IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

(T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 5th – Friday 28th July 2023

Before:
The Honourable Mr Justice Roth
Jane Burgess
Professor Michael Waterson
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE **Class Representative**

v

Mastercard Incorporated and Others **Defendants**

A P P E A R AN C E S

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

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

Tuesday, 18 July 2023

(10.30 am)

Housekeeping

MR JUSTICE ROTH: Good morning. We've been told there is a problem with the real time transcript this morning, and apparently it should become available around mid-morning, so there is a transcript being made of the proceedings, which you will receive, but it won't be in real time for at least part of the morning. As neither counsel are asking questions this morning, I don't think that should cause you any inconvenience, and I think we, as a Tribunal, will cope.

Secondly, pleased to say that as a result of the adjournment of another case, we won't have to decamp to the Rolls Building for closing submissions, but they will be in court 2, not in this court, which is needed for a multi-party hearing.

And we've received the VoC table. Thank you.

I think that's all from us before we ask the two experts to be sworn. Unless there's something from ...

MS DEMETRIOU: No, I was just going to call Mr Coombs.

MR JUSTICE ROTH: Yes. If you would like to call Mr Coombs, and then Mr Smouha can call Mr Parker.

MR SMOUHA: Thank you, sir, but Mr Cook is going to ...

MR JUSTICE ROTH: Mr Cook, yes.

Mr Parker, if you want to bring your copies of your report --

MR PARKER: I understand they should be electronically available.

MR JUSTICE ROTH: Yes. You may want, though, to look at --

MR PARKER: I don't have a clean copy with me, but if someone has a spare clean copy ...

MR JUSTICE ROTH: Indeed, of each other's reports. That's fine for you to have that with you.

MR PARKER: Right, okay. Maybe during the break I can ...

MR JUSTICE ROTH: Yes. Well, you can get it while --

MR PARKER: Could I have a ...

MR JUSTICE ROTH: Yes. Why don't you step away from the witness box and go and sort that out with Mr Cook?

(Pause)

(Mr Coombs affirmed)

MR JUSTICE ROTH: Thank you. Do sit down, Mr Coombs.

(Mr Parker affirmed)

MR JUSTICE ROTH: Yes, Ms Demetriou.

MR JUSTIN COOMBS (affirmed)

Examination-in-chief by MS DEMETRIOU

MS DEMETRIOU: Mr Coombs, you've given a number of reports in these proceedings. Can we go to {A/14/1}, please? Is this your -- the first report in these proceedings that you have made on causation issues?

A. Yes, it is.
Q. And can we go to page {A/14/58}, please? And is that your signature at the bottom of the page?
A. Yes.
Q. Can you confirm to the Tribunal that you are aware of the requirement of the various court and Tribunal rules for expert witnesses?
A. Yes, I am.
Q. And are the opinions that you've expressed in this report true to the best of your knowledge?
A. Yes.
Q. Can we please go to {A/15/1}, please? Is this the first of the reports you've produced on volume of commerce?
A. Yes.
Q. And if we go to page {A/15/49}, can you confirm that that's your signature?
A. Yes.
Q. And, again, can you confirm that you are aware of and complied with the requirements that apply to expert witnesses in these proceedings?
A. Yes.
Q. And are the opinions you've expressed in this report true to the best of your knowledge and belief?
A. Yes.
Q. And then let's go to {A/19/1}, please. This is the

responsive report that you filed, that you've made, isn't it, on causation?

A. Yes.

Q. And can we go to page 39, please {A/19/39}? Can you confirm that's your signature?

A. Yes.

Q. Can you again confirm that you complied with the requirements that apply to expert witness in respect of this report?

A. Yes.

Q. And are the opinions that you've expressed in this report true to the best of your knowledge?

A. Yes.

Q. And then {A/20/1}, please. This is your second report on value of commerce; correct?

A. Yes.

Q. And if we go to page {A/20/24}, again, is that your signature?

A. Yes.

Q. And can you confirm that in respect of this report you've complied with the requirements that apply to expert witnesses in these proceedings?

A. Yes.

Q. And are the opinions that you express in this report true to the best of your knowledge and belief?

A. Yes.
Q. And then let's go to {A/22.1/1}, please? This is a further report addressing a specific question in relation to relevant causation; correct?
A. Yes.
Q. And if we go to page {A/22.1/14}, is that your signature there that we see?
A. Yes.
Q. And can you confirm that in respect of this report too you've complied with the requirements that apply to expert witnesses in these proceedings?
A. Yes.
Q. And are the opinions you've expressed in this report true to the best of your knowledge and belief?
A. Yes.
Q. And then finally, Mr Coombs, there's an agree/disagreement statement, isn't there? So that's at {A/22/1}. Can you confirm that this is the joint statement that you've compiled with Mr Parker?
A. Yes.
Q. And if we go to page 27 {A/22/27}, is that your signature there?
A. Yes.
Q. And you are satisfied that the contents -- as far as you are concerned -- of this joint statement, your part of

it, are true to the best of your knowledge and belief?
A. Yes.
Q. And you've complied at all times with the requirements that apply to expert witnesses in these proceedings?
A. Yes.
MS DEMETRIOU: Thank you very much, Mr Coombs.
MR JUSTICE ROTH: Can I just check, because mine has not been paginated, the final report of 3 July, did you say it is A/22.1? Is that right?
MS DEMETRIOU: Yes.
MR JUSTICE ROTH: 22.1?
MS DEMETRIOU: 22.1, starting at page 1, and going on -- the report finishes on page 14 and there's then a letter of instruction.
MR JUSTICE ROTH: Yes. Yes, thank you.
Mr Cook

MR DAVID PARKER (affirmed)

Examination-in-chief by MR COOK

MR COOK: Mr Parker, could we have up on the screen, or have in front of you, your first report on causation in this case, which is {A/16/1}, and if we could now turn to page 88 of that document? {A/16/87}, I think. Is that your signature?
A. Yes.
Q. And can you confirm that you are aware of your

obligations to the Tribunal as an expert?
A. Yes.
Q. And does that report represent your true and complete professional opinion?
A. Yes.
Q. If we could now turn to {A/17/1}, that's your report on the value of commerce issue. Turn to page {A/17/45}, and is that your signature?
A. Yes.
Q. Were you aware of your duties to the Tribunal in making that report?
A. Yes.
Q. And does it represent your true and complete professional opinion on the matters contained therein?
A. Yes.
Q. Then tab 21 in the same bundle, that's your reply report. It addresses both causation and value of commerce. If we could turn to page {A/17/50}, is that your signature?
A. Yes.
Q. Were you aware of your duties to the Tribunal in making that report?
A. Yes.
Q. And does that represent your true and complete professional opinion?

A. Yes.
Q. And then finally, if we could go to {A/22/1} in the same bundle, that's the joint statement, and if you go to page {A/22/27}, please, is that your signature on the right?
A. Yes.
Q. Are you again aware of your duties to the Tribunal in making that joint statement?
A. Yes.
Q. And insofar as it includes your opinions, does it represent your true and complete professional opinion on those matters?
A. Yes.
Q. Thank you.
Sorry, I'm told that the version that is on the screen is actually the version that doesn't include Mr Parker's corrections that came in yesterday, and that may also be the case for some of the earlier versions of the reports.
So -- in which case, subject to the clarification of the corrections that you have made that were provided yesterday, do those represent compendiously your true and complete professional opinions?
A. Yes.
MR COOK: I think those were meant to be going on Opus this

morning. I thought they had already gone on by now already sir, but they will do.

MR JUSTICE ROTH: Well, that makes it particularly important you've got a copy which has the correct version with you.

MR COOK: Yes.

MR JUSTIN COOMBS and MR DAVID PARKER

Questions by THE TRIBUNAL

MR JUSTICE ROTH: Yes. Thank you very much.

Good morning, gentlemen. You may have been in what colloquially is called a "hot tub" before, or have observed them, and you know, in general terms, how it operates. The Tribunal will be asking you questions, really, to clarify, or probe, some of the things that one or other or both of you have said. You will always have an opportunity to respond to comments from your colleague, and we find that taking the matters really by topic, and getting both your views and your observations on each other's views is a rather efficient and constructive way of addressing these matters rather than having one of you face adversarial cross-examination from the other side, as it were, and then going through everything and then starting all over again with the process in reverse with the other expert, so that's what we're doing and that's what we're seeking to achieve, really, to go through the matters that seem to us most relevant and important.

Thank you very much for all the work you've done on volume of commerce. We've now got this agreed table that has been produced to us. I know you've both written full reports on volume of commerce, but in the light of that we're not going to ask you any questions now about volume of commerce. We think that's done as far as the question of -- what are called the on-us transactions, that's really not a matter of economic expertise, as you both recognise.

We're also not going to ask you about the plausibility of the run-off period. I think, Mr Coombs, you make brief comments on that at the end of section 3 of your report, but we're not -- that's not a matter that's before us in this trial, so we won't go into that but please, in this discussion, bear in mind your role as an independent expert.

You've both confirmed you are aware of the provision in the rules and the guidance. That's not an idle mantra. We do take very seriously the fact that your duty -- your overriding obligation is to the Tribunal, overriding because it overrides any obligation you may owe to the party that has instructed you, and also we think that the question of analysing the allegations in the pleadings, what actually is being alleged, that's a matter for us as the Tribunal. That's not a matter for -- in your role as an economist.

And we also have seen what you both say about costs and the relation of the costs studies, the EDC studies, to the bilateral interchange fees and the MIFs and the agreement that you reached on that very helpfully in the statement of points on which you agree, and in the light of that, we don't think it is necessary for us to ask you any questions about that, not because we're ignoring what you said but because you are agreed on it.

So, against that introduction, we will, now, ask you questions on matters we want to probe, and Professor Waterson will kick off.

PROFESSOR WATERSON: Thank you. Could I first -- this is a very general question. We will get to some more detail later on, but as a general matter would you characterise -- would each of you characterise the MIFs and the IFs as relatively stable over time with few movements within categories? Clearly, of course, there is an exception when the EEA MIF goes down to zero as a result of the EU Commission decision, but would you characterise them as relatively stable?

Mr Coombs.

MR COOMBS: So I think the short answer is yes. I mean, I think -- maybe just to elaborate a bit, I think one needs to put that into context in terms of little variation relative to what, and I think the point I would make is that there's little variation in the context of trying to actually analyse the data, so there's a lack of variation which makes it difficult to sort of draw conclusions.

PROFESSOR WATERSON: Thank you.

And Mr Parker.

MR PARKER: I think the answer is yes, they are very stable and there's few changes.

PROFESSOR WATERSON: Thank you. Good.

Secondly, and again, this is a very general question, how do you see the use of behavioural economic theory in the context of this case? Would you see it as essentially abstract theory but to be applied, taking account of specific characteristics of the market and the relevant participants/players, but we're essentially talking about body knowledge, or body of understanding amongst economists, which we're then applying to a particular case.

MR COOMBS: Yes. I mean, I would agree with that proposition, and, you know, maybe just to elaborate a little bit, you know, I think the point is that economic theory is generally based on certain assumptions and the question is whether those assumptions actually hold in this case, given the facts that we know, so you take what economic theory tells you and you say is that theory going to be relevant, given the facts that are known to you.

PROFESSOR WATERSON: Thank you.

MR PARKER: So I think the way I have approached it would be to see what economic theory might be able to tell us about the relevant question of causation as between intra-EU MIFs and UK domestic MIFs, to see whether that can generate some predictions that can then be tested in the data, and then to look for what data we have and see whether that theory is supported by the data or whether the data is inconsistent with that, and so if you like, that's how I have tried to marry economic theory and then analysis of data, subject to the data that we have.

PROFESSOR WATERSON: Thank you. That's useful. So, so far, there's agreement, I think.

Let's move on to a particular topic then -- the two-sided market, and it was Mr Parker, I think, that introduced the two-sided market in his analysis and so maybe I'll turn to him first on this occasion.

If we could -- I won't be turning up many things, but if we could turn up Mr Parker's first report {A/16/18}, please? Now, we see here that there is --

Mastercard operates a four-party payment card scheme, and I think that is common ground amongst the parties here, and you've characterised, Mr Parker -- who have you characterised as the two sides in this?

MR PARKER: So, essentially, I think there's an issuing side and an acquiring side --

PROFESSOR WATERSON: Right.

MR PARKER: -- and on each side, on the issuing side you also have cardholders, on the acquiring side you also have merchants, so for me you have two parties on each of the two sides of the market.

PROFESSOR WATERSON: Right. So -- okay, issuing side and an acquiring side.

If we think about the issuing bank, what are the issuing bank's incentives? How do you see their incentives?

MR PARKER: Do you many -- do you have a specific time period in mind, or is this a more general question?

PROFESSOR WATERSON: Is more general question. If you were working -- I'm sure you have worked for these sort of companies from time to time -- if you were working for an issuing bank, what sort of things would you expect them to want to maximise, if you like, or ...

MR PARKER: Well, firstly, profits.

PROFESSOR WATERSON: Yes.

MR PARKER: But if we perhaps break that down, I would be wanting to look at the costs that I incur, and I would want to look at whether the prices that I charge to my cardholders and the offer that I can make to my cardholders, I would be seeking to maximise those profits, so potentially the ways I could do that would be try and offer a better service to my cardholders through various features, or try to get reduced prices -- sorry, reduced costs.

There's potentially -- some of the costs are in the control of the issuing bank, because they are to do with the length of the -- they are related to the cardholder offer, so things like the length of time that you offer an interest free period and so on, and then there's the interchange fee as well, which is, if you like -- nets off some of those costs.

PROFESSOR WATERSON: Thank you. So, of course, amongst the cardholders that they attract, there will be some who pay off at the end of the month, at the end of the interest-free period every month, and then there will be other people, and so would you say there is also a further line of income, of revenue, which comes from those people who I think are called "revolvers" who continue to maintain a balance and, therefore ...

MR PARKER: Yes, that's right. There might be a range of revenues that you get from your cardholders, so one is the interest payments that you receive from them, there might be monthly or annual fees for the use of a particular type of card and so on, so that's also a relevant consideration.

PROFESSOR WATERSON: Although I think in the case of the cards we're talking about, essentially they are largely fee free, aren't they?

MR PARKER: As I understand it.

MR JUSTICE ROTH: And the interest, the APR, is a very significant source of revenue for these issuing banks, is it not?

MR PARKER: Again, that's my understanding, but I haven't gone into huge detail on that.

MR JUSTICE ROTH: Yes. Well, you perhaps follow the evidence that we've heard that that would make sense.

MR PARKER: Yes.

PROFESSOR WATERSON: Mr Coombs, following up on this brief discussion, do you think -- see things very differently from the point of view of the issuing bank?

MR COOMBS: Probably not very differently. So I certainly agree with Mr Parker that the starting point is that you would expect an issuing bank to be trying to maximise its profits, and then, as he says, you have to sort of try and break that down and then think about what are the things that influence the profit, so, you know, in very simple terms it's profit margins and volumes that influence the profit, and, you know, volumes here will depend upon the number of cardholders, so presumably the issuer would like to have, you know, everything else being equal, they would like to have more cardholders making more transactions, and everything else being equal they would like to be having more income for each cardholder, or on each transaction, including -- which would include the things that have just been discussed in terms of the income they received directly from the cardholder and, of course, also the interchange fee that they receive.

PROFESSOR WATERSON: Thank you. Yes, and so then -- is the issuing bank -- if we're thinking about this as two sides, is the issuing bank, and the cardholder, are their interests entirely aligned, or do you see them as being somewhat different?

Mr Coombs.

MR COOMBS: Sorry, I have now forgotten what the question was.

PROFESSOR WATERSON: Do you see the issuing bank and the cardholder as having interests in line with each other or are there tensions in that?

MR COOMBS: I imagine there would be some tensions in the sense that, you know, as always with a supplier and a customer, the issuing bank is trying to maximise its profits and, you know, to take one example, generally that would mean that it might want to charge a higher interest rate to the cardholder, and that's probably not going to be in the cardholder's interest, so there will be some areas where I imagine that the interests of the issuing bank and the interests of the cardholder are not aligned.

PROFESSOR WATERSON: Thank you.

And Mr Parker.

MR PARKER: Yes, I agree with Mr Coombs. I think potentially the sort of competition between issuing banks might end up with them ending up with a proposition that is also in the interests of the cardholder, but in principle if an issuing bank could manage to charge a higher price to a cardholder, it would seek to do so, if that didn't have, you know, adverse effects on its competitive position and hence the volumes.

PROFESSOR WATERSON: We've also come across the concept of monoline banks which are simply issuing. We will come on to the acquiring side in just a moment, but monoline banks who are simply issuing. If you think about the monoline banks and how they might operate, you know, they often offer interest-free periods to attract new customers and so on. How do you see the incentives of monoline banks here?

Mr Parker.

MR PARKER: I'm not sure they are any different to what we've just described, because we've only been looking at issuing banks. I think, you know, potentially when we come to acquiring banks and we start talking about people who are on both sides -- banks are on both sides, then that might differ, but if we're -- so far I think we've just been talking about the issuing side and if so I would see the monoline banks as being, you know, subject to the sorts of incentives that we've just been discussing.

PROFESSOR WATERSON: Thank you.

And Mr Coombs.

MR COOMBS: I agree.

PROFESSOR WATERSON: Thank you. Good.

So then let's turn to the acquiring side, and the acquiring -- so we've got an acquiring bank and also merchants. Now, I would like to explore the relationship between acquiring banks and merchants -- we will join the two sides together in a minute -- but acquiring banks and merchants. How do you see the relationship between those two parties on the other side of the picture?

MR PARKER: I mean, I would see it as sort of symmetric to the issuing bank/cardholder relationship that we've just been talking about, so acquiring banks would be keen to be able to charge their merchants more, if they were able to, without -- but without the merchant moving away, but that may not be possible, competition might drive them to offering competitive terms to the merchants, so I think it's probably a similar question as between issuing banks and cardholders just on the other side of the market.

PROFESSOR WATERSON: Right. So I would like to explore that a little bit more. If you think about the merchant, how might the merchant choose amongst acquiring banks?

MR PARKER: Well, the usual way you choose between a supplier is on the basis of price and whatever quality or other differentiating features that you might -- that they might have, so I think you would want to have a -- an acquiring bank that was offering you a cheap price plus an efficient service which I suspect here, and I haven't gone into enormous detail on thinking about this, but it is probably about the efficiency of the processing of the transactions and the efficiency of the sort of customer service and billing aspects of that to make sure that it all works smoothly, so I would imagine

it would be a combination of those factors.
PROFESSOR WATERSON: And Mr Coombs.
MR COOMBS: Yes. I would agree with that, so I think -- I mean, just to -- the only comment I would add is that one of the factors here would be the extent to which there are differences in terms of quality of service between the different acquiring banks, so if the quality of service is all the same, then price, the level, of the MSC is very important. If there are differences in quality, then maybe that might become more important than differences in price, so it depends to the extent to which there are differences between them.
PROFESSOR WATERSON: So then, thinking about the sides together, some banks are both issuing and acquiring banks. Others are simply issuing banks. I'm not sure that there are -- there may be some that are only acquiring banks, but I think they are probably in the minority, if there are any.
If you are thinking about the bank as having both an issuing side and an acquiring side, then what are the sort of factors that the bank has got to bear in mind? Again, I'll start with Mr Parker since he introduced the two-sided framework, I think.
MR PARKER: Yes. Well, I think it's all the factors that we've been discussing, so -- because it is issuing, so

prices, quality of service, the ability to differentiate and the volumes that you might get -- acquiring perhaps more around price and some quality of service or efficiency elements, and then an important element of price will be the interchange fee, or -- either the revenues received or the costs that you've incurred depending on, you know, depending what the level of that fee is.

PROFESSOR WATERSON: Thank you.

Mr Coombs.

MR COOMBS: Yes. So I think the -- I mean, the crucial issue here is what the balance is between the two businesses, so is the bank a net issuer or a net acquirer, so, you know, I agree with Mr Parker that, you know, all of the factors that we've discussed will be relevant. The thing that then becomes different is that if you are a net issuer then you are a net recipient of an interchange fee, and if you are a net acquirer you are a net payer of the interchange fee, so your incentives in terms of what the level of the interchange fee should be will differ depending upon whether you are a net issuer or a net acquirer.

MR JUSTICE ROTH: If you are a net acquirer, might you still not have a commercial incentive to wish to boost your issuing business?

MR COOMBS: Yes, you will want to maximise -- everything else being equal you want to maximise the size of your issuing business, but if you are a net acquirer, you are going to be trying to sort of think about the balance between the two sides of the business, so if you have a higher interchange fee, then that means you are receiving -- to the extent that you are an issuer, you are receiving the interchange fee on those transactions, but then there's a larger number of transactions on which you are paying the interchange fee, so therefore that means that your incentives are likely to be different from a bank which is a net issuer and has a large number of transactions where it is receiving the interchange fee and a smaller number of transactions where it is paying the interchange fee.

MR JUSTICE ROTH: Well, I understand that if you think everything is static, but my question was you might be a net acquirer but your strategy might be that it's more -- much more profitable to try and expand your issuing business, and therefore seek interchange fees that will most assist in expanding the issuing side of your business. Is that not possible?

MR COOMBS: That's possible, yes.

MR JUSTICE ROTH: Not unreasonable as a possibility, is it? It's not a remote possibility, is it?

MR COOMBS: No, it's certainly possible, but it's equally possible that the opposite is true, that you might be trying to maximise the size of your acquiring business.

MR JUSTICE ROTH: So isn't it a bit more complicated than just whether you are a net issuer or a net acquirer? It's also what your strategy is on where you want to grow your business.

MR COOMBS: Yes. That is relevant as well.

MR JUSTICE ROTH: Yes. Would you agree with that, Mr Parker?

MR PARKER: Yes. I think there's a sort of dynamic, long-term picture that you need to take into account when thinking about what your optimal kind of -- optimal position might be.

PROFESSOR WATERSON: Coming on -- over the period that we're talking about, it's quite a long period -- there has been substantial technical change -- there was substantial technical change over the period -- change in the nature of the card market -- I mean, initially, and in the initial part of the period I think up until 1995 at least there was -- retailers or merchants could charge a supplement, a surcharge for the credit card, when people paid by credit card, and some made great use of this -- I remember Ryanair making great use of this facility -- but also --

MR COOK: Sorry to interrupt you in your question, sir. I'm not sure where the 1995 figure came from. Surcharging was something that was lawful in the UK throughout the claim period, and the Ryanair days would have been rather later than '95 sir.

PROFESSOR WATERSON: Yes. Yes, I think that's right, yes. Thank you. I stand corrected, but the -- so in the circumstance where there is a surcharge, how do you see things being different, or do you see things being no different from the point of view of the card companies, the issuing and acquiring banks?

MR PARKER: So I think if there's the opportunity to surcharge which may or may not be taken, I think it -- we start moving up a level to sort of a bit more of a macro level which is: how do acquirers -- sorry -- how do merchants and cardholders behave, and how would they respond?

So if you have merchants who surcharge, then cardholders would find it less attractive to use that card in making that transaction because an alternative payment method wouldn't apply that surcharge, and therefore -- go back to whether -- the merchant at that point would have to take a view as to do I want to surcharge and potentially-- maybe I make all the same transactions as I would do, but maybe I also deter some people who -- for whom credit card is a convenient form of payment, and maybe I don't want to put them off, and that they might go elsewhere, so I'm not sure there's a definitive answer.

I think it is a complex picture, and rather depends on some of the real fundamentals of consumer behaviour and merchant behaviour.

PROFESSOR WATERSON: Thank you. Would the merchant be more likely to consider imposing a surcharge if the MSC was higher? I mean, if it's -- the MSC is very low, is it less likely to consider surcharging?

MR PARKER: I would think so, but it does also depend on -- I suppose, if you assume the same level of kind of customer deterrence, if you like, in each case as a result of a surcharge, then yes, presumably you would be less likely to surcharge if the interchange fee was -- sorry, if the merchant service charge was low.

MR JUSTICE ROTH: So if the -- and if the surcharge might lead some cardholders then to pay with an alternative means of payment to provide the surcharge by cheques -- we've almost forgotten about cheques, but in this period people had cheques or cash, then that might lead to less volume on card transactions.

MR PARKER: Yes. That's right. It would lead to some -- I mean, it would presumably lead to less volume on card transactions, some of which would switch to alternative payment methods, and possibly some of which wouldn't happen at all, depending on if people had -- were deterred from making the transaction at that merchant due to that policy.

MR JUSTICE ROTH: Now, going back to your answers to Professor Waterman about the incentives or objectives of the issuing bank, the issuing bank wants to boost the number of transactions on the card.

MR PARKER: Yes, there's an element to that.

MR JUSTICE ROTH: So that might be a constraint on the issuing bank seeking too high an interchange fee.

MR PARKER: Yes, these things are related and there are interactions between the sides that mean the issuing bank would want to take into account the impact on merchants because it has a knock-on impact on cardholders, and the same will be true in the other direction as well.

MR JUSTICE ROTH: Yes.

Mr Coombs, do you want to comment?

MR COOMBS: Basically, I agree that the merchant faces a trade-off in the sense that they might want to pass on the MSC to their customers and they would hope that the result would be that the customer would just pay with cash or cheque, but there's a risk that the customer will, instead, not use the merchant, and I think that would be particularly relevant where the customer is a real peak purchaser.

So, you know, taking Professor Waterson's example of Ryanair, you know, it might be that you don't, you know, book that many plane tickets and therefore it's something that, you know, you do very rarely, whereas -- a retailer you visit more often, if they surcharge, you will know that they surcharge, and you might be more likely to avoid that retailer and go somewhere else.

And I think the only other factor I would add, in terms of if cardholders stopped using the credit card, the question is, well, what payment -- what would they do instead? One possibility is maybe there is a surcharge on credit card payments but not on debit card payments, in which case customers might switch to debit cards and, therefore, you know, that might be that that is still, you know, income for the scheme, if the scheme is also issuing debit cards.

PROFESSOR WATERSON: Good. Thank you.

The other margin, if you like, from the point of view of the retailer, the merchant, would be as to whether to accept a particular card or not, and we see that particularly with American Express, and -- but also in-- not so much now, but certainly in the past, whether to not accept any cards at all -- for example, John Lewis was operated like that for a while, and so did Marks & Spencer's, or have their own -- effectively their own card for use in their own business, so do you see that as being significant or just another factor to be borne in mind?

MR PARKER: I think it is another factor to be borne in mind. It may have differed in importance across the period because we're talking about a very long time ago in the lifetime of these schemes, and it might have been more important to bear that in mind in the early part of the period when credit cards were not particularly well-established compared to later on in the period, you see from the value of commerce figures that Mr Coombs put up that there was a very big growth on the sort of yearly -- you know, on an annualised basis in the overall number of transactions, and the value of transactions as between the early part of the period and the later part of the period.

PROFESSOR WATERSON: Mr Coombs.

MR COOMBS: Yes, so I think it is a relevant consideration, is whether there was the opportunity to increase card acceptance and bring more merchants in. That certainly is a factor that will be relevant here.

PROFESSOR WATERSON: Good, and the other factor that has changed, and I remember this, but you may not remember this, is that the means by which the cardholder paid the merchant initially, there was a system of paper slips, sort of carbonised slips that were put into a machine, what was called a zip zap machine, and the merchant would run this machine over and back and the person would sign on the top copy of this card thing and they would keep the top copy and the other copy would be retained by the retailer. Of course we don't do that at all now.

What factors are going to -- so now, you know, we move gradually -- there was a period when sort of telephone -- sort of -- I hesitate to call it "challenging", but telephone checking on the nature of the customer would take place from the merchant and now we've moved to this chip and PIN system, but it was -- previously it was chip and signature and so on.

These various technological changes, how are they going to -- this is quite a broad question, but what would you see as the main factors that are going to influence the market as these technologies change, or what factors -- to put it the other way around, what factors would lead the issuers to make these changes?

MR PARKER: So I think many of these changes, and this will be a simplified answer, I'm sure, many of these changes are related to trying to reduce fraud in the use of credit cards, and increasingly sophisticated ways to make sure that the credit card user is the credit card holder and it hasn't been stolen or otherwise, you know, fraudulently -- a fraudulent transaction, so you are trying to have some more information that the cardholder, and only the cardholder knows and so on, but I think implementing those technological changes is probably costly, you might need, you know, different card readers or different types of-- sort of technology that the merchants might need to have, those will incur costs and so you might need to encourage your customers on either side to move to sort of accept different -- to use different technology to change -- to be able to take account of these sort of new developments. You could imagine a world in which there's a bit of a misalignment of incentives.

So, for example, it might be that the merchant needs to buy a new point of sale terminal to be able to deal with chip and PIN, but it was really the issuing bank ultimately gets the benefit of that, because that's potentially a fraud reduction technology where the immediate beneficiary of that is the issuing bank, and therefore the acquiring bank is acquiring the cost, and the issuing bank is incurring the benefits. That could lead to delays in the sort of acceptance and uptake of that technology.

You might get your net acquirers, you know, people who are on both sides, net acquirers, net issuers, operating both sides of the market thinking, "Well, this is just worth doing because on my acquiring side I incur some costs but on my issuing side I incur some benefits" but if you are just on one side of the market or the other then you need to find a way of trying to sort of get -- reduce the overall costs of the scheme because the overall costs of fraud and so on are an important part of that.

So, you know, the interchange fee, I think, has been used as a way of trying to sort of encourage movement between technologies to say, well, if the costs are more on the acquiring side of this new technology, maybe we should have a lower interchange fee to encourage the acquirers to incur the relevant investment costs, and the issuing banks will likely think that's worth doing, because, actually, we then benefit from the reduced fraud cost, we would like to incentivise the merchants in, you know, the acquiring banks and the merchants in that way. It feels like it is a complex picture. No doubt Mr Coombs will add a point to that.

MR COOMBS: I'm not actually sure I do have anything to add to that. I think I broadly agree with that, and, you know, obviously, we see the interchange fee, some of the electronic transactions sometimes are lower than interchange fees on non-electronic transactions which I think reflects that.

MR JUSTICE ROTH: These technological developments, introduction of -- well, extent of credit card usage, introduction of chip and PIN more recently, I think that's after the period of contactless, they would reflect the different conditions in different national markets, wouldn't they, according to how credit cards are used in different national markets. Would that be fair or ...

MR PARKER: I suspect that's the case but I must admit I don't have particular knowledge of that.

MR JUSTICE ROTH: Mr Coombs.

MR COOMBS: Likewise. It seems plausible, but it's not something I have really looked into.

PROFESSOR WATERSON: So finally in this area, then, we've seen some regulatory intervention with the Office of Fair Trading inquiring into interchange fees at some stage, and also, of course, the major factor, the EA decisions, or the parliament MIFs, so how would you -- what effect would you expect these to have, these -- the OFT investigation and the EEA decision on UK domestic

MIFs?

Mr Coombs.

MR COOMBS: Yes. I mean, maybe just for transparency I should mention I was working at the OFT at the time of the OFT investigation and was actually leading that investigation. In terms of what impact that might have had, well, you might think that MasterCard would be concerned about the level of its interchange fees, that that might be a reason why it might want to have lower interchange fees in order to forestall concerns about the level of its interchange fees. That's a possibility.

MR JUSTICE ROTH: That would be primarily domestic UK fees.

MR COOMBS: Yes, in terms of the OFT investigation, yes.

MR JUSTICE ROTH: Thank you.

Mr Parker.

MR PARKER: I mean, I suppose there are two sort of separate situations, aren't there. There's the outcome of an inquiry which has some kind of regulatory impact, so obviously the ultimate outcome of the EEA inquiry led to a reduction in EEA MIFs to zero for a period, and that's a very significant thing.

In terms of whether there would be an impact of an inquiry being opened and being ongoing, but before any decision has necessarily been made, I think it's impossible to say. It could be the case that someone being investigated might change their behaviour as a result of being investigated. It could be the case that they make no change to their behaviour as a result of being investigated, and they wait to see what happens, so I'm not sure that I can be of more assistance than that, really. I think it -- there are a range of possibilities.

MR JUSTICE ROTH: Thank you.

Mr Coombs, do you want to comment on that at all?

MR COOMBS: No. As I -- I mean, I think it is a possibility, but, you know, I think, you know, beyond that it is pure speculation.

MR JUSTICE ROTH: I think we will take a short break now. We take a break always mid-morning. We will take it slightly earlier because we understand that the transcriber, who had difficulty getting in, is now here happily with us, and will use the opportunity to set up in court. So we will take -- is ten minutes sufficient or -- yes. We will take a ten-minute break and return and commence.

(11.30 am)

(A short break)

(11.45 am)

MR JUSTICE ROTH: We heard some evidence that a particular feature of the UK market was that issuing banks would offer free balance transfers to cardholders to try and attract cardholders from another issuing bank.

And we also heard about, as Professor Waterson has referred to, the monoline banks who were only issuing. They did no acquiring and came into the market. We also learnt in the evidence that there are a relatively small number of banks with significant acquiring businesses. All of the acquiring banks are also issuing banks and there are quite a number of issuing banks that are not acquiring banks.

Does all this suggest -- going back to what you both said; that the banks want to make profit -- that the issuing side is likely to be more profitable than -- if well run, of course, than the acquiring side?

Mr Parker.

MR PARKER: I don't think I would necessarily draw that conclusion because if the issuing side was competitive, you would expect to see any profits competed away, similarly on the acquiring side. So it's not obvious to me either way that either side should be -- should be more profitable.

MR JUSTICE ROTH: Mr Coombs.

MR COOMBS: Yes, I think I would be reluctant -- that's -- there were a lot of factors that you described there, sir, and I haven't sort of thought through what the influence of all those factors would be and I'd be rather reluctant to sort of extemporise here and try and sort of work it all out on the stand, you know. So I think it's quite complicated in terms of the impact of all of those factors and I'm not quite sure what the overall impact would be.

MR JUSTICE ROTH: And you don't think one can reasonably infer from the fact that there was this strong competition to attract cardholders to boost the issuing business that banks saw that as a potentially lucrative or profitable side?

MR COOMBS: Sir, it may well be that banks -- well, sir, maybe just to break that down a bit. So I agree that there was probably a lot of competition to attract cardholders and that banks were trying to do that. They were doing that because they would expect to make profits from those cardholders in various different ways. So there's -- on the one hand, there is the interchange fee income. On the other hand, there's the interest and other income they derive directly from the cardholders.

So it seems to me correct that the banks vigorously compete to do that, but I tend to agree with Mr Parker that the outcome of that may be that they end up competing all that away. So it may be that, you know -- so, for example, it may be the interchange fee income effectively goes to the cardholders through various sort of benefits and subsidies that the cardholders receive, and in terms of the interest income, it may be that that was sort of redistributed between cardholders. So it may be that the revolvers were paying a lot of interest, but the people who paid off their cards every month were then benefiting from the interest-free period.

So quite what the overall impact on the bank profits would be, you know, I wouldn't want to give an answer to that without having really investigated it.

MR JUSTICE ROTH: Yes.

Do you want to add anything, Mr Parker?

MR PARKER: No, I agree with all that.

MR JUSTICE ROTH: I want to move on to talk about bargaining theory, which is something, Mr Coombs, you introduced in your report, and think about what relevant insights can be drawn from that for the purposes of this case.

We're right that we need to distinguish between bilateral negotiations between banks for an interchange fee and, as we know, the later stage in this long period when there were few or no bilaterals and when we have a MIF set by a central body, firstly, a group of banks and then later Mastercard.

So does bargaining theory -- in the way you've introduced it, we understand clearly you're referring to the bilateral stage. Is that really the focus of where bargaining theory is relevant or ...

MR COOMBS: I think it's relevant to both stages.

MR JUSTICE ROTH: And how is it -- can you just explain -- well, both stages, the three stages. There's the first one where they're bilateral negotiations. There's the second stage where it's the group of banks in MEPUK, or MEPUK, which sets the UK fee. And there's the final stage when it's just done by Mastercard International themselves.

MR COOMBS: Yes, sir, I was referring to the first two stages.

MR JUSTICE ROTH: The first two, so it's not relevant to the third stage?

MR COOMBS: To the extent that it was set unilaterally by Mastercard, no.

MR JUSTICE ROTH: Then when considering how it applies, dealing with the first two stages, perhaps one needs to distinguish the way it applies because it might be different, I expect. Would that be fair, if it's a bilateral negotiation or it's a multilateral group setting it?

MR COOMBS: Well, I agree that you need to consider both separately because obviously the facts will be different.

MR JUSTICE ROTH: Yes.

Now, relevant matters, as I understand the way you explain it for the bargaining theory, are the scope of outside options if the parties fail to reach agreement. That would be a relevant matter; is that right?

MR COOMBS: That's a relevant matter, yes.

MR JUSTICE ROTH: And would another relevant matter be the range of topics that are being negotiated? So if they're seeking to agree on X, Y and Z, the deal that they come to on X might be influenced, might it, by the offer being made on Y?

MR COOMBS: Yes.

MR JUSTICE ROTH: Would that be fair?

MR COOMBS: Yes, I agree. Yes.

MR JUSTICE ROTH: Thirdly, would it be relevant to consider whether this negotiation is an isolated transaction or within the context of a broader existing commercial relationship?

MR COOMBS: Yes, that would also -- well, that might also be relevant, yes.

MR JUSTICE ROTH: Yes. And would it also perhaps be relevant whether the outcome of the negotiation might attract regulatory scrutiny by Mr Coombs at the OFT, for example? Would that be a relevant matter that the negotiators might have in mind?

MR COOMBS: Yes, that might be a relevant factor.

MR JUSTICE ROTH: Yes.

Mr Parker, would you -- any comments on whether these are relevant matters or if you agree or disagree or other relevant matters that you think?

MR PARKER: Sir, I agree with all of those being potentially relevant matters and whether they actually were is going to be more of a factual question, but I think from the perspective of economic theory, they're all potentially relevant.

I think I would add also if you're carrying out sort of sequential transactions or sequential negotiations over time and what you do today potentially influences future negotiations on that matter or related matters and there could -- there could be an additional level of complexity that you'd want to take into account as a negotiator because you're then negotiating today, but what you decide today could influence what you end up -- how the negotiations go in the future. So you'd want to think about those as well, I think.

MR JUSTICE ROTH: Mr Coombs, do you think that's a fair point?

MR COOMBS: Yes.

MR JUSTICE ROTH: Then starting with the first one about the sort of outside options if you fail to reach agreement, the outside option, it's got to be a credible option to be relevant; is that fair?

MR COOMBS: Yes.

MR JUSTICE ROTH: And it would be an option -- the outcome, the outside outcome, would have to be clear, would it, to both parties what the option is? Would they have to have similar expectations?

MR COOMBS: Yes. So, I mean, maybe just to qualify that, the clearer it is, then the more influential it is.

MR JUSTICE ROTH: And as I understand what you say in your report, it doesn't actually matter if the option is not referred to as long as both parties have it in mind.

MR COOMBS: Yes.

MR JUSTICE ROTH: They don't have to articulate it; that's right, isn't it?

MR COOMBS: Yes.

MR JUSTICE ROTH: And it doesn't matter if the option is never used as long as they both know it's there; is that fair?

MR COOMBS: Yes.

MR JUSTICE ROTH: Mr Parker, do you agree with that?

MR PARKER: Yes, potentially. It doesn't necessarily have to be the case that you -- that you employ an option because it may be that recognising the option is there gives you useful material to then reach an agreement.

MR JUSTICE ROTH: So thinking here about the outside options in the negotiation between an issuing bank and an acquiring bank, one would be any default rule. If they can't agree a MIF, what will then be applied as the -- can't agree an IF, sorry -- I'm talking about the bilaterals now -- can't agree an interchange fee, what will be the default rule. That will be one matter, I think you say, Mr Coombs.

MR COOMBS: Yes.

MR JUSTICE ROTH: Would another matter be what will happen if there's an arbitration?

MR COOMBS: Yes. I mean, I think the difference is the default fee is something which is sort of -- if there is a default, then it's concrete and known what that is. Arbitration obviously is (a) uncertain and (b) potentially costly, so, therefore, the influence of arbitration is a bit more difficult to understand because of that uncertainty around it.

MR JUSTICE ROTH: Yes, but it's -- the fact that it's not been used in itself is not a reason -- the arbitration. We've heard there was perhaps one, certainly one in Belgium and nobody was quite sure if there was ever one in the UK, but certainly they were very rare.

The fact that there had hardly been any arbitrations, that's not a reason why it's not a credible alternative, is it?

MR COOMBS: It's not -- not necessarily, but I think the fact that it was never used might mean that people felt that it was something that they wanted to avoid because of it being costly and uncertain. So it might have been an influence, but it might also have been something that they were trying to avoid.

MR JUSTICE ROTH: And the fact that they're trying to avoid it is exactly the way it might influence their bargaining.

MR COOMBS: Yes.

MR JUSTICE ROTH: And any comment on that?

MR PARKER: Sir, I think both the default option and the possibility of arbitration are -- I'd put in a similar category, which is they're factors that you know -- that might be part of the walkaway option for both sides, and so you would probably take both of those upfront into your kind of -- into your bargaining situation.

I think you're right to say that potentially one of them being costly might well mean that you want to avoid it, but that doesn't mean it doesn't have an influence. It means you might want to try and arrive at a solution that avoids you having to go to arbitration that potentially has that sort of upfront effect.

MR JUSTICE ROTH: Yes, I think that's pretty much what you were saying.

MR COOMBS: Yes. Yes, I agree.

MR JUSTICE ROTH: Yes. Just one thing about arbitration. Mr Coombs, in your report on causation, {A/14/16}, at paragraph 3.8 there, you talk about arbitration and you say in the middle that:

"I consider ... the fallback rate would be likely to operate as such a 'focal point' which the arbitrator would be drawn to ... because [it] had previously been determined through discussions within Mastercard's relevant decision-making bodies."

I wonder if you could just help me with that because this is a -- we're talking about a UK issuing and acquiring bank, a domestic interchange fee. Are you saying that the EEA fallback MIF is, in your experience, something that the arbitrator would be drawn to?

MR COOMBS: Well, I would expect that it would be a factor that would be taken into account. So you imagine that in the arbitration process that, you know, one or other of the parties would want to say, "Well, there is this fallback rate" and that this is something that you should take into account because the fallback rate has been decided by the relevant Mastercard bodies based on, you know, whatever evidence and considerations they took into account. So I would imagine that it's a factor that the arbitrator would be drawn to.

MR JUSTICE ROTH: But it's an EEA fallback for cross-border transactions, isn't it?

MR COOMBS: Well, it depends on the relevant period that we're talking about and, also, I'm aware that there's a dispute between the parties in terms of the relevance of the EEA fallback rate, but if the EEA fallback rate was also the applicable -- the rate that applied in the UK, then you can imagine that the parties would refer to it and the arbitrators potentially would be drawn to it.

MR JUSTICE ROTH: Although the reason they're going to arbitration is they're not accepting the fallback rate?

MR COOMBS: Well, maybe one of the parties isn't accepting the fallback rate and the other party might be arguing the fallback rate is something that is relevant here.

MR JUSTICE ROTH: Yes. You don't think the arbitrator would be looking at the costs of the two banks and the evidence on costs?

MR COOMBS: Well, I imagine that there will be other factors that the arbitrator will be taking into account, such as costs or any other factors that the parties might present to the arbitrator.

MR JUSTICE ROTH: Why do you think arbitration is costly?

MR COOMBS: Why do I think arbitration is?

MR JUSTICE ROTH: Well, you've said that the reason they might want to avoid it is that it is expensive.

MR COOMBS: Well, it is just my personal experience of having provided expert evidence that's been used in arbitration is that arbitration seems -- in my experience, it's a costly and time-consuming process.

MR JUSTICE ROTH: And it might involve expert evidence.

MR COOMBS: Yes.

MR JUSTICE ROTH: And going beyond the EEA fallback rate, which is known.

MR COOMBS: Yes.

MR JUSTICE ROTH: Yes. So that's one factor, but you're not saying that you think that's -- the likely outcome of the arbitration is the EEA fallback rate, are you?

MR COOMBS: No, I'm just saying that it's something I imagine that the arbitrator's attention would be drawn to.

MR JUSTICE ROTH: Yes, I see. I perhaps misunderstood what you said.

Any comment, Mr Parker?

MR PARKER: I'm afraid I don't have much of a view as to what factors the arbitrator took into account in practice. I haven't considered that.

MR JUSTICE ROTH: Yes. And then if we think about the negotiations between -- the bargaining between the acquiring bank and the merchant, one aspect will be the ability of the merchant to take their acquiring business to another bank; is that right? That's the outside -- if they can't reach agreement.

MR COOMBS: In a negotiation between a merchant and an acquirer, yes, that will be the threat that the merchant would make.

MR JUSTICE ROTH: And that was, from what we understand, a very credible threat, because that would happen.

MR COOMBS: Yes.

MR JUSTICE ROTH: And the merchant -- if the merchant was on a -- the large merchants we had were often on an interchange fee plus or interchange fee plus plus, so they would know the interchange fee. The merchant might, in negotiation over a Mastercard interchange fee, refer to the interchange fee being asked for in regard to Visa, might they not? Can use that in the bargaining.

MR COOMBS: Well -- so if this is a negotiation between the merchant and the acquirer, then the acquirer has no control over what the interchange fee is. The interchange fee is just something that the -- under -- under an IC plus plus contract, the acquirer is simply passing on whatever the interchange fee is and the negotiation will be over the plus bit rather than the interchange fee bit of the contract.

MR JUSTICE ROTH: Yes. The acquirer, the merchant, will know the Visa fee, interchange fee, and the Mastercard interchange fee.

MR COOMBS: Yes, and that will be -- well, so assuming that this merchant is on an interchange fee plus plus contract and assuming that they're -- the option will be to go to another acquirer where they would also be on an interchange fee plus plus contract, then the interchange fee would be the same in both of those cases. So the interchange fee is just, you know, given. It's a floor for the -- for whatever the merchant is going to pay, and what the merchant will be negotiating is the margin above the interchange fee.

MR JUSTICE ROTH: But if the -- acquire Visa bilaterally agreed interchange fees, then another acquiring bank might have agreed a different interchange fee with Visa, might it not?

MR COOMBS: Oh, yes. Sorry, I was misunderstanding the question. Yes, so if you have -- so if the acquirers are paying different interchange fees and that was -- I mean, I'm not sure. To be honest, I'm not sure whether they overlap because my understanding is that bilaterals were more prevalent in the earlier period and interchange fee plus plus contracts were more prevalent later on. So I'm not sure to what extent they overlap, but to the extent they do overlap, then yes, that would be the case.

MR JUSTICE ROTH: And the merchants would be astute to see they don't want to pay more for Visa than Mastercard or vice versa, wouldn't they?

MR COOMBS: Yes.

MR JUSTICE ROTH: And the acquiring banks would know that, presumably, and therefore in their negotiation with issuing banks would not the concern about the Visa fee influence what they would agree about the Mastercard fee?

MR COOMBS: Well, presumably they want both of those interchange fees to be as low as possible, so I'm not quite sure what the influence would be in the sense that if you're trying to negotiate -- well, let -- sorry, let me step back.

So -- and one question is when they're negotiating, are they negotiating over the fee for one scheme on its own or are they negotiating over the scheme -- the bilateral fee for both schemes? That's one question. I'm not quite sure how that actually worked.

Assuming they're negotiating over just the Mastercard fee, then I'm not sure that the level of the

Visa fee -- so that would be information that everybody would know, but I'm not sure that that would stop the acquirer from trying to negotiate the best possible deal on the Mastercard interchange fee.

MR JUSTICE ROTH: Yes. Have you followed the evidence we've heard in the case or ...

MR COOMBS: Some of -- some of it, but not all of it.

MR JUSTICE ROTH: Not all of it. Yes, we heard evidence about bilateral negotiations that where a bank was issuer of both Visa and Mastercard, the negotiations would cover both.

MR COOMBS: Right.

MR JUSTICE ROTH: And that indeed goes back to what we were talking about; the range of matters covered and if -- particularly if both banks are members of both schemes, and the major banks, I think, were, they would negotiate for the interchange fees in one negotiation on the bilateral. This is the bilaterals.

MR COOMBS: Right.

MR JUSTICE ROTH: So the Visa one, what they're agreeing about Visa, would influence what they're agreeing about Mastercard and vice versa; would that be fair?

MR COOMBS: That would be fair. To be honest, it sounds like you have factual evidence on how this worked, which is probably more informative to -- than my speculation about how it worked.

MR JUSTICE ROTH: Yes.

Mr Parker, is there anything you want to say about that?

MR PARKER: No, I think it sounds plausible that it was a relevant factor.

MR JUSTICE ROTH: And the -- if the negotiation covers not only the fee, the interchange fee for standard and electronic card transactions, but also the fee for ATM withdrawals and -- on the card and the fee for what are called cash advances, which, as we understand it, is when you go to the bank and use your card to draw money, and there could be four different fees for these four different things, those would be -- going back to our general point, what you agree on one could influence what you agree on the other; is that right?

MR COOMBS: Yes. Yes, you might agree to a higher interchange fee on point of sale transactions in return for a lower interchange fee -- well, that's actually a bit more complicated because the interchange fees go in different directions --

MR JUSTICE ROTH: Yes.

MR COOMBS: -- definitely for ATM transactions. But you might agree to a less favourable interchange fee on point of sale transactions in return for a more favourable interchange fee on ATM transactions, for example.

MR JUSTICE ROTH: And if both banks are members of both schemes, whether as issuer or acquirer, they might be a net issuer on Visa and a net acquirer on Mastercard. So that would then affect -- and they're negotiating on both together. That might affect the approach they took to the negotiation; would that be fair?

MR COOMBS: Yes, that sounds fair, yes.

MR JUSTICE ROTH: Mr Parker, any comment?

MR PARKER: Yes, I agree with all of that, and potentially, if you thought you might be a net acquirer next period on one and net issuer on the other, depending what your future plans are, that's also, I think, a relevant consideration, as per the discussion earlier.

MR JUSTICE ROTH: So with bilaterals, the bargaining theory, the process is quite -- when looked against this factual matrix is quite complicated, isn't it? Is that a fair conclusion?

MR COOMBS: Yes, I think it is complicated because there's lots of factors here. I mean, I think -- I think the only point really that I've made in my evidence is that, you know, if all those other factors are equal, then if you're a net issuer, you will tend to prefer a higher interchange fee and if you're a net acquirer, you will tend to prefer a lower interchange fee. Holding all of those other factors equal, but to the extent that those other factors aren't equal, that is obviously going to influence the interchange fee that you're going to be willing to agree to.

MR JUSTICE ROTH: Yes, and that would include your strategy for your issuing business.

MR COOMBS: Yes.

MR JUSTICE ROTH: And then can you just explain how things change once you have the second of the three periods; that's to say when it's not a bilateral negotiation, but you've got a multilateral forum where the banks are setting a UK MIF?

MR COOMBS: So I think the same basic principle applies that -- I mean, the forum is different, so rather than it being a negotiation just between two banks, it's a negotiation between all of the banks who are decision-makers within the scheme, and those banks within that negotiation who are net acquirers are going to prefer a lower interchange fee. Those banks which are net issuers are going to prefer a higher interchange fee, subject to any other factors that may influence the decision-making.

MR JUSTICE ROTH: Although the ability to walk away and do a deal with someone else is rather attenuating in those circumstances.

MR COOMBS: Well -- well, in the -- so going back to the bilateral negotiation between an acquirer and an issuer, they -- you still have a situation that if you want to be a member of the scheme, there has to be some -- there has to be an interchange fee.

MR JUSTICE ROTH: Yes.

MR COOMBS: And so, therefore, you don't really have an -- it's not that you have an option to say, "I'm not going to reach an agreement with bank A. I'm going to go and reach an agreement with bank B instead." You have to reach agreements with both bank A and bank B if they're both members of the scheme.

MR JUSTICE ROTH: Just a moment, if you're an issuing bank, you don't have to reach agreement for acquiring with bank A. You can say, "Bank A doesn't do a good deal. I'm going to go to bank B."

MR COOMBS: Right. I mean, my --

MR JUSTICE ROTH: That's your walking away.

MR COOMBS: Yes.

MR JUSTICE ROTH: So how does that apply in the -- when it's a forum?

MS DEMETRIOU: Sir, I'm so sorry to interrupt. I think we're probably agreed that because of the honour-all-card rules, the premise for that question isn't correct. So all issuing and -- so because of the honour-all-card rules, there has to be an agreement between all issuing and acquiring banks, and that was the factual evidence as well. So it's not -- it's not a question of --

MR JUSTICE ROTH: I see. So --

MS DEMETRIOU: So the walkaway means the default would apply. It doesn't mean that there would be no interchange fee.

MR JUSTICE ROTH: Oh, as between -- for transactions between those two banks.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: Yes. Yes, you're quite right. So -- yes, I think I was considering ... yes.

So in the bilateral, there'll be -- if they can't reach agreement, there's default or --

MR COOMBS: Or arbitration, yes.

MR JUSTICE ROTH: -- arbitration.

In the multilateral forum, what you're saying is if they can't -- but they're seeking to fix the default rule.

MR COOMBS: Yes --

MR JUSTICE ROTH: So --

MR COOMBS: -- and then the question is: well, what would -- what would happen if they fail to agree a UK multilateral interchange fee? I think the question is: well, what is -- what happens if they don't reach agreement? So is it that if they don't reach agreement, the EEA MIF would apply? Because if that's the case, then obviously that is going to be something that influences the negotiation.

MR JUSTICE ROTH: Yes, I think if the -- because you'd be back to bilaterals if you can't get agreement in the forum is what you're saying.

MR COOMBS: Yes. So if you -- well, yes, maybe -- I think my question -- and, you know, this is a factual question, not a matter of expert evidence.

MR JUSTICE ROTH: Yes.

MR COOMBS: The question is: what would happen if they don't reach agreement? Now, maybe what would happen is they'd all reach bilateral agreements or maybe what would happen is they would default to the EEA MIF. And to the extent that they would default to the EEA MIF, then that would be an influence on the negotiation, in the same way that whatever the default was would be an influence on bilateral negotiations.

MR JUSTICE ROTH: Yes, so it works in a slightly different way in the multilateral forum.

MR COOMBS: Yes.

MR JUSTICE ROTH: And any other aspects that would apply that there in the -- that distinguish the application of bargaining theory in the multilateral forum?

MR COOMBS: Well, I suppose one factor is that -- one difference -- it goes back to what you were saying earlier, sir -- is that in the multilateral situation, whatever outcome is reached applies to everybody. So if you're an acquirer, you know that whatever interchange fee is agreed is not just the interchange fee that you're paying. You know that all the other acquirers -- in the absence of a bilateral agreement, all the other acquirers will be paying the same interchange fee.

MR JUSTICE ROTH: And how -- what will that do in terms of putting it up or down?

MR COOMBS: Well, it might mean that you might be -- you might be more willing to accept a higher level of interchange fee because you know that your competitors are going to face the same cost and, therefore, it will be easier for that cost to be passed on to the merchants.

MR JUSTICE ROTH: Yes.

Mr Parker, any comments about that?

MR PARKER: So I suppose on the last point, I think a similar -- a similar effect will be felt by issuers because -- so I think there's always a balance between issuers and acquirers. When you move into the period of a multilateral interchange fee and the negotiation, I think I add two things.

One is it does very much depend, as Mr Coombs said, on what happens if someone doesn't agree? Because depending on how nuclear that option is, it depends on how much any individual bank would want to be seen to be the person, you know, getting in the way of agreement, and potentially with, you know, various kinds of consequences in terms of, you know, having to do lots of bilaterals or whatever the alternative is.

And then the second, I think, which is a factor we haven't really touched on yet, but -- and is important, I think, as well in bilaterals, but perhaps in a more dilute fashion, is if you're all negotiating together and setting a MIF, so a sort of market level rate, you would want to take into account in those discussions the impact of the MIF on both sides of the market, because all the MIF is is a way of letting costs fall on one side of the market or the other once the interchange fee is taken into account.

And so you'd want to set it, I think, at a level that sort of tried to maximise the value of the pie. So you'd want to take into account -- as an issuing bank, you'd want to take in account the impact on acquirers and as an acquiring bank, you want to take into account the effect on issuers, because you're all -- you're all together trying to set the optimal level of MIF that will maximise the number of transactions through the scheme, essentially, because you've all -- you're all invested through various levels of costs and so on in being part of that scheme and wanting to see it work.

I think the same factors hold to some extent in the bilaterals period, because if you're a -- particularly if you're a larger -- a larger bank, you'll recognise that your decision also has impacts on -- your decision on the interchange fee as it affects one side of the market may also affect the other side of the market, which may then affect the first side of the market again because of all these interdependencies in demand.

So I think that effect is stronger in the MEPUK period, the middle period, and it's a bit more dilute in the bilaterals period.

MR JUSTICE ROTH: Mr Coombs, do you want to comment on that?

MR COOMBS: I think the only comment I'd make is -- so I agree that there's lots of factors that will be taken into account, including the overall size of the pie, but I still think that that doesn't mean that everybody's interests are completely aligned.

So each individual participant will want -- will be trying to maximise its own profits over the long run, which, as we discussed earlier, depends both on the volume of transactions but also the profit margin it makes on those transactions. So to the extent that profit margins are affected by the interchange fee, the incentives are still going to be somewhat different depending on whether you're a net acquirer or a net issuer.

MR JUSTICE ROTH: Yes. Then we wanted to just ask a little bit about the effect of Visa and the Visa fees in the MEPUK period.

We've talked about it in the bilateral negotiations, leaving aside the obligations of competition law for a moment, notwithstanding that we're in a competition Tribunal, the fact that the five major UK banks were members of both MEPUK and the Visa UK board -- I think it may have been called S2 -- would you think -- and would be -- as you've just been saying, thinking about their commercial interests, would that overlap in membership by the major banks lead to, do you think, a closer alignment in the MIF they'd set for Visa UK and Mastercard UK or greater differentiation?

MR COOMBS: So I think that -- sir, to be honest, it's difficult to understand exactly what influence that would have had, but the way that I think about it is that you imagine that the -- sort of the opposite situation. So if you imagine that there were a group of banks that were all a member of Mastercard and a group of banks that were all a member of Visa, then they would have viewed themselves as competing against each other. They would have viewed themselves as competing schemes. But if there's this overlap between the banks, then it's difficult to really understand how they sort of saw themselves as competing against each other because they were actually competing against themselves in some sense.

So, you know, it seems to me that that must have, you know, somehow influenced how they were thinking if they were in a meeting in a Mastercard room discussing what was going to be -- you know, whatever decisions were made about Mastercard. They must have known in the back of their minds that, "We're all also members of Visa". That must have had some influence in some way.

MR JUSTICE ROTH: Yes.

Mr Parker.

MR PARKER: I think it must have been the case that the Visa rates had an -- had an influence. If you think about the sort of positions of net issuers, for example, even if people were members of both schemes, they might be thinking, "Well, either I may not want to -- I suppose one of them had a lower interchange fee than another.

I might not find that terribly attractive as an issuing bank. Maybe I don't want to issue cards of that type or I will only issue those cards if customers specifically ask for them. I prefer to push customers towards the other type of card as a default."

So that's, I think, one way in which the impact of Visa could be felt.

MR JUSTICE ROTH: Can I just ask just a small point of clarification, Mr Coombs? In your -- I think it's your second report, but, in any event, your report of 16 June at {A/19/13}, you've got a helpful table 1 of issuers of credit and charge cards. You may remember this. And then if we go over the page {A/19/14}, you see near the bottom NatWest Bank.

We'd understood that NatWest Bank was an issuer of Mastercard as well and not just of Visa, but you're showing it as only issuing Visa's cards. Can you help us on that?

MR COOMBS: I'm afraid I can't help you at the moment. It's something I can go back and check, but, you know, there might have been a mistake in the table --

MR JUSTICE ROTH: Yes.

MR COOMBS: -- but I can't really help you right now.

MR JUSTICE ROTH: Right. I think we heard evidence that they were issuing Mastercard right through the period.

You suggest in that report that Mastercard -- you comment on the incentive of Mastercard to set a higher MIF than Visa. I think it's in this same report. Just if we go to the previous page {A/19/13} just above the table, you say at 2.12:

"The asymmetry in bargaining power implies Mastercard would not have had an incentive to lower its default [interchange fees] to the level of Visa's, as 'by maintaining a higher MIF than Visa, Mastercard would have had an advantage in attracting the business of issuers'."

Are you referring here to the time when it was set by MEPUK, not to the bilateral negotiating period?

MR COOMBS: Yes.

MR JUSTICE ROTH: And what about when it was set in the third period by Mastercard organisation? Would it apply to that point?

MR COOMBS: I think it would, yes.

MR JUSTICE ROTH: Would you like to comment on that, Mr Parker? Do you agree?

MR PARKER: I'm not sure it -- I'm not sure I'd agree there is an asymmetry in bargaining power necessarily.
I think you need to look at issuers on the one hand who would like a higher interchange fee and acquirers on the other hand who would like a lower interchange fee.

Depending on the balance of the indirect network effect, so the extent to which a more attractive offer to cardholders leads to more cardholders, more transactions through the scheme and so on that's then beneficial to merchants, that's -- that's an indirect effect in one direction. And then there's a similar indirect effect in the other direction, which is more merchants makes it more attractive to cardholders.

That balance, I think, is important in then setting the interchange fee. I don't think it's right to say that there's an asymmetry in bargaining power. So I think you'd want to take into account both sides and you'd want to then think about where -- where Visa is and see: do I want to be at Visa's rate? Do I think I want to be above Visa's rate? Do I want to be below Visa's rate?

I can imagine any of those are possibilities, depending on your views, your knowledge of the market and where you think those commercial considerations get you. But it's quite hard to sort of measure those indirect network effects and so I don't think economic theory gives you a precise prediction, but I think both of those are important and I don't think it's necessarily right to say that there's a clear theoretical prediction, for example, resulting from an asymmetry in bargaining power that -- as Mr Coombs sets out in that paragraph that we've just been discussing.

MR JUSTICE ROTH: Does this go back to the various factors that go into the bargaining power that we were talking about?

MR PARKER: I think it's -- yes, I think that's right. There's a lot of complicating factors and I'm not sure economic theory gives you an absolutely precise prediction about where you would end up in any of these.

MR JUSTICE ROTH: Yes.

Mr Coombs, do you want to comment?

MR COOMBS: I think the point here is very, very simple, which is on the issuing side, what you tended to have was that an issuer would be issuing the cards of one brand or the other, or for any individual cardholder, they will be issuing the card of one brand or the other. So the issuer had a choice. Do they give this cardholder a Visa card or do they give this cardholder a Mastercard? And they had a choice.

Whereas on the acquiring side, generally what happened is that merchants were accepting both brands of cards and, therefore, acquirers had to offer merchants both brands of cards and, therefore, you had this competition on the issuing side which didn't exist on the acquiring side. And the result of that was that the competition tended to focus on attracting the business of issuers and, everything else being equal, the way you attract the business of issuers is by offering them a higher interchange fee.

MR JUSTICE ROTH: And if Mastercard set a lower MIF -- we're talking about the stages 2 and 3 -- appreciably lower MIF than Visa, the issuers would tend to promote Visa card.

MR COOMBS: Yes, their incentive -- they would be -- they would be more likely to want to issue Visa cards than Mastercards.

MR JUSTICE ROTH: And if -- and therefore -- and equally the other way around, presumably --

MR COOMBS: Yes.

MR JUSTICE ROTH: -- if Visa set a lower MIF than Mastercard.

MR COOMBS: Yes.

MR JUSTICE ROTH: So wouldn't that tend to mean that they would -- they'd drive the two MIFs to be fairly close together?

MR COOMBS: It could do. Yes, it could do, but there may be other factors that meant that for some reason, they weren't driven together.

MR JUSTICE ROTH: But that -- yes, there could be other reasons that could operate.

MR COOMBS: Yes.

PROFESSOR WATERSON: So now let's turn to a different topic, which is Mr Merricks' allegations about causation. Now, I'm not going to ask you just at the moment about the empirical side. We'll come on to that. I'm first going to ask you about what you would expect to see in the data from the point of view of economic theory.

So let's suppose that the EEA MIFs operated as a floor or minimum price recommendation. What would you expect to see in the data if this was the case?

Maybe Mr Coombs could start.

MR COOMBS: So if it was acting as a floor or a minimum benchmark, then you would expect to see that the UK MIF would be equal to or higher than the EEA MIF.

PROFESSOR WATERSON: Thank you.

Mr Parker.

MR PARKER: Yes, I think that's right. I mean, you could -- depending on whether you -- how you interpret a floor, whether you mean you have to be above the floor or whether you can be at the level of the floor, would determine whether it's higher or equal to or higher.

PROFESSOR WATERSON: And would that be true throughout the three periods, if we view it as there being three periods?

Mr Coombs.

MR COOMBS: Yes. I mean, if there -- if it was the case that the EEA MIF was acting as a floor throughout the three periods, then yes, you would expect to see the same thing.

PROFESSOR WATERSON: Thank you.

MR PARKER: Yes.

PROFESSOR WATERSON: So then, again, thinking of it just from the point of view of theory, if the EEA MIF operated as a guidance or as a benchmark, what would we expect to see in the data?

Mr Coombs.

MR COOMBS: Well, would you expect to see that the UK MIF would be close to the EEA MIF.

PROFESSOR WATERSON: Thank you.

Mr Parker.

MR PARKER: I must admit I've struggled really to interpret what -- what "guidance" or "benchmark" might mean. So I think it's possible, as Mr Coombs says, that it could lead to it being close to. I don't quite know what "close to" would mean. It could be at the same level. It could be within some level. It could be that it's taken into account, but ultimately not acted on.

I think it's just very difficult to determine from that description a kind of clear theoretical prediction.

MR JUSTICE ROTH: You mentioned earlier in response to Professor Waterson's first question that they were relatively stable over this period. If it was a guidance or benchmark, insofar as one moved or changed, would you expect the data to show any change in the other?

MR PARKER: I would expect changes probably to be -- a change in one would lead to a change in the other, whether that happens contemporaneously or whether that happens sort of shortly afterwards -- if that's what we mean by "benchmark". I think I'd sort of interpreted "reference point" in that way, but you could interpret "benchmark" in that way. I think it's not completely clear. But yes, I would expect them essentially to move together if that was -- if that was the hypothesis, yes.

MR JUSTICE ROTH: Mr Coombs.

MR COOMBS: Yes, I agree.

PROFESSOR WATERSON: So turning the question the other way round, these two theories, what would be inconsistent with, first of all, the floor or minimum price recommendation?

Mr Coombs.

MR COOMBS: Well, I think if you saw the MIF tended to be below -- sorry, that the UK MIF tended to be below the EEA MIF, then that would be inconsistent with the theory.

PROFESSOR WATERSON: Mr Parker.

MR PARKER: Yes, if the UK MIF is below the EEA MIF, then that's inconsistent with that theory.

PROFESSOR WATERSON: Right. And would there be things that would be inconsistent with the EEA MIF operating as a guidance or benchmark?

Mr Coombs.

MR COOMBS: Yes, I suppose if they moved in -- if they moved differently, then that would be inconsistent with the theory.

PROFESSOR WATERSON: Mr Parker.

MR PARKER: Yes, I would agree with that and in particular, I think we're talking here about the EEA MIF being a guidance or a benchmark for the UK MIF and, therefore, as well as kind of close in time, you'd want the UK MIF to respond to the EEA MIF if it was being used as that benchmark. So you'd need to see -- if there was a change in the EEA MIF, then you'd be looking for changes in the UK MIF at the same time or afterwards, but not the other way around.

So if the UK MIF changed, but the EEA MIF didn't, you, I think -- and then there was a subsequent change in the EEA MIF, that would be the wrong way for that theory. So --

PROFESSOR WATERSON: So that would be inconsistent?

MR PARKER: Yes.

PROFESSOR WATERSON: Okay.

Now, that leads on, obviously, to the question of correlation and then to the question of causation. First of all, if you -- maybe you could each explain what the difference is between correlation and causation.

Mr Coombs.

MR COOMBS: Sir, I suppose correlation can be consistent with causation, but correlation on its own can't prove causation. So what you would normally want to do is you would want to have an economic theory or a set of facts that gives you a hypothesis and then you test that hypothesis -- you know, the hypothesis suggests that there should be correlation. If you test the hypothesis and you find there is correlation, then that correlation is consistent with your hypothesis. But your hypothesis has to be based in some economic theory or facts to start with.

PROFESSOR WATERSON: Thank you.

Mr Parker.

MR PARKER: Yes, I agree with what Mr Coombs has said. I would add that -- so correlation, I would say, is when two variables move together. There could be multiple causes as to why two variables move together and so you'd want to rule out other causes than the one that you're really looking for to avoid a sort of confounding factor problem.

So I think Mr Coombs is right to say what you'd want is a kind of economic theory or a prediction that says: if this is right, then this is what I should see in the data, and that may be a correlation or it may be some other statistical relationship in the data.

But I think that gets you as far -- and Mr Coombs was, I think right, to say this, that gets you as far as if you see that, then it's consistent with the hypothesis, but other things could be consistent with that hypothesis as well. And I think before you can get to causation, you have to rule out those other factors as being relevant. Otherwise, you just have: this data is consistent with this hypothesis, but I don't think it would be proof of causation at that point. I think you need to rule out alternative explanations.

PROFESSOR WATERSON: So to sum that discussion up, would you agree that correlation is necessary but not sufficient for causation?

MR COOMBS: Yes.

MR PARKER: Yes.

PROFESSOR WATERSON: Thank you.

Now, of course, when we are looking to do regression analysis, we are looking for characteristics of the data. I think -- tell me if this is unfair, but I think neither of you are particularly enamoured with the idea of doing regression of the data we have at our disposal here; is that reasonable?

MR COOMBS: Yes.

MR PARKER: Yes, I think there's limited data and you have to think about the best way of getting information out of that data and seeing how far you can push it, but I think there are limits to doing an econometric analysis.

PROFESSOR WATERSON: So would you say this is -- well, the problem is really twofold -- you may not agree with both of these, but let me try them -- first of all, that there are very few data points here and, secondly, that there's also relatively little variation and both of those factors are making regression analysis difficult. Would you agree?

MR COOMBS: I would agree that those are both factors. I think there is another factor, which is if you're trying to do a regression at the level of the individual interchange fee levels, you need to map the UK interchange fee category to an equivalent EEA category, and that is a difficult exercise to do in this case.

PROFESSOR WATERSON: Yes.

Mr Parker.

MR PARKER: Yes, I think they're both -- they're both relevant factors. I think I'd go further to say it's not just a matter of regression analysis. Any data analysis is going to suffer from those factors because they're relevant -- they're just relevant features of the data that we have.

PROFESSOR WATERSON: Thank you.

MR JUSTICE ROTH: If we look at the period to -- between 1995 and 1999, Mr Coombs, you've done some helpful tables -- perhaps we can bring those up at {A/14/28} -- where you show values per different category in table 2. And one sees in 1995 to 1998, some years we don't have any values. That -- it's just standard base and electronic, but the two categories that applied. And then in 1999, there's a very small volume of some additional categories, but relatively insignificant.

And if one compares -- this is the UK table. If we compare that for the EEA cross-border transactions, which you've done in the table on page 30 of this document, {A/14/30}, and if -- thank you. And, again, going up to '99, I think secured electronic and electronic would be -- in UK terms, I think you both accept later, were treated as electronic as far as UK is concerned.

It seems that the use of electronic was much more developed or increased faster in the UK than it did in Continental Europe, as reflected in the pan-European EEA volumes. Is that fair, looking at -- I don't know if we can bring them side-by-side, these two pages, in a size that one can see, page 28 {A/14/28} and page 30 {A/14/30}. Wonderful.

And if one just looks at adding up the electronic categories in the EEA, they are significantly below the electronic proportion in the UK. Is that a fair analysis?

MR COOMBS: Yes.

MR PARKER: Yes.

MR JUSTICE ROTH: Now, in mapping the categories, and you've just referred to mapping, I think, Mr Coombs, you say in your later report you're largely aligned with Mr Parker on this, which is very helpful. You've got a table where you're matching them on page 43 {A/14/43}, table 10. We can take away the left-hand side. Thank you. Page 43, yes, at table 10.

Can I just check: you've entitled it "Matched UK Domestic IFs", but they are -- I think you -- are they the -- are they bilateral IFs or are they domestic?

I think they're domestic MIFs, aren't they, that you've used in this table?

MR COOMBS: I think they are, yes.

MR JUSTICE ROTH: Yes. So we'll call them MIFs rather than IFs, yes, where you've got the various categories.

And, again, just to check on the categories that you agree can be mapped, I think you've agreed that the EEA electronic, secured electronic, enhanced electronic are broadly similar to the UK category that's electronic.

Mr Parker says that at -- I think in your report at {A/16/33}, paragraph 3.25:

"... the EEA and UK Electronic categories appear to have captured broadly similar transactions ..."

And you've treated them as comparable, subject to a few caveats.

And, Mr Coombs, you agree with that?

MR COOMBS: Yes. I mean, maybe just to explain on the mapping, so, I mean, I think Mr Parker and I have sort of taken the same approach to mapping; basically looking at the names of these categories.

MR JUSTICE ROTH: Yes.

MR COOMBS: However, when my mapping was put to Mastercard, Mastercard wasn't able to confirm that these mappings are correct. Mastercard said something along the lines that it's not possible to know whether the mappings are correct.

MR JUSTICE ROTH: Yes, we've noted that, but I think the two of you have approached it that-- that seems a broadly similar way of approaching it.

And then also if we go over the page to page 34 {A/16/34}, 3.28, the chip/PIN and chip/signature appear to capture the universe of chip. So you've, again, approached these on the basis that they can be compared with the EEA chip. And that's Mr Parker's report.

And, Mr Coombs, you agree with that approach; is that right?

MR COOMBS: Yes.

MR JUSTICE ROTH: And then the third category, the EEA and UK, we have the UCAF -- this is on page 35, the next page {A/16/35} -- the merchant UCAF, which is where -- and it's explained there, and then the full UCAF category.

And, again, in both of those cases, you considered that the EEA and UK seemed to be substantially the same; is that right?

MR PARKER: (Nods).

MR JUSTICE ROTH: And, Mr Coombs, do you agree with that?

MR COOMBS: Yes.

MR JUSTICE ROTH: Yes, that's what -- my understanding.

Now, I think we're moving to a significant topic, then, and rather than breaking that up, we'll take our lunch break now and we'll return at 1.50. You will be aware, of course, that you shouldn't talk about your evidence or the case over lunch. You can talk about anything else that you want, including with each other, but not this case.

(12.52 pm)

(The short adjournment)

(1.51 pm)

MR JUSTICE ROTH: Sorry, just one moment. (Pause)

PROFESSOR WATERSON: Thank you. So continuing with the correlation analysis, and there's some questions that we'd like to ask primarily from Mr Coombs, but we'll obviously allow Mr Parker to comment at appropriate points.

The first set of questions regards the weighted average and whether that's an appropriate metric to show the relationship.

And maybe if we can bring up a couple of documents. Mr Coombs' first report, that's {A/14/22}, paragraph 4.6(b):

"... I understand from documents in Mastercard's disclosure that the proportion of transactions, based on the number or value of transactions, accounted for by each card transaction category varies significantly over time. Hence, with data on weighted-average IFs only, it can be more difficult to determine whether changes in those weighted-average IFs are due to changes in MIFs of individual card transaction categories or changes in categories' weights, which are influenced by changes in consumer spending patterns."

So you identify a problem there, Mr Coombs.

Then if we could also have up the agreed statement on the other side.

MR JUSTICE ROTH: {A/22/9}.

PROFESSOR WATERSON: And here you agree that this gives limitations to any analysis of the weighted average IF level. It can be difficult to disentangle the impact of changes in weights.

So you acknowledge a problem, so I guess then the question is: well, how significant do you think this problem is and does to make it very difficult to draw any conclusions from these weighted averages?

MR COOMBS: So maybe there are two points to make here. The first is that I think we all agree that the data is very limited in this case, so this was a question of, rather than taking a purest approach and saying that, "The data is terrible and we can't do anything with it", what is the -- what's the best data that is available in this case? So -- so I took the view that the weighted average data was the best data that was available in this case. Secondly, on this -- so I'm not saying it's perfect or ideal, but it just seemed to be the best that was available.

The second point in terms of this particular sort of issue about are we -- is what we're seeing the impact of changes in the levels of individual MIF categories or is it the effect of the changes in the weights? I mean, the second paragraph here makes the point that, you know, how important this is depends on how Mastercard went about setting interchange fees.

So was it only concerned with the levels of the individual categories or was it also targeting the weighted average when it set them? And if it was targeting the weighted average when it set them, then this problem, you know, arguably then is not so much of a problem or maybe not a problem at all because maybe what we're measuring is the -- is the variable that Mastercard actually had in mind when it was setting the MIFs.

PROFESSOR WATERSON: Yes. So is there a reason why they might have targeted the weighted average?

MR COOMBS: Well, they might have done because it -- it sort of determines the revenues of the issuers overall, is the -- is determined by the weighted average.

PROFESSOR WATERSON: Thank you. That's useful.

So, Mr Parker, you're rather less enamoured of weighted averages, I believe.

MR PARKER: Yes, I am. I'm -- I'm concerned by the fact that you can get changes in the weighted average that are due to changes in the weights, not due to changes in the levels of -- levels of the prices of interchange fees for each category.

You can actually, I think, solve the problem by just looking at the interchange fees in each category in the UK and EEA. As we know, there was very little -- there was very little variation. That's where -- we discussed that earlier this morning.

Some of the analysis I do in my reply report shows that some of the changes that Mr Coombs highlights in the weighted averages are purely to do with the weights themselves and nothing to do with the changes in the categories, because, you know, we know all the categories. We know none of them are changing. We can see that what is going on is changes in the weights.

I'm also not compelled by the view that it's about -- potentially there's something about changing -- if Mastercard is interested in setting weighted average IF levels, I think for that to be the right way of thinking about it, it would have to be the case that you'd see that in the EEA and then you'd see that in the UK, and there was some kind of setting the EEA according to a particular weighted average and then that referring across or some variant of the theories that we were discussing prior to -- prior to the lunch break, some kind of relationship.

I haven't seen any evidence of that, so I think that's a missing link in that particular hypothesis.

PROFESSOR WATERSON: Thank you.

Mr Coombs, do you want to come back on anything?

MR COOMBS: No, and I think -- I don't think it affects what I said earlier. I think there is a question about how Mastercard went about setting interchange fees. I've referred to some factual evidence, but I think that's ultimately a factual question for the Tribunal.

PROFESSOR WATERSON: Yes. Yes, I'm not sure that we've had particular evidence on that point, but anyway.

Then, of course, pre-1997, there were no MIFs and so then the question is, Mr Coombs: well, what did you use in calculating these weighted averages?

MR COOMBS: So the weighted averages are the weighted averages. So this is the evidence that Mastercard provided.

PROFESSOR WATERSON: I see.

MR COOMBS: So it's Mastercard that calculated the weighted averages. I didn't calculate the weighted averages.

PROFESSOR WATERSON: Thank you. That's clear.

Mr Parker, anything?

MR PARKER: Nothing to add.

PROFESSOR WATERSON: Thank you. Okay.

Then, Mr Coombs, going further on in your first report to section 6, so if we carry on down through the document on the left of the screen {A/14/42}. Here we are.

You look here at -- in 6.6, for example, For Instance -- I think we can get rid of the thing on the right-hand side of the screen, for the moment at least:

"For instance, from 2001 to 2008 the Intra-EEA and the UK Domestic MIFs for 'Standard'/'Base' transactions were both at the same level ..."

Why are -- you're talking particularly about they're introduced in 1997. Why are you, for instance, saying 2001 to 2008?

MR COOMBS: I'm not quite sure that there's any particular reason other than that's just the observation about 2001 to 2008. I'm not suggesting that that period is more important than any other period.

MR JUSTICE ROTH: And then when you tabulate them in your figure 1, a couple of pages down at page 45 {A/14/45}, and you go through, but you stop in 2008. Why do you exclude 2009, which is part of our period, claim period?

MR COOMBS: Well, I think there are two points here. The first simple point is that was -- the data was provided up to 2008.

Secondly, the -- 2009, there's -- I think there's an issue about what is the relevance of the theory about 2009, the -- which has sort of beyond the European Commission infringement period and where the class representative claims that there was some sort of hangover period so that although the EEA MIF went down to zero, that that wasn't reflected in the UK MIF.

So that theory is somewhat different from the theories that we've been discussing so far.

MR JUSTICE ROTH: And do you know what the theory is that --

MR COOMBS: Well, as I understand it, the theory was that there was some sort of -- sort of lethargy in the adjustment of the UK MIF and, therefore, the UK MIF in that -- didn't immediately reflect a change in the EEA MIF.

MR JUSTICE ROTH: Yes. If there was that lethargy, would that mean the adjustment in the UK MIF would come a bit later?

MR COOMBS: Possibly. I mean, this -- obviously, this is the class representative's claim. It's not -- it's not

my sort of theory.
MR JUSTICE ROTH: Well --
MR COOMBS: But yes, that is what you might expect.
MR JUSTICE ROTH: -- (overspeaking) if you expect there to be a correlation or -- that might be consistent with causation, the EEA MIF comes down. What would you then expect the UK MIF to do?
MR COOMBS: Yes, so you would expect the UK MIF to come down, as you say. It may be that -- consistent with the class representative's theory that it would be delayed, the adjustment of the UK MIF.
MR JUSTICE ROTH: Yes. In the period when the UK MIF was set by MEPUK, the forum, the weighted average is done by the volumes at the different MIFs, isn't it?
MR COOMBS: Yes.
MR JUSTICE ROTH: The banks in MEPUK setting the UK MIF, maybe they had regard to the weighted average that would result in terms of the UK MIF, but is there any reason to think they could know the weighted average EEA MIF?
MR COOMBS: Well, they -- I'm not quite sure that I'm really able to answer that question. I mean, presumably they could do. They could have access to data on -- if that was provided to them by Mastercard.
MR JUSTICE ROTH: They'd have to get it from Mastercard?
MR COOMBS: Yes.

MR JUSTICE ROTH: If they didn't have access to the EEA MIF, then they couldn't take that into account in doing the weighted average UK MIF, could they?

MR COOMBS: Yes. If they didn't have access to the relevant information, no, they couldn't.

MR JUSTICE ROTH: No.

PROFESSOR WATERSON: So I think you've both agreed that this is a relatively short series of data.

MR COOMBS: Yes.

PROFESSOR WATERSON: Nevertheless, in your analysis, Mr Coombs, you break the data and you exclude some observations. So you break the data and we see that in the paragraph that's just starting at the bottom of the screen there. So you talk about a structural break there, the bottom line on the page.

MR JUSTICE ROTH: Can we move down a bit in the page? Thank you {A/14/45}.

PROFESSOR WATERSON: Yes. So you say -- yes, so which period in particular? Can we check that you do mean 2001 to 2003 rather than 2001 to 2002?

MR COOMBS: Yes. So I think -- I mean, the point here is if you -- if you just look at the graph --

PROFESSOR WATERSON: Yes.

MR COOMBS: -- you see that the two sets of dots seem to move together at the beginning and they seem to move together at the end and then there's a period in the middle where they don't move together. And quite how you define the boundary of that middle period is maybe a matter of judgment, but I observe that, you know, maybe it's 2001 to 2003 that you observe that that relationship breaks down.

PROFESSOR WATERSON: Yes, but, I mean, it's not just a point -- question of looking at the points on the graph. You also have to have reasons --

MR COOMBS: Yes.

PROFESSOR WATERSON: -- for having that structural break.

MR COOMBS: Yes.

PROFESSOR WATERSON: So maybe you could elaborate on the reasons why you chose a structural break there.

MR COOMBS: Yes. So that's what is discussed in paragraph 6.14(b), so there are two points that may be relevant here. So one is the fact that this sort of coincides with a period when a number of new categories were introduced, and the second point is that it coincides with the period of the OFT investigation. And what you observe here is that you see that the UK -- that the UK numbers fall, roughly coinciding with the period of the OFT investigation.

MR JUSTICE ROTH: The period of the OFT investigation being what?

MR COOMBS: So the OFT issued a -- what was then called
a Rule 14 notice in 2001 and then I think there was
a further Rule 14 notice in 2003 and then a statement of
objections, as it was then known, in 2004 and then
a decision in 2005. I think those are the dates.
MR JUSTICE ROTH: But your break stops before 2004.
MR COOMBS: Yes. So I think the logic here is if -- if
MEPUK was reacting to the assistance of the
UK investigation, you would think that it would
reduce -- you know, if it was to react to that, you
would expect that it would reduce the interchange fee
sort of at the beginning of that period. You wouldn't
expect that it would reduce it by a small amount every
year during the length of the investigation. What you
might expect is that it would make some reduction at the
beginning of that investigation period.
MR JUSTICE ROTH: That's 2001?
MR COOMBS: Yes, so the period immediately following the
Rule 14 notice in 2001.
MR JUSTICE ROTH: But not -- but you're excluding 2003.
MR COOMBS: Yes, so -- which is -- so if you take the
OFT investigation as being 2001 to 2005, it's sort of
the first half of that OFT investigation period.
PROFESSOR WATERSON: So whilst they were carrying on the
investigation, and you probably know this better than I,

whilst they're carrying on the investigation, there must be periods during that investigation when they are -- they rather view the investigation as being rather problematic for them and other periods when they view it as being relatively -- the outcome as being relatively benign or potentially relatively benign.

But you're saying that it's in the early period that they were viewing it rather negatively, are you?

MR COOMBS: Yes. So, I mean, obviously we're getting into the realms of speculation here, but the speculation is that they receive a Rule 14 notice from the OFT and that that might raise concerns.

PROFESSOR WATERSON: Right. So that's one of the factors, and the other factor you talk about is new structural categories.

MR COOMBS: Yes.

PROFESSOR WATERSON: How significant are those new structural categories, in your view?

MR COOMBS: Well, I mean, the point about the new categories is at the time when these new categories are being introduced and there may be uncertainty about the impact of these new categories, volumes through these new categories, it may make it more difficult to target a particular level of the weighted average MIF. That is the -- that's the theory, if you like, here.

PROFESSOR WATERSON: But then if we go down to paragraph 6.25 {A/14/48}, and let's also have a look at your table 2 here, which is -- again, I haven't got the reference.

MR JUSTICE ROTH: It's {A/14/28}.

PROFESSOR WATERSON: So the new categories -- remind me, which new categories are you talking about?

MR COOMBS: So there is -- so there are new categories that are being introduced, well, I suppose starting in '99 and also in -- throughout, yes, 2001 and up to 2003.

PROFESSOR WATERSON: So in 2001, which are the new categories? Can you identify them specifically for me?

MR COOMBS: So in 2001, there's -- a chip category is introduced --

PROFESSOR WATERSON: Right.

MR COOMBS: -- and a -- and an internet category.

PROFESSOR WATERSON: Yes. And we don't know about the internet category, but the chip category is 2.9% of the total.

MR COOMBS: Yes.

PROFESSOR WATERSON: Would you view that as a significant figure?

MR COOMBS: In terms of the volume?

PROFESSOR WATERSON: Hmm.

MR COOMBS: Yes. So the volume is -- yes, the volume is low. I suppose one question is whether -- you know, what view Mastercard might have had in terms of what it expected to be the volume. I don't know, but presumably it expected it to be something similar to what it actually turned out to be.

PROFESSOR WATERSON: Right. And then, of course, it becomes more important, as we see in 2003.

MR COOMBS: Yes.

PROFESSOR WATERSON: Unfortunately, we don't seem to have any data for 2002 on that point, so we can't say anything about that, but -- so you nevertheless think this is significant, although in 2001 it was very small.

MR COOMBS: Yes, I think what I'm saying is I'm saying it's a possible explanation for why we see the breakdown in the relationship.

PROFESSOR WATERSON: Right. Thank you. I may come back on that point, but I think it's time we allowed Mr Parker to take a view on these various issues.

MR PARKER: So I think I would be nervous about positing a structural break unless I had a really good reason to think that there really was something different going on.

If we could -- if we could put it back, perhaps, to the chart which was a couple of pages earlier in Mr Coombs' report, I think that would be helpful.

PROFESSOR WATERSON: I think just above 6.14.

MR COOK: Page 45 {A/14/45}.

MR PARKER: Thank you.

PROFESSOR WATERSON: Yes.

MR PARKER: So I think -- I think there is -- I think there would be a concern -- I think the discussion we had this morning, I was not -- it was not obvious to me that regulatory scrutiny or the period of a regulatory investigation would necessarily have any effect, and I think we've discussed that the time period of the OFT's inquiry was outside of the time period that Mr Coombs uses.

There's -- at the same time, there's an EEA inquiry going on for, you know, the vast majority of this period, which -- potentially it isn't taken into account. Presumably if one is interested in that, one would want to look at the EEA version as well.

There are multiple categories being introduced at different time periods, so we can see three of them in 1999 from Mr Coombs' table. I believe there are others after 2004 as well. There were categories being introduced in the EEA.

And then I suppose one of the kind of -- sort of overriding points is that the points that Mr Coombs identifies in relation to the structural break or the apparent structural break are all to do with the UK, but what's really going on in the time period that Mr Coombs identified is that the weighted average intra-EEA MIF is going up and going up quite considerably, and that seems to be -- if you were going to try to explain anything, it seems to me you would probably want to be trying to explain that at the EEA level rather than the UK level.

So for all these reasons, I think it's -- I don't think there's any compelling reason to think that there's a structural break in the data. I think there are lots of things going on. My feeling is that a better way to look at it is to look at the levels of category, IFs within categories, and to try and see what you can glean from those, which we could look at now because I have charts in my report, or if you're going back to it, we could -- we could do it subsequently.

PROFESSOR WATERSON: Thank you. Yes, I've obviously looked at those and I can say that your picture is fairly clear.

So coming back, I mean, there are relatively small numbers of these points and obviously -- well, hopefully you would both agree that if the ideal way to proceed is from the theory to the data, then it's -- are you agreeing that this is the way that you proceeded? You proceeded from the theory to the data or did you then go back to the theory to look at this incident that we're discussing at the moment?

Mr Coombs.

MR COOMBS: Sir, I think -- sir, maybe the sequence is this: is, first of all, there is the theory that there might be a relationship between the two.

The second thing was then to do what one commonly does, which is to plot the data and try to understand the data. The data suggests that there is a relationship for -- at the beginning. There's a relationship at the end. The relationship breaks down in the middle. That raises the question: why might this relationship have broken down in the middle? And try and understand what might be going on there.

So I think that's the sequence of thinking.

PROFESSOR WATERSON: Right. Thank you. That's useful.

But then do you agree that it becomes increasingly difficult the fewer the number of points that you have to say anything about the -- from the data?

MR COOMBS: Yes. Unfortunately, that's -- an inherent problem in this case is the limited amount of data, yes.

PROFESSOR WATERSON: Thank you.

Mr Parker, any comment on that?

MR PARKER: I think I would say I'm not clear on the theory that gets you to looking at correlations between weighted average MIFs. I don't think that follows necessarily from any of the points we've been discussing.

I think one other point just to raise is while Mr Coombs says that there's a correlation in the earlier period and a correlation in the later period, the relationship between the intra-EEA and -- EEA and UK MIFs is different in those periods.

So we have one period where the weighted average for the UK and the weighted average is -- is higher than the weighted average for the intra-EEA. Then we have another period at the end where it's the reverse and the UK weighted average is below the intra-EEA weighted average. So even to the extent that you've got a theory, you can see some correlation because they're both moving, in this case, downwards at the same -- at the same time.

Actually, we've had this complete reversal in the middle which is unexplained. I think that just casts further doubt on -- we've got a small number of data points. We don't really have a good theory for why these things should be moving together. Something strange has happened in the middle that's led to a different relationship and that's a permanent relationship that's ended up towards the end of the period.

So I think for all those reasons, I'm more compelled by looking at the individual -- the IF rates in the individual categories and trying to see what we can glean from those, recognising that -- because I think that that's closer to the theories that we're trying to identify, but recognising there that we still don't have a huge amount of data.

PROFESSOR WATERSON: Thank you. You've referred to those twice, so perhaps, in fairness to you, we should go to those. I don't have the reference for those.

MR PARKER: It'll be figure 4 in section 3 of -- was it A/16 was my first report?

MR JUSTICE ROTH: It is, and figure 4 is {A/16/40} --

MR PARKER: Let's hope that's the right reference.

MR JUSTICE ROTH: -- if that's the one you want.

PROFESSOR WATERSON: So maybe you can make --

MR JUSTICE ROTH: Is that the one you want?

MR PARKER: That is. That is the one, yes.

PROFESSOR WATERSON: So maybe you can make the points that you wanted to make in relation to this.

MR PARKER: Yes. So I think maybe the place to start would be to look at the grey lines, which are standard and base. We've been talking about that already. I think in Mr Coombs' report, he referred to the data in 2001 to

2008.

I think what we see is, if we take it back a bit further, we see that the EEA rate for the standard transactions was at 1.15 for 1995 and then it rose up to 1.3% as of 2001 and then it fell back again in 2007 and then it fell to 0 during 2008 due to the decision.

And what you see in the UK is the UK was always at 1.3, at least from 1997. So what seems -- and then -- so the EEA rate rises to meet the level of the UK MIF rate and then we roll on a few years where they're both at the same level, and then the UK rate goes down to 1.2 in 2006, and then that is followed by the EEA rate going down from 1.3 to 1.2 in 2007.

So that -- so, so far -- I'll come to the 2008 in a minute, but so far, that suggests that it feels more consistent -- I'm not saying it's causation, but it's more consistent with the EEA rate sort of almost following or going towards what the UK rate does rather than the other way round, because the changes or the levels in -- sorry, the changes in the EEA seem to follow, in our one example of 2006/7, or it rises from 1999 to 2001 up to the UK -- UK level.

So if you like, that -- to the extent that there is any relationship there, it appears to be the reverse of the relationship that is posited in the claim form and the theories that we discussed earlier.

And then we have a further set of data points in sort of 2008 where we have the decision coming into force, and the EEA rate falls to zero for -- across the board, but we see that the UK rate has not changed at all in that period.

So I take from that -- I don't see any evidence of the EEA rate influencing the UK rate in relation to -- in relation to standard -- standard rates.

A sort of -- I don't need to go into the details, but you sort of see a similar picture in the two electronic rates that you have, the dark blue and the dotted dark blue line in the EEA at 0.9 and 0.75. The UK rate comes in at 1 and then there's another electronic rate that comes in in EEA that goes from 0.85 to 0.95. So -- and then the UK rate falls down to 0.9.

So I think, again, in the electronic rates, we don't see a pattern of EEA rate -- don't see a seeming pattern of the EEA rate influencing the UK rate in any obvious way there.

And then we see a whole range of new rates coming in in different time periods. So we've got some in -- well, got some in the UK in 1999. We've got another in 2001. We've got some more rates in 2004, some further rates in 2005.

So there's quite a lot of stuff going on. It doesn't necessarily seem to match up between the EEA and the UK. So I think for me, this is quite a helpful chart in just trying to illustrate the patterns that you see in the data in terms of IF category levels, subject to the caveats that we had earlier about the extent of comparability between the categories, which there is some, but obviously that's with caveats.

PROFESSOR WATERSON: Thank you. And, of course, presumably things are changing. The technology is changing in different ways in these two different regimes, if you like. Does that affect your analysis at all, in your view? The rate by rate analysis, I mean.

MR PARKER: I think it probably suggests that that could be a reason why you see different changes happening in different -- in the UK relative to the EEA. So some of the -- the introduction of rates in the UK in 2004 and 2005 may reflect technological changes that were going on in the UK at that time that don't seem to have been replicated necessarily in the EEA at that time. They may have happened before. They may have happened after.

Ultimately, that's a factual question that I think is probably not one for me, but it's certainly a potentially contributory factor.

PROFESSOR WATERSON: Thank you.

Mr Coombs, do you want to comment on Mr Parker's charts at all?

MR COOMBS: Well, I -- I mean, I think, sir, I don't disagree with anything that Mr Parker has said in terms of what the graphs show. I think there are two things to bear in mind.

One is that there may be other things going on at the same time. So we're comparing the EEA and the UK MIFs, but there may be other -- other factors which are affecting the UK MIFs that are not shown here.

And, secondly, you know, without -- I don't want to sort of oversell the idea that it's relevant to look at the weighted averages, but I think if -- if it was the case that Mastercard was also -- or that MEPUK was interested in the level of the weighted average, then it may well be that you wouldn't see a direct cause and effect because they would also not be taking account of the level, but they would be taking account of changes in volumes at the same time.

PROFESSOR WATERSON: Thank you.

MR JUSTICE ROTH: We wanted to then look at the use of -- potential use of weighted average for a different purpose, which I think is what you did, Mr Parker, in your second report. I'm calling it the second report. I think you may number them differently because you include the value of commerce report.

It's the report of 13 June of 2023, which is at {A/21/1}, and in the annex to that report at page 51 {A/21/51}, you are seeking to investigate whether, as we understood it, the -- what proportion of UK interchange fees were at the EEA MIF in the period 1995 to 1997.

And you're using weighted averages, as set out in your tables, which we have at -- forgive me, because I think some new pages have been inserted and I've lost some of the Opus numbers, but I think it may be A/21/56. Let's see if that's the right -- no, it's 55 then {A/21/55}, the page before.

Yes, your table 6. You're now comparing weighted averages now for the purpose of seeing to what extent can one infer the degree to which transactions between UK banks were at the EEA MIF as a fallback in the years 1995 and 1996; is that correct?

MR PARKER: Yes, and 1997. So I think maybe the place to start here, just to provide a bit of context of what I'm trying to do, is in my first report and there is a bubble chart, which might be figure 3, which would be just before the figure 4 chart of categories that we've just been looking at. So it's in section 3 of that report somewhere.

MR JUSTICE ROTH: So that's A/16 and, again, I have new pages without the numbers. I think it may be {A/16/37}. Shall we try that? Is that the one?

MR PARKER: Thank you. That's perfect, yes.

So what this chart is showing is that there are a whole bunch of bilateral bank to bank agreements. This is out of the updated bilateral IFs schedule. And you can see that from 1995 onwards, they're basically at 1 and 1.3.

And I think there's a similar chart, probably if we go to the next page, for electronic rates.

MR JUSTICE ROTH: I think these are electronic, aren't they?

MR PARKER: I think this is paper standard, normal, so I think this is standard base.

MR JUSTICE ROTH: Ah, yes.

MR PARKER: So figure 2 and figure 3, I think, will be the same for electronic, which -- I think we see everything is at -- yes, everything is at 1%.

So I think the concern raised by the claimant is that these bilateral -- the bilateral interchange fees that are here may not reflect all of the data that's available -- or, sorry, all of the bilateral agreements that were in fact made and there may be some missing data and that potentially, that missing data may have been at the fallback rates.

And we know from the previous charts that the fallback rate was 1.15% from 1995 up to 1997 for standard, and it was either 0.9 or 0.75 for the different electronic categories.

MR JUSTICE ROTH: This is the EEA fallback?

MR PARKER: And so these are the EEA rates, and if that's being used as a fallback, we don't see that. We don't have records of that, either of bilateral IF agreements being made at that fallback or, for whatever reason, that being in the system. That -- that should be -- there should be some transactions, is the hypothesis, that were at those rates.

Right. If we can now return back to the table on the reply report that we were previously looking at.

MR JUSTICE ROTH: Which is {A/21/55}.

MR PARKER: Thank you. We have it. Thank you, sir.

So what I'm trying to do here is to say we know the actual weighted average UK domestic interchange fees in those periods, the weighted average of the two standard and electronic categories.

What I'm doing is saying: let's imagine that all of the bilateral interchange -- we have two scenarios; one where they're all at the rates that were prevailing in the bilateral world, so 1.3 for standard and 1 for electronic, and what would the weighted averages look like if all of the transactions were at those rates?

Or, alternatively, what would the -- what would the weighted average be if all of the transactions were at the EEA rates of 1.15 and 0.9 and 0.75?

And I do a bit of blending of the 0.9 and 0.75 to get a sort of weighted average within the electronic category. Essentially, what I find is you get a much closer correspondence between the actual and the hypothetical in the scenario where you assume that all the transactions are at the prevailing bilateral rates in the data available, so 1.3 and one. So that's comparing, in 1995, 1.132 to 1.148, 1.114 to 1.118 and 1.096 to 1.095, as opposed to scenario 2, assuming that the EEA MIFs -- all these -- there were many transactions in this case, all transactions at the EEA MIF levels of 1.15 and 0.9/0.75, and there you get much lower weighted averages.

So I conclude from this that it's a much closer correspondence if you make the assumption that all the transactions were at the prevailing UK bilateral IF rates than if they were at the EEA MIF rates, and I think that suggests that you don't need to hypothesise lots of missing transactions at the EEA level.

You can't entirely rule out that there were some transactions at that EEA MIF level because any time there's missing data, you could always have a range of missing values that -- some of which were at -- could have been at the EEA MIF level and some of which could be higher to get you back to the number you first thought of. You can't rule that out, but neither is there any particular reason to think that that was the case.

And then if we combine this with -- if we go down one page, I do a further --

MR JUSTICE ROTH: Just before you go on --

MR PARKER: By all means.

MR JUSTICE ROTH: -- just picking up what you just said, if we scroll up a page to your A.14, the previous page, page 55, where you refer to this table, table 6:

"... there is no evidence ... available to me that any UK ..."

I think you are saying it's any significant number rather than none --

MR PARKER: Well --

MR JUSTICE ROTH: -- from what you've just given; is that fair?

MR PARKER: I don't think you can say that there are any.

MR JUSTICE ROTH: Yes.

MR PARKER: I don't think you can rule out that there could have been some, but neither can you say that there definitely were any.

MR JUSTICE ROTH: Yes. And you can say, or you are saying, I think, that there can't be a significant number at the EEA MIF rate unless some were way below it, because then the weighted average would not be that much above the EEA MIF rate.

MR PARKER: Yes, I think if you start positing that some transactions were at the EEA MIF rates, you'd end up with a blended weighted average of scenario 1 and scenario 2.

MR JUSTICE ROTH: Yes.

MR PARKER: So that would essentially pull down the numbers from scenario 1 and take them further away from the actuals.

MR JUSTICE ROTH: And, in fact, the actuals are above scenario --

MR PARKER: Exactly, and so -- and I think a further piece of confirmatory evidence of that view is if you look at Mr Coombs' chart, which I replicate on the following page, if we could turn to that --

MR JUSTICE ROTH: {A/21/56}.

MR PARKER: So if we were to hypothesise that there were lots of transactions in '96/'97 that were at the EEA MIF rate of 1.15 and 0.9/0.75 and then we know that a UK MIF was set and that that was at 1.3 and 1, if there were lots of transactions at 0.15 and 0.9/0.75 and then they all went to 1.3 and 1, we should see an increase in that weighted average or certainly, you know, we should see something going in that direction because we've changed lots of transactions from 1.15 and 0.9/0.75 up to 1.3 and 1.

And we don't see that. We actually see a slight reduction in the weighted average from those two periods. So that to me is, again, suggestive that there weren't a material number of transactions at the EEA MIF levels in the period immediately prior to the introduction of the UK MIFs in 1997.

PROFESSOR WATERSON: So just to attempt a summary of discussion here, I think you're both agreed, but tell me if you're not --

MR JUSTICE ROTH: Sorry to interrupt you, but I think perhaps, Mr Coombs, do you want to comment?

MR COOMBS: Yes. Is it possible to go back to the table that we were looking at, table 6?

MR JUSTICE ROTH: I think it's the previous page {A/21/55}.

MR COOMBS: Yes. Sir, it may be that I'm misunderstanding the analysis here, but if I understand it correctly, there's a puzzle in my mind.

So if I understand correctly, Mr Parker is saying that the actual has to be somewhere between scenario 1 and scenario 2; that scenario 1 is the highest that it could have been if everything was at the bilateral rates and scenario 2 is what it would have been if everything was at the EEA MIFs.

But the actual is actually above scenario 1. So I don't quite understand how the actual can be above scenario 1 if scenario 1 is the maximum, but maybe I'm misunderstanding the analysis here.

MR PARKER: Yes, I think this is due to slightly different weights probably being used in the calculation of the actuals and my scenario 1, because one is from the submission, I think, to the OFT or maybe the EC -- yes, it's to the EC, so -- which I think was mostly around the big four. And I think the weights in scenario 1 are from a slightly different source. I think that's the EDC, so it will cover a slightly different panel of banks.

So I think that's -- so that's the source potentially of those -- of those small discrepancies.

MR COOMBS: Sir, that was the only comment that I had.

MR JUSTICE ROTH: Yes, no other observation, because I know you didn't have a chance to reply.

PROFESSOR WATERSON: Thank you. So to summarise, if I may, but please say if you disagree.

There is a real problem in getting very much out of these data points and you both made your efforts to get things out of them. To some extent, you draw different conclusions, but to other extents, you agree.

Is that too blunt a statement?

MR PARKER: I think that's hard to disagree with.

MR COOMBS: Yes, I agree.

PROFESSOR WATERSON: It was the first part that I wanted to emphasise; that there is a real problem of analysing these data points because there are so few of them.

MR COOMBS: I think there are many problems with analysing these data points and, as I say, you know, one can take the purist approach of saying there's nothing to be done, and I think maybe we both tried in our different ways to use them in what we felt was the most appropriate ways.

MR PARKER: I think I also tried to get what I can from the data. I think I would say there are -- there's quite a bit in the data that does not appear to me to be consistent with the theories in the claim form. Notwithstanding the fact that there is limited data available, I think if you just -- for example, the discussion on just looking at the different levels of IF categories I think is informative. That is the data that there is, so that's what we have to work with.

So it seems to me that one can draw some conclusions from that and I don't think that's consistent with some of the theories in the claim form. So I don't think one can entirely -- one should entirely throw away the data analysis, but one should think hard about the weight one places on it and how it matches up to the theories in the claim form.

PROFESSOR WATERSON: Thank you.

MR JUSTICE ROTH: Just one moment. (Pause)

Just a small point for clarification. If we look at {A/16/57}, it's just a factual point. Near the bottom of the page, Mr Parker -- this is from Mr Parker's report -- he says.

"I have not identified ..."

This is in (c):

"I have not identified any example in the data where a change in the EEA MIFs is followed by a corresponding change in the UK MIFs for potentially comparable categories."

I just wanted to ask: Mr Coombs, have you found any such examples?

MR COOMBS: I -- well, I didn't really investigate this question, but I'm sure what Mr Parker says is correct.

MR JUSTICE ROTH: Yes, thank you.

We have no more questions that we want to put to the experts. What we will do is then take a 15-minute break and give -- there's no particular magic in the order in which -- but perhaps, Ms Demetriou, if you want to go first if you have any supplementary questions.

MS DEMETRIOU: I was assuming Mr Cook would go first in the sense that --

MR JUSTICE ROTH: Well, that's fine if Mr Cook -- if you're agreed between you that Mr Cook should go first.

MR COOK: I'm not sure it's a question of being agreed, but I have no objection to going first.

MR JUSTICE ROTH: Yes.

We don't -- I have said this before; that it's -- I don't think it's productive to re-traverse ground that we have covered with the experts. So bear that in mind, but there may be other matters that you want to pursue.

So we'll come back at 3 o'clock.

MR PARKER: Sorry, may I ask the question of purdah and whether I am in purdah during Mr Coombs' cross-examination, whether he's in purdah during the break. On your behalf, just -- sorry.

MR JUSTICE ROTH: I think when you are not being cross-examined, and it will be now that, Mr Parker, you are now released, that you're not in purdah, so you can assist Mr Cook and, equally, once you are cross-examined that Mr Coombs can assist Ms Demetriou.

So, in other words, you are not in purdah now and will not be until you start giving further evidence.

MS DEMETRIOU: Sir, may I just raise a point about that because --

MR JUSTICE ROTH: Perhaps you all sit down.

MS DEMETRIOU: I think I would respectfully submit that everybody should be in purdah because they're in the middle of giving their evidence. I think the practical difficulty for me is that we now have a 15-minute break where Mr Parker is able to assist Mr Cook, but I envisage we're not going to have a similar break before I have to cross-examine and so I won't get the same benefit.

MR JUSTICE ROTH: Okay. Well, I think perhaps that is the better course, that you both stay in purdah then. Thank you.

(2.47 pm)

(A short break)

(3.00 pm)

MR JUSTIN COOMBS (continued)

MR JUSTICE ROTH: So, Mr Coombs, you are, of course, still under oath or, more technically, under affirmation.

Yes, Mr Cook.

Cross-examination by MR COOK

MR COOK: Mr Coombs, if I could ask you to turn to section 3 of your main causation report. It's bundle {A/14/15}, and this is the section in which you deal with insights from the theory of bargaining and that's obviously been -- you dealt with that extensively this morning, so a very small number of questions on that.

You say, if we go over the page at paragraph 3.5 {A/14/16}, that -- you say:

"... one outside option each member bank has in a bilateral negotiation with another scheme member is to leave that negotiation. However, prima facie, the credibility of a threat to 'walk away' appears limited or unrealistic given that this would imply abandoning participation in the Mastercard scheme, and it would be seen as such by the other member banks involved in the negotiation."

So I think you're talking here about bilateral negotiations; is that right?

A. Yes.

Q. You dismiss that, but you dismiss that because in general in your reports, you dismiss the role of Visa, don't you? Because the reality is that there is a very credible option for a Mastercard issuer who is particularly a large issuer who -- you know, if they don't get an acceptable interchange fee, which is simply to issue Visa cards instead.

A. So yes, that is correct; that an issuer could walk away from the negotiation and join Visa. The acquirer, that's not such a credible option because it's unlikely to want to leave the scheme and only be issuing -- only be acquiring Visa cards.

Q. You say join Visa, but we've heard in the evidence most of the banks were members of both, so they were able simply to start issuing more cards under one rather than the other. Are you aware of that?

A. Yes.

Q. And were you aware there was a Visa UK MIF throughout the claim period?

A. Yes.

Q. Yes. So in those circumstances, it's not a question of negotiating an interchange fee. They simply can conceal -- you know, they know what the Visa UK MIF is and they have the option of switching if an acquirer offers something materially worse than that, don't they?

A. Yes.

Q. Thank you.

Paragraph 3.8 of your report, if we go down to that, which addresses arbitration and, again, you were asked about this morning and mentioned -- made some points about the possibility that an arbitration might be costly, and I think you said that based on your experience of arbitration. Presumably you're talking here about commercial arbitrations in disputes; is that right?

A. Yes.

Q. But in the context of an arbitration where it would be carried out by a Mastercard body, where a UK cost study was already available, where there was a reference rate established by the UK members and, essentially, we're looking at one or two numbers, i.e., a standard rate and an electronic rate, that's likely to be a fairly short and painless process, isn't it?

A. I'm not sure I would really be able to give an opinion on that. I think the point I merely make is that the fallback rate is -- you know, effectively costs less using the fallback rate, whereas arbitration would presumably involve some costs that would not be incurred if you simply used the fallback rate.

Q. As you said, the parties might be trying to avoid arbitration. That may be why it doesn't happen in practice, or it may just be that people don't use arbitration because they have a shared expectation of where it would come out. You wouldn't need to go through the process if everyone broadly expected what the outcome would be. Do you agree with that?

A. Yes.

Q. Paragraph 3.11, you say {A/14/17}:

"All things being equal ..."

A phrase you've used a lot in your evidence:
"... and based on my understanding that no arbitrations were in fact initiated, I would also expect the IFs bilaterally agreed ... to be at or around the applicable ... rates."
And then you set out your reasons at subparagraphs (a) and (b).
You set out an expectation, but you don't actually conduct any real analysis of the bilateral rates in order to test that assumption, do you?
A. No.
Q. Well, why not?
A. I think -- well, I'm not quite sure, to be honest. I think the point here is that I was just explaining what I would expect to happen based on economic theory.
Q. Because, in reality, the bilateral rates are not generally agreed at around what is said to be the potential fallback rate, the EEA MIF. That -- presumably, the reason you didn't look at it is because it shows your theory is wrong or, perhaps more accurately, it shows everything else is not equal.
A. Well, maybe it shows that -- yes, it could be that everything else isn't equal. I think also the question is what -- how you define -- you know, how close does it have to be? You know, obviously that's maybe a matter

of judgment. But yes, there may also be other factors that are relevant here.

Q. And you then go on to set out various sort of additional paragraphs, 3.12, the European Commission decision, and 3.13, you say the OFT was of the same view.

You were the director of the OFT in charge of that investigation, weren't you?

A. Yes.

Q. So would it be reasonable to assume that when the -- I think it's footnote 59 there that you rely upon, 59 -- sorry, 60. But I think this would have been taken from the -- yes, it's taken from the OFT supplementary Rule 14 notice, and that was issued while you were the director in charge of that investigation.

A. Yes.

Q. And would it be reasonable to assume that as the director in charge, a document wouldn't have gone out if you disagreed fundamentally with it?

A. Yes. I mean -- well, to be completely clear, obviously I wasn't the sole decision-maker in that case. I was their director, but I was reporting to John Vickers, who was head of the OFT at the time. So it wasn't completely within my control, but yes, I mean, I agreed with the position the OFT was taking.

Q. So what you're doing here is citing as support for your view the view you held 20 years ago.

A. Yes.

Q. And, in reality, what you're saying is, "That was my view in 2003 and I haven't changed my view"; yes?

A. Yes.

Q. Actually, you carefully not looked at the actual data on bilaterals to see whether that contradicts your theory or not.

A. Well, you're correct to say that I didn't conduct a detailed analysis of the bilaterals, no.

Q. If we go down to paragraph 3.19 then, which is the next page {A/14/18}, and make that a bit larger. And this is discussing here -- I think it's the section above. This is discussing here -- it starts with dealing with the cost factors, but then mentions:

"... also with regard to market conditions ..."

This is paragraph 3.17:

"... in particular, factors ... competition from Visa's credit card scheme."

And you say Mr Hawkins gives evidence that merchants would refuse or discourage the use of Mastercard cards. Mastercard would lose issuer business to Visa.

You say:

"In my opinion, the difficulty with Mastercard's position is that it does not take into account merchants' incentives. Ultimately, merchants have little choice but to accept both Mastercard and Visa payment cards sooner or later. Credit cards are issued under either ... brand, the same card is not issued under both brands, it being the decision of the issuing banks which scheme's cards they would issue. This means that if a merchant accepted only one brand, it would risk losing the business of customers whose credit card was issued with the other brand. Merchants therefore tend to want to accept both brands which means that acquirers have to offer services for both brands to merchants. There is little or no real scope for merchants or acquirers to play one scheme off against the other ..."

You don't cite any evidence at all for that paragraph. Why is that?

A. To be honest, I don't think it's a very controversial statement to say that merchants accept both Visas and Mastercards.

Q. Well, you're saying -- but you go on to say rather more than that, don't you? You say:

"There is little or no real scope for merchants or acquirers to play one scheme off against the other ..."

What analysis have you actually done in relation to whether merchants were -- have a potential to threaten

to surcharge one card or not accept one card? Have you looked into that at all?
A. Well, as I say, I don't think it's a very controversial statement to say that merchants were accepting both types of cards and that you didn't find merchants that chose to only accept one type of card and not the other.
Q. In circumstances where interchange fees for the two schemes were virtually identical for Visa and Mastercard in the UK?
A. Well, whatever the level of interchange fees, I think the point still stands.
Q. Do you remember a famous incident at the beginning of last year where Amazon publicly announced it wouldn't accept Visa cards, Visa credit cards, basically as a result of a fee dispute with Visa? Do you recall that?
A. I am aware of that, yes.
Q. Yes. So it clearly can happen if there's a motivation to do so.
A. Well -- yes, my understanding is that eventually they didn't follow through with that and they did end up accepting Visa cards. Anyway, that's --
Q. They use -- would you say that is merchants having scope to play one scheme off against another? They have scope to do so and no doubt they got an acceptable deal as

a result of taking that approach.

A. Well, I think your example raises many issues. Apart from it being after the claim period, the question also is whether all merchants have the same bargaining power as Amazon, which I think is highly unlikely.

Q. And then you go on to talk about, 3.21 and 3.22, whether Mastercard -- you say {A/14/19}:

"I consider the position of Visa MIFs ..."

I think you mean "UK MIFs":

"... was largely not a relevant concern beyond Mastercard recognising that by maintaining a higher MIF than Visa, Mastercard would have had an advantage ..."

Were you aware from the data -- if we can go to {A/18.1/5}, so this is the consolidated MIF table. If we could blow it up a little bit in relation to 2003 and 2004.

So we see in 2003 that Visa reduced its UK MIFs in 2003, so that's the second column in 2003, and we can see Visa reduced, for example, electronic from 1% in 2002 down to 0.87 in 2003. Similar reductions for many of the other categories, card not present and chip, which were all the main categories by that stage.

And then if we see, 2004, Mastercard, or at this stage being set by MEPUK, followed suit. We see that in 2004. It's the first column. And then Mastercard, again, electronic comes down to 0.9, card not present comes down from 1.1 to 1, and similar reductions in relation to chip and PIN split out, but coming down from the previous 0.9.

So that's an example, isn't it, of it clearly being felt necessary for Mastercard to come down to -- well, this is when it was being set by the UK banks -- a level that was broadly comparable with Visa's rates?

A. Yes. Well, it would appear -- so we're taking the electronic category, so Visa reduced from 1% to 0.87 and Mastercard reduced, but its rate ended up higher than Visa's, if I'm following this correctly.

Q. It came down from 1% to 0.9.

A. Yes, that's right.

Q. A 10 basis point reduction, which left it with a 3 basis point advantage.

A. Yes, and --

Q. So it's maintaining a very small advantage, but nothing like where it started without that change.

A. Yes, and then for card not present, the Visa rate is -- the Visa rate was lower than Mastercard and it falls and then Mastercard still maintains a higher rate than Visa.

Q. It clearly shows, doesn't it, that simply maintaining a significant differential is just not going to be realistic for any extended period?

A. Well, I --
Q. The schemes all knew that.
A. Yes, I think what it shows is it shows that Mastercard was maybe taking account of the Visa MIF but wasn't trying to exactly match the Visa MIF.
Q. Thank you.
Weighted average MIFs. You were asked a number of questions about them this afternoon. Now, if we could go back to your third report, which is in bundle {F1/1/10}, at the top of the page, the paragraph that starts there, it says -- it refers to Mastercard's defence drawing on weighted averages and that was for a different purpose, but you refer to that.
You say use of weighted average is a problem for the reasons you then go on to explain, and you explain in the second sentence of paragraph 2.26:
"The reason is that different types of transactions are subject to different interchange fees, and the composition of those types of transactions may vary across time and across jurisdictions ... Controlling for all relevant factors that affected interchange fees and varied over time ... normally involves the use of a descriptive analysis and a regression analysis if possible.
"... A descriptive analysis examines the strength of

correlation between EEA and UK interchange fees and the evolution of other factors that could affect interchange fees. This type of analysis does not isolate the effect of EEA interchange fees on UK interchange fees but aids in identifying the outside factors which also influence interchange fees."

So at this stage, sort of before you were doing the analysis, you were saying the use of weighted averages was going to be a problem because of the issue with composition of the types of transaction, weren't you?

A. Yes.

Q. And that remains a problem that you haven't sought to deal with at all in your causation report.

A. Well, it's a problem that I discuss and I think we've discussed it this afternoon.

Q. Now, in terms of category weight, if we go to paragraph 5.6 of your causation report, which is {A/14/39} --

MR JUSTICE ROTH: Sorry, the report you were just in, the third report which is in the F bundle, what's the date of that one?

MR COOK: That was September, sir, and it was prepared for the CMC in relation to data. There was a disclosure application report, sir.

MR JUSTICE ROTH: Ah, right.

MR COOK: So that's the third report we were just looking at. The first and second reports are also in the bundle, sir, but they dealt with pass-on issues.
MR JUSTICE ROTH: Yes. Thank you.
MR COOK: In which case, if I could also then go to your fifth report, actually, which is in F1/4 and if we could go to paragraph 2.6 on page 2 {F1/4/2}, and here you said:

"I understand that various different MIFs applied to different types of transactions during the infringement period. I ... expect that the volume of these different types of transactions may have changed over time. For example, there was likely an increase in remote transactions relative to in- person transactions and an increase in 'chip-and-pin' transactions relative to signed-for transactions. These changing volumes may have influenced the level of domestic UK IFs, and it is therefore important that I can assess and take account of these changes."

So, again, even before you saw any of the data, you were identifying the likelihood that changes in technology would impact upon -- well, you say different MIFs, but sort of average MIFs, wouldn't it?
A. Yes.
Q. Yes. But if we then go to your causation report -- so

it's {A/14/39} and it was paragraph 5.6 I wanted to ask you about, if you blow that up. You say:

"While a highly positive correlation coefficient between, for example, UK Domestic IFs and Intra-EEA MIFs is indicative of a close relationship between the two variables, it does not necessarily prove a causal relationship."

And pausing there, there are a number of points, but one of them is the point you made this morning that correlation is not causation, so a familiar phrase to it.

But you say:

"Other factors, known as confounding factors, may be at play, which could influence both variables and create a spurious correlation that is not causative. Ideally, my analysis would control for these potentially confounding factors ..."

You say by multivariate regression analysis.

And then you go on at the end to say regression analysis isn't possible {A/14/40}:

"... the only viable approach is to conduct a correlation analysis while bearing in mind and seeking to account for the possibility of confounding factors."

And that's what you said at paragraph 5.6, but the reality is you haven't sought to account for the

possibility of confounding factors, have you?
A. No, because it was not -- it was not possible to do so.
Q. Well, it most certainly was in the sense of transaction weightings, which is the most obvious confounding factor here, isn't it, with the weighted average, as we've seen? That is likely to be the principal cause of movements in a weighted average.
A. Yes, and that's something which I discuss as being a limitation of this analysis and which I think we've -- we've discussed today.
Q. If we can go to {A/14/28}, which is your table 2, and this is where you show the share of transaction values by MIF category, a table you've seen with the Tribunal. It only goes up until 2004. If we can go a little bit higher up the page just so we can see, the subparagraph (b) above, which actually lists data that was available, it says that data provided by Mastercard was available at subparagraph (b) on the volumes and values of transactions by MIF categories for the period from 2003 until 2006.

You don't include the data for 2005 and 2006, do you, in your table?
A. For 2006, no.
Q. No. Why not?
A. I'm not sure. Can we go to the beginning of this

paragraph?

Q. Certainly {A/14/27}.

A. Thank you, and then back down {A/14/28}. (Pause)

Yes. To be honest, I can't remember why 2006 isn't included in this table.

Q. Okay. Well, we can look at the data now because you've given us the footnote at 1.15 to the document. The document is C18/66 and it's page 109 {C18/66/109}. So this is the data you refer to. It starts at 109 in 2003.

If we go over the page {C18/66/110}, we then have the 2004 data. So pause on this one because this overlaps with the analysis you have done and just to measure through what happened in particular with chip cards during this period, so to follow on the data that you didn't provide, we see "Chip" four rows down. It's 16 billion. There's also chip PIN-verified, which is the bottom entry in "Consumer", which is at 1.6 billion. So at that stage, chip was roughly £18 billion. Do you see that? That's the sort of 2004 figure.

If we go over the page to {C18/66/111} --

MR JUSTICE ROTH: Sorry, just pause a minute before we go. If we go back to 2004 {C18/66/110}, are these the figures in the table 2 we've got?

MR COOK: It's not. Table 2 is percentages. So these are simply -- these are volumes.

MR JUSTICE ROTH: Ah, yes. Yes.

MR COOK: So we're getting some idea of scale. We can see at this point, chip is, together with chip and PIN verified, slightly the largest category. But if we then go over the page to 111 {C18/66/111}, we can then see that chip, which is now -- the chip and PIN verified is rather more significant. We see chip is now 12.5 billion in the third row, chip PIN-verified is over 17 billion. So that's getting up towards 30 billion, a 50% increase over the course of the year, by far and away the biggest category.

If we then go to {C18/66/112}, which is 2006, we see we have -- pure chip now is just roughly 3 billion, but chip PIN-verified is now roughly 37 billion, so a total of 40 billion.

So we can see looking at that the very dramatic rise of chip relative to all the other categories you're seeing there. Chip's by far and away now the biggest category, looking at that list. It's 40 billion. The next is CNP, card not present, at 15.6. So we see there that chip is substantially increasing in size in the UK during this period.

A. Yes.

Q. And if we go then to {A/14/30}, which is your table on the EEA MIF categories where you do provide the 2005 and 2006 data, again, we can see a not dissimilar pattern taking place with chip in the EEA, which is an increase of 2004, starts to become a very significant number, nearly 11%, and 2005 triples. In 2006, it goes up to about 37%.

So you're looking there in relation to chip at very much a sort of common pattern of chip substantially increasing during the 2004 to 2006 period.

A. Yes.

Q. That key trend during that time period is not mentioned in your report. Can you tell the Tribunal why not?

A. Well, I think you -- I don't -- I'm not quite sure I understand the question. So you can see the pattern in --

Q. You can see the pattern in the data I've shown you from other documents, not in the report you have produced. It's very important when you're talking about weighted averages to actually see what's happening to the underlying weightings. That's what you said in your previous reports, didn't you?

So why did you not put forward the evidence which would show what was happening with the relative weightings?

A. Well, I think I have shown in this table what's happening with the relevant weightings and I don't think I, in anywhere in my report, say that there wasn't a change in the weightings.

Q. We'll come back to take a look at what you do say. So if we go down to paragraph --

MR JUSTICE ROTH: Sorry, just before you go on, the Mastercard document that you showed us, I think it was {C18/66/1}, which gives the actual figures year by year.

MR COOK: Yes, sir.

MR JUSTICE ROTH: And it says it's for -- I think I saw somewhere a period. Is it 2002?

MR COOK: I think it has four years, sir; 2003, 2004, 2005 and 2006. It's the 2005 and the 2006 which is the extra two years that one gets that aren't shown on Mr Coombs' --

MR JUSTICE ROTH: I see. So it doesn't go earlier than 2003?

MR COOK: No, sir.

MR JUSTICE ROTH: Thank you.

MR COOK: So Mr Coombs has taken data from different documents for the earlier period, but this one covers, as we see in subparagraph, was it, 2.13 --

MR JUSTICE ROTH: Yes, and there's no such -- Mastercard didn't have such figures for 2002?

MR COOK: Not in that document, sir, because that document is, like much of this case, a particular snapshot provided for regulatory purposes. What you see at 4.17(a) is there was data for a lot of the previous years, which is what Mr Coombs has relied on for '95, '97, '99, 2001.

MR JUSTICE ROTH: Yes.

MR COOK: It doesn't help us on the missing 2002 year, sir. That was the question.

Let's look at what you then do conclude, Mr Coombs, at 6.17 and 6.18 {A/14/46}, which is the sort of key bits of your analysis in relation to weighted averages. So this is your correlation for the two periods that you focus on where you say there isn't a structural break, and we'll come back, it won't surprise you, to the structural break in a moment.

So you say -- you identify the correlation and you say it's highly significant -- statistically significant and the correlation coefficients are close to 1. What you don't go on to consider is whether there are confounding factors there. Why not?

A. So the nature of the correlation analysis is it doesn't control for confounding factors, and that's something I've explained as a limitation of this analysis.

Q. But I showed you the earlier bit of your report where you said the important point then was then to consider

whether the correlation is actually driven by confounding factors or not; that that would create what you describe as a spurious correlation. You don't go on to consider whether this is a relevant causation -- a relevant correlation or a spurious correlation, do you?
A. No, I -- well, I set out the limitations of the analysis and present the results.
Q. You were aware, weren't you, that what this was in fact showing was simply changes in the weighting of transactions, weren't you?
A. Well, I say that it's obviously maybe caused by changes in the weightings and I acknowledge that point, yes.
Q. Well, you don't acknowledge that point. You don't describe it at all in those paragraphs. You simply say you get high correlation, statistically significant. You don't explain potential alternative reasons for that, do you?
A. Yes, but I've already addressed the point earlier in the report.
Q. Let's look at the reasons for why that's the case. You do set out at paragraph 6.16 what is happening in relation to -- and that's standard and electronic. I think you're looking at snapshots from '97 to '99.
We actually have a slightly longer time period if we

go back to table 2.

So if we go back to table 2 and table 3, the pattern is pretty clear from both of those tables that what you get during the first time period you're looking at -- so at table 2, which is {A/14/28}, you get standard going from 43.9% of transactions in the UK down to 23 and, meanwhile, electronic goes from 56 to 70.

And then if we go to {A/14/30}, which is the EEA MIF for the same period, we don't have the '95 data, but for '96, we see base going from 49.6 to 33 and sort of combined electronic goes from roughly 50% to about 62%.

So what you're seeing in both jurisdictions -- or "both jurisdictions" is misleading because it's cross-border. What you see in the UK domestic and cross-border is exactly the same pattern of transaction volumes changing as transactions switch from standard to electronic, and that's all your correlation shows, isn't it; that confounding factor of the same technological trend in both places?

A. Yes, so the weights are changing and I acknowledge that that may be reflected in the correlation coefficients, yes.

Q. So -- but you can't help us whether it shows anything else other than just transaction weighting?

A. No, I can't disaggregate and tell you, you know, to what

extent it's driven by the changes in the weights, no.
Q. But you actually have a clear explanation for why you get any form of correlation there, don't you, and no reason to doubt that that's a full explanation, do you?
A. Well, I don't know whether it's a full explanation, but clearly it's an influence, yes.
Q. And then if we go on to -- if we go back in your report to 6.17/6.18, which was a bit in relation to 2004 to 2008 {A/14/46}. Again, I've just taken you through the data we do have in relation to chip transactions for both jurisdictions in 2002 to 2006. Again, in both places, you get this increasing trend of using chip cards, don't you? Which would have -- and they're the cheapest. The MIF for chip cards is the lowest, so that's likely to result in reductions in the weighted average, isn't it?
A. Yes.
Q. So both the correlations you identify are, in fact, explained by the fact there were changes in the weighting of the different categories of transactions, aren't there?
A. Well, I would say that the changes in the weightings are influenced in the correlations, yes.
Q. But you can't provide any form of indication if there's anything else in there other than just changing in the

weightings, can you?
A. I can't break it down, no.
Q. No. Can you explain why you're putting forward this kind of analysis, though, without explaining there is a clear confounding factor which may explain the correlation you identify?
A. Well, as I say, I have in my report explained that that is a relevant factor, yes.
Q. Well, not in the sections where you find the correlation. You don't go on to say, "This may be spurious. There may be confounding factors." You don't explain that at all, do you?
A. No, but I've already identified that this is a factor.
MR JUSTICE ROTH: There is, Mr Cook, at footnote 149 on page 44 {A/14/44} in section 6, yes --
MR COOK: Structural break --
MR JUSTICE ROTH: -- I think making the point that you're making.
A. Yes.
MR COOK: Structural break. I was going to ask you about that next. So you think or suggest there may be a structural break. If we go to figure 1 on page {A/14/45}, that's your figure 1 graph. You suggest there may be a structural break in relation to that middle bit, 2001 to 2003.

At paragraph 6.14(b) a little bit lower down the same page, you set out your reasoning for why that may be a structural break and you say that period, that interval, is characterised by pronounced changes in the composition of card transaction types. Several new categories and associated MIFs were introduced in relation to both domestic and intra-EEA transactions.

And at the end, you also say:

"... this period roughly coincides with the OFT investigation ..."

So those are your two possible explanations of why this might be a structural break. Is that a fair summary?

A. Yes.

Q. Yes. So I want to ask you some questions about each of those --

MR JUSTICE ROTH: We did cover this.

MR COOK: I know, sir. There are some additional points, I'm afraid, sir.

MR JUSTICE ROTH: Yes, so ...

MR COOK: There are additional points of detail, sir, that, with respect, the Tribunal --

MR JUSTICE ROTH: Yes.

MR COOK: Yes. So I will take it as quickly as I can, sir.

If we go to {B/28/1}, which is the EEA MIF table, and if we blow it up in the middle of the page looking at 2000, the categories that change are in 2000. So before the period, there's introduction of -- well, enhanced electronic replaces the blend electronic and secured electronic and the introduction of chip. And then there aren't new categories introduced other than chip changes to a single category, apart from merchant UCAF and full UCAF in 2002.

So those are the changes we're looking at, and are those what you're describing as -- how do you put it -- pronounced changes in the composition of card transaction types? Is that what you were describing?

A. Yes.

Q. If we can go then to your causation report, {A/14/30} and your table 3, if you look at the percentages of transaction values, so we saw electronic is replaced --

MR JUSTICE ROTH: Well, we did all this --

MR COOK: If you feel there are enough points --

MR JUSTICE ROTH: I mean, that was the point Mr Waterson put to Mr Coombs, and I think he recognised that they are not very significant.

MR COOK: Sir, then I can move on from that one. Then, in which case, sir, you probably feel I have done the UK MIFs as well.

I just wanted to show you in relation to {B/12/1}, which is the UK MIF schedule for 2000 and 2001, if we look at 2001, 2002 and 2003, the only changes you get in the MIF rates -- and we can also see from footnote 4 that the change in 2004 is only on 1 October. The only change we get is the introduction of chip at 0.9 and the introduction of the internet at 1.1.

But just to clarify, if we can go to bundle {C7/320/1}, and this is minutes of a MEPUK board of directors meeting on 30 November 2000. And if we go to page 8 {C7/320/8} and we can see there that at the bottom of the page, it says:

"... the Board in its September meeting ... agreed the introduction of a new category for chip-enabled ... terminals ..."

So the decision to introduce chip was made in September 2000.

And then if we go over the page {C7/320/9}, we see the rate was agreed at this meeting, and I think you'll see that about two-thirds of the way down the page. The rate was agreed at this meeting on 30 November.

So the only rates that were introduced in this period, 2001, 2002, 2003, was the introduction of those rates which were agreed in 2000. Do you see that?

A. Yes.

Q. And if we go back to {A/14/28}, your table 2, which is

the UK categories. Internet, we can see, is trivial because in 2003, it's only 3%. So the only significant change is the growth of chip, which is minimal in 2001, but then seems to be higher in 2003. Do you see that?
A. Yes.
Q. Because you suggest that this period, 2001 to 2003, roughly coincides with the OFT investigation, which may have put some downward pressure on the level of the UK domestic interchange fees. That's your second reason.
    Now, it's {XC22/28/1} which is the first Rule 14 notice and you said, basically, the investigation really came to life when this was issued, and this was in September 2001, which I think -- take it from me it was. The date is buried away somewhere rather deep in this. I think it's on page 42 for anyone who is interested.
    So the OFT investigation really starts, comes to life, in September 2001, but we've just seen there were no changes in the UK MIFs after this notice at all, was there, during this period? So your structural rate based on the investigation simply cannot make sense, can it?
A. Well, I suppose it may be that Mastercard was aware that this was coming beforehand. It might -- this might not have been the first step in the investigation. It

would -- it notified the rules. It received requests for information and so on. So, you know, maybe this was not the -- sort of the first sign of the investigation.
Q. The reality is you're now desperately trying to find a reason to exclude data that simply doesn't support Mr Merricks' case, aren't you?
A. No, I'm just -- I'm just making a comment to answer your question.
Q. But if we go back to your main body of your report at 6.25, there is, I think, another explanation you give in relation to the structural break. So it's {A/14/48} and you say in the final sentence:
"Specifically, in 2000 and 2001, the number of MIF categories increased in both regions (in particular, chip categories were introduced), and subsequently, the shares of transactions under the different MIF categories evolved differently for domestic and cross-border transactions."
So I think there you are explaining in relation to the 2001 to 2003 period that there is a sort of -- you know, there are differences in -- different movements in transactional volumes; is that fair?
A. Yes.
Q. But you don't provide similar explanations in relation to the two periods before and after that you do

consider.

A. No.

Q. But the reality is, as we've seen, that, you know, all your data is showing is a parallel movement of growing electronics and transactions in both jurisdictions up until 2000. That's what we see, isn't it? Then both the UK and the EEA introduced chip rates and the UK gets more growth in chip rather earlier than the EEA MIF. Again, that's just transaction volumes. That's your structural break. And then parallel growth in chip transactions in the UK and the EEA from 2004 onwards.

So all of this correlation analysis is just about transaction volumes, isn't it?

A. Well, I'm not sure that it's just about transaction volumes, but I do agree that transaction volumes are a factor here, yes.

Q. So, Mr Coombs, you've explained you were the director of the Office of Fair Trading between 2001 and 2004. You have filed five reports in these proceedings. The first one is at F1/5 and if we go to the second page of that report {F1/5/2}, that's the introduction you describe about yourself.

In none of the first five reports you filed did you make any comment or reference to the fact that you had been the director in charge of an investigation in relation to UK interchange fees during the claim period. Can you explain why you didn't mention that earlier?

A. Well, I mentioned it in the -- in the first report on causation for this hearing. I explicitly mentioned it.

Q. That was your sixth report in these proceedings.

A. Yes.

Q. You didn't think it was an important factor that impacted on your impartiality and you should have mentioned it earlier?

A. I thought it was an important point to mention for the report that I produced for this hearing. I think on the first report -- the first report, I'm not quite sure whether it had my CV attached or not.

Q. Well, it didn't have your CV attached --

A. No.

Q. Actually, let's do a comparison. If we go to paragraph 1.3, we can see what you say about your experience as director of the Office of Fair Trading.

And if we could then show up on the screen as well page {A/14/4}, so we can show both documents, and paragraph 1.3 is essentially in the same terms for the first two lines, but you mention for the first time the fact that you were the director in charge of the team that investigated, you say, the notification of its rules, but, in practice, it was an investigation of

UK MIFs, wasn't it?
A. Yes, it was actually -- well, it was the notification of the rules that was being investigated.
Q. In your reports, you don't give any consideration to Debit Mastercard even though when you filed your report there was still a claim in relation to that, and that was a situation where UK domestic MIFs were lower than the EEA MIFs. Why did you not consider that?
A. Well, as I understood it, Debit Mastercard was a relatively sort of small product compared to the credit card products.
Q. Which contradicted, though, the floor theory, doesn't it?
A. Well, I'm not sure about that, but, as I say, as I understood it, the credit card products were the material products in this case.
Q. If I could ask you to look at {C6/288/1}, because you also didn't give any consideration to rates in other countries, did you, in Europe?
So that will be one where the -- operator, you can get rid, firstly, of Mr Coombs' report. If you could open the native format, please.
MR JUSTICE ROTH: Sorry, what is this document?
MR COOK: This is, I think, data produced in relation to, if we go to "Explanation" at the bottom left, I think it

was information that was submitted as part of the -- I'll check. I think it was submitted to one of the regulators.

MR JUSTICE ROTH: By Mastercard?

MR COOK: By Mastercard. So it's a Mastercard document.

And if we go to "Chart1" this is a table of domestic interchange fees in countries across Europe. I'm afraid the yellow at the bottom is almost unreadable so if we go to "Presentation", which is the next one across, and then go down the page, which unfortunately is not ordered by height, but it is at least readable.

MR JUSTICE ROTH: This is which year?

MR COOK: This is, I believe, 2000 or 2001, sir. If we go to the top of the page, it'll probably tell us which year we're looking at. We'll check the year. So it's 2000 to 2001, I think.

And then if we go down the table to the chart, that's average domestic interchange fees in those countries. We can see there are multiple -- we see, remember, that the weighted average EEA MIF was around the 1% mark. We can see there are multiple countries in which it's significantly below the 1% mark.

I'm told it's '99 data, sir.

Multiple countries, Czech Republic, Denmark, Finland, France, Slovak Republic being examples, but also lots of other countries where domestic MIFs are hugely higher than the EEA MIF.

Did you not think it was important to look at some other countries and where the comparative domestic rates were?

A. It's not something that occurred to me to do, no. This case concerns the UK, so I was examining the evidence in relation to the UK.

Q. Looking at that, there doesn't seem to be any relationship between domestic MIFs and the EEA MIF at all, does there?

A. Just looking at the graph, there seems to be a lot of variation of the domestic MIFs. I think it's the only conclusion you can draw from looking at this graph.

Q. In your supplemental note you produced -- give me a moment to find it. It's {A/22.1/1}, and you perform various analysis in this about whether or not there were lower interchange -- whether or not -- this is in relation to the EEA MIF and, in particular, whether the weighted average would have been below 1% or not, and you give various reasons why you think it might not have been.

If I can show you C2/321 -- sorry, I have actually got the wrong reference in relation to that. So I won't ask you about that document for now.

In which case, I think I have no further questions, sir.

MR JUSTICE ROTH: Any re-examination?

Re-examination by MS DEMETRIOU

MS DEMETRIOU: Just one question, Mr Coombs. So Mr Cook asked you why you didn't take account of what was happening with underlying weightings and he showed you one document with some transaction values. He also took you to your first report, which supported an application for disclosure of transaction data.

Did you get that data?

A. No.

Q. And you said earlier that it wasn't possible to disentangle the reasons behind the correlation and Mr Cook put to you that one of the reasons might have been a growth in electronic transactions.

Would the transaction data, had Mastercard provided that, have helped you with disentangling the causes for the correlation?

A. Yes, it would.

MS DEMETRIOU: Thank you.

MR JUSTICE ROTH: Thank you, Mr Coombs. We've no further questions from the Tribunal, so you are released now as a witness. Thank you.

(Witness released)

MR JUSTICE ROTH: Ms Demetriou, how much cross-examination have you got for Mr Parker?

MS DEMETRIOU: I think I can finish.

MR JUSTICE ROTH: I don't want to put you under pressure, so don't feel you have to curtail it. We're very ready to come back tomorrow.

MS DEMETRIOU: Yes. Well --

MR JUSTICE ROTH: But, equally, if we're going to come back tomorrow for 20 minutes, that seems inappropriate.

MS DEMETRIOU: No, no, I'd --

MR JUSTICE ROTH: We'd rather sit to 5 o'clock, as it were.

MS DEMETRIOU: I completely understand. I think I can do it this afternoon without undue pressure, bearing in mind that the hot tub has traversed lots of the issues.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So I'm just going to stick to supplementary questions.

MR JUSTICE ROTH: Would it help you -- we can rise for ten minutes, if you like, and we can sit till 5 o'clock --

MS DEMETRIOU: Thank you very much. That --

MR JUSTICE ROTH: -- rather than, as I say, to come back for 20 minutes tomorrow.

MS DEMETRIOU: That would help. Thank you very much.

MR JUSTICE ROTH: That would be inconvenient to everyone.

So we'll come back at 4.05 and then you take your time.

MS DEMETRIOU: Thank you.

(3.53 pm)

(A short break)

(4.07 pm)

MR DAVID PARKER (continued)

MR JUSTICE ROTH: Yes, Ms Demetriou.

Mr Parker, you appreciate you are still under affirmation.

A. Yes.

Cross-examination by MS DEMETRIOU

MS DEMETRIOU: Mr Parker, I want to ask you some questions about your table 6 at {A/21/55}, and they're questions supplementary to the questions the Tribunal has asked you already.

A. Yes.

Q. This is the table where you compare certain estimated weighted average interchange fees with actual weighted average UK interchange fees. And as we saw, you say at A.14:

"... there is no evidence on the data available to [you] that any UK domestic transactions took place at the EEA MIF rates in [those] years ..."

Now, looking at table 6, so if we can scroll to see the whole of the table, please, scenario 1 shows what

the hypothetical weighted average interchange fees would be on your calculation if there was complete bilateral coverage in the UK; yes?
A. Yes.
Q. And scenario 2 shows what the weighted average interchange fees would be if the EEA MIF applied to all domestic transactions; correct?
A. Yes.
Q. And then, finally, you've set out the actual weighted averages for UK domestic interchange fees; correct?
A. Yes.
Q. And turning to the weighted averages first, so you identify the source of these in a note below table 6 and you say that that's from MEPUK data from the MEPUK response to the OFT section 26 notice dated 18 February. Do you see that?
A. Yes.
Q. And let's go to that document. That's at {C8/415/2}. And this -- you can see that the first sentence refers to the provision of data to the OFT by MEPUK and if you look at paragraph 2.2, you can see that that says that:
"The [attached] MEPUK data file also now includes the weighted average MIF that was calculated on the basis of the MIFs of the four largest credit card banks in the UK. We have used the market shares of these

banks in UK acquiring as weights."

So the weighted average interchange fee data was limited, wasn't it, to the interchange fees of the four biggest UK acquiring banks; correct?

A. Yes, that's correct.

Q. And if we go to page 6 {C8/415/6}, you see at the top the names of the banks. So there was Royal Bank of Scotland, HSBC, Lloyds and Barclays, and those are the four banks whose data forms the basis for the weighted interchange fee calculation; correct?

A. Yes.

Q. And because the weighted average interchange fee data is only from the four biggest acquiring banks, I think you'd agree, wouldn't you, that it may not be representative of the whole market?

A. Yes, that's correct.

Q. And on that point, just as a matter of common sense, the larger the bank, the more likely they are to have the resources to negotiate bilateral arrangements with every other bank; would you agree with that?

A. That might be true. I haven't thought about that particularly.

Q. But does it seem logical to you that smaller banks are less likely to be able to negotiate bilateral arrangements with every other bank because it's costly

to undertake multiple negotiations?
A. It's certainly possible.
Q. And likely, do you think?
A. I'm not sure I'd go that far. I just don't think I know enough about that.
Q. All right. Now, only taking -- so if that's correct, then only taking the weighted average interchange fee data from the largest banks is therefore likely, isn't it, to skew the result in favour of banks with complete bilateral coverage? Do you agree with that as a matter of logic?
A. Well, it certainly means that the results are based on, you know, these banks. I'm not totally sure it necessarily leads to a skew, but it might do. But I think we don't know what's going on with the other -- with the -- we don't know what's going on when you don't have the data, so that's the issue.
Q. All right. If my supposition is correct that the larger banks are more likely to have complete bilateral coverage, if that's correct, which I appreciate you say you don't know, but if it is correct, then that would skew the results in favour of banks with complete bilateral coverage, wouldn't it? So that would mean that the weighted average would be more likely to be closer to scenario 1 in any event; do you agree with

that?

A. Well, not necessarily. It depends what's going on in the missing -- you know, in the banks for which we don't have information. I mean, if they have a very similar picture, then you'll end up in the same place.

Q. No, but if they were conducting more transactions, processing more transactions at the default MIF, then the results would be skewed in the way that I've said.

A. So I'm not sure I'm completely following, but if the data that we have is based on some of the largest banks then, yes, that -- the weighted average will reflect the picture for those largest banks.

Q. Yes.

A. If we're missing data on the smallest banks, then that obviously is not included in the calculation for the weighted average. Whether there's any skew in the results depends on whether the bilateral interchange fees or the interchange fees that related to those banks was -- were in any way different to those that related to the big four banks.

So I don't think you can make a point about skew in terms of the results, but you can certainly say that the results that are in table 6 reflect the big four banks.

Q. And where you say that whether there's any skew in the results depends on whether the bilateral interchange

fees or the interchange fees that related to those banks, i.e., the missing banks, were different --
A. Yes.
Q. -- if it were the case that the missing banks were processing a greater volume, a greater proportion, of their transactions at the EEA MIF, that would skew the results; correct?
A. Yes, if that's the case, as I mentioned earlier. We just don't know.
MR JUSTICE ROTH: Would it depend on the volume of transactions the smaller banks processed compared to the bigger banks as well?
A. It would, because the weighted average would mean that if the smaller banks are omitted, there's -- they won't have a huge impact on the weighted average one way or the other. So, you know, there's -- the banks that are in the sample are the larger banks. I think it's -- we don't know what the smaller banks -- we know the aggregate volume. We don't know the -- we don't know the IFs at which they were transacting, but it's unlikely to make a huge difference just because they're small. That's the nature of the weighted average here.
MS DEMETRIOU: And if we go, please, to page 4 --
A. Of?
Q. -- of this document {C8/415/4}. So it will come up.

Yes, it has come up.

So under "HSBC Data", it says that:

"These MIFs are calculated from total quarterly MIF fees paid (both Visa and MasterCard), divided by the relevant quarter's ... turnover."

So the weighted average fee data for HSBC included Visa interchange fees; correct?

A. Yes, I see that.

Q. Did you know that at the time when you were putting your table together? Had you seen that there?

A. If I had, I don't recall.

Q. So I think it follows from that that the HSBC data may not properly reflect the average interchange fees on Mastercard credit cards; correct?

A. Yes.

Q. And below "Barclays Data", so the first bullet point, the final two sentences, you can see that:

"MIF data for 1997Q4 are not available. [Because] Data within Barclays' Management Information System data warehouse for this period were corrupted."

So some of Barclays' data for 1997 is missing; correct?

A. Yes, that's right.

Q. And 1997 is an important year in all of this, isn't it, because it's the year at which everyone agrees that the

EEA MIF applied by way of default? And it's at that point that you talk about the structural break in your report; correct?
A. Well, we see that data for 1997 will cover Q1 to Q3, so it won't include the Q4 figures.
Q. No.
A. So we'd have to have a -- if that was a concern, it would -- sorry, for that to be a concern, it would have to be the case that the position in Q4 was materially different to the position in Q1 to Q3, and we just don't know, so I've used the data that's available.
Q. But it might have been and it's a deficiency in the data.
A. Yes, that's correct.
Q. And if we go to page 6 --
PROFESSOR WATERSON: Could I just check on that: Q4, is that the last three months of the year?
A. I would assume so, because I think these are the calendar year data, but I will be corrected if that's not right.
PROFESSOR WATERSON: So Q4 may well have a greater volume of transactions leading up to Christmas.
A. Yes, that's true, but the question is whether there's a different relative position as to Q1 to Q3, I think.
PROFESSOR WATERSON: Yes.

MS DEMETRIOU: And then if we go, please, to page 6, that should come up. I think that's a wrong reference. I will find the reference.

But the point that I want to make, and I just want to ask you if you're aware of this, is that the figures for all four banks included data for foreign issued cards. Did you know that?

A. I didn't know that.

Q. So that would include, presumably, US cards where the inter-regional fallback fee, which was higher, would have applied.

A. I see.

Q. And that's something again which would have affected the results. Do you accept that?

A. Potentially, yes.

Q. So these points -- all of these points undermine, don't they, the accuracy of the weighted average interchange fee data?

A. Well, they mean it's not perfect and I think -- I think none of the data is perfect. I think what this data is telling you, what this analysis is telling you, that if you can -- if you apply my scenario 1, which is the 1.3 and 1, you get something that's close to what was in the actual data. I fully accept that the actual data as submitted in this MEPUK document may not be perfect.

I guess the question is: does it tell you anything more about whether there were transactions at the EEA level? And I think the answer is no, it doesn't. It doesn't tell you anything positive about that.

Q. Just to show you the reference for the foreign cards, that's {C15/134/118}, just to be fair to you so you can see that.

A. Which paragraph am I looking at?

Q. Sorry, second paragraph:

"We would first like to clarify what the quarterly MIF data in the MEPUK Data file represents. The data was calculated from total quarterly MIF revenues, divided by the relevant quarter's credit card turnover. The figures include transactions on both foreign and domestic-issued cards. Hence, these MIF figures do in fact represent the effective average MIF for each bank."

A. Yes, I see. Thank you.

Q. Now, going back to your report at {A/21/54}, at paragraph A.11, you explain that you have data on relative transaction weights for 1995 and 1997 and then at 12(a) you explain you have used that data to calculate what the weighted average would be for complete bilateral coverage, assuming applicable rates of 1.3% for standard and 1% of electronic.

And the data that you've used for relative

transaction weights in 1995 and 1997 comes from EDC's 1997 cost study; correct?
A. Correct.
Q. So that's a different data source to the source that you were looking at for the actual weighted averages, which was the OFT response.
A. Yes, that's right.
Q. And if we go to {C5/70/1}, this is the 1997 cost study. And if we go to page 10 {C5/70/10}, so the data in the chart at the bottom of the page is the data that you used; is that right?
A. Yes, that's right.
Q. And it shows the percentage share of electronic and standard transactions for total transactions and total turnover; correct?
A. Yes, that's right.
Q. And the figures from 1995 are from EDC's previous cost study; is that your understanding?
A. That's my understanding, yes.
Q. And then if we go to {A/14/35}, we can see here a list of the banks which contributed to the cost -- to EDC's cost studies, and the entry for 1997 includes all of the four banks whose data was used to provide the actual weighted average figures. Do you see that? RBS, HSBC, Midland, Lloyds and Barclays.

A. Yes.
Q. But it also includes data from a number of other banks, doesn't it?
A. It does.
Q. So it's fair to say, isn't it, that when you compare the actual weighted average figures with your hypothetical weighted averages of complete bilateral coverage, you're not comparing like with like?
A. Yes, that's right. So I've got some further data on different banks here. As I mentioned this morning, I think potentially part of the reason why you don't see an exact match is because you've got these different -- different data sources giving you slightly different weights.
Q. So there's a risk, isn't there, on -- there's a risk in relying too heavily on any similarity between your hypothetical weighted average interchange fee calculations and the actual figures; correct? Because you're not comparing like with like and because there's deficiencies in the data. Do you accept?
A. It's not perfect, I certainly accept that.
Q. And if, as a matter of fact, we've seen evidence in this case -- and I appreciate the factual question is not for you, but if it's the case that, as a matter of fact, the EDC data, the data supplied to EDC by the banks, was not

robust and was unreliable, that would be a further cause for concern in terms of the reliability of these calculations; correct?

A. Which bit of the EDC data are you saying was not robust?

Q. Just the data provided, the raw data provided, by the banks to EDC, so the basis for EDC's table that you referred to. So if the input figures from the banks were not reliable, then that would also be a reason why the calculations might not be robust; correct?

A. If it applies to that table, then yes.

Q. Now -- so are you aware -- so I want to talk now about the proportion of transactions which might have been processed at the EEA MIFs during this period, and are you aware that according to the OFT decision that for transactions processed over Europay settlement system, the overwhelming majority in '97, '98 and '99 were processed at fallback rates?

A. No, I don't think I followed that particular part of the debate.

Q. So let's just look at that, so {B/6/22}. Do you see the table there, so "Percentage of purchase transactions made on the basis of bilateral agreements between issuers and acquirers", and they're very small?

A. Yes, I see that. Wasn't this a period where there was a UK MIF?

Q. The UK MIF came in at the very end of 1997.
A. And so should one interpret this -- when we're saying bilateral arrangements as opposed to fallback fees, should one interpret the fallback fee there as being the UK MIF?
Q. In 1998 and 1999, but in 1997, until 1 November, it was the intra-EEA MIF. So your weighted -- UK weighted averages are higher than the weighted average EEA MIFs; correct?
A. Yes, that's right.
Q. But that in itself doesn't demonstrate, does it, that this response, which -- this data was taken from a response by Europay to the OFT and this -- Europay's response to the OFT, on which this table was based, was only looking at traffic processed via Europay.
Now, we agreed that your weighted average interchange fee data was only drawn from the four banks; correct?
A. Yes, the last column, that's correct.
Q. And do you agree that if, as a matter of fact, a large proportion of the transactions of those banks were not processed via Europay, then your weighted average figures wouldn't shed any light on whether or not this analysis is correct and on whether or not the vast majority of transactions processed by Europay were

processed on the basis of the default EEA MIF?

A. Sorry.

Q. Let me take it again.

A. Yes, can we break that down, because I think there's quite a lot going on there.

Q. Yes. So I want to focus for the moment on the year 1997 up to 1 November, which is when the UK MIF was brought into force. So for the year -- for most of that year, the fallback fee was the EEA MIF.

A. Right.

Q. And the question is -- so one of the questions that will have to be determined is: what sort of proportion of transactions were processed in that year on the basis of the EEA MIF as opposed to bilateral arrangements? Are you with me so far?

A. Yes, thank you.

Q. And this table, which is based on data provided by Europay, indicates that only a very small proportion of transactions were processed on the basis of bilateral arrangements, so the vast majority in that year too were processed on the basis of the EEA MIF.

And I'm comparing that analysis with your table, which shows that UK weighted averages are higher than the weighted average EEA MIF, and I want to understand what that tells us and what that doesn't tell us about this information.

So the point I'm putting to you is that that will depend, won't it, on the proportion of transactions of the four banks that were being looked at that were processed via Europay? Do you understand the point and do you agree with it?

A. I think I understand the point. It seems to me there's something going on that I probably don't fully understand because I'm not close enough to the facts, but my scenario 2 basically says what happens, what would you expect the weighted average to be, if all of the transactions were at the EEA rates, which you say were the fallback and which you're suggesting that in 1997, virtually all of the transactions were at this rate, so that --

Q. The transactions processed via Europay. That's the critical point.

A. Okay. So what I don't know is whether the big four banks or anyone else actually had transactions processed via Europay. That's not something that is -- that I know about.

Q. So you haven't looked at that, but do you accept -- and I completely appreciate that's a factual question that's not for you, Mr Parker. But do you agree that that question, so that factual question, will shed light on the issue that I have been asking you about, which is whether or not this analysis, the OFT's analysis, for that year of 1997 up to 1 November where the fallback fee was the intra-EEA MIF and where the OFT is saying the vast majority of transactions were processed on the default.

So we have on the one hand. On the other hand, we have your table that shows a disparity between the EEA MIF and the actual weighted average interchange fees.

And the question about whether -- so my question is that marrying those two things together or, rather, looking at those two things, you need to know, don't you, the proportion of transactions of the four big banks that were processed via Europay? That's a relevant consideration to understand.

A. I think that would be helpful to know to try and reconcile these datasets, yes. I'm not totally sure quite what's going on between the two alternatives here.

Q. All right. Now, if we go to -- so just to be clear about this point, if we go back to your table 6, {A/21/55}. So the average interchange fee for 1997 you've got as 1.105.

A. Yes.

Q. And the middle column, which is cross-border transactions, you have as 0.927%.

A. Yes, that's right.

Q. And that data would be consistent, wouldn't it, with the OFT's figures being correct or it could be consistent with the OFT's figures being correct, because it's possible that the banks which didn't process transactions via Europay had agreed bilateral rates which were above the EEA MIF; correct?

A. I mean, in terms of the data we don't know about, anything is possible in principle because you could always conjecture a certain -- different sets of transactions at different levels and you could offset those with other transactions at other levels that would get you back to the weighted average that you'd first thought about, so ...

Q. Yes, and I think we've agreed that the proportion of transactions of the four big banks whose data you rely on for your calculations, the proportions of their transactions that go via Europay is relevant to the question of whether your table can be reconciled with the OFT's analysis; correct?

A. That's right, but I think if we look at figure 5 of my report, which is on {A/21/56}, which is the one that we turned to earlier, which is actually Mr Coombs' figure which I've replicated, what we see there is if there's a material proportion of transactions, then we should start seeing this change arising either from '96/'97 or from '97 to '98, depending on when exactly, you know, the MIFs are introduced.

But if they move from a -- you know, in that phase, if they move from the EEA rates of 1.15 and 0.9/0.75 to the UK interchange fees that then got put in place of 1.3 and 1, we should see some kind of jump and we don't, and that suggests that there isn't a material proportion, but we can't tell precisely.

Q. Yes, but you're just -- you're there just talking about the big four banks; correct?

A. Well, this depends on exactly what's in Mr Coombs' weighted averages, because this is his.

Q. All right. So this point about the jump that you say we should see and that we don't see and -- so assume for the sake of argument that the following factual matters are true. So the banks which the weighted average -- the four banks generally did some or all of their processing out of Europay. Okay? So let's assume that that's correct.

A. Outside of Europay?

Q. Outside of Europay.

A. So therefore --

Q. Not in the OFT's analysis.

A. At the -- at the EEA fallback rates; is that your contention?
Q. Yes, so --
A. Okay.
Q. And then let's say from 1997 to 1999, let's say the OFT's correct that Europay processed the overwhelming majority of transactions at default rates; yes?
A. Yes.
Q. And then let's assume that for banks which didn't use Europay to process transactions, these were transactions which were generally subject to bilaterally agreed interchange fees.
A. Okay.
Q. So if those assumptions are accurate, there wouldn't be a clear structural break in the weighted average fees, would there, because Europay would process transactions at different rates when the UK MIFs took effect, but this wouldn't be fully reflected in the weighted average interchange fees because the underlying data is drawn from banks which don't process all their transactions in Europay? Do you agree with that?
A. So there's quite a lot of "ifs" there. I think so; that, in principle, if all those factors are correct, then potentially you wouldn't see the structural break. I must admit I hadn't completely followed all of the

explanation there because it's relying on some factual stuff that I'm not fully apprised of.

Q. I appreciate the factual stuff is not for you, but I think you were following the propositions that I put to you.

A. Yes, and I think --

Q. Thank you.

A. -- that's potentially correct. You may not see it.

Q. Now, I just want to ask you something about the two-sided market, which we did cover this morning, and so I'm just going to ask you a short supplementary question about that just to make sure I understand your evidence.

A. Yes.

Q. And if we just pick up the [draft] transcript perhaps for today, so we see at [draft] page 23, I think, and [draft] line 25, here you are talking about the two-sided market and you said this morning that:

"The effect -- the two-sided market effect, if I can call it that as a shorthand, is stronger in the MEPUK period and a bit more dilute in the bilaterals period."

A. Yes.

Q. That was your evidence.

And I just want to take you to a document. These are Mastercard's submissions to the European Commission.

That's at {C10/371/1}, and these are Mastercard's submissions to the European Commission in response to the Commission's statement of objections, which is September 2003.
A. I see.
Q. And if we go to page 33 {C10/371/33}.
Have you looked at this document in preparing to give evidence?
A. No.
Q. Okay. I'll just take you through it then.
So you can see at paragraph 127 that what -- this is Mastercard-- what Mastercard is saying is that this submission raises the question of whether there are practical alternatives to the default MIFs and they put forward four possible alternative fallback options; do you see? And you can see that the second is bilateral negotiations with issuers setting fees in default of an agreement.
A. Yes.
Q. And the third is bilateral negotiations with the acquirers setting fees in default of an agreement.
And I just want to look at what Mastercard said to the Commission would be the result of these options and see whether you agree or not.
So if we go to page 34 {C10/371/34}, paragraph 130,

you can see, is dealing with the default interchange fees set by issuer. And at 131, you can see that Mastercard said there -- well, perhaps I'll just let you read 131, if that's okay. (Pause)
A. Yes.
Q. And then can you just read 132 as well.
A. Could you maybe scroll down slightly?
Q. Could we scroll, please? Thanks. (Pause)
A. Yes.
Q. So one of the things Mastercard is saying is that issuers will always have an incentive to increase interchange fees provided it doesn't impact business volume, and presumably you'd agree with that.
A. I mean, I think the key thing is para 132, the second sentence, so you have an "if" there:
"If the issuer only issued a small percentage of all cards ..."
So as I was mentioning this morning, we've got a range of different banks who have different proportions of the market and the bigger you are, the more worried you are potentially about your sort of market-wide impacts.
So yes, I think from a -- if you're talking about a kind of negligible issuer, then they won't have -- worry about their behaviour on the market as a whole.

If you're talking about a large issuer, then you might do. But subject to that, I think generally, yes, issuers would prefer --

Q. Higher interchange fees.

A. -- higher interchange fees, that's right.

Q. And then if we look at paragraph 134, Mastercard says there that:

"As issuers would set the default interchange fee at a level which maximises their individual profits without taking into account the wider effects on the system overall (in particular the network effects), an interchange fee set by the issuer would be higher than the current default MIF with continuing upwards pressure."

Do you agree with that?

A. So I think that's true subject to the "if" raised a couple of paragraphs earlier, so if the issuers are all kind of small and negligible and don't have -- don't have any kind of broader impact as a whole. If issuers are a bit larger, potentially these effects start becoming relevant.

Q. So Mastercard is talking about issuers generally here, as I understand it, and so is it your evidence that -- do you agree that in general, issuers would tend to set the default interchange fee at a level which is higher

than would be the case if you have a multilateral interchange fee?
A. Sorry, this is if issuers were responsible for setting --
Q. Default.
A. -- the default fee?
Q. That their incentives would be to set the default interchange fee at a level which maximises their individual profits and they wouldn't be looking at the wider effects on the system overall. That would be what they would -- that would be their incentive.
A. So I think that's possibly right, and I can see why Mastercard would not necessarily want to have the rules set such that issuers were setting interchange fees solely by themselves in terms of defaults and then similarly -- similarly acquirers.
I guess it depends at what stage issuers, you think, might start having an effect on the overall -- on the other side of the market.
Q. So I think what you're saying is that you can see why Mastercard wouldn't necessarily want -- you say it wouldn't necessarily want to have the rules set such that issuers were setting interchange fees by themselves or acquirers by themselves, and that's because the incentives of issuers will be to push up the interchange

fee, and that might not be good for the system as a whole, and the incentives of acquirers would be to push it down and, again, that might not be ideal for the system as a whole. Is that why you say that?
A. Yes, that's right.
Q. And then if we look at page 35 {C10/371/35}, this is dealing with the default interchange fee set by acquirers and, again, what we see is Mastercard is saying that:

"If the acquirer is free to set the ... interchange fee the acquirer has similar incentives as the issuer did in the above examples ... [so that leads it to reduce] the interchange fee. By lowering the interchange fee unilaterally by a modest amount, the acquirer will have a negligible effect on the revenues of each issuer, since the issuers will continue to receive interchange fee revenue from the other acquirers. The acquiring bank, therefore, can reckon that a decrease in the interchange fee that it pays will have a negligible influence on the behaviour of cardholders."

Would you agree with that?
A. Yes, subject to the point I raised earlier about the differential size of acquirers and a negligible acquirer. That's definitely true, but there are some

quite large acquirers. Potentially, they may start taking those effects into account.

Q. So you think generally it's true, but there might be a very large acquirer where that starts to become less true; is that your evidence?

A. Yes, because at that point, you're potentially starting to think that what you do might make an effect -- you know, broader effect on the market.

Q. And then at paragraph 139, we see again:

"Once again ..."

Mastercard saying:

"... again no individual acquirer will buck this trend and increase the interchange fee ... since, without collective action, i.e., a default MIF, any acquirer that did so would lose merchants to the other acquirers who could offer lower merchant service charges."

So, again, this is showing, isn't it, that the incentives of -- this is Mastercard saying that the incentives of individual acquirers will be to reduce interchange fees and that they won't individually be pitching the interchange fees for the good of the system as a whole; that's correct, isn't it?

A. Yes, I think that's quite possible if you set -- allow acquirers to set the default in the same way that if you allow issuers to set the default.

Q. And Mastercard's submissions here are drawing a distinction, I think similar to the distinction that you drew this morning when you talked about the difference between the MEPUK period and the diluted effect and the bilateral scenario, but Mastercard's submissions are drawing a distinction, aren't they, between collective action on the one hand and the incentives of individual issuers and acquirers; correct?

A. Yes, I think so.

Q. Now, I just want to ask you about one more point from this morning relating to -- let's go, perhaps, to [draft] page 22 of the [draft] transcript for today, [draft] line 16. So here, you're talking about a multilateral-- moving into a multilateral interchange negotiation.

And if we go to [draft] page 23 just over the page -- no, sorry, I have the wrong reference here. That's what we were just looking at. Just give me one moment. (Pause)

Sorry, it was right. I just can't read. So [draft] page 22, [draft] line 23, so it was correct.

So here, if we can just go up to see the context, so scroll up a little bit or down, rather, so we can see above [draft] line 21. So you're talking about a multilateral negotiation and then you say:

"It does very much depend, as Mr Coombs said, on what happens if someone didn't agree in that multilateral negotiation."

Yes?

A. Yes.

Q. And you say:

"Because depending on how nuclear that option is depends on how much any individual bank would want to be seen to be the person getting in the way of agreement, potentially with various kinds of consequences in terms of having to do lots of bilaterals."

So just to be clear about what you're saying here, you're saying that a relevant consideration -- so when you're in the multilateral negotiation and you're aware of how the rules operated and so it was possible for a certain percentage of banks to withdraw their consent from MEPUK, yes, and so I think what you're saying here is that whether or not they would do that would depend in part on the consequences and whether they would want to be seen as a disruptor; is that correct? Is that what you're saying?

A. Yes, I think it's -- it feels like it's a relevant consideration.

Q. Yes. And would you agree that a further relevant consideration would be how much there was to be gained by doing it?

A. Yes, I imagine that would be part of the consideration as well.

MS DEMETRIOU: Thank you. Thank you very much, Mr Parker. I don't have any other questions for you. Thank you.

Re-examination by MR COOK

MR COOK: Mr Parker, I do have a couple of questions, so I'll take those briefly.

You were asked questions initially about whether or not, in terms of the analysis you'd done, the big banks would be the ones, it was suggested, that will be able to negotiate bilaterals and small banks might necessarily not be able to negotiate bilaterals.

If I could show you B1/55 --

MS DEMETRIOU: Sir, I didn't ask Mr Parker to give his evidence on the facts. I asked him to assume with me that that was the case and I asked him whether it was logical that that might be the case, but I didn't ask him to give any factual evidence on that point.

MR COOK: And I'm not asking about factual matters particularly, sir. The question does arise out of this.

MR JUSTICE ROTH: I don't think Mr Cook has asked his question yet, so I'm not quite sure what he means.

MR COOK: I'm not sure yet, sir, either. If we go to

B1/55 --

MR JUSTICE ROTH: What is it you're looking for?

MR COOK: It's the bilaterals table, sir.

And if we come to page 2 {B/55/2}, we see, for example, NatWest, which was at the time the largest acquirer to the 1995 data. If a big bank is negotiating bilaterals, who -- negotiating comprehensive bilaterals, who will it need to negotiate with?

A. Everyone.

Q. And by "everyone", what size of banks does that include?

A. All the other banks, big and small.

Q. And you were then asked some questions by reference to the fact that the data was from the four largest banks, and that was the MEPUK data.

Just to clarify in relation to this, I'm going to tell you some things, but you should simply proceed on the basis that those are assumptions. That by the time period we're looking at, at that stage, Lloyds had acquired TSB, HSBC had acquired Midland and Royal Bank of Scotland had acquired NatWest. So that's the structure of what the position was by the time we're looking at that data.

Now, if we could then go to {C6/445/1}, and this is the Cruickshank report which was produced in March 2000. It's a report on competition in UK banking.

If we can go to page 99 in that report {C6/445/99}, you can see there it's a list of merchant acquiring market shares by volume, '97 to '98. So if we look through those banks --

MR JUSTICE ROTH: Can we enlarge that?

MR COOK: Yes, sir.

If we look through those banks and bearing in mind, as I've said, that when we come to 2000, RBS, so Royal Bank of Scotland, had acquired NatWest, we can see NatWest is the biggest, then Barclays, HSBC, then Alliance & Leicester, which is separate, Royal Bank of Scotland and Lloyds TSB. Do you see those?

So if we look at the '97 figures, which is the first column there, what percentage do the largest banks, recognising the four largest banks -- recognising that RBS then combines with NatWest, what percentage would you say roughly do they represent of the acquiring market?

A. A very large percentage. Close to 100%, but not quite because there's a little bit in Alliance & Leicester, Bank of Scotland and NAG.

Q. Yes. Then if we look at 1998, which is the second set of columns, roughly what percentage would they represent at that stage?

A. Also a large percentage, but probably closer to the

95% mark given that Alliance & Leicester has now taken a small but significant part of the market of around 5%.

Q. So your analysis is looking on data '95, '96, '97. Do you consider that is useful data or not?

A. I suggest it's relevant to the vast majority of the market.

Q. Thank you.

Then you were asked various questions by reference to the document {C10/371/1}, and these were submissions of Mastercard Europe in relation to the European Commission and to put that in context, this was in relation to the Commission's investigation in relation to the EEA MIF. That's the cross-border MIF, so applies across Europe.

I mean, can you give us any feel for what difference it makes in terms of number of bilaterals for all the banks across Europe to be bilaterals compared to the banks in the UK?

A. It's very considerably different because you have to do a bilateral as between every other bank and that, you know, goes up in an exponential or greater fashion. It's -- it would be an extremely large number of different bilaterals at that point.

Q. And in terms of the market shares of any individual bank, what would you think the difference would be between the market shares of a UK bank in the UK market versus even a large bank across the whole European market?

A. I mean, I think it's highly likely that all the banks from a UK -- sorry, an EEA perspective are pretty small. If my understanding is correct, banks are generally national and don't have a lot of kind of cross-border activity. If that's true, then any individual bank as a proportion of the EEA as a whole will be very small --

Q. So --

A. -- whereas there could be some significant UK banks within the UK context.

Q. And if we go then to page 33 {C10/371/33}, which you were asked some questions about, and it started there at paragraph 128, the four options.

And then we moved on to, over the page, to page 34 {C10/371/34}, and then some questions were put to you in relation to paragraph 132, the submission in the second sentence:

"If the issuer only issued a small percentage of all cards of the payment system its interchange fee has little influence on the average interchange fee that any acquirer pays within the system."

And what's your view on how far that applies in the UK or how far it applies cross-border?

A. So it would apply to a greater extent in the cross-border context because, as just discussed, there are a vast number of more banks in the EEA as a whole and to the extent that they are not large, don't have large cross-border operations, they'll all be small relative to the EEA. That will be less true in the UK where individual banks could be quite substantial, and we've seen some data on the size of the larger banks.

Q. And in relation to the acquiring side, what is the analysis there?

A. I suspect it's more concentrated. I mean, it will be the same picture as between EEA and UK because it will be, again, fragmented and dispersed across the EEA, perhaps not quite as much, and then within the UK, it will also be any individual acquiring bank, of which I think there were fewer. Certainly the data we've just seen suggests that individual acquiring banks could be a material proportion of overall transactions in the market and, therefore, potentially these effects become important within the UK, certainly on the acquiring side because you've got some very sizeable players there.

Q. And you were asked a question. It's at [draft] transcript [draft] page 129, and it was talking about issuers and said:

"Their incentives will be to set the default interchange fee to a level which maximises their individual profits and they wouldn't be looking at the wider effects on the system overall."

And just to break that down, in terms of maximising their individual profits, in the domestic context, what factors will be relevant to that?

MS DEMETRIOU: Sir, I'm sorry. He's just asking him to withdraw his earlier evidence he's given. He's answered the question and now Mr Cook is just asking the expert to revisit what he said. It's just not appropriate re-examination.

MR JUSTICE ROTH: Just a moment.

MR COOK: Sir, I'm asking the question in relation to the difference between domestic and cross-border.

MR JUSTICE ROTH: Just one moment. (Pause)

Mr Parker says the incentives will be to set the default --

MR COOK: That's the question, sir.

MS DEMETRIOU: He agrees --

MR JUSTICE ROTH: You asked a question, yes. That's the quotation from Mr Parker's evidence, is it, there at [draft] page 129?

MS DEMETRIOU: Sir, that's my question. I put to him a proposition and he says, "Yes, that's right".

A. Perhaps if we can go just slightly up the [draft] transcript, because I think we can't quite see my previous answer because I say, yes:

"... it depends at what stage issuers you think might start having effect ... on the other side of the market."

I.e., on the overall market size.

And I think if all of the issuers and acquirers are of negligible size and don't have any kind of wider concern about their behaviour on the market as a whole, that's one thing, and that seems to be much more an issue in the EEA given the number of banks and the size of those banks in relation to the EEA as a whole.

So I think the answer that I gave at [draft] lines 12 to 14 is more relevant in the UK because of the size of the UK issuers and acquirers relative to the market will be bigger than the size of any individual EEA bank relative to the EEA market.

MR COOK: Nothing further, sir.

MR JUSTICE ROTH: Good. I think it's just clarifying whether that's dealing with the EEA or the UK. That's the point of the question, so I think that's all right, Ms Demetriou. Just one moment. (Pause)

Thank you, Mr Parker. There's nothing more we want to ask you and that concludes your evidence.

A. Thank you.

(Witness released)

Housekeeping

MR JUSTICE ROTH: Well, it is now 5 o'clock. There was a point Mr Smouha had wanted to raise before because otherwise that concludes all the evidence in this case and we're due to return on Thursday 27th for closings.

Mr Smouha had asked whether you're abandoning those allegations in the pleading.

MS DEMETRIOU: No, we're not, sir. We're not abandoning them and can I -- would it help for me just to explain in two or three minutes why the premise for Mr Smouha's question was incorrect? Or are you happy just to take it from me that we're not abandoning them and we'll address this in our closings.

MR JUSTICE ROTH: I think it's better that you then address them in closings.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: You know, Mr Smouha, they are pursued, they have not been abandoned, and you can make submissions in closings on whether they should still be open and indeed regarding evidence that go to them that you may seek to submit was not challenged. And therefore even if they're not abandoned, if they're pursued, what the consequences are for what the Tribunal should find. But I don't think having a prolonged discussion about that now is really feasible. We can't sit much longer today. So I think you know what you need to address in your closing.

MR SMOUHA: Sir, we don't know what we -- sorry, in terms of the scope of what we need to address, we do. But, sir, I want to make clear that we do not know, still do not know what their case is in relation to those matters that I identified. We, of course, can develop in our closing submissions what we say Mr Merricks can and cannot advance, and, in particular, the submission that there is no -- in relation to the case that was put or not put, there is no basis upon which the Tribunal can be invited to reject our evidence.

Sir, I do wish to make it clear that we simply do not understand what the case is and what the basis is on which those matters that I identified are put.

MR JUSTICE ROTH: Well, you say you don't understand what the case is. You understand the allegation, you called them, as pleaded.

MR SMOUHA: Yes.

MR JUSTICE ROTH: And if that's not abandoned, then you understand what the case is. And what I think you're saying is you don't understand on what the evidence relied on to support that case is.

MR SMOUHA: Exactly so, sir.

MR JUSTICE ROTH: That's the point you're making.

MR SMOUHA: And if it was going to be said in closing submissions there is evidence that can be relied on, then that's not evidence that has been put to our witnesses.

Sir, let's leave it on the basis that you propose. We're obviously going to be exchanging written closing submissions.

MR JUSTICE ROTH: Yes.

MR SMOUHA: So, sir, it may be then that in the light of what is put in the closing submissions there may be further points that we have to make about what can or can't be relied on.

MR JUSTICE ROTH: We've got two days of oral closings, after full written closings.

And on the question of written closings, we of course are concluding significantly earlier than anticipated, and on the basis that if you have more time, you can write a shorter piece, I think we should impose a limit on closings. It's not going to help the Tribunal, or your efforts to persuade the Tribunal which is the purpose of your closings, if you give us 100 pages each.

And it's a question of what seems reasonable. We thought that 60 pages each should be sufficient. Is there anything you want to say on that score?

MR SMOUHA: Sir, the only point I would make about closing submissions and page limits is that obviously the focus of the closing submissions should be on the evidence.

MR JUSTICE ROTH: Yes.

MR SMOUHA: Both in relation to documents and in relation to witness evidence. And, sir, so a page limit constraint in that way simply leads to logistical challenges as to therefore better not to put extracts, key extracts from documents that one wants to quote, or key parts of the evidence.

So, sir, I would -- and the parties are going to be mindful of the need not to repeat what has been said in the opening submissions, and only to provide material that's actually going to be of assistance to the Tribunal. But a 60-page page limit, sir, I would suggest is going to, as I say, just simply lead to juggling issues in relation to the situation where actually sometimes it can be more helpful to the Tribunal to be able to put key passages in the body of the submissions, either quotations from documents or quotations from the evidence.

MR JUSTICE ROTH: Ms Demetriou, what do you say?

MS DEMETRIOU: Sir, I think a page limit would be a good idea. If Mr Smouha thinks he need a bit more space to set out -- I don't think that it is very helpful generally to set out big chunks of the evidence because the proposition can be made and the references can be given. But perhaps if you were to increase the page limit to, say, 70 pages, that would accommodate Mr Smouha's concern.

MR JUSTICE ROTH: Yes. Let me just confer. (Pause)

Well, Mr Smouha, we think a page limit is a good idea because when parties say they're mindful of what the Tribunal thinks, that doesn't always effectively constrain them. We will be generous and we'll say 75 pages each.

MR SMOUHA: Thank you, sir.

MR JUSTICE ROTH: And those will be submitted then -- if it's possible to bring that earlier. You've got two extra -- an extra day. If it's possible to have that by noon on Monday, rather than the end of Monday, that will give us more time to absorb it. You've got in fact a whole extra day -- no, two extra days to prepare it over what was envisaged, so I think that's a reasonable request. So we'll say noon on the 24th.

MR SMOUHA: That's Monday. Very well, sir.

MR JUSTICE ROTH: And we will adjourn until then when we resume in court 2.

(5.08 pm)

(The hearing adjourned until 10.30 am on Thursday, 27 July 2023)