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)

Thursday, 27 July 2023

(10.30 am)

(Proceedings delayed)

(10.35 am)

Discussion on MCI Rules

MR JUSTICE ROTH: Good morning. We resume this hearing now in the shadow of yesterday's judgment from the Supreme Court, which reversed the decision of the Court of Appeal, and as many here will know held that a litigation funding agreement whereby the funder gets compensation calculated by -- on the basis of a proportion of the damages awarded, is a damages-based agreement, subject to the regulations.

The implications of that for this case is clearly something that both sides will want to consider, and will need time to consider, and is not for today. As we understand it, neither side is asking us to adjourn their closings of this part of the trial pending consideration of the Supreme Court judgment, so we shall proceed accordingly.

We have received, since we were last sitting, two letters from the parties' solicitors and a table, pursuant to our request, of the arbitration rules, and we did want some help with that, if we can ask for that before we get into the closings. If I can now find my

copy, which I had a moment ago. Yes.

So, I know it's an agreed table, subject to dispute as to whether the rule E7.02.3 should be included or not but there's no dispute that that was the rule, so whether it's relevant or not doesn't matter.

We just want to understand what the rules are saying, and as this is agreed, what applied when.

So the first one is the MCI Rules which are dated 1 November 1989, and then we have the Eurocard Rules, dated 25 September 1991. Can we get some help which -- when they are both in effect, and we know subsequently the Eurocard Rules became redundant and were deleted, but while they were both in effect, which -- how do they relate with each other? Which one is governing?

We're a bit confused about that. If someone can help us. Perhaps you go first as you speak for Mastercard and then if Ms Demetriou wants to comment?

MR SMOUHA: Yes, sir. Our understanding is they both applied so there isn't anything in the rules which indicates that one takes priority over the other in the event of inconsistency.

MR JUSTICE ROTH: So they apply together?

MR SMOUHA: Just one moment.

Sir, Mr Leith draws attention to the fact if you look in the table at the top of page 2, this is the end

of the box dealing with the 1991 Eurocard Rules that last sentence:

"The present provision shall apply until after a good faith attempt to do so, a disagreement on the intra-country interchange fee and in effect is notified Eurocard International by those members that comply with Section 11.09.B.3 of Mastercard By-Laws and Rules."

MR JUSTICE ROTH: Yes, but isn't that saying something --

MR SMOUHA: So in other words, if --

MR JUSTICE ROTH: Something different?

MR SMOUHA: So if there's been a good faith -- as long as there's been a good faith attempt, then after that, you then move to the Mastercard Rules in relation to arbitration.

MR JUSTICE ROTH: "... comply present ..."

But this is a situation where intra-country, is this B or -- this covers both A and B, does it?

MR SMOUHA: Should we get the document up?

MR JUSTICE ROTH: I think that might be an idea.

MR SMOUHA: {C1/141/2}.

MR JUSTICE ROTH: Yes, so that's dealing with B but that's where an intra-country interchange fee are in effect, in other words where you've got a domestic MIF agreed, that didn't happen, we know in the UK till 1997, I think. We're within A, a situation where no intra-country

interchange fee is in effect.

MR SMOUHA: Yes, sir. So if you go back to A.

MR JUSTICE ROTH: And that has a provision of what takes place {C1/141/1} and so does rule 11.09(iii) of the MCI Rules and we're trying to understand how they relate to each other or do they both apply because they may say something slightly different.

MR SMOUHA: Is there something in the rules which clearly addresses the relationship between the two sets of rules generally? The answer is no.

Sir, can Mr Leith ...?

MR JUSTICE ROTH: Yes, anyone who can clarify for us we need to hear from.

MR LEITH: Sir, as to whether there's a provision within the rules that reconciles inconsistencies between Mastercard International Rules and the Eurocard Rules, the provision that Mr Smouha has shown you in B is an example of the Eurocard Rules yielding to the Mastercard Rules but it's an example that relates to that particular situation within B.

There's a further instance of, if I can put it this way, Eurocard Rules yielding to the Mastercard Rules. Once the Mastercard Rules are revised and expanded in 1993, the Tribunal will have seen our submissions that Eurocard, Europay at that time, recognises that its

rules, this part of its rules, are redundant.

MR JUSTICE ROTH: Yes.

MR LEITH: And then that section of the Eurocard/Europay Rules E7.02.4 is then deleted from the rules in June 1994.

MR JUSTICE ROTH: Yes, that's your footnote 2 to the table, I think?

MR LEITH: That's right.

MR JUSTICE ROTH: So from that point on it's quite clear you've just got the MCI Rules?

MR LEITH: That's right and the MCI Rules from 1993 onwards as we've said --

MR JUSTICE ROTH: That's all right. I understand from December 1993 onwards that's the position, although it's slightly odd that in June 1994, as shown in your table, this rule is -- well, perhaps -- well, was that what you're referring to, that's the deletion? I see.

MR LEITH: That's the deletion and the board papers for that meeting saying it's been redundant since December 1993, let's delete it.

MR JUSTICE ROTH: So it's only the period until the adoption of the 1993 Mastercard Rules in December 1993 that we're concerned with then there's an overlap?

MR LEITH: Well, that's the position as far as the text of the rules is concerned, yes, sir, but one point to bear

in mind is that the evidence of what banks understood at the time indicates that at least Bank of Scotland wasn't aware that there had been a repeal of the Eurocard Rules. And so the position overall at some points is really one of a complete lack of clarity, in the minds of at least some banks.

MR JUSTICE ROTH: Yes, there are two distinct questions. One is actually what as a matter of law, looking at it as lawyers, was the position under the rules. The other is what the banks understood at the time. So taking it in stages, we are trying to do stage 1. If we can't understand it, it's not surprising if banks are confused but as I take from what you said that for that period until December 1993, both would apply?

MR LEITH: From the period when the claim period begins, May 1992? Yes, but before that of course there's other points we make as well, sir.

MR JUSTICE ROTH: But May 1992 to December 1993. Well, that's helpful to start with.

And I will let Ms Demetriou comment in a moment. Then looking then at both those rules, taking the 89 MCI Rules first, which says:

"If at any time ..."

In the third line:

"Members within a country are unable to agree after

a good faith attempt to do so on the interchange fee for such intra-country transactions, Mastercard shall submit to the IAC the dispute which shall establish an interchange fee for such transactions."

And then it says:

"It shall be a condition to submission of an interchange dispute to members having at least 10% of the volume disagree with the then effective interchange fee."

But we don't quite follow that. If this is a bilateral negotiation the issuer and the acquirer can't agree, where does this 10% come in?

MR LEITH: Sir, quite and the point, the broader point here is these provisions are not written with the UK's position in mind. They're written for Mastercard internationally for each of its national markets. And the UK has -- is an outlier with its bilateral arrangements so the 10% volume requirement in the '89 rules is really in my submission reflecting the position that if there's a MIF or the fallback applies to all transactions in the national market, it can only be challenged if the 10% threshold method is met.

Now the caveat to that sir, members of the Tribunal, is that in 1993, Mastercard's more detailed rules, the December 1993 rules, relaxed the 10% volume requirement

where there's a dispute about bilateral agreements. So you get this much longer passage in the 1993 rules.

MR JUSTICE ROTH: Sorry to interrupt you but we're just trying to pin it down as best we can. So that, you say, is dealing with members -- that's dealing about the members unable -- not a bilateral dispute but members within a country unable to agree a common intra-country MIF, is that the point?

MR LEITH: Well, that appears to be what it's directed at, sir. There may be a question of fine legal interpretation as to whether it could be adapted to the position of a bilateral -- a dispute on a bilateral, but there is that volume requirement, 10% volumes.

MR JUSTICE ROTH: Yes and therefore?

MR LEITH: And Mastercard did tell the banks in the UK this was the relevant rule in 1992 when they asked.

MR JUSTICE ROTH: They told what, MEPUK?

MR LEITH: Yes.

MR JUSTICE ROTH: The relevant rule for what?

MR LEITH: For resolving disputes as to interchange in the UK.

MR JUSTICE ROTH: Bilateral disputes?

MR LEITH: Yes sir, because everyone was proceeding on the basis that it was bilaterals. There was no UK MIF, no question of a UK fallback MIF in 1992, sir.

MR JUSTICE ROTH: Yes, but it's a bit -- it doesn't -- and Mastercard said this is the rule -- they didn't say it's the Europay rule that applied, the Eurocard rule that applied? They say this is the rule that applies.

MR LEITH: I think as I recall, sir, they refer to -- there's a letter back in June 1992 in which they pointed to both sets of rules.

MR JUSTICE ROTH: If at some point you can give us the reference.

MR LEITH: Yes, sir.

MR JUSTICE ROTH: Right. Then we have at the same time the Eurocard Rules, which is the next box E7.02.4, and that distinguishes between two situations, A and B: A, "situation in which no intra-country interchange fee is in effect"; and B, situation where "intracountry interchange fee is in effect". So in 1992, 1993, 1994 we're in A, aren't we? We're within situation A, are we not?

MR LEITH: Well, sir --

MR JUSTICE ROTH: Because we haven't got a UK MIF.

MR LEITH: There's no UK MIF, that's right. That means we're not in B.

MR JUSTICE ROTH: So we must be in A.

MR LEITH: Well, there's a further provision C, which isn't in the tables, which is about bilaterals that just says

the foregoing do not preclude the bilaterals.

MR JUSTICE ROTH: Yes, you can have a bilateral.

MR LEITH: We can't be in B because there is no rate applicable so the closest we get is A. But again, sir, it's written with a different -- overall with a different situation in mind. It's written with a different situation in mind i.e., the situation in which banks would generally agree a rate, a MIF, a fallback for the whole market.

MR JUSTICE ROTH: Well, isn't it -- but it's written for a situation where no intra-country interchange fee is in effect. So you haven't got an agreement.

MR LEITH: Yes, that's when it's saying no such rate is effective, it's that kind of rate, yes.

MR JUSTICE ROTH: Yes, so we're looking at -- so that applies:

"With respect to ... in which only one member with an issuing Eurocard/MasterCard ... merchant and a new member is ... the amount of the interchange fee has to be agreed upon by the members ... after a good faith attempt ... if the members ... are unable to agree for such ... the following procedure shall apply ... notification to Eurocard ... by one of the members involved in the dispute ... members are unable to agree ... the international fee will temporarily apply ... and

a study will be undertaken ... appropriate intra-country fee amount to be applied ... Study costs will be equally borne by the members ... Should no agreement be reached at the end of a 60-day period ... Eurocard International will arbitrate the dispute according to the outcome of the study. The agreed intra-country interchange fee shall be applicable only to the ... Who are party to the agreement and shall be effective for at least one year unless ..."

They agree on a different rate. So is that saying that if you can't agree a bilateral then temporarily the international fee, whatever that means, will apply, and there will be this study and an arbitration unless they reach agreement in the meantime, is that what it's saying?

MR LEITH: Well, sir, it could be read in that way. I'm not trying to be cagey but the situation it's dealing with is where you already have the one member doing business in the market and then a new bank comes in. So at that stage you've gone from one bank to two banks and so in that circumstance it would be bilateral.

MR JUSTICE ROTH: Yes and what about existing banks, not a new bank but just existing banks who can't agree on the bilateral fee?

MR LEITH: Sorry, sir?

MR JUSTICE ROTH: What about a situation where it's not a new member coming into the market but established members but they cannot agree on what their bilateral interchange fee should be?

MR LEITH: Well, that situation is not very clearly dealt with under the rules, sir, and that's when the Mastercard Rules do deal with it more specifically.

MR JUSTICE ROTH: Well, that's the rule we looked at before.

MR LEITH: 1993 --

MR JUSTICE ROTH: In 1993 things get better but we're trying to cover this early period. So one is left to try and work out what these two overlapping rules mean in that situation. That's the position and no one is suggesting there are any other relevant rules?

MR LEITH: Our submission is going to be it's not necessary to untangle any of these legal points, sir, because the question which arises on the causation issue before you is what the banks thought about it. But I understand there are two stages.

MR JUSTICE ROTH: Yes, but the starting point -- not seeking to be over lawyerly about it -- is what the rules are and as far as we can understand them. Then there's the next question is how the banks understood them.

I appreciate you say we don't have to worry about the first, but personally I find it helpful to start at the

point of what the rules actually mean.

Right, so that takes one until December 1993. Then we've just got the MCI Rules and that is certainly clearer, and is it then the penultimate paragraph in -- on that page of the schedule, on page 2:

"In the event there is no intra-country interchange fee applicable to all members doing business in a country in effect at the time the dispute regarding intra-country interchange fee arises ..."

Which is the situation in the UK, no UK MIF:

"... then the international interchange fee applicable transition in which country this shall apply until the regional authority or executive on appeal, as the case may be, makes a final determination as provided here in or the dispute is otherwise resolved provided that if 90% agree then that agreement, they will determine the default."

And this is -- "until on appeal makes a final determination" and that refers back to the two paragraphs above, does it:

"In the event a dispute arises that could be appealed to the executive resolutions provided above such dispute shall first be submitted to the appropriate regional authority for resolution."

And so on and then they make a determination and if

it's not accepted then they have a right to request the executive committee resolve the dispute.

MR LEITH: That's right, sir, so there's a two-stage process. But there's another part of the framework here which does apply and which we've not looked at, sir, which is the last paragraph on that second page.

MR JUSTICE ROTH: Yes.

MR LEITH: So the provisions you were just referring to or reading from deal with appeals relating to a dispute over a fallback, a multilateral rate across a country.

The last paragraph encompasses the possibility of a dispute over a bilateral.

MS DEMETRIOU: That says "for legal reasons". That's a different point.

MR JUSTICE ROTH: Yes. Surely the paragraph above is dealing with a dispute over bilateral:

"In the event there is no intra-country interchange fee applicable at the time a dispute regarding intra-country interchange fee arises."

That's a situation where there is no multilateral fee for the country and then there's a dispute on a bilateral, isn't it?

MR LEITH: Well, it could be that or it could be that the final paragraph -- I do take the point, it does refer to "for legal reasons" but it then does explain in some

markets only bilaterals are used. The upshot is the same because it's the same set of fallback rates that are then applied --

MR JUSTICE ROTH: Yes, I see.

MR LEITH: -- as temporary defaults pending a dispute being determined.

MR JUSTICE ROTH: So it doesn't say, does it, that as I read it, that there's -- if you can't agree then the default applies and if you don't like the default you can go for arbitration. It actually provides if you can't agree then this dispute mechanism is triggered.

MR LEITH: Yes.

MR JUSTICE ROTH: And a default, whatever that default means, applies in the meantime.

MR LEITH: Yes. You only get to default if the dispute is referred to arbitration.

MR JUSTICE ROTH: That's what the rules appear to say but equally if the banks are doing business with each other and there is no -- nobody refers to arbitration, then the -- then those doing the processing like FDR or ECCSS will have to do something otherwise the transaction won't be processed.

MR LEITH: Sir, I think I might need to allow my leader to address that point. If I could just give you the reference to the letter from Mastercard International,

it's {C1/192}, 9 June 1992.

MR JUSTICE ROTH: Thank you.

MR LEITH: And we address that in our opening submissions at paragraph 50(2).

MR JUSTICE ROTH: Thank you. And then we see that there is an amendment and it's clear from the UK domestic rules of 1997, which is on the next page {C1/192/2} that -- which is referring to a dispute over a bilateral that MEPUK thought that this 11.09 rule will apply.

MR LEITH: Yes, well --

MR JUSTICE ROTH: That seems to be their understanding.

MR LEITH: It's in the domestic rules, yes. There are other provisions of the UK Rule Book, so this is referred to in footnote 5, sir, so there's no -- I'll let you read the footnote, sir.

MR JUSTICE ROTH: Yes.

MR LEITH: Sir, footnote 5 refers to chapters 5 and 6 of the UK domestic Rule Book and they explain that some specific procedures for the arbitration of disputes are set out in those chapters but it makes the point that --

MR JUSTICE ROTH: Refers to chapter 6 I think.

MR LEITH: Sorry it is chapter 6. It makes provision for those insofar as they are different from the arbitration procedures that apply under the global rules of the schemes.

MR JUSTICE ROTH: Yes.
MR LEITH: And so there's reference to the arbitration procedures that apply under the wider framework of rules set in this case by Mastercard International.
MR JUSTICE ROTH: Yes.
MR LEITH: And so what we say is about the amendment that's made in June 1997 you took me to, sir, that's referring to the fact that the members and here the rules contemplate that those procedures, those arbitration procedures under the MCI Rules will continue to apply, will continue to be available.
MR JUSTICE ROTH: Yes.
MR LEITH: Which just formalises what we say that the banks already understood the position to be, which was arbitration was always possible.
MR JUSTICE ROTH: Yes, it's clear that arbitration is always possible. What is less clear is whether arbitration is necessary or whether a default kicks in without the need to go to arbitration.
MR LEITH: Well, under the MCI Rules, which is what we're into now, so if we could please go back to the second page, the paragraph, sir, that you took me to, so the penultimate paragraph of that page. This is the point we discussed a few minutes ago. We only get into the fallbacks if there's a dispute that's referred.

1 And another point to note about what the defaults
2 are under this paragraph, the international interchange
3 fee is only the second default. If there is an interim
4 inter-country interchange fee that's been agreed by 90%
5 of members then that's the first default and it's only
6 if there is no such fee that we get into the
7 international fee.
8 MR JUSTICE ROTH: Yes.
9 MR LEITH: And we see in some of the evidence, so Mr Turner
10 Bank of Scotland --
11 MR JUSTICE ROTH: I think that's enough. I just want to get
12 what we're looking at understood.
13 At least once you get a UK MIF agreed the position
14 becomes clear but that's only in late 1997. Right
15 Ms Demetriou.
16 MS DEMETRIOU: Sir, on this I'm going to take it quite
17 quickly because we deal with it in our closings and
18 I will come on to it. But if you go to {A/29/30},
19 please.
20 MR JUSTICE ROTH: This is in your written closings?
21 MS DEMETRIOU: This is in our written closing, so
22 paragraph 39 deals with the rules and our position is
23 that on the face of the rules it wasn't compulsory to
24 have arbitration and we explain why in those
25 subparagraphs. And so the MCI Rules for the early

period state that arbitration is available to members having at least 10% of the total issuer and acquirer volume so that sets a pre-condition which we say suggest that it wasn't compulsory.

MR JUSTICE ROTH: Well, that seems to be drafted with a view to getting a country rule, doesn't it?

MS DEMETRIOU: Yes, but that's the rule that's being relied on for arbitration.

And then the Eurocard Rules talk about upon notification to Eurocard of a dispute. Then we have the first iteration of the UK Domestic Rules which make no provision for arbitration at all.

MR JUSTICE ROTH: Well, the Eurocard Rules, you say they are silent on the question but ... but equally the international fee will only apply upon notification of the dispute. You suggest that's only the arbitration mechanism. But if you look at the rule it's not just the arbitration, it's the whole process, including the application of the default.

MS DEMETRIOU: Yes, but what we've heard in the evidence is that there had to be a default. There were no arbitrations.

MR JUSTICE ROTH: Well, you are now going into the evidence but under the rules the evidence said various things by different people. We're just trying to understand what

as a matter of construction the rules say.

MS DEMETRIOU: Sir, yes, and it's a point about the rules I was going to make because the 10% requirement is important because --

MR JUSTICE ROTH: But that doesn't apply under the Eurocard.

MS DEMETRIOU: Sorry, in relation to the Mastercard Rules.

MR JUSTICE ROTH: Your 39.2 is the Eurocard Rules. And the Eurocard Rules say upon notification to Eurocard by one of the members, the international fee will temporarily apply.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And a study. So it's not just arbitration with option was triggered only. It's also on that basis the application of the international fee is optional.

MS DEMETRIOU: No, sir, the international fee -- the fallback fee temporarily applies whilst the arbitration is happening but that doesn't exclude -- that doesn't say if an arbitration doesn't happen, the international fee doesn't apply.

MR JUSTICE ROTH: Well, where does it say it does apply?

MS DEMETRIOU: That's the general hierarchy of the rules that we've seen in the other rules, that there's a hierarchy if there's no --

MR JUSTICE ROTH: Where do we see this hierarchy?

MS DEMETRIOU: Sir, can we come to it because I am going to

deal with this in submissions?

MR JUSTICE ROTH: We've been told that this is the agreed schedule --

MS DEMETRIOU: It is.

MR JUSTICE ROTH: -- of the arbitration provisions and we just want to understand it.

MS DEMETRIOU: It just might be more helpful if I come to it --

MR JUSTICE ROTH: Yes, fine, you can deal with -- you agree until late 1993 both the MCI Rules and the Eurocard Rules apply?

MS DEMETRIOU: Sir, the difficulty is that we only have extracts of the rules so we don't have all of the rules and what we do know is that in January 1999, if you just look at {C6/14/27}.

MR JUSTICE ROTH: January '99. So that's well after '92?

MS DEMETRIOU: It is, sir, but let me just show you what we do have at that stage. {C6/14/27} do you see "About This Book" the second paragraph, if you just read that. And what we don't know is if there was anything similar in the earlier period because we don't have complete versions of all of the rules. So we do agree with what Mr Leith said in the sense we don't have anything in the documents that indicates which rule takes precedence in the early period but we don't -- we're not sure that

there was no such rule that existed.

MR JUSTICE ROTH: Well, we have been told it does -- presumably the rules are available if you wanted to see them all?

MS DEMETRIOU: Well, they were supposed to disclose them and they certainly haven't disclosed full copies of all rules so that was part of the disclosure so I assume they are not available.

MR LEITH: Sir, we've done a thorough search for bundles of the rules -- that was ordered by the Tribunal -- and produced what was found. It was a long time ago, sir.

MR JUSTICE ROTH: I see, so the complete set is not available.

MR LEITH: Not from those early 1990s.

MR JUSTICE ROTH: So this is the best we've got. Right. Okay well, I'm sorry to have taken up all this time on that but we got this while we had adjourned and we did have some trouble understanding it and given the answers we've had, you may understand why we had trouble.

MS DEMETRIOU: Yes. I'm not sure we've done anything to move things forward. Anyway.

MR JUSTICE ROTH: I think that then takes us to Ms Demetriou's closing.

Closing submissions by MS DEMETRIOU

MS DEMETRIOU: Thank you, sir. We contend that this trial

has firmly established that there was a relevant causal link between the intra-EEA MIFs and domestic interchange fees. We say -- I'm going to approach my submissions on causation by reference to each of the separate periods of the claim but before doing that I want to take stock of the competing positions of the parties at the end of this trial.

Mr Merricks' position is that, for a large portion of the claim period, the EEA MIF was the default rate in the rules. For the period 1992 to November 1997 it was the fallback rate that applied if no bilateral agreement was reached. And from November 1997 to November 2004 it was the fallback rate that applied if there was not 75% issuer and acquirer support for MEPUK's MIFs. So in both cases it was the outside option, subject in addition to arbitration which I'll come on to later, which we've covered in part already this morning.

And the economic principle that's engaged here, that a negotiation and its outcome will be affected by the outside options is, we say, so basic as hardly to need saying. If a bank didn't like the way a bilateral negotiation was going, didn't like the rate that was on offer, it could walk away from the negotiation, knowing that the default EEA MIF would apply. So an issuing bank would know it would get at least the EEA MIF, and

an acquiring bank would know that it didn't have to pay more than the EEA MIF.

And unsurprisingly the evidence in this case has been consistent with that basic point. So Mr Parker, for his part, agreed that the outside option is relevant. Mastercard's factual witnesses said the same thing. So not a single person has said that the fallback was irrelevant, that the outside option was irrelevant to the negotiation. And despite not having had disclosure from the banks, we saw that Mr Warren of Midland Bank in fact did use the default EEA MIF to his advantage in his negotiations with other banks.

Sir, members of the Tribunal, Mr Merricks' case is therefore in a sense a modest one. We ask the Tribunal to find as a fact first of all that the EEA MIF was the outside option, and secondly that it was relevant, that it exerted a pull in the negotiations, be they bilateral until November 1997 or multilateral between that date and November 2004.

We do not ask the Tribunal to find that the EEA MIF was the only influence on interchange fee rates. We don't need to show that, and indeed we accepted in our opening submissions that Visa's rates had an influence on UK interchange fees.

It is Mastercard's case in these proceedings at this

trial that is ambitious. Mastercard requires the Tribunal to find that the existence of the EEA MIF as the default had no influence whatsoever on domestic interchange fees. And if we look at --

MR JUSTICE ROTH: You do go further than saying it had an influence, you say it was the floor.

MS DEMETRIOU: Well, we say --

MR JUSTICE ROTH: And one of your alternatives.

MS DEMETRIOU: One of our alternatives.

MR JUSTICE ROTH: That's more than an influence, isn't it?

MS DEMETRIOU: Well, sir, what we say the Tribunal should find is that -- it may for some banks have operated as a floor. So in some bilateral negotiations it may have operated as a floor in the negotiations. Mr Warren's evidence indicates that it did operate as a floor for him.

MR JUSTICE ROTH: He said it operated as a floor.

MS DEMETRIOU: He said he used the EEA MIF in negotiations. But we don't need --

MR JUSTICE ROTH: That doesn't mean it's a floor.

MS DEMETRIOU: Well, sir, we don't need the Tribunal to find that it was a floor.

MR JUSTICE ROTH: Well, we have to decide that allegation.

MS DEMETRIOU: You have to decide that allegation but we've advanced alternative allegations --

MR JUSTICE ROTH: Do you pursue the floor allegation?
MS DEMETRIOU: We do because it may be that in some negotiations between some banks it did operate as a floor. We don't have disclosure of negotiations between the banks. But what we do ask you to find overall is that as the outside option, it exercised a constraint on the negotiations and exerted a pull on the negotiations and their outcome.

Now, looking at paragraph 48 of Mastercard's written closing submissions, at {A/31/15}, this section of their closing submissions relate to the period 1992 to 1996.

MR JUSTICE ROTH: Just pausing there. It "acted as a constraint", "exercised a pull", which is a rather vague concept, and we've got to approach it on the pleaded allegations, don't we?
MS DEMETRIOU: Sir, yes and so benchmark and/or guidance is what we've put in the pleaded allegations and what we say that means is it was a benchmark in the sense it was the outside option and therefore imposed a constraint. That's what we mean by benchmark and guidance. That's how we explain our benchmark and guidance allegations, that we've called it the hierarchy allegation in our written submissions.

So, sir, looking at paragraph 48 of Mastercard's written closing submissions they say:

"These bilateral agreements were negotiated by reference to factors which had nothing to do with the EEA MIF, namely competitive conditions in the UK in particular Visa's UK MIFs, cost studies based on UK costs and prepared by EDC, and the reference rates that were agreed by MEPUK and took account of competitive conditions and EDC cost study."

So Mastercard is inviting the Tribunal to find as a fact that every bilateral agreement in the early period was negotiated by reference to Visa's UK MIF cost studies prepared by EDC and reference rates and they're asking the Tribunal to find that the outside option of the banks negotiating those agreements was completely irrelevant.

So it's Mastercard's case that is ambitious. They are asking the Tribunal to find that none of those banks negotiating bilateral agreements was ever influenced by the fact that they or their counterparties could walk away and cause the EEA MIF to apply. That's Mastercard's case.

Now I'll come on to the factors that Mastercard said were relevant which we've just seen summarised here, and in a nutshell we say that the influence of cost studies was very limited. That the reference rates are not an independent cause that Mastercard can rely on because

they need an explanation for the reference rates and their explanation comes back to Visa and cost studies. That's how they say that the reference rates were formulated.

I'll come on to those points.

But for present purposes there are two fundamental points to emphasise. The first is that Mastercard pointing to other factors that may have been relevant to bilateral negotiations will never be sufficient to establish that the EEA MIF was irrelevant. It simply doesn't follow from the fact that they can point to other factors that were relevant, that the EEA MIF was irrelevant. And the second point is that the existence of the EEA MIF as the default was in fact plainly relevant and Mastercard's submission to the contrary flies in the face of the evidence the Tribunal has heard and is incoherent as a matter of basic bargaining theory.

Now, how does Mastercard seek to address this basic point about how bargains work? It has, in our submission, no good answer. If we look at paragraph 2 of their written closings, {A/31/3}, Mastercard says that our theory, our case:

"... is based on a simplistic and flawed economic theory about the incentives of issuers and acquirers,

which is contradicted by the IFs actually agreed and the evidence."

So let's take those points in turn.

What does Mastercard mean when it says that "our theory is simplistic and flawed"? Well, if you read on, it means two things. Mastercard means that -- the first thing Mastercard means is that this is a two-sided market, which imposes some constraints on the incentives that acquirers and issuers would otherwise have. And we see that from paragraph 9 of their closing submissions.

And the second thing they mean is that issuing and acquiring banks might also have regard to other factors when negotiating, such as their particular business strategies.

Now, we accept those points in principle as far as they do go, but neither of them detract from the fundamental proposition that net acquirers generally wanted lower interchange fees, and net issuers generally wanted higher interchange fees and the outside option was relevant to both sides in the negotiation.

Now, the fact that the market was two-sided may have meant that there was a limit to how far, how high issuers were prepared to push interchange fees, and a limit to how low acquirers were prepared to argue for.

But in order to defeat our case on incentives,

Mastercard needs to show that the two-sided nature of the market meant that the incentives of the issuers and acquirers did not differ at all. That's what they need to show. They need to show that issuers and acquirers wanted exactly the same interchange fees for the good of the system. And that proposition is utterly incompatible with the evidence of Mastercard's witnesses, whose consistent evidence was that the acquirers exerted significant downward pressure on interchange fees.

If Mastercard were right, if everyone wanted the same fee then Mr Hawkins wouldn't have agreed that negotiations were hotly contested. {Day4/169:23}. Nor would Mr Peacop have said that in the context of bilateral negotiations large acquirers would not have accepted -- simply would not have accepted excessive interchange fees and we've put that reference in our closing submissions at paragraph 56.

Nor would Mr Sideris have said that it was logical, that's his word, that the net-acquiring bank in a negotiation would want a lower interchange fee. Or that issuers and acquirers had conflicting interests. His words again. Or as he said in his evidence to the Tribunal, interchange is about conflict, at the end of the day the right interchange fee is a level where

nobody is happy. {Day2:100/20-22} and none of the evidence from Mastercard's witnesses about MEPUK and then Mastercard Europe balancing the interest of issuers and acquirers would make any sense if in fact their interests were already aligned.

The theory which Mastercard urges on the Tribunal, also cuts across the regulatory inquires and decisions which form the backdrop to these proceedings. Mastercard fought for years to defend its default MIFs in the face of regulatory concerns. Why would it have done so if they were of no real effect because participating banks wanted the same interchange fee for the benefit of the platform? Indeed, Mastercard's submissions to the Commission insisted that a default MIF was required precisely because banks did not have an individual economic incentive to agree the same interchange fee. So a default MIF was needed to solve the collective action problem.

And the Commission of course ultimately found that the default MIF was an unlawful restriction of competition and that finding can't be reconciled with Mastercard's contention that banks, economic incentives were to agree the same interchange fee and that a fallback rate can have no causal effect.

The evidence therefore clearly supports the

existence of these differing incentives so Mastercard is wrong to say that our theory is simplistic and flawed. Our theory is correct.

Mastercard's next point is that our theory is inconsistent with the interchange fees actually agreed. And we say that this point is a red herring. We've never said that the interchange fees needed to be at the same level as the EEA MIFs. The way that we've put it in our written closing submissions is that there's a narrow spread between domestic interchange fees and the default EEA MIF and that's consistent with what Mastercard told the OFT at the meeting that took place in March 1994. It said that interchange fees were individually negotiated but the spread either side of the fallback rate was a competitive issue.

MR JUSTICE ROTH: If there was an inference, a pull, wouldn't you expect one movement in one then to be followed by movement in the other?

MS DEMETRIOU: No not necessarily, sir, at all because there's a certain lethargy in renegotiating bilateral agreements.

MR JUSTICE ROTH: Not immediately.

MS DEMETRIOU: Yes, we don't say that that's necessary.

MR JUSTICE ROTH: Well, then, what sort of influence is it?

MS DEMETRIOU: The sort of influence that Mr Warren was

talking about.

MR JUSTICE ROTH: Well, Mr Warren didn't say very much. It's just one sentence in a minute --

MS DEMETRIOU: No, sir, but we say it's very important, with respect. And we say it's very important because what we don't have in this case is disclosure from the banks.

MR JUSTICE ROTH: No, you never asked for disclosure from any bank, did you?

MS DEMETRIOU: No.

MR JUSTICE ROTH: Why not?

MS DEMETRIOU: Well, sir, it would be extremely difficult to get third party disclosure from the banks going back 30 years.

MR JUSTICE ROTH: Well, you never asked.

MS DEMETRIOU: Sir, no, we never asked because I think there may have been some discussion -- I'll have a look but I think there may have been some discussion.

MR JUSTICE ROTH: I don't think we ever heard an application.

MS DEMETRIOU: No, sir, I'll have to go back and check what the position was. I think that you put to me that it would be -- you put to me during the trial it would be extremely difficult to get disclosure from the banks.

MR JUSTICE ROTH: Well, not if the court ordered or the Tribunal ordered disclosure; they'd have to do it.

You couldn't get wide-ranging disclosure such as you got from Mastercard clearly but specific -- very specific disclosure, such as what were your bilaterals, there are basically four big acquiring banks. You know, what were your bilaterals in 1993, 1994, 1995? A fairly basic question.

MS DEMETRIOU: Sir, it may be a basic question but we've seen Mastercard itself has been unable so many years later to produce --

MR JUSTICE ROTH: Precisely because they're not parties to the bilateral.

MS DEMETRIOU: No, but Mastercard are parties -- they are required to preserve documents and the idea that the banks will have preserved those documents many years later seems unlikely.

MR JUSTICE ROTH: Well, you never asked. We don't know.

MS DEMETRIOU: Well, sir, we are where we are. I understand your point. I'll come back and see if there is any more light I can shed on that. But really our fundamental point here is in any negotiation the outside option is relevant, is highly relevant. Mr Parker accepted that. And the reason we say that the minute from Mr Warren is important is because as Mr Hawkins himself accepted in his interpretation of it what Mr Warren was saying, why did Mr Warren say it was useful to have the EEA MIF

default in negotiations? Well, as Mr Hawkins explains the only explanation for that can be useful because it represented the outside option. So either he expressly threatened or he -- or the threat was not express. But everybody knew in the negotiation that if they could not reach an agreement, the EEA MIF would apply. And so that really is a basic point and we do say that, yes, it's a minute but it's a very -- one minute in a document but it's extremely revealing and it's fundamental because it is consistent with the basic point about bargaining theory which, as I say, nobody has disputed, including Mr Parker.

So, we say that -- also of course Mastercard's submissions in proceedings before this Tribunal were that bilateral negotiations of interchange fees in the early period were made against the backdrop of a fallback MIF under the European Regional Rules. Don't turn it up but that's {C15/285/24-25}. And again we say yes, of course the intra-EEA MIF was the fallback and it was the backdrop for negotiations. Anybody negotiating would know that if they didn't reach an agreement that would be the fee that applied and so of course it operated as a benchmark. That's our fundamental case.

And it's also consistent with the evidence before the European Commission. If we look at {A/27/125}, and

paragraph 422, I think you saw this. I took you to this in opening but in relation to the Netherlands, the Dutch banks viewed the intra-EEA MIF fallback interchange fees as a starting point for setting domestic MIFs and you see what the largest acquirer for Mastercard in the Netherlands said, that they negotiate fees with the Dutch banks, basically the negotiated agreements have in common that the fees use the intra-EEA fallback levels as a starting point and they add something on top. That's the way that the Dutch -- this Dutch -- large Dutch acquirer handled their negotiations.

But we say it stands to reason that where a negotiation fails and you have a fallback rate that applies that will be in the minds of the banks negotiating and it certainly was in Mr Warren's mind.

So, in terms of the point that you put to me, sir, we -- Mastercard has throughout its submissions chosen to interpret our guidance allegation, our benchmark allegation as requiring that there be some kind of one to one tracking between the EEA MIFs and the UK MIFs. But -- or that those agreeing or setting the rate of domestic MIFs did so expressly by reference to EEA rates. But that isn't how we framed our guidance or benchmark allegation. The allegation, as is very clear from our opening submissions, is based on the hierarchy

in the rules, the existence of the EEA rate, default rate as the outside option, and the operation of that rate therefore as a benchmark in first of all negotiating the bilateral negotiations, and then the multilateral negotiations because the default represented the outside option for these banks that had differing incentives.

And so we say standing back, the Tribunal can see that the issues between the parties at this trial are perhaps narrower than at first appeared to be the case, although important.

We're not asking you to find that the default MIF was the only influence on UK interchange fees. The key question for 1992 to 1994, indeed for the whole period is whether Mastercard is correct to say that the default rule was irrelevant. And this trial we say has established that Mastercard is wrong on that fundamental point.

I'm going to turn now to the detail of our submission by reference to each of the periods of the claim and I'm going to start with the earlier and middle periods together, so 1992 to November 1997.

And the key questions that the Tribunal need to decide are: what was the default in the rules for that period, and did it operate automatically as a fallback

in the absence of a bespoke bilateral without any need to notify a dispute or commence an arbitration? Those are really the two key questions.

And before I address those questions, there's one point that I want to clear out of the way first. If we go to Mastercard's written closing submissions at {A/31/39}, please. Paragraph 107. So Mastercard is saying here that the Tribunal does not need to determine what the rules said. They say it's not relevant and does not arise because they say we accept -- which we don't and I'm going to come back to that -- that the relevant question is what the banks understood regarding their outside options at the time.

Now, our position has already -- has always been very clear on this point. We say that it's critically important that the Tribunal does determine what the rule said. And that's because, that's for this reason.

We do say that the understanding of the banks is consistent with the construction of the rules, that the EEA MIF was the fallback. But even if contrary to our case, even if we're wrong on that, so even if some banks thought that the default fee was the inter-regional fee, for example because they were set at the same level in the early part of the claim period, that confusion could not have arisen in the counterfactual where the EEA MIF

was zero and the inter-regional fee would have been significantly higher.

MR JUSTICE ROTH: Well, we're not dealing with that, are we?

MS DEMETRIOU: Sir, no, but we say there will have to be a further trial on causation.

MR JUSTICE ROTH: I know you say that, you said that many times, and a lot of, in paragraph after paragraph in your closing, you go into the counterfactual. But we're not concerned with that.

MS DEMETRIOU: No, sir, but I do want to make this point. I'm not asking you to make a finding but we do say it is important because the point has been debated to determine what's in the rules. Because if we're right that a further trial is needed and we say that we are right. I'm not going to repeat why we're right about that. Then it will be critically important to know what the rules say. And so --

MR JUSTICE ROTH: Well, I think we will try and determine what the rules say and whether they're clear. So I think whatever -- whether we need to or not I'm speaking for myself, I obviously haven't discussed it yet with my colleagues, I think that is a helpful starting point of what the rules say and whether they are clear.

MS DEMETRIOU: Sir, yes and we explain -- I'm not going to

turn it up in our oral opening submissions Day 1, page 76 lines 17 {Day1/76:17} and onwards, just for your reference we explain why it's important to determine what the rules mean.

MR JUSTICE ROTH: Equally I think both experts agree that in terms of negotiation it's the expectation of the parties negotiating and therefore their understanding which is important, even if that's different from what the rules say.

MS DEMETRIOU: Sir, in relation to the factual world. And I'm not going to go on about the counterfactual but of course it is but for causation and so one is looking at what would have happened but for the illegal EEA MIF and so one is looking at what would the banks have understood in a world where the EEA MIF was zero.

And so the finding of what the banks understood is relevant to what happened in the factual world but it does not answer the but for causation question and that really is why it's critically important to look at what the rules actually say.

So I am going to address together the point about what the rules say and what the banks understood because the wealth of documents establishing that the default rule was the EEA MIF rather than the inter-regional fee also indicate that this was the common understanding at

the time. So I'm going to deal with them together.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And the starting point, just in terms of the pleaded case and what's being advanced by Mastercard, is that we understand that Mastercard now has dropped its case that the EEA MIF -- that the inter-regional fee was the default in the rules in the early period. And can I just show you their pleading. If we go to {A/3/42} we'll start with our pleading. And so 102D(d):

"Although the international fee ..."

This is (d). This is Mr Merricks' amended claim form. Sir, if you just read paragraph (d), that's our pleading on the point.

MR JUSTICE ROTH: This is 102D(d)?

MS DEMETRIOU: That's right, 102D(d). (Pause)

And then if we go to Mastercard's defence at {A/4/47} and 93D. Yes 93D(e) and you see there their response. And you see at (iii):

"The reference to the 'international interchange fee' was to the inter-regional [fee] set by Mastercard International and not the EEA MIF."

And then if we go back to the --

MR JUSTICE ROTH: And then under (iv) is a reference to the letter we were just told about by Mr Leith, I think. That must be the C1/92 letter, yes.

MS DEMETRIOU: You see in relation to the rules both the Mastercard and the Eurocard Rules are e(ii) and e(iii). They are clearly pleading there that the international rate is the inter-regional rate and then if we go to their written closings submissions at {A/31/37}, paragraph 104 you see that what they're saying is that -- they're saying that the inter-regional rate was seen as the fallback by the member banks. And over the page, if we go to the next page {A/31/38}, so subparagraph (3) they say the relevant question is what the banks understood the position to be. And that -- and then if we go to paragraph 108 {A/31/39} they address the Scheme Rules but only insofar as they provide context about the banks' understanding at the time. And so we can't see any positive case in Mastercard's written closing submissions that seeks to support their pleaded case that international fee in the rules meant inter-regional fee.

MR SMOUHA: That's rather different from what you said a few moments ago that we are going to say we have dropped our case. Can you just read the heading of the section. Paragraph 101. It's not the case. We have not dropped our position as pleaded.

MS DEMETRIOU: Let's go back to 101.

"Understanding of the banks as to default."

That's my point that they're running a case on the banks' understanding but what they clearly pleaded was that the rules themselves said that the international fee was the inter-regional fee.

MR SMOUHA: Can you read 111(1). The last line, fourth line of the paragraph 111 and (1).

MS DEMETRIOU: This was not the bank's understanding. Nothing Mr Smouha is pointing to -- maybe I'm not being clear in the submission I was making I hope I was -- can I finish please?

MR JUSTICE ROTH: Just a minute. What 111 is saying is the reference to the international fee and interchange fee is a contrast to a reference to the EEA fee and any natural reading is international fee meant something else, i.e. the inter-regional MIF so I think they are saying that is what is the better construction of the rules.

MS DEMETRIOU: Okay, then it was so miniscule, the attempt to defend the pleading, that it passed me by.

MR JUSTICE ROTH: I think what they say is that's the better construction of the rules but that's -- as indeed Mr Leith said, that's not the most relevant question.

MS DEMETRIOU: And you have my submission on why construction of the rules is a relevant question.

MR JUSTICE ROTH: I think we will attempt to decide it in

any event and do our best and I think you accept that the banks' understanding is also relevant. So we will decide both.

MS DEMETRIOU: Sir, yes, so we certainly think you should decide both but just to be crystal clear about our submission, we say that the banks' understanding is only relevant to the factual world, and that that doesn't answer the counterfactual but for question. And that is, with respect, an important point not for now but it is why it's important that you decide what the rules say because if there was confusion by any bank during the negotiations in the factual world, when you ask the but for question later, not now, as to what would have happened in negotiations in a world where the EEA MIF was zero there couldn't have been any conclusion because the gulf between zero and the inter-regional fee would have been higher.

MR JUSTICE ROTH: It all depends what the inter-regional MIF would have been in the but for world and there are lots of questions to support that --

MS DEMETRIOU: Sir, there is no suggestion at the moment that the inter-regional fee would have been any different.

But, sir, that's why we say that the banks' understanding is relevant to the factual question, which

this trial is determining, but it's not determinative of factual causation of but for causation.

Now if we go to our written closing submissions at paragraph 18, please, so {A/29/9} and we set out here the key documentary evidence confirming that the intra-EEA MIF was the fallback. And I should just say at the outset that these documents are largely contemporaneous and so they do also shed light on what was the understanding at the time because people were saying this at the time. And the first point is the EPI notification to the Commission.

And if we could turn that up at {C1/404/1}, please. So the date of that is May 1993. You can see that's the notification. And if we turn to page 48 {C1/404/48}. Page 48 is where EPI explains the rule and towards the bottom of the page you see the heading "Interchange fee" and it's said that the interchange fee for cross-border transactions within Europe is referred to. Do you see that underlined as being the inter-country interchange fee. So EPI here are referring to the EEA MIF cross-border transactions within Europe as the inter-country interchange fee. That's how it defines it.

And then if we go to the top of page 4 -- sorry, the top of the next page {C1/404/49}:

"If members established within the same country are unable to agree on an interchange fee for domestic transactions ..."

Pausing there, that's called the intra-domestic transaction fee, so the intra-country interchange fee:

"... the inter-country reference fee would temporarily apply until an agreement is reached."

And we've just seen that inter-country fee is referring to the intra-EEA MIF.

MR JUSTICE ROTH: That's based on rule E7.02.4.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: That's the rule we were looking at.

MS DEMETRIOU: That's the rule that we were looking at, that's right.

So they're not saying here we'll only apply pending an arbitration they're saying we'll temporarily apply until an agreement is reached. There's nothing about arbitration but importantly for present purposes, they're clearly saying in May 1993 that the default is the intra-EEA MIF.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And then if we go back to paragraph 18 of our written submissions at {A/29/9} just to go through the document, you can see -- if we go over the page. At paragraph 18.2 we refer to the OFT document. And

the Tribunal will probably recall that document. I put it to Mr Hawkins. Let's turn it up at {C15/134/29} please. So this is a response to an OFT request for further information. You see that at the top of the page.

And then you see levels of fees for the previous five years were requested and you see the years set out. And then you see the two asterisks for 1995, 1996 and 1997, no specific UK fallback fee was set during this period. The figures shown in the table are the intra-European fallback interchange fees which would have applied in the absence of agreement, and so that's what the OFT were told by MEPUK. That's a MEPUK document.

And you may recall that that caused Mr Hawkins to concede that his evidence, at least in relation to 1995 must be mistaken. But as I'll come on to show you, his justification for then trying to draw the line at 1995 doesn't stack up. But for present purposes on this document there's nothing here that indicates that the EEA MIF only became the fallback in 1995. This document doesn't support that proposition. And we say that the EPI notification and other contemporaneous documents establish that it was the default earlier on.

And then if we just go back to our closing

submissions, please, at {A/29/10}. We see at 18.3, reference to the Cruickshank report. That was published in March 2000 and that says that domestic fallback interchange was set at the same level as the intra-European fallback fees until December 1997 so there's no caveat there saying: oh well, that all changed, that became the case in 1995.

This is fully consistent with the fallback -- the EEA MIF applying as the fallback throughout the early period of the claim.

Then if we look at {C2/176} this is a letter dated 18 May 1994 and it's from EPI to Royal Bank of Scotland and it's a response to an application for reduced EEA MIFs made by Royal Bank of Scotland in May 1994. And if we look at the second paragraph:

"As I understand it, the applications are effective against paper-based transactions acquired by the Royal Bank where the issuer is either [I'm emphasising] (a) another UK bank and no bilateral agreement exists or (b) a European bank."

And so it's clear from this RBS would have been in no doubt that the EEA MIF would apply by default to domestic transactions where no bilateral agreement. That's exactly what Europay were telling them in 1994.

And so we say that it just can't have been the case

that other banks shared Mr Hawkins' misapprehension that the fallback rate was the inter-regional fee. Here we see contemporaneous evidence of a bank applying for a reduction in the EEA MIF and being told that it would apply to domestic transactions where there's no bilateral agreement.

And then if we go to {C2/59/19} this is the flow chart which you'll recall I think from the evidence. And this was provided by EPI to MEPUK in January 1994 to illustrate the application of domestic interchange fees. And I don't think we need to go through it again now but it clearly indicates that the intra-EEA MIF was the applicable rate. And there's nothing in this document just while I'm on it to say arbitration is compulsory. In fact what you see is Europay will arbitrate on the dispute if requested to do so. That's how the rules were applied and understood.

And the Tribunal will also no doubt recall Mr Nelson's email of December 1994 where he said the UK domestic interchange --

MR JUSTICE ROTH: This flow chart, if there is no UK MIF, that's the first question.

MS DEMETRIOU: So can all the members agree on an interchange fee.

MR JUSTICE ROTH: This was in --

MS DEMETRIOU: 1994.

MR JUSTICE ROTH: -- 1994. Are the members allowed to agree? At that point they didn't, did they?

MS DEMETRIOU: We say they were allowed to agree because they then did agree. They were permitted to agree, they just hadn't reached agreement at that stage. So they were allowed to agree an inter-country interchange fee.

MR JUSTICE ROTH: Then you get the box "any member with 10% of volume" but we're talking about the bilateral dispute, they might not have 10% of volume.

MS DEMETRIOU: Yes, so that indicates, we say, that arbitration could not have been a compulsory feature.

MR JUSTICE ROTH: Well, then this flow chart doesn't address the failure to agree on a bilateral. It addresses the failure to agree on a multilateral.

MS DEMETRIOU: "Does any member wish to refer the dispute: No."

So let's say nobody wants to refer the dispute so you have a position where no bilateral has been agreed.

MR JUSTICE ROTH: Any member with 10% wish to refer the dispute. This is a dispute between two members neither of whom may have 10%.

MS DEMETRIOU: Yes, so the answer to that is no, we say.

MR JUSTICE ROTH: Then the question doesn't arise.

MS DEMETRIOU: Then the question did not arise. The answer

is no. Because then you see the question "is there an effective intra-country interchange fee in place" and you then say no. So there's no -- at that stage there's no intra-country fee in place and the answer is the inter-region interchange fee will apply.

And with the 10% point, sir, so of course small banks with much less than 10%, they have to have a default if there's no -- if there's no bilateral agreement. So it can't be the case that there has to be an arbitration. So one asks, well, are we in a position where a member has 10%, and wants to refer the dispute?

MR JUSTICE ROTH: Well, it could work either way. It depends what the rules provide. It could be that if you can't agree you will refer the dispute and then yes, there has to be a default and the rules say pending arbitration, this is the default.

Or it could say alternatively there is this default and if you want, either party could go to arbitration. And both are possible. Both will work.

MS DEMETRIOU: Well, sir, if you follow the flow chart the other way around then you see that if -- so if you think that members are not allowed to agree an intra-country interchange fee, which we say --

MR JUSTICE ROTH: Sorry to interrupt you but the starting point of this is, can all members agree on interchange

fee. So it does look as though it's addressing a situation where they're trying to get a common MIF in a country. But they can't agree.

MS DEMETRIOU: Sir, I don't think that can be right because then what you see in the flow chart is -- I think that may be placing too much weight, with respect, on the word "all". But you then see in the diamond, is there an effective intra-country interchange fee in place? And so I think if you omit the word "all" it might make more sense. So "can members agree on an interchange fee?" No. "Are the members allowed to agree an intra-country interchange fee", so a MIF? Yes. "Does [anyone] with 10%... want to refer the dispute to arbitration"? No. "Is there an effective [MIF] in place"? No. The intra-region fee applies.

MR JUSTICE ROTH: Have we got the covering letter that was sent with this?

MS DEMETRIOU: Can I come back to that because I don't immediately have the reference.

Sir, is that a convenient --

MR JUSTICE ROTH: I think so. We need to have a break, yes so we'll come back at 12.10.

(11.58 am)

(A short break)

(12.14 pm)

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Sir, you asked me about the context for the flow chart. If we go to {C2/59} these are minutes of a MEPUK meeting and you can see which banks were represented there, and you can see the date at the top, and if we go to page 9 {C2/59/9}, so that says that there's a -- that gives the reference to the flow chart so you can see a copy of the chart is attached to these minutes. Just above that:

"RLH advised that under MCI Rules, EPI would handle arbitrations."

He referred to a flow chart based on existing rules setting out the process by which Europay sets the interchange fee.

MR JUSTICE ROTH: Sorry, just a minute.

PROFESSOR WATERSON: So just to check, if you could go back to the first page where the members -- so Ms Devereaux, she was in attendance. Following her leaving are we to understand that this was to discuss specific UK business on page 9?

MS DEMETRIOU: Yes, so this is a MEPUK meeting, so it's discussing the UK. So this flow chart is obviously being circulated as being relevant to the UK and you see -- so it's circulated to all the attendees. You can see who the attendees are and the idea, and it's the

beginning of 1994 and so the idea that as Mr Hawkins said everyone shared his confusion that the default was the inter-regional fee we say is not correct based on the contemporaneous documents.

MR JUSTICE ROTH: But this is in the context of an arbitration, the interchange rate arbitration procedures and the interim rate to be adopted during the arbitration process.

MS DEMETRIOU: Yes, that's what they're saying.

MR JUSTICE ROTH: That's what they're talking about.

MS DEMETRIOU: But if we go to the flow chart on {C2/59/19} you see that's describing arbitration as available but it's certainly not saying that it's necessary. And so you see EPI will arbitrate if requested to do so, and the intra-country fee applies where members don't wish to refer the dispute to arbitration.

So the whole premise of this document is that arbitration is not required and indeed.

MR JUSTICE ROTH: Well, if 90% can agree -- are allowed to agree.

MS DEMETRIOU: It says: does any member with 10% wish to refer the dispute? So there's an option to refer the dispute to arbitration but nobody at any stage in this flow chart is required to refer a dispute to arbitration so it's optional throughout this flow chart.

And so to put it another way, the flow chart is incompatible with arbitration being compulsory and with it being a pre-condition for the application of the EEA MIF that there be an arbitration first.

Sir, the Tribunal will no doubt remember Mr Nelson's email of December 1994, if we can just look at that again quickly {C2/321/1} where he said that:

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

The fact was, as we heard in the evidence, the Europay system did operate on a basis of a hierarchy of fees with the EEA as default if there was no bilateral or no domestic MIF, and we say that that was -- sir, there is a point here to be made about necessary implication in the rules and/or about how the scheme operated in practice because everybody agrees that the honour-all-cards rule meant there had to be a default, a rate applied so in a sense whatever the rules say there are some complexities to the rules. The way the scheme worked -- and we heard clear evidence that the way the Europay system worked was that there was an automatic default. So no arbitrations took place and so the system operated according to the hierarchy.

And we saw that first of all described by Mr Dhaene.

He gave his evidence about the hierarchy in the Europay system. We hadn't known before we spoke to Mr Dhaene that that was how the Europay system worked because Mastercard pleaded a case that the fallback in the rules was the inter-regional fee and it served evidence from Mr Hawkins as to his own recollection but it never explained that the Europay system itself provided for the EEA MIF to be default but once we had Mr Dhaene's evidence, Mastercard served responsive evidence from Mr Van den Bergh which conceded that point and his evidence was to the same effect and you recall his witness statement talking about the hierarchy.

And just while I'm on the subject of Mr Dhaene, Mastercard queries in its written closing submissions whether we rely on Mr Dhaene's evidence. Of course we do because his evidence has been vindicated on several important issues denied by Mastercard, not least this point and the on-us transactions which I'll address at the end.

Now, Mastercard's only witness on the early period was Mr Hawkins and his written evidence -- his written evidence -- was that from 1 November 1996 the default became the EEA MIF but prior to that date, the default was the inter-regional fee and as I have said when MEPUK's submissions to the OFT was put to Mr Hawkins he

conceded he must have been wrong about 1995. And so the question is then whether any change took effect from the beginning of 1995 and it did not. There were no relevant changes to the Scheme Rules during the early period. They provided throughout that time that the fallback rate was the international interchange fee and so if the international interchange fee meant the EEA MIF in 1995 and 1996, it must also have done so in 1992 and 1994. And I've shown you the EPI submission to the Commission in 1993 and the contemporaneous documents in 1994 which support that.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Now, it's relevant to consider Mr Hawkins' explanation for there being a change in 1995. So he said if we go to {Day5/33:14} of the transcript. If we start at line 14. So, sir, you asked him:

"Mr Justice Roth: When did it change, given that in 1995 it was the EEA MIF?"

And he said?

"Answer: It changed at that period when Mastercard gave full licence to Eurocard/Europay to grant licences, Mastercard licences. Up to that time, Mastercard had directly granted licences and Europay granted Eurocard licences."

So that's his evidence. He seems to be saying that

there was some change relating to Europay's authority. But that doesn't work because it's inconsistent with his own written evidence. And if we go to Hawkins 2, his second statement at {A/13.1/8}. And if we look at paragraph 22, what he says is he used the same point to try and explain why there'd been a change at the end of 1996 so he said:

"I recall that towards the end of 1996 Europay became the sole licensor in Europe and was granted full delegated authority by Mastercard ..."

So he's using that change in authority at the end of 1996 in his witness statement to explain why the EEA MIF became the default on his view in November 1996. But he was wrong about the date so he was wrong about the end of 1996. And when --

MR JUSTICE ROTH: When did Europay become the sole licensor?

MS DEMETRIOU: Well, I don't have any --

MR JUSTICE ROTH: Because you say he's wrong.

MS DEMETRIOU: No, I think that he's right. I don't have any reason to suggest -- I think he's right that it was the end of 1996.

MR JUSTICE ROTH: So he's right about that?

MS DEMETRIOU: I think he's right about that. So he's using that in his statement to say well, that explains why for the first time in November 1996 the EEA MIF became the

default. But then he said in his evidence he accepted that in 1995, the EEA MIF must have been the default. And he tried in his evidence to say -- to suggest there was some change in 1995. And again he reached for this change but the timing is all wrong. And Mastercard tries to make the same point again in its closing --

MR JUSTICE ROTH: I thought you were saying that he was mistaken about both but you say he is right about one although you accepted he's mistaken about the other.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: But it would be helpful to know -- that should be a simple fact although any fact in this case that one would suggest is simple seems quite hard to establish. When Europay became the sole licensor is something that the Mastercard also might be able to help on.

MS DEMETRIOU: Can I come back to that?

Then if we go to Mastercard's written closings {A/31/41} paragraph 112 and if we look at the same -- so they say that we advanced a case in cross-examination that towards the end of the early period, particularly in 1995, the EEA MIF was the default. Of course, our case is that it was throughout the early period so I think it's wilfully misunderstanding our case here.

But then they say that we refer to the submission to

the OFT, and then they say that they accept that Mr Hawkins accepted its contents were correct. Then they say this timing is broadly consistent with a ruling which was apparently made by Europay around this time and they refer back to his witness statement.

But again we say that this is -- this just does not work.

MR JUSTICE ROTH: They do say there that as -- the last sentence "as Mr Hawkins explained in 1996".

They say "had become" so perhaps it's a bit vague.

MS DEMETRIOU: But our position is Mr Hawkins has now accepted that for 1995 at least -- and so this change in 1996 just doesn't help and it doesn't make any sense. But really the key point is there were no changes to the rules and Mr Hawkins really had no basis for saying that there was a change in 1995 and you may recall him trying to say well, the UK was a bit different and I said well, the rules were the same, weren't they, and he accepted that in the end.

And then if we go to {C3/268/9}. This is a discussion about the introduction of the UK Rules from the end of 1996, and you've looked at this before but you can see the heading at the top of the page "Adoption of 1997 arbitration fallback rates".

And then it's interesting incidentally that they

call them "arbitration fallback rates" because there were no -- there was no requirement for arbitration as Mastercard concedes and as you see in the table, in the first version of the UK Rules.

But then we see:

"Following a lively debate it was agreed not to ask EPI to change the arbitration process and fallback rates and that arbitration should continue to be handled by Mastercard."

And so what's being said here is that no change is being made, so no change is being made and that's because the pre-existing default was the EEA MIF. And there is not a single document in this case which indicates that a change was made to the default rate in 1995 and so the obvious conclusion on the documents is that the EEA MIF was the default rate for the whole of the early and middle periods.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Now, as to the understanding of the bank's negotiating bilateral arrangements, Mr Hawkins purports to give evidence that all of the other banks except perhaps, he says, small banks joining MEPUK for the first time, understood the default fee to be the inter-regional fee. And we say that no weight should be placed on that evidence for four reasons.

First of all, Mr Hawkins didn't know what other banks were saying in their bilateral negotiations and he repeatedly confirmed that these were commercially confidential. And we've put all the transcript references to that in our written closing submissions.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Secondly the documentary evidence shows that lots of people at the time knew the default was the EEA MIF. Europay obviously knew. It notified the Commission of that and some of the banks attended Europay meetings, RBS knew because we saw its correspondence with Europay. Mr Warren of Midland knew. And the Europay system was set up in that way.

Thirdly, we say Mr Hawkins' evidence about the understanding of others is undermined by his own concession in relation to 1995. If we go to Mastercard's written closing submissions at {A/31/38} and 105(4) this refers to Mr Strachan's advice to MEPUK in 1996. Let's turn that up at {C3/160/3}.

Now, that refers to the international rate, do you see that at the bottom of the page:

"Mr Strachan advised that, under the Mastercard Rules, there was a 90 day period during which the International Fallback Rate would apply ..."

Now international rate, that is obviously perfectly

consistent with the EEA MIF which was also an international rate. He's not saying it's the inter-regional fee. But if we go back to Mastercard's closing --

MR JUSTICE ROTH: Although I take your point entirely about the EEA MIF. But he also says that it's during -- would apply -- he also looks at it as pending during an arbitration.

MS DEMETRIOU: But this is under the heading "arbitration" and so he's probably looking at what would happen if an arbitration was going on. I don't think he's addressing the position if there is no agreement and there is no arbitration.

MR JUSTICE ROTH: Well, he's talking to -- he interprets the Mastercard Rules. Who is Mr Strachan, by the way?

MS DEMETRIOU: Mr Strachan is from Mastercard.

MR JUSTICE ROTH: Right, so he knows a bit about Mastercard's rules and he is saying this is what the rules mean?

MS DEMETRIOU: Well, sir, he is saying it under -- he is saying it in a part of a discussion relating to arbitration.

So I don't think you can read, with respect, into it that he is saying there has to be an arbitration.

MR JUSTICE ROTH: But he is clearly referring -- what's the

date of this?

MS DEMETRIOU: Sir, the date of this is 1996, the end -- sorry let's just go back to -- we can see it I think in Mastercard's written closings at {A/31/38}. Perhaps we can put that side by side with this document. So 7 May 1996.

MR JUSTICE ROTH: So he's clearly referring to rule 11.09, isn't he?

MS DEMETRIOU: Yes, but sir --

MR JUSTICE ROTH: Of the 1993 rules.

MS DEMETRIOU: Sir, the points we make is he's not saying here -- so this is in the context of a discussion about what would happen with an arbitration. So clearly if there were an arbitration, this is what would happen.

MR JUSTICE ROTH: Yeah.

MS DEMETRIOU: But the point that we make is -- the other point we make is if we look at Mastercard's written closings at 105(4) they're using this to say that -- to suggest that Mr Hawkins' evidence was that member banks understood this to be a reference to the inter-regional rate, do you see that?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And really the point is that this advice was given at a point in time when Mr Hawkins now concedes that the EEA MIF applied as the fallback. And we say

that it's just implausible, given the weight of documentary evidence, that that phrase "international fee" which obviously could refer to the EEA MIF which is an international fee would have --

MR JUSTICE ROTH: Speaking for myself, I don't think it points one way or the other.

MS DEMETRIOU: No, I address it because it's relied on by Mastercard.

MR JUSTICE ROTH: No, I understand that. I see -- I don't think it particularly helps Mastercard on saying it's not the EEA MIF. But I do think that he's clearly referring to rule 11.09 which -- and indeed that where he obviously gets the 90-day -- is it a 90-day period in 11.09?

MS DEMETRIOU: I can't immediately see it.

MR JUSTICE ROTH: It's very small writing. It was a 60-day period before. Under the Mastercard Rules, there was a 90-day period during which it would apply.

MS DEMETRIOU: It may be that he got confused and he should have been referring to the 60-day period.

MR JUSTICE ROTH: I wonder if anyone is not confused in this case!

MS DEMETRIOU: Sir, the fourth reason why we say that the Tribunal should not place weight on Mr Hawkins' assertion that others shared his confusion about the

application of the inter-regional fee is that he was an outlier for a long time on these issues and he accepted that during his evidence. It was only when the UK set its own MIF at the end of 1997 as he explained that others agreed with him. And we see this for example clearly if we go to {Day3/326:}. I think that's a wrong reference. I'll come back to that.

So the next question -- so, sir, that's what we say about what the rules said and how they were understood. We just say that the weight of the evidence -- that one doesn't get much help from the words "international fee" because the EEA MIF was an international fee. And when one looks at what everybody was saying at the time to regulators, so EPI to the Commission in 1993, the communications --

MR JUSTICE ROTH: I think we've got the point.

MS DEMETRIOU: You've got the point.

Now, the next question is the arbitration question and I'll take this more shortly because we've traversed some of this already.

Four points appear to be common ground. So first, the rules provided for the possibility of arbitration except from November 1996 to June 1997 when this wasn't included in the first version of the UK Rules, presumably we say because no arbitrations were taking

place so it wasn't in the forefront of everyone's mind.

Secondly, the default fee would have applied pending any arbitration.

Thirdly, no arbitrations in fact took place.

Fourthly, that the default had a potential application between a new licensee joining the scheme, and establishing its bilaterals, although Mastercard say this would be for a period of a few months in which there wouldn't be very many transactions and that's, for your note, Mastercard's written opening at paragraph 104.

But it's important that they've made that concession because it's impossible to reconcile that concession, that there would have been automatic default for new banks before they've established any bilaterals, with its case that the default was not automatic and that you needed to have an arbitration first before the default kicked in.

But in any event we say that the evidence that the default was automatic is overwhelming.

If we start with {C13/260/3}. This is the OFT's chronology questions and answers document dated 10 November 2004. So it's prepared by Mastercard. That's the title of the document. It's prepared by Mastercard in 2004. And then you see that because of

the -- so I'm going towards the bottom of the page.

"Because of the honour-all-cards rule, the cardholder's bank and the retailer's bank cannot refuse to do business with each other. This means that there must always be an agreed default mechanism which applies in the case of a failure by the banks to reach a bilateral agreement on interchange fees."

And I asked Mr Hawkins directly if there was a requirement to instate an arbitration in order for the default to bite, and he said there is no requirement. And we've quoted -- we've got a wrong citation which I'll just correct verbally so you have it on the transcript. We deal with that in our written closings at paragraph 33 but the reference should be --

MR JUSTICE ROTH: Just a moment. Yes.

MS DEMETRIOU: The reference should be {Day5/121:7-13}.

MR JUSTICE ROTH: Is this footnote 94 or footnote --

MS DEMETRIOU: There's just no footnote for that proposition.

MR JUSTICE ROTH: Well, there is a footnote 94. If you look at paragraph 33 of your closing.

MS DEMETRIOU: Yes, so the footnote -- there's no footnote after the quotation "there is no requirement" that I've got in my version. And so I'm just giving you the transcript reference which is {Day5/121:7-13}.

I won't take you back to the flow chart but I've made the point about the flow chart not saying that arbitration is -- was compulsory.

PROFESSOR WATERSON: On the factual question of new members, do we know who was -- who were new members in this -- from September 1991 when these rules came in until these rules were rescinded?

MS DEMETRIOU: I'm not sure that we do but can I take that away with me and see if I can help at all.

PROFESSOR WATERSON: Yes. Thank you.

MS DEMETRIOU: So Mr Merricks' and Mastercard's witnesses as I've said agree that the Europay system applied the default automatically without any need for arbitration.

We see that in Mr Dhaene and Mr Van den Bergh's evidence.

And when you get to the 1996 rules so {C3/386/78}. Rule 13.2.

MR JUSTICE ROTH: These are the 1996 --

MS DEMETRIOU: The rules that applied from November 1996, the UK Domestic Scheme Rules. And then we see in the absence of a bilateral agreement intra-regional rates apply. And we say that's simply confirming the position which had long since been applied. And as I said a bit earlier, sir, there's a question of necessary implication in the rules so you had to have a default

because of the honour-all-cards rules and it does appear from the evidence, and we say from the Tribunal should find, that in terms of the mechanics of the scheme, how it was operated in practice, it was operated on the basis that there was no need to have an arbitration first. That if there was no agreed rate it would default to the intra-EEA MIF. And so we say when the domestic rules were introduced in November 1996 that was simply confirming the position that had applied under the scheme.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And then if we go to {C4/133/107}, and rule 13.2. So this is the June 1997 UK Domestic Scheme Rules where they introduced arbitration, so there was an amendment. So we're still in the first year of the UK Domestic Rules. And you see there:

"Where two UK members cannot agree on the interchange fee to be used, the dispute may be referred to Mastercard by either member, for an arbitration decision."

And so, again, we see that here arbitration is plainly optional. And given that it's optional and that there has to be a fallback for the honour-all-cards rules to function, then Mr Hawkins was completely right that there was no need to institute an arbitration in

order for the default to apply. It applied automatically if banks didn't take up the option of an arbitration.

MR JUSTICE ROTH: This 13.2, the new one, the 1997 one --

MS DEMETRIOU: June 1997 -- sorry.

MR JUSTICE ROTH: -- does not seem to envisage a default applying without an arbitration being started, does it?

MS DEMETRIOU: Sir, that's my point. So my point is to make sense of these rules you need -- everybody agrees there needs to be a default, and so you can't read the sentence, the default will apply pending the arbitration, or that kind of sentence as meaning the default will only apply pending an arbitration, where here, at least, it's obvious that arbitration is optional.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So in terms of the relevance of the default, I said quite a lot about that when I started and in writing but I just want to pick up a couple of points.

So, we referred in our written closing submissions, at paragraph 72, to Mr Turner's memo. And you may recall -- I don't think we need to turn it back up -- that after setting out the higher inter-regional rates and the lower EEA rates, Mr Turner said: "As an acquirer I know which rates I would wish to apply in the absence

of a bilateral agreement". And we say that's really of apiece with Mr Warren's note in the minutes. And, as I say, it's a point which almost is so fundamental it goes without saying, which is that the outside option for the banks in the negotiations was an influence, was a benchmark.

And, as I've said, Mr Hawkins' explanation of why Mr Warren found the default useful is consistent with and supportive of our case. So he explains why in his view Mr Warren said: I found their default useful. And that's no doubt why he in his witness statement, and Mastercard in its written closing submissions, seek to suggest that Mr Warren's comment must have been limited to the period from November 1996 to November 1997.

And I just want to go back first to the relevant minute, at {C4/135/5}. So the date of this minute is 28 April 1997. You see that at the top of the page.

MR JUSTICE ROTH: Sorry, could you pause a moment.

(Pause). Yes, thank you.

MS DEMETRIOU: So, sir, I was just pointing to the date. The date of the minute is 28 April 1997, so we're in that period November 1996 to November 1997 where we had a UK rule where everybody agrees that it was the EEA MIF that operated as the default. And then at the bottom of the page, Mr Warren said:

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

Now Mr Warren says "in the past", and if Mastercard were right that he was only referring to the period between November 1996 and November 1997, it wouldn't have been natural to have said "in the past" because he would have said "currently" or "now the MIF has changed". Because their case, at least until Mr Hawkins conceded more, was that the EEA MIF was only the default in that year. So it would be very odd if he were saying in the very year which on their case it was introduced, three or four months later, well in the past it's worked to our advantage.

Now if we go to Mr Hawkins' first statement at {A/7/22}, paragraph 76. So you've seen this. It's where he draws the obvious conclusion that Midland -- why Midland would have used this or could have used this to agree -- could have used the EEA MIF to agree lower interchange fees in their negotiations.

And you see that his supposition is that this could have happened in 1997. But you see that the only reason he says that at that stage -- that was his view at that stage -- was because he's saying at that stage that that was the only year that the EEA MIF was the default, and

he's since accepted that that's wrong.

So if we go to Mastercard's written closing submissions at {A/31/42} and look at paragraph 117, so Mastercard says there:

"Mr Merricks places emphasis on a reference by Mr Warren in an April 1997 MEPUK meeting that, '[I]n the past, the use of the intra-regional rate as the fallback rate had worked in Midland Bank's advantage ...' Mr Warren also stated that, 'Midland was uncomfortable with this rate'. This minute dates from the so-called 'Middle Period' (November 1996 to October 1997) in which there was a UK Rule Book with the EEA MIF specified as a default ... but Mr Merricks appears to contend that the comment may also relate to the period before the adoption of the UK Rules in November 1996. If that is Mr Merricks' case, it is speculative."

And it says that they address Mr Warren's comment in detail below at paragraph 154.

Now, I'll come to 154 but just pausing here for a minute. There is just no basis whatsoever on which to conclude that the comment only related to the period November 1996 to November 1997. That is not the natural meaning of those words.

And Mastercard's position that the comment should be so limited is dependent on its submission that it was

only in that year that the EEA MIF was the default; but that's plainly wrong.

And now if we go to paragraph 154, so {A/31/55}, could I just ask the Tribunal to read paragraphs 154 and the first part of 155, before you get to the subparagraphs.

MR JUSTICE ROTH: (Pause). Yes.

MS DEMETRIOU: So Mastercard's argument here is first of all that the introduction of the EEA MIF as a fallback didn't lead to any changes in the existing levels of bilaterally agreed interchange fees. And, secondly, had the existing bilateral interchange fee agreements been terminated and reverted to bilaterals at the EEA MIF level, this would have caused major disruption in the market.

And it's on that basis that Mastercard argues that the EEA MIF could only have been a factor in a tiny proportion of Midlands' transactions. But, with respect, that's a boot straps argument if ever there was one, because the whole argument starts from the wrong premise; namely that the EEA MIF only became the default in November 1996, which is wrong for the reasons I've given you. Indeed you've seen the document in which MEPUK said it wasn't changing the fallback MIF in November 1996.

So we accordingly invite the Tribunal to reject Mastercard's attempt to confine temporarily Mr Warren's remark.

And then back to Mastercard's closing submissions. If we look at 156 to 157, please. {A/31/55} {A/31/56}. So page 55, paragraph 156 at the bottom of the page and then over -- if you could just read that and then over the page to 157.

So Mastercard is saying here that if banks had terminated their existing bilateral agreements in November 1996 there would have been a major problem in November 1997 when the UK MIFs were introduced at a level higher than the UK -- than the EEA MIF. And Mastercard say that Mr Hawkins' evidence on this point wasn't challenged by us. But, again, it's completely consistent with our case there was no major problem in November 1997 when domestic MIFs were introduced because our case is that the EEA MIF was the fallback throughout the early and middle period. That default rate was the outside option and therefore acted as a constraint on negotiations throughout the period.

The majority of the interchange fees recorded in the bilateral interchange fees table were at the EEA MIF in 1992 and 1993 for standard and electronic. For 1994 some remained at that level, but the majority increased

the standard rate to 1.3. This meant that the weighted average for those who increased their standard rate hovered just above the EEA MIF until the end of the period. And when the UK MIF was introduced, it was adopted at the prevailing rate. And so on our case there was no market disruption in either November 1996 or November 1997. It wasn't something that we needed to challenge.

Our point is that the EEA MIF was the default all the way through and --

MR JUSTICE ROTH: When you say the weighted average, each bank would only be interested in its own weighted average not --

MS DEMETRIOU: In its own weighted average.

MR JUSTICE ROTH: We don't really have evidence on weighted averages for individual banks.

MS DEMETRIOU: Let me see if -- that may not be quite correct, but I'll come back to that.

But, sir, can I just for present purposes, the bigger point that we want to make, is that there is no market disruption because we don't need to show, it's not part of our case that they were identical, that the domestic interchange fees were the same as the EEA MIF. We accept that they hovered slightly above them for part of this period, but what we do say is that they -- the

outside option was there from the beginning of the claim period, and so one wouldn't see any market disruption.

Now, in terms of Mastercard's case about what influences -- what the influences were on interchange fees, so it says that the actual default rates in the rules was irrelevant to banks negotiating bilateral interchange fee agreements, but that various other factors were relevant and those factors are cost studies, Visa, and reference rates.

We've dealt with these in our written closings submissions. I just want to make some additional points.

So Mastercard's position on the EDC cost studies we say is illuminating as to causation more generally, and I just want to explain why that is.

So as the Tribunal has seen, it's common ground between the experts that there is no correlation between cost studies and domestic interchange fees. And cross-examination of Mastercard's witnesses on the documents fully supported the experts' statistical conclusions. Time after time the Tribunal saw changes in the levels of costs identified by EDC, and no consequential change being made in the domestic interchange fees.

And if we just go back, by way of example, to

Mr Sidenius' evidence --

MR JUSTICE ROTH: I think we've got that point.

MS DEMETRIOU: You've got that point. We don't need to go back.

MR JUSTICE ROTH: And the experts have agreed that, having looked at them.

MS DEMETRIOU: Yes. Sir, the key pointed is that both Mr Sidenius and Mr Hawkins, you'll remember I took them through the changes in costs, which varied quite significantly, and showed them that none of those changes were reflected in changes in the domestic interchange fees. There wasn't a single occasion on which --

MR JUSTICE ROTH: And if it was causative, you'd expect some correlation.

MS DEMETRIOU: Well, I'm going to make almost the opposite point to you now, sir. I want to make this point.

We say there was no correlation. That, further, the spread between the costs identified by EDC and domestic interchange fees was often very wide. And I don't think I need to turn it up now but you can see that in Table 8 in Mr Coombs' causation report. The reference is {A/14/38}.

But despite this lack of correlation, and despite the often very wide spread, Mastercard's case is that

the cost studies did exert an influence on UK interchange fees.

And I just want to go to their written closing submissions. If we go to {A/31/11}. So paragraph 34, at the bottom of the page, these are the findings of fact that Mastercard invites the Tribunal to make in relation to the earlier period. And if we go on to page 12, if you look at (9): {A/31/12}

"Cost studies were a factor taken into account ..."

So this is the fact that Mastercard are asking you to make, the factual finding.

MR JUSTICE ROTH: Sorry, this is on page 10 -- oh I see, yes, 12 in the electronic page.

MS DEMETRIOU: So cost studies were a factor taken into account in setting of the reference rates as an initial point of reference, but also a point of reference for bilateral negotiations. A point of reference for bilateral negotiations they say.

And then if we go to {A/31/31}, paragraph 81. This is 29 of the internal numbering:

"Ascertaining the costs of transactions was considered important as a benchmark for several reasons."

Now, I don't need to remind the Tribunal that we have pleaded a benchmark case too in relation to the

EEA MIF. So, Mastercard's case is that the Tribunal should find that the cost studies operated as a benchmark and had an influence on bilateral negotiations, but that the default in the rules did not operate as a benchmark or have any influence on bilateral negotiations.

Their position on these points is completely inconsistent because they say that cost studies were capable of exerting an influence on domestic interchange fees, even though there was no correlation at all, even though costs changed frequently and those frequent changes never led to any changes in interchange fees, even though the spread between costs and interchange fees was often very wide, but at the same time Mastercard is inviting the Tribunal to find that the default in the rules, the EEA MIF, had no influence whatsoever on interchange fees, even though there is a correlation between the EEA MIFs and domestic MIFs, and even though the spread is narrow.

And let's leave aside for a moment Mr Coombs' correlation, because Mastercard criticises it. But Mastercard's position on the cost studies is that you don't need to show a correlation in order to establish that they exerted an influence or acted as a benchmark in relation to domestic interchange fees, and we agree

as a matter of principle with that.

In principle a factor can operate as a benchmark or a constraint in relation to domestic interchange fees without tracking them. But if that's true of cost studies, it manifestly must be true too of the EEA MIF.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And so where Mastercard, for forensic reasons, says a number of times we haven't pointed to particular examples, where changes in the EEA MIF led to corresponding changes in the UK MIFs, the answer to that is that it's unnecessary in our respectful submission.

And in fact the EEA MIF and the domestic interchange fees had a much closer relationship than the costs in the EDC cost studies and domestic interchange fees. And we've set that out at paragraphs 75 to 80 of our written closing submissions, which I won't repeat.

But just before we pause, can I just go back to paragraph 81 of their written closing submissions because this paragraph is also interesting for another reason.

The remainder of the paragraph is making factual points about the market: so, if interchange fees were too high it's likely that the largest merchants would have regarded them as unacceptable; if interchange fees were too low issuers would have had difficulty in

recovering their costs. That's making factual points about the market which are wholly consistent with the points we make about the differing incentives between issuers and acquirers, and wholly inconsistent with Mastercard's submission that the two-sided nature of the market means that everyone has the same incentives and wants the same rules.

Sir, is that convenient --

MR JUSTICE ROTH: Would that be a sensible point at which to break?

MS DEMETRIOU: Sir, I'm slightly behind where I thought I was going to be. I think -- no criticism intended at all -- that because we started --

MR JUSTICE ROTH: We did spend some time on the arbitration rule, but we did need to try and understand that.

MS DEMETRIOU: No, as I say, I totally understand.

MR JUSTICE ROTH: And indeed you've asked us to find what the rule says, so we all the more needed to do it. And we can't sit very late. Well, you take stock over lunch as to where you're getting to.

MS DEMETRIOU: Mr Smouha has indicated he wants a full day, which I understand. It may be that I don't finish before the end of the day. I wonder whether it's possible to come in a bit earlier tomorrow to give me a chance to reply at the end.

MR JUSTICE ROTH: Well, we will consider when you complete, and you let me know how much time you might need.

MR SMOUHA: Yes, sir, we've agreed effectively equal division of time, and so if my learned friend wants to keep some time for reply, that should really come out of this afternoon. I really need to start this afternoon if I'm going to leave time for reply tomorrow.

MR JUSTICE ROTH: I hadn't realised you were envisaging reply submissions, which I don't think was in our timetable.

MR SMOUHA: As far as I'm concerned that's a matter for my learned friend.

MR JUSTICE ROTH: Yes, well, we'll see what time we can start tomorrow, and whether we can go on a bit longer today. You did lose probably about 45 minutes this morning.

MS DEMETRIOU: Thank you very much.

MR JUSTICE ROTH: But we'll come back at 2 o'clock.

(1.04 pm)

(The short adjournment)

(2.01 pm)

MR JUSTICE ROTH: Ms Demetriou, we'll sit to 4.45 today and we'll review before we rise whether we should start earlier tomorrow.

MS DEMETRIOU: Thank you very much. I am going to cut out

1 some of what I was going to say in an effort --
2 MR JUSTICE ROTH: We don't want to cut you short in not
3 being able to make the submissions you want to make.
4 We'd only just add that the time spent looking at the
5 arbitration rules or the relevant rules really related
6 to both sides, it's not just to your time it comes out
7 of Mr Smouha's as well because it's a joint schedule and
8 we needed to understand it for everyone's interest.
9 MS DEMETRIOU: Thank you.
10 Sir, I think what I'm not going to do -- what I will
11 try to avoid doing as much as possible is repeating
12 anything in my written submissions so if I don't make
13 any point I would be grateful if it's not taken as
14 implicit abandonment of something we say, but really
15 I am just emphasising additional points really in these
16 closings --
17 MR JUSTICE ROTH: And picking up points in Mastercard's --
18 MS DEMETRIOU: And picking up points in Mastercard's.
19 MR JUSTICE ROTH: I always assume unless something is
20 expressly abandoned, it's not abandoned.
21 MS DEMETRIOU: Yes. So with that in mind I had addressed
22 additional points on cost submissions which we've dealt
23 with fully in writing.
24 We've also dealt with Visa in writing. Again
25 I don't want to repeat what we say there but in summary

we accept as we've said -- as we said in opening, that Visa's MIFs were a relevant consideration when it came to agreeing bilateral interchange fees but they weren't the only consideration. Mr Sideris accepted in respect of a later period that they weren't the only consideration {Day2/168:15-19} and we say the same is true of the early to middle period.

We say the Tribunal has seen from the interchange fee rates over time Mastercard certainly didn't consider it needed to be at parity with Visa.

And also competition with Visa wasn't only about interchange fees as Mr Sideris accepted, there were other parameters of competition.

MR JUSTICE ROTH: They didn't need parity but I think there was some evidence that if it was significantly below Visa then issuing banks would not choose to issue or promote Visa as their card, they would go -- they would not choose Mastercard, they would go for Visa.

MS DEMETRIOU: Well, I think we don't accept that -- I think we don't accept that that was the case because as Mr Dhaene explains in his evidence, and as we've submitted, in practice merchants were offering both cards.

MR JUSTICE ROTH: Yes, they were. But the bank -- an issuing bank would -- they had licences for both.

MS DEMETRIOU: Yes.
MR JUSTICE ROTH: And they could choose which one they're going to promote and which one to use.
MS DEMETRIOU: Oh, I see.
MR JUSTICE ROTH: And they wouldn't go for Mastercard if Visa -- Visa had a MIF I think pretty much throughout -- was significantly higher.
MS DEMETRIOU: And I think where we end up on that, that's one of the things of course Mr Douglas talked about in relation to Maestro whereas we say in our written submissions where we end up with that is that it was one of the considerations but not the only consideration, and so we --
MR JUSTICE ROTH: That would be a pretty powerful -- because that's the direct income. I mean, forget about Maestro, which is a different arrangement.
MS DEMETRIOU: Yes.
MR JUSTICE ROTH: But just -- and it's entirely logical if you can choose whether your whatever it is, Robert Fleming card is going to be a Visa card or a Mastercard that you issue to your customers, you have a licence for both, Visa has an appreciably higher interchange fee, why are you going to go for Mastercard?
MS DEMETRIOU: Sir, the reason I'm not wholeheartedly accepting that is because of course interchange fees

were only a relatively small proportion of the overall income that the issuers were getting from the cards because there was the interest rates and so --

MR JUSTICE ROTH: But they get those on both.

MS DEMETRIOU: Maybe not the same on both. So that's not --

MR JUSTICE ROTH: Well, they'd set it. The issuing bank sets the interest rate, they could choose.

MS DEMETRIOU: Yes, they could choose.

MR JUSTICE ROTH: They could decide.

MS DEMETRIOU: They could decide.

MR JUSTICE ROTH: So it wouldn't matter whether it's a Visa or Mastercard.

MS DEMETRIOU: Yes. So the point really is that incrementally the basis points are -- the differences are very, very small and so incrementally when one is looking at the overall income that the banks are receiving then we say that the basis point differences are small in the scheme of all of the income that they're receiving and so no doubt that's why they didn't need to be at parity.

But the point -- of course -- and this is not for now. What Mastercard can't do is rely on Visa's interchange fees in the real world to, as it were, deny the causative impact in but for causation of the EEA MIF, because of course Visa's interchange fees in

the counterfactual we say would have been lower so there are going to be complicated counterfactual questions in relation to Visa. But for present purposes what can't be said is: oh well, your case, Mr Merricks, on but for causation is dead in the water because Visa was a powerful influence in the real world that's really the point we make for present purposes.

Reference rates we've dealt with in our written submissions.

There's very little evidence in the documents about reference rates. A key question is substantively how they were arrived at. It seems to be from Mastercard's case that they were arrived at by reference to cost studies and Visa's MIFs. And if that's the case then as a matter of substance they don't really constitute an additional influence, more a repackaging of the influences that they rely on already under the heads of cost studies and Visa's interchange fees. But the key point we make is that they were at best a non-binding recommendation, and we say it can't be right that the actual fallback, the actual outside option under the rules had no influence at all, whereas this non-binding recommendation was all powerful.

And it's interesting --

MR JUSTICE ROTH: What if the reference rates were thought

to be very influential in an arbitration?

MS DEMETRIOU: Well, sir, in relation -- in an arbitration -- so our primary submission on arbitration is no arbitrations were happening, but there wasn't a requirement to go to arbitration, and so in practice arbitration was not an important constraint on the negotiation. And in relation to that, in relation to arbitration, we can see that the banks were concerned about the cost of arbitration.

Can I just show you C5 --

MR JUSTICE ROTH: I think we accept that nobody wanted to go to arbitration.

MS DEMETRIOU: Nobody wanted that. They were also concerned not only about the costs of the arbitration itself, but they were concerned -- there was -- they were also concerned about the precedent that an arbitration -- that an arbitration might set an unhelpful precedent. And so we have a meeting note -- let me just find the reference for you. {C5/107/27}.

And you can see here that there's the paragraph --

MR JUSTICE ROTH: "It is worth noting ..."

MS DEMETRIOU: "There is great concern that any Arbitration case will impact on existing domestic fallback rates. Should the EC become involved, then domestic rates could come under severe pressure. This attention could be

stimulated by the parties involved in an interchange dispute.

"There was then a second very long debate about the costs of Arbitration. At this point there was a great deal of discussion about not only the costs of the Arbitration process itself, but consequential losses, including the cost of a downturn in domestic rates and possibly the price of a cost study in order to arrive at cost figures for the Arbitrator. Apart from some hysterics, there were no answers to the potential cost issues ..."

And so they were concerned that not only about costs but that an arbitration would set an unhelpful precedent and would push down domestic rates and so there a was a general reluctance to arbitrate.

MR JUSTICE ROTH: Well, it might suit net acquirers.

MS DEMETRIOU: So sorry?

MR JUSTICE ROTH: Pushing down domestic rates would tie with the incentives for net acquirers.

MS DEMETRIOU: It might be but a much more direct piece of leverage for the net acquirers was of course the default MIF, and so in circumstances whereas we've explained there was no requirement to go to arbitration, and the default MIF applied automatically in the event of no bilateral, then it was obviously much more powerful for

the acquirers with their incentives to say, well, if we don't agree or impliedly to put forward the position that if there was no agreement then we default to the EEA MIF. That's a certain outside option whereas arbitration was uncertain and there was a reluctance to use it.

And so we say it's possible that the prospect of arbitration exerted some influence but not the same degree of influence as the EEA MIF. That's really the point we make.

And if we can go as well to {C3/165} this is really a document singing from a similar hymn sheet. It's an internal EPI email correspondence, you can see the date 10 May 1996 and it says:

"MEPUK would now like to set a fallback, as they are concerned over a renegade member appealing all the way to the MCI Board, and a fallback being then set which does not suit them!"

And so we say that this concern about what might happen in an arbitration would be particularly worrying for net issuing banks. An arbitration by a neutral arbitrator is highly unlikely to have taken the EDC cost studies at face value. And as we set out in our written closing submissions at paragraph 83, the obvious question for an impartial arbitrator to ask is the

question posed by Professor Waterson to Mr Sidenius, namely whether issuing banks' interest income had been taken into account and if not, why not? And an arbitration which conducted a fair and impartial analysis of the costs and benefits between issuers and acquirers carried the risk of an award which would drastically undercut the interchange fees that were charged by issuing banks at this time, not least because those cost studies were not taking account of the interest payments which vastly exceeded in terms of income the interchange fees.

So we respectfully say for that reason that the Tribunal should be very cautious about making assumptions that the cost of -- that the option of arbitration carried significant weight in bilateral negotiations.

And, sir, just on this point about -- the point you put to me earlier about the evidence of banks' negotiations in bilaterals and you said, well why didn't we seek the bilateral agreements from the banks. Well, those bilateral agreements wouldn't have shed any light on the negotiations which underpin them. They wouldn't have shown whether in the negotiations banks were doing what Mr Warren suggested.

And indeed, it's highly unlikely in that period of

time we're talking about the early to mid-1990s. There wasn't email then and so it's likely that any negotiations were done verbally and in any event that that those documents, any documents evidencing negotiations wouldn't have been kept and would in any event be disproportionate to search for.

Moving on, I'm going to come back to the direct application argument in relation to the middle -- in relation to the earlier and middle period. It's a separate argument based on the UCCO codes mostly and I'm going to come back to that because it's self-contained. But because we're on incentives I want to quickly deal with the 75% rule.

This is the MEPUK MIF period so 1997, November 1997 to November 2004.

And as we've explained in our written closing submissions, we have, I'm going to say, two key allegations in respect of this period because I'm viewing the hierarchy argument and the weighted voting argument really as part and parcel of the same allegation. They really run together.

Then we have the infection argument. The hierarchy argument is based on the 90% and then the 75% rules, which the Tribunal is familiar with. We've looked at those in the course of the trial.

And you'll have seen that if the support required by the rules, so 90% support from issuers and acquirers by volume and then 75% support from issuers and acquirers by volume, if that was not available then the UK MIF would have defaulted to the EEA MIF. And we contend that this requirement, this rule, the prospect that this might take place operated as a constraint on MEPUK when it set the UK MIF. And the evidence establishes that MEPUK sought to balance the competing interests of net issuing and net-acquiring banks, and because the weighted voting arrangements favoured issuing banks, MEPUK was able to set the UK MIF a little higher than the EEA MIF, but net-acquiring banks generally wanted a lower MIF and MEPUK was aware that if it put -- if it set the MIF too high acquiring banks could trigger the default and we say that this operated as a constraint on the level of the interchange fee.

What I propose to do now is take this allegation in stages by reference to the evidence.

So the first point is that the existence of the rule is common ground. There's a question whether triggering the rule would have entailed withdrawing support from MEPUK as a whole, such that the UK Rule Book would be lost in its entirety, or whether 25%, say, of acquirers could challenge the UK MIF alone. And that was

a question which the Tribunal will recall was canvassed during the evidence of Mr Peacop by the Chairman, and the Chairman I think expressed the view, the provisional view, that the rule entails withdrawing support from MEPUK as a whole.

The first point to make is that we say our argument works either way. But even if one reads the rule as requiring a challenge to MEPUK as a whole, the Belgian example of the rule being triggered shows that the rule appears to have been used to challenge interchange fees only, and if we go back to the letter from the acquiring bank, {XC22/75/21}. You can see there that:

"... please note that bank cart company wants to put an end to this 1.35% interchange ... In accordance with EPI's Rules and unless otherwise bilaterally agreed I hereby confirm that are applied as domestic interchanges in Belgium the international fallback interchange fees defined by Europay ..."

So what is being said is that here the bank is triggering the rule, saying "in accordance with the rules", meaning the 75% rule, the international fallback applies instead of the domestic interchange fee. And in the same document if you go --

MR JUSTICE ROTH: Just a moment.

MS DEMETRIOU: Sorry.

PROFESSOR WATERSON: I think it's the English which is put around an unusual way for us.

MS DEMETRIOU: I think so. It is. And we get more if we look at page 5 and 6 of the same document, this is Mastercard's response to the Commission's request for information and that's perhaps a little bit clearer.

So we look at the bottom, if we take it from the bottom of page 5 you can see the question: {XC22/75/5}

"For which reason ... does the MIF ... Apply by default to domestic transactions in each of the 'European' ... countries ..."

And then the answer you get on the next page. So the first answer is where they don't establish domestic MIFs then the EEA MIF applies by default. That's the first point.

But the second point is: {XC22/75/6}

"Additionally, a member or a group of members representing over 25% of either issuing or acquiring domestic POS volume may challenge the domestic fees applicable within a particular country. In this event, MasterCard will communicate to all members of that particular country that the requirements needed for setting a domestic fallback MIF are no longer met, and that unless a new agreement is met between members representing 75% of domestic issuing and acquiring

volume, and communicated to MasterCard ... MasterCard will apply the fallback intra-European MIF after a period of three months.

"The above scenario occurred in Belgium in June 2002, where the domestic MIF for MasterCard POS transactions was challenged by Citibank Belgium. Further to this, in its letter of 17 June 2002, Bank Card Company advised MasterCard Europe to put an end to the domestic MIF and to apply the intra-European MIF instead."

And so you can see there that Mastercard's talking about it in terms of a challenge to the rule, to the domestic MIF rather than as a challenge to the domestic Rule Book as a whole and commercially one can quite see that if there was a challenge to the UK MIF or to any domestic MIF then it would be open to the banks to treat that as a challenge to the interchange fee alone and not to the entire Rule Book. So if everyone else was happy with the rest of the Rule Book then as a matter of operation of the scheme commercially that would have been entirely possible for them to do and that does appear to be what happened in Belgium.

And if we look at {C18/465/3-4} you see the date of that document is 2007 and if we can put pages 3 and 4 up side by side, and if you just really scan through these

pages you can see reference to the 75% rule, and it's very much bound up with the reference to the 75% rule with the setting of domestic interchange fee. So that's obviously how it was seen of being of relevance to the setting of domestic interchange fees.

MR JUSTICE ROTH: This is "set by licence or by Mastercard".

MS DEMETRIOU: Yes. The second proposition is that the banks and MEPUK were all aware of this rule. We saw in the evidence that Mr Hawkins asked for abolition of the 90% rule saying it represented an increasing danger -- his words -- and we cover that in our written closing submissions at paragraph 43 to 44.

The third proposition is there were net acquirers with a market share of over 25% who could have triggered the rule. Indeed the evidence shows that Barclaycard alone had a market share of well over 25%, that is paragraphs 133 to 134 of our written opening submissions {A/29/51}. Let's not turn it up.

MR JUSTICE ROTH: Just a moment. I'm having a lot of problems today. (Pause). Sorry. Yes, thank you.

MS DEMETRIOU: The reference I just gave you should have actually been to our written closing submissions 133 to 134.

Fourth, the possibility of net acquirers forcing a default to the EEA MIF was a relevant factor for MEPUK

when setting the MIF. I'm not going to say much more about the incentives of net acquirers as we've covered this in some detail but it is worth going back to the evidence of Mr Peacop on this and we can take it from our written closing submissions, {A/29/50}, please. So 128 to 129. You'll remember that here Mr Peacop explained that the dynamics within MEPUK that they didn't increase UK MIFs because there were significant pressure from acquirers and large retailers to decrease the rates which ensured there was always downward pressure on the setting of the UK MIFs.

And he said he had particular experience of this issue himself. And he accepted in cross-examination that that pressure would have been vocalised at times.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And he accepted, and I just give you the transcript references, that MEPUK was conscious of the pressure that net acquirers exerted in favour of a lower MIF. That's {Day4/9:23} to page 10, line 7. And of course Mr Sideris, he was talking about the Mastercard Europe period but he acknowledged that the task of Mastercard Europe in setting the MIF was to balance out the competing interests. {Day2/100:16-22}. So MEPUK was conscious that the 90% and then the 75% rule formed part of the armoury of net acquirers in

exerting this pressure or constraint.

And if we can go to the transcript, please, at {Day4/51:7} and put 51 and 52 up side by side. This is Mr Peacop's evidence to the tribunal and if we take it from line 7, I say:

"Question: ... you've explained that it was significant pressure."

This is acquirers exerting significant pressure on MEPUK and it led to a downward trend and he says:

"Answer: One of the reasons for a downward trend, yes.

"Question: Well, you've explained that it was significant pressure. Do you stand by that?

"Answer: Yes."

Then I say:

"Question: And the significant pressure -- part of the leverage that they had under the rules -- do you accept this -- is that they could have collapsed the UK Rules by walking out?

"Answer: Hypothetically they could, yes.

"Question: Well, it was something they could have done under the Rules. Do you agree with that?

"Answer: I agree that they could, yes.

"Question: Right. And that's something, knowing the rules at the time, that you would have understood,

wouldn't you?

"Answer: Yes.

"Question: So it's part of the leverage which you had in mind wasn't it? So when you say 'significant pressure' that's part of the backdrop against which that significant pressure was being exerted, isn't it?

"Answer: I'm happy to accept that it's part of. I think I said it wasn't the only leverage and therefore it's part of, yes, I agree."

So Mr Peacop is there very clearly explaining that he was aware of the leverage that acquirers had by virtue of the 75% rule, and that that was part of the leverage that formed part of the significant pressure that they exerted on MEPUK to lower interchange fee rates.

And then Mr Douglas we can perhaps take this most easily from paragraph 139 of our written closing submissions, which I don't have the reference. Let's take it from his statement. So {A/10/13}. Paragraph 33. So you see there that in the context of Maestro, he said that the board:

"S2's board was dominated by the major banks, some of whom were 'net acquirers' ... There was, therefore resistance to higher interchange fees."

That's consistent evidence showing the competing

incentives at play when there was a multilateral negotiation.

And then Mr Hawkins, if we go to {Day6/17:11}, please. So lines 11 to 14. So the Chairman put to him:

"Did you ever see that as a threat" withdrawing support under the 90% rule and he said.

"Answer: It's a potential threat, sir, but it never actually happened."

I'm going to come back to that but really the point is that the rules didn't need to be triggered or expressly threatened in order to be a relevant factor in negotiations within MEPUK. Both experts agreed with that proposition and that's {Day8/42:1} to {Day8/43:2}. If you put pages 42 and 43 side-by-side. So this is talking about the outside option and, sir, you on the first of those pages at line 12 said:

"Mr Justice Roth: 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 agrees, he agrees they don't have to articulate it. And then you said:

"Mr Justice Roth: It doesn't matter if the option is never used as long as they both know it's there; is that fair?

"Answer: Yes."

Then you asked if Mr Parker agreed and he said:

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

And that's really precisely the point. And we say fifthly this constraint would have assumed greater significance in the counterfactual world of a zero EEA MIF because in the counterfactual the potential gain for acquiring banks would have been greater and the threat would have been more potent.

Now, on the first day of the evidence I tried to cross-examine you may remember Mr Sideris about this. Let's just look at that {Day2/115} and {Day2/116} if we can put those pages up side by side. Thank you. So I tried to take a hypothetical scenario in relation -- this is the bottom of the first of those pages with Mr Sideris to explore the constraint that the 75% rule imposed and Mr Smouha interrupted to say well, that question can only go to the counterfactual. And the Tribunal will recall that in Mastercard's written opening submissions they characterised the operation of the 75% rule as primarily a counterfactual question. And they've similarly devoted only one paragraph of

their written closing submissions to the 75% rule in these proceedings. That's paragraph 202.

But what we do have is clear agreement by Mr Parker that the extent of the possible gain for acquirers were they to trigger the rule is relevant to the potency of the threat. And we can take this evidence from our written closing submissions where we've set it out. {A/29/52}. Paragraph 136.2. So:

"Mr Parker broadly agreed with this -- but indicated that whether any individual bank would want to use the outside option would be affected by whether it was seen as a 'nuclear' option.

"In a ... further exchange [he] clarified this as follows:

"'Q. So just to be clear about what you're saying here you're saying that a relevant consideration when you're in the multilateral negotiation and you're aware of how the rules operated and it was possible for a certain percentage of banks to withdraw their consent from MEPUK is whether or not that they would do that would depend on part on the consequences and whether they would be want to be seen as a disrupter; is that correct? ... Yes, that 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'."

So a key question for the Tribunal is whether a counterfactual trial on this issue is necessary, and we say it plainly is as we've established the relevance of the causal mechanism. The evidence establishes that the players were aware of the rule that the incentives were operating in MEPUK, that significant pressure was being exerted, that Mr Peacop accepts that the leverage represented by the 75% rule was part of the picture in terms of exerting that leverage, and so -- and the evidence also establishes that the effect of the constraint, the extent of the constraint exerted by the rule would be greater in a counterfactual world of a zero MIF. And the Tribunal is unable in this trial to make any findings about the operation of the constraint in that counterfactual world so --

MR JUSTICE ROTH: I've said, and I don't want to keep saying it, we're not going to address what the counterfactual world would have looked like. We're not going to address what the Visa MIF would have been in the counterfactual world, we're not going to address what the rules would have been in the counterfactual world. There are a lot of questions about what that world might have been and how we approach it, if we get there.

MS DEMETRIOU: Sir, yes, the critical point is if we get there. And so, with respect, you've said to me a number of times "if we get there" and my submission is not that you should be making findings about the counterfactual now, but it is that we must get there. Because we've established on the evidence that this was a constraint in the factual world. And we've also established --

MR JUSTICE ROTH: The first question is whether you have -- that's what we'll address in the judgment.

MS DEMETRIOU: That's what you've got to decide and my submissions are we've established that.

MR JUSTICE ROTH: You say it is. I understand that.

MS DEMETRIOU: We say it is and we say that Mr Peacop accepted that it is.

So, sir, that's what I want to say about that period of the claim. I'm not going to repeat the submissions we've made about the infection argument because in view of time I don't think there's anything I can really usefully add to what we've put in our written closing submissions.

I do want to move on to the direct application argument.

As we explained in our oral opening submissions, our primary case when the claim was pleaded was that the EEA MIFs exerted a causal influence, they operated as

guidance or a benchmark or a floor on bilaterally agreed interchange fees in the early and middle period and subsequently on UK MIFs in the later period. And it was only once Mr Merricks received disclosure that a more direct route for establishing causation in the early and middle period became apparent, namely that the EEA MIFs were applying directly to certain domestic transactions.

And now that the evidence is closed it's clear that the EEA MIFs were in fact applying to a sizeable proportion of domestic transactions in the early and middle period and there are three evidential points that we make in support of that submission.

I'm going to summarise them first and then explore them in a bit more detail.

The first is the UC00 code and I will come back to that but in summary it's a resulting agreement code in the ECCSS system which describes a set of interchange fees which would apply to transactions between particular bank pairs and the disclosure shows that the UC00 code precisely tracked the EEA MIF fallback rates which were applicable -- sorry, I'm going to correct that. Precisely tracked the fallback rates which were applicable in the UK from time to time, because it first matched the EEA MIF changing when the EEA MIF changed. And then when we had a domestic UK fallback it switched

to the UK MIF rate. And Mr Van den Bergh explained that although it was a bilateral code from a systems perspective, it was in substance a fallback rate. And I'll come back to his evidence.

Now, the Tribunal will have seen the colour-coded BIF schedule Mr Merricks enclosed with his written closing submissions. Just to turn that up briefly it's at {A/30/2}. So this is identical to the Mastercard schedule but it's shaded. It has some colour coding.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And what it does is it shades in green the banks which we know had arrangements at the UC00 code in May 1993. And it also shades green any entries for those banks which are consistent with them remaining at the UC00 code. And in orange are entries which could be the UC00 default but which Mr Merricks can't say either way.

And our key submission is that this schedule shows that Mastercard has vastly overstated the extent of true bilateral coverage. In fact, there was a significant proportion of domestic transactions which took place at the EEA MIF.

The second point we make is that there are other documentary and witness evidence which establishes that domestic transactions were occurring at default

EEA MIFs. We address that in our written closing submissions and I'm not going to say anything further about it in view of the time.

And thirdly and finally there are the figures which EPI provided to the OFT which established that the EEA MIFs applied to virtually all transactions which were processed by Europay in 1997. And I'm going to take the first and third of those points in turn.

So starting with UC00 and I want to start with Mastercard's primary response to our case.

So if we go to A/2/23 -- sorry that's a wrong reference. It's their closing submissions so that must be {A/31/23}. And if we look at paragraph 65 and 66. So 65:

"It appears that Mr Merricks may suggest that the use of the resulting agreement code UC00 signified that the EEA MIFs applied to transactions between the relevant two UK banks because UC00 was 1% standard and 1% electronic. This should be rejected for several reasons. First, it's not open to Mr Merricks to pursue such a case since it was repeatedly put to Mr Van den Bergh that the UC00 code did refer to bilateral agreements and he agreed."

Now, the procedural point is a bad one because we agree that Mr Van den Bergh said that the code referred

to a bilateral agreement. We're not asking the Tribunal to find that he didn't say that. But Mr Van den Bergh also clearly said that it referred to a UK default rate. And the reality we say is that it was both. Where there was no true bilateral agreement, transactions between two banks were entered as a bilateral agreement at UC00 reflecting default rates.

MR JUSTICE ROTH: Just to understand, you say it's both. So where no bilateral agreement then they're entered at the UC00.

MS DEMETRIOU: But it's treated by Europay as being a bilateral agreement. That's really the key. And that's why Mr Van den Bergh -- and I'm going to come to -- I'm going to come back to --

MR JUSTICE ROTH: But are you saying -- just to be clear -- that if it's a UC00 code that means it's not in reality a bilateral.

MS DEMETRIOU: It's not a true bilateral.

MR JUSTICE ROTH: That's your position.

MS DEMETRIOU: That's our position. But the reason that Mr Van den Bergh said it was a bilateral was because that's from Europay's perspective, that's how they entered it.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: I'm going to come back to his evidence, the

transcript evidence. Now, we say first of all it's revealing that Mastercard's primary response to this is to take a procedural objection. That's because we say it has no good substantive answer to the point. And we can see another procedural objection that Mastercard makes over the page at 67, if we go it's maybe two pages on, 67(6)(b). {A/31/25}. We can see this relates to the schedule of NatWest bilateral agreements at {C2/405.1/1}. Do you see the footnote 131?

So the point being made here is a table headed "Domestic agreements NatWest". And if we turn that up, please, we can see that's at {C2/405.1/1}. So that relates to -- you can see that lists five banks, because the Bank of Ireland appears twice, in respect of which NatWest is transacting at UC00.

And then if we go back to Mastercard's submissions {A/31/26}, Mastercard then says at (b) at the top of the page, they say that they were interim documents which they should have put to Mr Hawkins and they say because we didn't put them to Hawkins, we can't contend that these documents show that NatWest was contracting at UC00. But we did seek to put these documents to Mr Hawkins. And let me take you to just part of a longer --

MR JUSTICE ROTH: He didn't understand these codes at all.

MS DEMETRIOU: He didn't understand them but I put them to him. If we go to Day 5 --

MR JUSTICE ROTH: But what Mr Hawkins said was he negotiated NatWest's bilaterals. He was the one who did it for NatWest.

MS DEMETRIOU: Well, he says -- I'm going to come to that, sir. He says he negotiated in the early days an agreement -- he certainly says he negotiated an agreement with Barclays.

MR JUSTICE ROTH: And with Midland, he said.

MS DEMETRIOU: Let me go and check that.

MR JUSTICE ROTH: Well, I think -- I'm fairly sure he said he negotiated with Midland. And he said NatWest had bilaterals, that he was the one doing it, I think he said for Coutts as well as part of the group, and he did it and that NatWest had bilaterals with all the issuers.

MS DEMETRIOU: Sir, let me come back to that because I want to show you what Mastercard say about that. And I want to deal with that in turn. I'll tell you what the point is that we say.

So we say that there isn't evidence that he negotiated all of those bilaterals all of the time with all of the other banks, and that insofar as the evidence is that NatWest had bilaterals in place with all of the other banks, some of those were UC00 bilaterals,

a minority as we see, but some of them were.

MR JUSTICE ROTH: But his evidence was that NatWest had bilaterals with all of the other banks, and that was not challenged.

MS DEMETRIOU: Sir, let me show me because I then sought to challenge that by putting this document to him.

I sought to challenge that by saying you've got this UC00 code and where I was going with that was that some of your so-called bilaterals were these UC00 code documents --

MR JUSTICE ROTH: He didn't know about that.

MS DEMETRIOU: He didn't know about that.

MR JUSTICE ROTH: You didn't put to him: no you're wrong, you didn't have bilaterals with all the banks. With some you failed to have bilaterals and therefore it was a default. He understood default and he understood bilaterals, he just didn't know the internal Europay codes.

MS DEMETRIOU: Sir, let me go back to what his evidence was in a minute because we say that he didn't give evidence that he negotiated these UC00 bilaterals with these particular banks.

MR JUSTICE ROTH: He can't talk about UC00 because that's not a NatWest term.

MS DEMETRIOU: Sir, the reason I want to put this in context

is we see what then happens is that NatWest then realises that there's some mistake, precisely because they think they do have true bilaterals and they correct the position. So let me just show you that. It's a sort of a momentary period of time. But in relation to the procedural points that are being made can I just make this overall submission.

If we go to {B/54/1} these are Mastercard's search terms in their disclosure statement of 23 June. And you can see that they include UC00?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And Mr Merricks asked Mastercard when it first became aware of the significance of UC00 in an email on 12 July which we don't need to turn up, but Mastercard's reply is at {D/254} so let's go to that. And so they say in response to your request relating to Mastercard's specific searches in respect of UC00, Mastercard identified the term UC00 in a particular document which is in fact Mr Nelson's email which it disclosed on 31 May 2023 as potentially relating to the way in which UK transactions are processed by Europay. As a result, it included it in its search terms. And it's now disclosed all responsive documents.

So this was a point that Mastercard was aware of at some point prior to 31 May 2023 when it disclosed to us

the document, Mr Nelson's document. And what we then don't have so we have then an amendment of Mastercard's defence and then Mr Van den Bergh, who is specifically called in order to give evidence about systems and neither of those documents so much as mention the UC00 codes. And of course Mastercard didn't address that in its opening submissions.

Now, I'm not making a big criticism about that, I'm just explaining how it arose in these proceedings.

And so what's happened in fact is that we've been left to try and piece together what UC00 means. We asked them in correspondence what does it mean and we didn't get a substantive answer to that even during the trial.

And so we're then left to try and piece this together with Mr Van den Bergh, and in fact the very last witness to give evidence. And in fact it's a very important point in the case because it tracks the default MIF.

MR JUSTICE ROTH: Okay, but I'm not sure that Mr Van den Bergh -- we can look at his evidence again. He was doing his best. He was on the processing side and they applied that code and they treated it as a bilateral and you say it's not a true bilateral. But we've got a table of the UC00 codes at a certain point

in time, don't we?

MS DEMETRIOU: We do. Sir, if you don't mind, can I take it in order. Can I go to Mr Van den Bergh's transcript first.

MR JUSTICE ROTH: It might be helpful to look at that first.

MS DEMETRIOU: Okay.

MR JUSTICE ROTH: Which is {D/272/2}. This is May 1993. And if you look at NatWest, NatWest according to this was at UC00 with all but four banks, and one of them being Midland as a UC00. And Mr Hawkins said NatWest had bilaterals with all the banks, and he expressly said they had one with Midland. And you didn't say to him: no, you're wrong, we suggest it didn't have bilaterals. With many banks you failed to cover bilateral. No good asking him what UC00 means because he doesn't know, that's dealt with by Europay. But he does know what a bilateral is and he does know when you don't have a bilateral and that evidence was not challenged. And moreover, if he's right and he did I think expressly say that we had an agreement with Midland then this does not correspond with that.

MS DEMETRIOU: Well, sir, in relation to NatWest there was -- then I think what happened was that they appreciated that there was an error in the Europay system and that was corrected. Can I show you that?

MR JUSTICE ROTH: But it means we can't rely on this table.
MS DEMETRIOU: Can I just take it in stages in terms of the evidence.
MR JUSTICE ROTH: Yes.
MS DEMETRIOU: Can we start with the transcript on {Day7/119:} Mr Van den Bergh's evidence. And if you start reading at that line. And can we go over the page.
MR JUSTICE ROTH: Sorry, which line?
MS DEMETRIOU: Sorry, line 20 at the bottom of the page.
MR JUSTICE ROTH: So if we go back to the letter again, is that it?
MS DEMETRIOU: No, sorry I was going to go to the transcript of the evidence, Day 7, page 119 and 120.
MR JUSTICE ROTH: And 119, starting at line 20.
MS DEMETRIOU: Towards the bottom, yes.

"Question: So if we go back to the letter again ..."

So if you read on to the following page, the answer is? So I've asked: {Day7/120:4}

"Question: ... wherever bilateral rates were not inputted to the system, the default rates would apply automatically ..."

And he says:

"Answer: ... you should see that at different

levels because we could only set up the agreements on the member level. So it would still -- look like a bilateral or a domestic fallback agreement, but most likely the actual fee amounts would be the same than in the implementation."

And then if you go to line 19:

"Answer: ... if you look at it from a systems point of view, you would still have a bilateral agreement in place, but most likely, let's say, if your -- if your domestic multilateral rate would be 1%, then you would also implement a 1% in your bilateral agreement."

And if we go to the next page {Day7/121:5}

"Answer: ... you should see at different levels because we could only set up the agreements on the member level. So it would still look like a bilateral or a domestic fallback agreement ..."

And then if you read on:

"Question: ... so here what's being said is, 'Well, we've left some fee structures blank, yes, and so the current default rates should apply'.

"Answer: Yeah.

"Question: That would be the default rate under your system. So if there was no bilateral, it would be the domestic multilateral. If there's no domestic multilateral, it would be the EEA MIF; correct?

"Answer: No, that's not what I mean. I mean that if you look at it from a systems point of view, you would still have a bilateral agreement in place, but most likely, let's say, if your -- if your domestic multilateral rate would be 1%, then you would also implement a 1% in your bilateral agreement.

"Question: I see.

"Answer: So systems-wise, it would be a bilateral agreement, but the value of that bilateral agreement would be the 1% which is also equal to what we had on the domestic fallback."

And then we see at page -- so what's being said is that it's entered in the system as a bilateral but at the fallback rate. It's actually a fallback fee but entered as a bilateral.

And then, sir, you asked a question if we go to page 123, starting at line 11 {Day7/123:11} so you asked a question just above that and you asked a question about what would happen if the bilateral agreement had blanks and Mr Van den Bergh answered that. So he said if there was a previous bilateral agreement that would be entered. Do you see that at the end of that particular passage on the page:

"Answer: ... the person who implemented it would look into the system and would implement the rates that

-- yeah, that were there ..."

If we can go over the page: {Day7/123:1}

"... already ... or the rates that were under the bilateral agreement."

Then I asked what would happen if there was no previously agreed rate and they had been left blank.

"Question: ... then the operator has to input some rates; correct?

"Answer: Correct, yes. So it was the Interchange Team that received this form and they, yeah, completed it into instructions to the operator so that he had all the records ...

"Question: Yes, and if there were no agreed rates for, say, point of sale transactions, then the operator would put in the rates that -- the fallback rate in the system, so the UK rate; correct?

"Answer: Correct.

"Question: And if there was no UK rate, the EEA rate; correct?"

And if we go to page 132 {Day7/132}, so lines 4 through to 20:

"Question: And UC00 is a transaction code, is it, for a bilateral arrangement at a particular rate ...

"Answer: I believe UC00 was the domestic fallback code."

Then, line 15:

"Question: If there was no domestic fallback, would that then escalate to the next level down, which would be the intra-EEA MIF code?

"Answer: If there was no bilateral code and there was no domestic code, in that case, it would fallback to the intra-European rate."

Then if we go finally to page 147 {Day7/147:7} so lines 7 to 16, so the question:

"Question: ... going back to the fact that UC00 refers to a domestic default rate ... and where there was no domestic default rate before 1997, so there was no UK MIF before 1997, something had to be put into the system, correct, where there was not some specific rate agreed between banks?

"Answer: If you did not have a rate agreed between banks, I guess this is pointing then to this UC00 agreement with those rates that you showed."

Which were the EEA MIF rates. And so his evidence -- we took a while to get there but his evidence is clear in my respectful submission that it's a domestic default rate which is input to the system as though it were a bilateral.

And if we go back to our written closing submissions at paragraph 98 {A/29/38} what we see is the UC00 code

in fact tracked the fallback rates applicable to the UK. So starting at 98.1:

"In May 1993 ... the UC00 [rates] were 1% for Standard and 1% for Electronic [which] matched the undiscounted Intra-EEA MIF ... between 1990 and ... 1995. The other resulting agreement[s] ...were different from the EEA MIF..."

Then at 98.2:

"The structure of the Intra-EEA MIF changed in April 1995 when it split into 1.15% for Standard, 0.9% for Electronic and 0.75% for Secured Electronic. The UC00 code changed with it."

In exactly the same way and we've put the references to the documents there.

And then at 98.3:

"When the UK MIF was introduced in November 1997 with rates of 1.3 for standard and 1% for electronic. In April 1999, new categories were introduced ... the UC00 code was updated to match these figures."

And so what you have all along is a tracking of -- so it shows -- these documents show that Mr Van den Bergh was correct, that it was -- the UC00 code was the domestic default but until there was a UK MIF, the domestic default was in the hierarchy the EEA MIF. And so you see the UC00 code tracking first of

all the EEA MIF and then the UK MIF when it became the domestic default --

MR JUSTICE ROTH: Have we got a table of the UC codes?

MS DEMETRIOU: We take it from the documents which I put to Mr Van den Bergh which we've footnoted --

MR JUSTICE ROTH: I think we've got somewhere, haven't we, a table showing what they are?

MS DEMETRIOU: Insofar as we have them, we've referred to them here.

MR JUSTICE ROTH: Yes, it's probably referred to here.

MS DEMETRIOU: We don't have consistent documents all the way through but we have documents showing that they track these changes.

MR JUSTICE ROTH: So if we take, looking at your footnote {C2/405.2/1}. That's it. Here are the codes. I don't know what date this is. You say this is your footnote 234. I think your case is -- well, your basic case is the EEA MIF was a strong influence on bilateral negotiations.

MS DEMETRIOU: Anyway, yes.

MR JUSTICE ROTH: And sometimes the bilateral negotiation therefore might have resulted in the same bilateral agreement in the same rate.

MS DEMETRIOU: Well, we have two different separate points.

MR JUSTICE ROTH: But isn't that quite possible?

MS DEMETRIOU: Quite possible.
MR JUSTICE ROTH: And suppose the bilateral agreement was for a 1.15 basic and an electronic of 0.9, well, what code would have been put in out of these codes?
MS DEMETRIOU: So the UC00 agreement was, they were these codes --
MR JUSTICE ROTH: But you say those are defaults where there is no agreement.
MS DEMETRIOU: So they were -- we say that they were entered, where banks were transacting at -- where it was marked UC00 on the Europay system, we say that they weren't true bilateral agreements.
MR JUSTICE ROTH: I understand that, but what I'm asking: suppose there is a true bilateral and the true bilateral they've agreed 1.15 basic, 0.9 electronic, that's their agreement so it's a true bilateral. What of these codes do you say would have been put in on the Europay system?
MS DEMETRIOU: Well, I'm not sure we know --
MR JUSTICE ROTH: Well, we've got the codes.
MS DEMETRIOU: So the first point is that I don't think we have all the codes so that you can see --
MR JUSTICE ROTH: Well, these are the codes, I thought that's what this document is. You say an internal EPI shows the codes and UC00, UC002 and indeed that table we were looking at a moment ago has UC00, UC002 and so on.

MS DEMETRIOU: But, sir, the second point is because we've seen, as we've set out in our submissions that the UC00 transactions changed every time that the default changed, it tracks the default, then it's unlikely to represent a true bilateral agreement. Unless the bilateral agreement said we are contracting at the default fee.

MR JUSTICE ROTH: Well, we know a lot of bilaterals you say were so influenced by the EEA MIF, they might have been at the EEA MIF. This is a period -- this table is May 1993 so there's no UK MIF. I just at the moment don't know what you say would have been entered for a true bilateral at 1.15 and 0.9?

MS DEMETRIOU: Well, I think --

MR JUSTICE ROTH: Why wouldn't they use the UC00 code? All they want is the code that gets the right amount.

MS DEMETRIOU: Sir, I think that they would've used the UC00 code if they intended -- so they may have had a true bilateral where they meet and say: we would like to agree that we apply the default rate.

MR JUSTICE ROTH: Well, no, they negotiate and they start at 1.2 and 1.1 and they end up at 1.15. Whether they're interested in the EEA MIF we need not consider but that's what their agreement is.

MS DEMETRIOU: Yes, but then, sir, the agreement would not

be at UC00 because what we see is that UC00 -- so if they say, right until further notice we want to be at 1.15 for example. UC00 would not have served them --

MR JUSTICE ROTH: Well, what code would it be?

MS DEMETRIOU: We do not know. We are trying to make the best of this, but we do not know. But what we do know --

MR JUSTICE ROTH: Why do you say it wouldn't be UC00 and why do you say that when Mr Hawkins says, I had an agreement for NatWest with Midland and that's put in here at UC00 that doesn't reflect the agreement they had rather than a default because Hawkins is apparently wrong and he didn't have an agreement with Midland, that's what I don't understand.

MS DEMETRIOU: Can I show you in relation to NatWest because what we see in relation to NatWest -- let's see first of all what Mastercard say about that at {A/31/26}. So we've just looked at that. We'll go back to it. They say -- internal page 24. If we perhaps go back and look at the pages side by side so you can see the context. So we've looked at the document at {C2/405/25}, subparagraph (6). We've just looked at that, that's the five banks with NatWest.

And then what Mastercard say about that is that that document, and we see this at (b) at the top of page 26

{C2/405/36} that the document was an interim document which was quickly understood to be erroneous. And let me just show you what they mean by that.

So if we start with {C3/51.2} just to go through the chain of documents. So this is an EPI email, December 1995 regarding an internal review at NatWest Bank and you see from the subject it relates to bilateral agreements NatWest. And at the bottom of the page there's a reference to Mr Terrazzano of NatWest needing EPI's help in clarifying the actual situation with regard to bilateral agreements.

So it seems there that NatWest is concerned that it didn't have a perfect understanding of EPI's records of its bilateral arrangements. And that email was circulated with the document at {C2/405.1}. We've seen already the five banks listed on the UC00 code. And the email was also circulated with {C2/405.2} so can we look at that. I think that's -- oh, that's the document we just looked at showing the UC00 code was updated to reflect the April 1995 changes in the EEA MIF.

And then if we go to {C3/77}, this is EPI's letter to NatWest one-month later on 30 January 1996 saying I'm attaching a list of bilateral agreements held by NatWest and as you will see our respective files appear to be in harmony.

So there seems to have been some intervening discussion --

MR JUSTICE ROTH: And that list is C3/55.

MS DEMETRIOU: Exactly.

MR JUSTICE ROTH: Of 1996.

A. So this is actual bilaterals.

MS DEMETRIOU: Exactly. There are no resulting agreement codes. But if we put it together --

MR JUSTICE ROTH: So these are not defaults, these are actuals.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: So we know that certainly at that point NatWest had actual agreements with virtually everyone?

MS DEMETRIOU: Yes and if you put this side by side with C4/405.1 -- sorry, {C2/405.1} you'll see that the banks which were listed at UC00 are now at 1% standard and 1% electronic so they've been moved away from the default rate.

And so although the documentary evidence is fragmentary, it appears that NatWest was confused when the intra-EEA MIF categories changed in April 1995. So presumably what was happening was as the earlier document showed, their transactions with those five banks were being processed at UC00 codes and they noticed that the rates were no longer 1% because the

UC00 code changed in line with the default MIF and so there was then an internal review and so then what happens is you then have true bilateral agreements which were at the old 1% rates and these were registered with Europay on 30 January and NatWest stopped using the UC00 code. So that I think is the most likely explanation of what happened, that -- that NatWest intended to have true bilaterals.

MR JUSTICE ROTH: Or that it had bilaterals at 1% and then they were increased to 1.3 and therefore it needed to change code. But I go back to the point that Mr Hawkins' evidence was very clear. You say it wasn't.

MS DEMETRIOU: Let me just go back to -- let me just make sure I've addressed the various other points Mastercard have said, including that one.

So if we go to paragraph 67 of Mastercard's written closing {A/31/24} I just want to look at all the points they make. So their first point is because the UK banks, this is at 67(1), could apply for reduced EEA MIFs in respect of certain merchants, this somehow disproves that the UC00 code was the EEA MIF because the UC00 code was set at 1% for both standard and electronic which was the undiscounted EEA MIF. That's the point they were making. And the basic point which we make in reply is the reduced EEA MIF rates were only available

on the application of the banks. And for the Tribunal's reference there's an example of one such form in the bundle, that's at {C2/91/1} and it's undisputed that the EEA MIF was the fallback for at least part of the period of this claim. And by fallback what was meant always was the undiscounted rate. So if a member bank did nothing, the fallback rate which would apply was 1% for standard and 1% for electronic which was the undiscounted EEA MIF rate from 1990 through to April 1995 and the UC00 code was then used within Europay where two banks hadn't sent details of a bilateral arrangement or applied successfully for a discounted rate. So it was essentially the default code used by the ECCSS operators where there wasn't a bilateral agreement. And if banks had proactively contacted Europay with details of their discounted rates or bilateral arrangement then that would have been reflected on the system so presumably there would have been some ancillary arrangement to reflect the fact that they'd got a discount.

And then going back to subparagraph (2), Mastercard's second point is that Mr Van den Bergh said that UC00 was always a UK domestic code and again I think I've dealt with that.

MR JUSTICE ROTH: You've dealt with that.

MS DEMETRIOU: Yes, we don't dispute that. And (3), if we can go over the page, {C2/91/2} I think we've dealt with that as well, so they say it can't refer to the absence of a bilateral but I've explained what we say about that.

And then (4) is the point about Mr Hawkins but I just want to go back to Mr Hawkins' statement on which Mastercard relies. And so they rely on Hawkins 1, paragraphs 34 to 39. Let's look at that at {A/7/9}. So perhaps we can put up pages 9 and 10 next to each other, please and get rid of the table, thank you. So paragraphs 34 and 35 concern the operation of the scheme generally and not NatWest's bilaterally agreed rates.

MR JUSTICE ROTH: This is in 89 to 91?

MS DEMETRIOU: Yes, but these are the paragraphs they rely on in their closing, so I am just going through them. So they refer to the scheme generally.

MR JUSTICE ROTH: They refer to paragraphs up to 39, don't they?

MS DEMETRIOU: In their closings --

MR JUSTICE ROTH: The reference you just gave me in their closing is Mr Hawkins, paragraphs 34 to 39.

MS DEMETRIOU: Yes, 39, exactly. I'm going through them.

So at 37 we see that Mr Hawkins recalls negotiating a bilateral rate with Barclays and he carries on at

paragraph 38, if we can go over the page {A/7/11} to state that he thought -- that he thought that the Mastercard inter-regional rate was suitable for that bilateral arrangement.

And then at 39 again he says he repeats his view that the inter-regional rate was a suitable rate for the UK. And he doesn't say anything about other bilateral rates that NatWest had in 1992. And if we go back to -- if we go to {A/30/2} and this is our table of bilateral arrangements which we've colour-coded and you'll see looking at the NatWest entries that the Barclays entry has been left blank because Barclays wasn't on a UC00 code in 1993, instead it was at 1.1 --

MR JUSTICE ROTH: But I go to the oral evidence where he was actually asked about it?

MS DEMETRIOU: Well, sir, his oral evidence, he didn't in our submission -- no doubt Mr Smouha will pick me up on it, they haven't made the point in their written submissions but in his oral submissions we certainly don't think that he negotiated bilateral agreements --

MR JUSTICE ROTH: Not that he negotiated but that NatWest had. And it is referred to in their closing. Day 5, page 87, if we can have that, please. {Day5/87:1}

MR SMOUHA: To help my learned friend for timing as well, sir -- well, we can go on. {Day6/74:1} in answer to

your question, sir, is evidence that he negotiated bilaterals for NatWest and Coutts. And {Day6/32:1} that NatWest agreed a bilateral with Midland.

MR JUSTICE ROTH: With Midland, yes.

MR COOK: There are two paragraphs, so my learned friend knows: paragraph 64 of Hawkins 1 and paragraph 38 of Hawkins 2 where he says virtually everything was done pursuant to bilaterals.

MR JUSTICE ROTH: If one looks to the one that's up at the moment, I'm not sure which page. If we can go to {Day5/87} at line 10. No, sorry at -- he's asked about.

MR SMOUHA: Line 7 to 9.

MR JUSTICE ROTH: He says:

"Answer: I cannot know what banks he's referring ... certainly didn't apply to NatWest who had agreements with everyone ... I can only speak for the NatWest position, but we ... have a very substantial part of the market."

And it's not suggested that no, you must have been mistaken. You only had agreements with -- an agreement with Barclays.

And if one goes to {Day4/168} where you ask about Mr Warren, who was Midland. And then you say he recalls -- no it's the top of the page. He says:

"Answer: ... I know that Midland did not apply that

rate generally because we had a bilateral agreement with Midland and it didn't reflect that."

And your table shows, I think, that NatWest and Midland, certainly in part of the period, were at the default rate.

MS DEMETRIOU: Sir, I think that the position is twofold, if I can make two points.

So the first is that, yes, Mr Hawkins said that they had bilaterals with everyone and that he negotiated with Midland Bank. But what we see at the same time is that, perhaps erroneously their bilaterals were recorded as UC00 for a period of time or certain of their bilaterals were recorded for a period of time at UC00 and then that appears to have been corrected once they realise -- once someone realised there was a mistake.

The second point we'd make is that this -- with respect to Mastercard, this is a point which they should have dealt with. They searched for the documents. They're the ones that know what UC00 means and it was only --

MR JUSTICE ROTH: But it's not about UC00, Ms Demetriou, it's about what agreements, what were the bilaterals agreed by basically four banks.

MS DEMETRIOU: Sir, it is about UC00 because that provided us with the evidential basis for putting to

Mr Hawkins --

MR JUSTICE ROTH: But why didn't you seek evidence from the banks what were their bilaterals --

MS DEMETRIOU: Sir, I think the answer to that.

MR JUSTICE ROTH: -- if that is what you are seeking to establish?

MS DEMETRIOU: Sir, I think the answer to that is that because we had apprehended that the bilaterals were all notified to Europay we assumed all of these bilaterals would be disclosed.

MR JUSTICE ROTH: The bilaterals, I think Mastercard had always said we don't know about bilateral agreements between banks because --

MS DEMETRIOU: Well, I think there was an obligation to notify the bilaterals to Europay and what they're saying all this time later they're saying the coverage is patchy.

MR JUSTICE ROTH: It's a very unsatisfactory way of trying to establish what was the position.

MS DEMETRIOU: No, I mean what they say is they weren't privy to the negotiations. They've certainly said that. I don't think they've said that these bilaterals weren't notified to Europay. I think the position was they all had to be notified to Europay but what they do say is their records are now patchy all of these years later.

MR JUSTICE ROTH: And we know you say that at least on NatWest the Europay entries were apparently wrong and had to be corrected.

MS DEMETRIOU: Yes. So we've got some evidence on that and that may well be because Mr Hawkins -- because they were one of the banks that had true bilaterals. But what we do see, if we go back to -- well, we don't have to go back to it but what we see from our table shaded green is that when you look at the footnotes, I'll come back to this, when you look at how the table was compiled we say that a large -- that a significant number of these bank pairings were at UC00 and so were entered as bilaterals, but actually were at the default rate.

MR JUSTICE ROTH: Well, if UC00 is only reflecting something that's not a bilateral, as opposed to either a bilateral at that rate or the lack of bilateral in a default because that's the only code that encapsulates those percentages.

MS DEMETRIOU: Sorry, you're putting to me that it could be either of those two things?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Sir, in principle yes, except for the fact UC00 rates move with the default, and so if one is negotiating a rate -- unless one says in the negotiation, well, we would like our rate to move with

the default, if you're negotiating a fee then it would be unlikely that that would be recorded at UC00 because the effect of recording it at UC00 is that it would move -- the rate would move with the default, which appears to be what happened with NatWest when it was then subsequently corrected.

Just going back to subparagraph (5) of where we were on Mastercard's submissions. {A/31/25} or {A/31/26}. So subparagraph (5) they cite an email from Europay which states there is no precedent to suggest that because we've changed the cross-border rate, domestic rates change as well. This is down to issuers and acquirers to decide. And we see the email at {C2/361.1} and it refers to the -- you see at the top:

"The issues raised by Bob Stevens in his note."

And below 2.1.1 is the quotation on which Mastercard relies.

So all that is being said there first of all is it's not a point on our case on UC00, all that is being said is if banks agree different bilaterals, then the domestic rates won't change at the same time as the EEA rate. There's nothing particularly surprise about that.

But Mr Stephens' note is at {C2/353.2}. Mr Stephens was at FDR. And you can see the date, it was sent on 6 February 1995 which was shortly before the intra-EEA

MIF categories change with effect from April 1995 and the purpose of the note is to obtain clarification of certain points ahead of that change. So if we go to page 2 {C2/353.2/2} issue .1.1, Mr Stephens asks:

"In the absence of a domestic bilateral interchange program ... do Europay plan to take a proactive stance and either write to domestic members or publish a bulletin in order to obtain formal agreement to the new programs and rates in a domestic environment."

So Mr Stephens is asking will Europay seek consent for the members whose domestic transactions will be processed at the EEA MIF where they have no bilateral arrangement?

And back to EPI's email at {C2/361.1}, Mr Nelson said at 2.1.1:

"I think we have answered this in our last letter. There is no precedent to suggest that because we have changed the cross-border rate that domestic rates change as well. This is down to the domestic issuers/acquirers to decide. The new structure and rates should not be a surprise to the UK. We fully consulted with Ken Howes the UK's representative on the BMAC."

And so what he's saying we submit is that EPI won't be seeking formal agreement from the UK members without bilaterals for whom the EEA MIF will apply to domestic

transactions because they were properly consulted. And so this exchange doesn't help Mastercard. To the contrary it's further evidence of the EEA MIF applying to domestic transactions without bilateral arrangements and that's the basis on which Mr Stephens is asking if EPI will seek consent before it changes the default rates applicable to their domestic transactions. If the default wasn't applying to those domestic transactions there would be no issue at all.

And then if we go back to Mastercard's submissions {A/31/26} subparagraph (6) -- oh, I've dealt with that already.

And then (7) is again a helpful document for us and they seek to say the question wasn't answered but clearly we've shown UC00 does -- did track the default.

So in short, we say that the existence of the UC00 code and Mr Van den Bergh's evidence and the documents that we've referred to show that certain domestic transactions were being processed directly at the default EEA MIFs, and the question then arises as to what proportion of transactions were processed at the default rates in the early and middle period. And the starting point is the colour coded table.

And we do say this about the table. So throughout this trial, Mastercard has presented its bilateral

interchange fee table as representing evidence that there was very full bilateral coverage. But this now has to be read in the light of the UC00 code which reveals that certain bilateral arrangements were in fact not true bilaterals.

MR JUSTICE ROTH: We have the use of the UC00 code in 1993, which is the table we looked at.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: Do we have it for later periods?

MS DEMETRIOU: No, we don't.

MR JUSTICE ROTH: So how do we know if it was still the UC00 code in 1994?

MS DEMETRIOU: Sir, we know the rates that were being -- let me just check that I'm right about this. No. So we have the rates tracking over time but we don't have an equivalent table, and so what we've coded in green going forward is where the rates track the default rate and so they're consistent with the UC00 agreement --

MR JUSTICE ROTH: But you don't know if it's UC00 or not.

MS DEMETRIOU: No we don't, that's true.

MR JUSTICE ROTH: What's the position about Save & Prosper, for example?

MS DEMETRIOU: Perhaps we can get up the table. So that's {A/30/8}, so we haven't shaded those green --

MR JUSTICE ROTH: What code were they at?

MS DEMETRIOU: We don't know on the documents what code they were at.

MR JUSTICE ROTH: At all?

MS DEMETRIOU: No, we don't know. They were a new bank that came after 1993 so they're not in the 1993 table.

Can I just show you an illustration of the issue.

MR JUSTICE ROTH: It's very unsatisfactory as an evidential basis to make such a finding when the banks themselves, or some of them at least, are likely to have this information.

MS DEMETRIOU: Well, sir, we don't know. We rather assumed that Europay would have the information. They did have the information at some point but they haven't kept it all and that's why the disclosure is patchy.

I just want to explain something by reference -- if we can go to {D/272/2} which is the matrix we were looking at from May 1993.

MR JUSTICE ROTH: Before you do that, the colour coding. So to be clear when it's actually based on a UC00 code is for which period?

MS DEMETRIOU: Well, what we have is the matrix in 1993.

MR JUSTICE ROTH: So that's it.

MS DEMETRIOU: That's what we have in terms of the code. But we've tracked it in green where the rates -- we've got the rates over time. Where they track the default

rate but there's --

MR JUSTICE ROTH: But not Save & Prosper?

MS DEMETRIOU: No, because they're not in the table in 1993 so we don't know what their code was at any point.

MR JUSTICE ROTH: But we know what their rates are.

MS DEMETRIOU: Yes, it's possible from their rates that they were also UC00 but we've been conservative in terms of the shading.

MR JUSTICE ROTH: Alternatively the others were no longer -- yeah. So your table is on the basis that NatWest did not have an agreement with Midland in 1993 or at all, or with Lloyds, correct? Or indeed an on us rate. So the on us was at the default.

MS DEMETRIOU: Sir, which page are you looking at?

MR JUSTICE ROTH: I'm looking at the entry for NatWest in your table.

MS DEMETRIOU: Page 2. {A/30/2}.

MR JUSTICE ROTH: And I'm looking, going down the column you're assuming that they had no agreement with Midland at all in 1993, no agreement with Lloyds in 1993; correct?

MS DEMETRIOU: Do you mean no true bilateral agreement?

MR JUSTICE ROTH: No agreement, so therefore it defaults. That's your assumption.

MS DEMETRIOU: All we can say for certain is that it was at

the UC00 code. That's what we know.

MR JUSTICE ROTH: That's what we know and your assumption is that means they have no agreement with Midland, no agreement with Lloyds.

MS DEMETRIOU: Or possibly that their agreements were at the default, it was registered as UC00 and then when there was a change everyone realised the mistake because it didn't matter because they went to the MIF.

MR JUSTICE ROTH: In which case sometimes these green shading is not a default but it is a bilateral, a true bilateral.

MS DEMETRIOU: Well, we don't have evidence from the other banks saying: well, it is a mistake, we're changing back and so where we've shaded it in green, the rates have carried on tracking the default.

MR JUSTICE ROTH: It just seems extraordinary that NatWest, one of the biggest acquirers, would not have negotiated an agreement with Midland and Lloyds, and not the suggestion made to Mr Hawkins.

MS DEMETRIOU: No and, sir, one possibility -- because what we have is -- what we can see is that their agreements -- their transactions with those banks were registered as UC00, and so we have on the one hand, if I can put it this way, Mr Hawkins' evidence and the proposition you're putting to me which it is unlikely

they wouldn't have had a true bilateral agreement with Midland or Lloyds because they were big banks. So we have all that on one hand.

On the other we have the fact they were registered at UC00 which Mr Van den Bergh says was a default --

MR JUSTICE ROTH: Well, he says it's a bilateral and if there was no agreement then they would enter the default at that bilateral.

MS DEMETRIOU: Well, sir, it's a bit more than that because as we've shown in our closings, and I took you through the paragraphs, the rate does track the movements.

MR JUSTICE ROTH: I see that point. We had better take a break I think. I think we've probably exhausted UC00, haven't we?

MS DEMETRIOU: Nearly.

MR JUSTICE ROTH: Oh. All right. Well, we'll come back at 3.45.

(3.35 pm)

(A short break)

(3.49 pm)

MS DEMETRIOU: Sir, just a few more minutes on UC00. I won't be much longer on it.

Could we go to {C6/288}. This is a spreadsheet which Mastercard has somewhere relied on, and if we go down to the tab that says "ECRD Retail", please, UK, the

next tab. Thank you. And can we scroll up. Yes, exactly. And so this is a 1999 document spreadsheet and do you see the top row says "UK00". Do you have that, sir?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And then if you go to the very end it says "Comments: fallback domestic", so that is consistent with Mr Van den Bergh's evidence.

MR JUSTICE ROTH: Just a second. I'm with you.

PROFESSOR WATERSON: Where did this document come from?

MS DEMETRIOU: This is part of Mastercard's disclosure. It's from Europay. And so the top row shows UC00 and the comment is "fallback domestic" then you see a number of UK codes because you were asking me about codes and you can see "UK01" says "true bilateral" and that really does -- it is consistent with Mr Van den Bergh's evidence about the UC00 being a domestic fallback rate and they distinguish interestingly between that and true bilaterals.

Sir, just going back to a point you put to me.

MR JUSTICE ROTH: This was not created for this --

MS DEMETRIOU: No, it's a document from 1999. Sir, you put to me the point about Mr Hawkins and Midland Bank and so on and in a sense either hypothesis works for us because either way if UC00 -- because we know that for a period

of time NatWest did have some agreements that were registered as UC00 in the system and that was then corrected and you took me to the spreadsheet, the table in 1993 that showed rather more. And really either way works for us in the sense that either they were transacting on the basis of bilateral agreements that were agreed at the default MIF because of the outside option, because of the influence that the EEA MIF exerted, or they weren't true bilaterals and they were entered into the system as -- on the fallback rate.

But we're not seeking to say that anything in this regard that Mr Hawkins said is untrue but there is a practical problem. Can I just show you the correspondence, or I can show you the references. So if we go to -- let's go to {D/253} and really the point here, sir, is you said to me why didn't you put these points to Mr Hawkins, but really the evidential basis for saying to him: well, what you thought were bilaterals might have been registered at this UK default really came up later. And you'll see that this is correspondence from my instructing solicitors on 12 July, writing to Mastercard's solicitors, asking precisely about the UC00 code. And you can see going down, the second paragraph from the bottom:

"Please provide all details that Mastercard is aware

of regarding the UC00 code."

And in particular we say that we need to know -- we need to determine to whom questions should be put. And we say that in the email. My solicitors say that in the email.

And we ask for a response on the same day.

And then if we go to {D/254} this is Freshfields' response and there is no substantive response to what UC00 means. You saw this before. It's about when they started searching.

MR JUSTICE ROTH: Yes, we've seen this.

MS DEMETRIOU: And it's only if we go to {D/272} so it's only on 17 July, which was after Mr Hawkins' evidence had closed, that Freshfields wrote to explain that UC00 relates to the interchange fees applied to transactions between a particular bank pair.

So we were seeking information about this during the trial but we didn't get any information until after Mr Hawkins' evidence had closed. And so we did explore it with Mr Van den Bergh. But in any event -- really it was the UC00 codes which provided the evidential basis to put the questions to Mr Hawkins. Because otherwise a question which was: oh, well, you didn't really negotiate bilaterals wouldn't have really taken things very far. He probably would have said yes we did. But

really the point was --

MR JUSTICE ROTH: Well, we would have had his evidence and then we could have said did you do it yourself and we would have known and then it might suggest that we have to choose whether that's more reliable than an inference from the UC00 code.

MS DEMETRIOU: Sir, I think the way of squaring the circle is that the evidence shows -- we say that the evidence does establish and Mr Van den Bergh said that the UC00 code really does relate to a default rather than a true bilateral but we're not seeking to say Mr Hawkins is wrong about his agreement with Midland. We think the most likely scenario is that they agreed --

MR JUSTICE ROTH: Or that NatWest had agreements with all the major banks.

MS DEMETRIOU: Or that NatWest had agreement with all the major banks.

But what we do see from the table that we colour-coded is that those agreements were at the default rate and it does appear when the default rate changed in 1995 they thought: whoops, we didn't intend to be contracting at that rate, let's go back to 1 which was the rate we agreed. So I think that is the most likely explanation of how you square the circle.

Now, of course -- and just if I could make another

point really. The bilateral interchange fee table provided by Mastercard, when you look at the footnotes let me take an example. So if we go to Mastercard's updated schedule at {B/55.1/4}. And look at RBS and if we look at the first column, or if we look at the column -- let's look at the second column from May to December 1993 and if we go to the footnote, footnote 3 on page 2 that's based on the matrix that we've been looking at. So it's based on that matrix and you can see that that column has been populated with lots of 1% interchange fees.

And if we can expand and look at footnote 31 which is tiny for me at the moment. I think it's on page 4 {B/55.1/4}. So that says that the Royal Bank of Scotland interchange fees are accurate as at 21 April 1993. And when you look at the documents that are being referred to, so you can see what's referred to is {C1/373} let's go to that. That's the underlying EPI document that supports the matrix that we saw. And so it's not --

MR JUSTICE ROTH: And that's a contemporary document.

MS DEMETRIOU: That's a contemporary document and it's an EPI document and so one could be forgiven looking at Mastercard schedule for thinking that those agreements in May to November 1993 were true bilateral agreements

at 1%. But in fact they were UC00 agreements and when you look at the footnote in the document that's being referred to, it's an EPI document and that relates to how EPI input the so-called agreements into the system.

MR JUSTICE ROTH: But it could be a bilateral at 1% inputted at UC00?

MS DEMETRIOU: It could be and we say on that hypothesis too that reinforces our case on the influence or the benchmark case in relation to the EEA MIF.

Sir, we do -- I think you have my point that we say it's more likely and you saw the schedule, the matrix, not the matrix, the Excel spreadsheet which distinguished between the fallback and true bilaterals. And because of the tracking that we've indicated we do think it's more likely that in the main they were -- there was a lack of agreement which was then registered as UC00.

And the next question then is: well, what proportion of transactions went through directly on the default, on the EEA MIF? And the Tribunal has relatively limited information regarding the exact market shares of banks over time. You've got the percentage figures in the bilateral interchange fee schedule table, but we can see -- we don't need to turn it up -- footnote 6, {B/55.1} that those relate to the percentage

shareholdings in MEPUK in 1996. So they are rather a snapshot.

And there isn't material -- as you know, that material -- the transaction data doesn't exist so there isn't data according to which we can reconstruct the historical volumes issuing and acquiring volumes.

And indeed Freshfields wrote to us -- again no need to turn it up {D/251} saying that it's not possible to reconstruct historic transaction volumes.

MR JUSTICE ROTH: Yes, the shareholding is 1996.

MS DEMETRIOU: 1996.

So we say that you get some assistance as to volumes from our green shading in the table. Some assistance as to volumes that went through at the default for the reasons that I've given. And we get some further assistance by the figures which EPI provided the OFT --

MR JUSTICE ROTH: The green shading, it doesn't tell you what volume different banks represent though, does it? When you say it gives us some guide on volumes.

MS DEMETRIOU: It does give us some guide but we can't -- we have very limited information because -- precisely because Mastercard hasn't kept the transaction data.

MR JUSTICE ROTH: No, but what guide do we get from the green shading? If Signet is all green right through, how does it tell us what share of transactions Signet

accounts for?

MS DEMETRIOU: If we go to {A/30} we see for example Signet, we don't know the market share --

MR JUSTICE ROTH: That's what I mean.

MS DEMETRIOU: -- in 1996, so it must have been very small.

MR JUSTICE ROTH: Well, the others we do for 1996 but going forward you make the point, the very fair point it's just a snapshot.

MS DEMETRIOU: Yes. But if we look at Lloyds, for example, on page 4 {A/30/4} so we have the snapshot that it had a 10.6% shareholding in 1996 and we see quite a lot of green there in terms of its --

MR JUSTICE ROTH: But the only way to get any sense of volume is from the 10.6%, isn't it?

MS DEMETRIOU: It is, yeah, it is. And so this gives a sense of volume from looking at the 10.6% but it's not very precise. But we say that further assistance is provided by the figures which EPI gave to the OFT and you'll have -- you'll know our point on this already and you'll have read our written closing submissions on this point.

And we ask the Tribunal to endorse the OFT figures because we say that EPI would have had transaction data at the time which no doubt formed the basis for its response to the OFT and it would have responded

carefully to the OFT. But the position is now that the transaction data has been destroyed. So nobody is saying -- of course if one had the data that the OFT had before it, one could in the trial say: well, we don't think the OFT has drawn the right conclusion from that data. But one doesn't have that data, it's been destroyed and we say there is nothing to suggest that the response that Europay made was made in error or that it was using data that was inaccurate, there simply isn't evidence to establish that.

MR JUSTICE ROTH: That's for transactions on the Europay system.

MS DEMETRIOU: Correct.

And so what the OFT of course didn't make any findings about is what proportion of transactions took place on the Europay system. So the Tribunal will, we respectfully submit, have to determine that. And I'll come to it in a moment, but for present purposes the point I want to make is that the proportion of transactions going over Europay is relevant to the question of the conciliation of the OFT's findings and the weighted averages relied on by Mr Parker. Because you'll recall that Mastercard says: oh well, the OFT can't be right because they're not -- there's a disparity between what the OFT has found and the

weighted averages of Mr Parker. But he accepted that the two positions are reconcilable, depending on the proportions of the proportion of transactions that was going over ECCSS.

And we've made the point also on weighted averages that the weighted average data is inaccurate. We've made that point in our written closings and there's various problems with it ranging from including Visa's MIFs, missing datasets, including the inter-regional transactions. So there's a clear limit in any event to the accuracy of any comparison between the weighted averages and the OFT figures. But the overriding point is that the figures are reconcilable with the weighted averages depending on the proportion of traffic handled by Europay. And Mastercard also states -- Mastercard states at paragraph 138 of its written closing submissions, if we go to {A/31/48} they say that even if ECCSS had been processing --

MR JUSTICE ROTH: Paragraph 138.

MS DEMETRIOU: Even if ECCSS had been processing a significant proportion of transactions in 1997 the figures in the Europay response can't represent the proportion of transactions conducted pursuant to bilateral agreements in 1997. And Mastercard's point is that whatever the OFT figures say, they can't be right

because there are too many references to lots of banks having bilaterals in 1997 in its schedule.

But as we've explained, that can be explained by the fact that many of those will relate to the UC00 code. And Mastercard cites Mr Van den Bergh's evidence for example that there was complete bilateral coverage in 1997. But he was clear that he meant bilateral only in the technical sense of the word and that they were entered as bilaterals or at least he was including agreements that were entered as bilaterals on Europay's system.

Now, Mastercard also say at 138, paragraph 1, that Europay stated publicly at the time that prior to the introduction of the UK MIF at the end of 1997 there existed a network of bilateral agreements. That isn't what Europay said. If we go to the document they rely on at {C6/361/5}. What they actually say is until 1997 there had been few new entrants and there had existed a network of bilateral agreements concerning the level of the interchange fee with the increasing number of new members it became increasingly unwieldy to negotiate all the necessary bilateral agreements.

So what they actually said was there were bilateral agreements pre-1997 but then it became difficult to conclude them and they tailed off by the time the UK MIF

was introduced.

And then going back --

MR JUSTICE ROTH: Just a minute. They said prior to 1997 there existed a network of bilateral agreements.

MS DEMETRIOU: And then with the increasing number of new members, it became increasingly unwieldy to negotiate all the necessary --

MR JUSTICE ROTH: That's after 1997.

MS DEMETRIOU: I don't think it necessarily is after 1997.

MR JUSTICE ROTH: Until 1997 there were few new entrants. And then with the increasing number of new members, that's presumably after 1997. That's what they're saying?

MS DEMETRIOU: I didn't read it that way.

MR JUSTICE ROTH: "Until 1997".

MS DEMETRIOU: There had been few new entrants and so until 1997 there was a network of agreements and from 1997 it was increasingly difficult to negotiate them.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And so the point we make is there seems to have been -- this is not inconsistent with what the OFT is saying.

Mastercard also suggests that there may have been a dip in the transaction volumes processed by ECCSS in 1997 and there isn't in our submission any evidence to

support that. Its submission rests on the contention that ECCSS must have been processing fewer transactions because NatWest was no longer using ECCSS in 1997. That's at paragraph 135(4) of their closings at {A/31/48}.

And if we look at the documents Mastercard relies on in support of that submission, so at footnote 247, they cite {C3/82.1} as support for the proposition NatWest had decided to move its processing in-house. And if we pick that document up {C3/82.1}. And you can see from the third paragraph down that they're talking about a prospect. So if NatWest do take EPS-Net out of the switch, the revenue impact to Europay would be higher. So at this stage at least it's hypothetical, it's a discussion.

MR JUSTICE ROTH: Yes, you say it was a threat rather than a decision but by 2000 we know they had removed, they had withdrawn.

MS DEMETRIOU: Sir, there's a sort of overriding point which is whatever NatWest did, where it was transacting with banks that weren't at FDR, then it was using Europay. So the fact NatWest may have moved its processing to FDR, unless it was intra FDR, then Europay would still be involved.

MR JUSTICE ROTH: But the big banks Midland and Lloyds were

FDR, weren't they?

MS DEMETRIOU: Well, we had that document in 1995 which showed that quite a large proportion of transactions were going through ECCSS, do you remember, so --

MR JUSTICE ROTH: But it was about a third.

MS DEMETRIOU: It was about a third; correct.

MR JUSTICE ROTH: And NatWest was about a third of the market.

MS DEMETRIOU: Yes, but the third didn't just make up NatWest. There were quite a few other banks.

MR JUSTICE ROTH: Yes, but once NatWest withdrew that would be -- whenever it was, that would be a big chunk out. What you can say, the evidence as I understand it is in 1996 as you point out, they threatened to withdraw. That's recorded here.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: By 2000 they had withdrawn as per Cruickshank and Mr Hawkins said in the I think mid-1990s they did withdraw so we've got to put those together.

MS DEMETRIOU: Sir, yes, if you go to Cruickshank so {C6/445}, but let's go to --

MR JUSTICE ROTH: One minute. {C6/445/263}.

MS DEMETRIOU: That talks about NatWest doing its own processing.

MR JUSTICE ROTH: And at that point FDR is doing Lloyds,

HSBC, previously Midland, RBOS, whereas NatWest and Barclays do their own. So certainly ECCSS had gone down very much because those are all the big banks who do the acquiring.

MS DEMETRIOU: Sir, if we go to {C10/268/2} what we see there that's the information provided by Mastercard in relation to 2001 and 2002 and you can see there that what they're saying is that Mastercard Europe processed a very large proportion of UK domestic transactions in 2001. And so there is a danger in reading too much into references to banks doing their own processing because the question isn't just what a bank was doing, but what the counterparty bank was doing. And if they were doing -- so a bank that was -- Midland doing its own processing that had transactions with, say, NatWest doing its own processing would go through Europay because they both had different processing -- they both had different processes.

So one can't say oh well, NatWest was doing its own processing, Midland was doing its own processing, therefore a lot of it must be outside the ECCSS; it's actually the opposite that's true. It's because they don't have the same processor they are transacting through Europay, that's really the point.

MR JUSTICE ROTH: Why could they not transact through FDR,

I'm not clear?

MS DEMETRIOU: If the ones that were transacting through FDR and FDR, that would be an intra-FDR transaction but what we just saw in the Cruickshank document was that FDR is providing processing transactions to Lloyds TSB and HSBC. So, for example, one assumes that Lloyds HSBC transactions would be intra-FDR but NatWest and Barclays do their own processing. So where you have NatWest as acquirer, say, and Lloyds as an issuer, then that would be through ECCSS because it's not the same processor that they're using.

And if we go to {C3/466} this is a Europay slideshow entitled "1997 Business Objectives". So it appears to be an internal Europay document. And if we go to page 8 {C3/466/8}.

This is setting out the total number of domestic transactions processed by EPI, and so you see for 1995 it's 123 million. You can see the figures, end 1997 must be a projected figure.

But take 1995. 123 million. The Tribunal will recall that's broadly consistent with the 100 million figure we extrapolated from the internal EPI memorandum of 5 July 1995. Again I'm not taking you to it but the reference is {C2/458.1}.

MR JUSTICE ROTH: This is Europay for the UK.

MS DEMETRIOU: Yes. Then if we go to {C5/382/2} these are the minutes of MEPUK's technical committee from 20 October 1998 and if we go to page 3 -- I'm not sure this is the right reference. Oh it is the right reference. Yes, that's right. Towards the top of the page in a discussion relating to the year 2000 project it says that: {C5/382/3}

"EPI had offered only to provide testing support via simulators, but that UK members in particular had insisted upon a greater level of reassurance, since although most of their traffic was domestic, some 70% of the total was still processed via EPI."

So that's also a helpful indicator.

So piecing this together we know around a third of domestic traffic was processed by ECCSS in 1995, around 70% in 1998 and 95% in 2001. And so that paints a compelling picture we say of steady growth and also a compelling picture of a significant proportion of domestic traffic being processed via ECCSS in 1997.

And so, sir, it is not possible for the Tribunal to be precise in relation to estimating the volume of transactions that went through at the default. We do say it's a case for the broad axe. And we have estimated in our closing submissions that some 50%, drawing all of that information together, some 50% of

transactions went through directly at the intra-EEA MIF.

So, sir, that's what I wanted to say about direct application. I'm going to now turn to the end of the claim period, so 2004 onwards. And as we explained in our --

MR JUSTICE ROTH: Can you pause a moment. I'm again having problems today with this. (Pause). Yes.

MS DEMETRIOU: Thank you, sir. We explained in our written closing submissions at paragraphs 51 and 154 that the domestic MIFs and the EEA MIF were devised by the European Interchange Committee from 2004 to 2008 and that committee received briefing papers for the Interchange Fee Team led by Mr Sideris. And we've quoted at paragraph 154 of our written closings the terms of reference for the European Interchange Committee from August 2003 which included within the objectives to -- and I am quoting -- "review interchange at European level by region, by market and by product on a regular basis and recommend the required repositioning".

And we say that this is an indication that the committee even in 2003 had an overall function of providing strategic oversight at the European level.

And as we set out at paragraph 155 of our closing submissions, as soon as the European Interchange

Committee obtained control of the UK domestic MIF we see the head of corporate affairs indicating there will be a formal review and this will be part of an overall review of MIF-setting in Europe.

And then there are two stages to the review of UK MIFs and in both stages we see clear examples of the EEA MIFs having an influence. So the first stage can we go to {C14/363/1}. So under "Background" you can see at the bottom -- you can see a table first of all to introduce the merchant UCAF and full UCAF and under "Background" you can see:

"On 18 November 2004 the Mastercard global board vested in the president and chief executive officer of Mastercard the sole authority to establish and implement Mastercard brand domestic UK interchange rate programmes, effective immediately."

And if we go to page 2, and it's the penultimate paragraph: {C14/363/2}

"There is therefore a need to implement changes in the UK to reflect the strategy developed for support of SecureCode implementation in Europe. This was delayed at the end of 2004 by member discussions ... but the expectation is that Mastercard will move to a similar structure for the UK."

And then we see:

"In other European markets we see growth in SecureCode internet merchants ..."

And then if we go to page 4, under the heading "Rationale": {C14/363/4}

"The rationale for this proposal is the following:

"The proposed fees aim to start aligning the UK domestic MIF structure with the European one in view of SEPA (1st step)."

And then:

"The Merchant UCAF tier is positioned at the same fee level as the Electronic tier consistently with the European approach."

So we see that there are new categories being introduced with the express aim of starting to align the UK structure to the EEA structure.

In the second stage of the review there are further structural changes to try to continue that alignment.

So if we can go please to {C15/152}. And if you look at the second table on the page, you can see that four categories are being deleted and standard is being reduced from 1.3 to 1.2. You can see that in bold.

And then if we go to page 3, {C15/152/3} we see that the aim of this proposal, a sentence or so in, is to:

"... reduce the number of tiers and start aligning with the intra-European structure in view of SEPA."

And at the end of the subparagraphs for Pan Key Entry and CAT it explains:

"These transactions will fallback on standard (idem intra)."

Meaning the same way as it does in the EEA MIF structure.

We see there is similar wording at the end of the "Internet" subparagraph, but they there say expressly, not in Latin "same as intra-European".

And then the final bullet point explains the reduction in the UK standard rate by 10 basis points is to make sure that knocking out those UK categorise to harmonise with the EEA structure doesn't result in the UK weighted average shooting up.

And on the question of weighted averages Mr Sideris explained, if we just take this quickly from {Day2/134:15} he explained in this passage, so line 15 he accepted that what they were doing was to keep the weighted averages the same and that's why a reduction was being made in the standard rate and if we go to the next page too {Day2/135:} he says it's correct that decision-makers did look at weighted averages as targets and he says they did amongst other things like tier rates themselves and weighted average as well.

And then in terms of the second stage of the review,

let's go to {C15/152/4}. So this is the same document we're on and you can see the heading "Mastercard World Signia":

"The UK domestic World Signia POS fallback interchange programme currently defaults to the UK tier structure. In 2004, World Signia domestic volumes represented 1.23% of total consumer volumes. It is proposed to implement the World Signia intra-European structure and rates for UK domestic transactions.

"The impact on the average World Signia MIF is an increase from 0.99% to between 1.64% and 1.66%. It is believed that Visa infinite rate is around 1.80% ..."

This was a premium card which was already in use in the UK and other countries in the EEA and as of 2004 the MIFs in the UK were lower than the EEA MIFs and the European Interchange Committee decided to increase the UK MIFs to exactly match the EEA MIFs and notably they decided to match the Mastercard EEA MIF and not the MIF for the Visa product which is mentioned here.

And if we go to Mr Sideris' evidence, {Day2/140:}, please. Can we have page 140 and page 141 next to each other. So we asked Mr Sideris about this and if you take it from line 20 of page 140, I asked:

"Question: And there's no cost study, is there, explaining why it makes sense for the UK?

"Answer: I don't remember if there was a cost study at this stage.

"Question: No, no other analysis indicating why it's appropriate for the UK.

"Answer: I don't remember if there was at that time."

The fact is there is no other analysis in the documents. The rate was moved to match the EEA rate.

And if we go back to the document at {C15/152/4}, the next point is Mastercard Worldcard. And you can see there that Mastercard Europe:

"... is developing a new specialist product, the World card, that also provides acceptance for everyday usage. This is in line with its global strategy."

And then if we go please to page 5. At the bottom of the page: {C15/152/5}

"Both the structure and rates for the Worldcard program will be aligned on the intra-European ones. The expected average domestic UK interchange rate for the Worldcard is expected to be comprised between 1.44% and 1.46%."

So this was a proposal to introduce a new product. There isn't a detailed and bespoke UK market analysis and cost study here. There are evidently already proposed EEA rates in the pipeline and the proposal is

expressly that both the structure and rates for the Worldcard programme will be aligned on the intra-European ones.

Now, as it transpired, the intra-EEA launch did not go ahead as planned. The Worldcard intra-EEA rates were launched at the standard consumer MIFs and the UK launch did go ahead at the interchange fee levels which had been based on the intended intra-EEA ones but we say these are clear examples of the EEA MIFs having a bearing on the thinking and decisions of the European Interchange Committee and so they were influencing the gradual development of the UK MIFs.

And of course not a point for today but in the counterfactual of course the EEA would have been much lower and so we can see here some influence in the factual where they're quite closely matched. You would expect the influence to be more visible and more pronounced in the counterfactual.

And if we turn up Mastercard's written closing submissions at {A/31/69} and if we run down the findings that they're inviting the Tribunal to make in respect of this period of time, so we can see at (2)(a):

"The EIC periodically reviewed the UK MIFs, making significant changes to them by successively:

"(a) Implementing two new 'UCAF' categories ..."

As I've shown you that's expressly stated to be the aim of aligning with the EEA structure.

Then lowering the standard MIF to 1.20%. Again, as I've shown you, the reason that that was done was to try once the structural changes had been made to avoid the UK weighted average increasing as a result of the deletion of those categories to harmonise the EEA and UK structures.

Then at (d) introducing new UK MIFs for the World Signia card and as we've seen, those were increased to the same levels as the EEA MIFs and Mr Sideris couldn't point to a special UK cost study or a specific piece of UK analysis to explain the level at which they were set.

Then at (e), introducing a new premium card to which substantially higher UK than EEA MIFs applied. That is a materially incomplete account. As we have seen, the original fees proposed for the UK were simply based on proposals for premium EEA MIFs which had already been formulated and as it happened the UK MIFs were signed off but the EEA MIFs weren't. But the original formulation wasn't based on some piece of bespoke analysis relating to the UK.

And then (f) and (g) need to be handled with care. The 4p minimum interchange fee was revoked for credit cards one year later in 2009, Mr Sideris' first

statement, paragraph 130. And PayPass was about rolling out the new contactless technology, the EEA MIF did ultimately introduce a PayPass category but by the time it was introduced in 2009, it was after the Commission decision, so it was rather different.

And then we say, just scrolling down that (3) and (4) are assertions which are not consistent with the documents I've shown you or the passage from Mr Sideris' evidence where he was unable to point to any bespoke UK analysis for World Signia.

Finally on this period, the infection argument we've set out at paragraphs 159 to 160. It's an alternative argument which is that on Mastercard's own evidence, Mastercard did not make significant changes to UK MIFs in terms of changing the levels of MIFs that applied in the UK. And so if the causal mechanism stops in November 2004, the causal effect certainly doesn't come to an immediate and abrupt end at that date.

So that leaves us with on-us transactions, which I can certainly finish by my guillotine of 4.45.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And I need to start by reminding the Tribunal of the evidence from Mr Hawkins on this point. Mr Hawkins was shown two documents, so {C1/375}. This is a 1993 Europay document and you can see that NatWest

to NatWest is at 1 and 1. And then {C2/255}, this is the August 1994 version. We can see that NatWest on-us rates have increased to 1.3 and 1.

And then if we go to the transcript we can see what Mr Hawkins said about this {Day6/46}. If we can put 46 and 47 up, please, side by side. {Day6/47}.

So if we take it from the bottom of page 46 you can see the questions I asked him about that. So I say you can see NatWest is listed there:

"Answer: Yes.

"Question: So that must refer to transactions between NatWest as issuer and NatWest as acquirer; correct?

"Answer: Yes.

"Question: And it specifies an interchange fee applicable to those transactions, doesn't it?

"Answer: It does."

It couldn't be clearer, "it does".

So then I say:

"Question: And if we look at {C2/255/1}, there's a similar table ..."

Then we can see the dates:

"Answer: Just to be clear, the previous one was '93?

Yes.

So I've shown him both those tables.

And then at 20:

"Question: And if you go down to the ninth row, again, we can see NatWest listed and so, again, those are transactions where NatWest is the issuer and NatWest is the acquirer; correct?

"Answer: Correct.

"Question: And we see that actually the rates have changed."

Can we go over the page, please: {Day6/48}:

"Question: They're now 1.3 and 1, whereas in the '93 table they were 1 and 1. Do you see that?

"Answer: Yes, I see that.

"Question: So at some point between the April 1993 table and the August 1994 table, NatWest must have notified Europay about these updated rates?

"Answer: Yes."

And then I took him to the schedule of bilateral interchange agreements and I showed him Coutts' agreements as well and I said, I asked him whether the Coutts-Coutts rates were the fee applicable where Coutts is the issuer and Coutts is the acquirer, do you agree? And he said, yes, he agreed with that.

And then you asked if -- you, sir, asked if Coutts was part of NatWest, and he said: yes, he used to

negotiate Coutts' rates for them.

Then if we go over the page again, I said I'm not going to do this for the whole table but I went back to the interchange fee schedule. We can see that at the top of page 49. And I showed him RBS-RBS transactions. And then I said let's go back to NatWest. {Day6/48}, {Day6/49:}:

"Question: We've seen the NatWest interchange fees. Let's go back to the first page ...and we see two-thirds of the way down the NatWest/NatWest transactions and we see how those fees move from 1 to 1.3. We've seen that in the attachment. So NatWest -- I think you can accept can't -- you can accept, can't you, that this reflects some kind of internal consideration on the part of NatWest as to what the appropriate interchange fee should be for on-us transactions?

"Answer: Yes, but it wasn't specific to NatWest ... it was a general reflection you see that all the rates went [down]."

And then if we move on, please. Sorry, that's it -- yes, that's the relevant passage.

So we know that these aren't theoretical interchange fees because Mr Hawkins accepted that they were interchange fees that NatWest charged on on-us transactions.

1 And NatWest on-us transactions were being processed
2 by Europay in very significant volumes in the early to
3 mid-1990s.
4 MR JUSTICE ROTH: Yes.
5 MS DEMETRIOU: And if we go to -- we probably don't need to
6 do this, because I think the Tribunal have seen it, but
7 the bilateral interchange fee table, it's evident that
8 almost all of the banks have rates specified for on-us
9 transactions. And so there are only three banks which
10 don't have on-us rates specified, and as far as we can
11 see, these seem to have been monoline issuers during the
12 early middle period, and we talk about that in our
13 written closing submissions at paragraph 205, and the
14 references are in footnote 439.
15 Now, Mastercard seeks to say that some on-us
16 transactions were processed by banks internally but that
17 doesn't matter because Mr Hawkins expressly confirmed
18 that the same interchange fee would be applied, even if
19 there was internal processing. And we can see that from
20 {Day6/53:}. If we can put 53 and 54 side by side. And
21 so at the end of 53, I say:
22 "Question: So presumably, is it right, at the end
23 of each financial year the issuing part of the bank
24 would prepare a record of its revenues and profits so
25 that senior management could follow its performance?

.

"Answer: Yes

"Question: And that would also be true of the acquiring part of the business; correct?

"Answer: Yes.

Sir, you asked if they account separately.

"Answer: Yes, sir, internally yes."

Then I asked:

"Question: So presumably in relation to on-us transactions, there would have been a fee that was recorded internally, wouldn't there?

"Answer: Yes, I believe so. They were subject to the same interchange fee arrangements as anyone else."

And so his evidence really is very clear that for on-us transactions the interchange fee arrangements were exactly the same.

But let's see what Mastercard seek to say about that in their closing submissions at {A/31/77}, paragraph 237. What they try and do here is spin this very clear evidence in a way that just doesn't match the evidence that's been given. So page 77, paragraph 237, please. So that's internal page 75, sir. So they say:

"Secondly, Mr Merricks seeks to expand his claim to include the internal budgeting funds within a single bank which carries out both acquiring and issuing.

Again, however, this is not the pleaded claim. The claim is expressly limited to interchange fees paid by acquiring banks to issuing banks. There is no claim in relation to the internal budget of individual banks. While one would expect any sizeable commercial organisation to have internal budgets for different parts of its business (and Mr Hawkins unsurprisingly confirmed this was the case at NatWest), that is completely different from a fixed fee payable between two separate businesses, not least because a single organisation is free to change its internal budgeting in order to promote its business in whatever way it chooses."

I'll address the pleading point shortly in a minute but the substantive point is Mr Hawkins didn't say it was a matter of flexible internal budgeting which varied during the claim period. He stated categorically that the acquiring arm of the bank was subject to the same interchange fee arrangements as anyone else vis-à-vis the issuing arm of NatWest.

So we submit that regardless of whether the on-us transactions were processed externally or internally, so whether ECCSS was being used or it was being processed internally, there was an interchange fee payable on that transaction by the acquiring arm of the bank which was

passed on to merchants through the MSCs.

Sir, I dealt with the pleading point in opening. I can remind you of what we said about that but we say it's a bad point. Shall I take you to our pleading in the time available? I think I have time to do it.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So if we go to {A/3/35} and look at the claim form. And we can see paragraph 92, that the basic cause of action is in -- is a cause of action in breach of statutory duty.

Then if we go to page 37 {A/3/37}, paragraph 97, the loss alleged for breach of statutory duty is loss to consumers who paid higher prices for goods and services. And then we have particulars of causation under paragraph 98. So the infringement caused the interchange fees paid by acquiring banks to issuing banks on both cross-border transactions and domestic transactions to be higher than they would have been absent the infringement.

So this includes an interchange fee paid by the acquiring arm of a bank to the issuing arm of the same bank, and that's plainly the fair reading given that the loss alleged to have been caused is higher charges passed on to consumers.

MR JUSTICE ROTH: Just a second. (Pause). Yes.

MS DEMETRIOU: So if there were any doubt about whether internally processed transactions are covered by the pleadings, it's dispelled by the reply. But there is no doubt. So if we go to {A/5/46} and paragraph 69(a).

MR JUSTICE ROTH: This is the reply, is it?

MS DEMETRIOU: This is the reply. And that pleads in terms an inference that fees were charged internally by banks on such transactions, on on-us transactions. And that inference is proved to be well-founded given the clear evidence from Mr Hawkins.

Now because the evidence on on-us transactions is so overwhelming, we don't really need our fallback argument on the merchant service charges. It's addressed in our written closings. We do maintain it though. It's addressed in our written closings at paragraphs 207 to 209. And, as I submitted in opening, Mastercard appears not to have a substantive answer to this point so it's taken, again, a pleading point.

And you can see the pleading point in its closing submissions at paragraph 236.1. So that's {A/31}, at the very end of the document. Let me just find the reference. Last page of the document {A/31/78}. Thank you. In fact I think it's 236(1) {A/31/76}.

So it takes this pleading point at 236(1).

And then secondly it says, at (2), that there's no

evidence before the Tribunal on how MSCs were set or charged during the claim period.

Let me take the second point first because Mr Merricks has done enough to put evidence before the Tribunal and to cross-examine witnesses. It is Mastercard that's conspicuously failed to address the point in evidence.

And we can see filed on behalf of Mr Merricks, at {A/14/20}, Mr Coombs' report of 17 May 2023. So the paragraph at the top of the page, 3.26(b):

"Whether or not an IF was paid on an on-us transaction, it is still likely that any interchange fee overcharge would have affected these transactions. This will particularly be the case if the same MSC was charged on both off-us and on-us transactions. Since an interchange fee overcharge would have affected the level of this uniform MSC, it would have led to equally higher MSCs for both off-us and on-us transactions."

Mr Parker didn't respond to that in his reply report. Mastercard then served five additional witness statements on 19 and 20 June, two of which specifically addressed on-us transactions -- that's Mr Sideris and Mr Van den Bergh -- and none of those witness statements address the point. And there is documentary evidence before the Tribunal on what IC plus and IC plus plus

pricing is and how it contrasts with standard pricing.

If we go to {C21/322/31}, this is the Payment Services Regulator report. It's from 2021, but it's consistent with Mr Peacop's evidence, which I'll come to in a minute. But if the Tribunal could just read, please to yourselves, 3.63. (Pause).

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And if we go over the page we can see from 3.64 that over 95% of merchants have standard pricing. The Tribunal may recall I went through the PSR report with Mr Sideris, but he indicated he couldn't speak to earlier time periods. But Mastercard's second witness was Mr Peacop, and he gave clear evidence about when IC plus and IC plus plus was introduced. Can I just give you the reference. {Day4/133:18} and it goes through to {Day4/134:24}. And as part of that he said -- I asked him the question:

"Question: Can I just ask you one follow-up question? So where you say in your statement that the largest retailers, which by the 2000s tended to be on interchange plus arrangements with their acquiring bank, so is it the case that these interchange plus arrangements were taken up or became more common in the 2000s? Is that what you're saying?

"Answer: Yes.

"Question: So is it right that in the 2000s, because you talk about larger retailers here, that small and medium retailers still tended to be on standard pricing?

"Answer: Yes."

And the point is pleaded in the reply at {A/5/46}. That's paragraph 69aa. I'll just let you read that, in view of the time, if that's okay. (Pause)

And Mastercard says in its written closing submissions at paragraph 236(1) that a claim can't be expanded through a reply and it cites footnote 396 of the White Book. That commentary says, at paragraph 9.2 of Practice Direction 16 states that a reply must not contradict or be inconsistent with an earlier pleading, for example it must not bring a new claim. But this is not a new claim, it's further particulars of causation within the context of a single cause of action, breach of statutory duty. The basic claim is that the infringement caused loss to consumers because of the causative effect of the higher EEA MIFs. This is simply an amendment to particularise that the higher domestic interchange fees impacted the fees charged to merchants irrespective of whether from the perspective of the banks they were internal or external transactions.

But, as I say, we maintain the argument. We think

the pleading point is a bad one, but we think we get home fairly and squarely on the first way in which we put the point, in view of the overwhelming evidence on on-us transactions.

Sir, those are my submissions, unless there are any further questions, which I anticipate, given the time, there probably won't be.

MR JUSTICE ROTH: Yes, just a moment. You can answer this tomorrow, but it would just be helpful. There is a section in the Mastercard closing -- let me just find the reference to it. Paragraphs 36 to 38 explaining some of the background. If you can just tell us tomorrow if that's agreed. I don't think it's controversial but if you could just check through that.

MS DEMETRIOU: I will, I will let you know tomorrow.

MR JUSTICE ROTH: The other thing I wanted to ask you is in your closing, paragraph 200 -- it's a small point -- you talk about the fall in intra-EEA MIF in 2008.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And then you say it shed no light on the causal ... in the early middle period. And then you say, second, even in respect of the MEPUK MIFs period.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: You are referring to, there, the MEPUK MIF --

MS DEMETRIOU: I'm sorry, you are right.
MR JUSTICE ROTH: It should be the MCI period, shouldn't it?
MS DEMETRIOU: MCE period, yes, Mastercard Europe period, that's quite right.
MR JUSTICE ROTH: Yes, that's what I thought. And you say the premise is changes weren't immediately reflected.
MS DEMETRIOU: Yes.
MR JUSTICE ROTH: But if you can tell us whether it's suggested that the UK MIFs did eventually fall like the EEA MIF. It didn't do so immediately, but are you saying that it did do so a bit later?
MS DEMETRIOU: Sir, can I come back on that one as well tomorrow?

Can I mention I spoke to Mr Smouha just in the short adjournment this afternoon and he indicated that he does need a full day. I would quite like 15, 20 minutes for reply. I wonder if there is any possibility of the Tribunal starting at 10?

MR JUSTICE ROTH: Yes, that's fine, we'll start at 10 o'clock. Will that be adequate, Mr Smouha?
MR SMOUHA: Sir, yes. I'll leave my learned friend 15, 20 minutes at the end of the day.
MR JUSTICE ROTH: Yes, and you'll have about five minutes at the beginning, just to answer those questions.
MS DEMETRIOU: Thank you very much.

MR JUSTICE ROTH: Very good, 10 o'clock tomorrow.

(4.52 pm)

(The hearing adjourned until 10.00 am
on Friday, 28 July 2023)

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