

OPUS 2

INTERNATIONAL

Sainsbury's Supermarkets Ltd v (1) MasterCard Inc, (2)
MasterCard International Inc, (3) MasterCard Europe S.P.R.L.

Day 10 - Redacted

February 10, 2016

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1 Wednesday, 10th February 2016
 2 (10.30 am)
 3 (Proceedings delayed)
 4 (10.40 am)
 5 (Open court session)
 6 Housekeeping
 7 MR JUSTICE BARLING: Good morning.
 8 MR HOSKINS: Good morning, sir.
 9 I have a tiny piece of housekeeping just to keep you
 10 in the loop. We were sent a third von Hinten-Reed
 11 yesterday, and haven't had a chance to take proper
 12 instructions on it. What I said to Mr Brealey is I will
 13 take instructions at lunchtime and then I will indicate
 14 to him whether we are happy for that to go in or whether
 15 he has to make an application.
 16 MR JUSTICE BARLING: That's fine. I'm not sure whether we
 17 have got it. I'm not conscious of having it, but it may
 18 be that the system has got it here.
 19 MR BREALEY: It was sent.
 20 MR JUSTICE BARLING: Yes, I am sure it was.
 21 MR BREALEY: It corrects a calculation.
 22 MR JUSTICE BARLING: I haven't read it, so --
 23 MR HOSKINS: As you did with Mr Sidenius, if you have the
 24 time and inclination and want to look at it
 25 de bene esse, obviously I have no objection to that. It

1

1 might speed things up if we do have to put up a fight
 2 about it.
 3 MR JUSTICE BARLING: That's fine. Any other housekeeping?
 4 MR HOSKINS: I'm going to call Mr Willeart.
 5 MR BART WILLEART (affirmed)
 6 Examination-in-chief by MR HOSKINS
 7 MR JUSTICE BARLING: Thank you, Mr Willeart. Make yourself
 8 comfortable. Get some water if you would like some.
 9 I do not see any glasses. Are there glasses?
 10 There are.
 11 MR HOSKINS: Hopefully you should have bundle C2 in front of
 12 you, and if you can turn to tab 7, please, there should
 13 be a document entitled "Witness statement of
 14 Bart Willeart".
 15 A. That is correct.
 16 Q. If you can flick through -- you do not need to read
 17 it -- to the end, can you confirm that this is your
 18 witness statement?
 19 A. This is my witness statement, that is correct.
 20 Q. Thank you. There is a signature on page 138.
 21 A. Yes, that is correct.
 22 Q. Can you confirm that that's your signature?
 23 A. That is my signature, that is correct.
 24 Q. Actually, there is a correction there I think you want
 25 to make before I ask you the next question, which is to

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1 paragraph 1.
 2 You say:
 3 "I was the head of MasterCard's interchange fee team
 4 from the start of 2010 to 2012, I'm currently
 5 ... (Reading to the words)... for MasterCard."
 6 I understand you want to bring that up to date?
 7 A. Yes, I have just changed role. Since October 2015,
 8 I was general manager of France.
 9 MR JUSTICE BARLING: Since October 2015?
 10 A. Correct.
 11 MR HOSKINS: Subject to that update, can you confirm the
 12 contents of the witness statement are true?
 13 A. They are the same, so they are true.
 14 MR HOSKINS: Sir, I know you wanted to ask some questions.
 15 It is between you and Mr Brealey when you want to.
 16 MR JUSTICE BARLING: I suspect we will do that afterwards
 17 and then you can come back if you want to.
 18 Cross-examination by MR BREALEY
 19 MR BREALEY: You are now based in Paris?
 20 A. I am based in Paris.
 21 Q. Although you are based in Paris now, just from
 22 paragraph 1 of your statement, which -- I think is the
 23 key relevance for today is that you were part of the
 24 interchange fee team for just over two years?
 25 A. That is correct.

3

1 Q. In your statement, and I can start here at paragraph 11,
 2 you refer to MasterCard's terms of dealings. Just so
 3 that we get it straight, I think these are the scheme
 4 rules. You call them scheme rules?
 5 A. Correct.
 6 Q. Just to identify them, I think they are at E3.10. You
 7 will be happy to know that I am not going to go through
 8 them in detail, but to identify that these are what you
 9 mean by the MasterCard terms of dealing. It is at
 10 tab 201. So it is the 2014 version. Obviously, the
 11 versions change, do they?
 12 A. Yes. These are indeed MasterCard rules, I assume.
 13 Q. Yes, exactly. Who at MasterCard formulates these terms
 14 of dealing?
 15 A. So to be very clear, the interchange team was not
 16 involved in setting these rules, these were set by the
 17 rules team.
 18 Q. The rules team?
 19 A. Absolutely.
 20 Q. I think if you can --
 21 MR JUSTICE BARLING: You just have to keep your voice up
 22 a little bit, and if you can speak in this direction
 23 because I think the microphones also have to catch you.
 24 MR BREALEY: Slightly ignore me.
 25 A. So there was, in MasterCard there is a team responsible

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1 for setting the rules. So the terms and the rules, and
 2 the participants in the payment system how they behave,
 3 how they need to react and respond to different matters
 4 with respect to the scheme. And I was responsible at
 5 that time for the interchange team, which was specific
 6 for setting the interchanges across Europe. So I was
 7 not responsible for the rules; I was responsible for the
 8 setting of the interchange.

9 Q. Correct. Very quickly, where is the MasterCard rules
 10 team? Where is that based?

11 A. So MasterCard's rule team is not based in one single
 12 location. So there is different people involved from
 13 both global function as well as European functions. So
 14 I couldn't tell you exactly where everybody amongst the
 15 team is based, where it is multiple people involved in
 16 that team, including a lot of people from Europe and
 17 including also people from product areas, different
 18 business areas, to make sure that the rules that are put
 19 forward in the scheme actually make sense both from a
 20 scheme fraud perspective and business perspective.

21 Q. So is there a forum that is held every now and again
 22 which sets out the scheme rules? Who decides whether to
 23 amend it, for example?

24 A. I'm probably not right person to ask that because I was
 25 not involved in that process.

5

1 Q. And how does that potential bank or financial
 2 institution sign up to these terms of dealing?

3 A. It is my understanding that when somebody becomes part
 4 of MasterCard's scheme and is assigned a licence, that
 5 they are also obliging to the rules that MasterCard puts
 6 out there. So you become a member of the payment
 7 scheme, then you need to adhere to the rules, so that
 8 everybody else in the payment scheme understands that
 9 this new participant obeys by the rules.

10 Q. So you refer to the licensee has to adhere to the rules,
 11 obey the rules. So what happens if they disobey the
 12 rules?

13 A. There is various consequences that could be. Of course,
 14 in first place this participant will be notified of
 15 that.

16 Q. Notified of the breach?

17 A. Of the breach, indeed. And of course it is like in any
 18 breach of rules, at a certain point in time there could
 19 be consequences for that entity. But, again, I was not
 20 responsible for managing that process, I was not
 21 responsible for setting the rules.

22 Q. At paragraph 12, just so that you can refresh your
 23 memory, you say:
 24 "It is the combination of all these rules which
 25 determine the allocation of responsibilities between the

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1 issuers and acquirers."

2 So the issuers and acquirers, by signing up to the
 3 terms of dealing, adhere to MasterCard's allocation of
 4 responsibilities?

5 A. Yes. Just to put it into a perspective, so what I refer
 6 to in my witness statement is the fact to interchange,
 7 we might come to that, is a balancing mechanism where
 8 the objective of this balancing mechanism is to maximise
 9 the volumes, transactions and usage of the payment
 10 scheme. And in order to do that we need to maximise at
 11 one site, on the site where the card is issued to the
 12 cardholders. The issuers of this card, at the same
 13 time, need to maximise the participation of the merchant
 14 in this eco-system.

15 Q. Mr Willeart, I do apologise, but that is in your
 16 statement, that is your evidence. But if you could
 17 concentrate on answering my questions I'm posing --

18 A. Sorry, I will get to the point.

19 So one of these rules relates to the fact that who
 20 is paying in case, for instance, as an example, if there
 21 is a fraud on the card. The rules specifies that the
 22 issuer in many cases will be responsible for covering
 23 the fraud, so the issuer has a cost for that and the
 24 interchange needs to take that into account. There is
 25 a balance in the system. And that's where, for

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1 instance, in a practical way this refers to.

2 Q. So you refer to costs of the issuers. So if one goes,
 3 for example, yes, if you just keep your finger in your
 4 witness statement but if you go to tab 1 of this bundle.
 5 Don't lose your witness statement, but if you go to
 6 tab 1 of the bundle, which is the witness statement of
 7 Mr Sidenius, page 11, paragraph 31, you have mentioned
 8 at paragraph 12 of your witness statement the allocation
 9 of responsibilities as regards fraud.

10 But I take it from your evidence that the MasterCard
 11 terms of dealing also set out the allocation of
 12 responsibilities for the actual credit write-offs, fraud
 13 losses, fraud investigation cost, collections, funding
 14 costs and processing costs? Have you seen paragraph 31?

15 A. Yes, I see paragraph 31.

16 Q. At paragraph 12, you say there's an allocation of
 17 responsibilities, and you highlighted fraudulent
 18 transactions. And I'm just asking you whether the
 19 MasterCard terms of dealings also sets out allocation of
 20 responsibilities relating to the six items at
 21 paragraph 31.

22 A. I wouldn't be able to answer if they were specifically
 23 in the rules because, again, I was not responsible for
 24 setting the rules. But typically in a payment scheme
 25 where it is a bank issuing cards, the costs for fraud

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1 investigation and so on are borne by the issuing side.
 2 That's why they recover the costs.
 3 Q. Let's put it another way: your team sets the
 4 multilateral interchange fee, correct?
 5 A. Correct.
 6 Q. When you are setting the multilateral interchange fee
 7 you have regard to these six items?
 8 A. We use multiple components to define the right balance
 9 and the right level of interchange, of which one of the
 10 components is the cost components. And this is what is
 11 referred to in this witness statement of Mr Sidenius.
 12 Q. So the answer is yes, you will have regard to these six
 13 items?
 14 A. Yes, we will get information in terms of the costs that
 15 issuers in the market on average bear for driving the
 16 payment scheme.
 17 Q. This is an area where you may be asked further
 18 questions. Have you still got your finger in your
 19 witness statement? Keep your finger in your witness
 20 statement and just flip to C2, tab 2, page 40,
 21 paragraph 67. You have got those two.
 22 You say at paragraph 10:
 23 "The interchange terms on which acquirers and
 24 issuers deal together can either be agreed by
 25 an acquirer and issuer with each other (a bilateral

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1 agreement) or can be set by MasterCard in a particular
 2 country.
 3 "Fallback interchange fees. Fallback interchange
 4 fees only apply in ...(Reading to the words)... as their
 5 name would suggest."
 6 Now, you were the general manager for the Nordic and
 7 Baltics. You are now the general manager for France, as
 8 I understand it. Before we get to what Mr Douglas says
 9 about the UK, are there any examples of bilaterals in
 10 Europe?
 11 A. Absolutely there are examples of bilaterals. Just to be
 12 very clear and the mechanism, how interchange works, it
 13 is in the first place the promise that a cardholder, in
 14 every market where it goes and wants to pay, the system
 15 works. And the issuer knows what he will get as a cost
 16 and what he will get as a revenue to accept the
 17 transaction. At the same time the merchant knows what
 18 the costs and revenues are associated with the
 19 transaction.
 20 That is the basis. That is why we have a fallback
 21 balancing mechanism. Then MasterCard allows between the
 22 issuers and acquirers to make bilateral agreements
 23 around what is the level of interchange which they will
 24 agree. So in some markets this is applied and used, in
 25 some other markets it is not applied and used, and in

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1 some European markets, for instance, like the Swedish
 2 market is a good example, bilaterals are used.
 3 Q. And as I understand it, is it Austria, the debit card?
 4 Are there bilaterals in Austria, are you aware?
 5 A. I'm not aware of bilaterals in Austria. But there are
 6 multiple examples where it exists and there are multiple
 7 examples where it does not exist.
 8 Q. You have given Sweden there and you say there are
 9 multiple examples. Can you assist the Tribunal with any
 10 other examples or countries in Europe, for example?
 11 A. I can give you an example. Sweden is a market where
 12 there is a lot of bilateral existence. For instance,
 13 also in the Baltic markets there are examples of
 14 bilateral interchange fees.
 15 Just to clarify, perhaps also on the bilaterals,
 16 that the level of the bilaterals can sometimes be higher
 17 than the multilateral interchange fees, sometimes can be
 18 lower. This is a commercial, or a negotiation between
 19 the two parties in the system.
 20 Q. I asked you to just go to Mr Douglas' witness statement
 21 C2, at tab 2 of C2, paragraph 67, page 40. So this is
 22 in a world of no multilateral interchange fee in the UK.
 23 He says:
 24 "MasterCard would have had to persuade its issuers
 25 and acquirers to enter into bilateral agreements setting

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1 bespoke interchange fees to apply to the transactions
 2 between them. I believe that a sufficient number of
 3 bilateral agreements could have been entered into to
 4 deal with this given the limited number of major issuers
 5 and acquirers in the UK market."
 6 Then he goes on to say about Maestro and rates.
 7 But just concentrating on those two sentences, is
 8 that something that you would agree with?
 9 A. Within the market domestically in the UK, if there is
 10 a limited number of participants, issuers, acquirers,
 11 I think indeed it is possible that those issuers and
 12 acquirers would be able to agree amongst themselves
 13 about what is the level of interchange that both parties
 14 seem to need to make the system work. That is
 15 domestically set.
 16 Of course, it is impossible for every single
 17 acquirer and issuer in the UK market to do this across
 18 the world with all transactions. On a limited scale it
 19 is possible. Just to clarify, that possibility exists
 20 and there's nothing stopping in MasterCard rules for
 21 issuers and acquirers in the UK market to do that.
 22 Q. On that point, it existed, if you just -- have you got
 23 bundle E3.10? Go to page 4068, bottom right.
 24 A. This is the same bundle?
 25 Q. It is the scheme rules. It is bundle E3.10. The terms

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1 of dealing. And the relevant page, it is the big
 2 printed one, 4068. I'm interested in section 3.3.3
 3 "Transaction requirements".
 4 So the customer must apply with a functional 24-hour
 5 day operating connection to the interchange system.
 6 Have you got the page?
 7 A. Yes, I have got the page.
 8 Q. And not force any other customer wishing to operate
 9 multilaterally using the interchange system into
 10 bilateral agreements.
 11 Can you just assist on what the purpose of that
 12 obligation is: not to force any other customer wishing
 13 to operate multilaterally to use bilaterals? Why would
 14 that obligation be in the terms of dealing?
 15 A. I cannot comment on the specifics, why this is there.
 16 This seems to be a technical requirement, and sometimes,
 17 for instance, if we are talking about cross-border
 18 transactions as one example, a multilateral fee is
 19 required if one of the parties does not have
 20 a bilateral.
 21 In any case, if there is a bilateral agreement
 22 between an issuer and acquirer it always prevails, so it
 23 is always the transaction that is used. And there is
 24 nothing stopping MasterCard(?) between issuers and
 25 acquirers to enable bilaterals.

1 Q. Okay. You can put that bundle away, I won't refer to
 2 that again.
 3 If you go to paragraph 24 of your statement, please,
 4 to pick up a point that you started to make. I slightly
 5 cut you off. But you say there that there are multiple
 6 factors which are considered when setting interchange
 7 fees. And you start off with cost data, yes?
 8 A. Correct.
 9 Q. And you say at paragraph 26, I'm just focusing on cost
 10 data at the moment, so it is the first heading that you
 11 refer to in 24. Just focusing on that.
 12 At paragraph 26, if you could just look at
 13 paragraph 26, at a basic level the scheme must ensure
 14 that all the participants involved in it can cover their
 15 costs.
 16 What do you mean by that? Costs of what?
 17 A. I mean, that is a payment system. This is a two-sided
 18 system. This is at the one hand the issuing bank
 19 distributing the cards and they will incur costs for
 20 distributing these cards. They need to recruit new
 21 cardholders, they need to score credits, for instance,
 22 on this new cardholder, they have costs to process the
 23 transaction.
 24 At the same time, also on the acquiring side that
 25 deal with the merchants that have a relationship with

1 the merchants, they also have costs. So there is the
 2 overall set of costs to make the payment system work.
 3 That is the costs I refer to.
 4 Q. So keeping that paragraph 26 in mind, then going to
 5 paragraph 31, and again just focusing on costs, you say
 6 that:
 7 "MasterCard, in attempting to balance the costs of
 8 the issuers and acquirers ..."
 9 Which is what you just referred to:
 10 "... wants to ensure that issuers are not paying too
 11 large a proportion of the total costs, since this will
 12 make the scheme uncompetitive ...(Reading to the
 13 words)... from cardholders."
 14 What do you actually mean by that?
 15 Could you just explain how paragraph 26 and the
 16 first sentence of paragraph 31 act out?
 17 A. This I think goes back to the principle of the
 18 four-party scheme that I mentioned. It is costs on the
 19 issuing side to recruit cardholders, to manage that, it
 20 is costs to recruit merchants and manage and process the
 21 transactions on the merchant's side.
 22 Various studies and theories have been developed and
 23 measured those costs in this eco-system, and it has been
 24 found that the costs on the issuing side far outweigh
 25 the costs on the merchant side. So in order to make the

1 system work and to make sure that issuing banks
 2 distribute cards to cardholders that participate in the
 3 system, they need to be compensated, because if the
 4 costs are not the same you will not get any issuing of
 5 cards to the cardholders. And you will, of course --
 6 you get merchants, but you also need to get cardholders.
 7 That is the basic foundation of the interchange, is
 8 to balance the mechanism and to make sure that both
 9 parties who have a benefit to make the payment scheme
 10 work, the merchant and the issuers who distribute the
 11 cards, that they both contribute to make this eco-system
 12 maximal, optimal and drive volume and drive usage of the
 13 system. And at the basis of it, the issuing side has
 14 a much higher cost component than the merchant side, and
 15 that's why there is a balancing mechanism which we call
 16 interchange.
 17 Q. We shall come on to that in a little while.
 18 Going back to paragraph 24, after cost data you
 19 refer to competition, and this is a theme that is
 20 throughout your witness statement.
 21 Could you just explain what you mean by competition
 22 there?
 23 A. So competition is indeed a very important element in the
 24 setting of interchange as well. Why? Because in the
 25 first place MasterCard, when you develop and launch

1 a product, it needs to be competitive in the market. So
 2 if you launch a product you need to make sure that the
 3 product you provide to the issuer can compete in the
 4 market with other products.
 5 So if you are making a standard product you need to
 6 be able to compete with alternative products for the
 7 issuers, for instance. It could be Visa in this case.
 8 If you are making premium product you need to make sure
 9 that from a consumer perspective the benefits that are
 10 given to the consumer, the insurances, the rewards, that
 11 they are competitive with what the issuer could do as
 12 an alternative. For instance, issuing an Amex card.
 13 So competition is a very important part of setting
 14 interchange as well.
 15 Q. Keeping that competition, that competitive element in
 16 mind, I just want to take you to three paragraphs of
 17 your witness statement.
 18 Again, keeping the competitive situation in mind,
 19 the first sentence is paragraph 30 and then I will take
 20 you to all three and then I will ask you the question.
 21 In 30, you say:
 22 "The costs incurred are not necessarily the defining
 23 factor in the rates set by MasterCard."
 24 All you have to do is say yes or no, because
 25 otherwise we will lose ourselves.

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1 But that's your evidence: that the costs incurred
 2 are not necessarily the defining factor in the rates set
 3 by MasterCard.
 4 Then at paragraph 35, you say, again this is your
 5 evidence, a vital factor when setting rates is the rates
 6 of MasterCard's main competitors. Correct?
 7 A. Mmm.
 8 Q. Then if you go back to paragraph 17, you say that:
 9 "To assess and set interchange fees, the interchange
 10 fee team researches the relevant payment market looking
 11 at market trends."
 12 And
 13 "If necessary, will request a cost study."
 14 I take it from that that sometimes you don't
 15 actually request a cost study.
 16 So keeping those three statements in mind, the
 17 logical implication of that, those three statements, is
 18 that you may raise an interchange rate that is not based
 19 on cost?
 20 Can I have a yes or no answer to that and then you
 21 can --
 22 A. Am I allowed to put the context?
 23 Q. I will ask you the question, then you can say anything
 24 you want, but I would like an answer to the direct --
 25 MR HOSKINS: I think he should be allowed to answer it the

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1 way he wants.
 2 MR BREALEY: No, I would like to --
 3 MR HOSKINS: I think he should be allowed to answer it the
 4 way he wants.
 5 MR BREALEY: I would like to ask the direct question and
 6 then you can say anything you want to clarify it.
 7 The logical implication of that is that you may
 8 raise an interchange rate that is not based on cost?
 9 Yes or no, and then you can say whatever you want.
 10 A. I would say no. And I would say that the -- in setting
 11 the interchange for a specific product always different
 12 factors will be taken into account.
 13 What I mean is in the first place a cost basis will
 14 be taken into the account. In the first place. And we
 15 always will take -- look at what is the cost basis. It
 16 does not mean that at every point in time a new cost
 17 exercise needs to be conducted because that is a very
 18 complex process, but an element of the cost is always
 19 taken into account.
 20 Secondly to that, it might not be the determining
 21 factor for setting interchange. You might very well
 22 have an interchange which is below -- set below
 23 a certain cost level to make the balancing. But if that
 24 results in a product that is not competitive, it doesn't
 25 work in the market, the issuer is not able to issue the

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1 product because you have set the wrong interchange and
 2 it cannot compete on the issuing market, then you have
 3 got the wrong interchange. It is one of the factors.
 4 Next that there's also a third dimension which
 5 important, which is the evolution of the market, for
 6 instance, new technology. If we are talking about
 7 contactless transactions, if we are talking about chip
 8 cards to improve the security, we will use interchange
 9 to drive the innovation in the market.
 10 So there is multiple aspects to setting of the
 11 interchange of which the cost and competition are
 12 important ones, but they are not the only one.
 13 Q. That is not quite what I asked you. You do take into
 14 consideration costs, I accept that. I asked you, and
 15 I will ask it again: do you ever raise an interchange
 16 rate which is not based on cost? Is the increase ever
 17 made with, for example, a competitive situation in mind?
 18 A. That is possible. It is very well possible that you
 19 have an interchange which is higher than the cost rate
 20 because of a competitive reason, though those cases are
 21 very, very exceptional. But theoretically it is
 22 possible.
 23 Q. I had understood that MasterCard's evidence regarding
 24 the Maestro is that it just was that: they wanted to
 25 increase the Maestro rate in order to be competitive

20

1 with Visa?
 2 A. I think that is a very short (inaudible) summary of why
 3 their rate needs to be increased. But I understand that
 4 it is essential in the market to have a product that is
 5 competitive. So if the rate is not competitive that is
 6 a good reason to increase it, yes.
 7 Q. Mr Willeart, there are thousands of documents in this
 8 case and, forgive me, but one document seems to be
 9 missing and that is the precise calculation by the
 10 interchange fee team of the UK MIF.
 11 Can you assist the Tribunal with why that is?
 12 A. I cannot answer on the specific document because I was
 13 not --
 14 Q. It is not annexed to your statement, for example?
 15 A. No, exactly. So I would say that, and I think what you
 16 are hinting at is, is there one precise formula where
 17 you magically pump in all the information and the
 18 interchange comes out? No. An interchange is
 19 a balancing mechanism and you need to take various
 20 inputs into account to set the right level of
 21 interchange.
 22 There are other examples, for example if the Central
 23 Bank sets a interest rate, they are also using a
 24 mechanism in the market to balance. So it does not
 25 necessarily require one specific formula.

21

1 So this, typically where you are balancing two
 2 different market sides, it does not mean necessarily
 3 there is a specific formula for saying "This is now the
 4 right level of interchange".
 5 Q. There is no document that MasterCard can produce to the
 6 Tribunal or to the experts in this case which will allow
 7 them to assess in some detail how the interchange team
 8 arrived at a certain level throughout this claim period.
 9 A. I would disagree with that. I think MasterCard
 10 typically put a very robust methodology in place. We
 11 set interchange levels, taking the different components
 12 into account. That was surely the same case for the UK
 13 interchange where at the one end there was taken a cost
 14 basis as an input, which was a cost study performed
 15 typically by Edgar Dunn, it was outsourced to have
 16 an independent company to look at what are the costs in
 17 the market. Secondly, we would look at different
 18 research. What are the trends in the market. How we
 19 drive people from cash to electronic payments. And of
 20 course there was a (inaudible) done from competition,
 21 and there is various documents from every single time
 22 that MasterCard set an interchange, there was a thorough
 23 process done that took multiple months, was
 24 independently done and came to a conclusion in a
 25 document that was presented for approval independently

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1 by MasterCard.
 2 So I would disagree. There was a very robust
 3 process and there was documentation to prove it, as in
 4 the various documents.
 5 Q. Have you exhibited any calculation to your witness
 6 statement?
 7 A. I have not in my witness statement given any statement
 8 about exact level of interchange in UK.
 9 Q. No.
 10 A. So I did not feel I would need to submit annexes on what
 11 is the level of interchange. But I am sure that the
 12 court can have access to the pages and documents, if it
 13 has not got it already, that defined how the rate in the
 14 UK was set.
 15 Q. And with detailed calculations of the costs, the
 16 competitive situation, the market conditions, every
 17 single factor that was taken into account to arrive at
 18 the certain level of interchange fee for the UK, you
 19 think that such a document exists, do you?
 20 A. There are typically interchange documents, EIC
 21 documents, which are a proposal and which state -- which
 22 are a summary for a committee to review.
 23 Q. Correct, they are a summary. I am not sure I need the
 24 exhibit to your witness statement. We get a minute
 25 saying this is what it should be, but I'm asking you

23

1 whether there are any documents which would allow us to
 2 verify how it has been calculated?
 3 A. So in preparation of this document there are various
 4 materials made, calculations made to come to this
 5 conclusion and this is the end result, which is a study
 6 that were done to come to the conclusion. For instance,
 7 if there is a cost component and a cost study done,
 8 there is a lot of work done, data collected from various
 9 parties in the market, in this case I'm referring to
 10 studies done by Edgar Dunn, they collect those
 11 informations and they produce an end report. The result
 12 of this end report is produced in the interchange
 13 proposal, which is the EIC document.
 14 So there is a process and there is a summary to come
 15 to a conclusion.
 16 Q. Yes, Mr Willeart. We have lots of Edgar Dunn reports,
 17 we have lots of EIC reports, we have nothing in the
 18 middle. We have no detailed calculations from your
 19 interchange team which would allow us to verify how you
 20 have gone from Edgar Dunn to what the EIC has
 21 sanctioned.
 22 A. I would say the different inputs are clearly laid out in
 23 the document, and the logic and how a rate was proposed
 24 is clearly laid out in this document. So I'm not
 25 sure -- as I mentioned, there is no one formula that

24

1 will make up this is the level of interchange, but the
 2 logical conclusion, how you get to the level of
 3 interchange, is clearly explained in this document.
 4 Q. Anyway, for today's purposes you are not able to assist
 5 the Tribunal in how the interchange fee team arrived at
 6 the UK MIF? Except in a very vague terms.
 7 A. I would disagree with that. I think to me what
 8 I explained is that interchange committee took into
 9 account the various cost components, took into account
 10 the competitive level in the market and took into
 11 account the different factors to come with the rate
 12 proposal. And that was what was used, and in this case
 13 for the UK interchange team it was done before I became
 14 responsible, for the same process applied when I was
 15 responsible.
 16 MR SMITH: Mr Willeart, a few moments ago you used the
 17 analogy of the Bank of England interest rate setting.
 18 Now, as I understand that process, there is a regular
 19 meeting, a monthly meeting, at which the rate is
 20 reviewed. And I anticipate before that meeting there
 21 are briefing documents circulated, they are read, the
 22 Committee assembles, they discuss, make a decision and
 23 then after the decision minutes are published for the
 24 public as to how the conclusion has been reached.
 25 Is that the sort of process that MasterCard adopts?

25

1 In other words, are there regular reviews of what the
 2 MIF should be for a particular market, monthly or
 3 however, or is it a more ad hoc process?
 4 A. I would say it is -- there are multiple changes that can
 5 happen and when there is a review required. For
 6 instance, when there is a new product being launched in
 7 the market, that will be taken into account. There is
 8 going to be a meeting with the business people and the
 9 product teams in MasterCard to understand what they are
 10 trying to achieve in the market, what is the competitive
 11 situation, what is happening in the market trends.
 12 That information will be collected, and of course
 13 together with the interchange team, will be reviewed and
 14 a proposal for how the interchange should be set is
 15 developed. So such process indeed exists.
 16 And there is multiple ways it can exist. It can
 17 start with the interchange team reviewing the rates. It
 18 can come from business needs. It can come also from,
 19 for instance, a new technology in the market and there
 20 is a change required. It can also be that competition
 21 has made a change.
 22 So there is, I would say there is a very regular
 23 discussion with market teams about what's the level of
 24 interchange, what are the various products that need to
 25 be issued. And all that typically results in

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1 an interchange proposal if there is a change required to
 2 the setting, and that would then go to the -- through
 3 the approval process.
 4 So there is a similar type of approach, not
 5 necessarily every week, but there is a similar type of
 6 methodology approach.
 7 MR SMITH: Correct me if I'm wrong, it is perhaps not
 8 regular in terms of a monthly set date.
 9 A. Correct.
 10 MR SMITH: But perhaps more triggered by something
 11 happening, whether it be a new product or a new
 12 technology or a sense that the competitive situation in
 13 the market may have changed requiring a review.
 14 So would it be fair to say that the review of the
 15 MIF requires some form of external trigger to produce it
 16 rather than it being done on a time set basis?
 17 A. Definitely external factors will trigger it, but also
 18 internal factors; we will look at the evolution of the
 19 products in the market.
 20 To give you one example, at some point in time we
 21 observed that the premium product, which were competing
 22 with Amex, we had launched the world product in the UK
 23 market, became very successful in the market. We
 24 expected more world products to come into the market, so
 25 we proactively took the decision to lower the

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1 interchange across products in order to manage the cost
 2 in the system for the merchant and for the acquirers in
 3 the system.
 4 So this was a case, for instance, where there was
 5 not necessarily any external competitive situation.
 6 There was more, let's say, a proactive approach from
 7 MasterCard side to look at what is going to be the
 8 future evolution of the average interchange in the
 9 markets and do we need to take any action.
 10 So that was one occasion. But you are right, there
 11 is multiple ways you can be proactive. Sometimes it is
 12 a new product.
 13 MR SMITH: Thank you, Mr Willeart.
 14 Thank you, Mr Brealey.
 15 PROFESSOR JOHN BEATH: I have a supplemental question. I'm
 16 still trying to get to grips with what goes on in your
 17 team's mind as you are generating this MIF, because the
 18 way you describe it you have some hard information,
 19 I presume that's what EDC provide, hard information, it
 20 maybe based on some judgments of players, but it's hard
 21 information. Then you also have soft information, which
 22 is all this stuff about, you know, what the market is
 23 like and so on.
 24 Now, when you bring these things together you have
 25 to have a baseline to start from. So is the baseline

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1 the cost information and you then have a judgmental
 2 factor? Because, you know, thinking about the Bank of
 3 England MPC process that's exactly what it would be.
 4 There is hard data on the economy, and then you think
 5 about expectations and things of that sort.
 6 Is that actually the way your team ends up with
 7 "This is today's MIF"?
 8 A. It is a very good question. I'll try to explain it.
 9 So I would say -- in the first objective I would say
 10 that the product that you put in the market, let me
 11 assume that we would be setting the rate for a new
 12 product from MasterCard that would be launched, of
 13 course the first objective would be to ensure that the
 14 product is competitive in the market.
 15 So that is the first objective. Then what you would
 16 do is you would look at the cost information --
 17 PROFESSOR JOHN BEATH: But if it didn't cover the costs.
 18 I mean, if to be competitive it didn't cover the costs,
 19 would you simply withdraw the product?
 20 A. So if you would, let's say, need to set an interchange
 21 would be higher than the costs in order to be
 22 competitive, then I think no. So you could still go
 23 ahead.
 24 But, for instance, let me make a concrete example.
 25 The premium product. We get a study from Edgar Dunn

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1 that says the cost in the market on average is 100 basis
 2 points on average. Then we want to compete with Amex.
 3 So we say, well, Amex gives the issuers on average,
 4 let's say, 160. So if I'm going to launch a product
 5 at 100, it is never going to be able to compete, no
 6 issuer in the market will launch this.
 7 So I can actually make -- set an interchange rate
 8 which is competitive with Amex, say I put it at 140
 9 because Amex has a different acceptance. So we look
 10 at 140 as a competitive rate, but then I would look at
 11 the overall costs in the market and then make
 12 an estimate how much of these products will be issued in
 13 the market. And I will look at the total costs in the
 14 market of all MasterCard products for merchants:
 15 Standard products, premium products. And the average of
 16 that, I would try to ensure that that is below the cost
 17 level, so that on average the merchant does not
 18 necessarily have an increase, or will not be above the
 19 cost. But that does allow me within this average to set
 20 some products at the higher rate to compete and some at
 21 the lower level.
 22 That is why the average is a very important
 23 mechanism for setting this interchange.
 24 MR BREALEY: That was a very helpful answer of the thought
 25 process that you go through, but we don't seem to have

30

1 any details or minutes of the interchange fee team which
 2 would give us a clue as to how you go about that thought
 3 process; is that correct? Do you have minutes of the
 4 interchange fee team?
 5 A. There were minutes of the meeting made which noted to
 6 the decisions taken on each of the proposals.
 7 Q. But not why? Not detailed calculations?
 8 A. Again, to me if I look at the proposals, read the
 9 proposals, I think the logic in the proposals is quite
 10 clear and follows the same logic as I explained.
 11 There is not a difference and the proposal is clear
 12 to how a rate was set, what was taken into account. The
 13 minutes did not go further than the discussion and the
 14 proposal, that is true.
 15 Q. Well, let's look at an example that you give in your
 16 witness statement, which is the development and the
 17 repricing of the DMC proposition, which you refer to at
 18 paragraph 42.
 19 You say
 20 "I was therefore tasked with developing and
 21 repricing the DMC ..."
 22 That is the debit MasterCard proposition:
 23 "... in an attempt to grow its volumes in 2010/11."
 24 You say that essentially you wanted to establish
 25 debit MasterCard as a superior debit product offering

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1 towards issuers, correct?
 2 A. Correct.
 3 Q. 43, the strategy was essentially to increase the
 4 functionality of the debit MasterCard, and link it to
 5 the premium segment.
 6 Again, at 44:
 7 "In terms of functionality, we sought to relaunch
 8 debit MasterCard mandating PayPass functionality."
 9 That was the increase in functionality, but it was
 10 also a correlation with the increase in interchange
 11 rates because you say that in order to do that, you
 12 wanted to increase the interchange rates to persuade
 13 issuers to issue MasterCard debit cards.
 14 So in 43 and 44, you are looking at increasing
 15 functionality and increasing interchange rates to
 16 persuade issuers to take that card.
 17 Could you expand on that? Why are you increasing
 18 the rates in order to persuade the issuers to take the
 19 DMC which has increased functionality?
 20 A. I think it comes back to the essential point that if we
 21 set and launch a new product in the market, it needs to
 22 be competitive. And it needs to be competitive in terms
 23 of the proposition to the cardholder so the issuers can
 24 have an attractive product to distribute in the market.
 25 That is the essentials.

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1 What we found is when DMC at that time, when it was
 2 launched, and it is no secret, was not gaining a lot of
 3 traction in the market. If you look at our market share
 4 in the UK market, it was very low.
 5 When we looked at the position of DMC versus the
 6 competitive product of Visa, we did not find there was
 7 sufficient appeal to pick up this product.
 8 So the strategy of the product in the market team at
 9 that time was to revamp, relaunch it and make something
 10 that was more appealing and also more adjusted to the
 11 time.
 12 At that time it was the coming of contactless, so
 13 that needed to be a default proposition. We wanted to
 14 make sure that cardholder had a secure product, so we
 15 would put zero liability for cardholders in the product.
 16 Then we refreshed the interchange setting. Two
 17 objectives: first of all because we made a more
 18 appealing product, it was also higher cost for the
 19 issuers to put contactless on there, to put the zero
 20 liability insurance on there.
 21 Also because we found the product, and in this case
 22 the interchange, had not made a difference for issuers
 23 to issue the product. So there was a change in product
 24 construct that justified us to change the interchange
 25 setting for that product.

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1 Q. Okay. Also at paragraph 42, at the same time as you are
 2 establishing debit MasterCard as a superior debit
 3 product with increasing interchange rates to persuade
 4 issuers to take them, this is the third bit in 42, you
 5 are confirming Maestro has entry level debit product.
 6 We have evidence on this, you may have been in
 7 court. What is entry level debit product? Is that, as
 8 some people have acknowledged, the youngsters and the
 9 students?
 10 A. I think this is in the context, when we look at the
 11 debit product that MasterCard wanted to offer to
 12 issuers, we say we are going to offer product which is
 13 superior versus Visa, with contactless on there, with
 14 insurances on their superior product. But we also want
 15 to make sure that when we have a range of products in
 16 the market there is a product which has less
 17 functionality, which has less benefit around the
 18 product, if you wish. So that is where Maestro was
 19 positioned at the time.
 20 Q. You gave evidence of what I call the Maestro story, 36
 21 to 41. Can I just confirm your knowledge of it.
 22 You joined MasterCard I think in 2010?
 23 A. 2009.
 24 Q. So this is after --
 25 A. Correct.

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1 Q. -- the HSBC story --
 2 A. Correct.
 3 Q. So your knowledge of Maestro is a couple of years on,
 4 and as you fairly say at 39:
 5 "It was my understanding from historic documents?"
 6 A. That is correct.
 7 Q. Then at paragraph 41, you refer to "a selection of
 8 documents available to me".
 9 A. Mmm hmm.
 10 Q. One document I should take you to to see whether, when
 11 you were drafting this statement, you had access to it,
 12 is at E3.12, tab 222, 4949, a document that we have
 13 seen. I don't know whether you have seen me refer to
 14 it. I took Mr Douglas to it, 4949, this is a MasterCard
 15 document, maybe round about the time that you arrived.
 16 Do you remember ever seeing this? Is this one of the
 17 selection?
 18 A. I don't remember (inaudible), but I don't remember.
 19 Q. So you never saw this when you drafted your witness
 20 statement?
 21 A. I don't know, no.
 22 Q. So if you go to 4949, here is MasterCard's assessment
 23 some years after. So they have obviously spoken to HSBC
 24 and RBS.
 25 "The reasons for the portfolio losses in debit ...

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1 and there are multiple factors that influenced HSBC and
 2 RBS's decision to migrate their debit portfolios from
 3 MasterCard, notably overall economics, acceptance and
 4 marketing."
 5 I took Mr Douglas through this and he accepted that
 6 all these were contributory factors to the loss of RBS
 7 and HSBC, yes?
 8 If you weren't around at the time, then you
 9 obviously can't give direct knowledge of it, can you?
 10 But from your reading of historic documents or talking
 11 to people, were you aware of the limited functionality
 12 of Maestro? Were you aware?
 13 A. What I was aware of is that -- this was mentioned,
 14 I think it was also mentioned on Monday. There was the
 15 famous less acceptance for the Maestro product. I think
 16 that is one of the topics.
 17 Q. If you just pause there. If you look at the second
 18 product strategy:
 19 "The UK was still Maestro-based providing strong UK
 20 acceptance, but inconsistent throughout Europe and
 21 little across other global markets with the US
 22 representing a key acceptance gap."
 23 Were you aware of that?
 24 A. Well, I have a slightly different view from the way it
 25 is written here, because if I look across Europe,

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1 Maestro and especially -- Maestro is a very strong brand
 2 and a strong product. If I look at the Dutch market,
 3 for instance, all of the Dutch cards are Maestro cards.
 4 In Germany, 80 million cards in Germany has as a brand
 5 on there, Maestro. Why do they have it? Because it
 6 allows them to cards they use outside of Germany.
 7 Q. Pausing there. Can you flip back to page 4857 and let's
 8 look at the figures that were available at the time.
 9 So what HSBC and RBS had, when they were making
 10 their decision whether to go with Visa or not. 4857.
 11 This is another MasterCard document, debit MasterCard.
 12 A new choice. You see 4857. We call this the
 13 10 million versus the 23 million point.
 14 So the figures at the time that these two banks were
 15 making these decisions, we see the acceptance. I think
 16 one of the witnesses -- I don't know whether it was
 17 Mr Perez, I can't remember now. I think it was Mr Perez
 18 yesterday accepted that where you see the figures for
 19 MasterCard, you can take equivalent figures for Visa
 20 because they have a similar reach.
 21 But you see there: acceptance 23 million locations
 22 worldwide for, say, Visa, but only 10 million locations
 23 worldwide for Maestro.
 24 I would suggest to you that that is a humongous
 25 difference in acceptance.

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1 A. For sure I'm not going to debate the figures here.
 2 I fully follow you there is a big gap in numbers, but
 3 I just also want to put in perspective that Maestro is
 4 exactly the brand taken by many banks across Europe to
 5 give their cardholders access outside.
 6 So the level of acceptance, where it is, could be
 7 that in at small remote locations in the US there is not
 8 a Maestro, but if you travel to New York, travel to the
 9 key points, there is Maestro acceptance.
 10 So the overall numbers might be lower too, but
 11 surely 80 million German Maestro travellers also travel
 12 to the US. I agree there is a difference in numbers,
 13 but there is also an important factor about where the
 14 acceptance is.
 15 But I do agree with you that there is a difference
 16 in numbers --
 17 Q. Quite a significant --
 18 A. There is a significant difference in numbers,
 19 absolutely. But the important part is where is
 20 acceptance gap. The important piece.
 21 Q. One of the reasons for the significant difference in
 22 numbers was the limited functionality of Maestro.
 23 I think you accept that. For example, we have just seen
 24 it was sporadic. Let me put it as neutrally as I can.
 25 In the US it could not be used for e-commerce at the

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1 time. It had limited functionality.
 2 That is one of the reasons you were charged with
 3 establishing a superior DMC, correct?
 4 A. I think you need to take the time perspective. So I do
 5 understand there is, and there is, a difference in
 6 acceptance of the product. I'm not going to debate
 7 that.
 8 Q. And is it due to functionality?
 9 A. I would say at that point in time there is different
 10 functionality of Maestro online versus, for instance, a
 11 Visa card online at the time.
 12 But let's put it in perspective at that time.
 13 E-commerce transactions, we are talking the period
 14 2005/2006, e-commerce transactions were a very small
 15 proportion at the time. So if you take different
 16 perspectives about what happens, to me the interchange
 17 component is a very critical aspect.
 18 I'm not saying that the other doesn't play a role,
 19 but the interchange one, let's not forget the gap in
 20 interchange between Visa card and a Maestro card, and
 21 just make the numbers. If you make the numbers, the
 22 card was 10 basis points difference. 10 basis point, if
 23 you take a portfolio of 5 million cards -- I'm just
 24 making an example here -- about £8,000 spent makes on
 25 a yearly basis about £40 million difference for a bank

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1 if they issue a Maestro card and they issue a Visa debit
 2 card.
 3 I think that's also an element that we should not
 4 ignore because that's a key factor for me.
 5 Q. It is, but if I'm a cardholder and I have a Maestro and
 6 I go to Los Angeles and I can't use my Maestro card,
 7 I may go to another bank that will offer me a card that
 8 I can primarily use in the UK but also gives me that
 9 ability abroad. You would accept that?
 10 A. No, I understand that acceptance is a key part. But I'm
 11 also saying that acceptance on key locations was there,
 12 because the Germans also travel to the US. And it might
 13 be that in outside locations, in Texas and wherever,
 14 there is a lower acceptance, but if you go to the key
 15 airports, key cities in the US, there was Maestro
 16 acceptance. There is no problem.
 17 There is 80 million Germans, all the Dutch. This
 18 was a cross-border brand. The reason of existence of
 19 Maestro in Europe is the fact that it allowed domestic
 20 schemes in Europe to give international acceptance. So
 21 surely it worked for the Germans, so it cannot have been
 22 that bad that it totally didn't work for the UK market.
 23 Q. But I think you have accepted that there was --
 24 A. A difference --
 25 Q. -- a difference in functionality between Maestro and the

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1 Visa product?
 2 A. Absolutely.
 3 MR SMITH: To be clear, this difference in functionality
 4 though is exactly the same in Germany as it is in
 5 the UK?
 6 A. Absolutely.
 7 MR SMITH: So why is it that Maestro is still so popular in
 8 Germany compared to the UK, in your view?
 9 A. My personal belief is that the product in the UK was
 10 uncompetitive. If you have a 10 basis points gap versus
 11 the competition, versus Visa, which result in 40 million
 12 difference on a yearly basis, that is the difference.
 13 In the Netherlands, in Germany the product is not
 14 uncompetitive.
 15 And I do agree that there is perhaps the benefits of
 16 the bigger acceptance, higher e-commerce use is
 17 an element in consideration, but I would not -- let's
 18 not forget the key component is the fundamental
 19 economics of the product.
 20 MR JUSTICE BARLING: So the difference, differential in
 21 Germany and Holland was --
 22 A. There is no differential between the competition.
 23 MR JUSTICE BARLING: The MIFs were equivalent, were they?
 24 A. Exactly. So there was not a competitive disadvantage
 25 which was the case in the UK.

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1 So that to me is a very logical explanation why the
 2 banks moved away from the product. The amount of money
 3 that they lost if they would not switch was too big.
 4 MR SMITH: Just to understand in very broad brush terms the
 5 structure of, say, the German market. Obviously Maestro
 6 is bigger. Could you just give us a thumbnail sketch of
 7 the extent to which there is greater or less debit
 8 versus credit card usage in Germany than in the UK and
 9 the extent to which Visa and MasterCard are bigger or
 10 smaller relative to Maestro, again in Germany and
 11 the UK? Just give us a feeling of the two markets.
 12 A. I (inaudible) your point, because of course I don't want
 13 to simplify, compare the UK market, German market. The
 14 markets are different in terms of card usage.
 15 The German market is very much a cash market still,
 16 and in terms of proposition, MasterCard has, because of
 17 Maestro, been, let's say, the cross-border partner for
 18 the domestic banks, if there is a domestic scheme in the
 19 market, which is called Giro. And that is used by the
 20 Germans, and when they travel abroad they use the
 21 Maestro brand to pay the cards. That is --
 22 MR JUSTICE BARLING: E-commerce is less, is it?
 23 A. No, e-commerce -- so there is e-commerce developed for
 24 Maestro for sure as well. But the acceptance for
 25 Maestro online is still less than it is for MasterCard.

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1 That is a fact.
 2 MR JUSTICE BARLING: Are you saying that's less important in
 3 Germany because it is a cash economy?
 4 A. I would make a difference between now when e-commerce is
 5 significant, but let's not forget this was happening in
 6 2005/2006 when the banks took the decision, e-commerce
 7 was a very small proportion at that time. We were at
 8 the start of the e-commerce period.
 9 MR BREALEY: With respect, they gave the decision in the
 10 last quarter of 2007.
 11 A. Excuse me?
 12 Q. The banks made their decision not in 2005/2006. They
 13 made their decision in the last quarter of 2007.
 14 MR JUSTICE BARLING: Sorry, Mr Brealey, we have been
 15 interrupting you. Shall we have a short break then?
 16 Mr Willeart, feel free to stretch your legs but do
 17 not talk to anyone.
 18 (11.40 am)
 19 (A short break)
 20 (11.50 am)
 21 MR BREALEY: So Mr Willeart, just concluding on this and we
 22 were looking at paragraph 42, 43, 44, the launch of what
 23 you call the superior debit MasterCard. And I think we
 24 have established that your evidence is that the launch
 25 of the superior debit MasterCard merited higher

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1 interchange fees because of its functionality, correct?
 2 It is what you say.
 3 A. It needed to be a competitive product and functionality
 4 was one of the aspects, yes.
 5 Q. So if you get higher interchange fees because of
 6 increased functionality, logically, I would suggest to
 7 you, an inferior product should attract lower
 8 interchange fees. It is a question. An inferior
 9 product should logically attract lower interchange fees?
 10 A. It depends on the context, the specific context of the
 11 market, what product was the competition at that time.
 12 I cannot answer that as a theoretical hypothetical
 13 scenario.
 14 Q. You can't answer a straight question? You think it
 15 depends?
 16 A. It depends on the context because the product in all
 17 cases needs to be competitive, so I don't know in your
 18 scenario what is the competitive situation. If the
 19 inferior product is competing with another inferior
 20 product which has a higher interchange then it is
 21 a different situation.
 22 Q. Let's see if we can get this straight. So on the
 23 Maestro, I think it is accepted that it was not as good
 24 as the competing Visa product. You would accept that?
 25 A. Correct.

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1 Q. If it is inferior to the competing Visa product you say
2 that you need higher interchange fees in order to make
3 that inferior product competitive with a Visa product,
4 correct? Competitiveness seems to be the key element
5 here.
6 A. It needs to be a competitive product, yes.
7 Q. So in other words, I think you talked about the 10 basis
8 points. It would be MasterCard's intention to increase
9 the interchange fee of the Maestro product simply to
10 compete with the superior Visa product, correct? To
11 make it competitive in terms of the amount of money the
12 issuers are going to receive.
13 A. That could have been one of the scenarios, yes.
14 Q. So in essence, the effect of your evidence is that had
15 MasterCard increased the Maestro interchange rate, they
16 would have been asking merchants to pay issuers to
17 retain an inferior product? Correct? Logically it
18 follows.
19 A. I think -- I mean -- I'm not sure I follow the context.
20 Q. I think you do follow me. The whole thrust of this
21 evidence that you give at 36 to 41 is that if only we
22 could have increased the interchange fees we could have
23 made the Maestro as competitive with Visa and retained
24 the two accounts.
25 That's the thrust of what you are saying, and what

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1 I'm putting to you is if you had been able to do that,
2 to make it as competitive as regards price, the
3 merchants would have been paying for issuers to retain
4 an inferior product. It is a simple proposition. Can
5 you agree or disagree?
6 A. I would agree that if the rates would have been the same
7 as the Visa product, that most likely would not have
8 lost the debit portfolio to Visa. That's my personal
9 belief on that.
10 Q. And it would have meant that for a period of three or
11 four or five years, MasterCard retaining the accounts,
12 that people with a Maestro card in the UK would have had
13 a 13 million location gap, because we have seen the
14 difference between Visa and Maestro amounts to
15 13 million locations?
16 A. But just to be very clear, the interchange you are
17 discussing is a domestic interchange in the UK.
18 Q. I thought --
19 A. The acceptance gap we are talking about was
20 an acceptance gap in the US.
21 Q. It means --
22 A. So the proposition in the UK was very competitive and
23 similar as the Visa proposition. You were talking about
24 a competitive difference in acceptance in the US.
25 Q. Anybody living in Tottenham in London with a Maestro

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1 card would have 13 million locations, less than if the
2 person in Tottenham took the Visa card to use worldwide,
3 correct?
4 A. I don't understand why the acceptance in the US has
5 a difference for the acquirers in the UK in terms of the
6 costs for the transaction of the card.
7 Q. It has a difference for the cardholder, doesn't it?
8 A. For the cardholder, there is a difference, I understand,
9 yes.
10 Q. Yes.
11 A. But I don't understand what is the difference for the
12 cost of a transaction in the UK. I don't understand
13 that.
14 Q. All I'm putting to you that had MasterCard increased the
15 rate by 3p or 4p, on your evidence, your evidence is, if
16 only you had been able to do that, you would have
17 retained the accounts for three, four, five years, how
18 long the period was, you would have retained the
19 accounts, the customers in the UK who had Maestro cards
20 would have had an inferior product?
21 A. In the UK the customer would have a similar product as
22 the Visa product because the acceptance was the same.
23 Q. You also mention Amex.
24 A. Yes.
25 Q. About how you are going to lose market share if only you

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1 could compete with Amex.
2 Is this the evidence -- we are looking at
3 essentially paragraphs 46 to 56 -- are you giving this
4 evidence with your interchange fee hat on, or what? Or
5 your experience as the general manager of France, the
6 Nordics? Where is the experience coming from?
7 A. Probably my witness statement has elements of both, I am
8 sure.
9 Q. So if you go to -- I don't know what bundles -- have you
10 got E --
11 A. I have bundle E3.12.
12 Q. I think we will not need that. You will need to put
13 that away and go to E3.13.
14 So we won't go at length through all the Amex
15 documents, we have been through it with the witnesses,
16 but I will take you to this one, E3.13, tab 249. Before
17 we delve into this document, let's just go to the
18 front -- is this blue? (Pause)
19 Then I'm afraid I can't ...
20 MR JUSTICE BARLING: This is the document that we went into
21 camera.
22 MR BREALEY: Let's see if I can --
23 MR JUSTICE BARLING: It depends on how extensive your
24 cross-examination --
25 MR BREALEY: I will do my best.

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1 MR JUSTICE BARLING: See how we get on.
 2 MR BREALEY: This is confidential to MasterCard so I will
 3 take you to various passages, you can read it and
 4 then ... (Pause)
 5 I'm going to show you this document in the context
 6 of your evidence where you say that you need higher
 7 interchange fees to compete with Amex, correct? And
 8 just let's get some base rules from the evidence that
 9 you have given on the interchange fees, how you set
 10 them.
 11 Do you accept that the multilateral interchange fee
 12 is a cost set by MasterCard?
 13 A. It is a balancing mechanism by MasterCard, correct.
 14 Q. If I can call it the MIF, that the MIF sets a proportion
 15 of the issuer's costs. I think you have accepted that.
 16 So the MIF sets a proportion of issuers' costs?
 17 A. The MIF balances the costs from the issuers to the
 18 acquirers, correct, yes.
 19 Q. I'm just taking this from your evidence.
 20 This is not necessarily in your evidence, but I put
 21 it to you that the effect of that is that there is no
 22 competition between acquirers and issuers as to the
 23 proportion of issuers' costs because it is a common
 24 cost. Do you agree with that?
 25 A. Yes.

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1 Q. But you say that this fixed common cost is necessary to
 2 stimulate interbrand competition from a competitor, here
 3 Amex, correct?
 4 A. Yes.
 5 Q. Whilst it may restrict intra-brand competition -- do you
 6 understand the --
 7 A. Can you --
 8 Q. Intra-brand competition? Intra-brand competition is
 9 competition in the focal product, say MasterCard. So
 10 there is no competition in the MasterCard
 11 interchange fee.
 12 A. Okay.
 13 Q. So there is a distortion of competition, a common fixed
 14 cost, MasterCard. But you say that that restriction of
 15 competition intra-MasterCard, you need it in order to
 16 compete with Amex?
 17 A. What I'm saying and what I mean is that you need to be
 18 competitive with Amex, and for that purpose MasterCard
 19 has multiple products, premium products to compete with
 20 Amex, and other products that compete with standard
 21 products, yes.
 22 Q. It's what the economists like Dr Niels and
 23 Mr von Hinten-Reed --
 24 A. It's complex --
 25 Q. Call intra and inter-brand competition. I thought you

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1 might know that.
 2 That is in the context of your evidence here. This
 3 document, you can see what it is. It is a -- I am sure
 4 I can say this, a steering committee. Do you know
 5 whether you were on the steering committee?
 6 A. I was not on the steering committee, no.
 7 Q. So you have never seen this document?
 8 A. I have never seen this document.
 9 Q. Do you get access to these sorts of documents? I mean,
 10 this is essentially a commercial document giving the
 11 state of play of the market and of the competitors. Do
 12 you ever get access to this sort of stuff?
 13 A. Could be that I get access to this, but this is not
 14 necessarily systematic.
 15 Q. When you signed your statement, when it was prepared for
 16 you, did you have these sorts of documents? Were these
 17 sort of documents shown to you?
 18 A. No.
 19 Q. If you go to page 5319, I think it is 5319, we have seen
 20 this before, do you agree that MasterCard has
 21 a significant acceptance advantage over Amex?
 22 A. Yes, I agree with that, but you need to nuance
 23 a little bit.
 24 We are talking about the premium markets. So it is
 25 important always to look about the premium market in

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1 specific. So if you look at the market in total and
 2 look at acceptance, for a premium cardholder, the
 3 acceptance in a small village in the north or in the
 4 south is less important than the acceptance in a high
 5 street location in London.
 6 So while these figures are market averages, you of
 7 course would need to look into, from a premium
 8 perspective, what is the acceptance and what is level of
 9 acceptance, but of course there is a difference in
 10 acceptance, I do agree with you there.
 11 Q. At paragraph 55 of your statement, I think you are, or
 12 throughout really you also are referring to the Amex GNS
 13 offering.
 14 If you go back to 5318, at the bottom you see it
 15 says:
 16 "The Lloyds Duo."
 17 You see the second bullet point, there was evidence
 18 from someone from a bank in these proceedings saying
 19 that the Lloyds Duo was complex and customers did not
 20 really understand the two-card concept.
 21 Would you agree with that? Is that your experience?
 22 A. Unfortunately, I can't comment a lot on the market
 23 experience, but I understand that it was not, let's say,
 24 potentially as successful as they may have wished.
 25 I have not been very close to that specific product ...

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1 Q. Again, this has been debated at length, but I in
2 fairness show it to you. If you go to 5327, you see
3 that that is dealing with what we have referred to
4 publicly as the experience in Australia. Are you aware
5 of the Australian experience --
6 A. I'm not aware in detail of the Australian experience.
7 Q. If you go over the page, which is 5328, the penultimate
8 bullet point, which says "meaning".
9 A. Which page? It is page 28.
10 Q. I'm sorry, page 5328, with the fourth bullet point:
11 "Meaning that ..."
12 Are you aware that that was the experience in
13 Australia?
14 A. I guess -- I'm not aware of the details in the
15 Australian market, but I think the key point is to
16 understand in this context how did MasterCard compete in
17 that market.
18 If MasterCard was able to compete with the premium
19 rates towards Amex, I would expect typically that lots
20 of market share would be limited. MasterCard would have
21 been capped at an interchange level, then of course it
22 would have been a challenge to compete and I would
23 expect Amex to gain share.
24 If MasterCard was able to issue a card at the
25 premium interchange rate, I would expect them to be able

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1 to compete and defend their position. My understanding
2 is that there was a premium interchange for MasterCard
3 at that time in the market. But ...
4 Q. Well, I'm not sure that's correct. But are you aware
5 that --
6 A. I believe there is an average of what MasterCard was
7 expected to respect, and an average is important because
8 it allows you to set premium interchange to compete
9 with Amex and to set a lower rate, and then you respect
10 the average. I think that's the essential element for
11 the Australian case.
12 Q. So you have or you have not studied Australia?
13 A. No, I have not studied, but I understand that there has
14 been an average interchange which is respected.
15 Q. If you were aware of it you don't feel you should have
16 dealt with it in your witness statement?
17 A. Sorry?
18 Q. Should you not have dealt with this in your witness
19 statement? You are coming to this Tribunal, it was for
20 the court, saying that it was almost certain that you
21 would lose premium business. I'm suggesting to you that
22 you haven't really been shown all the documents which
23 would better inform you as to whether that's correct or
24 not. Would you accept that?
25 A. I have not seen this document.

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1 Q. Are you aware of what is happening in the UK, the market
2 intelligence about how Amex is responding to the
3 0.3% cap?
4 A. No, I'm not.
5 Q. But I do suggest to you that the concerns that you or
6 MasterCard have about losing market share to Amex, if
7 you did read all documents and gained the market
8 intelligence, would be misplaced. I have to formally
9 put that to you.
10 Do you accept that you would like to gain more
11 market intelligence in order to say that it is certain
12 that you would lose the premium business to Amex?
13 A. I would say that the Amex is a significant threat in the
14 premium space to MasterCards. I mean, both when I was
15 working on the interchange side, both as I'm working as
16 a general manager, I see we are competing with Amex in
17 the market. So I'm very comfortable in saying that,
18 yes.
19 Q. Sorry, are you saying that you would not wish to look at
20 more market intelligence before making statements that
21 MasterCard will lose its premium business? Are you
22 saying that you would not want to be better informed?
23 That you can make this statement on the few documents
24 that you have seen?
25 A. I'm saying that I have seen, I have seen and

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1 I experienced myself commercial discussions where we
2 have been competing with Amex and we have had a very
3 tough time to compete and on many occasions we have lost
4 business to Amex. That I can definitely say.
5 Q. Can you go back in your witness statement to
6 paragraph 14. This is something we have not seen
7 before.
8 Paragraph 14, you say:
9 "Although interchange fees have generally been paid
10 by the acquirer to the issuer in four-party schemes,
11 given the structure which has been adopted by MasterCard
12 in relation to issues such as fraud and payment timing,
13 it is not inevitably the case that the fee must be paid
14 to the acquirer to the issuer."
15 Paragraph 14.
16 Has it ever happened in your experience that the
17 interchange fee, or a fee, has been paid by the issuer
18 to the acquirer?
19 A. It has happened, but it is rare occasions.
20 Q. In what circumstances does it happen?
21 A. It can happen in cases where the balance of the cost and
22 the mechanism to operate a payment system needs to be
23 incentivised in the opposite system. But it is not
24 common and it is a typical exception.
25 Q. Well, in that balancing of the costs -- I think you have

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1 gotE3.13. If you could go to, I think it is the same
 2 tab. Are you still at 249? At tab 249? Could you go
 3 to page 5312.
 4 Are you aware of the amount of money that UK banks
 5 earn in interchange fees as opposed to what they earn in
 6 interest on credit cards?
 7 A. I'm not aware in specific terms and I would assume that,
 8 of course -- I understand it is a significant component
 9 of their revenues, I fully understand that. If you ask
 10 about specifics, I'm not aware to give you an exact
 11 amount.
 12 Q. But you have been head of the MasterCard interchange fee
 13 for the UK, and so I take it from your evidence that you
 14 have never really considered interest payments when
 15 setting the interchange fee?
 16 A. As part of when we set interchange fees, we used -- one
 17 of the aspects was the cost methodology. In that cost
 18 methodology, as I mentioned, the process was to look at
 19 the different components in that system on the cost
 20 side, and my understanding was that those costs would be
 21 used and then put to set the interchange fee also has
 22 taken into account the fact that there could be other
 23 revenue streams in -- for issuers on that side.
 24 So to my understanding that was the basis, yes.
 25 Q. So it is your evidence, is it, that when you set the UK

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1 interchange fee, you have regard to the substantial
 2 amount of money that banks earn in interest on credit
 3 cards?
 4 A. My understanding is that -- and I would definitely
 5 suggest, because this is a specific question also, the
 6 way we make our cost studies regarding to interchange,
 7 and I would suggest also to -- and I'm not the expert --
 8 say that at that point in time Edgar Dunn was sending us
 9 the cost methodology and the cost process, that as part
 10 of this methodology has been looked at the various
 11 credit card components, being cards that had revolving
 12 aspects or where there was an interest case, and there
 13 is cards which had -- charge cards where there was no
 14 interest attached, if you wish to --
 15 Q. Mr Willeart, sorry to interrupt. Are you referring to
 16 the two reports that Mr Sidenius is going to refer to
 17 tomorrow? Have you looked at those, is that what you
 18 are meaning?
 19 A. I mean to that exactly.
 20 Q. You mean those two reports?
 21 A. I mean exactly this.
 22 Q. In 2002 one is a draft. We will have to ask him
 23 tomorrow because we don't know whether they have been
 24 submitted to the OFT, the European Commission. We are
 25 at a complete loss. But you are getting your knowledge

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1 from those two reports, you are not getting your
 2 knowledge of interest from anything that you have done
 3 during your time at the interchange fee?
 4 A. No. For sure we also looked at the overall market and
 5 how issuers can make, let's say, can compensate costs
 6 that they face. In terms of some markets there is card
 7 fees in the markets, like a market like France, for
 8 instance, you have high card fees, which is not the case
 9 in the UK market. In the UK market you have some banks
 10 which have interest and you have some other banks that
 11 don't have an interest income.
 12 So definitely I'm aware of that and that's
 13 definitely something that we took into account.
 14 Q. If you go to page 5313, you will see at 5313 that
 15 MasterCard's analysis, which comes from Datamonitor,
 16 which I understand is a public group, and the Boston
 17 Consulting Group analysis, where you see on the
 18 right-hand side the billions of pounds that credit cards
 19 generate for issuers, correct?
 20 A. Yes.
 21 Q. If you go to 5315, you will see a significant proportion
 22 of credit card customers are revolvers, that is to say
 23 they pay interest. 5315.
 24 A. Yes.
 25 Q. Now, did you ever follow the European Commission's

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1 infringement decision of 2007?
 2 A. What do you mean with follow?
 3 Q. Did you read it?
 4 A. I did not read it of course.
 5 Q. Have you ever been told about its implications?
 6 A. Of course I understand that there was a procedure
 7 ongoing with the European Commission, yes.
 8 Q. And did you see the General Court's judgment? Have you
 9 seen that in your --
 10 A. I have not read it, no.
 11 Q. So in your role as head of interchange fee, you have
 12 never been educated as to the implications of
 13 the Commission's decision and the judgments of the
 14 European Court?
 15 A. I understand that there was a proceeding ongoing with
 16 the European Commission, yes.
 17 Q. Have you ever been told by MasterCard that interest from
 18 credit cards should be taken into account when fixing
 19 an interchange fee? Are you aware of that?
 20 A. I have not been aware of that, no. But of course all
 21 the revenue sides that the bank can take into account,
 22 like, for instance, card fees, also interest fees, we
 23 looked at those market elements as part when we reviewed
 24 the markets. So ...
 25 Q. Have you ever carried out an exercise where you have

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1 netted off the interest from the level of issuers' costs
 2 incurred in dealing with credit cards? Have you ever
 3 carried out that exercise?
 4 A. No.
 5 MR BREALEY: No. I have no further questions, my Lord.
 6 Thank you very much.
 7 MR JUSTICE BARLING: Mr Hoskins, perhaps it would be more
 8 expedient if we asked some questions ourselves and then
 9 Mr Brealey can come back if he needs to, and then you
 10 can --
 11 MR HOSKINS: It saves me bobbing up twice, potentially.
 12 MR JUSTICE BARLING: Yes.
 13 Questions by THE TRIBUNAL
 14 MR SMITH: Mr Willeart, I have got what I fear are some
 15 rather basic questions on the operation of the
 16 MasterCard system. If you don't know the answer, please
 17 don't worry, just say so.
 18 I think I will be avoiding discussion of information
 19 that's confidential, but if we do stray into
 20 confidential territory perhaps you will say.
 21 Just to begin with, some terminology. MasterCard
 22 obviously is a four-party system, and I'm going to
 23 describe the four parties in my questions as customer
 24 issuing bank, although I know it can be a financial
 25 institution, acquiring bank and then merchant, and then

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1 we have MasterCard as the scheme operator.
 2 As I understand it, both the issuing bank and the
 3 acquiring bank have a contract with MasterCard?
 4 A. Correct.
 5 MR SMITH: And that is largely, as I think you told
 6 Mr Brealey earlier, based on the standard terms
 7 contained in the MasterCard rules?
 8 A. Correct.
 9 MR SMITH: Which we saw in bundle 3.10.
 10 But to be clear, there are many other rules
 11 descending into far greater detail in terms of how one
 12 processes transactions and how one administer --
 13 A. Correct. There is a whole set of technical rules
 14 as well.
 15 MR SMITH: Which, quite rightly, we have not been
 16 troubled with.
 17 To what extent though are terms individually
 18 negotiated between, let's say, an issuing bank and
 19 MasterCard, for instance, agreeing exclusivity to one
 20 bank that it would only issue MasterCard or, as the case
 21 may be, Visa cards?
 22 A. So typically when a bank, especially when we take
 23 a larger bank, MasterCard can get into commercial
 24 agreements. So I want to make a bit of a separate --
 25 there is the rules. All the banks that are

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1 participating in this scheme respect the rules, there is
 2 no necessarily exceptional or limited. When we are
 3 talking about commercial agreements, MasterCard can
 4 engage with commercial agreements, and what it does is
 5 it gives financial incentives to issuing banks to
 6 distribute and promote the card basis in the MasterCard
 7 brand.
 8 You mentioned specifically about exclusivity, and
 9 I can talk a little bit about that as the general
 10 manager, I have been, for the Nordics and now for
 11 France. We typically do not have agreements where we
 12 are exclusive working or, if you wish, locking in
 13 a customer with MasterCard. What we are doing is we are
 14 providing a financial incentive and in return, of
 15 course, we are asking that this bank drive the volumes,
 16 drive the spend.
 17 What happens if the bank decides halfway through,
 18 okay, I want to get rid of MasterCard, I want to work
 19 with Visa or somebody else? They can fully do that.
 20 There is not a protective measure in that contract, but
 21 they will not get the benefits of the contract. They
 22 might agree with another scheme, a new contract.
 23 So that is typically the practice that we make the
 24 agreements. We make a financial agreement, the bank
 25 will benefit from some financial incentives, could be

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1 a discount on the pricing, could be an additional
 2 financial incentive linked to the performance of the
 3 card portfolio.
 4 MR SMITH: And are there similar, you call them commercial
 5 agreements between MasterCard and acquiring banks?
 6 A. There is agreements with acquiring banks, absolutely.
 7 That exists. There are probably less so (inaudible)
 8 agreements, but that exists.
 9 MR SMITH: So in the case of acquiring banks it is much more
 10 likely that you have really just got the licence with
 11 MasterCard and very little on top by way of supplemental
 12 commercial agreements?
 13 A. It depends, so I would agree that is typically what
 14 happens. But in some cases, for instance when we are
 15 deploying, let's say, contactless infrastructure, to
 16 accept contactless cards might give the acquirer
 17 an incentive to put his terminal in the market, for
 18 instance. That could be an example of that. Or to run
 19 a campaign with a merchant, for instance.
 20 MR SMITH: Yes, I see.
 21 To be clear, as between issuing banks and acquiring
 22 banks, there's no express agreement apart from that
 23 contained in the MasterCard scheme rules?
 24 A. Typically not.
 25 MR SMITH: Now, I just want to understand exactly the flow

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1 of monies when one has a transaction using the
 2 MasterCard payment system.
 3 So let's suppose that a cardholder goes into a shop
 4 in London, using his MasterCard and purchases a product
 5 for a certain consideration. Obviously, the transaction
 6 is processed using the merchant's equipment, the card
 7 reading equipment, and I will come backing to that, if
 8 I may. But let us assume the transaction is authorised
 9 and goes through. In terms of the money flow, the money
 10 is taken from the cardholder, either from his current
 11 account if it is a debit card or by way of the extension
 12 of credit from the issuing bank to the cardholder if it
 13 is a credit card.

14 So assuming no bilateral agreement as to
 15 interchange, at this point the issuing bank will pass
 16 money over to the acquiring bank --

17 A. Correct.

18 MR SMITH: -- but it will hold onto the MIF?

19 A. That is correct, yes.

20 MR SMITH: Does it hold onto anything else, for instance,
 21 the scheme fee which I understand is payable --

22 A. No.

23 MR SMITH: It doesn't?

24 A. No. So the scheme fee in this case, MasterCard will
 25 have a separate billing of its fees directly to the

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1 issuer.
 2 MR SMITH: I see. Thank you.
 3 So the only thing that the issuing bank holds onto
 4 is the MIF?
 5 A. Correct.
 6 MR SMITH: And it passes the net amount over to the
 7 acquiring bank?
 8 A. Yes, that is correct.
 9 MR SMITH: And the acquiring bank then deducts a further
 10 amount, representing the cost of its services to the
 11 merchant?
 12 A. That is correct.
 13 MR SMITH: And passes what one could call the net net amount
 14 to the merchant?
 15 A. That is correct.
 16 MR SMITH: Again, there's no deduction for the MasterCard
 17 scheme fee, that's separately accounted for?
 18 A. No, absolutely, that is correct.
 19 MR SMITH: Just assist me on this. The MasterCard scheme
 20 fee, obviously paid by both acquiring bank and issuing
 21 bank, but separately from the £10 transaction that I'm
 22 hypothesising, is that a flat fee or is it ad valorem,
 23 or does it depend?
 24 A. It is typically linked to the drivers. So they are
 25 linked from the issuing bank to the number, volume of

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1 the transactions typically.

2 Also fee for the number of cards they have in the
 3 portfolio, but typically it is the volume, the turnover
 4 on the card which drives that.

5 MR SMITH: Now, going back to this chain of payments,
 6 I presume that there is a dovetailing of the provisions
 7 in the MasterCard scheme with the arrangements at either
 8 end of the scheme, in other words, with the issuing bank
 9 to the cardholder and with the acquiring bank and the
 10 merchant, authorising these deductions.

11 And just to expand on that before you answer.
 12 Looking at the relationship between the merchant and the
 13 acquiring bank, the agreement between those two entities
 14 will define what the acquiring bank is allowed to
 15 deduct, and that's the merchant service charge?

16 A. The acquiring banks make their commercial agreement with
 17 the merchant, absolutely.

18 MR SMITH: Equally, at the end other end when you look at
 19 the relationship between the issuing bank and the
 20 cardholder, there will be some form of provision whereby
 21 the cardholder agrees that his account, whether it is
 22 his current account or his credit account with the bank,
 23 can be debited with the amount of the transaction?

24 A. Correct.

25 MR SMITH: And would I be right in thinking that in terms of

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1 the deductions that, say, the issuing bank can make when
 2 paying the acquiring bank, it is only entitled to make
 3 agreed deductions, it can't make the deductions that it
 4 feels on any one day able viable to make?

5 A. Absolutely.

6 MR SMITH: These are stipulated.

7 A. Absolutely, that is my understanding.

8 MR SMITH: So the only deduction that an issuing bank can
 9 make is either the MIF, or if there is a bilateral
 10 agreement, the amounts stipulated in the bilateral
 11 agreement?

12 A. Correct.

13 MR SMITH: Now, just help me -- if you don't mind can we
 14 confine this to the UK in terms of the size of issuers
 15 versus acquirers in the UK. We have heard from other
 16 witnesses that there are perhaps 20 or so acquirers in
 17 the UK. Does that fit with your understanding?

18 A. Yes, that could be the case.

19 MR SMITH: But you are sounding quite tentative. It is not
 20 perhaps your --

21 A. It seems to me a lot. It could be that it was a lot at
 22 that time. Typically there is a bit of consolidation in
 23 the market, so it could be that it's less now than it
 24 was 20 -- over time, yes.

25 MR SMITH: So 20 feels a higher figure to you?

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1 A. Yes.
 2 MR SMITH: In terms of the number of issuing banks, can you
 3 help us on how many issuing banks might be issuing cards
 4 in the UK?
 5 A. Maybe 20 as well. 20 as well.
 6 MR SMITH: Right. That's helpful.
 7 Now, we have established that there isn't a direct
 8 agreement between the issuing bank on one side and the
 9 acquiring bank on the other side. It is the umbrella
 10 agreement that constitutes the scheme rules.
 11 So how exactly does the payment stream work? We
 12 have obviously got millions of transactions a year done
 13 with MasterCards, and somehow one has got to ensure that
 14 the £10 in my hypothetical example moves from the
 15 cardholder account into the account of the merchant.
 16 That's what the interchange system does; am I right?
 17 A. So in this case there is different -- I mean, I need to
 18 explain a little bit.
 19 When there is a transaction happening, at some point
 20 in time the transaction is authorised, the merchant --
 21 the cardholder pays it. The merchant at that point,
 22 where there is a transaction which is authorised by the
 23 issuer, he says, okay, I'm willing to accept this
 24 transaction. Then what happens during certain cycles
 25 during the day, there is an exchange of information in

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1 terms of how much is the specific amount and specific
 2 additional information is exchanged between the issuer
 3 and the acquirer. Then the issuer and the acquirer,
 4 they hold accounts to settle against each other. So
 5 there is a sort of compensation made every day, for
 6 instance, where the issuer and acquirer will settle
 7 their accounts.
 8 That is the way it works. So at some point in time,
 9 at the end of the day, as an example, the issuer and
 10 acquirer will net out and one owes the other and they
 11 will make the payment. So that happens in this case,
 12 this is happening. If the transaction is processed by
 13 MasterCard, MasterCard offers its service to the
 14 customers to make these settlements. This is settlement
 15 services.
 16 MR SMITH: So essentially MasterCard keeps a running
 17 account?
 18 A. Correct. Every bank member has a settlement account,
 19 correct.
 20 MR SMITH: Each bank member as a member. And you net off
 21 the transactions as against each participating bank and
 22 the net figure is paid on a regular basis?
 23 A. That is correct.
 24 MR SMITH: Is that daily?
 25 A. My understanding is it is daily.

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1 MR SMITH: Thank you.
 2 So what we have essentially is a settlement system
 3 that means that you don't have to have each individual
 4 issuing bank carrying out a series of complicated
 5 calculations as to what it owes to a whole range of
 6 acquiring banks.
 7 A. Correct.
 8 Q. That is one of the services that MasterCard offers its
 9 licensees?
 10 A. Correct.
 11 Q. Now, in terms of the interchange fee, as we all know
 12 there is a default set which is the MIF. Now, the
 13 issuing and the acquiring banks can choose to vary that
 14 MIF?
 15 A. Correct.
 16 MR SMITH: And they can do so, am I right, whilst remaining
 17 a member of the settlement system? They simply --
 18 A. Absolutely.
 19 MR SMITH: -- vary the MIF to something else?
 20 A. Typically what happens is if they want to make
 21 a specific agreement they will notify MasterCard and
 22 they will tell MasterCard: here is our contract, what we
 23 want to agree, and MasterCard will implement it as
 24 a system.
 25 So then we operate as a technical implementer of

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1 this transaction, of this agreement between the issuer
 2 and the acquirer.
 3 MR SMITH: Is it possible for the banks, by way of
 4 a bilateral agreement, to choose to exit from the
 5 interchange system altogether and settle as against each
 6 other, or is that not possible?
 7 A. I'm not sure I follow. So if they would like to have
 8 a different interchange fee applied, they can agree and
 9 MasterCard would execute it. I personally have not
 10 heard of the situation where -- actually, I do --
 11 I think they can select a different processor, I don't
 12 know if it could be a first (inaudible), it could be
 13 other process provider that does the transaction for
 14 them. That is perfectly possible, yes.
 15 MR SMITH: In effect they could choose to have a settlement
 16 system separate from the MasterCard system, provided
 17 they agree?
 18 A. Absolutely.
 19 MR SMITH: You mentioned earlier on in your evidence that in
 20 some markets bilateral agreements are relatively
 21 frequent and in other markets, like the UK, they are
 22 less so.
 23 Can you help us with what causes bilaterals to be
 24 popular in one market but not popular in another. Why
 25 is it that -- I think Sweden you mentioned. Why is it

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1 Sweden operates on a basis of bilaterals whereas in the
 2 UK the evidence we are having is that they are actually
 3 very rare?
 4 A. I think there is various reasons, I think the historical
 5 reasons why the banks in Sweden have agreed to use
 6 bilateral. I think there was a bit of the common market
 7 practice, and my understanding also was that this was
 8 done under, let's say, the support and the supervision
 9 of the local competition authorities to complement
 10 a bilateral agreement system. Which does not mean that
 11 there was no fallback, but they implemented a bilateral
 12 system.

13 In other markets it happens, the customer is told it
 14 doesn't need to do so, to set these bilaterals, and it
 15 relied on the multilateral interchange fee, because it
 16 felt that going to bilaterals would not change the
 17 outcome and the multilateral interchange fee was the
 18 right level.

19 But I would say in most of the cases there was
 20 a multilateral interchange fee. If you look across
 21 Europe, it is the most commonly used.

22 MR SMITH: In general terms it is a MIF?

23 A. Exactly, and there is a few exception countries, if I
 24 can say so.

25 MR JUSTICE BARLING: Maestro was bilateral in fact even in

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1 the UK.
 2 A. Yes.
 3 MR JUSTICE BARLING: Mainly it was on the basis of
 4 a bilateral agreement.
 5 A. That was my understanding as well, correct. Even
 6 MasterCard didn't set those bilateral rates because they
 7 were agreed, but my understanding is, well, that wasn't
 8 a bilateral...
 9 MR JUSTICE BARLING: Yes.
 10 MR SMITH: As I understand it, it is a less common scenario
 11 now than it was in the past, but can I ask you what
 12 happens when the issuing bank and the acquiring bank are
 13 the same legal entity? So we have exactly the same
 14 person at both ends, or not quite the ends but both ends
 15 of the chain.

16 In that case do the issuing bank and acquiring bank
 17 go through the interchange system or does the entity
 18 simply deal with it itself?

19 A. It depends a little bit. Most of the cases they do not
 20 go to the interchange system because it is as we call it
 21 an on us transaction. It is a transaction where the
 22 issuing and the acquiring entity is the same, so it
 23 remains --

24 MR JUSTICE BARLING: It is "on us", isn't it?

25 A. Exactly. That typically does not go through the

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1 interchange system.

2 MR SMITH: So in effect the bank will settle with itself
 3 because it's got the data at both ends that it can
 4 work out --

5 A. That is correct.

6 MR SMITH: -- the position on its own?

7 A. Yes.

8 MR SMITH: The last area I wanted to ask you about was about
 9 acquiring banks.

10 Now, acquirers, would it be the case that they
 11 attempt to acquire transactions not just for MasterCard
 12 but also for Visa and American Express?

13 A. Absolutely. So acquirers typically want to have the
 14 relationship, and the biggest possible relationship,
 15 with all the payment transactions that a merchant
 16 offers.

17 So typically in the first place Visa, very clearly,
 18 and then with Amex of course it depends if they are
 19 entitled to get an Amex licence, if they are entitled to
 20 capture those transactions.

21 MR SMITH: One can see the business sense. If I'm
 22 an acquiring bank I want to be able to say I can process
 23 all kinds of transactions, you choose which ones you
 24 want me to process for you.

25 A. Absolutely, I agree.

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1 MR SMITH: I assume that means that there is a degree of
 2 common hardware in terms of the equipment that is at the
 3 merchant's shop, so that one card can be processed with
 4 one piece of equipment?

5 A. That's typically in the markets that we know. Here very
 6 much the case, yes.

7 MR SMITH: So, so far as the cardholder is concerned, the
 8 transaction looks exactly the same whether it is a Visa
 9 card, a MasterCard or an American Express card?

10 A. Absolutely, they put in the transaction and put in the
 11 card in the terminal and they pay.

12 MR SMITH: And then, at least if it is an electronic
 13 transaction, there is some communication between the
 14 merchant's terminal and the acquiring bank?

15 A. Correct.

16 MR SMITH: But then I assume the streams diverge and one of
 17 the functions that the acquiring bank undertakes is to
 18 shunt the data that it acquires from the merchant to the
 19 appropriate system?

20 A. Correct. It could be Visa and MasterCard goes to the
 21 acquirer. It could be that if it is Amex transaction it
 22 goes directly to Amex, for instance. And from the
 23 acquirer it can go, for instance, to a MasterCard or to
 24 a Visa, let's say, platform.

25 MR SMITH: Presumably, we mentioned the technical manuals

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1 earlier on, the technical manuals for how one processes
 2 a MasterCard transaction will be different to those for
 3 Visa and to those for Amex or, indeed, Maestro?
 4 A. That is correct.
 5 MR SMITH: It might be the same object but the detail is
 6 different?
 7 A. That is correct.
 8 MR SMITH: And that is one of the services that an acquirer
 9 provides?
 10 A. Correct.
 11 MR SMITH: Can a merchant choose, if it wants to, to use
 12 multiple acquiring banks for its transactions?
 13 A. Absolutely. A merchant can choose to say I want -- "for
 14 my MasterCard transaction I want to use this acquiring
 15 bank, for my Maestro transaction I want this bank, for
 16 my Visa cards I want to get a better deal with a
 17 different acquirer". So they can fully choose which
 18 acquirer they use.
 19 MR SMITH: How, finally, can that division be sliced? You
 20 have divided it quite logically between different
 21 payment schemes. So you might have an acquirer, as you
 22 say, for Visa and an acquirer for MasterCard. Can one
 23 differentiate between debit and credit cards?
 24 A. Yes. For instance, and I made the example of Maestro
 25 and MasterCard, the merchant can make a specific

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1 agreement with one acquirer to only process one brand of
 2 product. That can happen, yes.
 3 MR SMITH: But presumably there has to be some sort of
 4 agreement between the merchant and his various
 5 acquirers --
 6 A. Typically they have multiple agreement, to decide on
 7 which product they process. Some merchants even have
 8 multiple acquirers for multiple products just to allow
 9 to not be dependent on one acquiring bank.
 10 MR SMITH: Like issuing banks, acquiring banks essentially
 11 are selling a core product, the payment system, that
 12 they can't really differentiate. Because one has the
 13 common MasterCard system and the honour all cards rule.
 14 In effect, the service that any MasterCard cardholder
 15 gets is exactly the same. The card is used for payment
 16 and the money is moved from his account to the merchant.
 17 A. Correct.
 18 MR SMITH: And that service will be the same whether the
 19 acquirer is one acquirer or not?
 20 A. Correct.
 21 MR SMITH: In terms of the honour all cards rule, am I right
 22 that it applies as an obligation to honour all credit
 23 cards, and separately as an obligation to honour all
 24 debits cards in the MasterCard scheme?
 25 A. There is typically umbrellas of products. So under the

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1 MasterCard product, all of the MasterCard products would
 2 be contained for the consumer side, for instance. If
 3 you have a premium card or a standard card, that would
 4 be what we call all under the umbrella of the
 5 MasterCard. At the same time, the acquirer is not able
 6 to differentiate between I accept a card for this issuer
 7 or from another issuer. This is what we call the all
 8 issuer aspect of this honour all cards rule.
 9 MR SMITH: Sorry, let me unpack that a little bit.
 10 So one has a premium card that is created by
 11 MasterCard and issued by banks. And one is not as
 12 a merchant entitled to discriminate between cards of
 13 that sort?
 14 A. So if you are accepting a MasterCard standard, you are
 15 also accepting a World card --
 16 MR SMITH: I see. I suppose my question is how many
 17 umbrellas are there? Is it the case that every
 18 MasterCard with the MasterCard logo has to be accepted,
 19 or is there a broad differentiation not based on issuer,
 20 but based upon the type of card which limits the honour
 21 all cards rule?
 22 A. For instance, Maestro is typically a different
 23 acceptance brand. So typically the merchant decides
 24 which brands it accepts. Under the MasterCard umbrella
 25 they would accept all MasterCard credit cards. Maestro

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1 would be different, where they can select, accept or
 2 don't accept that product, and I understand also in
 3 the UK the DMC MasterCard is also a separate product
 4 that they can accept.
 5 So there is the choice for which products they
 6 accept or they don't accept.
 7 MR SMITH: I see. I can understand it more clearly from
 8 Maestro because that was separately branded, but you are
 9 saying that the MasterCard debit card is seen as under
 10 a separate umbrella compared to credit cards?
 11 A. That is my understanding.
 12 MR SMITH: Again, that is worked out in the detail of the
 13 MasterCard scheme?
 14 A. Yes.
 15 MR SMITH: Going back to this question, then, of
 16 differentiation. How is it that an acquiring bank can
 17 improve its position vis-a-vis merchants to provide
 18 a better service? What can it do?
 19 A. I'm not an acquiring bank so ... Typically they would
 20 compete on service, they would compete on the type of
 21 terminals they provide, technology they provide,
 22 maintenance they provide. Of course they will also
 23 compete on the pricing that they provide to their
 24 merchants, and to give you an example, you have got
 25 merchants with a presence across multiple countries. So

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1 they will try to put in place reporting, they will try
 2 to put in place infrastructure that the same merchant,
 3 whogoes across multiple countries, can deploy. So they
 4 have a bit of common infrastructure as a merchant.
 5 So it depends a bit on the merchant segment, I would
 6 say. Some merchants it might be very local support.
 7 Some merchants they might provide an advice service,
 8 like loyalty solutions, like fraud solutions, to detect,
 9 service. Others might be more central support. So
 10 there is all the services that acquirers typically
 11 provided to merchants.
 12 MR SMITH: In terms of competing on price, when one looks at
 13 the merchant service charge, I think it is
 14 uncontroversial that the interchange fee is a large part
 15 of that charge. Do you find that there are acquiring
 16 banks who are approaching MasterCard with a view to
 17 negotiating a lower MIF for transactions that they
 18 process?
 19 A. So the MIF, that is applicable across the market, so we
 20 typically do not make a specific arrangement with one
 21 acquiring bank. No. We typically don't do that.
 22 MR SMITH: When you say you don't do that, is that because
 23 no one has asked you to do that? Obviously we are all
 24 here because a large number of retailers consider that
 25 the MIF was too high and that they were having that cost

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1 passed onto them by the acquirers, although we have not
 2 heard evidence on this. But I can't imagine that the
 3 acquirers weren't aware of it. So it must be
 4 a significant advantage if an acquirer could say, look,
 5 my price to you, the merchant, is less because I have
 6 negotiated a cheaper deal with MasterCard. But in your
 7 experience that didn't happen?
 8 A. No, that typically didn't happen. I am sure the
 9 commercial pressure from the acquiring side was there
 10 and that the sales team who took care of the acquiring
 11 side might have gotten those questions. But typically
 12 we didn't do that because if you would give one
 13 advantage specifically to one acquirer, you create
 14 a competitive disadvantage in the market because the
 15 other acquirer would not be able to offer the same rate.
 16 So the rate in the market needs to be the same for all
 17 acquirers, otherwise if I give one acquirer the benefit
 18 then he can go off to the market with a specific
 19 benefit.
 20 MR SMITH: So one of the things that informs the MasterCard
 21 MIF is that it should be non-discriminatory?
 22 A. Exactly.
 23 MR SMITH: As regards acquirers.
 24 A. Absolutely.
 25 MR SMITH: You might differentiate between products, but you

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1 would not otherwise differentiate --
 2 A. Absolutely, that was essential, yes.
 3 MR SMITH: So if an acquiring bank wants to try and achieve
 4 a different interchange fee, the only route, as far as
 5 you are concerned, would be the bilateral route to
 6 negotiate with the pool of issuing banks?
 7 A. Absolutely, yes.
 8 MR SMITH: Thank you. That was a very long line of
 9 questions, but thank you, Mr Willeart.
 10 PROFESSOR JOHN BEATH: Just following on from that, the way
 11 we are seeing this four-party or the four-stage system,
 12 the circle of flows, we have got these two rather active
 13 people in the business: the merchants who are
 14 complaining about something and the issuers who are
 15 desperate to get profits. And there's this very passive
 16 but crucial element, the acquirer.
 17 Do these acquirers exert no pressure at all?
 18 I mean, after all the MIF is supposed, does indeed, to
 19 allocate costs between -- somehow balances between
 20 acquirers and issuers. In setting that balance, you
 21 might expect acquirers to have some voice. Do they?
 22 A. So for sure acquirers definitely did have a voice and
 23 they definitely also did -- your point about looking for
 24 influencing the MIF, getting a lower MIF. For sure,
 25 acquirers definitely are vocal. But I was not

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1 necessarily dealing directly with acquirers at the time.
 2 But also when we set interchange fees at the time we
 3 also took that perspective into account. So it was not
 4 just there was a look at what needs to be done at the
 5 issuing side, what respect to the merchant acceptance,
 6 there was also the way that the acquirers could deal
 7 with whatever balance was put to the market.
 8 PROFESSOR JOHN BEATH: We got this pie, the MIF, and the
 9 sharing does seem to be asymmetric.
 10 A. Correct.
 11 PROFESSOR JOHN BEATH: You might have thought that in
 12 a strong market, to get a share of the pie there would
 13 be rather more bargaining going on?
 14 A. But I think that -- I mean, there was the -- you
 15 mentioned the imbalance because I think the costs were
 16 also more higher on the issuing side. I think that is
 17 the reason why there is the balancing mechanism. But --
 18 PROFESSOR JOHN BEATH: So the acquirers are fairly happy
 19 with the way costs are balanced, are they, in the MIF?
 20 A. Of course, being -- they are looking at their costs and
 21 they typically would like to see lower costs. So for
 22 sure they would also, at the same time that the issuer
 23 would always complain that interchange is too low, the
 24 acquirers would always complain that the interchange is
 25 too high. It is a fact in the balancing mechanism, both

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1 parties are always unhappy.
 2 MR JUSTICE BARLING: Mr Willeart, can I just ask you
 3 a question about paragraph 38, just to clear up
 4 something. This is not confidential, is it?
 5 MR HOSKINS: Sorry, I'm just catching up. No, it is not.
 6 MR JUSTICE BARLING: This is dealing with the Maestro
 7 experience.
 8 You say in summary between 2000 and 2006 Maestro
 9 experienced this decline in market share volume. Then
 10 you refer to July 2006 and Maestro UK's debit market
 11 share and you have the percentage there. That was the
 12 high point, wasn't it, rather than the low point?
 13 A. My understanding was that it was the high point. It
 14 might have been a little bit higher before and that it
 15 was already coming down to 40%, but it definitely went
 16 down further, much lower --
 17 MR JUSTICE BARLING: Yes. You say in the next passage, you
 18 refer to a much lower market share, don't you?
 19 A. Correct.
 20 MR JUSTICE BARLING: Of the defined debit MasterCard and
 21 Maestro. So that obviously happened, therefore, after
 22 July 2006.
 23 Do you know what the trajectory was over time of
 24 that? There was quite a dramatic --
 25 A. It was a dramatic decline.

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1 MR JUSTICE BARLING: Yes.
 2 A. It was a dramatic decline. Honestly, I don't know --
 3 when I joined MasterCard, at that time I think the
 4 decline was mostly already happening, so we were --
 5 let's say, we are seeing that the customer had flipped
 6 the portfolio from Maestro to Visa at the time. So
 7 there was the decline of the transactions that I was
 8 aware of.
 9 MR JUSTICE BARLING: There was mainly two customers, wasn't
 10 there?
 11 A. Exactly, very big customers.
 12 MR JUSTICE BARLING: Thank you very much.
 13 Mr Brealey, anything arising out of that?
 14 MR BREALEY: No.
 15 MR HOSKINS: Sir, I do, but I will be quick. I feel the
 16 pressure from behind me.
 17 MR JUSTICE BARLING: Sure.
 18 Re-examination by MR HOSKINS
 19 MR HOSKINS: In relation to the last question, I am sure you
 20 are well aware that I have the graph I have shown you
 21 a few times?
 22 MR JUSTICE BARLING: Yes, I might just need to be reminded
 23 where that is. Don't bother now.
 24 MR HOSKINS: I can do it very quickly. It is reproduced in
 25 our skeleton argument, which is A2, at page 10.

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1 MR JUSTICE BARLING: A, tab 2, page 10.
 2 MR HOSKINS: You will see it comes from first Niels,
 3 figure 33, which is D3, tab 3, page 249. That gives you
 4 the trajectory.
 5 MR JUSTICE BARLING: Thank you very much.
 6 MR HOSKINS: I just want to deal with two topics with you.
 7 I will deal first with Maestro, as that's what we have
 8 just been dealing with.
 9 We know that the Maestro MIF in the UK, back in the
 10 2000s, was set by S2, not MasterCard.
 11 A. Mmmm.
 12 Q. If MasterCard had been free to set the rate for Maestro
 13 in the UK during that period, what process would
 14 MasterCard have followed to determine what you describe
 15 as a competitive rate? What process would have been
 16 followed?
 17 A. I think we would have followed the process where, as
 18 I described, we would have taken a consultation on the
 19 market to understand the costs that issuing banks and
 20 acquiring banks faced to deploy the product. So there
 21 would have been a process where there would have been
 22 consultation, in this case with an external company that
 23 collected the costs. They would do the survey in the
 24 market with the issuing banks, with the acquiring banks
 25 and they would come with a result which was the average

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1 costs to process this transaction in the market, that
 2 would result in the cost basis.
 3 Of course, we would also look at the same time about
 4 what is the competition in that market. So what would
 5 be competitive products to this Maestro proposition. We
 6 would also look at, if we look at the specific levels of
 7 interchange per transactions, what this -- the
 8 incentives we would like to give to stimulate the
 9 deployment of more secure technology in the market. And
 10 then we would have put together a proposal that would
 11 have set the rate that would come to this -- to take
 12 this information into account, the cost level as well as
 13 the competitive aspects, yes.
 14 Q. You said you would look at what competitive products
 15 are. Functionality, as Mr Brealey has described it,
 16 does it play any part in this process of setting
 17 a competitive MIF?
 18 A. If the functionality leads to higher costs for the
 19 issuing side, or other costs in their cost system then
 20 we would take it into account. We would not take into
 21 account that there would be a lower acceptance gap
 22 necessarily in the US because the domestic interchange
 23 is not supposed to deal with that. The domestic
 24 interchange is to deal with the domestic market.
 25 Q. Then going back onto a different topic, it probably

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1 seems a very long time ago, but when we started this
2 morning, Mr Brealey put it to you that there are no
3 documents which indicate the methodology adopted by
4 MasterCard to set the UK MIF or UK MIFs. There are no
5 detailed calculations.

6 You referred to proposal documents, I think was one
7 of the terms you used, and you said the logic was clear
8 from them. Can I ask you to go to bundle E3.2, tab 49,
9 please. Is this the type of document you were talking
10 about in response to Mr Brealey?

11 A. Absolutely.

12 Q. What is the purpose of this type of document, just in
13 terms of how does it fit into the process of arriving at
14 an interchange --

15 A. So the process to come to an interchange rate is
16 typically a process that takes several months' time,
17 where there is this phase of collecting the information
18 from the local market, of collecting the local market
19 cost information. Working together with the local
20 market seems to take the input from the local issuing
21 banks, local acquiring banks, the merchant side. And
22 then based on this information there is a proposal made
23 to the Committee, which is called the European
24 Interchange Committee, that discusses, challenges, asks
25 questions to ensure that the right balance is set. And

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1 in that committee there is multiple people, multiple
2 functions, if you wish, represented, people from the
3 merchant side, people from the issuing side, people from
4 the product side, legal team, and they would discuss the
5 proposal that has been prepared by the interchange team.
6 And then they would either endorse it, ask questions,
7 review it and move on. But this is, let's say, the
8 discussion document that is proposed in the Interchange
9 Committee.

10 MR HOSKINS: We see from this document, the heading is
11 "European Interchange Committee and its proposal". Is
12 this what you were talking about when you were talking
13 about a proposal --

14 A. Absolutely.

15 Q. I have no idea, but have you seen this particular
16 proposal before?

17 A. I have seen this proposal, yes.

18 Q. You have. We don't need to go into great detail, but
19 just to give a flavour of what's taken into account and
20 how the final decision is reached, perhaps by reference
21 to headings in this document, can you just give a sense
22 to the Tribunal of how this document demonstrates what
23 you say is the logic behind the setting of a MIF rate?

24 I'm not particularly concerned with this particular
25 MIF, but the general process, what is taken into

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1 account?

2 A. So this is a document that is supporting a specific
3 proposal, so it typically starts with laying out what is
4 the proposal so that everybody understand what is the
5 current rate and what is the proposed rate.

6 Then when we go section by section, we'd describe
7 how the interchange team came up with this proposal, or
8 we'd start typically by laying out the market context,
9 what is the context, what is the usage of electronic
10 payments in the market, what is the state of the
11 technology, how much cash there is in the market, what
12 is the needs of the market. Then it will typically
13 include -- it will include, if there is any background
14 on the specific product it will explain that, what has
15 been the history of this product.

16 Then it will make a proposal and explain why this
17 proposal is laid out there and it will take into account
18 that the cost information, as I mentioned before, what
19 is the result of any cost study that has been conducted.

20 Secondly, we would also take into account what is
21 the competitive landscape in the market. Then it will
22 come with a proposal, and then it will deal with what is
23 the -- our expectation as MasterCard of this proposal in
24 the market. So how will issuers react, will they be
25 able to use this product and compete. Secondly, how

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1 will merchants react, how will acquirers react.

2 So this is a sort of holistic perspective from all
3 the stakeholders in the system on the proposal, and that
4 typically concludes the document and the proposal.

5 Q. Why do you take into account how merchants might react?

6 A. It is very important, for instance, when we are setting
7 a new product, premium product, for instance, we
8 understand that you are setting a higher interchange, so
9 you want to understand is this something that can be
10 acceptable in the market, does this give benefit,
11 additional sales to the merchant, one example.

12 The other example is, for instance, when you are
13 setting out contactless technology, if you are setting
14 a specific rate of interchange will this rate allow
15 merchants to deploy terminals that are capable of
16 accepting contactless transactions.

17 So we are driving towards more secure transactions
18 and secure payment system, so we want to ensure that it
19 makes sense for the whole eco-system.

20 Q. Why do you take, or do you take account of how acquirers
21 might react?

22 A. Acquirers, of course, are very important in the
23 eco-system as well. Just to give you one example, there
24 is not only the economics, but there is also the
25 technical specifications.

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1 We can come up with a very creative rate to make
 2 a new product in the market or to deploy new technology.
 3 But if acquirers cannot implement it in the system, we
 4 can never deploy the product in the market. So all
 5 parties -- it needs to work for all parties otherwise it
 6 doesn't work.
 7 Q. How do acquirers fit into the economic eco-system? You
 8 mentioned that when you moved on to the technical
 9 aspect.
 10 A. We typically also looked at how, if acquirers could
 11 position this product into the market. So if they would
 12 be able to sustain this, include this new product in
 13 their pricing towards merchants. So if we introduced
 14 a new interchange fee or launched a new product and we
 15 knew that this needed to be included into the
 16 contractual agreements between the merchant and the
 17 acquirer, we tried to make sure that there was
 18 sufficient time and sufficient possibility to position
 19 this into the merchant agreements.
 20 MR HOSKINS: I don't have any further questions.
 21 MR JUSTICE BARLING: Thank you.
 22 Right. Well, Mr Willeart, thank you very much
 23 indeed.
 24 We will start again at 2.10 pm.
 25 (1.10 pm)

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1 (The short adjournment)
 2 (2.10 pm)
 3 MR HOSKINS: Good afternoon, sir. Mr Brealey bamboozled me
 4 by giving me a bit of paper to put in a file just as you
 5 walked in, so if you would bear with me.
 6 MR JUSTICE BARLING: Keep you on your toes.
 7 MR HOSKINS: I will gather my thoughts. Thank you.
 8 Just to update you on the Mr von Hinten-Reed, we are
 9 don't consent to it, so there is going to have to be
 10 a little spat. But I think Mr Brealey would prefer to
 11 do that tomorrow afternoon, because obviously it's his
 12 application. I'm happy to do it then.
 13 MR BREALEY: Apparently it is at D2.1, tab 8.
 14 MR JUSTICE BARLING: So we have to read it, then?
 15 MR BREALEY: Apparently.
 16 MR JUSTICE BARLING: I haven't read it yet.
 17 MR BREALEY: D2.1, tab 8.
 18 MR JUSTICE BARLING: I suppose we need to do it now rather
 19 than when the witnesses are ... (Pause)
 20 Tab 8.
 21 MR HOSKINS: Sir, I think Mr Brealey wants to make the
 22 application tomorrow.
 23 MR JUSTICE BARLING: Yes, I will forget otherwise to take
 24 it. D what?
 25 MR BREALEY: D2.1, tab 8.

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1 MR JUSTICE BARLING: Right.
 2 MR BREALEY: As I understand it, it goes to the quantum.
 3 There was a flurry of experts' reports in December and
 4 then before the trial on the question of whether
 5 Sainsbury's should give benefits in respect of Nectar
 6 points.
 7 MR JUSTICE BARLING: Yes.
 8 MR BREALEY: In other words, it was thought that interchange
 9 fees paid by Sainsbury's Supermarkets fed into the bank,
 10 fed into Nectar points and then fed back into retail.
 11 The argument is that Sainsbury's Supermarkets has to
 12 give credit --
 13 MR JUSTICE BARLING: Against any damages?
 14 MR BREALEY: -- against any damages. It's like a set-off.
 15 As I understand it, this comes from Mr Greg Harman.
 16 He says we have got to give credit.
 17 Mr von Hinten-Reed -- this came late, this was after the
 18 expert reports. We didn't object to it. This came
 19 late. Mr von Hinten-Reed dealt with it. Then as
 20 I understand it, shortly before the trial Mr Harman
 21 adduced a further report on this, which bumped up the
 22 amount that we would have to give benefit for. It's
 23 like 3 million to 32 million or something, and this has
 24 prompted Mr von Hinten-Reed to look at it again. And he
 25 does not see on published documents that there is a link

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1 between the reduced interchange fees, result of the cap,
 2 and the Nectar points.
 3 MR JUSTICE BARLING: This is the further response from
 4 Mr von Hinten-Reed?
 5 MR BREALEY: Yes.
 6 MR JUSTICE BARLING: So he is answering the second Harman on
 7 that?
 8 MR BREALEY: Harman 4.
 9 MR JUSTICE BARLING: I know, but the second one dealing
 10 with --
 11 MR BREALEY: Yes. He doesn't believe that Sainsbury's
 12 Supermarkets should give the credit that he originally
 13 thought.
 14 Essentially in his report, as I understand it --
 15 I can go and have a look at it -- he conceded that there
 16 was some credit to be given.
 17 MR JUSTICE BARLING: And now he says there shouldn't be any
 18 credit? Is that the gist of it?
 19 MR BREALEY: It's got lower. It is certainly not the
 20 30 million that Mr Harman now says.
 21 MR JUSTICE BARLING: Anyway, it is some kind of response to
 22 Harman 4?
 23 MR BREALEY: Yes.
 24 MR JUSTICE BARLING: That's it, right.
 25 MR BREALEY: That is it.

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1 MR JUSTICE BARLING: Mr Hoskins, do you want to just give us
2 the flavour of your objections?
3 MR HOSKINS: I thought this might happen.
4 MR JUSTICE BARLING: Just so we can bear it in mind when we
5 read it, without --
6 MR HOSKINS: I will just give you why we oppose it.
7 It is not correct that this is a response to third
8 Harman because Mr von Hinten-Reed had already responded
9 to the point in the third Harman in the addendum to
10 second Mr von Hinten-Reed.
11 If you go to our skeleton argument, you can see what
12 the position is currently on the evidence before the
13 Tribunal. So if you take up A, tab 2, at page 275.
14 MR JUSTICE BARLING: Yes.
15 MR HOSKINS: So this is dealing with our flowcharts and this
16 paragraph deals with this need to give credit for the
17 lower amounts of benefits Sainsbury's stores would get
18 from Sainsbury's Bank if there were a lower MIF. That's
19 what we are dealing with.
20 MR JUSTICE BARLING: Yes.
21 MR HOSKINS: As the evidence stands at the moment, Mr Harman
22 and Mr von Hinten-Reed both accept that some discount
23 should be applied, but have differing views as to its
24 size. You will see in the footnote the reference to
25 first Harman because this was not something that was

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1 introduced later, it was in first Harman. And
2 Mr Harman's figure is that the value is about
3 4.4 million per annum. So that's for a period for end
4 of 2006 to present day, 4.4 million per annum.
5 Then the addendum to second Mr von Hinten-Reed,
6 which is the response to Harman as it currently stands,
7 you will see the reference there, his total is
8 24.5 million. So you see the disparity is about
9 40 million-odd against 24 million-odd.
10 That's the current evidence before the Tribunal.
11 MR JUSTICE BARLING: Until this came along?
12 MR HOSKINS: Until this came along. So it is not that this
13 is simply our response. What this actually is is
14 an attempt to resile from a response. It is not that
15 Sainsbury's hasn't had a chance to deal with this, it
16 has dealt with it, but now Mr von Hinten-Reed wants to
17 resile from the position that is in the evidence and
18 take a different view.
19 MR JUSTICE BARLING: Right.
20 MR HOSKINS: If you have the third expert report that
21 Mr Brealey referred you to --
22 MR JUSTICE BARLING: Which --
23 MR HOSKINS: I have it at D2, tab 8. Sorry 2.1, tab 8.
24 MR JUSTICE BARLING: The one that's objected to?
25 MR HOSKINS: That is correct.

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1 MR JUSTICE BARLING: Yes.
2 MR HOSKINS: It is paragraphs 6 to 14. I think the easiest
3 thing, if you don't mind, is if you just briefly read
4 those.
5 MR JUSTICE BARLING: I was not intending that we would have
6 the whole argument now, but I just wanted to --
7 MR HOSKINS: I can finish the argument in four minutes, and
8 then you have got -- Mr Brealey knows what we are
9 objecting to.
10 MR JUSTICE BARLING: 6 to 14 is the bit you object to?
11 MR HOSKINS: It is the reason why we say there is a problem
12 with this.
13 MR JUSTICE BARLING: It is the reason. Yes. Yes.
14 MR HOSKINS: You will see the point is the experts in the
15 evidence currently before the Tribunal were both
16 proceeding on a given factual basis.
17 MR JUSTICE BARLING: Which is now said to be fundamentally
18 flawed.
19 MR HOSKINS: Paragraph 9, what Mr von Hinten-Reed says:
20 "I have revisited Sainsbury's Bank's website to
21 understand why these changes were made."
22 And he produces this extracts from the website.
23 A piece of factual evidence. And as a result of that,
24 he then says, paragraph 15, he is going to propose
25 an alternative approach entirely to the assessment.

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1 So the reason we say, it won't surprise you, why we
2 object to this going in, is that the justification for
3 the new report is based on a completely new alleged
4 factual issue. We don't know if we have had proper
5 disclosure on this issue. The inference must be we
6 haven't, because otherwise Mr von Hinten-Reed wouldn't
7 be going to the Sainsbury's Bank website and pulling
8 down a new document.
9 So, first of all, we say it seems pretty clear that
10 there hasn't been disclosure on this factual issue. The
11 second point is that there is no Sainsbury's witness
12 evidence to support this position, there never has been.
13 So all we have is apparently Mr von Hinten-Reed, whether
14 prompted by Sainsbury's or of his own volition, we don't
15 know, going to the Sainsbury's Bank website and pulling
16 down this piece of information. So no disclosure, no
17 witness evidence. And of course the Sainsbury's factual
18 witnesses, they have now closed their factual evidence
19 so we have not had a chance to cross-examine anyone on
20 this particular factual point.
21 So that is why we object.
22 This is an attempt to resile from a report that was
23 carefully considered. It is based on new factual
24 evidence and it would cause us considerable prejudice.
25 This is the difference between us and the second

100

1 Sidenius. We say it would cause us considerable
 2 prejudice because we are not in a position, the Tribunal
 3 is not in a position, to assess whether this is
 4 factually accurate or not. All you have is an extract
 5 set out from a website. And that's why we object.
 6 I understand if Mr Brealey doesn't want to do it
 7 now -- I thought it was helpful hopefully to download
 8 and it's helpful for Mr Brealey to see it as well.
 9 MR JUSTICE BARLING: Obviously without reading it I haven't
 10 taken it all on board, I can't absorb, exactly, this.
 11 But I mean, if there is a sort of some factual position
 12 at large which is within a fairly small scope, the
 13 alternative is for us to assess damages on some assumed
 14 factual basis which is fundamentally flawed and at first
 15 sight has a degree of less attractiveness.
 16 On the other hand, it may be that it can't be easily
 17 remedied for the reasons that you have indicated.
 18 I just don't know at this stage.
 19 MR HOSKINS: I understand.
 20 MR JUSTICE BARLING: There is a little gap obviously between
 21 now and the expert evidence, or the expert witnesses
 22 giving evidence. We will consider this overnight.
 23 MR HOSKINS: Of course you will, and it is my sucking eggs
 24 points. You have a balancing exercise and Mr Brealey
 25 has a chance to respond and to comment on that as

101

1 an issue.
 2 To be fair, I don't think he was expecting to make
 3 the application now. I am not trying to bounce it,
 4 I just thought it would be helpful to explain --
 5 MR JUSTICE BARLING: It is helpful for us to know the nature
 6 of your objections.
 7 MR HOSKINS: -- where we are at.
 8 MR JUSTICE BARLING: We will read that.
 9 Fine. Then now we are going to call Mr Koboldt.
 10 MR HOSKINS: I call Mr Koboldt.
 11 MR CHRISTIAN KOBOLDT (affirmed)
 12 Examination-in-chief by MR HOSKINS
 13 MR JUSTICE BARLING: Thank you, Mr Koboldt. Make yourself
 14 comfortable before you start.
 15 A. Thank you.
 16 MR HOSKINS: Do you have bundle C2? I see it in front of
 17 you.
 18 A. Yes.
 19 Q. If you go to tab 3, please.
 20 A. Yes.
 21 Q. Is that a document entitled "Witness statement of
 22 Christian Koboldt"?
 23 A. It is.
 24 Q. If you just flick through, you do not need to read the
 25 pages, to the end.

102

1 A. Yes.
 2 Q. Can you confirm that that is your witness statement?
 3 A. That is my witness statement.
 4 Q. There should be a signature on the last page.
 5 A. Yes.
 6 Q. Is that your signature?
 7 A. That is my signature.
 8 Q. Can you confirm that the contents of this statement are
 9 true?
 10 A. They are true.
 11 MR HOSKINS: Mr Brealey will have some questions.
 12 Yes, there is a confidentiality issue.
 13 MR JUSTICE BARLING: Right.
 14 MR BREALEY: It is all blued, isn't it? The whole witness
 15 statement I think is blued?
 16 MR HOSKINS: It is.
 17 MR JUSTICE BARLING: Right. This is an opportune time to
 18 say that I have received a communication through my
 19 clerk from someone who I'm not sure is here today,
 20 a legal journalist, who I think travels from Brussels.
 21 I don't know whether she is present or not?
 22 MISS KENNER: I have asked if we could be let known --
 23 MR JUSTICE BARLING: Are you Miss Kenner(?)
 24 MISS KENNER: Yes.
 25 MR JUSTICE BARLING: Right, so you are here.

103

1 The problem is I am sure that the parties would try
 2 and give anybody who asked them as much indication as
 3 they can of when they are going to need to hear some
 4 evidence in camera, but there is an obvious problem. As
 5 you have seen this morning, because the default position
 6 is that we sit in public, not in camera, it is incumbent
 7 on counsel to do their very best to see if they can
 8 conduct the cross-examination without going into camera.
 9 And you saw that that's what counsel did this morning,
 10 and counsel has made attempts to do that on other
 11 occasions. But there are just some times when it
 12 becomes impossible without having to refer a witness
 13 expressly to something that is a business secret or is
 14 otherwise confidential. And even when it is possible to
 15 ask the question, there are times when the witness feels
 16 very inhibited in giving a proper and full answer.
 17 So, I'm afraid -- can I encourage the parties, at
 18 the request of Miss Kenner and anyone else in a similar
 19 position if they do ask you, to give them the best
 20 estimate if you can, especially if they are travelling,
 21 of when a witness is likely to be heard and whether they
 22 are likely to give their evidence, or a substantial part
 23 of it -- I appreciate you can't give an exact guarantee,
 24 and that's the problem because the order in which
 25 witnesses are called is not always easy to orchestrate

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1 in advance. Sometimes a witness is ill or unavailable, 1
2 or there's another reason why you have to call a witness 2
3 out of the anticipated order in which you were going to 3
4 call them. 4
5 So we do the best we can and I can assure you that 5
6 we do try at all times to conduct the hearing in public, 6
7 except when it is impossible to do so. 7
8 This particular witness'evidence is almost entirely 8
9 subject to the confidentiality ring, and so I am sorry, 9
10 I know it means it is inconvenient, but that's the way 10
11 we have to go. So can I ask anyone else who is not 11
12 within the confidentiality ring to leave. 12
13 MR BREALEY: We are almost finished with the witnesses of 13
14 fact. Just flipping through, for example, the 14
15 claimant's expert reports, there's not a great deal of 15
16 yellow or blue. I will have a look at the defendant's. 16
17 So it may well be that we can give some indication. 17
18 A lot of it is white. 18
19 MR JUSTICE BARLING: Have you been in touch, Miss, with the 19
20 parties, solicitors or anyone, to ask? 20
21 MISS KENNER: I just asked on a daily basis. 21
22 MR BREALEY: I do not want to put any burden on 22
23 Mischon de Reya, but I am sure that I can let people 23
24 know the extent to which I am going to cross- examine on 24
25 blue, but I will leave it -- 25

105

[REDACTED]

1 MR JUSTICE BARLING: Yes. I will just encourage the 1
2 parties, if they can, to try to give as much information 2
3 as possible to anyone in the position of this lady, who 3
4 needs to know before she buys her train ticket whether 4
5 she is going to be allowed in or not. I know it is very 5
6 difficult, but there we are. 6
7 Thank you very much. 7
8 (2.30 pm) 8
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13 (In camera session) 13
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106

[REDACTED]

107

108

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