are not being  
17          pursued, in particular the floor case at any time, and  
18          the floor and guidance case from 1997 in relation to the  
19          setting of the UK MIF.

20          Sir, whether deliberate or not, that case is, in our  
21          respectful submission, not open any longer to  
22          Mr Merricks to advance. The evidence on those matters  
23          not having been challenged at all and no contrary case  
24          put at all.

25          So, sir, I'm going to explain in a minute. I'm not

1           arguing this point out but I will just explain it in  
2           a moment what we suggest and the reason I'm raising this  
3           point at this stage. But, sir, just so you have in  
4           mind, and it may be that the Tribunal has already  
5           appreciated this, in particular the critical evidence of  
6           Mr Peacop at paragraph 83, {A/8/27}.

7       MR JUSTICE ROTH: That's the first page of his statement.

8       MR SMOUHA: Sorry, this is the one that was changed. Can we  
9           try 25, paragraph 83. Sorry, this is the one where  
10          there were a couple of pages at the front that were  
11          moved.

12      MR JUSTICE ROTH: I think is it page 23, {A/8/23}.

13      MR SMOUHA: Thank you. Paragraph 83, which is where  
14          Mr Peacop deals with -- and this is in the section  
15          dealing with the alleged relevance of the EEA MIFs to  
16          the setting of the UK MIFs. And then in Mr Hawkins'  
17          statement paragraphs 117 and 125. 117 is at {A/7/33}.  
18          And 125 at page 35 {A/7/35}, Mr Peacop and Mr Hawkins  
19          not cross-examined on those parts of their statement or  
20          on this subject at all.

21          Sir, I mention this now for three reasons.

22          First of all, it is appropriate to mention it at the  
23          close of the factual evidence. We don't suggest it  
24          should be immediately discussed or resolved. I am not  
25          suggesting, sir, that the scope of the expert evidence

1 must be adjusted or constrained immediately but I do not  
2 want it to be suggested that we allowed the expert  
3 evidence to proceed without indicating that we  
4 understand that the case that is advanced or can be  
5 advanced is now much more limited than as pleaded and  
6 indeed as opened.

7 Secondly -- sorry I apologise for my voice getting  
8 a bit hoarse.

9 Secondly if, as we apprehend, there has been  
10 a careful and deliberate decision to restrict the case  
11 advanced, as appears from the scope of the  
12 cross-examination and what was cross-examined on, it  
13 would obviously be helpful to us and to the Tribunal to  
14 be told what is no longer pursued.

15 Third reason, because, sir, we would suggest that  
16 before we part on-- it'll be probably Thursday to go and  
17 prepare written closing submissions, there should be  
18 complete clarity about what issues are and are not in  
19 play. So in particular, sir, as we would understand it  
20 issue 9(c) on the list of issues in the form that you  
21 had shortly before the trial started, this is {D/246/5}.

22 Issue 9(c), "Did the intra-EEA MIFs operate as (1) a  
23 'floor', 'minimum price recommendation', 'minimum  
24 starting point', and/or 'minimum level'; [and] (2)  
25 'guidance' and/or 'a benchmark' for UK MIFs", sir, we

1           would understand to be out.

2           If, sir, there is anything the Tribunal needs to  
3           resolve, we would suggest that it should be discussed  
4           after the expert evidence but before, as I say, the  
5           parties move off to prepare closing submissions so that  
6           there is definition around the issues that are still in  
7           play.

8           And as I say, sir, it may be, and we will apprehend  
9           there probably has been, careful consideration of this  
10          on the other side because of the very apparent limited  
11          scope of the cross-examination on those aspects.

12       MR JUSTICE ROTH: Well, we're not going to, and you're not  
13          asking us to, and we certainly won't hear submissions on  
14          that at 4.50pm, and you've said it's not going to affect  
15          the expert evidence. I don't expect we'll be sitting,  
16          by any stretch of the imagination, on Thursday, and it  
17          may be we don't even need to sit on Wednesday, we'll  
18          see. But after the conclusion of the expert evidence we  
19          can hear what Ms Demetriou has to say about that. She's  
20          got an opportunity to consider it.

21       MR SMOUHA: Certainly, sir.

22       MR JUSTICE ROTH: I don't think we ever formally approved  
23          a list of issues. I know that was prepared and we  
24          suggested it be prepared, and there were different  
25          versions so we're not specifically tied to that. We

1           are, I think, tied to the allegations in the pleading as  
2           to the way Mr Merricks has put his case.

3       MR SMOUHA:   Indeed.   But if there are matters in the  
4           pleadings, allegations in the pleadings which have not  
5           been advanced at the trial and not cross-examined on  
6           then that is obviously important to resolve before we  
7           get to closings.

8       MR JUSTICE ROTH:   I understand that.

9       MR SMOUHA:   Can I check one thing with Mr Cook in relation  
10          to the point you made about timing.

11               Just on timing, obviously, sir, we don't know how  
12          long the Tribunal will be with the experts tomorrow but  
13          at the moment we would not expect -- we will have some  
14          cross-examination and I know my learned friend will as  
15          well, following the Tribunal's questions.   So at the  
16          moment we think it's unlikely that we would finish the  
17          expert evidence tomorrow.

18       MR JUSTICE ROTH:   Well, we'll see.   If a matter is covered  
19          sufficiently in the questioning in the hot tub,  
20          generally it doesn't achieve a lot to go back into it  
21          all by cross-examination.   But we are not containing  
22          cross-examination at the moment.

23       MR SMOUHA:   Well understood, sir.

24       MR JUSTICE ROTH:   Very well. 10.30 tomorrow.

25       (4.50 pm)

(The hearing adjourned until 10.30 am on Tuesday,  
18 July 2023)