IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1349-1350/5/7/20(T)
1384-1385/5/7/21(T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 12 April 2021

Before:
The Honourable Mr Justice Roth (President)
Tim Frazer
Paul Lomas
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Westover Group Limited and Others

Claimants

v

Mastercard Inc & Others, Visa Europe Limited & others

Defendants

A P P E A R AN C E S

Kassie Smith QC and Fiona Banks (On behalf of Dune, Adventure Forest Limited and Westover Group)
Matthew Cook QC and Ben Lewy (On behalf of Mastercard)
Brian Kennelly QC, Jason Pobjoy, Isabel Buchanan and Daniel Piccinin (On behalf of Visa)

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Monday 12 April 2021

(10.30 am)

(Proceedings delayed)

(10.43 am)

THE PRESIDENT: Good morning. I apologise for the delay in starting. We had some technical issues linking --

Can you hear me now?

I was just apologising for the late start because of some technical issues we were having in the Tribunal.

I must then begin by reminding everyone that, although this case is being heard remotely, it is of course a full Tribunal hearing in just the same way as if everyone were here present in the courtroom in Salisbury Square House, where I am now sitting.

An official transcript will be produced in the usual way, but it is prohibited for anyone else to make an unauthorised recording, whether audio or video, of the proceedings, and that is punishable as a contempt of court.

I also mention that we will take a short break, in the usual way, in the middle of the morning at a convenient time of about ten minutes.

Thank you all for your three skeleton arguments, which we have read, and we have looked at some of the material you have asked us to look at.

With that, I think, Ms Smith, it's over to you.

Submissions by MS SMITH

MS SMITH: Sir, members of the Tribunal, I appear for the claimants on this application on this preliminary issue and Mr Brian Kennelly QC appears for the Visa defendants and Mr Matthew Cook QC appears for the Mastercard

defendants.

By way of housekeeping, we are working --

THE PRESIDENT: Just before you go on, I think we have the names of junior counsel who are with them on the skeletons, because I think although we only see the leaders, then to be fair to the juniors who do a lot of the work, as we know, they are not alone.

MS SMITH: Sir, absolutely and I hope the juniors are also on the call. Incognito for the purposes of today, but, yes, their names are all on the skeleton arguments and obviously thanks to them for all the work.

Sir, we are working from the bundles, the CMC bundles updated, I think most recently on Thursday, and with a new authorities bundle for today's hearing, which is a preliminary issue hearing as to which we, I, on behalf of the claimants, submit that under Article 6(3)(b) of the Rome II Regulation and the subsequent retained EU law which reflects that Regulation, the Italian claimants in the Alan Howard proceedings and the Westover proceedings can choose to base their claims on the law of this court, that is English law. This court has jurisdiction over their claims and they can choose English law as the applicable law because the restriction of competition on which the claims against each of the Visa and Mastercard defendants relies directly and substantially affects the market in the UK.

We therefore request the Tribunal to determine that as a result English law governs their claims.

My submissions this morning will be structured as follows:

1. I will address the general approach we say the Tribunal should take under Article 6(3) of Rome II.

2. I will set out our positive case as to why the Italian claimants can elect to apply

English law to their claims in these particular proceedings.

3. Finally, I will address the submissions made against us in that regard by Mastercard and Visa.

Starting first with the approach to be taken, we say that should be taken, under Article 6(3)(b) of Rome II. The starting point in my submission is that Article 6(3)(b) is a specific application of the principle of effectiveness of EU law.

In this regard, I rely upon the extracts from the Commission's Green Paper, as to damages claims, and the White Paper on damages actions and the comments of the Advocate General in the CDC Hydrogen Peroxide cartel claims that are set out in paragraph 16 of my skeleton argument.

Sir, you will have seen those submissions and I do not need to take you through the relevant authorities, unless you would like me to do so of course, but for your note the Green Paper is at the authorities bundle, tab 7. The White Paper is at authorities bundle, tab 9 and CDC is at the authorities bundle, tab 1.

We also rely on the commentaries on Article 6(3)(b) in Dicey & Morris, particularly at paragraph 35-61, which is in the authorities bundle at tab 14 and Dickinson at paragraphs 6.5 to 6.9 of the authorities bundle-tab 12.

I don't take you in detail to these authorities, because as I understand it this submission is not a controversial one.

As Mastercard says in paragraph 15 of its skeleton argument, the purpose of Article 6(3)(b) and I quote:

"... is to simplify the process of cross-border competition litigation by allowing a claimant to plead a case under only one system of law."

That is the lex fori.

Of course there are limits built into Article 6(3)(b) so as to prevent forum shopping. Principally, the requirement that the restriction of competition on which the

claim relies must also directly and substantially affect the market in the lex fori.

We agree that there are those limits, but when interpreting and applying Article 6(3)(b) we would ask the Tribunal to bear in mind its overriding purpose of procedural economy and pursuing the principle of effectiveness.

Next, as to a further point I make as to the general approach to be taken under Article 6(3)(b) of Rome II, is in my submission it's important to bear in mind the stage in proceedings at which a court or tribunal will be considering the question of applicable law.

As in these proceedings, it's generally necessary and obviously sensible, to determine the issue of applicable law at an early stage in the proceedings. Before, we say, any substantive assessment of the case has been carried out.

We say the fact that the applicable law is to be determined at an early stage in proceedings necessarily impacts the extent and nature of the inquiry that is to be carried out by a court or tribunal in determining that issue.

In particular, we say this is reflected in the language of Article 6(3)(b), which refers specifically, and I quote, to:

"... the restriction of competition on which the claim against the defendants relies."

In our submission, the primary focus, therefore, should be on the restriction of competition as pleaded by the claimants because that is the restriction upon which the claim relies. That's the language used in Article 6(3)(b).

Bearing in mind the purpose of the Regulation and the stage at which applicable law is to be determined in proceedings, we say it can't have been intended that at the stage of determining applicable law, the court or tribunal should carry out a mini trial into the substance of the restriction.

Similarly, we say --

THE PRESIDENT: Just pausing for a moment. A mini trial of course can mean various things. It's a somewhat loose expression. It doesn't mean though that the court or tribunal can't hear evidence on this point, does it? If it's necessary --

MS SMITH: No.

THE PRESIDENT: -- that it is part of the trial. Albeit it might be taken first or, as in this case, as a preliminary matter, but it's still something on which the court -- it is not like, as it were, summary judgment -- could if appropriate hear witness evidence. Isn't that right?

MS SMITH: We certainly don't say that you can't have recourse to evidence in determining the question of applicable law.

We say, however, that the primary recourse of the court should be looking as the language of 6(3)(b) says at the restriction of competition on which the claim relies.

Similarly, we do say that when Article 6(3)(b) refers to markets, it can't have been intended that a full market definition exercise would be carried out for the purposes of determining the applicable law.

In many cases -- maybe not this particular case -- market definition may be hotly disputed and it can't have been intended we say that the parties should go to a contested hearing on market definition in order to establish applicable law. Particularly, I say this, because -- as I have already said -- the purpose of Article 6(3)(b) is to make it easier for cross-border claims to be brought consistent with the principle of effectiveness.

That brings me to my final point on the general approach to be taken under Article 6(3)(b), and that is what is meant by the reference in that Article to:

"... when the market is likely to be affected in more than one country."

My submission is that this means where the market is or is likely to be affected in more than one country, either because the restriction of competition affects a market whose geographical area covers more than one country or because it affects two or more separate national markets, for example.

We say that interpretation is consistent with the language of the Directive, which refers interchangeably to markets and to countries. We also say it's consistent with the purpose of the Directive, to centralise claims arising from restrictions of competition affecting more than one national market, such as classic cross-border cartel claims before a single court in line with the principles of procedural economy and effectiveness.

That interpretation also appears to have been the intention of the legislator. If I can ask you to look at the authorities bundle in this regard at tab 12. This is an extract from a commentary on the Rome II Regulation by Andrew Dickinson. If I can ask you to turn to page 700, paragraph 6.68, under the heading "The claimant's right to choose the law of the forum". His opinion is set out:

"The escape clause in Article 6(3)(b) applies when the market is or is likely to be affected in more than one country. This language suggests that Article 6(3)(b) is primarily concerned with situations in which the geographic area of a single market covers the territory of two or more countries leading to the application of the laws of each of those countries under Article 6(3)(a) on a distributive basis."

But then in the final sentence of that paragraph, he says:

"Article 6(3)(b) may also be capable of applying to a situation in which a single restriction of competition affects more than one market."

You will see his footnote to that last sentence is footnote 182, which we find on page 701.9 of the bundle. Footnote 182 refers as support for that statement

to the Commission staff working paper accompanying the Green Paper for damages actions for breaches of Article 81 and 82 of the EC treaty, which referred to cases in which:

"The affected market is bigger than one single state or where there are several national markets."

We say that's the correct approach to be taken to the meaning of those words under Article 6(3)(b).

We note that this submission is effectively accepted by Visa at paragraph 11 of its skeleton argument, where they state that although the paradigm case of the application of 6(3)(b) is where competition is restricted in a market that is wider than national, they go on to say, and I quote:

"The language and policy of Article 6(3)(b) could at least arguably also apply to a single restriction of competition that affects more than one market."

Visa gives, in paragraphs 11 and 12 of its skeleton, the example of a single cartel agreement between two manufacturers who compete in several national markets. In such a situation, Visa says, there's only one restriction of competition which leads to less intensive competition across the relevant separate markets. We agree and submit that Article 6(3)(b) can and should apply in such a case.

Further, we say, that the claims in the present case brought by the Italian claimants are no different in this respect from such a cartel agreement. We say there is one restriction which we challenge, which applies across a number of countries, or a number of national markets.

THE PRESIDENT: This is, just to be clear, one restriction giving rise to the different MIFs about which you complain, the domestic, the intra-EEA, the regional, it's one restriction ...

MS SMITH: One restriction about which we claim which is what we call the default MIF settlement rule. Then, under that rule, various MIFs are charged to the claimants and our claim is based on those MIFs -- or the quantum of our claim is based on those MIFs. The challenge is to the default MIF settlement rule, which I will come on to now.

My submission on the second topic that I wish to address, which is our positive case as to why we can apply English law, the Italian claimants can apply English law to their claims in these proceedings.

Starting by looking at the restriction of competition --

THE PRESIDENT: Sorry, before you leave the Rome II, may I ask you just two questions on it.

First, on this question of what is the applicable law and the claimant's invocation of Article 6, paragraph 3(b), who has the burden of proof of showing that it's English law if the claimant is choosing to base his or her claim, the law of that court? Would that imply that it's the claimant who has to satisfy the court that the conditions of 6(3)(b) are satisfied?

MS SMITH: I think that's probably fair, sir, yes.

THE PRESIDENT: Yes, thank you. That seemed to be the position to me but I think it's important to clarify that.

Secondly, I just notice that, at the beginning of Rome II, if you go to the recitals and page 255 in our bundle, there's reference in the third recital to the opinion of the European Economic and Social Committee, I don't know if anyone has referred to that. And then various other opinions in footnote 2. Do they, do you know, shed any light on Article 6(3)(b)? You have taken us to the Green and White Papers of the Commission, but these are the actual precursor documents cited in the Regulation. Are they of any assistance to us?

MS SMITH: I know that -- I'll check -- my juniors have carried out a lengthy search for helpful case law and background information to try to find guidance on the application of 6(3)(b) and there is surprisingly little material available. I don't want to say positively that we have double-checked all those opinions, I think we probably have, but I can come back to you, sir, and confirm that if I may once I have double-checked the situation.

But there is, I have to say, sir, surprisingly little material on 6(3)(b). The most helpful material that we have been able to find, and we have carried out a pretty lengthy search, is that contained in the Green and White Papers on damages actions and the Advocate General's opinion in the CDC case, and that pretty much, apart from one Dutch case, is what we have been able to find, sir.

THE PRESIDENT: Yes. None of you have referred to, I think, any of those materials, but if you can confirm -- you don't have to do it today, but later in the week -- that there's nothing there, it's good to know because obviously those are the actually recited anterior documents.

I think you have just answered this question, there's no authority, I think, in this country that's addressed Article 6(3)(b)?

MS SMITH: No, sir.

THE PRESIDENT: You say there's one Dutch case. Is that of any assistance to us?

MS SMITH: Sir, it was a Dutch case ... I can dig it out. I don't think that a great deal of assistance came from that case, except that -- I think it was either a jurisdiction or applicable law case -- Article 6(3)(b), the judge there ... I will come back if I may, sir, and come back to you on that Dutch case. The judge held that the Dutch law was applicable law to a multi-jurisdictional case and put a great deal of emphasis on the principle of effectiveness in reaching that decision. But I can dig out the references to that case.

THE PRESIDENT: Did you say it was in Trucks?

MS SMITH: I do not think there is an English translation of it, I was assisted by someone in chambers who has Dutch who was able to look at that case for us.

THE PRESIDENT: Is it a Trucks case, did you say?

MS SMITH: I think it probably is.

Let me just see if my junior can confirm electronically whether --

THE PRESIDENT: Why don't you come back to us on that after the break, in due course?

MS SMITH: Sir. If I can then move on to my second topic, which is the application of 6(3)(b) in this case in particular. I start by looking at the restriction of competition on which the claims against each of the defendants relies.

Starting with our pleaded case. If I may ask you to look at the particulars of claim in the Westover claims against Mastercard, the Visa particulars are pleaded in almost precisely the same terms so I won't go to them both.

It's in volume 2A of the bundle, sir.

THE PRESIDENT: Yes. Maybe we will make that our working pleading, if Mr Kennelly doesn't mind, we will take -- they are in identical terms, I think the paragraph numbering may be one different.

MS SMITH: The particulars are in identical terms, sir, I will need subsequently I think to look at the defences of Visa and Mastercard --

THE PRESIDENT: Yes, we will look at the defences but as to the pleading, if we stick with the Westover Mastercard just for simplicity.

MS SMITH: Tab 36 of volume 2A. If I can ask you to turn in there to page 372, starting at paragraph 78, this is our case under Article 101.

Paragraph 78:

"The Mastercard rules including the obligation to pay an interchange fee in respect of each transaction facilitated by the Mastercard platform was at all material times an agreement and/or concerted practice."

Then at paragraph 81 we explain why we say the aforesaid agreement and/or concerted practice had the object or effect of restricting competition. If I can emphasise in particular what we rely on for the purposes of this claim, is B, for the purposes of today, B, the obligation to pay an interchange fee in respect of each transaction facilitated by the Mastercard platform. Alternatively, the obligation to pay the applicable MIF either alone or in combination with the Anti-Steering Rules, restricts competition on the Mastercard acquiring market and/or between payment platforms. In the absence of the aforementioned obligations there would be competition, alternatively more effective competition, between acquirers and/or other payment platforms for merchants' businesses. We repeat and rely on what is set out in paragraph 69, which is at page 369. If I could ask you to turn back to that, sir. It adopts part of the pleadings made under Article 102. It's paragraph 69A in particular:

"The Mastercard rules require an interchange fee plus the acquirer fees to be paid by acquirers to issuers and the various MIFs fix a minimum level of the interchange fee rate for all acquirers. This inflates the base on which acquirers set charges to merchants, with that base being common for all acquirers, the MSC will typically reflect the costs of the relevant MIF, with the result that the MIF fixes a minimum price floor for the MSC, which leads to a restriction of price competition between acquirers and/or a distortion of competition in the Mastercard acquiring market by artificially raising prices to the detriment of merchants such as the claimants. In particular the MIF has a minimum price floor if the MSC is immunised from competitive bargaining,

acquirers have no incentive to compete over that part of the price which is a known common cost, which acquirers know they can pass on in full and do so and (2) is non-negotiable, merchants having no ability to negotiate it down."

You will see the amendments that have been made to paragraph 69 of our pleading. Those amendments were made in light obviously of the Supreme Court judgment in Sainsbury's v Mastercard.

Recital 23 of Rome II provides that the concept of a restriction of competition for the purposes of Rome II should cover prohibitions on agreements and concerted practices which have as their object or effect the restriction of competition within a member state or within the internal market.

As I have shown you, the restriction upon which we claim in this case or which we rely in this case, is the imposition of what we have called in our skeleton the default MIF settlement rule. That's the imposition of a non-negotiable obligation on acquirers to pay a default MIF to issuers. That is contained in the scheme rules.

That rule, we say it's common ground, that the default MIF settlement rules, that applied by Visa and that applied by Mastercard, apply on a pan-European basis. So that is the restriction upon which we rely.

While we are in the pleadings, if I could ask you to look at market definition --

THE PRESIDENT: Does the pleading actually quote the rule?

MS SMITH: I don't think it quotes the rule by reference to the paragraph number, because at the time we didn't have access to all the rules, but it does set out the relevant rules in paragraphs 25 through to 28, which is at pages 349 to 352. We say the Mastercard rules in this case have been subject to variation over the period of claims, certain of them have been available online and we

have had access to what we understand to be the latest version and each of those rules, in paragraph 26, provides that a transaction settled between licensees gives rise to the payment of an interchange fee, save where an applicable bilateral interchange fee is in place, the rules provide that default MIFs are payable. Mastercard sets all MIFs.

As I understand it, those rules are admitted by both the Visa and Mastercard defendants, or at least the aspects of them that -- of the rules, each transaction gives rise to the payment of a default MIF in the absence of a bilateral interchange fee agreement.

THE PRESIDENT: Yes. When you said the restriction we rely on is the default MIF settlement rule, I think were your words, I am just trying to relate that to the various rules you set out in paragraph 26.

MS SMITH: Yes, the combination, sir, if I may, of paragraphs A and B, albeit -- yes, the combination of paragraphs A and B, 26, that the transaction gives rise to the payment of an interchange fee and save where that interchange fee has bilaterally been agreed, so a bilateral interchange fee is in place, the rules provide that the default MIFs are payable.

THE PRESIDENT: What I am trying to see is whether the rule -- one may need to look at the rule if we have it somewhere -- actually says a default MIF is payable or provides for Mastercard to set a default MIF which then becomes payable. Because if no default MIF has been set, then there's nothing to pay.

MS SMITH: Yes, I might be able to assist --

THE PRESIDENT: In other words, just to explain, whether it's an enabling rule or it's actually an immediately effective rule that has practical effect immediately, not -- obviously the rule is in force, but does it enable Mastercard to do something which then bites or does it actually have a financial effect as

a rule?

MS SMITH: Sir, it might assist if I refer you to the witness statement of Mr Centemero that's been produced by Mastercard for the purposes of today's hearing, and it's in bundle 1, the core bundle, tab 10 and he sets out, in paragraph 11 of his statement, at page 284.2 of the bundle --

THE PRESIDENT: 284.2, yes.

MS SMITH: He sets out the relevant rule as set out in the Mastercard rules. So a transaction gives rise to the payment of the appropriate interchange for your service fee as applicable, the corporation has the right to establish default interchange fees and default service fees only -- it's understood all such fees only apply if there's no applicable bilateral interchange fee or service fee agreement between two customers in place.

THE PRESIDENT: The corporation, for this purpose, is Mastercard?

MS SMITH: Mastercard, yes.

THE PRESIDENT: Just a moment.

MR LOMAS: Then I think the third paragraph:

"The corporation will inform customers as applicable all fees it establishes and may periodically publish ..."

Which gives a slight flavour of being enabling rather than mandating, so to speak.

MS SMITH: It might be useful to read to the end of that paragraph, obviously it enables the corporation to inform customers of the fees it establishes and once it has established those fees, unless an applicable bilateral interchange fee or service fee agreement is in place, any intra-regional or interregional fees established by the corporation are binding on all customers.

MR LOMAS: Thank you.

THE PRESIDENT: Yes.

This is something on which it may be necessary to look separately at Mastercard and Visa. This is the rule you rely on, is it, as regards Mastercard? I understand you didn't have access to it perhaps when you settled the pleading, when you and Ms Banks settled the pleading, but now that you have seen it, is this right, this is what you call the default MIF settlement rule?

MS SMITH: Yes.

THE PRESIDENT: That's the rule you rely on; is that right?

MS SMITH: Yes, it's that rule as the source of the -- yes, it's that rule.

THE PRESIDENT: Rule 9.4.

MS SMITH: Yes.

THE PRESIDENT: That's very clear.

Do we know the position as regards Visa?

MS SMITH: I don't think we have equivalent evidence from Visa, or the equivalent exact law for Visa. Our understanding is that there's an equivalent rule ... but I don't have the evidence, no.

THE PRESIDENT: As you understand it -- Mr Kennelly in due course can correct it if it's wrong -- the Visa rule, although it won't word for word be the same, is of the same nature?

MS SMITH: That's my understanding.

I will come, sir, if I may, to address in due course the argument which Mastercard specifically makes, which I think is effectively based on this enabling nature of the rule. So that hypothetically Mastercard could, although it never has, as I understand it, set a default interchange fee at zero, if it wished to do so.

THE PRESIDENT: That's a separate argument, I think, I mean it could just not set an interchange fee at all.

MS SMITH: Yes.

THE PRESIDENT: It has the right to do it.

MS SMITH: I'll come on in due course to that point as well.

THE PRESIDENT: Yes.

MS SMITH: But in principle it could choose not to set an interchange fee.

Perhaps if I may come to that as I get through my submissions.

THE PRESIDENT: Ms Smith, you are cutting out a bit, it may be because you have turned away from the microphone.

MS SMITH: I will try to not turn away. Let me know if there are problems with the sound and I will try to sort that out.

I hope you can hear me now.

THE PRESIDENT: Yes, thank you.

MS SMITH: While we were in the pleadings, I was taking you to the market definition as in our case. I will take you to the Mastercard pleading, page 363 at paragraph 54 first. Paragraph 54 makes it clear, unsurprisingly, that the definition of the relevant markets, we say, will be the subject of expert evidence in due course, as is often the case, but pending the preparation of that expert evidence we'll plead as follows.

Over the page, at paragraph 59, our case is that the relevant geographic markets are national in scope, alternatively they extend to the territory of the EEA.

So it's not the case, contrary to what is asserted in the Visa and Mastercard skeletons, that it's common ground that the relevant markets, in particular the acquiring markets, are national in geographic scope. Our alternative case is that they are EEA-wide and that will be, we say, settled once expert evidence is put in on that point.

THE PRESIDENT: Can I interrupt you there for a moment. You have pleaded in the alternative.

MS SMITH: Yes.

THE PRESIDENT: One of your alternative pleas, as I understand it, is admitted by both Visa and Mastercard. They say: we agree with your case that they're national.

If you plead in the alternative like that, what's the effect of the defendants agreeing with you on one of your alternatives? Does that settle the matter? Or can you still go ahead and say well never mind they agreed with that, we want to run our alternative?

MS SMITH: I will double-check the pleadings but my understanding is that all parties' positions on market definition are subject to expert evidence.

THE PRESIDENT: I may be wrong, but I thought that both Mastercard in response to this plea and Visa in response to the equivalent in the Westover v Visa case have admitted that geographic market is national.

Let me ask Mr Cook if we can just clarify this. Is that right or is it subject to expert evidence?

MS SMITH: The reference, if it assists, in the Mastercard defence is in tab 43 of bundle 2B.

THE PRESIDENT: 2B? Just a moment, tab 43?

MS SMITH: Their statement on the treatment of the relevant markets is on --

THE PRESIDENT: I see, paragraph 66. Mastercard is also subject to its expert evidence.

MS SMITH: Yes, you are correct, sir, over the page, paragraph 71:

"It is admitted the markets are national in scope."

So there is an admission, but as I said it is subject to expert evidence.

THE PRESIDENT: Just one second.

So that's Mastercard. Then Visa ...

MR KENNELLY: If it assists, sir, I will give you the reference, it's Visa's defence on page 433.

THE PRESIDENT: It's in the core bundle, is it?

MR KENNELLY: I have it in my bundle 2A.

THE PRESIDENT: It's been re-amended, I think.

MS SMITH: It has.

THE PRESIDENT: I think it's at bundle 1, tab 14, page 31 something.

MS SMITH: Starts at page 383, for the re-amended defence, re-re-amended defence.

As to --

THE PRESIDENT: Has it been re-re-amended?

MR KENNELLY: Not for this purpose, sir. Shall I give you the reference for the document you have?

THE PRESIDENT: Yes.

MR KENNELLY: It's at page 369 and it's paragraph 53.

THE PRESIDENT: But it's, I suppose, paragraph 47, the defendants will also rely on expert evidence.

MR KENNELLY: Indeed, the point you make, sir, about admissions, about the fact that we have admitted the first sentence of paragraph 58 is at paragraph 53 on 369.

THE PRESIDENT: Yes, the first sentence is admitted.

MR KENNELLY: The second sentence is denied.

THE PRESIDENT: There's no proviso saying they will rely on expert evidence to establish their case, but I think it's an unequivocal admission, as I read it. Is that right, Mr Kennelly?

MR KENNELLY: Yes. Yes, it is.

THE PRESIDENT: Yes.

MS SMITH: Sir, yes --

THE PRESIDENT: My question is: what's the effect of that? Can you still say they've agreed with what we have said, with one of our alternatives, but we want at trial -- we may want to abandon that and run the alternative? Can you do that?

MS SMITH: Sir, simply because the other side have admitted one of the other alternatives, I do not think that stops us from running them as alternatives, subject to expert evidence.

THE PRESIDENT: Don't forget, this is the trial of the preliminary issue, this is not --

MS SMITH: Yes, absolutely.

THE PRESIDENT: -- an interim application or anything.

MS SMITH: Yes, sir. I simply was drawing you to the pleadings to make the position clear, seeing that -- and perhaps the assertion that it's common ground that the relevant markets are national in geographic scope is correct insofar as that is admitted by the Visa and Mastercard defendants. That is the statement made in their skeleton, subject on Mastercard's pleading, to expert evidence.

But we say, as I made the primary submission under 6(3)(b), 6(3)(b) applies to a restriction of competition which affects a market whose single geographical area covers two or more countries, or where the relevant restriction affects two or more separate markets.

Even if there are separate national acquiring markets, we say that Article 6(3)(b) applies where a restriction covers those two or more separate national markets.

THE PRESIDENT: No, I understand that, and I think that is common ground, that it

can.

MS SMITH: Absolutely. That I was about to say is common ground, as is highlighted by paragraph 11 of the -- I think it's paragraph 11 of the Visa skeleton.

THE PRESIDENT: Yes.

MS SMITH: We say the default MIF settlement rule falls within the ambit of Article 6(3)(b), either because it affects a market whose geographical area covers two or more countries or because it affects two or more separate markets.

We say, finally, the final piece of the jigsaw is that that restriction directly and substantially affects the market in the UK.

In that regard, we rely upon the extracts from the Commission's study on the application of the interchange fee Regulation set out in paragraphs 20 and 21 of our skeleton argument.

Again, unless you would like me to do so, sir, I do not propose to go through those extracts specifically. For your note, they are found in the authorities bundle, tab 11, and I hope you have, towards the end of last week -- Thursday I think -- received an updated version of our skeleton, with references to the authorities bundle page numbering in tab 11, because unfortunately the internal page numbering of that study, the Commission's study, that were originally included in our skeleton didn't make their way into the version of the study included at tab 11. I hope you have an updated version of our skeleton with that bundle page numbering in it.

THE PRESIDENT: Yes ... I actually don't know what version I have, but don't worry about that, we'll sort that out.

MS SMITH: It's in paragraphs 20 and 21 of our skeleton argument that cross references to the Commission's study on the application of the interchange

fee Regulation demonstrating card use from the UK is widespread and high value and it gives the references. I hope you have our skeleton with the bundle page references in it now.

THE PRESIDENT: The version I have, take for example paragraph 20A it says see page 51, see page 94 but that's the internal reference, is it?

MS SMITH: Obviously the amended version of the skeleton hasn't made its way to you, I think it was sent to the Tribunal on Thursday, but I can make sure that it gets sent over --

THE PRESIDENT: It will be somewhere, don't worry about it, we will find it.

MS SMITH: It might be more efficient than me going through it and giving you references orally.

THE PRESIDENT: We will check that.

MS SMITH: As I understand the position, Visa and Mastercard don't dispute that the rule requiring payment of a default MIF, or what we've called the default MIF settlement rule, applies on a pan-European basis.

They don't appear to dispute that it directly and substantially affects the market in the UK, that rule.

What they argue, as I understand it, is that the focus should be on the particular MIFs, specifically the particular level of the MIFs. They argue that the Italian MIF and the other cross-border MIFs, that is the EEA MIF and the interregional MIF, paid by the Italian acquirers and passed on to the Italian merchant claimants, are separate restrictions. Each of them is a separate restriction of competition which affects only the acquiring market in Italy and therefore cannot directly and substantially affect the English acquiring market for the purposes of 6(3)(b).

That's how we understand the case to be made against us and my third topic of

submission is to address that case.

The first point I wish to make is that our pleaded case, as I have said, which relies on the relevant restriction being what we have called the default MIF settlement rule, is consistent with the approach taken by the Court of Appeal and the Supreme Court in the Sainsbury's v Mastercard cases' decisions and we rely upon the findings of the Court of Appeal and the Supreme Court in that regard.

I would like to take you to the judgments, the relevant judgments, to make good those submissions.

THE PRESIDENT: Before we go to that, aren't there two stages in this? We've looked at rule 9.4, the Mastercard rule. That provides that everyone has to abide by and apply the default MIF when the corporation, in the language of the rule, establishes it.

Then, as we know in some detail from Mr Centemero's statement, at certain points they established a rule for Italy, which became the domestic Italian MIF.

So there's a further decision to have a domestic Italian MIF. One of the questions, which I don't think is something we will get much help from, as I recall, but you may argue differently from the Sainsbury's judgments, is: is that separate decision the one that creates the restriction of competition arising from the Italian MIF? Or is it not in itself an anticompetitive arrangement when they established the Italian MIF? Can it all just be related back to the enabling rule? That seems to me a rather important question before we get into how a default MIF rule restricts competition at all.

Because of course in Sainsbury's, you actually had a MIF that's been set, they weren't looking at these two stages.

MS SMITH: Sir, yes. I do think the judgments are important in that regard and I do

think that the approach that the courts took is important in that regard. My first submission, I think, is this: it may not be just two levels or two steps in the process that we are looking at here. I would characterise this as in fact being three steps, or maybe ...

The first step is the enabling rule.

The second step is in effect whether it's a separate decision or whether it's part of the same enabling rule, is the decision to put in place a default MIF? That we have this power to do so and we will do so. That is what is either part of the enabling rule or is a next step, applying the enabling rule, and we will apply a default MIF to all transactions across Europe, whether they are domestic, intra-regional or interregional.

Then there's a third stage, which is to set different levels, or prices, for each of the different types of transactions. The domestic Italian MIF, the interregional or the EEA MIFs.

The approach we say that the Court of Appeal and the Supreme Court took, and we say the correct approach, is that they looked at the first two stages that I have just set out together. They held that that -- what we have called the default MIF settlement rule, which contains not only the enabling aspect of the rule but the positive aspect of deciding to impose a default MIF in the absence of a bilateral agreement, that was the objectionable restriction. What was not objectionable or what gave rise to the restriction was not the level at which the different prices were then set subsequently, but the first two stages of that process.

That can be illustrated very simply, for example, and before we even get to what the courts said, by the fact that the claims that were being considered by the Court of Appeal and the Supreme Court were claims based -- I will take you to

the relevant paragraphs if I need to -- for UK domestic MIFs, Irish domestic MIFs and EEA MIFs. Three different types of MIF underlay the claims considered by the Court of Appeal and the Supreme Court.

Presumably, although there's no mention of this because it was in my submission not relevant to the court's reasoning, those MIFs were set at different levels.

The Supreme Court and the Court of Appeal did not say we need to look at the level of each of those different MIFs and how it is applied and what effect it has in the acquiring market of Ireland and the UK. We instead look at the fact -- we look at the enabling rule and the fact that there is a rule that for every transaction a default MIF will be applied in the absence of the bilateral agreement.

We say it's a combination of what I have characterised as the first two levels or first two steps of the process. That in itself is the restriction. That is the default MIF settlement rule. The enabling rule which has always been and is understood by all participants in the scheme and in the transactions to be a rule that will be applied and/or has always been applied.

In light of that, I think it is informative to go to the judgments of the Court of Appeal and the Supreme Court. If I might do that by starting, sir, with the judgment of the Court of Appeal, which is in tab 3A of the bundle. If I can start by asking you to turn to paragraph 7, which is on page 101(7), where the issues before the Court of Appeal are framed, and specifically to ask you to look at paragraph 7.1, which is the Article 101 issue against the background I have just outlined:

"The issue is: do the scheme rules setting default MIFs restrict competition under Article 101 in the acquiring market by comparison with the relevant counterfactual?"

The issue is framed in the way I have just outlined, but it is the scheme rule setting default MIFs which is whether that restricts competition under 101(1).

(Pause)

Just for your note, the Court of Appeal sets out the relevant rules in annex 1 to its judgment, which starts on page 101.83. I am not going to go through them in detail, but they are effectively in the nature of this enabling rule. The Court of Appeal is fully cognisant of the fact that different MIFs are set for different types of transactions under this rule.

THE PRESIDENT: Yes. Give me just a moment, would you.

(Pause)

What I am finding slightly strange is I can't relate the Mastercard rules, as set out at 373 to 376, to the Mastercard rule that we looked at earlier, set out by Mr Centemero, if I pronounce his name correctly as I hope I do.

MR COOK: If I can help, sir, if you go to paragraph 376 of the Court of Appeal judgment, it quotes what was then rule 8.3 and I think that is materially identical to what Mr Centemero quotes at paragraph 9.4.

MS SMITH: It's --

THE PRESIDENT: I see, it's just set out a bit differently. Yes, I see ... and the corporation will inform customers ... yes. That now equals rule 9.4.

MS SMITH: Then it's also important to note paragraphs 377 on 101.85:

"The default MIF levels referred to above were published separately from the scheme rules, as is the case for Visa they vary according to transaction type."

THE PRESIDENT: I am just looking at the 8.4. **(Pause)**

Yes, thank you. Then we now have, helpfully, the Visa rules.

MS SMITH: Or at least the Visa rules that were applicable then, and I do not understand them to have changed in any significant way.

Sir, that's the issue as framed by the Court of Appeal. If I could then ask you to turn to paragraph 127 of the Court of Appeal's judgment, page 101.35, paragraph 127.

THE PRESIDENT: Yes.

MS SMITH: This we referred to because the Court of Appeal makes it absolutely clear what measures it was considering, or what measures it considered to be the relevant restriction in this case. Paragraph 127:

"In our judgment, the scheme's argument as to the correct counter factual ignore these fundamental propositions. The measures in question in this case are the agreements between the issuers and the acquirers to be bound by the scheme rules set by the scheme defendants or put even more simply the scheme rules set by the scheme defendants. Those rules set default MIFs payable in the absence of bilateral agreements being reached."

It is that measure or rule that is the subject of the Court of Appeal's analysis and the restriction that was being considered by the Court of Appeal.

If you then look, sir, at paragraph 133 of the Court of Appeal's judgment on the following page, 101.37, the Court of Appeal there considers the Commission's decision in the Mastercard case:

"Looking at the Commission's decision as a whole it can readily be seen that the Commission was dealing with the same factual situation in these cases in relation to both Visa and Mastercard. A default MIF set by the scheme in the absence of any bilateral interchange fees being agreed between issuers and acquirers. The Commission's conclusion was broadly the same as that agreed between Popplewell and Phillips, namely that in the counterfactual situation the absence of the challenged restriction, issuers and acquirers would ultimately not agree bilateral fees so the situation would revert to

settlement at par, with negotiations being undertaken as to the merchant service charge absent the MIFs."

Then at paragraph 135, the Commission's stated in its conclusion at recital 4.10:

"The Mastercard MIF [what does it mean by that shorthand 'Mastercard MIF' we'll see] constitutes a restriction of price competition in acquiring markets, in the absence of a bilateral agreement the multilateral default rule fixed the level of an interchange fee rate for all acquiring banks alike thereby inflating the base on which acquiring banks set charges to merchants, prices set by acquiring banks would be lower in the absence of this rule and in the presence of a rule that prohibits ex post pricing. The Mastercard MIF therefore creates an artificial cost base that is common for all acquirers and the merchant fee will typically reflect the costs of the MIF. This leads to a restriction of price competition between acquiring banks to the detriment of merchants and subsequent purchasers. The reference the Court of Appeal says to an absence of a bilateral agreement is to describe the nature of the rule which provides for a MIF to be the default absent a bilateral agreement."

In my submission, what the Commission is referring to here by the "Mastercard MIF" is not any particular MIF or the particular level of a particular MIF charged. What it is referring to is the rule that provides that in the absence of a bilateral agreement a default MIF will be set by Mastercard, or Visa -- Mastercard in this case -- and will be charged.

It is that, that restriction, that both the Commission and the Court of Appeal are concerned with. Because it is that default rule which fixes the base for acquiring banks to set charges to merchants.

The level is not a factor, or particular level is not a factor. What is a factor is the existence of that requirement, of that artificial cost base.

Turn to paragraph 156, the same approach is made clear on page 101.41. Paragraph 156, if we can start with paragraph 156. The Court of Appeal is now analysing the Court of Justice's decision. There are some difficult double negatives here, but:

"The proper analysis of the CJEU's decision on these points is that it endorsed the counterfactual adopted by the General Court as a matter of law, it rejected the arguments (1) that the no default MIFs and prohibition of ex post pricing counterfactuals is inappropriate."

It held that that counterfactual was appropriate.

It rejected the submission that there was no basis for saying the MIF set a floor on the merchant service charge, so it did set a floor.

The Court of Justice rejected, third, the submission that the imposition of the MIFs did not restrict competition between acquirers, because the merchants could still compete in relation to the parts of the merchant service charges that were unaffected by the MIF.

Those are the positive findings of the Court of Justice adopted by the Court of Appeal. What's very important, sir, is then -- what in my submission for the purposes of this hearing in particular is what the Court of Appeal then says in paragraph 157. They say:

"It would be remarkable if the same scheme rule requiring the payment of MIFs in default of the agreement of bilateral interchange fees were to be held in breach of Article 101 in one member state but not in breach of it in another member state, whatever the factual or expert evidence might have been as to what might have happened in the postulated counterfactual."

It's absolutely crystal clear, we say, if not from the rest of the judgment from this paragraph, that the objectionable restriction relied upon by the Court of

Appeal is the scheme rule requiring the payment of MIFs in default of the agreement of bilaterals.

It also, in effect, is saying here it would be remarkable if that same scheme rule were in breach of rule 101 in one member state but not another and understood against the background of the fact the Court of Appeal was considering in this case a claim based not only on the payment of UK MIFs but also Irish domestic MIFs and EEA MIFs, all of which are set at different levels, and the Irish MIF and the UK MIF set presumably at different levels in different member states, the Court of Appeal is clearly focusing on the scheme rules not different MIFs charged in different member states.

Then if I can ask you, sir, to turn to paragraph 168, which is on page 101.44 of the Court of Appeal's judgment. About halfway down paragraph 168, you will see a sentence starting:

"We take the view that 137 of Phillips J's judgment is beside the point."

It is the next sentence that I would highlight:

"As we have already said, the exercise under 101(1) is to consider whether there would be more competition in the absence of the measure in question. The measure in question here was the rule that in the absence of bilateral agreements a default MIF would be imposed."

Sir, again we say it's crystal clear that that is the restriction that the Court of Appeal was concerned with for the purposes of its findings in the Mastercard/Sainsbury's case.

Then what's also important is the Court of Appeal's substantive approach, as it explains it in paragraph 169, and its interpretation of an application of the Commission's -- the European decisions.

Halfway down paragraph 169:

"In fact, as we have already said above the Commission's decision at recital 460 [we have already seen the Court of Appeal cite the Commission's decision at recital 460] was explaining why the MIFs were not like an excise tax but actually restricted competition between acquirers and forced up prices for merchants. The reference to statements of retailers demonstrating that they would be in a position to exert pressure on acquirers in the absence of a floor to the merchants' service charge was there to explain that without a default rule that fixed a MIF in the absence of such bilateral agreements, merchants could shop around and contract with the acquirer who incurred the lowest interchange costs."

If you then also, before I make my submissions on that point, I ask you to look at paragraph 172, the end of that paragraph, at the top of page 101.45:

"We consider that Phillips J was misled by Ms Rose's argument as to the sliding scale of MIFs including the zero MIF as one point on that scale. As we have said, that ignores the basic question one is required to ask under Article 101(1), namely whether there would be more competition without the measure in question, that is to say the rule imposing a default positive MIF in the absence of bilateral agreement. The answer to that question was delivered by the Commission and approved by the general court in the CJEU. The correct counterfactual envisaged no default MIF and a prohibition ex post pricing, the MIF did set a floor on the merchant service charge and restricted competition between acquirers, because the higher prices resulting from it limited the pressure which merchants could exert on acquirers, reducing competition between acquirers as regards the amount of the merchant's service charge."

I make two submissions.

First, we say, it is clearly the case that the Court of Appeal considered the "measure in question" or the relevant restriction to be the rule that establishes a default MIF in the absence of a bilateral agreement.

The second submission: it is that rule which is objectionable, because it reduces competition on the acquiring market. Because it creates an artificial cost base, which is set by collective agreement, between acquirers, issuers and the schemes and it cannot be competed or negotiated away by merchants.

As the Court of Appeal said in paragraph 169:

"The merchants cannot shop around to contract with the acquirer who incurs the lowest interchange costs ..."

Because there is that collectively set element, which artificially inflates the cost base and which cannot be negotiated by merchants because it has been collectively set by different parties on a different market.

What's important is that the propositions made by the Court of Appeal are expressed in wholly general terms. Any fee for settling transactions on the acquiring market set by a collective agreement between the issuers, acquirers and schemes, which cannot be negotiated away by merchants is unlawful because of its anticompetitive effect, because it creates that artificially inflated cost base.

THE PRESIDENT: When you say "unlawful", I think you mean restricts competition under 101(1).

MS SMITH: Under 101(1), yes, we are not into 101(3), that's for another day, but 101(1), it is a restriction on competition.

There is no mention, obviously, and we say because it is not the Court of Appeal's reasoning, about the level of that fee. It is the nature of that collectively agreed interchange fee which cannot be negotiated away by merchants, and

that is the restriction.

I will move on to the Supreme Court judgment, which I say endorses and it makes clear --

THE PRESIDENT: Just before you do that, the restriction of competition that's being addressed, I think by the Commission and here by the Court of Appeal, explained in the passages you have taken us to, is a restriction of competition on the acquiring market.

MS SMITH: Yes, sir.

THE PRESIDENT: You have pleaded some other markets as well, I think.

MS SMITH: We have.

THE PRESIDENT: You pleaded restriction of competition on those markets also; have you not?

MS SMITH: We have, sir.

For the purposes of today we rely on our pleading, which I took you to -- I can't remember off the top of my head the relevant paragraph, but I think it's the second aspect of our 101 case which reflects what was found by the Supreme Court. Of course our pleading was pleaded before we had the benefit of the Supreme Court judgment.

THE PRESIDENT: Are you relying also on restriction of competition in the issuing market, or indeed in the platform market, however it's defined -- there's some dispute as to whether there's one platform market or there's a Visa platform and a separate Mastercard -- are you relying on those as well?

MS SMITH: They form part of our pleaded case and they are part of our pleaded case under 101 and we will rely on them.

For the purposes of today, we say it's sufficient to look at the case as set out -- or that relies upon and reflects the judgment of the Court of Appeal and the

Supreme Court. Because even that simple limited case, we say, fulfils the requirements of 6(3)(b).

THE PRESIDENT: That's the restriction on the acquiring market?

MS SMITH: Yes.

THE PRESIDENT: You are not relying on whatever you may establish at trial about restrictions on the other market for the purpose of Article 6(3)(b); is that the position?

MS SMITH: If I could come back to you on that, because we have not -- as you rightly pick up -- developed our arguments in that regard, because we say it is sufficient to look at the element of the case that we plead that relies upon impact on the acquiring market. We certainly do not drop those other aspects of our case. Whether I need to develop those other aspects of our case for Article 6(3)(b), if I can come back to you on that, I would be grateful.

THE PRESIDENT: Yes, if you could, please.

Would that be a sensible moment to take a break?

MS SMITH: Yes.

THE PRESIDENT: Yes. We will come back at -- just so we have a sense of timing, it's obviously a very important point and it may be by no means an easy point, especially as it's one, I think, where there's no authority to guide us, but it's a very contained point, I think.

I don't know what you have agreed about timing? Will you be concluding, I imagine, before lunch? I think you need to.

MS SMITH: Yes, I should certainly be finished before lunch.

THE PRESIDENT: Yes.

I would have thought we want to give whoever goes first -- I don't know what has been agreed between Mr Cook and Mr Kennelly to have about half an hour

before lunch or thereabouts, 20 minutes, before lunch to get started so they can then -- they may have, I hope, divided up the argument, because clearly there's some overlap between them.

So that we are not in difficulties on timing.

MS SMITH: Given that it's now 12 o'clock and we didn't start until about 10.45, I am not sure I will finish a good half an hour before the lunch break, but I will certainly be finished before lunch.

THE PRESIDENT: We might curtail our lunch break by 10 minutes because we robbed you of some time at the start, but I do think we need to have a break.

MR KENNELLY: Sir, if it reassures you Mr Cook and I have coordinated. I will go first and we will seek to avoid any overlap.

THE PRESIDENT: Thank you. That's what I would have expected from two very experienced counsel.

12.10.

(11.59 am)

(A short break)

(12.10 pm)

THE PRESIDENT: Yes, Ms Smith, do we go to the Supreme Court?

MS SMITH: Sir, if I may, just before we go there, there are two points you raised that I said I would address.

First of all, the Dutch case I referred to. It's not in Trucks, I apologise, it's an Air Cargo claim. It's called Equilib Netherlands BV v the various airlines in the Air Cargo cartel, it's an Amsterdam district court decision handed down on 1 May 2019. We can get hold of this decision if you wish, but as I said it's only in Dutch.

It didn't concern Rome II, because the cartel pre-dated Rome II. It concerned

applications to the domestic provisions on applicable law, which provide that in cases of unfair competition the law of the State in whose territory the market is affected shall apply.

The court took the view that this was participation in a cartel which was one single continuing tort or wrongful act, which had competition in markets worldwide and that as a result, the principle of effectiveness and good procedure, this is paragraph 3.24 of the judgment, were sufficient to conclude that Dutch law is applicable to all claims, because the cartel conduct had worldwide effects, including in the Netherlands.

THE PRESIDENT: Yes.

MS SMITH: It's some help on the principle of effectiveness, but limited.

THE PRESIDENT: Yes, thank you.

MS SMITH: The second point is you asked about other aspects of our Article 101 pleading relating to impacts on competition in the issuing market and the platform markets. Just to clarify, the same arguments apply to those pleadings, those restrictions, on the issuing side as apply to our case based on restrictions in the acquiring market, which are consistent with the Court of Appeal and Supreme Court. We are still, on the issuing side, talking about one rule, as we have pleaded in our particulars, which affects multiple national markets on our primary case. It's just a different product market but the same rule we say having effect to costs and the number of different markets or countries.

Effectively, just to make it absolutely clear, we do maintain that case as well for the purposes of this application but the arguments are effectively the same. It's the application of the pan-European rule which applies in a number of different countries or national issuing markets on our primary case.

THE PRESIDENT: Yes, thank you.

MS SMITH: The product market.

Turning if I may then to the Supreme Court judgment, which is in authorities tab 5. Just for your note, the MIFs that were before the Supreme Court -- I will not take you through it in any detail -- are set out in paragraphs 27 to 31 of the Supreme Court's judgment and make it clear that they were considering UK MIFs, Irish domestic MIFs and EEA MIFs.

As you will recall, the Supreme Court, as regards the restriction issue, started its consideration of the restriction issue on page 151 in paragraph 42. I will come back to what they say in paragraph 42 when I am addressing Mastercard's submissions, but as regards the restriction issue, the Supreme Court considered first whether it was bound by the CJEU judgment and then it decided whether it should follow the CJEU judgment in any event, even if it was not bound by it.

On page 153, the court starts its analysis of the Commission decision at paragraph 51. You will see there it refers to recital 4.10 of the Commission decision. We have already seen recital 4.10 in the Court of Appeal judgment, which refers to the multilateral default rule which fixes the level of the interchange fee rate for all acquiring banks alike, thereby inflating the base on which acquiring banks set charges to merchants.

By referring to that recital, the Supreme Court is highlighting the passage in the Commission's decision where the Commission identifies the restriction of competition by reference to the multilateral default rule.

In our submission, that is what the Supreme Court shortens, the shorthand it uses subsequently, is either to refer to the "Mastercard MIF" or "the MIF". When it uses that shorthand, "the Mastercard MIF" or "the MIF", it's referring to what is

there set out as the scheme's multilateral default rule, and in fact the Commission takes the same approach in recital 4.10 by using the same shorthand, "Mastercard's MIF", but what it means when it uses that shorthand we say is the multilateral default rule.

Then if you look at paragraph 67 of the Supreme Court's judgment, on page 156, having looked at the Commission's decision, the Supreme Court then looks at the General Court's decision and then here at paragraph 67 the Court of Justice's judgment, endorsing the General Court's rejection of the zero MIF argument in the following terms:

"The appellants cannot criticise the General Court for having failed to explain how the hypothesis applied had less restrictive effects on competition than the MIF, given that the only difference between the two situations lies in the pricing level of the MIF."

So it's here comparing a zero MIF with a positive MIF:

"As the Commission rightly points out, the judgment under appeal is not based on the premise that high prices in themselves constitute an infringement of 101(1), on the contrary as is apparent from the very wording of paragraph 143 of the judgment under appeal, high prices merely arise as a result of the MIF which limit the pressure that merchants can exert on acquiring banks, with the resulting restriction in competition between acquirers as regards the amount of the MIF."

So our submission, the Supreme Court understands the European Court judgment as having concluded that the anticompetitive effect of the MIFs, that is the default MIF settlement rule, arises because it reduces price competition between acquirers and prevents merchants thereby from competing down or competing away the MIF. That was the effect on competition, not because

the default price was set at one level rather than another, or that it was set at a high rather than a low level, or if it was set at zero.

The Supreme Court then goes on to reject Visa's and Mastercard's arguments as misinterpreting the European Court decisions. That's paragraph 73 of its judgment on page 157.

If you see paragraph 74 on page 157, in saying Visa and Mastercard involve a misinterpretation of the decision, the Supreme Court says:

"As regards the Commission decision, recital 459 bears repetition in the absence of Mastercard's MIF [again using that shorthand] the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into account the acquirer's individual margin or cost and his mark-up."

Paragraph 75 is important:

"The Commission was here focusing on the process by which merchants bargain with acquirers over the MSC, it was contrasting the position where that charge [the MSC] is negotiated by reference to a minimum price floor set by the MIF and one where it is negotiated by reference only to the acquirer's individual margin or cost and his mark-up, ie between a situation in which the charge is only partly determined by competition and one in which it is fully determined by competition. In the latter situation the merchants have the ability to force down the charge to the acquirer's individual margin or cost and his mark-up and to negotiate on that basis."

Then they say at paragraph 77:

"Mastercard General Court has properly to be interpreted in a similar way. In paragraph 143 the General Court rejected the zero MIF argument and held that since the MIF sets a minimum price floor for the MSC which is not

determined by competition it necessarily follows that the MIF has in effect restricted competition."

Says the Supreme Court:

"This is the context in which the pressure referred to in the next sentence falls to be considered. The consequence of the minimum price floor set by the MIF is that such pressure is limited to only part of the MSC, ie that relating to the acquirer's individual marginal cost and mark-up, in the present case about 10 per cent of the MSC."

Then they say a similar analysis applies to Mastercard CJ and they talk about the pressure which the Court of Justice referred to at paragraph 195 is the same as that referred to at 143.

Again, we say the Supreme Court holds that the MIFs, using that shorthand, are anticompetitive because merchants cannot compete away those fees because those fees have been collectively agreed between the acquirers, issuers and schemes.

The Supreme Court's analysis is made even clearer, we say, when you look at its reasoning when it considers whether it should follow the CJEU judgment in any event even if it's not bound by it. That starts, you will recall, on page 160 of the bundle numbering from paragraph 95 onwards. The whole of the section, which is quite short, bears reading but I would emphasise if I may what the Supreme Court says in paragraph 103:

"There is a clear contrast in terms of competition between the real world in which the MIF sets a minimum or reservation price for the MSC and the counterfactual world in which there is no MIF but settlement at par. In the former a significant proportion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement made.

In the latter, the whole of the MSC is open to competitive bargaining. In other words, instead of the MSC being to a large extent determined by a collective agreement it is fully determined by competition and is significantly lower."

The first sentence explains the effect of the MIFs in the cases before the court, which is to set a minimum or reservation price for the MSC. However, I submit that it's clear from the remainder of paragraph 103, the second sentence onwards, that the anticompetitive evil is the fact that merchants cannot bargain down or bargain away the default fee because that fee is immunised from competitive bargaining between acquirers and merchants because of the collective agreement that fixes this price.

Accordingly, the amount by which a price for a service, in this case the MSC, is fixed collusively is not the legally relevant consideration in the Supreme Court's analysis, rather it's the fact that a part of that price is fixed collusively and immunised from competitive bargaining.

Visa and Mastercard both say that in determining the applicable law under 6(3)(b) in the present case the Tribunal needs to consider the separate effect which each MIF has, that is the Italian MIF and the cross-border MIFs, on each separate or cross geographic product market.

What they actually mean is the level of those particular different MIFs and that's spelt out in Visa's skeleton at paragraph 28 and Mastercard's skeleton at paragraph 32. But I have shown you that the Court of Appeal and Supreme Court judgments did not find that the MIF was a restriction of competition because of its level, or look at the level of the separate MIFs that were before it in any event.

When the Supreme Court and the Court of Appeal referred to "the MIF", they were clearly concerned with the scheme rule. I have made the point that those

courts were considering a number of different MIFs, the UK domestic MIFs, Irish domestic MIFs and EEA MIFs. There was no suggestion of course in those judgments, there is no suggestion, that a different approach should be taken to those different MIFs, either because they were applied in different national markets or because they had been set at different levels.

On the contrary, you have seen, in paragraph 157 of its judgment, the Court of Appeal said it would be remarkable if the same scheme rule were held to be in breach of 101 in one member state but not in another. It's that scheme rule which is the restriction.

Now, Mastercard takes its arguments one step further and says setting a MIF is not ipso facto unlawful. In this regard they rely upon the judgment of Mr Justice Barling in Deutsche Bahn and two particular paragraphs in the Supreme Court judgment in Sainsbury's v Mastercard.

First of all, addressing the judgment of Mr Justice Barling in Deutsche Bahn, our submissions generally on Deutsche Bahn are set out in paragraph 24 of our skeleton argument and I don't repeat those.

But I do want to take you, sir, to paragraph 46 of the Deutsche Bahn judgment, which is the paragraph specifically relied upon by Mastercard. The Deutsche Bahn judgment is in tab 2 of the authorities bundle, page 52. So that's tab 2 of the authorities bundle, page 52.

Mastercard relies in its skeleton on paragraph 46 of the judgment and states, paragraph 27.1 of its skeleton, that the judge made a finding that setting a MIF is not ipso facto unlawful and instead whether a MIF restricts competition depends on the level at which it's set.

If you look at what the judge actually said at paragraph 46, he says halfway down paragraph 46:

"As I understand it, it is common ground that the setting of a MIF is not ipso facto unlawful it depends on the level at which it is set."

The judge didn't make such a finding. It's simply recorded that it was common ground between the parties, so there's no analysis of the judge at that particular point. In any event, Mr Justice Barling's decision in Deutsche Bahn pre-dated both the Court of Appeal judgment and the Supreme Court judgment in Sainsbury's v Mastercard. You have my submissions on what was found to be the relevant restriction in those judgments.

THE PRESIDENT: What Mr Justice Barling said may be right, may it not, because it's only unlawful if it doesn't qualify for exemption under Article 101(3). I am not sure that's what he meant because of the previous sentence. But in any event, the statement that it's not necessarily unlawful because it may in certain circumstances and at a certain level, and that's what he refers to, satisfy the conditions for exemption.

MS SMITH: That's precisely --

THE PRESIDENT: Your point is dealing with the restriction of competition -- we are not interested, as it were, for present purposes as to whether it might, although a restriction of competition, qualify for exemption. That certainly would depend on the level.

MS SMITH: I don't disagree with that. Let's then go on, if we may, to the paragraphs in the Supreme Court judgment that Mr Cook relies upon to say that a MIF, setting of MIF, or default MIF rule is not ipso facto unlawful.

He relies upon paragraphs 42 and 88 of the Supreme Court judgment.

Effectively, if we may start with paragraph 42, which is on page 151 of tab 5 of the authorities bundle.

That simply records, in paragraph 42, that the CAT decided two issues which are no

longer in dispute. Namely that the MIF did not amount to a restriction of competition by object and the restriction issue fell to be considered against a counterfactual in which the transactions would be settled at par by default, which was equivalent to a default MIF of zero.

Then, similarly, at paragraph 88 on page 160 of the bundle reference, the Supreme Court there is simply saying that the Budapest Bank's case, of which you will recall, sir, can be distinguished from the present case because it inter alia concerned a different counterfactual, it was a restriction by object, and it was a different type of agreement.

I think really that paragraph 88 doesn't take Mastercard any further, it's paragraph 42 as I understand it which is the crux.

As I understand Mastercard's arguments, what they say is because the legality of the MIFs at issue has to be evaluated by reference to a counterfactual of settlement at par, equivalent they say to a zero-rated MIF, it cannot be ipso facto unlawful.

We say two things in response to that.

First, the relevant restriction, which is what we say is important for the purposes of Article 6(3)(b), was considered by the Supreme Court and the Court of Appeal to be the scheme rule imposing the obligation on acquirers to pay a default MIF. You have had my submissions as to why we say that's the case.

Secondly, we understand Mastercard's argument to be that because Mastercard could, hypothetically, exercise its power under rule 9.4 of the scheme rules to set a zero MIF, it cannot be ipso facto unlawful, as Mastercard puts it. This is paragraph 45 of Mastercard's skeleton.

It says, and I quote from his skeleton:

"If Mastercard had exercised the power granted by rule 9.4 to set a zero Italian MIF,

on the Italian claimant's case there would be no ground for a claim."

The first and most obvious point in response to that of course is that the Italian MIF which is the subject of the claims is not set to zero and there's no suggestion it ever has been.

THE PRESIDENT: That's now moving from the scheme rule to the decision setting the Italian MIF.

MS SMITH: We may not have a claim, because we may not have suffered any damage if the scheme MIF had been set at zero, but that's a very different point from saying the relevant restriction is the Italian MIF in itself or the argument that the rule, because it could be used hypothetically to set a zero MIF, cannot be a restriction. Because there would be no difference between a zero MIF and the counterfactual.

We say that it's a wholly unrealistic hypothetical because rule 9.4 has never been used -- and the equivalent Visa scheme rules -- to set a zero MIF, and never we say will be because the whole of Visa's and Mastercard's pleaded case, and modus operandi, the whole of their pleaded case and their evidence submitted so far, is that on their very business, their very arguments in their pleaded case, are that positive interchange fees are needed for their schemes to function. Because they are needed to provide an income stream to issuers. This is at the very heart of their case on 101(3), for example.

We say that -- this comes right back to the point I was making about the three levels -- this rule is an enabling rule and hypothetically could be used to set a zero MIF, but the whole point is that it is not understood as such and does not operate de facto as such, it is not understood as such by all participants in the scheme, all those who agree to that rule, it is a rule to set default positive MIFs because Visa and Mastercard say they need to set positive MIFs for the

schemes to function and to provide an income stream to issuers.

If I can take you to their pleaded case --

MR LOMAS: Ms Smith, is what you are essentially saying, that any non-zero default MIF is an ipso facto restriction of competition and in this case we don't have non-zero MIFs?

Sorry, we don't have zero MIFs.

MS SMITH: I say that any positive MIF is an ipso facto restriction position. In this case we don't have zero MIFs.

MR LOMAS: You say the limiting case of a zero --

MS SMITH: Sorry --

MR LOMAS: The limiting case of a zero MIF does not occur and any positive MIFs gives you an effect of restriction of competition.

MS SMITH: I say that the zero MIF would never occur because of Visa and Mastercard's pleaded case that they need positive interchange fees, so the rule is a rule for positive interchange fees, whatever the level.

If I could take you to Mastercard's defence first -- I don't think this should be in dispute but it is worth looking at their defence. Bundle 2B, tab 43. I can take you to similar pleadings for Visa, but Mastercard primarily made this point. If you look at Mastercard's defence at tab 42, bundle 2B, Visa makes a number of points.

First, it makes the point that positive MIFs are necessary to cover or contribute to the costs incurred by issuers. The costs incurred by issuers by, for example, issuers giving a payment guarantee against fraud.

If you look at page 105 of Mastercard's defence, 35C, on page 105:

"Costs arising from fraud card holder default and deferred payment by card holders are an inevitable part of the operation of a payment card scheme and

acquirers cannot expect to receive the benefit of the scheme without contributing to the costs involved. Acquirers contribute to the costs which issuers incur in complying with these default rules through the interchange fee."

Then if you look at page 138 of Mastercard's pleading, a similar point is made in paragraph 102A and B:

"In order for the Mastercard scheme to operate, both issuers and acquirers must be able to recover their costs, if they cannot the scheme would cease to operate or alternatively would not operate conferring the same or similar benefits to merchants and card holders. The relevant MIFs at the rates actually set were designed and had the effect of allowing issuers to recoup part of their costs underlying the value of services that they undertake to provide to acquirers and ultimately merchants, such as swift payment, payment guarantee against fraud and payment guarantee against card holder default."

So it's integral to the scheme and the survival of the scheme.

For your note, a similar point is made at paragraph 102K on page 141.

Mastercard also makes the slightly different point, a second slightly different point, that at least as regards interregional MIFs and EEA MIFs and domestic MIFs for commercial cards:

"Competitive [for which read positive] MIFs, are necessary in order to compete with schemes such as American Express."

If you look at pages 117 over to 118, in 117F Mastercard talks about the market for interregional transactions and sets out the nature of that market, in particular, over the page, the presence of American Express.

Then at G, more to the point that it would not be possible to operate a four-party scheme for interregional transactions, that is a scheme such as that operated

by Mastercard, without competitive interchange fees.

The same point is made at paragraph 93G on page 135, for your note.

The third point Mastercard makes, which is related, is that it faces a commercial incentive to set interchange fees at a level which will "maximise usage of the scheme". What it means is it needs to pay issuers positive interchange fees up to a level which doesn't then tip over into leading to merchants refusing to accept those cards. So it needs to maximise use of the schemes by paying issuers positive interchange fees, see page 124 of the bundle, paragraph 64D.

In setting interchange fees -- sorry, let's start at paragraph 64D on page 124:

"It is admitted and averred that among other factors issuers have a commercial incentive to participate in a payment platform that yields the highest interchange fees. Since interchange fees provide a revenue stream to issuers but impose a cost on acquirers, Mastercard's commercial incentive is to set interchange fees at a level which will maximise usage of the scheme, which involves setting interchange fees at a level which is competitive with the revenue offered by other competing card schemes without resulting in merchants refusing to accept Mastercards or discourage their use."

The same point made on the opposite page, 65D. Again the same point is made, for your note, paragraph 65D, 125.

The point is we have to get the fees up and pay positive fees to issuers to persuade them to participate in our scheme, but we don't want to push them so high that merchants stop accepting the cards. So we have a commercial incentive to set interchange fees at a positive level.

That is consistent, unsurprisingly, with the evidence which Mastercard has submitted so far. I am not going to take you to it given the time but for your note

Mr Cotter's second witness statement, paragraph 24.3, bundle 1, tab 5, page 103 in which he makes the point that in the context of Mastercard's case on the relevant counterfactual after the IFR they needed to charge a positive MIF.

Visa's pleadings and evidence make the same point. I will not take you through their pleadings, but I will take you just to one piece of evidence submitted by Visa. Mr Livingston's statement which was produced for the CMC, just to finish the picture for Visa, which is in core bundle 1, tab 19, page 539, paragraph 8.

THE PRESIDENT: Just a moment.

MS SMITH: Sorry. Core bundle 1, tab 19, page 539. Mr Livingston, who is the senior vice-president, Chief Financial Officer, of Visa Europe and he says at paragraph 8:

"Positive interchange fees [I underline the word 'positive' there] are an important part of the operation of a Visa scheme not just in the United Kingdom but around the world. Positive interchange fees are beneficial for the various stakeholders in the scheme for the reasons set out in Visa Europe's defence. I believe that if Visa had been told it could not lawfully operate with positive MIFs it would have explored with its legal advisers the reason for this position and considered alternative business models that would have been likely to be lawful and likely to achieve the same or similar benefits for those stakeholders."

Paragraph 11 over the page is talking here about the Visa MIF unilateral interchange fee counterfactual, but he says in paragraph 11:

"For the avoidance of doubt, I am not suggesting that Visa actually considered adopting this model, because Visa's position was and remains that MIFs were and are lawful, but had Visa been told there was no lawful way to operate

a scheme with positive MIFs I believe it would have sought to find a lawful way to operate with positive interchange fees, as I explain below."

Paragraph 15:

"In a scenario in which Visa was prevented from setting positive MIFs because they were considered to be collectively determined and therefore anticompetitive, I believe that this model would have been attractive to Visa, because it would have enabled the Visa system to continue operating with the positive interchange fees that issuers would be likely to choose under this model. Visa believes that positive interchange fees bring benefits for all users of its system. I agree. All else being equal Visa would therefore prefer a model that allows it to continue operating with positive interchange fees to one in which such fees were not possible."

On Visa and Mastercard's own case, the hypothetical does not exist and never will exist. We say as a result participants in the scheme although the scheme rule is worded so as to, hypothetically, allow the setting of a zero MIF, that's just a hypothetical that will never exist. All participants in the scheme know that in signing up to the rules and participating in the scheme they are agreeing that for each transaction -- by participants in the scheme I mean issuers, acquirers and the schemes themselves -- over the scheme a positive interchange fee at some level will be paid to the issuer. That is what the agreement is, that is the restriction in the present case.

The actual level does not matter.

In conclusion, therefore, we say it's the obligation contained in the scheme rules and imposed as a matter of contract on acquirers to pay a default MIF to issuers which is non-negotiable, it cannot be bargained away by merchants. It is the relevant restriction which has an effect on competition.

That restriction applies on a pan-European basis, it directly and substantially affects the market in the UK just as much as it does in other markets. And it is the restriction on which the claims against each of the defendants relies.

Therefore, we say Article 6(3)(b) applies, the Italian claimants can elect to base their claims on the law of the court seised, that is English law.

One point, sir, that I do need to make before I finish and I fairly should make it now so that Visa and Mastercard can respond if they think necessary.

The submissions that I have been making today about the nature of the restriction under 101(1) found by we say the Court of Appeal and the Supreme Court and the approach to be taken we say to different MIFs and that we say the reasoning of the Court of Appeal and the Supreme Court can be applied irrespective of the MIFs charged, whether they're Italian, interregional, EEA, has a substantial overlap with the issues that you and your colleagues will be considering at our hearing in May on summary judgment.

Particularly because the defendants' cases on the commercial card MIFs and the interregional MIFs effectively say you have to take a different approach to those different types of MIF than you do to the UK domestic and EEA MIFs that were considered by the Supreme Court.

Although I have only developed my arguments to that extent necessary for the applicable law issues today, it's likely that there will be a substantial overlap between those issues and the issues to be considered in the summary judgment hearing in May.

I say that point only to make this subsequent point, which is that you and your colleagues may therefore think that it's sensible to give your judgment on both of these applications, both the applicable law issue and the summary judgment issues, once you have heard fully argued submissions after both

hearings.

I only say that because as I was preparing for this hearing it came home to me quite strongly that a lot of the arguments made today on the applicable law will apply, or may overlap -- not with the counterfactual points, which go to the post-IFR period, the unilateral interchange fee model et cetera, those are separate arguments. But the points on the Supreme Court judgment not applying to commercial cards, interregional MIFs et cetera, there will be quite a substantial overlap between those issues and those which I've been arguing about today on applicable law.

THE PRESIDENT: Yes. We'll think about that and see what others say about it. But if we've heard full argument on this point, we will see whether it makes sense to postpone what we decide. Thank you for drawing that to our attention.

Yes, thank you. Just one moment. We will just take a few minutes to confer. We will leave the platform for just a moment.

(12.47 pm)

(A short break)

(12.51 pm)

THE PRESIDENT: Thank you very much. There's nothing more we wish to ask you at this point.

Mr Kennelly, I think it is you who goes first. Is that right?

Submissions by MR KENNELLY

MR KENNELLY: Yes, sir, and, members of the Tribunal.

Just by way of preface, and this is a point I make by reference to my learned friend's submissions, but also her skeleton argument, and we have heard this point

made throughout the morning: there was a fundamental error at the heart of the claimant's submissions. Their core argument is that the restriction of competition is the agreement that the MIFs should be paid. You heard that repeatedly today.

The claimants thereby are eliding the agreement that requires the payment of MIFs and the restriction of competition, and they are two separate things.

Under Article 101, there are two separate elements: the agreement, for these purposes, on one hand and; on the other hand, the restriction of competition caused, or assumed to be caused, by the agreement.

The agreement, as we know, can be made and implemented in one place, in one market, and can produce effects in another place and another market. In this case, the claimants' argument, their pleaded case, and we will come to that, is that the rule requiring -- sorry, the claimants' argument on this preliminary trial, and contrary to its pleaded case, which I will come to -- is that the rule requiring the MIFs to be paid is an agreement between Visa issuers and acquirers.

But its effect on competition is the effect that it has on acquirers' incentives to compete with each other, to win business from merchants in the acquiring market.

Everything that Ms Smith showed you this morning, all of these submissions she made, and the citations of the Court of Appeal in particular, in the Sainsbury's case, emphasised that the effect on competition, the restriction which is produced on a market, is the effect that the MIFs have on acquirers' incentives to compete with each other to win business from merchants in the acquiring market.

The restriction of competition is where acquirers, knowing that they all face this

common cost, build it straight into the MSCs that they offer to merchants, and the MIF makes up most of the MSC, and, absent this common cost, the acquirers would compete with each other over the whole of the MSC for the merchant's business.

The focus under Article 6(3)(b) is the restriction of competition. A restriction of competition has to happen on a market, and the question under 6(3)(b), as I will come back to, is which market in which country does this restriction on competition occur?

For my learned friend to get home on 6(3)(b), she needs to persuade you that the market in the United Kingdom is affected directly and substantially by the particular restriction of competition in the Italian market, because that is the restriction of competition on which the Italian claims are based.

That acquiring market where the restriction occurs, the restriction of competition, is a national market. That's what the European Commission found in the Mastercard case, as upheld by the general court and CJEU. The same analysis was upheld by the Supreme Court in Sainsbury's. And it is the claimant's primary pleaded case. I will come back to their alternative plea of an EEA-wide acquiring market.

Turning to the claimant's pleaded case -- and, here, if the Tribunal will indulge me, I will be going back to parts of the particulars of claim that you have already seen, but just to emphasise that the claimants themselves plead that the restriction of competition, upon which their claim is based, is a restriction of competition on a particular acquiring market.

We see that -- with the Tribunal's indication, I'll go to the particulars of claim in the Mastercard case, volume 2A, tab 36, and first to page 364, paragraphs 58 and 59.

At 58(b), we see the claimants pleading the particular -- on the acquiring side of the platform, a product market for the supply of merchant acquirer services in respect of Mastercard, for my purposes Visa transactions; that's the acquiring market.

At 59, we see the plea that the relevant geographic markets are national in scope, echoing, unsurprisingly, the analysis in the Mastercard case in the CJEU. Then, the alternative plea about the markets being the territory of the EEA.

Then over the pages to 369, you will see at 69(a) the -- although it's under the 102 plea, my learned friends relies on it for the purposes of her arguments under Article 101. The reference there is to the effect of the interchange fee.

Here she spells out, in terms, what is the particular restriction of competition. It's not the rule requiring the MIF to be paid. She says the rules require an interchange fee plus the acquirer fee to be paid by acquirers to issuers and the various MIFs fix a minimum level of the interchange fee. This inflates the base on which acquirers set charges to merchants, with that base being common for all. The MSC will typically reflect the cost of the relevant MIF, with the result of the MIF fixed as a minimum price floor. Then this:

"... which leads to a restriction ... price competition between acquirers and/or a distortion of competition in the Mastercard acquiring market."

That is the restriction of competition. I note at 69(a)(ii) a reference to it being non-negotiable, merchants having no ability to negotiate it down; I can come back if necessary to the fact that may be different in different national markets, in particular Italy.

But for the present purposes, I am focusing only on what the claimants themselves say is the restriction of competition in this case.

Then if we can go to 81(b), where they plead, again, what is the particular restriction

of competition which is the effect of the rule requiring the payment of the MIF.

At 81(b), you see the obligation to pay an interchange fee in respect of each transaction facilitated by the platform or, alternatively, the obligation to pay the applicable MIF, either alone or in combination with the rules ... restricts competition in the acquiring market, in the absence of the aforementioned obligations and rules, there would be competition or, alternatively, more effective competition between acquirers and other payment platforms ... merchant's business.

That is absent the rule there would be more competition on the acquiring market. It's the restriction on the acquiring market; that is the restriction of competition that is pleaded by the claimants.

Seeing the time, if you will forgive me just to go to my final point before lunch, simply to go to the claimant's skeleton, so the Tribunal sees absolutely clearly what is in issue in this case.

There was some slight uncertainty, I think, during the morning about what is actually in issue here because the pleaded point between us that's in issue for this preliminary issue trial is relatively narrow. You see it in the claimant's skeleton at paragraphs 17 and 18.

I will take this slowly, if the Tribunal will permit me, because it's very important to understand the battle lines for the purposes of this preliminary issue trial.

At 17, the claimants say: the restriction of competition on which they all rely is the imposition of the non-negotiable default MIF settlement rule.

Then this:

"It is the Claimants' pleaded case that this rule is imposed pursuant to an agreement or practice between undertakings ... has the object or effect of [and I rely on this in particular] restricting competition between acquirers [not issuers or

other platform providers] by setting a non-negotiable price ... for the MSC."

Then at 18: that aspect of the Claimants' case relies upon the analysis of the Supreme Court in the Sainsbury's case.

I can come back, after lunch, as to how the analysis in the Supreme Court in the Sainsbury's case certainly does make the point that the restriction of competition in issue is the one on the acquiring market, which is a national market, but does not support the submission my learned friend has been making this morning, that it is the agreement which is the restriction of competition. That, we say, is plainly wrong, but I can develop those submissions in more detail when we come back.

THE PRESIDENT: It's 1.04, and it does seem to me that it is a fairly short, compressed point, although as I said earlier not an easy point. We will come back at 1.55, and I think we should be all right time-wise, should we not? Do you anticipate a problem, Mr Kennelly?

MR KENNELLY: No, sir, I do not.

THE PRESIDENT: Then we will come back at five to two.

(1.04 pm)

(The luncheon adjournment)

(1.58 pm)

THE PRESIDENT: Yes, Mr Kennelly.

MR KENNELLY: Thank you.

We just left the claimant's skeleton argument where you saw at paragraphs 17 and 18 that it is their pleaded case that the default MIF settlement rule has the object or effect of restricting competition between acquirers and they said, 18, that aspect of the claimant's case relies upon the analysis of the Supreme Court in Sainsbury's. So it is to the Supreme Court judgment that I now ask

you to turn, behind tab 5 of the authorities bundle.

Again forgive me if this is going -- this definitely is going over old ground, just for the sake of completeness, the issue before the Supreme Court is described at paragraph 40(i) at page 150, under the heading "The issues":

"Did the Court of Appeal err in law in finding that there was a restriction of competition in the acquiring market contrary to Article 101(1) ..."

The Supreme Court's analysis for my purposes begins at paragraph 50 on page 153, addressing the question of whether the court was bound by the judgment of the Court of Justice in Mastercard.

At 50, the Supreme Court refers to the, again, restriction of competition identified by the Commission, by the Commission, in the Mastercard decision. There it said the MIF in the scheme restricts competition between acquiring banks by ... and then it goes on to explain what the restriction is, by inflating the base on which acquiring banks set charges to merchants, thereby setting a floor under the merchant fee in the absence of the multilateral interchange fee the merchant fee set by the acquiring banks will be lower.

Then at 51:

"This reflects the finding made at recital 410 [again referring back to the Commission decision] ... Mastercard's MIF constitutes a restriction of price competition in the acquiring markets."

Markets plural.

Because the Commission's finding was that the acquiring markets were national in nature, they were no broader in scope. That's reflected in the CJEU judgment in Mastercard at paragraph 11 -- there's no need to turn it up, it's common ground.

Then at 52:

"This is further explained at recital 448 ... The decisive question is whether in the absence of the MIF the prices acquirers charge to merchants at large would be lower. This is the case, because the price each individual bank could charge to merchants would be fully determined by competition ..."

I pause there, competition on the national acquiring market:

"... rather than to a large extent by a collective decision among the banks."

If you could turn, please -- actually noting just at 54, near the bottom of that page, you see in the third line, a reference to an argument rejected by the Supreme Court from Visa, a reference to the "... counterfactual with settlement at par (equivalent to a zero rated MIF) ..."

I can come back to this later. Although the argument was rejected, the fact that settlement at par was equivalent to a zero rated MIF isn't rejected, in fact a zero rated MIF is the counterfactual upon which -- the equivalent of the counterfactual on which the court ultimately settled.

I will come back to that for the purpose of a different point.

My point at the moment, and the reason I am taking you through this judgment, is to focus on the fact that the finding is that the particular restriction of competition happened on a particular acquiring market in a particular member state. That's the finding in the European Court and in the Supreme Court also.

It's grounded on findings of fact. You see this over the page at 154, where again the Supreme Court is quoting from the Commission decision. This is paragraph 55 of the Supreme Court's judgment, but recital 460 of the Commission decision. It's just below (e) on the left, recital 460 and there's a reference there, no need to read all of it, just to statements of retailers demonstrating they would be in a position to exert that pressure if acquirers were not able to refer to interchange fees as the starting point and so forth.

That's part of the evidence upon which the Commission made its findings about the particular restriction which it found to exist on the acquiring market.

That's relevant, and we will come to see how, because it feeds into the six criteria identified by the Supreme Court that should be applied to the particular facts in a particular case.

Over the page to 156, now the Supreme Court is examining the Advocate General's opinion in the Mastercard appeal in the Court of Justice, and, again, the Advocate General notes the fact that the Commission examined the particular facts. This is at paragraph 64 of the judgment. The Supreme Court referenced the Advocate General and then, skipping down to paragraph 54 of his opinion, it says:

"In the present case [this is the Advocate General speaking], the Commission examined the competitive process that would have developed on the acquiring market ..."

I pause there, meaning the acquiring market in each member state, each member state having a separate acquiring market:

"... in the absence of the MIF ..."

THE PRESIDENT: Yes. In the previous paragraph quoted, the Commission considered the decision setting the MIF, decisions of an association of undertakings restrict competition between acquiring banks ...

MR KENNELLY: Yes, that is the effect which the agreements produce, and that is the distinction I make between the agreement, which is the requirement to pay the MIF, and the restriction of competition which it produces. That restriction has to happen on a market and the market where it happens is the acquiring market, which is a national market.

That national market is in a particular country, which may not be -- it may have

nothing to do with the country where the agreement is made and I will come to the importance of that distinction when we look at Article 6(3) itself in a moment.

Then sticking with the basic point I am making here about the fact that these restrictions of competition happen on particular acquiring markets which are national, again if you could turn to paragraph 85 of the Supreme Court's judgment where it's analysing now the Budapest Bank case, I note in passing that again in that case the Court of Justice was proceeding on the basis that the acquiring market was national, it was the acquiring market in Hungary. You get that in indented paragraph 78.

THE PRESIDENT: Yes, we have that point, yes.

MR KENNELLY: Then we come to paragraphs 92 and 93 of the Supreme Court's judgment so 92:

"Whether Mastercard CJ is binding depends upon whether the findings upon which that decision is based [those are the factual findings] are materially distinguishable from those made or accepted in the present appeals."

Skipping down to 93 then the Supreme Court says:

"In our judgment, the essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals."

Then it sets out, critically, the six steps to finding the infringement.

Ms Smith has referred to some of these, but each of them is important. You see: (i) the MIF is determined by a collective agreement; (ii) it has the effect of setting a minimum price floor; (ii) the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition; (iv) the counterfactual is no default MIF with settlement at par; (v) in the counterfactual there would not be bilateral interchange fees; and then (vi), and this is critical, in the

counterfactual the whole of the MSC will be determined by competition and the MSC would be lower.

What you see there, members of the Tribunal, from (i) to (v) is that they build up to the finding of a restriction of competition in (vi) because in the counterfactual the whole of MSC would be determined by competition in the acquiring market, and that is there would be more competition in the acquiring market than where the MIFs fix a large component of the MSC for the purpose of competition in the acquiring market.

Pausing there, noting the difference, the potential factual difference between the UK and Italy, the sixth factor is that in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower, there the finding is that even if Visa and Mastercard's MIFs were being held to zero, the MSC would be lower overall because in the Commission's analysis and in the analysis, the accepted findings of fact in England, there was no competition between Visa and Mastercard for this purpose.

The MIF wasn't negotiable from the perspective of the merchants. In Italy, there is a domestic card scheme so the competitor dynamics are different in Italy. There is a domestic payment card scheme which does not exist in England and wasn't featured in the analysis of the Commission in the Mastercard decision.

That point I just made isn't determinative. The key point is: where is the restriction of competition upon which the claimants rely? In which market does that occur? In which country does that occur?

Then over at 99, over the page, again you see the Supreme Court saying on the facts as found, again relying on the fact that it depends on facts made in relation to a particular market, the effect of the collective agreement is to set

the MIF, is to fix a minimum price floor for the MSC.

Then 103, again I'm quoting the very same passages relied upon by my learned friend but against her, because again for the purposes of my argument this demonstrates that the restriction of competition which is the focus of this judgment and her pleaded case, is the one on the national acquiring market. There, halfway down, the Supreme Court says:

"In the former a significant portion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement made. In the latter the whole of the MSC is open to competitive bargaining."

That's on the acquiring market.

For the purposes of the differences with Italy, and again as I said my argument does not depend on this, I will just give the Tribunal the reference. That's Mr Holt's first statement at paragraph 24, bundle --

THE PRESIDENT: Sorry, Mr Holt?

MR KENNELLY: Mr Holt.

THE PRESIDENT: That's the expert, isn't it?

MR KENNELLY: Yes. He will be speaking to the competitive conditions in different member states. But simply for the purposes of my point that there's a domestic payment card scheme in Italy, it's bundle 1, tab 6, page 262.

In Mr Holt's third statement, which you have for the purposes of the summary judgment application, he speaks to this also, and that's at page 16, paragraphs 58 to 60. But I shall not turn those up now, you have --

THE PRESIDENT: If the only point is that there is a domestic payment scheme in Italy, I would imagine that's not disputed.

MR KENNELLY: The point I am drawing from it though is that what that

demonstrates is that there may be -- well there are different competitive conditions in Italy. How that six-part test that the Supreme Court derives from the Mastercard judgment of the Court of Justice applies will depend on the facts to which it is applied. It will have to be applied in due course to the Italian market, the facts in the Italian market.

My learned friend says the Court of Appeal said, and it has to be said obiter, it will be remarkable if there was an infringement in one member state but not in another. Apart from it being obiter, ultimately it will have to depend on how those six factors are applied to the particular market conditions in the acquiring market in Italy.

THE PRESIDENT: I mean, I think that's a different point, isn't it? You may say the loss is less or whatever in Italy, that doesn't prevent it being determined by English law.

MR KENNELLY: No, sir, it's a different point because my primary point, which is the only thing that matters for the purpose of today, is what is the applicable law. The applicable law depends on where the restriction of competition takes place and whether the restriction of competition in Italy, upon which the Italian claims are based, is substantially and directly affecting the UK market. Since the restrictions on competition are different in different national markets, it's completely unreal to suggest that the one in Italy, between Italian acquirers, has a direct or substantial effect on the UK market.

THE PRESIDENT: Yes, I mean it all comes down to that critical point of whether restriction of competition, as used in Article 6(3), incorporates the effect, because the effect is the effect on a market and, as you say, the Commission -- the European courts on appeal and you presumably say binding us, say these are national acquiring markets.

So they're national markets.

MR KENNELLY: Sir, yes.

THE PRESIDENT: If restriction of competition for the purposes of Article 6(3) incorporates, therefore, the effect on the market, then you're right. If it doesn't, then Ms Smith is right, because it's clear that the effect is, as you have shown us in these passages, and I think is common ground, is the competition between acquirers on the national market.

MR KENNELLY: Sir, indeed.

We would say it's inconceivable that -- I will come to it -- restriction of competition in Article 6 could refer to the agreement which causes the restriction of competition. I mean apart from that being contrary to the basic language, it's also contrary to the purpose of Article 6(3). The restriction of something that's produced by an agreement or a concerted practice and the restriction of competition is the harm and as you will see Article 6(3) is focusing on a particular harm and the harm happens on a market, not where the agreement happens to be made.

I will come to that when I come to Article 6, but to deal with an earlier point Ms Smith made, the suggestion that in fact the Tribunal should base its judgment on her alternative case that the acquiring market extends across the whole of the EEA.

THE PRESIDENT: Aren't we bound by the European Court judgments on that?

MR KENNELLY: Yes, sir, but let's take it in stages.

First of all, as her skeleton said, her primary pleaded case was that the acquiring markets were national. Which we admitted unequivocally.

That's the end of it. It's really illogical where the primary pleaded case has been admitted, the issue therefore is determined, the alternative case then cannot

be revived in the way that Ms Smith suggests.

Secondly, and more importantly, as you say the authorities upon which she relies are as clear as could be that the acquiring markets are national in scope and it's never suggested in any of them that the acquiring market extends beyond any individual member state, still less across the whole of the EEA.

One can see right away why that's a completely unreal suggestion. It would involve a finding that acquirers such as Worldpay in the UK were competing with say UniCredit in Italy for the purpose of merchants' business in the UK, or in some third country if the market were genuinely pan EEA --

THE PRESIDENT: That's why we asked about the other markets where it said competition is restricted.

MR KENNELLY: That's why, sir, in the Sainsbury's case there was evidence about the particular restriction between particular acquirers in the UK and Ireland. That was necessary for the EEA MIF and for the domestic MIF, because for all the MIFs the acquiring markets are national.

THE PRESIDENT: But if there's a restriction on the issuing market, the position might be different.

MR KENNELLY: It may be, sir, but that's the first we've heard of it. The case which we have come to meet is a case about the acquiring market as the claimant said in their skeleton, and that was the basis on which the other issues were stayed.

If you recall, sir, at the first CMC, the other issues were stayed and the non-stayed issues relating to the lawfulness of the MIF were to proceed to the summary judgment hearing.

The only matters that are going forward at that summary judgment hearing are the ones related to the alleged restriction of competition on the acquiring market.

THE PRESIDENT: I had overlooked that. It's as specific as that, is it, the stay?

MR KENNELLY: Not in terms of the stay, sir, no, that's not reflected in Ms Smith's language, but we have all proceeded on the basis that it was the unlawfulness of the MIF on the acquiring market because that is the finding upon which the claimants rely from the Supreme Court judgment, which is why they say it's suitable for summary judgment, because they say it's obvious having been determined at that level that they should seek summary judgment against us.

It's never been suggested that they were seeking summary judgment on the basis of their claim that there was a restriction of competition on the issuing market or on the platform market, and we have not prepared for that and this is the first we have heard of it.

It's a very surprising suggestion made by Ms Smith having taken instructions, when her skeleton argument says in the clearest possible terms that the claimant's pleaded case -- actually, paragraph 17 -- is that the settlement rule has the object or effect of restricting competition between acquirers --

THE PRESIDENT: Yes.

MR KENNELLY: We relied on that --

THE PRESIDENT: Ms Smith did not really suggest the position is any different for the purposes of this argument, if one looked at the other pleaded markets.

MR KENNELLY: Very well.

The point on this about her suggestion that there may be a pan-EEA market in the face of all of the contrary findings, the final point to make about that is of course the burden of proof is on the claimants. They had the opportunity to adduce evidence on this point. That was reflected in the same order which stayed the other issues, for your reference it's paragraph 11A of that, no need to turn it up, and of course they didn't do so. So there is no evidence to

suggest that there's some kind of pan-EEA acquiring market.

THE PRESIDENT: Are we bound in any event -- I don't know if it's a finding of fact or law -- by the Commission decision on that as upheld by the European courts?

MR KENNELLY: Yes, because of the way the claimants have pleaded their case and the way it's been presented to you. I mean, Ms Smith may make a different submission but that's certainly how I have read her pleaded case and the case that she presented to you.

If it's a question of fact, if she has different facts she may say you are not bound for those purposes, but there are no other facts before you to take a different approach. In any event, even if she were to have evidence of different facts, which she doesn't have, we would say since this is a trial of the issue you can only find in one particular way, because there's nothing going the other way.

THE PRESIDENT: Yes, I was just thinking about Article 15, is it, of Regulation 1 from 2003, would we not be doing something inconsistent with the Commission if we were to say it's not a national market. That is the point I was ventilating, I am not saying I know the answer immediately, but ...

MR KENNELLY: If I may just assist. That's quite right. If Ms Smith's submission is, and I think this is what she is submitting, if she has this alternative case that for the purposes of the period and the MIFs covered by the Commission decision, there was in fact a pan-EEA acquiring market, then it would be contrary to Article 15.1 for you to support such an allegation, because that would run directly contrary to the analysis of the Commission.

THE PRESIDENT: Yes, thank you.

MR KENNELLY: On this point, if further support was needed then Deutsche Bahn is directly on point. Admittedly the context was different, they were applying the

1995 Act and identifying the significant elements of the tort for the purposes of the 1995 Act, but that exercise did involve the particular restriction of competition caused by the MIFs.

Could I take you briefly to that now. That's at tab 2 of the authorities bundle. Again, I will take you to paragraph 46 of the judgment, the very same paragraph that you have looked at earlier with Ms Smith, at page 52 of the report.

Ms Smith submitted to you that you could disregard the analysis in this judgment because the controversial passages were common ground. Not so from paragraph 46, she read to you the third sentence that begins:

"As I understand it, it is common ground ..."

I place reliance on the final sentence, because true it is that the judge said it's common ground the setting of the MIFs is not ipso facto unlawful, it depends on the level. But then he says this, and this is not common ground it's the judge's own analysis:

"In any event to allege coordinated conduct in setting a MIF together with the resultant loss would be insufficient. A restriction on competition, actual or presumed, must be pleaded and established. It is not enough to simply say there is a rule which requires the payment of a MIF and that loss flows, you have to identify a particular restriction of competition."

And I would add on a particular market.

Then if you ask what is the restriction of competition, it's examined at paragraphs 49 and 50, over the page, and the allegations made in this case, in Deutsche Bahn, are very similar to the ones you have seen in my learned friend's pleaded case, 49 the allegation is:

"The MIF restricted competition by, absent bilateral agreement, fixing the level of the interchange fee for all banks alike."

I can skip down to 50, since this is repetition now of what you have seen previously.

The learned judge says this at 50:

"Nor do I agree that the restriction of competition should be regarded as indistinguishable from the events alleged to have caused loss and incapable of having a location of its own."

Here we have an echo of the argument made by Ms Smith that there's no need to look at where the restriction takes place, it's sufficient to say the agreement is the restriction.

The learned judge says a restriction on competition actual or presumed is the result of a combination of circumstances which manifest themselves on the relevant market. As the claimants themselves have stated, the restriction of competition is identified by comparing a factual state of affairs with a counterfactual and I would add on a particular market.

THE PRESIDENT: Yes.

MR KENNELLY: There's no doubt about the kind of restriction of competition that's alleged. There's a dispute my learned friend says about whether they can distinguish their case by arguing that the setting of MIFs, or of any positive MIF is ipso facto unlawful, but even if it is their case that the setting of any positive MIF is ipso facto unlawful they still need to isolate a restriction of competition, or restrictions of competition, and ask in what country or countries that event occurs.

As I have said, on the Supreme Court's analysis, which they adopt, different restrictions of competition arise on different national acquiring markets.

Then we turn, members of the Tribunal, to Article 6(3)(b). That's in tab 8 of the authorities bundle. If I may go first to the recitals. My learned friend placed great emphasis on the proper interpretive exercise for the purpose of

interpreting Article 6(3) and so I shall take you with some care through the recitals, beginning at recital 15.

There, the Regulation begins:

"The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the member states, but then the practical application of the principle where the component factors of the case are spread over several countries varies, the situation engenders uncertainty as to the law applicable."

Section 16 I draw your attention to the second sentence:

"A connection with the country where the direct damage occurred, the lex loci damni, strikes a fair balance between the interested person claimed to be liable and the person sustaining the damage. It also reflects the modern approach to civil liability."

Pausing there, one sees right away that focus on the connection with the country where the direct damage occurred isn't simply about vindicating the rights of claimants, and I will come to 6(3)(b) in a moment, but about striking a balance between rights of claimants and rights of defendants.

Then 17:

"The law applicable shall be determined on the basis of where the damage occurs."

Skipping down to 18:

"The general rule in this Regulation shall be the lex loci damni, provided for in Article 4.1."

Then we come at recital 21 to the special rule in Article 6. I rely in particular on this first sentence:

"The special rule in Article 6 [that is the whole of Article 6] is not an exception to the general rule in article 4.1, but rather a clarification of it."

That's important, because it makes clear that Article 6 is not a departure from the principle that the applicable law is that of the country where the damage occurs. Really it's more a question of the EU legislature identifying what is the damage for this purpose. The damage for this purpose is the restriction of competition on a particular market.

Then at 22:

"The non-contractual obligations arising out of restrictions of competition in 6(3) should cover infringements of national and community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is or is likely to be affected, in cases where the market is or is likely to be affected in more than one country by the restriction of competition, I add the claimant should be in certain circumstances able to choose to base his or her claim on the law of the court seised."

My learned friend relies on the next recital, 23, which I think the claimants claim somehow defines what is a restriction of competition for these purposes, therefore to allow her to argue that the agreement infringing Article 101 is in fact the restriction itself. In our submission that's not what recital 23 says. 23 says:

"For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associated undertakings and concerted practices which have as their object or effect the prevention or restriction of distortion of competition ... as well as [I rely on that] prohibitions on the abuse of a dominant position within a member state or within the internal market where those agreements, decisions and so forth are prohibited by Article 81 and 82."

That's not telling you what a restriction of competition is, it's telling us that the

concept of restriction extends to restrictions which arise under agreements and concerted practices, but also under abuses of dominance.

THE PRESIDENT: It's like a definition, it seems(?) already, isn't it?

MR KENNELLY: It is, but for the scope of the legal provisions engaged. There's nothing to suggest -- which would be an extraordinary suggestion if it were there -- that an agreement could itself amount to a restriction. As opposed to something which causes a restriction on a particular market, which is a very different thing.

My learned friend says it's important to focus on the principle of effectiveness, but of course under EU law when you ask how do you apply the principle of effectiveness, you ask: is the interpretation effective to secure the objectives of the particular legislation? The Tribunal needs to ask: what are the objectives of this legislation? You must construe it so as to ensure the effectiveness of this Regulation. We see the legislature telling us that there is the principle that there must be the applicable law from the country where the direct damage occurred and the special rule in Article 6 is not an exception to that principle but a clarification of it. The damage for these purposes is the restriction of competition on a particular market in a particular country.

With that we turn to Articles 4 and 6. Article 4 states the general rule that the law applicable to a non-contractual obligation arising out of tort shall be the law of the country in which the damage occurs.

Then Article 6(3)(a):

"The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected."

The reference to a restriction of competition, as opposed to the place where the

agreement was made or the place where the claimants ultimately suffered loss, is significant. The legislature is focusing on the fact that the harm for these purposes, the direct harm, is the place where the restriction occurs, where the competitive pressure is reduced. That is the restriction of competition. And the applicable law shall be the law of the country where that happens.

Of course, 6(3)(a) on its face is expressly envisaging a situation where different national laws could apply to different parts of the same claim, reflecting the general rule.

The legislature is not saying that having to sue under more than one national law violates the principle of effectiveness, in some cases the claimant will have to do just that.

But then we see 6(3)(b). This is an exception. Normally under EU law, exceptions are to be narrowly construed. But it has its restrictions in its own terms. It says:

"When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by [again we have] the restriction of competition out of which the non-contractual obligation on which the claim is based arises ..."

In this case, the Italian claims are based on a restriction of competition in the Italian markets. The question for you is: is the UK market substantially and directly affected by the restriction of competition between Italian acquirers in the Italian market?

THE PRESIDENT: One can emphasise it different ways. Out of which the non-contractual obligation on which the claim arises, well the claim arises out of the multilateral agreement, or decision of the association of undertakings.

MR KENNELLY: In my submission you have to read 3(a) and 3(b) together. When the Regulation is speaking of the restriction of competition it's the restriction of competition where the market is. So it's restriction of competition in a market. And the law picker was normally the law of the country where that market is. That has to inform the interpretation of 3(b) when you ask: is the market, in the United Kingdom for these purposes, directly affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises? That presupposes that there is a restriction of competition in Italy and the UK is, like Italy, affected by that same -- not just affected, but directly and substantially affected by that same restriction.

That makes sense for the purposes of a cartel for example, where, in an international market, a global market, let's say for example crude oil, a cartelist would fix prices, even different prices for different countries. But the restriction of competition happens on that global market. The reduction of competitive pressure happens between those global competitors. That's where the restriction occurs.

In this case, the restriction of competition, which is in issue, happens on national markets, between national acquirers, and whether there's a restriction and the degree to which there's a restriction will depend on the competitive conditions in different national acquiring markets.

THE PRESIDENT: Do you say, contrary I think to the commentary that Ms Smith referred to, that 6(3)(b) can only apply where the market affected is more than one country? As opposed to a situation where you have several national

markets affected?

MR KENNELLY: No, sir. No. We agree that where there's a single restriction, like the one I've described, in a global cartel, 6(3)(b) could be triggered by that. If it produced its restriction of competition operating in a single market or -- or -- if that single restriction of competition produced effects in different national markets. Because again one could imagine how a single restriction of competition on a global market could produce effects in different national markets, but because there's a single restriction of competition between the global competitors, the 6(3)(b) applies.

We agree with the commentary to that effect. But in the commentary, consistent with our submission, there must be a single restriction of competition. What you can't have, and there's nothing in the contrary to support Ms Smith's argument that somehow the agreement, the underlying agreement which sets the rule, amounts itself to a restriction. There's no authority and no commentary to support an analysis to suggest that somehow a cartel agreement, or any agreement, can itself be a restriction, of itself.

If that were the proper approach to Article 6(3)(b) or 6(3) one could see outcomes which are completely contrary to facilitating claimants and private damages actions. If the price fixing agreement is the restriction of competition, the location that the defendants choose for their price fixing agreement will determine the applicable law for all claims against them. Even if the actual reduction of competitive pressure is happening in different countries in different markets and causing harm to consumers in those different markets.

On my learned friend's case, those claimants would be deprived of the particular rules in their own markets where the competitive pressure was reduced, where the restrictions occurred, because the applicable law would be the law

where the agreement was made, which would be the law chosen by the defendants.

That cannot be right. It's contrary to the language and the policy to which my learned friend --

THE PRESIDENT: Well the law would be -- I am just trying to understand that. The primary rule is 3(a).

MR KENNELLY: Yes.

THE PRESIDENT: If you had a cartel agreement made in Switzerland, but it had effects on the markets in the UK, in Germany, in Italy and a British purchaser claims, then under 6(3)(a) they would be able to say it's English law, wouldn't they? It's not about where the restriction of competition is made, it's about the market likely to be affected.

MR KENNELLY: Yes.

THE PRESIDENT: So they wouldn't deprive the claimant of English law by having made the agreement in Switzerland.

Equally, an Italian claimant, on your argument, claiming in the Italian court would be saying it's Italian law that applies, because that is the market that's affected if it's a national market.

MR KENNELLY: That depends, sir, on reading 3(a) and 3(b) completely differently. I mean, true it is the reading that you have given of 3(a) which is the reading which I say informs the reading of 3(b), but for my learned friend to get home on reliance on what you, sir, have just said involves a reading of 3(b) which has nothing to do with 3(a). It means that the legislature when it talked about restrictions of competition, out of which the obligation on which the claim was based arises, refers to something other than a restriction of competition on the market.

THE PRESIDENT: I am just trying to understand on your case what 3(b) -- what it does cover.

MR KENNELLY: Okay, so 3(b) -- this is a --

THE PRESIDENT: An example of where it does apply.

MR KENNELLY: It applies in the case of a restriction, and we see many of them in competition law, a restriction which is made in a market which extends across member states or where a restriction is made at a high level but which produces effects in different national markets.

Consistently with EU competition law practice, one often sees cartels such as the vitamins cartel in 2001, we see it in cartels for raw material such as oil and gas, rare metals for example, any international market like that where you have global operators competing with one another on a global scale, where the conditions of competition are relatively homogeneous across the whole world. If they enter into a cartel, that involves normally a restriction at a global level. They may fix prices which differ between member states, and so that will affect consumers differently in different member states, but the restriction, a restriction of competition is something that involves a reduction of competitive pressure between competitors in a market. If that market, where competitive pressure has been introduced, is an international market there's a single restriction of competition between them on that market.

That's what 6(3)(b) focuses on. In that scenario, that kind of cartel could affect every member state in the European Union and a group of claimants may have claims in England, France, Germany, Spain, Italy wherever. They bring all their claims in England and because they are all suing in respect of a single restriction competition, that single restriction in an international market, they may rely on the court seised.

THE PRESIDENT: Just to be clear and I understand this, you could have an English claimant who is purchasing in England or in the UK and in Italy and in Germany --

MR KENNELLY: Yes.

THE PRESIDENT: -- and that claimant brings its claim in the English court and it can say that it then chooses to base its claim on English law and it's entitled to do so?

MR KENNELLY: Yes.

THE PRESIDENT: Because it's been purchasing in different national markets that are all affected by the same restriction of competition?

MR KENNELLY: Yes.

THE PRESIDENT: If, however, an Italian claimant who is purchasing only in Italy, were to bring its case in the English court, what then? It would have to base its claim on -- it couldn't choose English law; is that right?

MR KENNELLY: No, an Italian claimant in that scenario having seised the English court's jurisdiction, could again -- so where the market is -- sorry, let me just see.

Where a person seeking compensation for damage sues in the court of the domicile of the defendants, an Italian suing in the domicile of the defendant, which is England for these purposes, may choose to base their claim on the English law, the court seised, provided that the Italian claimant can show that the UK market is among those directly affected by the restriction of competition, in this scenario at the global level.

THE PRESIDENT: Even though the Italian has not bought in England?

MR KENNELLY: Yes, because the Italian can say my claim -- the starting point is jurisdiction, so he has jurisdiction against the English defendant and he can

say, "My claim against this English defendant arises from the very same restriction of competition which is causing direct substantial effects in England", and therefore the Italian claimant can sue in England on that basis without having bought anything in England.

In that scenario, he's relying on the same restriction of competition that the others have. That's why --

THE PRESIDENT: Yes, I see.

MR KENNELLY: It is critical to focus on what is meant by restriction of competition and to be precise about that in Article 6(3)(b). The legislature chose those words advisedly --

MR FRAZER: Mr Kennelly, can I ask you a question just in contrast to the paradigm example you have just given, is it your submission that it's different if, say, instead of one global cartel which affected a number of markets, let's say a number of suppliers differing in different countries entered into a network of cartels and the network might have different members in each country because it was a national supply market rather than a global supply market and you might have purchasers in more than one country as well, but you've got a number of cartels and therefore a number of different restrictions of competition. Is it your case that 6(3)(b) would not apply in those circumstances because the Italian claimant purchasing under the Italian cartel is not basing himself on the same restriction that's applied in England, in the UK?

MR KENNELLY: Yes, that's correct.

MR FRAZER: I see, thank you.

MR KENNELLY: There has to be a single restriction.

Mr Frazer, in your model there, there are different restrictions of competition and the

Italian claimant there, his claim arises from a different restriction of competition to that which affects the market in the UK and therefore in those circumstances he could not rely on Article 6(3)(b). In that scenario that you just described, the European Commission might find a single and continuous infringement between the parties. In those kinds of scenarios, the Commission sometimes find what's called a single continuous infringement, because all the participants in their various markets have a common objective, a common plan and sufficient awareness of what they are all doing.

My learned friend makes this point in her skeleton, if there's a single continuous infringement, again that shows one restriction not so. One can have a single continuous infringement along the lines that you described, but you still don't have a restriction in Italy for these purposes, which is the same restriction producing harm in the UK market and 6(3)(b) doesn't avail you.

MR FRAZER: Understood.

You are saying that the current claim and your defence does not fit in with the paradigm which you have given for the use of 6(3)(b) because it doesn't depend on a single restriction. Have I understood that?

MR KENNELLY: Precisely, yes.

That's why the use of the language "restriction of competition" is so important in 6(3)(b), they didn't say agreement or indirect harm. Restriction of competition is a particular thing and it happens on a particular market, as indeed 6(3)(a) says. That's where the relevant harm happens for the purposes of this Regulation. That's why it's important to focus on it and not use it as a form of shorthand for the agreement which causes the restriction. That's a different thing. That's the real error at the heart of my learned friend's case, she's eliding the two. It's dangerous to do so because it could lead to very -- on my

reading of the Regulation -- harmful effects, because you then would have the applicable law determined not by where the harm happens, which is the restriction on competition, but by other things such as the location of the rule setter or the makers of the agreement.

MR FRAZER: I see, thank you. I am sorry I interrupted you.

MR KENNELLY: Really we say the proper approach to interpreting Article 6(3)(b) is plain from the face of the Regulation itself, there's no need to go to the *travaux*. Having said that, prompted by the President's comments this morning, we had a look at the *travaux preparatoires* that are cited in the Regulation and we found nothing of relevance in them, which no doubt is why Ms Smith didn't have anything to that effect in her skeleton either.

The claimants perhaps because they could not find anything helpful in the *travaux* rely on the 2008 White Paper on competition damages, the reliance placed on that is far more than it can bear in our submission, this was not a detailed examination of Rome II, still less *travaux preparatoires*, the document they are relying on is something made after the Regulation was entered into. It's really a summary commentary by the Commission after the fact, it doesn't tell you anything about the proper meaning of the Regulation.

Any procedural economy -- we accept there must be some emphasis on procedural economy, the intent of Article 6(3) is designed to cover the kinds of claims that I have described to you. Ones where there is a single restriction that covers multiple member states, either because there's a single market across the member states or where there are different effects in different national markets but all the while a single restriction.

Because it has to be the same restriction that affects the Italian claimant for our purposes, as affects the English claimant under Article 6(3)(b).

In fact, the example which the claimants gave in their skeleton at paragraph 27, and the point which Ms Smith made to you this morning, is that they believe their case is just that. They believe that they are the same as the victims of a global cartel, a single restriction at an international level producing effects in different markets. But we say that argument only works if UK acquirers, and I repeat an example I gave earlier, such as Worldpay or Barclaycard, were competing with Italian acquirers, say Nexi Payments or UniCredit, for the business of UK or Italian merchants and somehow the restriction of competition happened between them at a pan-European level, so the competitor pressure was reduced between those acquirers at a pan-European level and that harmed consumers in England and Italy, a single restriction harming consumers in England and in Italy. But that's never been suggested by anybody and that's not their pleaded case.

You have my point, I made it in passing to Mr Frazer a moment ago, about single continuous infringement. The claimants make this, and this is my final point, they say in their skeleton at paragraph 30, no need to turn it up, that the level of the Italian MIF had a direct and substantial effect on the English market. Just focusing on it, they are saying the actual Italian MIF had a direct and substantial effect on the English market because, they say, Visa set both the Italian and the other MIFs as part of a single continuous infringement.

In our submission that does not make any sense. Just because Visa set the MIF for Italy doesn't mean the Italian MIF affected Visa's setting of the UK MIF in any way. As I have said earlier, an infringement of competition law and a restriction of competition law are different. The claimants are eliding the concept of an infringement of competition law and a restriction of competition on a particular market.

An infringement, as this Tribunal knows very well, involves various different elements, one of which is a restriction of competition.

The claim that all of Visa's conduct amounted to a single continuous infringement, not a single continuous restriction but a single continuous infringement, across the EEA doesn't tell you anything about whether there was only one restriction of competition across the EEA.

I have described already to Mr Frazer how a series of agreements producing different restrictions of competition in different national markets could amount to a single continuous infringement, where they form as I said part of an overall plan, pursuing a common objective for the sufficient intention and awareness between participants. But the definition of a single continuous infringement doesn't depend on there being a particular restriction of competition in a particular market or a single restriction of competition, it can easily arise where there are different restrictions of competition. In fact in this case you have seen how the Mastercard EEA MIF was found by the Commission to be a single continuous infringement and yet in Deutsche Bahn the learned judge thought that there were multiple distinct restrictions of competition in different national acquiring markets. That's indeed our submission today.

Overall, on the Supreme Court analysis and on the claimant's own primary case, the restriction of competition that affected the Italian claimants happened in Italy, between the Italian acquirers competing for the Italian merchants' business. That particular restriction of competition did not extend to England.

If there was a restriction of competition here, it was a different restriction of competition between the British acquirers competing for British merchants' business and therefore we say that 6(3)(b) was inapplicable.

My final point, the claimants say in their skeleton, paragraph 28, there would be no unfairness to us if the claimants are governed by English law as the ultimate analysis would be the same, because if the MIFs violated Article 101 in England they would in Italy too. But that misses the whole point of this application. Which is the limitation period. They will lose a year of their claim if Italian law is applied and that is plainly a disadvantage to Visa if the claimants quite inappropriately get the benefit of an extra year under English limitation rules when really Italian law ought to govern their claim.

Unless I can be of any further assistance, sir, those are my submissions.

THE PRESIDENT: Thank you very much.

Yes, Mr Cook.

Submissions by MR COOK

MR COOK: Yes, sir, I don't know when you want to take the break, sir. As is the nature of things, Mr Kennelly has already hit most of the high notes from the perspective of the defendants so I am going to gratefully adopt his submissions and just make some additional points.

That will probably take me 30 to 40 minutes or so, I don't know if you wanted me to start now and have a break a little way in or take the break now, sir?

THE PRESIDENT: I think why don't you go ahead and we will see how we get on, whether we take a break during your submissions or possibly when they have concluded.

MR COOK: Sir.

The first point I wanted to emphasise, sir, is that this is a trial. It's not a summary judgment hearing. The Tribunal are not therefore being asked to determine whether the claimants have on the pleadings alone an arguable case. There

were various points I would say in my learned friend's earlier submissions where she appeared to be urging upon you that kind of summary judgment standard. With respect, that's wrong.

While this point is being determined early, this is as much a trial as if this issue were being determined as one of many issues at a multi-week final hearing. Directions were given for factual evidence to be filed, if there had been relevant disputes of evidence --

THE PRESIDENT: We are with you on that, Mr Cook.

MR COOK: I am delighted to hear it, sir.

The reason why that leads in particular to the issue of the geographic market point here, and we do say in relation to that that essentially my learned friend, there are two answers in relation to that point --

One is to say that my learned friend has pleaded a primary case, and in circumstances where the primary case is now common ground because we've accepted it, she can't back away and rely upon the alternative case.

The second point is, even if it's open to her to run an alternative case, or the alternative case is there on the pleading and still open to her, this is a situation where there is simply no evidence of any kind, no factual evidence, no expert evidence, of any kind, to substantiate that alternative case.

So it simply fails inherently, just because there is nothing to support it.

Yes, we simply do say that point dies stillborn, because there is simply nothing to support it at all. My learned friend at various times suggested it would be wrong for the Tribunal to feel it had to have clarity on market definition in order to make a decision on choice of law. But ultimately, that's where the burden of proof point arises. We do agree with my learned friend, in answer to a question from the chairman that the burden of proof must lie upon the

claimant, and we say that's a simple application of the: he or she who asserts must prove principle. That it is the claimant that must show that the conditions for an election under Article 6(3)(b) are met and specifically the requirement for a direct and substantial effect and in the context of market definition if there was going to be an attempt to support a wider market definition it would need to be made good and they simply have made no attempt to do so.

You did ask a question in relation to the question of whether we are bound by the Commission decision. Sir, in relation to that, the Commission decision itself only concerned the period to December 2007. These claims concern the period -- I think the earliest -- what we are dealing with here is -- this claim is actually brought in 2019 or 2020, depending which one we are talking about, and goes back potentially six years or five. We're looking at a period of 2013 onwards. So we are dealing with quite significantly different periods, and it would therefore at least potentially be open to a party to show that, without in any way challenging the Commission's decision and analysis, that whatever the market position was in the period from 1992 to 2007, the world had moved on and the Commission had spent significant effort, it would say, trying to develop what it called the SEPA, the Single European Payment Area. So strictly the position, sir, is that it could be the position that the market has evolved and it's one of those areas in particular where you certainly can get changes in market definition as a result of changes in market structure over time.

But ultimately, sir, in order to say that you don't follow the Commission you are looking for some kind of change of circumstance that would justify departing from its approach. In that context, it might be possible to do so. But you

would need some rather substantive evidence to do so, of which there is none.

So sadly I cannot say that my learned friend is bound -- is unable to run her wider market point, she just doesn't get off the ground in seeking to do so evidentially.

Sir, so that's what we say is the starting position in relation to this. The other point I wanted to make in relation to the proper scope of this hearing concerns what I suspect was my learned friend's attempt to salvage her case, by advancing what I say is an unpleaded case unsupported by any evidence that it was always understood that Mastercard would use the power in rule 9.4 to set positive MIFs.

My starting point is there is no pleading of any such implicit understanding that we would always set positive MIFs. Again, there is no evidence of any kind to support that contention. Again, the suggestion that the rule was inherently there to set positive MIFs is unsupported, unpleaded and simply doesn't get off the ground again.

My learned friend tried to back that up by asserting, again without any evidence, that a zero MIF does not occur, and will never occur. With respect, again, that's not only not the pleaded case that the claimants advance, it is wrong and my learned friend's own pleading admits that it is wrong. There have been times when Mastercard has set zero MIFs. Or relevant times when Mastercard has set zero MIFs. I can make that good, sir, on the pleadings by going -- this is a point which we will see is common ground, so I don't need evidence because it's common ground. That is, sir, if we go to bundle 2B, tab 43 and page 118. That is Mastercard's defence in the Westover proceedings.

Sir, paragraph 53 on page 118 and this follows on from the Commission decision. It

explains, and paragraph 40 concerns the Commission decision which we are responding to. It says:

"The consumer EEA MIFs in place on 19 December 2007 [that was the date of the Commission decision] continued in place until 12 June 2008, when they were reduced to zero."

The significance of that is that we were given six months to cease the infringement and we did so before the end of those six months, which we did by reducing the EEA MIF to zero, so we therefore complied with the Commission decision.

(b) between 12 June 2008 and 30 June 2009 the consumer EEA MIF was zero pending discussions with the Commission about the new levels the consumer EEA MIF.

We then plead at (c) to (f) what we say happened during the course of those discussions with the Commission.

At (g) with effect from July 2009 Mastercard increased the consumer EEA MIFs to the levels in its undertaking to the Commission.

There was a period there of over a year in which Mastercard set the EEA MIF at zero. I said, sir, that's common ground. If we go on to tab 48, which is my learned friend's reply in the same set of proceedings. If we go to page 401, we can see the response at paragraph 33 to our defence that we have just seen at paragraph 53. We see at (a) that the Mastercard's pleas in subparagraphs (a), (b), also (c) and (d) but (g) were admitted.

It is common ground that Mastercard had a zero consumer EEA MIF in place for a period of over a year. That of course is a period that slightly pre-dates the period of the claim, but the idea therefore that it was never the case that MIFs would be set at zero and everyone always understood that Mastercard would not do that, that simply cannot stand in the light of the admitted facts.

So any sort of unpleaded inferential case again simply does not get off the ground. We say those admissions are crucial, not just because they undermine the case that there was some implicit understanding albeit that's unpleaded, but they also show, with respect, the true nature of the restriction of competition which the Commission itself identified in the Commission decision.

Just to remind us, sir, the Commission decision was only concerned with the EEA MIF. It wasn't concerned with interregional MIFs, it wasn't concerned with domestic MIFs of any kind. It was the EEA MIF that was held to be unlawful and the Commission did not require Mastercard to remove what my learned friend describes as the default MIF settlement rule, we see the iteration of that is now rule 9.4 in Mastercard's rules, which I will come to in a moment. It didn't even require Mastercard to remove that general settlement rule in relation to cross-border European transactions.

The Commission was satisfied that Mastercard had ceased the relevant infringement by setting the EEA MIF at zero. That demonstrates, we would say, that it is the setting of the MIF, at a positive level, which is the relevant restriction of competition. Not, and that's what I will seek to show you next, not the existence of an enabling rule which creates the possibility for setting interchange fees at levels which are potentially restrictive of competition.

We say in relation to that, it shows that it is the setting of the MIF itself which is the relevant potential infringement for these purposes. That's the mischief in these circumstances.

As I said, I will make that good by taking you to the relevant rule itself, which we find -- you have seen it already, sir, but if I can take you back to it -- in the core bundle, bundle 1 at tab 10. It's set out in the witness statement of Mr Centemero, who I have to personally apologise to on the basis I described

him as Ms Centemero in this skeleton argument and he is in fact a Mr. I apologise; that was a typo.

THE PRESIDENT: All these Italian first names which can be sometimes confusing, at least to us.

MR COOK: Tab 10, sir, it's the witness statement of Mr Centemero. Just to clarify, because there's some confusion, we set out there rule 9.4 as it now is, and I piped up in the middle of my learned friend's submissions to explain that that was effectively identical to the 8.4 rule as cited in the Supreme Court judgment.

There is also rule 9.5, which is equivalent to the rule 8.5 set out in the Supreme Court judgment, which we find, sir, in the next tab, tab 10A, at page 284.17, which is the equivalent rule in relation to intra-country interchange. The strict position is actually that 9.4 as it now is concerns interchange fees generally, but actually only specifically deals with interregional and intra-regional rules.

Then 9.5 concerns intra-country transactions so that's domestic, domestic rules. But for present purposes I don't think anything turns on the fact there are two rules rather than one.

If I can take you to rule 9.4, I don't take you to it in the original, it's set out in Mr Centemero's witness statement at paragraph 11. Sir, just to take you through the provisions of that rule and what it does.

Firstly, it says a transaction or cash disbursement cleared and settled between parties gives rise to the payment of the appropriate interchange fee or service fee as applicable.

We say that in and of itself tells you nothing, it begs the question: what interchange fee? And how will that be set? So that in itself tells you nothing.

There's a distinction drawn there between interchange fee and service fees. Service

fees are what Mastercard describe, used as a term when a MIF is a negative MIF. When the fee moves the other direction and is actually payable to the merchant -- as a practical matter, sir, that arises predominantly in relation to cash disbursement, that when a merchant gives a card holder 100 euros say in Italy they will receive a fee, that's a service fee, in Mastercard's terminology, in the words of the Supreme Court that's a negative interchange fee. Even in the face of the rule, sir, it's raising the possibility there might be fees going the other way, negative interchange fees rather than positive interchange fees. Which, as I say, is a further indication there's no general understanding that this rule will only ever be used to adopt a positive MIF going from acquirer to issuer.

The second bit of this, sir, then gives the corporation the right to establish default interchange fees and default service fees. Again, sir, that is simply permissive, or enabling. It gives us a power, which we may then choose to use or not.

Then the third paragraph:

"The corporation will inform customers of all fields it establishes and may periodically purchase fee tables".

Then:

"Unless an applicable bilateral interchange fee or service fee agreement between two customers is in place, any intra-regional or interregional fees established by the corporation are binding on all customers."

Again, sir, this is simply permissive in the sense it simply says it's enabling -- I think was the term -- on the basis that if set it makes it binding but nothing about this rule in and of itself imposes any specific interchange fee at all.

An interchange fee will only be imposed in circumstances where there is then

a separate subsequent decision by Mastercard to set a particular positive, negative or zero MIF.

My learned friend tried to split this up into being a three-stage process, with respect we say it is only two stages, there's a general permissive enabling rule and then there will need to then be a specific subsequent decision by Mastercard to set a particular MIF. It's only that subsequent step which on the analysis that my learned friend has taken you through, Mr Kennelly has taken you through in relation to the Supreme Court, which has the potential to increase MSCs in a way which restricts competition in particular markets.

Sir, we simply say in relation to this, you can test it very simply by looking at a number of possibilities, whether this rule in and of itself has any restrictive effects. If this rule was in the rules unchanged, but Mastercard did not in fact set an EEA MIF or did not set an Italian default MIF, it cannot be suggested that there would be any restrictive effect on competition or that the Italian claimants would have suffered any loss, because there would simply be no interchange fee set pursuant to this.

So this rule in and of itself does nothing.

Similarly, if we had set the EEA MIF at zero, as we have just seen, sir, that we have in fact in the past done --

THE PRESIDENT: I don't quite follow why it said that setting the MIF at zero is not a restriction of competition, given there's the potential for negative MIFs.

MR COOK: Can we say we entirely agree with you and argued that very heavily before the Supreme Court, who disagreed with us.

THE PRESIDENT: I mean, that may be the counterfactual but if you were to set a negative MIF, that would -- or by setting it at zero, you prevent acquirers from offering inducements to merchants, don't you?

MR COOK: Sir, to some extent what you are doing is repeating -- not perhaps repeating, coming up with almost verbatim the relevant findings of Mr Justice Phillips in the Sainsbury's v Visa trial, which led Mr Justice Phillips to conclude that the MIF was not in fact a restriction of competition, for just that reason.

THE PRESIDENT: I am saying it is. I am saying any MIF is a restriction of competition, as it seems to me, because you are preventing acquirers from competing with each other by offering more favourable interchange fees. They all have to offer the same interchange fee, or merchant service charge, as it were incorporating interchange fee. It's the uniformity that it seems to me restricts competition, not the level, positive or negative or zero.

MR COOK: The problem with that, sir, is the counterfactual -- this to some extent was what we spent a day and a half or so on in front of the Supreme Court, arguing exactly this point, that the counterfactual essentially has exactly the same vice we said as the actual, which is, there is a uniformity. The uniformity is essentially equivalent to a zero MIF and whether that's put in terms of: you must pay 100 per cent of the price. Which effectively is settlement at par, or it's put in terms of: you must pay 100 per cent of the price and there is no MIF or a zero MIF. You still have a centrally determined rule which produces a common outcome.

Yes, that was indeed the basis of the argument that said the counterfactual has the same vice as the actual and the Supreme Court's answer to that essentially is to say that there is greater competition when the MIF is set at zero, because there's competition in relation to the entirety of the MSC, not only part of the MSC.

That is an argument that -- that's what the Supreme Court concluded, so that's the

reason why zero has acquired its special magic here for these purposes.

Nonetheless on the Supreme Court's analysis, which is obviously binding on all of us entirely here, the effect is that setting it at zero produces a result which is identical to what is said to be the counterfactual.

Setting it at zero is recognised not to be a problem. Competition is going to be identical in those circumstances to the supposed counterfactual. Again, there was an argument about whether settlement at par is equivalent economically identical to a zero MIF, and it was common ground that it was economically identical and competition would be exactly the same because they are the same outcome. Everyone pays 100 per cent of the price.

THE PRESIDENT: Yes.

MR COOK: The other scenario, potentially, is the possibility that Mastercard could have set the Italian MIF at for sake of argument 1 per cent but was able to show that that MIF, 1 per cent Italian MIF, was objectively necessary within the Italian market for the survival of a four-party credit card scheme of this type. That's of course the objective necessity ancillary restraint argument, which would mean there was no restriction of competition.

All those are scenarios which results in Mastercard doing or not doing something, depending on what we are dealing with, which involves no restriction of competition at the end. So the rule is permissive and can be adopted in a way which provisionally at least, is lawful or potentially is unlawful. Depending on analysis of the specific conditions in a specific particular market.

In relation to the paragraph we will come back to from Mr Justice Barling's judgment in Deutsche Bahn, it isn't simply a question of the level being dependent upon exemption, there may also be a point in relation to objective necessity.

A point that largely failed in the context of the case before the Court of Appeal in Sainsbury's and AAM, on the basis that in the UK market, and I say the Irish market because those were the only two markets in consideration in that case, there was not a strong enough non-four-party competitor to show that Mastercard would have been wiped out.

In different markets, potentially, and we do plea this in relation to the Italian market, you do get other competitors who potentially are strong enough and are not four-party schemes that we wouldn't be able to survive in relation to them, but again that's very much a factual question depending on the competitive conditions in particular markets, which is why it does need to be looked at based on particular specific conditions in the specific market in question. And the reason why nobody has ever said that we must remove our default rules entirely. There's a recognition that these rules create the possibility of Mastercard doing things that are entirely lawful in a variety of different ways that I have just identified.

That's why all of the previous cases have been concerned with specific decisions by Mastercard to set specific particular MIFs. The Commission decision and the follow-on proceedings before the European courts were only concerned with the cross border EEA MIF.

The Sainsbury's case before the Tribunal was only concerned with the UK MIF, just the UK MIF. It wasn't concerned with the EEA MIF at all either, there was no claim in relation to the EEA MIF.

Then what's come to be known as the AAM case, which was originally heard by Mr Justice Popplewell, there the claim was just in relation to the UK MIF, the Irish MIF and the EEA MIF.

Again all of these cases are about very specific rules and specific countries at

particular times. The Deutsche Bahn case, which I will come back to, that concerned a whole *smorgasbord* of different countries and therefore domestic MIFs of a lot of those countries, but again specific decisions by Mastercard to set specific MIFs at particular times at particular places, and that has always been the basis of each of these claims.

My learned friend tried to support her case in relation to the idea that there was a general understanding that a positive MIF would be set by reference to various parts of my defence, which sets out various commercial imperatives and incentives on the part of Mastercard.

Some of those of course reflect a case on objective necessity. We only plead a case on objective necessity in relation to specific individual MIFs in specific markets. We do not advance an objective necessity case for example in relation to the EEA MIF, because of course events have shown and that was true in any event, Mastercard did not fight objective necessity in relation to the collapse of the entire scheme in the context of the Commission decision anyway. But that was only in relation to the EEA MIFs, we don't advance in these proceedings an objective necessity test in relation to the EEA MIF, we similarly don't advance an objective necessity test in relation to the UK MIF.

Again, nothing we said there supports the idea that we are saying every MIF in every market will always be set at a positive level regardless of competitive conditions.

My learned friend suggested that the Supreme Court didn't say anywhere they need to look at each separate market, but to some extent that's the product of how the issues had narrowed down by the appeal stages. There had of course been extensive consideration at the first instance trials to the particular markets under consideration in those cases, predominantly the UK acquiring

market but also the Irish acquiring market that was relevant to the AAM case. So there was substantial expert and factual evidence on those two particular markets.

Then Mr Kennelly took you to the six factors identified by the Supreme Court, which essentially, if those hold good in relation to a particular national market, would mean that the Commission's original analysis in relation to the EEA MIF held good, but ultimately that's what we are going to be fighting about in a month's time or so, is whether those six factors do hold good in relation to particular national markets. It's by the very fact the Supreme Court sets out those six particular factors, it shows there's a need to consider them by reference to the particular market under consideration.

All that happened is that in the context of where the proceedings had fined down and refined by the stage they got to the Supreme Court, is it was being -- there were no evidential differences between the UK and Ireland which it was said resulted in different outcomes for the two countries. But absolutely there was extensive and detailed evidence on each of those two sets of market ... on those two distinct and recognised to be distinct national markets. It was common ground between the parties in those claims that there were two -- there was a UK-only national market for the purpose of Sainsbury's and there were two separate national markets that were relevant, the UK national acquiring market and the Irish national acquiring market for the purposes of AAM.

Sir, I think the research of all the parties has shown that there's very little case law in relation to Article 6(3). I do say that the Tribunal is assisted by the decision -- in the absence of any specific case law on Article 6(3), I do say it's helpful to look at Mr Justice Barling's decision in Deutsche Bahn. You were taken to

that by Mr Kennelly briefly, I would like to take the Tribunal to it in a little bit more detail. Mainly because, sir, it does go to what you said at one point in Mr Kennelly's submissions was the central issue of whether restriction of competition includes effect on a market. That is the issue with which Mr Justice Barling was directly grappling in Deutsche Bahn, albeit as my learned friend rightly says primarily in the context of the 1995 Act rather than in the context of Article 6 of Rome II, but nonetheless I say the analysis of Mr Justice Barling on these points ultimately ends up grappling with exactly the same issues about the way in which Article 101 itself works.

Is that a convenient point to have a break or shall I dive into Deutsche Bahn?

THE PRESIDENT: Let's have a break before German railways, yes.

As you say, you are adopting Mr Kennelly's submissions which have covered much ground. You have about how much longer, Mr Cook?

MR COOK: I would have thought no more than 15 minutes, sir.

THE PRESIDENT: I think we are on target to finish for 4.30.

Very well, we will come back at 3.35.

(3.26 pm)

(A short break)

(3.35 pm)

THE PRESIDENT: Yes, Mr Cook.

MR COOK: Thank you, sir.

Deutsche Bahn is to be found in the authorities bundle at tab 2. The claims are explained by Mr Justice Barling in his judgment at paragraphs 13 to 15. Just to summarise briefly for our purposes, this was a case that involved multiple claimants established in a number of EU member states, who brought combined proceedings in England challenging the legality of, what's important

for present purposes, the EEA cross-border MIF and also the domestic MIFs in their home countries and seeking damages in relation to the MSCs which each had paid. That included a number of Italian merchants who made claims in relation to the MSCs which they had paid in Italy, so the direct analogy to the Italian claimants in the present case.

Again, I make the point that again this was another case in which it was specific MIFs being challenged not the existence of a permissive rule which gave Mastercard the power to set MIFs.

This was a case that spanned the full period going back to 1992, potentially at least, there were obviously limitation arguments. This was the first stage in determining them, which meant Mr Justice Barling needed to grapple with the three different sets of choice of law rules that were in place during that lengthy claim period. We see that summarised at paragraph 12.

Sir, you have disappeared off the screen, can you still hear me?

THE PRESIDENT: I can. I don't know why I have disappeared --

MR COOK: You are back, sir.

For present purposes, it was the first of those, the Rome II period from January 2009 onwards and then what Mr Justice Barling considered in relation to the period governed by the Private International Law (Miscellaneous Provisions) Act 1995, so the 1995 Act.

In relation to the Rome II period, we see that dealt with at paragraphs 21 to 29 of the judgment, and it's right to say it's dealt with very briefly on the basis in that case it was common ground that, for the purposes of Rome II, the country -- this is paragraph 22 -- where the market is or is likely to be affected, so that's 6(3)(a), was the country in which the merchant was based at the time of the transaction. For the period to which Rome II applied, all the claims by the

Italian claimant in those proceedings were governed by Italian law and that, as paragraph 22 records, was a point that went by concession, it shows Italian claimants in that case didn't even think the point being advanced by my learned friend was arguable in those circumstances.

What I do pray in aid in particular is not the concession on this point, but the reasoned judgment then given by Mr Justice Barling on the application of section 11 of the 1995 Act. We see the statute of provision in question set out at paragraph 31 under section 11 of the 1995 Act:

"The general rule [subparagraph 11(1)] is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur."

(2):

"Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being ..."

There are specific rules for personal injury or damage to property which do not concern us:

"In any other case, the law of the country in which the most significant element or elements of those events occurred."

We see at paragraph 40 what Mr Justice Barling concluded he needed to do in that context, in the context of applying section 11, first to identify all the English law elements of the events constituting the alleged tort. Then identify the countries in which those elements or events took place and then, finally, to decide on the basis of a value judgment which was the most significant.

Getting ahead of ourselves, essentially the punchline of this is that Mr Justice Barling concluded that the restriction of competition, at least in the context of a MIF claim, and in particular in the context of a MIF claim where it was common ground that there were separate national markets, that was the most

significant element and that occurred, we will see, in the relevant national markets.

Therefore the Italian claimants, the relevant restriction was in relation to the Italian domestic market, for example, for these purposes, which is the reason why I say ultimately why you see a great deal of analysis by Mr Justice Barling designed to determine how to apply section 11, the outcome of it ultimately on his analysis comes back to what I would say is the critical issue for the purposes of Rome II that we are looking at, which is: where did the restriction of competition take place?

MR FRAZER: Sorry, there's a really -- isn't there a difference between what Mr Justice Barling was trying to do and what we need to do here? In the 1995 Act, as you just pointed out, he had to rank where the effects ... in effect, he had to look where the most significant element took place, rather than seeing where a direct and substantial effect took place, which is rather a different exercise than we do under Rome II. Do you still see it as useful guidance for us?

MR COOK: I do suggest it is useful guidance, on the basis that what he actually ended up ranking was where the agreement was made, where the restriction of competition took place and where the loss occurred, so those were the three factors they ended up ranking. As part of that, he looked at where the restriction of competition occurred and decided that was the most significant.

Having picked on that as being the most significant one, essentially he ends up looking at exactly the same question which is relevant for this Tribunal, which is: where did the restriction of competition occur? That's the reason why I say you end up with an analysis which works through section 11 of the 1995 Act, but the outcome of it is to say you essentially just look at the restriction of

competition and you ask the question where did it occur. That is the reason why I say it ends up being ultimately the same analysis that you have to carry out here, sir. That's the reason it's helpful.

MR FRAZER: I see, thank you.

MR COOK: Paragraph 46 that Mr Kennelly had taken you to and I think my learned friend had earlier this morning. The point in relation -- we saw from this, which is it's common ground that the setting of the MIF is not ipso facto unlawful and as I said earlier, I come back to that, which is it's accepted as a result of the Supreme Court decision that a zero MIF is not unlawful. It is not restriction of competition and there may also be a MIF which is objectively necessary in a particular market. Also illegality of course covers the possibility that it may be exempt for those purposes.

My learned friend Mr Kennelly took you to 46 and paragraph 50 and said in relation to both that it's talking about a restriction of competition and saying in his view you have read into that restriction of competition in a particular market. I absolutely agree with that and I will come back to show you paragraph 121, which that point is made good, and paragraph 121 is essentially the conclusion of all of this. What Mr Justice Barling is saying at 46 and 50 is that restriction of competition is something that involves an analysis on the relevant market, we see that in the middle of paragraph 50, which involves a comparison between the factual and the counterfactual.

Then paragraphs 53, 54 and 55 I want to particularly emphasise. This, sir, is the answer to your question, sir, which is the location of the restriction of competition. This is the point where Mr Justice Barling is essentially doing what I say you need to do for today's purposes, albeit he has to do a lot of other work in order to decide that this is the important part of his reasoning.

But 53 here, which is dealing with the location of the restriction of competition, and these three paragraphs I say are the important, for our present purposes, parts of the reasoning. He starts off by doing what's relevant for section 11, which is saying that restriction of competition is an event for the purposes of section 11. He said:

"Other than that regard there appeared to be little if any dispute between the parties on the element of the tort acquired, the claimants accept that the relevant product market is the market for acquiring payment cards and the relevant geographic markets are national in scope."

For present purposes I say it matters not a whit that my learned friend refers to issuing markets in her pleading as well, and hadn't really developed anything in her submissions by reference to that, because equally the agreement that the markets are national in scope applies to both, and insofar as there is some alternative case, as I have already said, that simply does not go anywhere because there's no evidence to support it. The fact it's acquiring only doesn't matter for our purposes.

Then at paragraph 54, Mr Hoskins in that case took the judge through the particulars of claim in some detail to indicate why it's clear the claimant should also be taken to have accepted the alleged restrictions of competition took place in each of the relevant product and geographic markets. I simply say that that follows. Those are the markets that they have pleaded here and identified as being those affected by the infringement in question. The final sentence of that paragraph:

"In all such cases it was alleged that the MSC charged by the acquiring banks to the claimants would have been lower but for the anticompetitive effect of the EEA MIF in each of the relevant national product and geographic markets."

That's essentially the case we face here. That is what the Italian claimants say, their MSCs would have been lower but for the anticompetitive effects of the various MIFs they complain about, in what they accept is the national market, the Italian national market.

We say that is just simply an analysis which shows it's quite right to say that the restriction of competition that establishes a case here for the Italian claimants is indeed a restriction of competition in one or more -- ie covering the possibility it may be issuing and acquiring -- national Italian markets.

Then if we go to paragraph 121, which is the conclusion in relation to this entire section, Mr Barling works his way through a great deal of evidence in relation to the various different MIFs which we need not concern ourselves with for present purposes, 121 is the conclusion. He says:

"Based on the value judgment I am required to make, the most significant elements/events in the tort alleged in the present case is not the loss allegedly suffered, significant although that element undoubtedly is, nor is it the setting management of the MIFs and the adoption of the CAR, though these also have significance, it's the restriction of competition."

Again that's the point which he ends up saying this is what I must focus on, which is the requirement which happens to be the same requirement as under Article 6(3):

"Although, as the claimants have pointed out, loss is not a necessary element of an infringement of Article 101, a restriction of competition is necessary and indeed at the heart of such infringement. If there is no restriction of competition, there is no tort."

"The mischief at which Article 101 is aimed or put more positively the beneficial aim of that provision is the protection of the competitive process, competition does

not occur in the abstract but on a market."

I say that's the bit that is particularly central for the present purposes, is the fact that you cannot have restriction of competition as being some amorphous term. This is a point which we say is the critical issue for the proper construction of Article 6(3)(b), that you can't have restriction of competition as being a loose term that applies to an agreement or a loose term that applies in the abstract. It can only be something that applies by reference to the competition in a particular market. The present case is it's clear that what we are dealing with is a particular national market, because that's common ground, there's no evidence for anything wider.

Then it goes on to say here -- so in that case it's not in issue that the material markets are each of the national markets providing acquiring services, it is those separate markets which are alleged to have been subjected to the restriction of competition. Those markets are the theatres of the wrong allegedly done by the defendants.

That is true here, that the theatre of the wrong allegedly done to the Italian claimants is the Italian domestic market, or markets if one looks at issuing and acquiring, and that's made good in due course.

Whether or not there may also have been wrongs done by the defendants to other claimants in other markets -- potentially with other MIFs -- is with respect simply irrelevant. Those are not, in the wording of Article 6(3)(b) the restriction of competition out of which the non-contractual obligation on which the claim is based arises.

An English company faced with those things, it might well be saying that there is a restriction of competition and some of the English claimants here do, in the UK market. But that is not the restriction of competition out of which the

Italian claimants claim that a claim arises. They say it arises out of an effect in the Italian market. If there wasn't that effect, they would simply not have a case that caused them any harm or any loss.

That's why we say that Deutsche Bahn ultimately ends up focused on exactly the same question, which is where is the location, what is the place, where competition is reduced and restricted for the purposes of the claim by each set of claimants. For the Italian claimants it is clearly and exclusively Italy.

My learned friend started her submissions today by relying on the principle of effectiveness under EU law -- I am now moving on from looking at Deutsche Bahn, this is a more general point.

In terms of the principle of effectiveness under EU law, she started with that and I can finish with it, she referred in particular to paragraph 15 of my skeleton, which is the purpose of Article 6(3)(b) -- or Article 6(3), is to simplify the process of cross-border competition litigation by allowing a claimant to plead a case under only one system of law. My learned friend said she agreed with that. While it's always nice to have some common ground, with respect it doesn't help my learned friend.

This is not a situation in which the Italian claimants contend that they have suffered loss in multiple countries and so they want to be able to bring claims for all of those different national losses under a single common law.

The Italian claimants only contend that they have suffered loss in Italy. Their claim is therefore already governed by a single system of law, Italian law. The Italian claimants simply want to be able to rely on a different law, completely unconnected to the claims which they make, namely English law, merely because it gives them a preferable limitation period. We say that is a pure case of forum shopping and nothing in Article 6(3)(b) is intended to allow

forum shopping of that kind, namely a claimant who only has a claim in relation to a restriction of competition in their own national market being able to elect that wholly domestic claim is governed by the law of another country, merely because they choose or are entitled to bring proceedings in that other country.

There is simply no policy justification for that, there's no effectiveness principle which supports the idea that you should be able to choose a different law, unconnected to the wrong that you assert has been caused and has caused you loss.

The proper law of these Italian claims, moreover, cannot be determined based on the happenstance that the Italian claimants have been able to find some UK merchants who also want to make similar claims in relation to what they say are restrictions of competition in the UK market and the fact they have all brought those claims in single claim forms in these proceedings. The fact that there are unconnected UK claimants who may have claims or do have claims governed by English law does not provide a justification for Italian claimants also being able to assert that the same law applies. Ultimately, these are claims for the Italian claimants about Italy and there is no practical or policy justification for allowing them to assert that Italian law is not the relevant governing law in relation to those Italian claims.

Sir, unless I can assist further, those are my submissions.

THE PRESIDENT: Just give us a moment, would you.

(3.54 pm)

(A short break)

(3.57 pm)

THE PRESIDENT: Thank you, Mr Cook, there's nothing we wish to ask you.

Ms Smith, it's for you to reply. Can I just ask you to clarify just one thing at the very beginning, which is the period of the claim. Just so we can be sure we get this right. Just looking, if we take the Westover particulars of claim, what is the claim period?

MS SMITH: The claim period is, and I think this may have been spelt out in the reply rather than the particulars, and in the quantum schedules to the particulars, which are not in the --

THE PRESIDENT: I thought it might be there, but we don't have them.

MS SMITH: Six years from the date of issuing the claim, six years back from the date of issuing the claim.

Again, I don't have to hand the claim forms, though I think they are in one of the bundles.

THE PRESIDENT: They are, yes. I am not sure they say it but you say that's -- I'm sure it's understood by -- people will have looked at this carefully, but it's in the reply you say that it's spelled out?

MS SMITH: I think it is, but I am sure an email will pop up if I'm wrong but I'm sure it's either in the quantum schedules or in the reply that it becomes clear that it's six years back from the date of issuing the claim for all the claims, on the basis of the election we make at the very end of the particulars for the application of English law.

THE PRESIDENT: Yes. I am looking at the Westover ...

MR FRAZER: The claim is dated 14 April 2020, Westover v Mastercard.

MR COOK: If I could help tab 48 in bundle 2B is the reply, and it's paragraph 2 of the reply which says that the period is limited to the period after 20 December 2013, so that's six years prior --

THE PRESIDENT: Sorry, which paragraph is it?

MR COOK: Paragraph 2 of the reply, it goes over the page, it's 2A which makes clear the date and it's based on six years under English law. We obviously say the Italian claims are limited to one year shorter, based on Italian law, and there will be a shorter period in relation to the second set of claims.

THE PRESIDENT: Yes, thank you very much.

Reply submissions by MS SMITH

MS SMITH: Thanks for that, my memory was not entirely faulty.

By way of reply I would like to address two issues raised by Mr Cook and then a fundamental point raised by Mr Kennelly.

First of all, if I could ask you to look at bundle 2B, Mr Cook submitted or asserted there have been times when Mastercard set zero MIFs. In support of that statement, he relied upon his pleading in paragraph 53(b) of his defence.

If you look at paragraph 53(b) on page 118 of the bundle, tab 43 of bundle 2B, you will see that the only example that Mr Cook has been able to give of a MIF being set by Mastercard to zero is when it was set to zero as a result of regulatory intervention by the Commission and pending discussions with the Commission about new levels of the consumer EEA MIF. So it was set because of the Commission decision and was set only pending the setting by Mastercard of new levels of positive MIFs.

That example, in my submission, does not undermine my point that the scheme's commercial imperative, as made absolutely clear by their pleadings and their evidence, is to charge a positive MIF and that the commercial de facto position is that the rule about which we complain imposes a positive default MIF.

Mr Cook also then referred to what he described as negative interchange fees. He

described it then being applied in a situation when a cash disbursement is made by a merchant. In that regard, can I ask you to look at the rules in bundle 1, tab 10, Mr Cook you to the rules in the exhibit of Mr Centemero.

If I can ask you to turn to page 284.25, rule 9.1. The definitions that are set out in rule 9.1, there are definitions there in rule 9.1 of interchange fee and service fee. If you look at those definitions, it's absolutely clear that what Mr Cook referred to somewhat misleadingly as "negative interchange fees" are not in fact interchange fees at all when applied in the situation described by Mr Cook, they are completely different fees. They are service fees, paid by the issuer to an acquirer when a cash disbursement is made. Primarily those cash disbursements are made through cash machines, ATMs, but may also in certain circumstances be made by a merchant who provides an equivalent service of cash disbursement, but in that situation it is a different fee, a service fee paid by the issuer to the acquirer as defined with respect to the interchange of a cash disbursement.

What we are concerned with are interchange fees that are paid with respect to the interchange of a transaction.

THE PRESIDENT: Yes.

MS SMITH: Just correcting those two -- or dealing with those two points made by Mr Cook.

If I can then turn to the discussion that the panel had with Mr Kennelly. I will deal with it point by point.

Mr Kennelly's main point, and the focus of his submission, is that, for the purposes of the application of Rome II, Article 6(3)(b), the focus should be on the market where the competition restriction applied and had effect. He stressed, repeatedly, that the markets here are national. I would make the following

points on that.

First, there is a contrast to be drawn -- on the face of the Regulation, obviously, and on the whole purpose of the Regulation -- between Article 6(3)(a), which does apply to a non-contractual obligation arising out of restriction of competition generally being the law of the country where the market is likely to be affected, and Article 6(3)(b), which is explicitly an exception to that general rule as described both by Dicey & Morris and by Dickinson, it is an exception to the general rule.

In our submission, 6(3)(b) can apply to a restriction which affects a number of national markets. That is what distinguishes 6(3)(b) from 6(3)(a) and also, with respect to Mr Cook's submissions on Deutsche Bahn, is what distinguishes 6(3)(b) from section 11 of the 1995 Act.

If you look at 6(3)(b) itself, tab 8 of the authorities bundle, 6(3)(b) unfortunately in common with a number of European legislative provisions, is not explicitly clear, but we say you have to look at the last sentence of that Article. 6(3)(b) refers to the restriction of competition, upon which the claim relies, and substantially and directly affects also the market in the Member State of the court seised. We say it explicitly envisages a number of national markets to which a restriction applies, including the market in the member state of the court seised.

THE PRESIDENT: You are on the last -- it's in two parts, 6(3)(b). Isn't the second part simply dealing, after the semi colon, with the position where you have more than one defendant?

MS SMITH: Yes, it is.

THE PRESIDENT: It's just a clarification of the basic provision of 6(3)(b), which is the first part.

MS SMITH: Absolutely. It is that, and that is the part of 6(3)(b) that we rely on, because there is more than one defendant. But it also, in my submission, reflects the wording of the first part before the semi colon, which is that: provided that the market in that member state, that's the member state seised, is amongst those directly and substantially affected.

So again, it's talking about the market in the member state of the court seised, it's talking about markets in a number of different member states.

THE PRESIDENT: Yes.

MS SMITH: So it's the same point. I could make the same point about the wording before the semi colon as I could make about the wording at the very end of that section, it's just that we fall under the second part of 6(3)(b) because we are suing a number of different defendants.

But the point is that it explicitly, in my submission -- or relates to a market being affected in a number of different member states. In that situation, which is an exception to the general rule in 6(3)(a), the claimant can elect between those applicable laws.

Now that, I say, comes from the wording and the language of the directive itself. It also comes from the staff working paper which supported the Green Paper on damages actions. Although the White Paper -- I think Mr Cook made this point -- the White Paper post-dated the Regulation, my recollection is that the Green Paper pre-dated the Regulation and the staff working paper on the -- the Green Paper on damages actions is cited in Dickinson, which is in authorities bundle 12, page 701.9, footnote 182.

THE PRESIDENT: Sorry, which paragraph of Dickinson.

MS SMITH: 12, page 701.9, footnote 182 --

THE PRESIDENT: Yes, you took us to that before.

MS SMITH: Just to take it back to make it clear that this is the staff working paper accompanying the Green Paper for the damages actions, and a direct quote is taken from that paper in this footnote where it refers to cases in which -- this is in support of a statement made in the body of Mr Dickinson's book, that Article 6(3)(b), it would appear, can also apply where -- and a restriction affects a market in a number of different markets in a number of member states. He says that at paragraph 6.68 on page 700, where Article 6(3)(b) may also be capable of applying to a situation in which a single restriction of competition affects more than one market.

The reference citation he gives to support that is a citation from the Commission staff working paper accompanying the Green Paper, and the citation is -- it refers to: the affected market is bigger than one single state, or where there are several national markets.

So that is the staff working paper that accompanied the Green Paper.

The Green Paper itself -- sorry, we don't have the actual staff working document that went with the Green Paper in these authorities -- but the Green Paper itself is at authorities bundle, tab 7, and if I could ask you to look to page 252 in that tab, page 252, under the heading "2.8: Jurisdiction and Applicable Law", the second paragraph under that heading:

"With regard to the issue of applicable law, reference should be made to the Commission's proposal for a Regulation on the law applicable to non-contractual obligation."

So at this stage it was still a proposal. The Rome II Regulation:

"As damages claims are generally torts, they fall under the scope of this proposal."

Then I would like to highlight the last two sentences:

"The law of the forum could be the applicable law in all cases. Special consideration

should be given to cases in which the territory of more than one state is affected by the anticompetitive behaviour."

So the focus there is on the conduct, the anticompetitive behaviour, where an effect is found in a territory of more than one state. It's not quite as explicit in the Green Paper, we say it's more explicit in the staff working document that went with the Green Paper.

On the basis of those authorities, I make the following submission. It's in effect the submission I have made already, but it is important to recognise that in our case, our case is that the default rule, MIF rule, has the same effect in each national market, insofar as the nature of the anticompetitive effect is the same. It restricts competition on the acquiring market between acquirers, and that is the effect on competition and the restriction that was highlighted by the Supreme Court in paragraph 93.6 of the Supreme Court judgment, which Mr Kennelly also referred you to.

If I can ask you to turn to that. In tab 5 of the authorities bundle, page 160. The effect, paragraph 93(6), is that, by contrast with the factual, in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower. We say that is the effect, that's the nature of the effect, which is the same, the restriction is the same and the effect -- and competitive effect it gives rise to is the same in each member state, whatever the level of the MIF. It prevents the merchants from negotiating down the MSC to the marginal cost of acquirers. I am not going to take you to the paragraphs I showed you in the Court of Appeal and the Supreme Court; that was the anticompetitive evil that the Court of Appeal and the Supreme Court identified, and that is the restriction.

Now, Visa accepts -- and, quite fairly, Mr Kennelly accepted it in his oral

submissions -- in paragraph 11 of their skeleton argument that section 3(b) could at least arguably also apply to a single restriction of competition that affects more than one market. He gives the example, in paragraph 11 of his skeleton, of a single cartel agreement.

He says that a single cartel agreement could be between -- could have effects where there is less intensive competition across a number of different relevant national markets.

When pressed by the panel, Mr Kennelly accepted in his oral submissions that Article 6(3)(b) would apply to a pan European cartel which applies in different national markets. Crucially, and I wrote this down verbatim because I think it is a crucial concession, he said it would apply to a cartel, and I quote, which:

"... may fix prices which differ [in different] member states ..."

So the nature of the restriction is the same. The exact price charged in each member state may be different. We say that is exactly what is at issue here. The default MIF settlement rule is a restriction that fixes the MIF by way of collective agreement, and which cannot be negotiated down by merchants. It's fixed at different levels, different prices, in different member states.

It's extremely telling in that regard to look at how the Supreme Court started its analysis of how it would approach the question of MIFs even if it wasn't bound by the Court of Justice.

If you look on -- we hopefully still have this open -- page 160 of authorities bundle, tab 5, the Supreme Court judgment, paragraph 96. They say:

"Under 101(1), an agreement between undertakings which has the effect of directly or indirectly fixing purchase or selling prices is a restriction of competition under 101(1)(a). It is well-established that the prohibition of price-fixing under 101 also extends to the fixing of part of that price."

"98. The relevant selling price in the present appeals is the MSC."

So the relevant selling price is the MSC; the part of the price which is fixed is the MIF. Then over the page, 99:

"On the facts as found, the effect of the collective agreement to set the MIF is to fix a minimum price floor for the MSC. In the words of Mr Dryden, AAM's expert economist, it sets a reservation price that minimum price is non-negotiable, it is immunised from competitive bargaining ... merchants have no ability to negotiate it down."

That is the nature of the restriction, regardless of the fact that the MIF may be set at different levels in different member states. Just as a cartel agreement may have pan European effect, and is intended to do so, so does the default MIF settlement rule in the current case.

Just as it is not unfair for cartelists to be subject to a law applicable in one of the markets affected by their cartel arrangement, including the different limitation period that might be applied in that market, it is not unfair for the card schemes to be subject to the applicable law in one of the markets in which their rule is applied, and the restriction applies and has effect.

It's on that basis that we say Article 6(3)(b) does apply in this case and the Italian claimants' election of English law should succeed in this case.

Unless I can assist the panel further, those are my submissions in reply.

THE PRESIDENT: Again, we will just take a moment.

(4.20 pm)

(A short break)

(4.21 pm)

THE PRESIDENT: Thank you all very much. It's a short but not straightforward point, and it appears that it's never been decided, from all your researches

before. It's certainly not acte clair, but it's clear that one thing we cannot do is make a reference to the Court of Justice to tell us the answer; we are going to have to come to it ourselves.

We will let you know in the usual way when a judgment is ready to be issued.

We shall now rise.

(4.22 pm)

(The hearing concluded)

1

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?