IN THE COMPETITION 1517/11/7/22

APPEAL TRIBUNAL

Salisbury Square House 8
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London EC4Y 8AP

Monday 24 March – Friday 4 April 2025

Before:

The Honourable Justice Michael Green
Ben Tidswell
Professor Michael Waterson

Merchant Interchange Fee Umbrella Proceedings

APPEARANCES

Matthew Cook KC, Sonia Tolaney KC & Owain Draper on behalf of Mastercard (Instructed by Jones Day and Freshfields LLP)

Daniel Jowell KC, Jessica Boyd KC, Isabel Buchanan, Ava Mayer & Aislinn Kelly-Lyth on behalf of Visa (Instructed by Linklaters LLP and Milbank LLP)

Kieron Beal KC, Philip Woolfe KC, Reuben Andrews, Flora Robertson & Oscar Schonfeld on behalf of the SSH Claimants

OPEN Thursday 3 April 2025

(10.07 am) Housekeeping

MR BEAL: The reason we are both standing, sir, is Mr Cook wants to object to something.

MR COOK: Sir, a bit of housekeeping. At 5.20 on Friday evening last week, the Merchant Claimants produced some new analysis from Dr Trento. That came in after the end of the evidence in Trial 2B and they seek to rely upon that in paragraph 194.1 of their written closings. So we anticipate exactly what I am going to say, that is just way, way too late.

THE CHAIRMAN: Yes.

MR COOK: We have not had a chance to test it, we have not had a chance to analyse it, we have not had a chance to put questions to Dr Trento on it, Ms Webster was to hold back the chance to answer in relation to it. G1.

Perhaps even more problematically, Dr Trento indicated in cross-examination that he had done this analysis previously. So it is not just that they had done something new. It appears that they did it and it has been sat on for several years, and as a result we get ambushed with it after the end of the evidence. Simply, it should be struck through.

THE CHAIRMAN: We saw that. I think the objection was

made known to us on Monday morning. We thought also that it was too late to go in. But what are you asking us to do, just to ignore it? You are not asking for a new set of closing submissions or amended set of closing submissions? I mean we are well able to just ignore that evidence.

MR COOK: Absolutely, that is the most sensible thing to do.

THE CHAIRMAN: Mr Beal, do you want to press for it?

MR BEAL: Yes, if I could just briefly set out the position. I am not inviting you to take it into account. What happened was Dr Trento was cross-examined on those points. He had, in the light of receiving the responsive reports, carried out some internal work to make sure that he was not barking up the wrong tree. That represents his internal workings. In the course of cross-examinations, he said, "Well I did check this as part of my duty as an expert to make sure I was not getting things wrong", and to which I think the point was put to him he had not produced that. He said, "No, I did not feel the need to." We took the view that seeing as he had mentioned it expressly in the course of cross-examination if the Tribunal wanted to check his homework, they could, but we are

not seeking to rely on it directly.

THE CHAIRMAN: It is not the way things work, really.

MR BEAL: Now, I accept that, I accept that. The only reason we produced it at all was because he had mentioned this and we thought if we did not at least put it forward that we might be criticised for him having not produced --

THE CHAIRMAN: We all know that you have put it forward now so --

MR BEAL: I have heard what you say about the weight you will put on it and I am not seeking to dissuade you from that course.

THE CHAIRMAN: We will leave it there, shall we? Thank you.

Submissions by MR BEAL

MR BEAL: So these are my closing submissions for Trial 2B. As with Trial 2A, this part of the case proceeds on the assumption that liability has been established in respect of each of the MIFs. None of the MIFs was lawfully set, as a result of the infringing aspects of the scheme rules, which subject to Trial 1 is the necessary premise for this trial.

Thirdly, that the unlawful level of the overcharge was the full extent of the MIF, since the

correct counterfactual to determine the overcharge is settlement at par and therefore zero MIFs, and that the unlawful overcharge has been paid by the acquirer to the issuing bank, which I also accept is very much the subject of this particular -- well, features in this -- it is a necessary assumption that the acquirer has paid the unlawful overcharge.

I mentioned that in opening Trial 2B at the beginning of last week and I thought it was uncontroversial, but in fact I see from Mastercard's written closing, paragraph 236, that they say that the overcharge does not involve any prima facie loss to the merchants. That is the submission that is made, I have quoted it.

THE CHAIRMAN: Can I just check I am not getting the transcript. Is there a problem we know about?

MR BEAL: So the submission that has been made at paragraph 236 of Mastercard's closing is that the overcharge does not involve any prima facie loss to the merchants. The Sainsbury's Supreme Court at 206, if we turn please to {AB-D/21/71}. At paragraph 206 on that page what they find is as follows:

"In our view the merchants are entitled to claim the overcharge on the MSC as the prima facie

measure of their loss."

So if it is being suggested that the overcharge does not involve any prima facie loss to the merchants, then that appears to be at odds with paragraph 206 of the Supreme Court. Here we say the unlawful overcharge on the MSC is the unlawful MIF that has been paid by the acquirer under the scheme rules.

At paragraph 251, just clearing away what is the necessary assumption for this trial, Mastercard denies that liability has been established merely by virtue of the Mastercard I decision for any MIFs other than the intra-EEA MIF, and it is of course absolutely right that liability on the other MIFs is very much the live issue in Trial 1 and we are awaiting judgment in that trial. But, with the greatest of respect, there is not much point having Trial 2 on an assumption of liability if this Tribunal is being asked to assume that actually some of the MIFs have not been found to be unlawful. That is, with respect, not a terribly sensible basis for proceeding with this trial. I do not think it is suggested that some MIFs may be unlawful and some may not be for the purposes of this trial either. We have to work out what would be the appropriate

acquirer pass-on on the assumption that each of the MIFs is unlawful. Otherwise, we could end up with a hole in the evidence and a hole in the findings as at Trial 3, when the various disparate pieces of work are pulled together.

Again, contrary to Mastercard's submissions at paragraph 253(2), Trial 1 did proceed on the basis that the MIF had never existed precisely because the Supreme Court had told us that the counterfactual was one in which there was a scheme -- an absence of a scheme rule setting a MIF, but instead we had settlement at par and the scheme rule involved a prohibition on ex-post pricing. That was the very counterfactual that lay behind the liability analysis at Trial 1 and indeed there was a great deal of some point in Mastercard's submissions, I will come to the reference a bit later. They say, "Well if we are right that we have to assume that MIFs never existed, then all sorts of investigations would have to be conducted as to what the market would look like without any MIFs for the four card payment systems in circumstances where Amex and UnionPay and others are -- well, UnionPay, I think was a four-party system, but Amex certainly, Diners Club were three-party systems. As Mr Tidswell and

Professor Waterson will remember, that was very much a live issue in liability 1. We had a great deal of submission and evidence on what would happen to the various parties to a card payment scheme in the event that the four-party schemes were not able to pass this unlawful overcharge over to the issuing banks and instead Amex was able to attract issuers on the basis of what they said was an implicit MIF. So it is not as if these issues have not been covered. They have, it is just we do not have, at the moment, the benefit of the Tribunal's answers to these questions.

THE CHAIRMAN: Just so I understand because obviously I was not involved in Trial 1.

MR BEAL: I appreciate, I am trying to bring you up to speed, sir.

THE CHAIRMAN: When you say you had to assume that the MIF was not being charged. Is that right?

MR BEAL: Yes.

THE CHAIRMAN: And that there was settlement at par. What does that mean?

MR BEAL: Settlement at par means that the amount that is paid by the issuing bank goes over to the acquiring bank without any deduction of the MIF. So if one imagines the legendary diagram that was produced for

Trial 1, you have the cardholder who pays for a pint of milk in Tesco, that card has been issued by the issuing bank. The issuing bank says to the card holder, "Thank you very much for using your debit card, we are going to charge you through your account", and the money gets transferred from the cardholder's account to the issuing bank for onward transfer. That onward transfer goes from issuing bank to acquiring bank as payment on behalf of the merchant, Tesco, who has accepted the debit card for the transaction. Before that money physically gets transferred from the issuing bank account to the acquiring bank account, they deduct the MIF because the scheme is directing both sides what to pay the other through the clearing and settlement process.

There was an evidential wrinkle and this becomes relevant to a submission I need to make in a moment because Mastercard have given unsubstantiated evidence about how the acquiring system works without any footnoted references to the underlying evidence. There was an evidential wrinkle in Trial 1 as to the extent that there appeared to be a situation in which some of the funds for some of the schemes in certain circumstances actually got directed via a bank account that was owned by the

scheme, and I remember Mastercard at some point during Trial 1 produced an explanation of clearing and settlement for the benefit of the Tribunal, which sought to explain precisely how it worked. But without having been directed to the references to the underlying evidence, I have not had time available to me since finishing my closing submissions for Trial 2A to bottom out exactly where the references are in the Trial 1 material. But my strong recollection is that for the majority of the transactions in question, what the scheme was doing was directing a bank account to pay another bank account through the clearing system and those bank accounts had to be maintained from memory with a clearing bank, so the issuing bank had its own bank account with a clearing bank, typically an account within, if it was one of the big UK banks, it had its own clearing account with the Bank of England and it would then be directed by the scheme what the amount to be transferred to the acquirer was for a batch of transactions.

THE CHAIRMAN: So a five-party scheme?

MR BEAL: Well yes, that was one of the insights that the learned president's diagram brought to bear, which is in fact there are a whole series of things going

on at the top, it is not simply a -- it is a house with a roof, I think is the best way of putting it.

THE CHAIRMAN: So settlement at par basically means the underlying transaction amount without any deduction of MIF?

MR BEAL: That's exactly right. The consequence of that is that the scheme is operated not on the basis of this latent transfer between two parties to the scheme and not by the scheme itself. The scheme is operated simply by having scheme fees and that the merchant acquirer negotiates for MSCs on the basis of whatever they have to pay the network for using the network and their acquirer margin. There is not the latent transfer of funds between the acquiring bank and the issuing bank.

THE CHAIRMAN: Thank you.

MR BEAL: That is settlement at par.

In terms of prohibition on ex-post pricing, why is that relevant? The concern was if you do not have that prohibition, then there would be an opportunity to take hostage any proffer of a credit card, you would not know what the price was going to be until such time as the issuing bank said, "Well actually, thank you very much, you are asking for this card to be used, here is the money we want for

the interchange fee." So you had to prohibit that, otherwise the scheme would collapse.

The short point is that is the counterfactual analysis for liability determined by the Supreme Court. You have got a separate counterfactual analysis for reasons I will come on to, dealing with what is the level of the overcharge. Ordinarily, in a competition case you work out what is the infringement in the market by saying, "Well, what would the market conditions have looked like but for the impugned activity?" Then there is an adjunct to that question, which is, is it right that the impugned anticompetitive activity has led to a different price being paid by the victim of that unlawful activity? To which the answer is, "Well, you need to look at what price would they have paid but for the infringing conduct", and that goes to determine the recoverable loss. That is where the but for calculation comes in. I will need to make submissions in a moment as to why that counterfactual analysis does not necessarily apply with full vigour at the stage of looking at pass-on.

Everyone is agreed here, I am stating the obvious, that IC+ contracts represent mechanical acquirer pass-on in full and we seek, respectfully,

a finding to that effect. I note here, simply in limine, that there is no suggestion that that analysis has to be subject to any counterfactual analysis where you look at what would the price have been but for the infringing conduct on an IC+ contract. So it is accepted, because of the way IC+ contracts work, the actual world analysis drives a conclusion that acquirer pass-on is in full. It is only, therefore, for standard contracts that the schemes are seeking to say actual world analysis of the pass-on of the overcharge has to give way somehow to a counterfactual analysis of what would the prices have been for MSCs but for the infringement that affects not directly the MSC, but indirectly via the charge of the unlawful MIF.

THE CHAIRMAN: Are you saying you do not apply a counterfactual analysis for IC++ contracts?

MR BEAL: I am saying we have not and I am saying that schemes have not insisted that we should.

THE CHAIRMAN: But if one does?

MR BEAL: If one were to and if, for example, on an IC+ contract there was a mechanical deduction of the MIF but the MSC remained at the same level because the acquirer was brazen enough to say, "Okay, the MIF has been reduced, this is an IC+ contract, but I am

now going to increase my acquirer margin because I have headroom", then on a purely counterfactual analysis then that would produce a conclusion that the MSC had stayed at the same level and, therefore, there was no recoverable loss, on one view. If you are simply looking at what would the MSCs have been in the counterfactual but for the infringement, it might be suggested on evidence that the acquirers have enough market power that they will simply swallow it themselves and not pass it on. How tenable that proposition would be is obviously debatable but the point is they have not argued that it is an evidential exercise that needs to be conducted.

THE CHAIRMAN: You have to assume that there is still an IC+ contract in place?

MR BEAL: You do.

THE CHAIRMAN: So they are only charging the fees without the MIF.

MR BEAL: But the but for analysis would be, would they increase the acquirer margin because in fact the overall MSC figure would remain the same and they would be allowed to do so? Now obviously that is not an evidential point they have advanced because they probably see the merits of it, but my point is

they have not sought to introduce a counterfactual analysis to back up the IC+ position. It may not be anything more than a forensic point.

THE CHAIRMAN: As long a everyone is agreed, it is 100%.

MR BEAL: Visa and the claimants are agreed that acquirer pass-on for merchants with card turnover exceeding 50 million, card turnover exceeding 50 million or turnover full stop exceeding 100 million as 100%. But we disagree on whether or not it is appropriate to have that split at that level based on either card turnover or full turnover. But either way we say that level of acquirer pass-on would apply to opt-in claimants and those of the SSH merchant class who fit the bill.

Visa in their closing have introduced for the first time a suggestion that somehow there has to be proof of turnover by opt-in claimants, but you will recall that the definition of the class is those with over £100 million worth of turnover and Mr Holt's evidence, and I thought it was Visa's position, was that a £100 million turnover would equate with a £50 million card turnover and, therefore, the two ways of measuring who was in that particular class of larger claimants would be the same.

Formally, I should say, the opt-in claimant class is only those with £100 million turnover and above regardless of the card turnover. If Visa no longer wants to accept that the proxy used by its witness was an appropriate one, then no doubt they will tell you why they have resiled from that position.

Mastercard, for its part, accepts 100% APO for opt-in claimants, only if they are on IC+ contracts. So Mastercard is not supporting the turnover division.

We respectfully suggest there is no substantiated basis before you to distinguish between smaller and larger merchants. There is no suggestion of a market segmentation and the arguably arbitrary line of 50 million pounds card turnover is an inheritance from the PSR, reflecting problems we think they had securing sufficient data for larger merchants. The PSR appears to have randomised their merchant data requests to get the 2000 merchants that they were then analysing and if that is right, they appear to have ended up with a very small selection of larger merchants. You will recall the evidence was that the six largest merchants were entirely excluded from the analysis representing, I

think, 14% of turnover, but I will come to the figure when I look at the PSR report. But of course the random distribution of merchants by number is going to favour smaller merchants because they represent by number the majority of merchants undertaking card transactions. But by transaction value it is the larger merchants that represent 70 to 80% of the transaction pot.

THE CHAIRMAN: And they are also more likely to be on IC++ contracts?

MR BEAL: They are, they are. So there are some difficulties with the randomisation process from the PSR, which means that it is more likely to be looking at smaller merchants than larger merchants and when I come on to look at the PSR's analysis of its own data, they recognise that they do not have enough to go on with a group of larger merchants in the £50 million to £100 million turnover range and so they do not do any analysis for that group.

We say complete acquirer pass-on in this case both for blended contracts and for IC+ matches, commercial expectations and dare we say common sense, it is consistent with the qualitative evidence from the merchants. Even when acquirers do not have IC+ pricing with their merchants, they use

typically blended rates but which are tiered to reflect different card types. You will recall that I took you to the invoice from a particular acquirer to particular merchants, which, even when they were simply on a transaction times percentage basis, they were broken out into premium cards, business cards and so on.

This approach is redolent of the heavy hand of the MIF influencing the MSC charges that actually get paid by the merchant at the end of the day. It is also, we say, consistent with the acquirers' own evidence in public financial statements and fuller acquirer pass-on marches hand in hand with economic theory. We have nonetheless ended up with Visa's split on the turnover threshold, so that anyone below that turnover threshold does not get 100% APO on their case, they get 75%. Ms Webster pitched a range from 60 to 80% for blended contracts in general, she made it clear she was not advancing a specific figure, but Mastercard nonetheless select 63% for their percentage. I do not shy away from reiterating that the logical consequence of that is that a very substantial proportion of the MIFs that have been charged to merchants through the MSC would therefore have necessarily to be assumed to have

been swallowed or absorbed by the acquirers in the subsequent MSC passed on to merchants.

If one imagines, for example, consumer debit MIFs, which we think represent around 50% of the SSH Claimants' claim, I think Mr Holt's evidence at some point was that debit MIF for Visa represented about 70% of transaction value. That may not have been directly Mr Holt's evidence, it may have been a submission from my learned friend Mr Jowell, but either way it is a proportion, high proportion of the claim value as attributable to debit card MIFs. If we assume that a high proportion of the claim full stop is attributable to debit card consumer MIFs, then we are looking at 0.2%, up to 37% of that 0.2% figure having been not passed on and, therefore, necessarily absorbed or swallowed as a cost by acquirers. Given that that amounts to hundreds of millions of pounds, that would be, we say, a surprising conclusion to draw, not least from the public reports and financial statements that we have got from the acquirers themselves.

I mentioned in opening Mastercard does not shy away from that conclusion, it has said, "This is an important issue because hundreds of millions of pounds are at stake", and they say that because they

are hoping that the Tribunal will rule that acquirers have somehow absorbed this cost rather than passing it on and indeed have absorbed this cost rather than passing it on, not for the larger claimants, which necessarily drive the turnover, the higher turnover, of the acquirers, but for smaller merchants, seemingly on the basis that the margins for smaller merchants may be higher, that is the way it is put. Notwithstanding that smaller merchants make up a much lower value of transactions for acquirers that they are not going to be a significant part of the business.

Just on the margins point, the essential reasoning commercially is this: where you have transactions that are essentially largely automated, then you have substantial economies of scale from offering acquiring services. The more transactions you are able to process, the more money you will make and with decreasing marginal costs, because of the high costs of establishing a platform, but the low marginal costs of running a platform for payment services you end up with a position where driving transaction volumes is going to be the key to your commercial strategy. I will take you to some evidence to support this a bit later on.

If that is right the fact that you are charging low volume merchants a higher MSC makes sense because they are more expensive. You cannot get the volume, the throughput, in order to offer them the benefit of the economies of scale of the larger volume transaction trading. The evidence I will show you will be when Visa introduced the cross-border acquiring fee. Worldpay had a very public spat with Visa before the CMA, complaining about Visa's approach saying, "You have reduced the cross-border acquiring fee, you have not reduced the domestic fee. That produces an arbitrage risk for us from cross-border acquirers and our large merchants are at risk of migrating to other EU acquirers and we will lose money." Their concern was with the migration of the large merchants because they were the ones driving the volume of commerce.

That is foreshadowing to some extent. The trouble, we say, with the counterfactual thought experiment that the schemes urge upon you is that it risks producing seriously odd results. Visa's response to this, we say with respect, is euphemistic. What they say at paragraph 124.2 of their closing is that acquirers have not absorbed or

swallowed this loss or cost, rather:

"They have made a commercial decision to narrow their profit margin."

So rather than suffering a cost, they have taken a conscious commercial decision to narrow their profit margin.

The final preliminary observation is that Mastercard has said in a number of places that certain evidence was not challenged. I did try and forestall this particular submission being made by pointing out when cross-examining each witness, and indeed when starting my opening, that I was not going to be able to cover every point. I make the same point again. I cannot conceivably before lunch cover every point in the written closings. The fact that I have not covered them does not mean it is an acceptance.

THE CHAIRMAN: The usual weasel words.

MR BEAL: The usual weasel words is how Mr Justice Barling used to put it to me when I made the same point.

THE CHAIRMAN: You have covered a hell of a lot in your 100 pages of written closings.

MR BEAL: You are not short of material in the footnotes, for which I am eternally grateful to those who sit

behind me in the usual way as well.

I move on to more substantive points. Burden and standard of proof. This is well trodden ground. Two really simple points I think, well not simple, but it boils down to essentially two points, as I see it, between the parties. Firstly, the burden of proof is on Visa, we say, to show that the exemption criteria are met. So to the extent that they want to say that the exemption criteria operate to justify an otherwise unlawful restriction of competition, they have to meet the case law that deals with how that has to be proven. The answer is it has to be proven with cogent evidence and the burden is on them to do so. That is a distinct exercise from the assessment of loss.

Could we please look at two authorities briefly. First, authorities bundle {AB-C/9/27}. This is the Mastercard General Court decision, paragraph 196. Please can I invite you to read 196.

THE CHAIRMAN: Yes.

MR BEAL: The Supreme Court in Sainsbury's dealt with exemption separately from the question of compensatory loss and pass-on. Could we see initially, please, how they dealt with loss? This is {AB-D/21/74}. It is familiar territory again,

but could we look please at paragraphs 224 to 226. In fact, that starts a bit further on {AB-D/21/76}. We see:

"As the regime is based in the compensatory principle and envisages claims by direct and indirect purchasers in a chain of supply it is logical that the power to estimate the effects of passing-on applies equally when pass-on is used as a sword by a claimant or as a shield by a defendant."

At 225 we see the need for estimation and they make the observation that the MSC is in all probability not addressed as an individual cost item but would be bundled with other costs and used in annual budgets. They do not draw any conclusion from that about pass-on. But they then say:

"The extent to which a merchant utilised each of the four options" -- that is the one to four we are familiar with -- "has to be a matter of estimation. In accordance with the compensatory principle and the principle of proportionality the law does not require unreasonable precision."

So all of that is dealing with estimating loss and working out, you would apply the same principle of best estimate to the extent of pass-on to the extent of identifying the recoverable loss quantum.

THE CHAIRMAN: Which was the schemes were very much relying upon in Trial 2A.

MR BEAL: Yes, but consistency is an overrated virtue. In paragraph 226 we see:

"In conclusion, we do not interpret the Court of Appeal as having held that the defendants had to prove the exact amount of the loss mitigated. But in so far as the Court of Appeal has required a greater degree of precision it erred."

So the error of the Court of Appeal was not in applying the broad axe principle both to issues of recoverable loss quantum, but also then to the separate issue of the extent of pass-on. That is not actually dealing with what the test for pass-on is. We see that the test is: has the loss been passed on in one of the two categories? Out of the four ways a merchant might respond, it is only categories 3 and 4 that actually constitute pass-on.

THE CHAIRMAN: They are saying effectively that you apply a broad axe to both.

MR BEAL: Yes, which we accept. If we could then see in contrast that is where they deal with quantum -- to the extent they deal directly with pass-on that is where they make observations about it. Then at 232, we see and we have moved on here to the different

issue, which is essentially {AB-D/21/78} part, I think, of the application for remission by one of the other parties. The point I am drawing is this:

"As regards the evidential standard to be applied, this court has confirmed that as a matter of EU law, cogent empirical evidence is required to show the claim for exemption is made out. In the light of this, the Court of Appeal's conclusions in the AAM proceedings ... cannot be faulted. AAM should have succeeded on its claim under article 101(1). So far as concerns Mastercard's defence based on article 101(3) (the exemption issue) there had been a full trial on this issue and on the issue adduced at trial the judge should have dismissed it, as the Court of Appeal rightly held."

This is dealing with the 101(3) point and in contrast to the broad axe principle what they are saying is cogent empirical evidence is required to show that the claim for exemption is made out. If we could then, please, go back earlier in the judgment because it is dealing with an aspect of the cross-appeal and the plea for remittal. If we go back please to page 44 {AB-D/21/44}, we can see where, in a prior section of the judgment, the Supreme Court has dealt specifically with exemption.

Please could I invite you read paragraphs 128 and 129. If we could then turn please to page 49 {AB-D/21/49}, paragraph 137. There are some observations about the merchant indifference test which is getting into the substance of the fourfold criteria for exemption. We do not need to worry about that. It is the last sentence:

"In order to obtain exemption they" -- that is the defendants -- "still have to back up any reliance on the MIT as a benchmark with robust analysis and cogent empirical evidence."

At 139 a bit further on we see a reference to those four conditions, and the fact that it is for the defendants to satisfy those conditions. Of course, because this is an exemption from what otherwise would be unlawful activity the court's traditional case law would be to require a degree of rigour to be brought to bear in satisfying the court that those exemption criteria are met. It is a test the defendants failed to meet in the Sainsbury's case.

MR TIDSWELL: In 129 the court is talking about benefits no doubt because that is what was at issue.

MR BEAL: It was one of the four criteria.

MR TIDSWELL: That is the point you are making about 137,

the merchant indifference test. It is that it does not just apply to the benefits? Because here we are talking about the evaluation of the harm, are we not?

MR BEAL: The merchant indifference test was geared towards what benefit you get from using a card which is effectively a saving over cash. So the Commission at the Mastercard decision stage had said that the merchant indifference test might justify a certain fee for a card transaction because it is cheaper to use a card than it is to use cash and therefore there is a benefit from it and let's see what that weighing of benefits is.

MR TIDSWELL: I may have misunderstood, but I thought that part of the Visa point was that, yes, this applies to benefits but when it comes to quantifying the harm it is not as stringent a test. Maybe I have misunderstood that, but there is nothing here that tells us that point precisely.

MR BEAL: No, what this tells you is that in order to meet each of the four conditions, you have to produce cogent and robust evidence because it is in the nature of invoking the fourfold criteria for exemption that you are seeking to justify unlawful conduct.

MR TIDSWELL: So you are saying the observations about the standard of proof apply to all four of the conditions.

MR BEAL: Yes.

MR TIDSWELL: Not just to benefits.

MR BEAL: There is no finding that somehow you have to do a proper job on one, two and four but you can take a more relaxed approach to three. There is no authority for that proposition. My understanding of Visa's case is this is all about estimating quantum and therefore you can apply the quantum approach. My point is analytically that is simply wrong as a matter of law because what you are seeking to do here is provide full fact justification for what is otherwise unlawful conduct. You do have to bring rigour to bear and having the broad axe is the antithesis of rigour. It is understandable from the quantum sense because you are trying to do the best with what you have got.

THE CHAIRMAN: In practical terms for our purposes we are being invited to assess an economy-wide pass-on for APO, yes? That is what Visa are asking us to do for the purposes of Trial 3.

MR BEAL: They have asked you to do that. It is not actually an issue in the merchants' claims because

all the merchants' claims is are concerned about is the merchant rate. It was an issue in the Merricks claim because Mr Merricks had to prove on an economy-wide basis what the recoverable loss was, but Mr Merricks is no longer with us -- well, he is with us, but he is spending his money somewhere else. It is not an issue in our trial, that is my primary submission.

THE CHAIRMAN: It is not an issue in our trial, but what do you say it actually means if we are being invited by Visa to find an economy-wide pass-on rate?

MR BEAL: What I hoped was the slightly more conciliatory approach that I took in relation to 2A was to suggest that you make findings and piecing those together into a final figure for economy wide rates to the extent it feeds into exemption, those factual assessments can be fed in with any further assessment at Trial 3. You will appreciate that we have concentrated on the sectors where we have claimants. Visa says every one of their sectors has a claimant but not all of those sectors are covered by evidence that we have been looking at.

It is really when it comes to an economy-wide weighting that we say that at the moment we simply do not have the visibility of how Mr Holt has pieced

together the appropriate weighting for the 14 sectors. We do not have any visibility of how Visa puts together those 14 sectors, save on some internal basis. Whilst in response to my submissions in Trial 2A, Mr Jowell in reply referred me to a data pack which has a list of myriad claimants and one of them, Grand Vision, is identified as being in the health sector. Grand Vision is the opticians. That may well be right. He explained that Mr Holt had got something wrong in an earlier part of the report and in fact the pie chart had the right version. My point is I have no visibility really of the underlying way the weighting has been done by Visa because it is all done in a black box within Visa.

THE CHAIRMAN: You are saying that means they have not produced the cogent evidence that they are required to if they want an economy-wide pass-on rate?

MR BEAL: I do not even think they have tried to produce the cogent evidence because they do not accept that they have a burden of proving anything in this trial. So whilst they are dealing with quantum issues, and I have no objection to them dealing with quantum issues, what I am suggesting is a satisfactory way of dealing with this is to say that

it does not actually matter because we are making findings anyway. You can plug those findings into Trial 3 where the burden will be on the right basis and do with it what you like. But inviting you to determine at this stage, "Computer says 94%" is, with respect, going to be quite difficult because you will not have had the benefit of all of the other evidence about how that has been calculated, what the weighting factors are and other evidence that may well need to be given as to the other elements of the exemption criteria.

What we do not want, with respect, is arguments about what should have been decided at this trial in Trial 3 and accusations of res judicata and so on. That would be unfortunate.

MR TIDSWELL: It is a little bit different with acquirer pass-on, though, is it not, because there is no question of different sectors, it is just one number, is it not?

MR BEAL: I accept that point.

MR TIDSWELL: In a way, one way or another we are either going to end up with a rate which we say applies to all blended contract merchants, and then we have the IC++ rate, and there may be some arguments about how the weighting works. Those, perhaps, are things

that could be left for Trial 3.

MR BEAL: I think that is a good point and you do have visibility of the top five acquirers and the PSR data and the top three acquirers effectively and the merchant data. I can see the force in that point. My concern really is trying to plug in a final figure when we have not -- (a) it is not a directed issue for this trial, the question of the exemption criteria, but I accept that it is highly unlikely at Trial 3 if you found that the acquirer pass-on rate is X, that either party would sensibly be able to contend that actually that was a mistake or wrong or needs to be changed for the simple reason, sir, you have just given, which is you have clearly got enough to deal with the acquirer pass-on issue at the economy-wide level. I hope that is helpful and not unhelpful.

In terms of the test for acquirer pass-on, we traversed a lot of this ground in Trial 2A. My short point is I am not pitching for a different test for acquirer pass-on as for merchant pass-on. The reality here is that the acquirers have necessarily, we say, established on the basis of the assumptions of this trial that they have paid an unlawful overcharge through the scheme rules. That

unlawful overcharge has been determined on the counterfactual basis set by the Supreme Court and the conclusion is that the level of the unlawful overcharge is the full extent of the MIF. But the restriction of competition is not the particular level of the MIF, it is setting any MIF full stop. So it is a systemic infringement of competition essentially because there is an agreement between the parties to the schemes that the acquiring bank have to pay any amount to the issuing bank because the proper counterfactual is that that would not happen, there would be settlement at par and a restriction on ex-post pricing, such that the level of the unlawful overcharge is the full extent of whatever MIF is produced by the scheme.

What then happens is we need to show at this stage that the acquirer has, in fact, passed on that unlawful overcharge either in full or to a given percentage extent on to us through the merchant service charge.

THE CHAIRMAN: You have to assume that the acquirer has suffered loss because it has paid an unlawful MIF.

MR BEAL: Yes.

THE CHAIRMAN: And it has a claim in theory in that respect.

MR BEAL: Yes, that's correct.
THE CHAIRMAN: Even though it may have been a party to --
MR BEAL: That is the ex turpi causa issue which in fact has been dealt with in Courage v Crehan.
THE CHAIRMAN: We are not talking about pass-on, we are talking about passing on of a loss.
MR BEAL: Yes, I am saying the same analytical process. I have to invite this Tribunal to consider: has the acquirer passed on its loss to us, have we then passed it on to the merchant as in Trial 2A? But I am not inviting this Tribunal to adopt anything other than the direct and proximate cause test for factual causation in order to prove that as a distinctive act of mitigation the acquirer has passed on that loss to us, and that is one of empirical fact. So therefore, we say counterfactual analysis, whilst it might help inform that factual question, ultimately it has no determinative role to play in working out what the answer is. On liability issues, as I have made clear, the counterfactual is necessary because you need to show what the competitive nature of the market would have looked like without the restriction.

Similarly on overcharge issues, which was the issue in Trucks, you need to work out what the

overcharge would have been, sorry what the prices would have been paid but for the infringement. Therefore you need to imagine a world where the infringement was not there, how much lower would the prices have been. That is necessary to establish the unlawful overcharge. None of that needs to happen here because the unlawful overcharge is the full amount of the MIF. We respectfully suggest that the counterfactual analysis has a much less obvious role, where one is dealing with a factual question of has a particular person who has suffered loss nonetheless mitigated that loss by avoiding it through pass-on to a different person. I do not propose to take you back through it because you are now wearily familiar with the Trucks findings, but for your note, paragraph 230 of the CAT Trucks decision that is {AB-D/37/99}, endorsed by the Court of Appeal at paragraphs 154-156, that is authorities bundle {AB-D/43/53}, show that the factual question is the one that has to be answered. One way of looking at that is to say, well, "Would you have been paying a different MSC or a different price for a truck in the counterfactual world?" Actually, the question legally that needs to be answered is: has a particular direct purchaser here passed on the

loss to an indirect purchaser?

Visa at paragraph 10 of their closing submissions simply submit that counterfactual is required, but they refer back to their earlier submissions, which are again simply an assertion and do not engage directly with Trucks, in particular where this Tribunal in Trucks had said the counterfactual analysis is one way of helping answer the factual question, which is: has there been a pass-on of avoided loss to a different party?

In that sense, I suppose, Visa's approach is at least consistent with their stance in Trial 2A, but so is ours and we say that here it is a factual enquiry is the test that has been set by the case law and confirmed by the Court of Appeal. I should add there was an application for permission to appeal against the Court of Appeal's decision in Trucks which the Supreme Court rejected. There is no suggestion that the Supreme Court somehow needs to decide this because it has already looked at this.

The reality is that applying the factual test, if, as we say we can, we can show that there has been pass-on, then the counterfactual analysis does not come into it. That is why I tried to raise as a

forensic point, but there is no counterfactual analysis for the IC+ which was greeted with a degree of incredulity. The reason for the incredulity is that you do not need the counterfactual analysis. It is obvious that the loss has been passed on because that is the mechanic of the contract.

Now, Mastercard say that their counterfactual analysis is mandated by the Commission guidelines, 2019, and they rely on paragraph 66. Can we turn that up, please, it is {RC-J1.4/19/18}. They cite this paragraph et seq and following in their written closing. But if we could turn please to page 18 of that document, 66 says:

"The purpose of building a counterfactual is to isolate the effect of the infringement from other factors affecting the price of the product or service, which would have affected such a price even if the infringement had not taken place."

It refers to, for example, price increases for a cartel. Indirect and direct purchasers should not be affected by price factors that are unrelated to the infringement. We then see in paragraph 68, however, which is not expressly cited by Mastercard:

"While these methods seek to construct how the market would have evolved absent the infringement,

direct evidence available to the parties and the court, for example, internal documents describing how the direct purchaser has passed on the initial overcharge in a specific situation. They also provide under applicable national legal rules important information for assessing damages in a specific case."

What does that mean? Slightly unpacking it, it means that if you can see from the contractual relationships between the parties, for example, that the loss that is recoverable in the hands of the direct purchaser has been passed on in fact to the indirect purchaser, then that is one way of dealing with the pass-on issue. I am asked to read footnote 63. Could I please invite you please to read footnote 63 because it is quite long and it has lots of complicated references to case law.

THE CHAIRMAN: What are we being asked to read?

MR BEAL: Mr Cook wants you to read footnote 63.

MR COOK: You obviously do not need to read all the references, just the cases that have decided it.

THE CHAIRMAN: I am aware of them anyway. What is that a footnote to? It is not 63.

MR BEAL: That is a footnote to a point in recital 66, which Mr Cook wanted you to read and he was

proposing to rely upon. It has got nothing to do with recital 68, which was the one I took you to, but Mr Cook is conscious, no doubt, his reply being curtailed by having missed his time allocation.

THE CHAIRMAN: I just wonder 66 was not talking about pass-on, was it?

MR BEAL: It is not, no.

THE CHAIRMAN: It is talking about the infringement?

MR BEAL: It is talking about dealing with the infringement and looking at the effect on prices as a result of the infringement having taken place. True it is that will cover things like what is the level of -- is there an infringement in the first place and what is the level of the overcharge?

THE CHAIRMAN: The direct purchase?

MR BEAL: And then allocating between direct and indirect purchases will necessarily be a matter of pass-on. Even in this situation, we are looking at recital 68, the fact that you can work out how the parties have dealt with the prices as between them by looking at their internal documents describing how the direct purchaser has passed on the initial overcharge in a specific situation. So even if the counterfactual analysis might be assisted by a counterfactual analysis, in fact, the Commission is

saying in terms you can also deal with this by looking at how the direct purchaser has passed on the initial overcharge in a specific situation.

MR TIDSWELL: Is this an argument more about what use the counterfactual is rather than whether you have one. There is, just as a matter of obvious logic, there is a counterfactual, isn't there, which is the position that would prevail if there was no MIF.

MR BEAL: I am not suggesting that we should exclude from our minds entirely what the counterfactual would show you. My submission is the counterfactual in this situation is not determinative because the test that has been set by the Court of Appeal is a factual one. We are looking at the question of the avoided loss as a species of mitigation. The issue of counterfactual may be informative, may not on that issue, but it is certainly not determinative. Whereas the schemes are saying it is determinative. I am saying where is the evidence in the case law that that should be the approach you follow?

MR TIDSWELL: It only matters, does it not, because that is the way they have put the counterfactual. This is increases and decreases, is it not, is this what this is all about?

MR BEAL: The way this crunches out is that I am making

the obvious point that the acquirers have passed on, in fact, the unlawful overcharge to us because we have paid the MSCs and the MSCs either directly or necessarily sufficiently directly reflect the MIF. The schemes are saying, "No no, no, that is not what you look at. We are dealing with a price decrease because you have to assume that MSC levels no longer include the MIF but they did previously." So we are looking at a drop in the level of the MSC price in theory. Would the benefit of that price reduction have been passed on in the hypothetical situation in the counterfactual world? So they say, therefore, you have to look at the empirical evidence relating to price decreases and we say, "No, actually, because you cannot posit a lawful level of the MIF at any stage and certainly for practical purposes at any stage post-2007, when the European Commission decision says that scheme rules setting MIF are unlawful."

MR TIDSWELL: Is there not a distinction between the counterfactual, which is the position that we would be in if there was no MIF, and as set out in 67 and 68, the methods by which you identify what the position in the counterfactual would be? That is when you get into the argument about whether an

increase or a decrease is a helpful way of looking at it, when you can argue that both of those, both ways, you can argue with equal force that an increase is as helpful a way as working out whether somebody is going to pass something on or not.

MR BEAL: The difficulty, as we see it, with a counterfactual looking at a decrease is it does not reflect the fact that the MIF has in fact been charged in the actual world. So you are never really in a position where -- the MIF has always been charged. That is the problem.

MR TIDSWELL: Yes, but if you are -- the question you then want to ask yourself is, "Well, how do I find out how much acquirers pass on?" And then you adopt some tests to see what the tendency of acquirers is to pass things on. One way you can do that is to show what happens if, particularly if you want to look at some natural experiments and events, you then take what you can from those decreases. But that is all just part of the evidential picture that goes to an overall assessment of how much we think they did actually pass on. Is that not a sort of a more authentic way of looking at it?

MR BEAL: I think that is the highest, yes. So the hypothetical reaction of an acquirer to a decrease

in the MIF would be something that this Tribunal can look at, take it into account, form an evaluative judgment on. I think probably my submission is that the hypothetical response to an increase is going to be more meaningful conceptually, because what we are dealing with here is the imposition of an unlawful overcharge and that unlawful overcharge having been passed on in fact to my client. Therefore, the conceptual way of looking at a MIF increase and how it would be dealt with better suits that paradigm. I am not saying that you could not conceivably take into account the counterfactual posits a decrease, of course you could. Where it matters is if you have empirical evidence that suggests price decreases are passed on with less vigour than price increases.

MR TIDSWELL: Yes but neither of those analyses are the counterfactual for the purposes of the exercise, there may be counterfactual analyses, in the sense that they obviously are what happens in a different world, but they are not the counterfactual analysis. The counterfactual analysis is just simply the assumption that there is no MIF.

MR BEAL: Yes.

MR TIDSWELL: You are trying to work out how you quantify

the difference between the two.

MR BEAL: Yes, framed that way, with which I respectfully agree, the question is: imagine the world without a MIF, what would MSCs have looked like? That would be the pure counterfactual. It is only really, I think, because Mastercard in particular, less so -- Visa does not subscribe to this principle. Mastercard wants you to envisage a situation where there is a cliff edge day one of any particular claim, depending on the point at which the claimant sets it, so for some of the claimants that would be four years ago, for other claimants it is 2011. But imagine in the counterfactual, on the day that the claim form is issued the MIF suddenly drops from 0.5% to zero, would the acquirer at day claim form plus 2 have passed on the benefit of that reduction to the acquirer? We say if you go down that route then you end up with a hypothetical thought experiment that does not reflect reality.

THE CHAIRMAN: It is not what the experts were testing. That is what I find confusing about this counterfactual analysis. It is not looking, obviously, it is a counterfactual so it is not looking at the real world, but it is not what the experts were asked to do either, is it?

MR BEAL: No.
THE CHAIRMAN: They were looking at changes, both increases and decreases or similar costs or whatever, and asked to come up with a pass-on rate.
MR BEAL: They were trying to assist in the determination of how much of the unlawful overcharge has been passed on to merchants through the MSC. That is what they were trying to do.
THE CHAIRMAN: And they can only do that by observing increases or decreases?
MR BEAL: Correlation between changes in the one variable on the other, but the dependent variable is the MSC, the variable of interest is the MIF.
THE CHAIRMAN: But the counterfactual assumes that we are only interested in decreases and a dramatic decrease.
MR BEAL: That is the counterfactual urged upon you by the schemes. I think Mr Tidswell's point is that you can have different counterfactuals that you evaluate and consider in different ways, with which I have not, with respect, demurred. But it is important to identify the right counterfactual and that is what I am coming on to next. I think it is trite law, I hope it is trite law, that the counterfactual cannot include an unlawful situation.

Could we look, please, at the Court of Appeal decision in Dune. This is authorities bundle {AB-D/35.2/18}, paragraph 39. It is the judgment of Newey LJ. What his Lordship identifies four or five lines down is:

"Plainly, a counterfactual that would itself breach competition law could not be an appropriate one. Subject to that, however, a counterfactual should reflect what would be likely to have happened if the measures at issue had not existed."

Pausing there, the measures at issue here are the scheme rule requiring the deduction of the MIF in the hands of the issuer at the time that the funds are remitted to the acquirer. It is not a MIF specific analysis.

Now, Visa at paragraph 11 of its closing submissions say it is only the measures at issue which are removed in the counterfactual. If we look down please at paragraph 41, that is another part of this decision that they rely upon. His Lordship there said:

"I accept that, for the reasons summarised in the last two paragraphs, it is at least seriously arguable that, with the advent of the IFR, the UIFM and bilaterals counterfactual became the relevant

counterfactuals."

So what this is looking at is the liability question. The Dune claimants had applied for summary judgment. They had said, "This is all very straightforward because the counterfactual is settlement at par with zero, with a prohibition on ex-post pricing." That submission was accepted in part for the intra-EEA MIFs, i.e. the ones that are subject to the binding decision of the Court of Justice in Mastercard. The Schemes would then say, "Ah, but for every other MIF there are different counterfactuals which might establish a different position on the market analysis for the purposes of establishing the infringement." So this was looking at liability and I can make that good by having a look, please, at page 11, at the way that the case had been put. At paragraph 21, one sees:

"Visa and Mastercard's case is that the introduction of the IFR has changed the counterfactuals which should be used when determining, among other things, whether they are UK, Irish and intra-EEA MIFs were restrictive of competition."

Just pausing there, the Mastercard decision by virtue of its timing, the infringement decision

ended in 2007. Mastercard then removed the intra-EEA MIF until I think March, April, May, June, July, sometime in 2009, so there was an 18 month period or so, from December to about that time when there was no intra-EEA MIF at all, which is why I am positing 2007 as being the furthest point you can go back, if one needs to find a fixed point of time for the counterfactual analysis, which I say you do not.

Being that as it may, what is being said here is that the IFR has essentially imposed a cap on the MIFs that can be charged. That removes the need for the scheme to collapse. You can then have a scheme of negotiation subject to the cap and that changes the counterfactual analysis and whether there is a restriction in the market. All of that is subject to intense debate and scrutiny in Trial 1 but it is dealing with liability. That is the point.

What you cannot have, in our respectful submission, is a counterfactual in which, if it is right that the counterfactual is assumed for our purposes assumes liability and therefore assumes a counterfactual on liability of no MIF, no scheme rule directing a MIF and a prohibition on ex, i.e. a settlement at par and a prohibition on ex-post pricing. What you cannot do is say that somehow

that very rule is reinstated for certain MIFS but not for others. That is the submission that Mastercard is in practice advancing to this Tribunal and I say I am afraid that is contrary to the authority in Dune, because they are inviting you to assume that the impugned scheme rule is back in place, but for some MIFs rather than others. As I think has become clear in my answers to the bench's questions, this has real bite here because if one focuses solely on the counterfactual that posits a substantial reduction in the MIF at the start of the claim value, and you cannot look therefore at any other aspect, then the Schemes are inviting this Tribunal not to consider the evidence in the real world of reactions of acquirers to price increases in the MIF because they would say that does not fall within the scope of the counterfactual. I should emphasise this is not necessarily Visa's position, but this is very much Mastercard's position, I am having to deal with both and there are nuances between the cases advanced against me.

Of course, Mr Holt acknowledges complete pass-on for price increases, albeit he does not come out waving a flag saying it, but that is the consequence of his evidence. You, sir, the learned

chairman, picked up on this in Mr Holt's evidence when he was appearing to equivocate during cross-examination and you said to him, "I thought your evidence was that price increases gave rise to full pass-on", and he accepted. From recollection he accepted that the evidence suggested that that was the case, that was paragraph 346, I think it was, of Holt 13 and then reiterated at paragraph 408, or something like that, in Holt 14. All of the references are in either our opening or our closing.

This also feeds into a separate point as to which particular events should be the concentration of the focus. So Ms Webster has only relied on PSR data for her final conclusions. She has sufficient concerns about the acquirer data that even though she conducted some analysis of them she is not using them to put forward any percentage. So to the extent that Mastercard in its written closing seeks to shoehorn that evidence in, it cannot have it both ways. Either the acquirer data is as Mr Cook would say, "wholly unreliable, not worthy of being used at all", at which point Ms Webster's data analysis of the acquirer data presumably has to be put in the recycling bin under the desk, or they say the acquirer data can be used at which point Ms Webster

has not actually set her stall by reference to analysis of that data.

THE CHAIRMAN: Does she analyse any increases?

MR BEAL: No. She is simply PSR data, IFR event, let's see what the PSR did and she then reruns her own analysis of the PSR data over a four-year period which covers two separate sampling processes and comes up with a result. So it is decrease only, that is the only analysis. It is a four year period and it is subject to confounding factors.

THE CHAIRMAN: That is at least consistent with Mastercard's position.

MR BEAL: Yes. I am not accusing them of internal inconsistency, just inconsistency with authority.

Mr Holt does look at price increases and price decreases and you will have seen, I am not proposing to get into the weeds, I do not have enough time to do so, but you will see from his tables, table 7.1, table 8.1, you will see that his preponderance of estimates are decreases. One of his increases is zero%, which, as I understand it, he has accepted to be unreliable and had been greyed out in Visa's opening skeleton, as presumably not being something that carried any weight. Unfortunately, with Mr Holt's weighting we do not have any public

statement of what weight he did put into place. It is apparent that if you do a simple average of averages approach that you do not get to the 75% figure that he commends to the Tribunal. So there has been what he describes as an internal exercise of judgment on his part, but unfortunately it has not been committed to writing and no explanation has been given to it. The average of averages point is the way that Mastercard have seized upon Mr Holt's work, certainly for the standard rate analysis, but that of course does not take into account Mr Holt's internal weighting of the different evidence.

The other way that this plays in the counterfactual, is Mastercard at paragraph 257 of their submissions suggest that we cannot show when the benefit of any MIF reduction would have been passed on to us by the acquirer. So what they say is, "Oh well, it is the tipping point from Trucks", they say, "You have said in Trial 2A" -- which we have -- "that it is incumbent upon somebody sharing pass-on to not just say pass-on in the abstract over a 13-year period, but actually to say when the tipping point would have come, when would the loss have been avoided by being transferred, as a matter of principle." That is the way we have put it. As

I say, it is the point on what is the tipping point where the accumulated costs suddenly get passed on downstream to a customer. That is then used against us by my learned friends from Mastercard. They say, "Ah, well you cannot show when you would have received the benefit of any MIF reduction." Of course we never did receive the benefit of a MIF reduction in the real world because we carried on paying the 0.2% on debit cards from day one, and the evidence is that consistently that is roughly the rate for debit card payments throughout. So it is a rather odd counterfactual which requires us to show when we would have received something that we never received. That really proves our point. The MIF rate was here set by the schemes. They have the data and they know by reference to transactions submitted through the respective networks when those transactions took place. So when a merchant acquirer has a series of shops, the shops all submit end of day batch files. This is all based on -- when I was making these submissions in Trial 1, I was relying on a decision of the Court of Justice in a case called Bookit which was a VAT case but they set out the process by which merchant acquirers were involved with the Odeon Cinema and a payment company

called Bookit, in dealing with card payments at the Odeon Cinemas. So what I am telling you now, there is an evidential basis for it, it was dealt with in Trial 1, so I hope I am not falling foul of what I am about to accuse Mr Cook of, of making unsubstantiated factual assertions about how things work without pointing in the direction of where the answer is. But merchant acquirers receive batch files from merchants, they submit them to the scheme. The scheme then carries out the clearing and settlement process and the outcome of that is that an issuing bank is told how much to pay a certain acquiring bank minus the MIF. That is the instruction via the scheme and that is how money changes hands.

What that necessarily means is for every transaction that any given acquirer has processed through the scheme, the scheme has a record of, because those electronic transfers of the files to enable the transfer to take place have been received by the network. So when they complain, and they do quite vigorously, "Well we do not know what these acquirers were doing", of course they do, because those acquirers in order to pay my clients, the merchants, the money minus the MSC, have had to go

through the network, the network has received the instructions through the batch files and the network has then given instructions for the different participants in the network to pay and receive sums of money. So there is a missing gap here. It is right that there is no heavy evidential burden on the Schemes because the burden is on us both legally and evidentially, but we do say it is a bit rich for the Schemes to complain quite so vociferously about internal data held by acquirers that has been available since December 2024 in circumstances where they have taken no steps to check their own records and their own network systems to see what the position was. Nor have they seemingly approached the acquirers with whom they have a very close relationship to get to the bottom of this, save through the joint expert process, and if they did not like the answers that were coming back from any of the acquirers then they could have taken it further with those acquirers. It has taken an awfully long time. I should also say by the way there was a process for dealing with merchant data where it was all centralised via -- Visa was given the task of liaising with the acquirers, as one remembers from the CMC proceedings where this has

been a running issue. Visa, as I understand it, wanted any data from the acquirers to be centralised in the hands of AlixPartners and there has undoubtedly been some tension in the relationship between AlixPartners and the merchant acquirers because one of the merchant acquirers has incurred very substantial legal fees in dealing with that relationship because they have submitted a bill for their legal fees in dealing with this and we are being invited to obviously contribute to that bill, as I understand it. I will be corrected if I am wrong.

To answer Mastercard's jibe, the point in time at which we pay a MIF overcharge via the MSC is the point at which we pay the MSC to the acquirer. That is the point at which we suffered the loss.

THE CHAIRMAN: I am getting confused as to what the relevance of that is.

MR BEAL: Well, Mastercard's closing submission says, "You cannot show when you suffered the avoided loss by the amount being passed on to you." But in order to try and make that point, they put it through the prism of a counterfactual analysis and what they say instead of saying, "When did you suffer the loss?" They say, "When can you show that you took the

benefit of a MIF reduction?"

MR TIDSWELL: So this is the short run or long run point, is it?

MR BEAL: This is the counterfactual point. This is the counterfactual point that they are trying to use to have a poke at us as to us not having established when we suffered a reduction in the MIF. My point is, how can we show what we suffered a reduction in the MIF when we never did.

MR TIDSWELL: But is the point being put in the context of the timeframe in which it might take for the pass-on to occur?

MR BEAL: No, I think the point is being put against us simply on the basis that we have complained about when it comes to MPO, we say that they have not been able to show when a pass-on of the MIF to the merchant would have taken place through the accumulation of various overhead costs in the long-term. So it factors into the long-term analysis in that sense. Obviously, if they are right that there is a short-term profit-maximising decision by a merchant to pass on the MIF through that mechanism, that short-term mechanism, then this point does not hold good. It is only when we come on to look at the implicit channels that we say, if

you are using an implicit channel, when do you say we pass on that loss to the customer, so that the mitigation criteria is met? So the long-term comes into it to that extent.

MR TIDSWELL: With acquirers, I think all the experts agree what happened relatively quickly, whatever happens happens quickly, albeit that there may be some delay because of the way that blended contracts are structured and so on.

MR BEAL: Yes, there is an issue that has come up about three-month, six-month, 12-month analysis of some of Dr Trento's work, and it is said you should have used moving averages, you have not used moving averages, you used moving averages for the different analysis of a longer period over which merchant pass-on was being suggested to take place. He has explained all that. When you have an obvious event and it is something like the sudden imposition of a post-Brexit interchange fee that is much higher than it was pre-Brexit or an increase of a commercial rate that is distinctive and you can identify it, then the need to have that time analysis does not really follow, so you can simply conduct regression analysis of the event and it is pretty clear that there is a jump in the figures. That is all you --

to that extent, it becomes obvious that is the event.

When you have a general analysis, then that sort of moving average approach is more appropriate and that is why it was used for Trial 2A and not Trial 2B, because at Trial 2A there was no obvious event. We were only in a general analysis, there was no event studied because of the noise to signal ratio.

MR TIDSWELL: In the transcript it records the paragraph in Mastercard's closing, the reference you gave us is 25 but I think it should be 250?

MR BEAL: 257.

MR TIDSWELL: That is helpful, thank you.

MR BEAL: Can I come on please to deal with the approach to CICC claims and then perhaps that would be a convenient moment.

THE CHAIRMAN: Yes.

MR BEAL: The short point here is that CICC has pleaded in its claim form that the counterfactual should be one in which there is no commercial card MIF but settlement at par. That is {RC-C/71/95}, counterfactual is identified as no default MIF or commercial card MIF and settlement at par in accordance with Sainsbury's. That's 229 and 234 of

the Visa opt-in claim form. I do not think I need to turn it up, it is, in fact, cited in Mastercard's closing submissions as well.

Trial 1 is looking at the legality of all the MIFs, not just the commercial card MIFs. The CICC's claims have been joined to the Umbrella proceedings. The Umbrella proceedings necessarily encompass Trial 1 and the conclusions of Trial 1. If this is a pleading point, my understanding is that the pleadings are not yet closed in the CICC claims. Even if they were formally closed an application to amend could be made. But more tellingly, Ms Webster, who is Mastercard's expert, expressly assumes that the effect of an overcharge affecting consumer cards is the same as for a change affecting commercial cards, and she relies on a read-across from her consumer card estimate to commercial cards based on economic theory and factual evidence. For your note, that is Webster 3, paragraph 2.46 {RC-F1.3/2/17}. Ms Webster in cross-examination said, "An analysis of commercial cards by themselves would be less reliable." Now, we dispute that but that was her evidence. That is {Day22/185-186}.

Ms Webster did not conduct any separate analysis in respect of commercial cards. So to the

extent that Mastercard bears an evidential burden of showing that a separate APO rate is available, they are necessarily relying on Ms Webster's analysis of the PSR data where there was no separate treatment of commercial cards because all of the cards, as I understand it, were wrapped into PSR data. So it is only if you take steps to try and extrapolate from that PSR data the transactions that relate specifically to consumer cards, which I think Mr Holt and Dr Trento have done, that you end up with a position where you can disentangle the effect of the commercial cards.

The first point is legally the suggestion that you have to focus solely on commercial MIFs for the CICC claim is wrong. Secondly, as a matter of procedure, this trial is joined with Trial 1 where all the MIFs are in issue. Thirdly, if it is a pleading point, we can amend, and fourthly, the import of this submission from Mastercard is that they cannot rely on their own expert evidence.

That is probably a convenient moment for a transcriber, well deserved transcriber break.

THE CHAIRMAN: All right, we will have a ten minute break.

(11.24 am)

(Break)

(11.36 am)

MR BEAL: Please could I start with a correction. I misstated something and want to correct it. It transpires that three of the five acquirers, who had given data as particulate of the PSR data, had in fact separated out the commercial card transactions from the consumer card transactions and Ms Webster was able to look at that and do some analysis on it. I am afraid I misstated the position. For the other two my understanding is that separation had not been conducted and therefore the analysis was not possible. I am sorry my submission was overblown.

Can I then please make some very short comments about the qualitative factual evidence. So I am not going to repeat the evidence that I took you to in opening or which I went through with Mr Holt in cross-examination. It has been suggested that somehow all of this information relates to IC+ contracts. For the procurement exercise, the fact is that when contracts are being offered, the acquirers are approached and no doubt they put forward their best proposition. If their best proposition is an IC+ contract, then that is what they are offering. The point I was making was

nowhere through this process are they offering some reduction in the MIF or the scheme fee as their best offering.

There has been an assertion, which I am not in a position to judge, that Sainsbury's was on an IC+ contract. That is the assertion made by Mastercard, paragraph 23(8). Visa is slightly more careful. It says at paragraph 125.1 that in relation to -- I think there were 12 merchants in issue in those particular combined proceedings, and what they say is that those remaining at trial were on IC++ contracts. I am simply not in a position to vouchsafe that one way or another, but it does imply, in my respectful submission, that at least some those merchants were not on IC++ contracts, but then either did not proceed to trial because there was a settlement or I do not know if they had moved IC++ contracts. I have no doubt that Mr Jowell will be able to inform the Tribunal better on that point on instructions from his client when he makes his submissions this afternoon.

A series of points are taken about the flaw being a reference to IC+ contracts. The point I put to Mr Holt in cross-examination was that the Mastercard 1 decision, when it talks about the

intra-EEA MIF setting a floor for the merchant service charges, I put to Mr Holt that that was looking back at 2002 and you probably could not infer that it was an IC+ contract and from memory he accepted that point.

Can I then please come on to look briefly at some regulatory decisions. I have already been in opening through the 2021 report and we looked at aspects of Annex 2 in the 2021 report in cross-examination. Can I look please in slightly more detail at the 2024 PSR report, which looks at the implications of a price increase in the MIF occasioned by Brexit changes. This starts at {RC-J9/3/1}. It is marked as a non-confidential document. Could we turn to page 4 please, there is a conclusion at paragraph 1.11, the first white bullet rather than the first black bullet says:

"Merchants and acquirers are unable to respond to increased IFs in such a way as to exert competitive constraints on Mastercard and Visa."

If we then please look at page 26 {RC-J9/3/26}, paragraph 3.39 the PSR notes that the outcome of the Sainsbury's litigation was that the, "setting of a minimum MIF within the four-party scheme operated by Mastercard and Visa amounts to a restriction of

competition (involving an agreement on prices), which has the effect of immunising one part of the MSC from competition; the merchant being unable to negotiate with the acquirer the level of that part of the MSC. Accordingly, this prevents an element of the MSC being negotiated down with the consequent effect of artificially increasing the MSC."

Page 35 {RC-J9/3/35}, please, paragraph 4.12. The conclusion that is reached by the PSR on the basis of some material I will need to go through in slightly more detail in a moment, as it says:

"Set discussed in more detail in Chapter 6, our analysis of UK acquirer data for 2022 shows the financial impact of the outbound IF increases on UK acquirers was modest. This is because most of these fees were passed on to UK merchants. Approximately 95% of all of the outbound IF increase were passed on to UK merchants either immediately (80%) or at some point (15%). Only around 5% of these increases were 'absorbed' by a small number of UK acquirers and never passed on to merchants.

In response to our interim report, one of the schemes challenged our provisional finding ... We are confident that the pass-through from acquirers to merchants was significant and that, as explained

below, this removed acquirer financial incentives to countervail the increases."

If we could look at paragraph 4.17 at the bottom of the page:

"Acquirers told us that they were and are very unlikely to leave either card scheme in response to the outbound IFs increases. As already stated, not providing acquiring services to merchants would entail significant business losses for acquirers. Some acquirers and merchants summed this up as the 'must-take' status of the Mastercard and Visa cards to merchants."

In terms of the 95% analysis, that begins principally at page 72, paragraph 6.6 and 6.7. This shows the split between IC+ and standard contracts and to estimate the prevalence of each contract type, the PSR asked UK acquirers for the values of UK-EEA CNP transactions for IC+, IC++, fixed, standard and any other contracts. They obtained data from 15 acquirers which collectively accounts for over 90% of those card transactions by value. Twelve of these acquirers use a combination of pass-through pricing and blended contracts; but by value the vast majority of their contracts are pass-through. The remaining three only use

pass-through pricing with their merchants.

The findings were that around 80% of transactions by value relate to IC++ or IC+ and around 20% of the transactions relate to contracts on fixed or standard prices.

We then see at 6.12 how the PSR then looks at its estimation of that further percentage figure. So within the 20%, 20% are on fixed or standard pricing, and we see in 6.9 out of the acquirers that use blended contracts in addition to pass-through, seven, which account for 14 of those percentage points in question, told us that as part of their repricing exercise they were passing it on in full over 12-18 months.

Another acquirer which accounts for a further 2%, so we are up to 16% at this point, said repricing took place where appropriate but could not give more precise details. For the remaining acquirers, namely the remaining 4% that is unaccounted for:

"We could not establish whether the pass-through took significantly longer to happen or happened at all."

What the PSR does with that is it equates the 14% out of the 20% with pass-on in full, see 6.10

and then overleaf it finds that the one who said we were likely to, but we don't quite know when that is the 2% figure, they equated that with essentially a 50% pass-on. Then for the remaining four, accounting for 5% because the one that was equivocal represented 1%, they said they would treat that as being zero pass-on so nothing at all.

On that conservative basis they therefore derive a 75% of that 25% is treated as being passed on in full and the other 5% is not. But that is crucially dependent on the quality of the answers that are given. If they simply could not work out what the position was, they essentially took that as a zero figure.

MR TIDSWELL: The data that is referred to there is not data that has been made available to the experts in this case, is it?

MR BEAL: No. If we please then look at page 78 {RC-J9/3/78} paragraph 6.40, the PSR necessarily acknowledges that the process I have just described produces a conservative estimate and they say at the bottom of that paragraph:

"Where it was unclear what the acquirers had done, we took a conservative approach. In most cases however it is very clear, IF charges related

to blending pricing were passed on to merchants. We estimated acquirers passed through approximately 75%."

Of course part of that is predicated on the four acquirers not having given a satisfactory answer one way or the other. The reason why the PSR can do that conservative analysis is because it is sufficient for their purposes to say that this is causing detriment to merchants, and they are rebutting the suggestion that somehow the acquirers would have absorbed the bulk of any change in the MIF, such that there was not downstream detriment to merchants.

In 6.42 the schemes came back on this analysis, which had been in the provisional finding, and we see they queried in particular the treatment of the equivocal answer and that they said:

"We assumed a 50% pass-through in this case, but even if this acquirer did not pass on the increase that would not notably affect our main results. The total pass-through across all acquirers would be 94% instead of 95%."

So even if you move the equivocal answer to "completely unclear what they did" or "no" answer, you end up with 94 rather than 95.

That's the 2024 analysis. The 2025 report on scheme fees is at {RC-I4/41/63}, and please could I invite you to read paragraphs 4.150 to 4.151.

THE CHAIRMAN: Yes.

MR BEAL: I accept of course that this is scheme fees, not MIFs, but what we say is telling is that there is no evidence of different responses by different acquirers to different ways. The increases in the fees were passed through to merchants in full regardless of size and regardless of contract.

Can I now deal with some observations in relation to the market? I am dealing here, essentially, with five relatively short points. First is the structure of the MIFs. I do not think I need to establish that the MIF is a very significant component of the MSC. You have the evidence that it is between 40% and 85% from Ms Webster. Just for your note, there is in fact a breakdown from one merchant which shows a figure of mid-70s, it is {RC-I4/61/16}. I do not think we need to turn it up, but it is there if further evidence is needed. If we look please in Mr Holt's 14th report, {RC-G1.3/2/36}, paragraph 93, what Mr Holt says there is:

"The other experts make a similar distinction

between more and less blended contracts. Ms Webster and Dr Trento refer to 'more blended' Standard Contracts as 'non-tiered' and ... 'less' blended as 'tiered'. While Ms Webster appears to focus on describing the types of blended contracts ... I note that as set out in Holt 13, the acquirers who provided data in T2B appear to have mostly tiered blended contracts."

What shows, relying on data that is marked as "confidential", is that the vast majority of merchants pay different MSCs for example for inter-regional and commercial card transactions:

"Dr Trento also explains that most UK acquirers appear to offer tiered blended contracts, albeit there are differences in the number of tiers."

So the concept of having a fixed headline rate that applies to everyone either on a per unit or ad valorem basis is effectively de minimis.

For your note there is a similar observation about commercial card MIFs at Holt 13, Annex 4, paragraph A23, that is {RC-F1.4/6/162}. The card schemes have suggested that the presence of blended contracts means that the MIF increase might be spread between different elements of the transaction. So if you have for example an increase

in the commercial MIF, some of the cost of that might be met through increasing a consumer MIF. I think the tiered pricing contract prevalence shows why that submission is overstated. The reason for that, as we saw for example from the invoice, if you are getting an invoice on a monthly basis as a merchant where the commercial transactions are separately identified from the consumer transactions, consumer debit, consumer credit, then the suggestion that you can somehow mask a price increase on one with a price increase on another simply does not stand to be -- it is not consistent with the evidence that you have.

Visa, in its closing submissions at paragraph 85, says it is clear that the vast majority of MSCs in the relevant data are ad valorem. They cite Mr Holt's 14th report at paragraph 290 which for your note is {RC-G1.3/2/94}. If you go there what Mr Holt does is he says MIFs and MSCs are mostly specified as ad valorem. This is something I picked up with him in cross-examination, {Day 21/115-120}. I don't have time to take you through that now, but the short point is Mr Holt had not actually carried out any analysis of the specific proportion of transactions. What he had relied on was Acquirer C

data which had significant per unit components to its pricing.

Could I now please go into closed? Because I am about to move on to some confidential material.

(In closed session)

(1.01 pm)

(Break for lunch)

(1.53 pm)

MR BEAL: I am afraid I have not been able to resist the overwhelming urge to sit down. So unless you have got any questions for me, I have no further submissions.

THE CHAIRMAN: Thank you very much and we have got rid of the clock.

Submissions by MR COOK

MR COOK: Sir, I will start with the same caveat that Mr Beal started his submissions with. There are -- is a lot that is said in my learned friends' closing submissions, both in writing and orally, that we disagree with, in particular a lot of what was said today to the court to characterise what we say in our closing submissions. I do not have the time possibly to go through all of them, but particularly where Mr Beal give you a reference to something we said, I would always invite the Tribunal to go and

see what we actually said rather than the straw man that Mr Beal sometimes makes it out to be. I am going to try and focus on what respectfully I say are the important points in terms of what the Tribunal has to decide.

I am going to start by getting what I hope is some of the undergrowth out of the way, so I can focus on what is really important in this case, namely the empirical analysis. It is perhaps surprising that Mr Beal spent three hours on his feet and said so little about the detail of the empirical analysis because, with respect, that is very much where the focus lies here. All three of the experts agree that the empirics are the important thing. One can get some indications out of economic theory, but ultimately all of the issues about competition and everything else will drop out of the empirics, and that is where the focus needs to lie.

Just to deal with some of the broader points made by my learned friend, my learned friend relies on a number of ancillary matters to support the idea that blended contracts must have pass-on, which is complete or near complete, and we say there are essentially, although he makes lots of arguments,

four recurring fallacies in those arguments. First, a very large proportion of them are based on materials that relate to interchange plus contracts. Now we know that pass-on is 100% for interchange plus contracts because they are mechanically cost plus agreements which specifically pass through the MIF. That simply just tells the Tribunal absolutely nothing about what happens with blended contracts which do not have that mechanical pass-through structure. My learned friend made a point about the fact that we have not suggested there is a need for counterfactual analysis. There is obviously a need for counterfactual analysis. It is just really obvious, in relation to IC++ contracts. When something mechanically tells you what the answer is going to be, we do not need to think about it too hard to do so. That does not alter the legal need for counterfactual analysis, it is just very simple.

MR TIDSWELL: When you say "material that relates to IC++", do you mean it relates to a mixture of IC++ and blended? Is that what you mean?

MR COOK: I mean an awful lot of the individual and detailed documents that Mr Beal referred to and we have responded to in our written closing are often examples of IC+ contracts, IC+ negotiations or are

dealing with the position of acquirers when the predominant amount of their business is the IC+, so all of those kind of matters, or indeed the decisions of the courts, such as Sainsbury's, that was dealing with IC+ contracts.

What I am saying in relation to those is, and I do not have time to go through all of the individual documents, we have done so in our written closing, is all of those ones that are essentially just no that is IC+ is just missing the point entirely.

MR TIDSWELL: Where it is blended, so for example Sainsbury's is entirely reliant on Mastercard in the European Commission, which of course is not just one or the other, it is a mixture of both and presumably depends on the mixture at the time.

MR COOK: It is a mixture of both. Ultimately, with all of those kind of cases and this is true with Trial 1, for example, the question is whether or not there was an appreciable restriction of competition. An appreciable restriction of competition does not mean that every single merchant is harmed or the extent of any harm to individual merchants. It means that there is enough of an impact on competition that there is harm. There was before the court a sort of point, when we took the position in relation to

Trial 1, that there was enough of a floor effect for commercial cards, it was on the basis that quite a lot of the market is based on IC+ or ones that are very close to IC+. So the fact that there is this mixture out there, the level of restriction does not matter and certainly does not have any impact in terms of assuming or requiring a finding of either material pass-on for everybody, or beyond that, that they are going to be anything like complete or near complete, which is what Mr Beal submits. That is what we do say in relation to those.

In practical terms, in cases like Sainsbury's, those were simply a dozen of the largest merchants in the United Kingdom who were on IC+ contracts.

Nonetheless, we have gone through in our responsive submissions and in our closing, so our responsive case and going through all of the documents they have relied upon, pointing out why documents do not help, they add some more, we keep on pointing it out again. As I say, I will come back to the detail, but we do say when you actually look at them and analyse them, there is not a single one of those that really advances matters in terms of the issues before the Tribunal, or that provides anything like the analytical force of the material

that is in front of the Tribunal. So if we can get to things like the 24 PSR report, that is done at a level of qualitative analysis, which is so much more inadequate than the material that is in front of you today.

My learned friend's closing submission tries to gloss over those problems with the numerous examples we have pointed out, by saying whatever the merits of the individual criticisms, as a body of material all these documents point in one direction to a very high degree of pass-on APO. That is paragraph 35.1. But with respect, the fact they have identified lots of irrelevant examples means the material does not actually point anywhere at all. Simply the volume of points they have made does not make them individually or collectively good points.

The second point is, and certainly this was present during the course of the cross-examination, the Merchant Claimants forget just what a large proportion of transactions take place at merchants with IC+ contracts. This trial, as you know, is just focused on that minority of transactions that takes place under standard blended contracts which are almost exclusively with what we call smaller merchants. Now, because the large majority of

transactions take place at merchants with IC+ pricing, the largest merchants, with that mechanical pass-on 100% mechanism, it is common ground that pass-on at the market wide level is very high. But what we are focused on is pass-on in relation to that subset of business with smaller merchants.

Now, that is central to the claims before the Tribunal, in particular the CICC opt-out claim, which is, by definition, smaller merchants.

THE CHAIRMAN: That is why I was trying to get a handle on the amount we were talking about. You are saying it is a relatively small amount.

MR COOK: Well, it is a relatively small amount of the economy, sir, the economy is quite, even today is quite large.

THE CHAIRMAN: A relatively small amount of the claims that are before us in terms of value?

MR COOK: No, sir, because actually in terms of -- and the difficulty, of course, is as we said in our closings for both T2A and 2B is from Mastercard's perspective, there actually are not very many emerging claims left at all in relation to, certainly what we know because we settled with them, what we know of the merchant claims that are out there. The vast majority of the merchants who are

suing, the individual merchants bringing individual claims are actually quite sizeable, they are not the Tescos and Sainsbury's anymore but they are quite substantial businesses. There was a questionnaire for Trial 1 in relation to this, so the majority of them are on IC++ anyway, so the sort of, the residual issue, even taking account of the fact that Visa has settled with less than we have, for the merchant Umbrella proceedings is a relatively narrow one. It is the CICC claims where it becomes a more important point.

In terms of the numbers of course what we have done is given you the numbers as the CICC claimants have put them forward. We do not accept those numbers are right and there were various arguments in front of -- well, in relation to some of those numbers in the past, or the problems they would have making them good. What is left is it is clear it is a material point of disagreement between the parties.

Where one gets to on that is the claimants' arguments that economic theory points to a high rate of pass-on essentially goes nowhere. We are all agreeing across the market as a whole there is a high, depending how one wants to characterise

things, very high level of pass-on, but the question is, is it the same for everybody or is there, in fact, a difference for the subsector business with smaller merchants? We say there, there is. Because the entire contractual mechanism and the margins are completely different. I will come to that.

Third, we say the claimants ignore the extensive evidence in relation to the ways in which the acquiring market does not work well for smaller merchants. There is extensive analysis of that in the 2021 PSR report. That is a document that the Merchant Claimants just persistently skip over because they have no answer to those issues and characterise us as having overblown the issues. All we have done is set out what the PSR has concluded based on extensive analysis, surveys, discussions with acquirers and merchants. We have set out the key passages from the 2021 PSR report. They are in our positive case at paragraphs 68 to 92, and I would respectfully invite the Tribunal just to revisit that section at some point, because it does set out all of the ways in which the acquiring market simply does not work effectively for smaller merchants in terms of allowing them to get extremely competitive prices and low margins.

With respect, we say that once you understand those problems in the acquiring market, incomplete pass-on to smaller merchants is exactly what you would expect to find, and that just follows from a market where competition is not working well.

MR TIDSWELL: You mean incomplete pass-on when the interchange fee reduces, or do you mean as a matter of generality regardless of whether it is up or down?

MR COOK: Certainly, I mean, I am not going to come back on counterfactuals because we could spend the whole afternoon repeating the same kind of point.

MR TIDSWELL: No, but I just want to understand your point about it.

MR COOK: So absolutely in relation to a fee reduction, I would say that. Where we have got to at the end of this hearing is there is essentially common agreement between the experts in front of you that there is not going to be anything other than potentially a temporary timing issue, and the evidence indicates no timing issue, between the different pass-on rates for increases and decreases. That is what economic theory expects and to the extent there is a difference in the data analysis, and I will be saying actually most of the data we

are talking about here is just completely unreliable in relation to the acquiring data material, it is likely to simply be noise rather than anything else.

In relation to the point about increases and decreases, as I said, I do absolutely stand by the sleeping dogs lie analogy in relation to this. If you are an acquirer and you have a customer who you are making a high margin on, it is a very profitable relationship and you know, because this is what the PSR has carefully analysed and explained that what happens in this market is inertia. A lot of the smaller merchants just do not pay attention to this, yes, they could save money if they did, but they just do not seem to appreciate that. It never comes to the top of their inbox or their in-tray, because what happens is these contracts just roll on for a long time, indefinitely. There are not really price rises because they have ad valorem percentage based, so it is not a situation where you get something through and obviously it will be 1 April a couple of days ago when many, many bills in the economy went up.

THE CHAIRMAN: April fools.

MR COOK: Unfortunately, it was not April fools. So that is the kind of situation where people get the bill

through the post and they say, "Wait a second, that has gone up, do I need that, should I be paying for Sky football?", or whatever it might be. That triggers you to start thinking about it because the price has gone up and that's what PSR says, those kind of trigger events do not seem to happen very much for smaller merchants.

MR TIDSWELL: That seems like a very odd market where you have got that dynamic and you have also got the acquirers, because of the sleeping dog point, the acquirers are terrified of losing small merchants. Surely that is inconsistent, is it not? Surely if the acquirers are that sensitive to the small merchants and their actions, then you would see small merchants taking advantage of that.

MR COOK: Sir, I think one of the things in relation to that, firstly, I would say that -- firstly, dealing with the value point, the reality is that while individual small merchants are not that valuable per se, there are of course a lot of them, so collectively they are valuable. So the idea that this is not particularly valuable and important, the profits are not important, with respect, we say is simply wrong.

MR TIDSWELL: That is quite an efficient market, is it

not, if a number of small merchants have collectively a lot of power, surely that is quite an efficient market.

MR COOK: It would be an efficient market if they were out there trying to switch and that is what all of the analysis and evidence shows.

MR TIDSWELL: The acquirers are still so nervous about them switching that they give up margin and give them margin as a result. That does not seem to square, does it, it is hard to see how that all that fits together.

MR COOK: With respect, sir, we say once you understand the inertia point it really does. Which is if you know that you have got a customer that has this inertia problem, because it has no trigger to go out and start looking for a better deal. The point about this is, you know, we of course know because we have read the analysis that they can do better, but for the individual small shops who are not reading PSR reports, lucky them, that is not the top of their list. They have got all sorts of other bills they are worried about, all sorts of other suppliers, so it does not come to the top of the list. That is what, with respect, we say that makes perfect sense that if you are an acquirer, you do

not want to, you know, become the person who says, "We want to try and make a small change", when if people do try and switch, they can make savings. So we say there is nothing particularly surprising about it. Mr Holt explains it all. Essentially, you have already built in that very high level of profit margins and it is better to keep those high margins than encourage people to switch.

THE CHAIRMAN: So you are saying the acquiring market for small merchants does not work very well for them, but they are, there is incomplete pass-on to them, so in a sense they are doing quite well out of it, are they not?

MR COOK: Sir, it is very difficult to say they are doing quite well out of it in circumstances in which, we will look at the numbers in a moment, but some of them are paying multiples of four or five times MIFs. So the point being is they have not been doing well. They are already paying a very, very large premium for the product and that is the reason why --

THE CHAIRMAN: So you are looking at the non-MIF part of the margin?

MR COOK: Absolutely, and that is of course -- and the reason I am looking at that is that is what an

acquirer is focused on. That is its revenue, that is his net revenue. So of course it is focused on that four times, five times, the bit above it, because that is what is at risk. If it triggers merchants to start looking elsewhere, that is potentially what they lose.

It is more a situation where they have already, sort of, they have taken advantage of that market power to extract the full value and you just cannot keep on doing that. That is the point we say, but ultimately this becomes, we do say, an empirics point.

MR TIDSWELL: Surely if the acquirers were worried about losing that they would reduce their own margin. Is that not what they would do rather than worry about the pass-on? Surely, if that is what the market dynamic is, why is the margin so big?

MR COOK: Because of inertia. Because potentially they could say --

MR TIDSWELL: That is an awful lot of inertia, is it not?

MR COOK: That is what the PSR report says, there is that inertia but people just are not focusing on it. One of the things that makes this market very different from the kind of markets we have been dealing with in Trial 2A is the fact that pricing is not public.

Because one of the other advantages you have here is if I go into the supermarket everybody going in can see what the price of bananas is, so they cannot take advantage of fact that I might be willing to pay more for bananas than you, sir. So -- because they price the same for everybody. Again, one of the great advantages from the acquirer's perspective is because pricing is opaque, it is not public and it takes quite a lot of effort to find out what competing prices are, what they can do is price discriminate, which is wait until somebody is potentially thinking of moving, wait until somebody comes along as a potentially new customer and then, with them, they can. If somebody is about to leave, then, yes, you do offer them a better price to stay because you have got this margin and so you can compete some of that down. That is why you get a you know, on anyone's case, quite a substantial amount of pass-on in this market.

PROFESSOR WATERSON: It seems to me you are describing something akin to the insurance market for home insurance, let's say, or car insurance, before you were told what you paid last year, as it were. Is this the sort of thing you are thinking about?

MR COOK: Yes, the analogy here is with all of the kind

of consumer markets where regulators in every sector have spent 10 or 15 years saying, "Consumers could get a better deal if they would only make the effort", and they have tried to put in place various behavioural mechanisms, such as telling you, "By the way it has gone up by 5% since last year", to try and encourage you to do so. So it is the same kind of consumer market where too many people are with the same bank that, in my case, gave me a plastic money box when I was four. There are a lot of markets like that, where consumers do not do as economists would like them to, which is do efficient things, because it takes effort and they do not necessarily think about that.

PROFESSOR WATERSON: I certainly, as an economist, I have analysed this sort of situation. I know exactly what you mean. But that works better, I think, if the price of the underlying thing, the MIF, does not go up much. When you are talking about triggers, the triggers are more, "Has my price increased?" than "Why has my price not decreased?", if you like.

MR COOK: That is certainly right to say that, yes, you are likely to be triggered to look elsewhere by, particularly by somebody raising the price. If you had a price decrease you would probably be quite

happy, it might minimise your desire to do that. The question that is being put to me is why, given market power, do they not simply keep on, acquirers keep on putting up the price to these small merchants and that is the answer, it is the trigger point which you want to try and avoid that happening.

I do want to just show the Tribunal again, it is graph 2 from the hot tub agenda. If we could bring that up, it is {RC-M1/6.1/2}. It is the one at the bottom of the page which shows the prices paid for card acquiring services by merchants of different sizes. Just to provide context to that graph, Ms Webster's analysis shows that average MIFs for merchants on blended contracts were just below 0.5% prior to the IFR and around 0.3% afterwards. So that gives you an idea of where the MIF line lies under that yellow line. Indeed, therefore, the multiples that you get. Firstly, the enormous range of different prices you get working its way up from the biggest merchants paying roughly 0.4 up to the smallest merchants paying over 1.8. So they are paying four and a half times the price. Then, as well, the level of margin that is being generated as a result.

My learned friend sort of addresses, raises the 90% figure, which is the figure from Sainsbury's, that MIFs were 90% of MSCs, but again that was an IC++ picker for the biggest merchants in the country. They are able to negotiate very small margins because they have a lot of countervailing buyer power. But you see here for the smaller merchants, for the reason the PSR gives, are getting poor deals and very, very startlingly high margins, which again is an important point of contradistinction from what we have seen in relation to Trial 2A, that the kind of retail margins one was talking about there were measured in single figures, often low single figures. The margins here for small merchants are measured in hundreds of percent.

MR TIDSWELL: This is prices on margins, is it not? I think Mr Beal made a point about volume cost to serve. Do we have any data on margins as opposed to --

MR COOK: I was aware of that, I was going to deal with it. Firstly, that is a point Mr Beal has raised for the first time on his feet today. There is no evidence of that. It is very difficult to see, in terms of processing transactions, where the economies of scale would arise. The reality is

processing an electronic transaction essentially has zero inherent cost because it is simply some data going through the wires. So it is not at all clear what economies of scale he might be suggesting are.

One of the points made by the PSR was exactly by reference to these margin points. So the PSR clearly did not think there was some clear justification, or the acquirers were not suggesting that there was an economy of scale point that could explain these kind of differences for individual transactions. That is what we are looking at here. There may be economies of scale for how many machines one gets, but that is an entirely separate set of pricing and that is not part of this at all.

With respect, we do say that the Tribunal can look at this and get a fairly clear idea of the very different kind of margins that are taking place and merchants of different sizes.

PROFESSOR WATERSON: Can I just ask, you may or may not know the answer but do merchants always get electronic bills from their acquirer, or do they get paper bills?

MR COOK: I do not know. I would not want to give evidence even if I did. I suspect in the modern world, it would be very, very rare for any kind of

significant banking business to send out paper bills to -- that is my submission, as opposed to my evidence. It would be very, very rare for a bank to send out a letter with the bill.

PROFESSOR WATERSON: I am just thinking of examples where it could be very expensive to serve for merchants.

MR COOK: Yes, with respect, it seems very unlikely that that would indeed be the case.

The second point I take, and I can only take it so far, is when you look at graph 2, is despite the significant drop in average MIFs, there is little or no effect on MSCs. I am obviously not suggesting you can eyeball a chart like this and avoid the need for empirical analysis, but I do say it is wholly inconsistent with the suggestion of complete or near complete pass-on for merchants of all sizes.

The fourth point is that the claimants try to elide IC+ pricing and blended pricing as though they are fundamentally the same thing and that is just not the case. The cost-plus pricing, IC+ pricing, is very different from the conventional pricing model one sees in most retail sectors because it is that mechanistic production of the price by reference to the specific costs involved. Blended prices just, they are an agreed price for the vast

majority of the contracts that one sees, and Acquirer C, because we are in open at the moment, seems to be different from this and the others. Blended pricing blends across multiple different types of transactions that have very different levels of MIF that applies. Of course, we are not suggesting that that means pass-on will not take place, necessarily, but it is a disconnection between the individual MIF and the cost of an individual transaction type, which when you realise the margin point, means there is this very substantial disconnect between the two, the cost element and the price element. So blended pricing does have that disconnection and that is the reason why you are not going to get the same kind of pass-on rates, with respect we say, for blended merchants, particularly the smaller merchants paying multiples of the MIF, compared to what you see in relation to the largest merchants paying IC++.

THE CHAIRMAN: If an acquirer wanted to change the MSC rates in a blended contract, presumably it would mean a new contract? They would have to negotiate with the merchant and enter into new rates with the merchant. It would not happen automatically. There is no way of the acquirer doing that itself.

MR COOK: It certainly would not happen automatically, that is absolutely right, sir, and that is the distinction.

THE CHAIRMAN: Whereas it does happen automatically in IC++? So it requires an actual communication and negotiation with the merchant?

MR COOK: It is strictly not -- depending on the contract, I think Mr Beal has shown the Tribunal an example of a contract or an acquirer's letter to people that addressed the fact it had a clause in its agreement that allowed it to unilaterally vary. We do not have a picture to know how far those are common, prevalent or anything else, those unilateral variation rights, but if that was the case, it is not quite a negotiation but it would be a letter through the post saying -- or a letter electronically -- saying, "We have decided to change the rates, here is our good reason and that is what is going to happen." So that is what I would say would be the trigger point. So there would need to be some kind of communication, obviously, that says, "We are changing your prices", and that's the trigger point there.

THE CHAIRMAN: You are saying that would be a trigger point and therefore that's why the acquirers sort of

hold off doing that --

MR COOK: It would not be true for everybody necessarily but certainly it would be enough people, you know, if you tell a lot of people that their prices are going to go up, then a fair proportion of them are likely to think, "I should do something about that." So it is generally a trigger point, yes.

PROFESSOR WATERSON: The point you just made about blended pricing, just so I understand it, are you saying that a tiered contract is not a blended contract?

MR COOK: No a tiered contract is -- what one gets in this market is a variety of different contracts with levels of tiering. There is, starting at the most basic, one actually has a kind of contract which is the fixed price contract, you can get a very small proportion, but that is £10,000 per year for whatever proportion you do. Then one gets true blended, perhaps, one of the acquirers referred to it, and that would be perhaps one or two MSCs that applied to absolutely everything. Then if you work your way up, and we saw with Acquirer 3, it had 81, 82 and 83 kinds of contracts. Again, 83 seemed to have only two or three tiers, up to 81, which had 38 tiers.

So those will all be blended to one degree or another, because even the most tiered, which seems to be the 81 contract, still has a number of tiers that cover different MIFs. Strictly, and it is where the point of standard contract, the point being is rates do not automatically vary by reference to MIFs.

MR TIDSWELL: Yes, so that's the other point I was going to ask you. So in all of these it is the case -- is the MIF rate set out separately from the -- if it is set out separately from the acquirer's margin and the scheme fee you would say that is an IC++, is that how you define it? Or would you still have a degree, if you like, of tiering that was, as you say, there were some sort of composite categories?

MR COOK: I think it would depend, the contract will say in its contract clauses that, "Your MSC will be set in a particular way." Either it will say, "Your MSC will be the interchange fee plus the scheme fee plus margin", whatever that might be, or it will say, "The MSC will be X%", and it might be that it has 5, 10, 15 of those but if it just says, "The MSC is this rate", then that is what we are talking about blended contracts.

MR TIDSWELL: So it is a blended contract if it does not

distinguish the scheme and the acquirer's margin, but there were different levels of blending within those contracts from true blending through to something that looks pretty like an IC++ except in terms of the disaggregation, but it does not give a specific acquirer and scheme fee?

MR COOK: The 81 contract is, we say, with respect, quite important because that is the Acquirer C contract which ends up being very close to the extent that the experts were not sure for a long time whether that quite tipped over into being IC++ or not.

MR TIDSWELL: That is the question I am asking. But why? Either it aggregated the three components or split them out. I think I was putting to you that it only becomes an IC+ or an IC++ if you split one or two of them out. Is that not the definition?

MR COOK: That is right and that is why on balance they have concluded or the experts agree it is a blended contract.

MR TIDSWELL: But it has got a lot of different --

MR COOK: Yes, it has also got a lot of additional -- I think what they call additional transaction fees. You have a basic rate. Then plus additional bits. So it starts to have an element of + to some extent but not perhaps the full formal IC++. It is, and we

do rely upon this, and it is a point Mr Holt made for example, that contract is one that gets really very close in terms of being IC+ in terms of how connected it is to individual MIF rates. That is something, with respect, the Tribunal has to be quite careful about when it comes to look at estimates of pass-on from that particular acquirer that it does seem to be unusually close to an IC++ contract.

MR TIDSWELL: Mr Beal's challenge was why would then not accept that it is almost an IC+ and take the 100%, should that not be plucked out and treated as 100% if those characteristics are so clear?

MR COOK: That is one way of dealing with it. The point I was really making we make in relation to it, is it paragraph 183 of our closing, is what you have to be careful about is reading across from a pass-on rate in relation to those very, very tiered contracts, an assumption that that is indicative of the market as a whole. That is one of the question marks Mr Holt has in relation to some of the estimates he gets for that particular acquirer, is that may be right for that acquirer, but is it actually a number you can use for the market as a whole?

MR TIDSWELL: Because you would expect because of that

degree of breaking out of a different MIF, you would expect there to be a very, very close connection between the charge and the MSC actually charged, between the MIF and the MSC.

MR COOK: It is paragraph 178 I am told of our closing that makes that point. It is a point one has to be cautious about the relevance of some of the numbers one gets from looking at individual acquirers, given the Tribunal is trying to come up with a market-wide rate, by which I mean one that applies to blended contracts rather than the whole economy rate my learned friend is seeking.

Let's turn then to the crux of the issue before the Tribunal. With respect, we say ultimately the Tribunal has multiple different analyses of real world events before it from the experts. At least one party takes issue with every one of those analyses. The critical issue is really which of those analyses can the Tribunal view as sufficiently reliable to be useful for an assessment of pass-on.

As the Tribunal knows, we say the only material on which the Tribunal can safely place real weight is the analysis of the PSR data. We say that follows because the PSR data was collected, cleaned and interpreted by the PSR, with the benefit of its

statutory powers and, therefore, the full co-operation of the acquirers; and, more significantly, proper time for analysis. It had the time to go through the process at the speed that it wanted. That is the first point.

Secondly, the PSR data covers a major change in MIF rates that applied to a large majority of cards. So we have the signal to noise point. It is a good example of a real world natural experiment.

The third point, the PSR data is representative across the market as a whole because it includes data from the five acquirers who make up over 90% of the market.

The fourth point, the PSR data goes back furthest in time and it is very close to the start of the CICC claim period, and it is much closer to the start of the merchant umbrella claim period than the later data. One of the risks of course is the PSR has been trying to sort of encourage merchants to take, you know, to stop being so lazy, to actually try and get better rates, to encourage switching, so there is a possibility that the later one comes forward the more the market has shifted. So the closer we are to the time we are talking about in the counterfactual, the better indication

one is likely to get from it.

The other point on the PSR data is the experts had the PSR data for over a year by the time of their first reports, and that gave them a full opportunity to understand and analyse that data and make sure they were -- they had a real opportunity to work with it and work through it. That allowed them to put forward all three experts to put forward comprehensive analyses in their primary reports of their preferred way or preferred multiple ways or many specifications of looking at the PSR data. That also then meant the other experts got that in the primary reports and had a full opportunity within the timetable to review and analyse what the other experts had done and then respond to it in their reply reports.

So all of this we say points to the PSR data providing a robust basis for analysis. We say, with respect, the T2B acquirer data, there are just too many problems and uncertainties in relation to that data for that to really produce any results which can be relied upon.

Something that is said against me is, "What was the point of doing all of this if the data is not very useful?" Of course, at the time when the

disclosure order was made, it was hoped this would be a valuable source of data and it would be possible to end up with some robust analysis in relation to it. But the process has ended up being a lot slower and a lot more imperfect than I think any of us hoped. But the end result of that was the acquirer data was received essentially a year later than the PSR data, right at the end of 2024. It meant it had to be cleaned and interpreted at speed with very limited and incomplete assistance from the acquirers and the reality is that when I cross-examined various experts have been cross-examined on it, they are simply in the dark, making guesses about what data they should be looking at and what they should be doing with it. That is just simply not a sensible basis for producing robust pieces of analysis, particularly when you see the very substantial amounts of data they have ended up excluding with really little understanding of why they were doing so. The level of pruning that one gets in this kind of data is, with respect, quite extraordinary.

Dr Trento removes up to 76% of observations, Mr Holt removes up to 87.8% of observations.

It is said against me that I am just

complaining about the scale of the data removals, but that is not the case. Scale is obviously important because if a trivial amount of data had been removed, then we could safely assume it would have no material effect on the results.

The problem here is the combination of removing a very large amount of data and the fact that the experts do not know that what they are doing is the right thing to do. They do not know if they are only excluding irrelevant, flawed data or whether they end up retaining the relevant accurate data. They are simply taking a shot in the dark. What you get is when people run alternative specifications on the data, alternative approaches, it does make significant differences.

I will come to what I say is the most extreme outcome of that uncertainty, which is Dr Trento's Brexit analysis, for what I call at the moment Acquirer B, we will need to go into private when I look at the details of that. It is now apparent following a late confirmation from Acquirer B that his analysis is conducted on a data set that does not include the relevant transactions. That is what happens when you do not know and understand what is in the data, that you end up running something that

is simply not addressing the right thing at all and then the other analysis where the data includes a large proportion of data, which again must include the wrong material because the numbers simply are not consistent with the actual MIFs set by the schemes.

So these are data sets that it is absolutely clear, and we are not in any way suggesting that people have not done, sort of, the best they can, whether at some point, with respect, they should have said, "We have done the best we can but it is simply not viable." We do say that, but simply the best they can is so imperfect with the level of information, engagement and the time period they have had to do this. So we do say there are simply fundamental issues with the acquirer data. The problem is we do not know why this happened and it is my learned friend's submissions about whether it is miscoding or whether it is we just do not understand the data and/or whether it is misdescriptions and mislabelling. The problem is we just do not have any idea and since we do not have any idea, the experts have no way of addressing those problems.

Mr Beal made, with respect, what I may say was

the rather bizarre suggestion today that Mastercard and Visa were at fault because we had the data and we could have identified the relevant point here. It is extraordinary to make that suggestion in oral closing submissions. It is completely wrong. Mastercard has no knowledge at all of the MSCs paid by individual merchants. Merchant service agreements are confidential agreements between acquirers and merchants. We just do not know anything, other than what is in the public domain, about what is agreed either generally or individually with merchants so we could never provide any data in relation to MSCs and that is the reason why the parties went out to the acquirers because the schemes do not have the data. Of course if we had been already sourced with it, it would have been a lot more efficient than going to third parties who understandably had no particular interest in getting involved in the litigation.

THE CHAIRMAN: You do know about the MIFs, though, paid by the acquirers. Is that right?

MR COOK: We know what MIFs were paid by acquirers but the problem is that the data is anonymised. So we have no knowledge at all of if you say a particular merchant code 101 paid some transactions. We have

no idea who that merchant is. We have got no way of identifying it within our data what they paid.

THE CHAIRMAN: You know which acquirers are paying MIFs to the issuers?

MR COOK: Yes we do, but in no way does that help us identify in relation to this -- the acquirer we are talking about, what is happening in relation to these individual merchants, who seem to be as well on a very specific narrow category of contract with their particular acquirer. We simply do not have the data. It has never been suggested that we did or should gather it in. It is far, far too late to raise that suggestion in oral closing submissions.

The other problem I would say that has arisen from the late provision of the T2B acquirer data is that the experts only put forward very limited analysis of that data in their primary reports. As Mr Beal explained this morning, Dr Trento did not have time to clean certain bits of the data himself at all, and there were certain additional cleaning steps, the removal of nonstandard MIFs, that he says he would have liked to have undertaken but he did not have time to do so. So they simply did not have time to do what they would have liked to have done, whether it would have been right or wrong at the end

of it.

As a result what we get is a number of new analyses coming in with reply reports -- that is two weeks pre-trial. We get Dr Trento's data packs less than eight working days before trial, and that just left us virtually no time to analyse that work, it meant Ms Webster did not have a chance to respond, Mr Holt did not have a chance to respond. We have identified from a sort of preliminary analysis a number of obvious flaws with those additional analyses, but with respect, it is inherently unsafe to rely upon analysis that has not been properly tested when we know that there are serious problems here.

Sir, I am going to turn now to the specifics of the acquirer data analysis that would require me to go into private.

THE CHAIRMAN: Thank you.

(In closed session)

(3.21 pm)

(Break)

(3.33 pm)

Submissions by MR JOWELL

MR JOWELL: Thank you, Mr Chairman. In the very little time left to me I must echo the weasel words of

Mr Beal KC that I will not be able to deal with every point. I should mention that Mr Beal has indicated that he may be able to give me a ten minute additional indulgence which is very kind of him.

THE CHAIRMAN: Very generous, yes.

MR JOWELL: The experts in these proceedings are all agreed that the issue before you, acquirer pass-on, is an empirical one as Mr Cook has pointed out. The remarkable feature of this part of the proceedings in a way is that the answer to that empirical question is largely agreed between the experts, in that they agree that the answer is likely to be above 50% and below 100%. You heard very little about Dr Trento in Mr Beal KC's submissions particularly his answer to that empirical question because Dr Trento's answer is a range of 75 to 100%. Mr Holt's result of 75% for merchants on £50 million with £50 million credit card turnover and below and 100% above all on an all-in standard contract merchant 81% figure are actually within Dr Trento's range of 75 to 100%.

I observed that although he takes Mr Holt to task for giving a range of 50 to 100% and not simply deriving or explaining how he has got there from his

actual data results, he does not do the same for Dr Trento, for whom exactly the same criticism can be made because Dr Trento's figure of 75 to 100% is not just simply an application of his mathematical application of his results. In fact, in my submission it is to the credit of both of those economists that they have avoided spurious precision and instead sought to exercise their judgment and arrive at a reasonable range.

THE CHAIRMAN: It would have been even better if they had agreed a figure. They are not that far apart.

MR JOWELL: Agreed. We also observe that you will see when Mr Holt translates his figures into an economy-wide rate, he came out at 94%. When you look at Mr Beal took you to the PSR 2024 analysis and he showed you there that they are at 95%. In fact, when you look, he also showed you that in the 2024 PSR they estimate that those on standard contracts have a 75% pass-on rate, so the PSR is actually lower than Mr Holt. The reason why the 94 and the 95 are different is because they are looking at different time periods. Within those two time periods there is a different proportion of merchants on the IC++ contracts. Actually if you look into the 2024 PSR report, the figure there is actually

suggesting a lower pass-on rate for those on standard contracts than Mr Holt suggests.

It is important not to lose sight of all of that.

I want to, if I may, start with some general conceptual or legal points and then move on to three specific points on the data analysis. My learned friend reminded you in his oral submissions, that we proceed on the basis of assumptions. We assume that the MIFs are to have amounted to an infringement of article 101, that therefore it is a prima facie restriction of competition. We also assume that the MIFs do not meet the criteria for exemption under article 101(3). That is even though both of those issues remain unresolved, and indeed the 101(3) remains entirely untried. So the MIFs have not actually been determined to be unlawful at all, but for perfectly sensible reasons of efficiency and practicability, that is how these proceedings have been structured.

But we do just want to lay down one note of caution, and that is that making that pragmatic assumption of unlawfulness should not be weaponised as a means of skewing the outcome in favour of the claimants. It is very important that the claimants

should determine entirely objectively where in the supply chain the loss has, as a matter of economic fact, fallen and it should guard against any tendency to assume that because Visa and Mastercard are assumed wrongdoers and merchants assumed victims of a tort, it should err on the side of overcompensation. The Tribunal should maintain that strictly objective approach. It is true in law and it is clear, as the Supreme Court said in Visa v Sainsbury's that it must err against both under and overcompensation. But it is particularly important in the present case, not only if you like for the reasons of legality, but also because of how the nature of the infringement and the interrelatedness with the 101(3) points.

Can I explain that? First of all, this is not in any sense a case akin to a secret cartel. Visa and Mastercard have been entirely transparent about the existence of the MIF and Visa has always actively engaged with regulators, and indeed in the early days, it received an exemption and subsequently entered into commitment agreements with regulators. It is important not to lose sight of the fact also that neither Visa nor Mastercard are actually the recipients of the interchange fee that

is under attack. It is the issuer that receives the interchange fee and that is not paid on to Visa in any way. Visa receives the scheme fee, but that is completely different and that is not in play, at least for Trial 2.

So Visa is potentially liable for the interchange fee not because it receives it, but because it imposes that obligation as part of its rules on the acquirer to pay it to the issuer.

The other question is this -- that is important to bear in mind is this. That it is Visa's case that the receipt of the interchange fee by the issuer means that issuers are themselves incentivised to issue more and better cards and to provide additional benefits to consumer cardholders. We are all familiar with the card points and airline points, but also the free debt that is provided on credit cards, insurance against fraudulent transactions on debit cards and so on. The extent of all of this, and whether without the interchange fee those benefits would not exist or would not exist to the same extent, would all need to be assessed in Trial 3 when it comes to question of exemption. Of course similarly in that Trial 1 would have to consider the benefits that merchants

receive from the prevalence of card issuance that the interchange fees stimulate the extent to which they avoid cash and the costs of cash potentially increased and quicker transactions and so on.

I do not say all of this because I am making a trailer for Trial 3. I just say it because simply this, that the assessment of legality under 101(3) is going to be a complex one, and its outcome will depend in part upon the resolution of the prior question that we are determining within this trial of on which groups the economic burden from the interchange fee falls and to what extent. How much of the fee falls economically on the acquirers, how much on the merchants and how much on consumers. The reason that matters is because in Visa v Sainsbury's the Supreme Court held that you do not just look at, if you like, all consumers as one. You have to separate out merchants and consider the harm to them and then whether the benefits to merchants outweigh that harm, you have to consider consumers and the harm to them and whether the benefits outweigh the harm to consumers.

So my point is just this. That, if you like, you are determining in this case and the next a simultaneous equation, but you are doing so

sequentially. If you skew the answer to the one question which is the first equation you are going to get the second one wrong as well. That is why it is particularly important that the Tribunal should take an entirely objective approach in which it assesses the empirical evidence in the round and not skewed by a preponderance or a tendency to see some people as victims who need to be compensated by wrongdoers.

That is the first conceptual issue I wanted to mention. The second one is the intuitive point about the pass-on to small merchants, which Mr Cook has really covered already. We very much agree with him and his analogy with, as one might put it, the reasons why -- look, it is perfectly understandable, as Professor Waterson says, it is very easy and intuitive to understand why an acquirer might not pass on a full decrease to a smaller merchant, but it is less intuitive to understand why it would not pass on the entirety of an increase. Actually, the answer is precisely this analogy if you like, of the not wanting to wake up the sleeping cash cow. If I may give an analogy --

THE CHAIRMAN: That is quite an analogy!

MR JOWELL: -- from my own life. I recently received a

large increase on an insurance I pay, I think health insurance in fact. It immediately prompted me to look around and that is why, you see, when an increase comes in, you might want to temper that because you do not want to wake up the sleeping cash cow, which in that case was me.

The claimants make a number of points. They say, one point they make in their written closing at paragraph 140.1, is they say you cannot distinguish the position with smaller merchants because they also shop around and switch providers. With respect, that is directly contradicted by the PSR's clear findings, which you will see summarised at 32 to 35 of our written closing. That switching among smaller merchants is rare and that the enquiring market is not working well for those merchants. They mistakenly rely on a section, a document {RC-J4.4/21.8/31}, which Mr Holt was taken to in cross-examination and is cited in the claimants' submissions at 377. But all that says is that there is a hypothetical willingness on the part of merchants to switch if faced with price increases, not actually evidence of actual small merchants switching, and it does not in any way undermine the PSR's wider conclusions.

As regards the proposition that it is somehow counterintuitive that acquirers would swallow a large part of any interchange fee increase, we say it is important to not lose sight of the fact that overall the acquirer pass-on rates are incredibly high even on everyone's analysis, so Mr Holt's it is 94%. The claimants have not put forward any convincing evidence based on the acquirers' accounts or elsewhere that would suggest that not passing on that small percentage would somehow jeopardise the acquirers' profitability. We find there is nothing inherently surprising in finding that a small part of the burden of interchange fees falls on acquirers. Of course, as you have seen the PSR 2024 report agrees with that. They also find that 5% is not passed on and the PSR would certainly know if that was entirely counterintuitive.

The next general question is should we be looking at price increases or price decreases, or both? The answer is, plainly both. There is no need to get into a terribly metaphysical question about the counterfactual. Mr Holt has consistently looked at both. I think it is fair to say that actually all of the experts have looked at both and have not given a preponderance to one or another.

There is the theoretical rockets and feather phenomenon, but the evidence in this case shows that acquirer pass-on happens relatively quickly. It happens over six months to one year and thereafter it plateaus and there is no real evidence of persistent increases of pass-on in the longer term. You can see that set out, for example, by Mr Holt in his 13th report at paragraph 350 and in his 14th report at paragraph 233.

Now, one can see it in those graphs which a number of the merchants -- of the experts rather have presented, which show the impact and you see, you can see very clearly the visual plateauing of the change in the MSC.

Now, the claimants in their closing suggest, they seek to dismiss the relevance of those graphs that show how quickly pass-on occurs, and they seek to rely on other confounding factors, that they say make the graphs unreliable, like scheme fees or IT and staff costs. We say this argument is not credible. The scheme fees are controlled for in the analysis, certainly in Mr Holt's graphs which show acquirer net revenue. As for IT and staff costs, they are simply immaterial in particular over a period of one year. So we say the graphs give you a

clear and complete answer to the rockets and feathers phenomenon.

I then come to another conceptual point, which is the question of whether you should calculate the economy-wide pass-on and if so, on what basis. The claimants are keen to say that the burden of proof of establishing that we fall within article 101(3) lies on us. They say the economy-wide pass-on rate is relevant to article 101(3) and therefore the burden of that falls on us, and they also say that we need to satisfy a particular evidential standard, cogent empirical evidence. The short answer to all of this is that it is an unbelievably arid point because all that is required for this final step is to take the IC++ rates and the blended contract pass-on rates, that will have been determined inevitably, and then work out the proportions of merchants that have contracts of each type. That is the only step that could even be remotely controversial and that is arriving at the estimates of the proportion of the different types of contract within the merchant population. The rest is just very straightforward, even for me, mathematics. One sees Mr Holt describe the position, in his 13th report, if we could go to that, please, it is

{RC-F1.4/5/131}, if we could have that up please. If you go over the page, you will see paragraph 357. He describes, and perhaps if you can just read 357, and he explains how he arrives at his calculation.

So there is nothing obscure about this and nor it seems is there anything controversial because if we could go now please to {RC-G1.1/2/25}, you see here in Dr Trento's report, where he seeks to -- and you see in the right-hand column of table 2 that he transforms his own results into an economy-wide rate, at 92-100%. If you look at footnote 3 to the table you see he says:

"For the economy wide pass-on rates for Ms Webster and myself I calculated the weighted averages of the lower bounds and the upper bounds of IC++ and blended MSAs using the proportion of turnover in 2018."

So the same method that Mr Holt used. So we do not really know why this is an issue because it does not seem to be -- the methodology does not seem to be in dispute between the experts.

THE CHAIRMAN: Similarly, you could just take whatever pass-on rates we conclude exist, and then do the calculation for Trial 3 by putting them all together and working out the weightings and you have your

economy-wide rate.

MR JOWELL: We could -- or you could.

THE CHAIRMAN: That is precisely what I am trying to avoid!

MR JOWELL: We could, but this is why I say this is really an arid point.

THE CHAIRMAN: I see the point. I do not really understand where burden comes into this.

MR JOWELL: No, exactly, it is not the sort of issue where the burden is going to matter.

THE CHAIRMAN: No.

MR JOWELL: And it is not the sort of issue where we do not have cogent empirical evidence. Of course we have cogent empirical evidence in the 2018 PSR report. It is an arid debate, but I cannot resist and argument with Mr Beal about something as interesting as this. So I will just very briefly give you my submissions on the point.

The answer to it is we actually say he is wrong about this because the burden of proof here actually continues to lie with him. To appreciate why that is one needs to go back to what it means to establishing that the agreement in question meets the criteria for exemption. Now, exemption only arises, 101(3) exemption, only arises if there is

first established a restriction of competition. That, according to the statute, involves the defendant establishing that the four conditions are met. So you have to establish that they would contribute to improving the distribution of goods or promoting technical or economic progress, consumers have to receive a fair share of the resulting benefits, and then there are a couple of provisos. The restrictions must be essential to achieving those objectives and the agreement must not give the parties any possibility of eliminating competition.

In practice, the European Commission has explained what this consists of in practice. If I can just show you that {AB-E/2.1.1/2}. You will see if you go to paragraph 11, this is the Commission's guidelines:

"The assessment under article 81 thus consists of two parts. The first step is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anticompetitive object or actual or potential anticompetitive effects."

So that is 101(1):

"The second step, which only becomes relevant when an agreement is found to be restrictive of

competition, is to determine the procompetitive benefits produced by that agreement and to assess whether these procompetitive effects outweigh the anticompetitive effects. The balancing of anticompetitive and procompetitive effects is conducted exclusively within the framework laid down by article 81(3)."

So the need for an exemption arises once the claimant has first established that there is a restriction of competition under 101(1) that has led to anticompetitive harm to one of the parameters of competition. The burden under 101(3), in broad terms, is then to show that the procompetitive benefits outweigh the anticompetitive harm. Of course, we accept that the burden of that is on us and we have to do so according to the Supreme Court by cogent empirical evidence but this is actually, but that is about establishing the existence of the benefits. That is not about establishing the anticompetitive harm, to begin with, to the consumers or groups of consumers that the benefit must outweigh. We submit that the burden of proof applies on that stage, on 101(1) stage, proving harm, both in terms of you have to both establish that you, the claimants, have suffered harm, but

also that it is on them to show the harm to that group within the economy.

THE CHAIRMAN: So you are saying we are still on the anticompetitive side?

MR JOWELL: Exactly, it is logically anterior to deciding where the conditions are met. But as I said, it is terribly interesting --

THE CHAIRMAN: You do not need to start the opening for Trial 3 yet.

MR JOWELL: A terribly interesting but very arid point.

I want to briefly, if I may, go through three specific points on the econometrics.

Could we go into closed session, for convenience?

(In closed session)

Housekeeping

(4.42 pm)

THE CHAIRMAN: Do we actually need to deal with that now or should it just, you know, fix up a CMC in the usual way?

MR WOOLFE: That is what we wanted to do. Obviously you cannot see the diary, but we wanted a direction that the CMC should be listed next term. There is not actually that much dispute between us. We want a full day CMC to deal with the listing of Trial 3 and the other side are content with a half day CMC to argue about whether or not Trial 3 listing should happen now. That is in a sense the difference. We just want a CMC to be set.

THE CHAIRMAN: Just to decide whether it should be listed.

MR WOOLFE: That is Visa's position supported by Mastercard. Our position is there should be a full day CMC to argue what steps should be taken towards Trial 3. You cannot really decide in the abstract as to whether or not it makes sense to proceed with the listing because you have not had the details so we say a full day's CMC should be listed next term. That is the full extent of the matter we wanted to raise.

THE CHAIRMAN: You would normally just apply to the CAT for a listing for a CMC. Why does it require a direction from me?

MR WOOLFE: Letters have gone into the Tribunal, sir, on 11 and 13 February. They were attached to a letter that was sent to the Tribunal last night, you may not have seen it. In those letters we were asking for listing of a full day CMC next term, and I believe Visa were saying, were resisting that or rather saying at most a half day CMC to argue about whether or not there should be a CMC on Trial 3.

THE CHAIRMAN: A pre-CMC?

MR WOOLFE: Those letters have gone in. We just have not yet had a decision yet about it and the issue is the longer it goes on without that CMC being listed, the longer time it is until a listing for Trial 3 can ever happen. Obviously, the Tribunal's diary is getting fuller with other matters. If we want to get Trial 3 on in any sort of reasonable time, we need to get the CMC on, sir. That is why I have been asked to raise with you to give a direction that there should be a CMC next term.

THE CHAIRMAN: A full day CMC?

MR WOOLFE: A full day CMC that is our position, sir, yes.

THE CHAIRMAN: Does anyone want to say anything about that?

MS TOLANEY: We do not object to the CMC being a day if that is the only point in dispute. We agree, sir, that it can be listed in the usual way via the CAT and the parties putting forward availability.

THE CHAIRMAN: Availability, yes.

MR COOK: Our only consideration would be that it would be sensible to receive the Trial 1 judgment before it is listed. I anticipate the Trial 1 judgment coming out soon, hopefully please not too soon. If it comes out tomorrow, I will cry. At least have a week or so off before it comes out. But apart from that, yes, once there is a Trial 1 judgment that will clearly provide a direction of travel going forward.

THE CHAIRMAN: You certainly will not have a Trial 2 judgment before then, but I think it should just follow the usual course and it seems like you are all agreed that there should be a CMC at some point next term so fix it up.

MR WOOLFE: Thank you, sir, we will do.

MR BEAL: Thank you very much for sitting late.

THE CHAIRMAN: It remains for me to say thank you very much to all of you for your very helpful and

excellent submissions, both in writing, voluminous writing, and orally, and that is not just to the advocates. I know there has been a lot of contribution from those behind you as well to those submissions. So you will, no doubt, hear from us in due course. Thank you very much.

(4.46 pm)

(The hearing concluded)