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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

(T)

Case No: 1266/7/7/16

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 5th – Friday 28th July 2023

Before:

The Honourable Mr Justice Roth

Jane Burgess

Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Walter Hugh Merricks CBE

**Class Representative**

v

Mastercard Incorporated and Others

**Defendants**

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**A P P E A R A N C E S**

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

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

Thursday, 6 July 2023

1  
2 (10.30 am)

3 (Proceedings delayed)

4 (10.37 am)

5 Housekeeping

6 MR JUSTICE ROTH: Good morning. I've been asked by our  
7 transcriber to remind everyone, including no doubt  
8 myself, that we should be sure to speak with the  
9 microphone not far away so that the audio is clear for  
10 her.

11 Yes, Mr Smouha.

12 MR SMOUHA: Thank you, sir. Good morning, sir. Good  
13 morning, members of the Tribunal.

14 The plan for today is we will continue our opening  
15 submissions, aiming to complete our submissions by about  
16 12.30. Ms Demetriou has confirmed to me that she needs,  
17 but doesn't need more than, half a day with Mr Sideris.  
18 So I will call him either shortly before or immediately  
19 after the lunch break.

20 We will be a bit longer than originally planned  
21 because I just wanted to pick up on and respond to some  
22 of the points made by my learned friend yesterday, in  
23 particular on pieces of evidence, which we say have been  
24 incorrectly characterised and, also, because -- I hope  
25 this is fair -- the case has been -- in the way the case

1 has been opened compared to the written submissions,  
2 compared to the amended pleadings, that's been a bit of  
3 a moving target.

4 Just before I move on to credit cards, sir, could  
5 Mr Cook just give you some references for the points he  
6 was making about the debit card rules at the end of  
7 yesterday?

8 MR JUSTICE ROTH: Yes.

9 MR SMOUHA: Thank you.

10 MR COOK: Yes, sir. So it's just a reference to make good  
11 the points that I made last night in relation to the  
12 tribunal's question about the operation of the  
13 Maestro Rules.

14 It's bundle {C14/459/1}. For time reasons, I'm not  
15 going to take the Tribunal to the documents, just give  
16 the references. So that was C14/459, a copy of the  
17 Maestro Global Rules, and page 331 {C14/459/331} sets  
18 out the position in relation to European defaults, and  
19 that's the same position that applies in relation to  
20 Mastercard credit cards from at least November 1996  
21 onwards, namely that in the absence of a bilateral MIF  
22 or a domestic MIF, the EEA MIF applied as a default.  
23 Then -- that's page 331.

24 Then bundle {C16/47/1}, and that's an explanatory  
25 note in relation to the UK Maestro scheme and that sets

1 out that the UK Domestic Rules had to be agreed by  
2 members representing at least 51% of issuing and  
3 acquiring volumes. So that's the equivalent of the  
4 75% rule for Mastercard credit, but apart from the  
5 percentage, it's the same there. The EEA rules are only  
6 displaced by UK Rules set by the requisite percentage of  
7 members.

8 You then have an explanation for how the UK Rules  
9 operated, and that's in Mr Douglas' statement, and  
10 that's {A/10/13}, in particular paragraphs 32-36. And  
11 he explains that the UK Rules provided for interchange  
12 fees to be agreed bilaterally with arbitration as  
13 a fallback. There was an interim default interchange  
14 fee which applied pending arbitration and that was set  
15 by S2 Card Services, which was a representative  
16 organisation for the banks, so the equivalent of MEPUK,  
17 and bilateral rates were generally agreed around the  
18 level of those interim default rates.

19 And there are documents in the bundles showing those  
20 interim default rates, for example, {C13/421/1}, which  
21 sets out rates at that point in time, which I think is  
22 2005, and the explanation of the basis of the rates,  
23 which were based on a UK cost study and UK market  
24 conditions and, as always, there's no mention of the  
25 EEA MIF rates at all.

1           So we say the picture that emerges here is very  
2 similar for Mastercard credit. The EEA MIF would have  
3 been the fallback in the absence of UK interchange fees.  
4 You get bilateral negotiation with arbitration as  
5 a fallback, with the bilateral interchange fees  
6 coalescing around the indicative rates set by the  
7 representative organisation, which is analogous to the  
8 position from '92 to '97 for Mastercard credit.

9           And as you heard from Mr Smouha yesterday, what you  
10 end up with is UK interchange fees which were  
11 substantially lower than the EEA MIFs, and we say that  
12 just -- it's a clear example which demonstrates the  
13 fallacy of the floor guidance arguments that are being  
14 put.

15 MR JUSTICE ROTH: Yes, thank you.

16           Opening submissions by MR SMOUHA (continued)

17 MR SMOUHA: Thank you, sir. So on debit cards, we do submit  
18 that the interchange fee scheme had similar features to  
19 those that Mr Merricks claims and relies on in the  
20 credit card interchange fee scheme, and so if the --  
21 Merricks' case that bilateral negotiations for credit  
22 cards were causally affected by a belief that if no  
23 agreement was reached, the EEA MIF would apply, the same  
24 would have to be true for debit cards. But as we saw  
25 yesterday from looking at the level, structure and

1 changes in rates and also the evidence of the basis of  
2 the decision, that was not what happened.

3 So, sir, those evidential contraindications of  
4 causation that we saw in relation to debit cards are  
5 what I want to show you now, as also being present in  
6 the facts in relation to credit cards. Let me just  
7 identify them at the start. Nine points:

8 First, different structures of rates from time to  
9 time. Second, different levels of rates. Third, the  
10 absence of changes in the UK interchange fees when there  
11 is a change in structure or level of the EEA MIF.

12 Fourth, changes in the UK domestic interchange fees,  
13 which bear no resemblance to anything that has happened  
14 to EEA MIFs or where the EEA MIF has not changed.

15 Fifth --

16 MR JUSTICE ROTH: Is that sort of the converse of three?

17 MR SMOUHA: It is, exactly. So looking at changes in one,  
18 seeing whether there is anything that happens in the  
19 other and vice versa.

20 And, of course, these are -- as I've shown you,  
21 these are -- in some cases, these are examples rather --  
22 as you know, there were changes in both driven by  
23 innovation, but which we say is not a causal -- not  
24 caused by the EEA MIF in a relevant sense. But these  
25 are, as I say, contraindications from where one looks

1 over the entire period.

2 Fifth point, actual contemporaneous evidence of the  
3 decision-making process and of the factors that were  
4 considered in relation to the agreeing or setting of  
5 UK interchange fees, whether bilaterally, or the MEPUK  
6 indication of a reference rate, or the Mastercard  
7 setting of MIFs in due course.

8 As to what factors were in play in that  
9 decision-making process, we have -- and this is the  
10 sixth point -- contemporaneous evidence of UK-specific  
11 domestic market conditions as a basis for decision,  
12 for -- a basis for agreement and the setting of the  
13 level; indeed, the setting of the level and indeed  
14 structure of the UK interchange fees.

15 Seventh, contemporaneous evidence of competitive  
16 considerations; Visa as a key factor in the agreeing and  
17 setting of the level and structure of UK domestic  
18 interchange fees. That --

19 MR JUSTICE ROTH: That's different from six, is it?

20 MR SMOUHA: No, it's part of six. So six is general in  
21 relation to market conditions. It's -- the competitive  
22 considerations being one of --

23 MR JUSTICE ROTH: Yes, so that's a sort of sub-part.

24 MR SMOUHA: That's quite correct, sir. It's a sub of six.

25 That one, Visa, as I understood my learned friend's

1           submissions yesterday afternoon, is now not disputed.

2       MR JUSTICE ROTH: Well, I think what they said is they

3           accept it was taken into account --

4       MR SMOUHA: Yes.

5       MR JUSTICE ROTH: -- but they don't accept it was the main

6           driver, I think --

7       MR SMOUHA: Yes.

8       MR JUSTICE ROTH: -- for --

9       MR SMOUHA: Indeed. So yes, so --

10      MR JUSTICE ROTH: So they're not suggesting it was ignored,

11           but --

12      MR SMOUHA: So I formulate it as a key factor. Of course,

13           for the purpose of our case, the relative weight of

14           factors in relation to any decision doesn't matter,

15           because all we are doing is meeting a case and the issue

16           you are deciding is whether the EEA MIFs were a cause in

17           fact.

18           So we say, and this is apparent from our -- sir,

19           from our comments on the list of issues, the Tribunal

20           doesn't need to decide in relation to those matters,

21           which were factors, which were more important in

22           relation to any one time, the question of relative

23           weight. That's not the point. We -- when we identify

24           the matters that were factors, we do so by way of

25           support of our negative case that the EEA MIF was not

1 a factor.

2 MR JUSTICE ROTH: Yes.

3 MR SMOUHA: The next one, so also a sub of the UK-specific  
4 domestic market conditions, is the contemporaneous  
5 evidence of the consideration of costs and cost studies,  
6 because that is of UK costs.

7 MR JUSTICE ROTH: Yes.

8 MR SMOUHA: And then ninth and last, this is another sub --  
9 this is a freestanding and very big point -- the absence  
10 of contemporaneous evidence of the consideration of  
11 EEA MIFs as a factor, guide, minimum, floor or  
12 benchmark; a causal irrelevance so far as the  
13 contemporaneous documents are concerned and, also, as  
14 you will be hearing from the witnesses, but importantly  
15 in relation to the contemporaneous documents.

16 So, sir, I'll deal chronologically with the  
17 three periods. So May 1992 to November 1997, that is  
18 what one might call the bilaterals era, the period prior  
19 to there being a UK MIF.

20 Second, November 1997 to November 2004, so starting  
21 with 1 November 1997, being the date on which the first  
22 UK domestic MIFs, as requested by MEPUK, were in force.

23 And, third, November 2004 to June 2009 -- sorry,  
24 June 2008. There's a one-year run-off, but I put that  
25 on one side. That's not -- for separate consideration.

1 November 2004 being when Mastercard took over the  
2 setting of UK MIFs from MEPUK.

3 And again, sir, the focus of our submissions in  
4 writing and also this morning is on the facts, either  
5 not disputed or demonstrable from contemporaneous  
6 documents. And, sir, as we've said in our written  
7 submissions, and this is basic in terms of the  
8 appropriate approach -- and forgive me for emphasising  
9 it again -- but the Tribunal should of course, in  
10 seeking to reach conclusions and making findings of  
11 fact, which is the principal objective of this trial,  
12 place principal reliance on the contemporaneous evidence  
13 as being the best and most reliable source of evidence  
14 as to what happened, most especially as the Tribunal is  
15 being asked to consider the position going back to the  
16 early 1990s.

17 The starting point is that in the period May 1992 to  
18 November 1997, there was no UK MIF, so instead  
19 Mastercard licensees in the UK agreed rates bilaterally  
20 with each other, and the Tribunal has the bilaterals  
21 table, which I would ask you to have open again.

22 I will come back in a moment just to address  
23 a little further the submissions made by my learned  
24 friend yesterday about what this table does and doesn't  
25 show in terms of the completeness of it, which Mr Cook

1           said something to you about yesterday. I'll come back  
2           to that.

3           But just as we're going to spend a little time with  
4           this now for this period, just to orient you a little  
5           further on it for the purposes of two general points,  
6           what you will see if you -- just on page 1 {B/55/1}, the  
7           cover page, you will see that part A sets out the  
8           bilaterally agreed rates for standard transactions.

9           There are references in the documents at different  
10          times. Sometimes they're called standard. Sometimes  
11          it's called normal. Sometimes they're called paper  
12          transactions.

13          And then part B, which starts at page 13 {B/55/13},  
14          sets out the equivalent rates for electronic -- agreed  
15          rates for electronic transactions.

16          Each part is ordered in descending order of the  
17          acquiring banks' shareholding in MEPUK as of 1996, so --  
18          and the shareholding of the banks in MEPUK reflected  
19          their market share at that time. So at the top of  
20          page 2 {B/55/2}, you'll see that. So in part A, you'll  
21          see NatWest come first and the shareholding is indicated  
22          in italics in the left-hand column, 35.2%. As I say,  
23          that's in 1996.

24          Then the table then goes down through banks in their  
25          descending order of shareholding. So the next one is on

1 page 4 {B/55/4}, Midland -- no, sorry, we have Coutts,  
2 but no shareholding indicated there.

3 PROFESSOR WATERSON: Coutts are included (inaudible -  
4 microphone off) --

5 MR SMOUHA: Of course, part of NatWest.

6 MR JUSTICE ROTH: NatWest, and so, I think, was Ulster.

7 MR SMOUHA: Ulster. Yes, I ought to know that.

8 MR JUSTICE ROTH: It says it on the next page.

9 MR SMOUHA: It does, and likewise Ulster. Thank you.

10 And then Midland on page 4 {B/55/4}, 19.5%;  
11 Barclays, 16.9%; Lloyds 10.6% and so on.

12 The column second from the left shows the issuing  
13 banks, the counterparties to the bilaterals of the  
14 acquirers. Those are set out in alphabetical order.  
15 Of course, most issuing banks were also acquiring banks,  
16 so the same agreements appear twice in the table. So  
17 NatWest as acquirer with Clydesdale, for example, as  
18 issuer and then that same bilateral will then appear in  
19 the table with Clydesdale as acquirer and NatWest as  
20 an issuer.

21 PROFESSOR WATERSON: I notice they don't include themselves  
22 in this table. So, for example, Barclays doesn't  
23 include Barclays as an acquirer. It doesn't include  
24 Barclays as an issuer.

25 MR SMOUHA: NatWest does on the first page.

1 PROFESSOR WATERSON: I see.

2 MR SMOUHA: And I will -- yes, and Mr Cook says generally  
3 they won't because those will be on-us transactions, so  
4 no bilateral, no need for a bilateral and processed  
5 internally within the bank rather than on Europay.

6 MR JUSTICE ROTH: Which begs the question then why NatWest  
7 is.

8 MR SMOUHA: Yes, I agree that it begs that question --

9 MR JUSTICE ROTH: And Ulster and Midland.

10 MR SMOUHA: Can I deflect that question off to my right and  
11 if necessary behind, sir, while only agreeing with you  
12 at the moment that it begs the question?

13 MR JUSTICE ROTH: Yes. We have a few others, but somebody  
14 can work through that and --

15 MR SMOUHA: I'll come back to that as soon as I'm in  
16 a position to --

17 MR JUSTICE ROTH: Can I just go back to -- I probably just  
18 didn't pick it up. The electronic --

19 MR SMOUHA: Yes.

20 MR JUSTICE ROTH: -- does that mean -- I mean, this is the  
21 earlier period. We weren't -- I don't think people were  
22 doing PIN numbers at that point. I think they were  
23 those things you would sign and the card would be swiped  
24 through, wasn't it?

25 MR SMOUHA: Yes --

1 MR JUSTICE ROTH: That's presumably the paper ones. If  
2 I follow the distinction, electronic, is that over the  
3 phone, or what does that mean? (Pause)

4 MR SMOUHA: Yes, Mr Cook tells me that where -- in that  
5 period when authorisations were obtained by telephone,  
6 that would have characterised a transaction as  
7 electronic -- yes, the obtaining of authorisation  
8 electronically as opposed to the old, as I remember it,  
9 giving your card, put it in the machine which they --

10 MR COOK: Carbon paper.

11 MR JUSTICE ROTH: Yes.

12 MR SMOUHA: Indeed, which of course Mr Cook only knows about  
13 by the people reporting to him how it was done in  
14 history.

15 What you have seen from the consolidated MIFs table  
16 is as new technologies were developed in relation to  
17 electronic, that often led to new categories when there  
18 were new security advances and so on.

19 Now, sir, just two other points. One is that you  
20 will see, unsurprisingly, that the bilateral agreements  
21 generally tailed off after 1997/1998, of course, because  
22 the first UK MIF was introduced.

23 And then the only other point is as with the MIF  
24 table, a bold entry denotes a change in rate. So on  
25 page 2 {B/55/2}, you can see most of NatWest's

1           bilaterals for standard changing to 1.3 in 1994 and so  
2           on.

3           MR JUSTICE ROTH:   Yes.

4           MR SMOUHA:   Now, my learned friend made the submission  
5           yesterday that the evidence indicates that there were  
6           actually significant gaps in the bilateral agreements  
7           that were in place between banks.  This was at -- this  
8           is the transcript reference {Day1/28:9} where my learned  
9           friend said:

10                 "... we say that the suggestion that the disclosure  
11                 shows there was complete bilateral coverage is, in any  
12                 event, wrong.

13                 "If we go to ..."

14                 And the reference was given:

15                 "... this is part of Mastercard's schedule of  
16                 bilateral interchange agreements."

17                 Going to the table:

18                 "If we look at -- for example, if we look at the  
19                 bottom of the page, Save & Prosper as an acquirer, so  
20                 the banks in the first column -- you can see at the top  
21                 of the page, those are agreements where these banks are  
22                 acquirers and you see that they had no bilateral  
23                 arrangements until 1994.  We know from other documents  
24                 that they were active in the market because they  
25                 responded, for example, to an EDC cost study in 1991."

1           Now, I just want to address that, if I may, and I do  
2           so in stages. So page 11 of the table {B/55/11},  
3           Save & Prosper at the bottom showing bilaterals --  
4           listed bilaterals in 1994.

5           Now, the first point is, and as Mr Cook indicated  
6           yesterday, this table was produced as part of  
7           Mastercard's disclosure, reflecting the documents that  
8           have been found that show bilateral agreements. So that  
9           is one limitation of it. It is not and cannot be and is  
10          not suggested to be at all a complete representation of  
11          all bilateral agreements that were made.

12          Just because it reflects everything Mastercard has,  
13          it does not follow at all that the table represents the  
14          entirety of the bilateral agreements that actually were  
15          in place, and in terms of the assessment of that, which  
16          is an issue between the parties, we say that the  
17          Tribunal should look at the evidence in the round, which  
18          we've extensively detailed in our submissions, in  
19          particular that the banks understood that they were  
20          required to enter into bilaterals and, as you know, we  
21          say that the Tribunal should find that, in fact,  
22          bilaterals were ubiquitous.

23          Secondly, there are good, indeed rather obvious,  
24          reasons why the disclosure available to Mastercard in  
25          2023 would not be comprehensive as to all the bilateral

1 agreements that were in place in 1992, 1993 and 1994.

2 First, passage of time. Obvious point. Second, the  
3 disclosure is drawing on -- is from repositories which  
4 are within Mastercard's control. Europay would not  
5 necessarily have had comprehensive records of all  
6 bilateral agreements even at the time, because Europay  
7 did not process all transactions. Processing was also  
8 done by banks in-house and by, Mr Cook told you, FDR.

9 Now, I can illustrate all of this by reference to  
10 Save & Prosper, which is the bank that my learned friend  
11 referred to. So the main point that my learned friend  
12 made was that in the table, there are no bilateral  
13 agreements showing before 1994, but we know that  
14 Save & Prosper did agree bilaterals before 1994.

15 Can I show you an example: {C1/252.1/1}. Here is  
16 a letter from Save & Prosper of 30 November 1992 --  
17 sorry, 24 November 1992, received by Barclays on  
18 30 November 1992:

19 "Thank you for your letter ...

20 "I enclose, duly signed, the necessary form."

21 So this is in relation to a bilateral in 1992,  
22 presumably for 1993 and -- so we know one is there. Why  
23 is it not in the table? It's not in the bilaterals  
24 table because there is some doubt as to precisely what  
25 the rate was at the time. There's no doubt there was

1           a bilateral agreement. So it has not been included in  
2           the table.

3           MR JUSTICE ROTH: It does set out the rate, doesn't it?

4           MR SMOUHA: That's for later. That's for 1 April 1993  
5           onwards.

6           MR JUSTICE ROTH: Yes, but it's not in the table.

7           MR SMOUHA: Oh, but we don't have the form.

8           MR JUSTICE ROTH: Ah, I see. So you -- well, in any event,  
9           I don't think --

10          MR SMOUHA: That --

11          MR JUSTICE ROTH: I mean, the point you make is it's common  
12          ground that Save & Prosper did have bilaterals in,  
13          I imagine, 1992 and 1993, because they were trading and  
14          accepting, acting as acquirer, maybe also as issuer,  
15          I don't know. And you just say the table is not seeking  
16          to be comprehensive; it's based on insofar as you have  
17          clear records.

18          MR SMOUHA: Indeed.

19          MR JUSTICE ROTH: That's the short point.

20          MR SMOUHA: Exactly, sir.

21                 And the only other point to add to that is in  
22                 relation to Save & Prosper, Save & Prosper is a very  
23                 small player. My learned friend took the Tribunal only  
24                 to Save & Prosper, which is towards the end of the  
25                 table, because it is small. Now, that is telling

1           because for the larger players on the table, we do see  
2           a much more comprehensive coverage of bilateral  
3           agreements. NatWest had the -- there's a long list of  
4           1993 agreements. Midland, a wide range of bilaterals in  
5           1992, many in 1993 and so on.

6           And then lastly on Save & Prosper, my learned friend  
7           said that Save & Prosper in 1991 responded to an EDC  
8           cost study, so it was suggested that we know they were  
9           active in the market before 1994. Now, that's not  
10          correct either. Save & Prosper were just sent a cost  
11          study questionnaire, but did not respond to it, or at  
12          least we don't have any response. And I'll just give  
13          the reference for that --

14         MR JUSTICE ROTH: Well, we know they're active to some  
15          extent in the market because of the letter you've just  
16          shown us.

17         MR SMOUHA: Yes --

18         MR JUSTICE ROTH: So --

19         MR SMOUHA: -- but the point my learned friend was making  
20          was about -- what was being suggested was they had  
21          actually responded to a cost study in 1991.

22         MR JUSTICE ROTH: Yes, but that was just to show that they  
23          were paying with cards, which is not in dispute now.

24         MR SMOUHA: They were -- you have my point.

25         MR JUSTICE ROTH: Yes.

1 MR SMOUHA: It's trying to build an enormous amount of  
2 weight to try and draw inferences that actually there  
3 wasn't extensive coverage -- bilaterals coverage-- just  
4 on the basis of this point about Save & Prosper.

5 And then -- and, by the way, Save & Prosper used  
6 a different processor, and I will just give you the  
7 reference for that: {C1/197.1/1} and {C2/458.1/1}. They  
8 used FDR, not Europay.

9 Now, you will have seen -- just doing a quick turn  
10 of pages generally in relation to standard, you'll have  
11 seen -- and there are two things I draw attention to  
12 that you get a general sense of.

13 First, between pages 4 and 7 {B/55/4}, you see the  
14 general shift of standard rates from 1.0 to 1.3 between  
15 1992 and 1994. And if you go to page 13 {B/55/13},  
16 again, you just get a general sense of the emergence of  
17 electronic rates in 1993 at 1.0, which do not move from  
18 that figure; absolutely all of them and across the  
19 period to 1997.

20 So those are the rates that actually existed at the  
21 time. The Tribunal can see that they were widespread,  
22 NatWest having -- alone having 19 agreed rates.

23 Now, Mr Merricks makes the guidance and floor  
24 allegation in relation to those rates. In other words,  
25 he contends that the rates in these bilateral agreements

1           were caused by the EEA MIFs either by the application of  
2           a minimum or by use of the EEA MIFs as guidance.

3           And can I ask you just to look again at the way his  
4           positive case on this is set out in my learned friend's  
5           written submissions, {A/1/28}. This is paragraphs 76 to  
6           78 of Mr Merricks' written submissions. If we can just  
7           scroll up so we can see the whole of 76.

8           And then I'm going to go to some particular parts of  
9           this, but you'll just note, if we go over the page and  
10          look at 77 to 78 {A/1/29}, what you see there is this is  
11          entirely concerned with Mr Coombs' analysis. There is  
12          no reference to any facts, no reference to any  
13          contemporaneous documents and you'll notice that, also,  
14          there is no reference here to any actual EEA MIF rate  
15          and there is no reference here to any actual rate agreed  
16          in a bilateral.

17          Indeed, you may have noticed yesterday that in my  
18          learned friend's submissions, she did not make reference  
19          at any point in her submissions to an actual EEA MIF  
20          rate at all, not for any period, which when you consider  
21          what this trial is about is quite remarkable.

22          Anyway, the key point here is at paragraphs -- in  
23          paragraph 76 in the fourth line {A/1/28}:

24          "In particular, there is a strong correlation  
25          between weighted average intra-EEA MIFs and domestic

1 interchange fees in the Early Period ..."

2 "... a strong correlation between weighted average  
3 intra-EEA MIFs and domestic interchange fees in the  
4 Early Period ..."

5 And the key words obviously are "weighted average".  
6 And as the Tribunal will hear, what Mr Coombs has done  
7 is to apply weighted averages to these fees, which has  
8 the effect, of course, of producing an average between  
9 1.3 and 1 and so brings that a little closer to the  
10 actual EEA MIFs which we'll get from the MIFs table in  
11 a moment, so as to give at least a little more semblance  
12 of resemblance.

13 Now, I'm not addressing the fallacies of the  
14 economic analysis in Mr Coombs' approach. Mr Parker may  
15 say something about that a little later. The point here  
16 is that no such conversion of data to switch to  
17 a comparison currency of weighted averages is either  
18 necessary or appropriate because the Tribunal can,  
19 indeed we would say must, make the direct comparison of  
20 like rates with like rates.

21 And to see what the rates actually were as a matter  
22 of fact, that the correct currency of comparison, being  
23 actual rates and actual structure of categories, let's  
24 now go to the MIFs table at {A/18.1/2}, page 2 of the  
25 table.

1           And the Tribunal will see that for this period, so  
2 starting in 1992, as we looked at yesterday, the range  
3 of bilaterals in the square brackets shown in the  
4 first column for Mastercard UK and you see that the  
5 range in 1992 was -- for standard was between 1 and 1.1;  
6 electronic always 1. And then for 1993, the range was  
7 between 1 and 1.3; electronic 1, always 1.

8           Then in 1993 -- sorry, then in 1994, the same. No  
9 change.

10          Going over the page {A/18.1/3}, still just looking  
11 at the bilateral range, 1995, the same, no change; 1996  
12 the same, no change; and then in 1997, of course, the  
13 MIF set at 1.3.

14          Then going back to 1992 now, let's look at the  
15 Visa UK MIFs. Let's just quickly run through those.  
16 1992, Visa, 1.1 standard; electronic 1. 1993, Visa,  
17 standard, 1.3; electronic 1. And then it doesn't  
18 change. Visa, 1994, 1.3 and 1. 1995, Visa, 1.3 and 1.  
19 1996, Visa, 1.3 and 1.

20          And just to mention that the source documents for  
21 the -- if we just go back to 1993, the source documents  
22 for the information that Visa changed their MIF to 1.3  
23 is that that was a change with effect from 1 April 1993,  
24 and you see there in footnote 15 at the bottom reference  
25 to the documents which show that.

1 MR JUSTICE ROTH: So it's the case that although Mastercard  
2 didn't have a UK MIF, as we know, till November 1997,  
3 Visa had a UK MIF rather earlier; is that right?

4 MR SMOUHA: Yes, sir, and, in fact, we'll see a document  
5 shortly which makes specific reference to that.

6 MR JUSTICE ROTH: Do you happen to know, or perhaps  
7 someone -- and I don't need to see the document, just to  
8 orient it-- when? Did Visa start really by '92 already  
9 to have -- so when we see in the early part of this  
10 table, Visa UK (overspeaking) --

11 MR SMOUHA: (Overspeaking) --

12 MR JUSTICE ROTH: -- Visa --

13 MR SMOUHA: Yes.

14 MR JUSTICE ROTH: -- it's an actual MIF just as opposed  
15 to -- whereas we know Mastercard UK at that period is  
16 the range of bilaterals.

17 MR SMOUHA: I'll check and also give you a reference to  
18 that.

19 MR JUSTICE ROTH: Yes. I'm not so bothered about the  
20 reference because I'm sure it's not controversial. It  
21 just helps to understand what's happening.

22 MR SMOUHA: Absolutely.

23 And then -- and so, as I say, we see there the  
24 change of the Visa UK MIF to 1.3 with effect from  
25 1 April 1993 and then -- and, as I say, the Visa rates

1           then do not change.

2           Then the third column, the EDC cost studies, and  
3           then the EEA MIFs, and let's look at those.

4       MR JUSTICE ROTH: Yes. (Pause)

5       MR SMOUHA: So, sir, there's a document which shows that the  
6           Visa MIF was in place at least -- well, from some time  
7           before 1991 anyway, and the document reference is  
8           {C1/151/1}. Thank you.

9           Now, looking at the EEA MIFs across this period,  
10          back to page 2 {A/18.1/2}, the fourth column for 1992,  
11          and the first point to note, importantly, is that the  
12          EEA MIF was not a straight 1% during this period. It's  
13          shown in the table for 1992 as 0.5 to 1%, and that is  
14          because there were a number of discounts to the 1% that  
15          could apply to the EEA MIF, and footnote 12 explains  
16          what all of those are and gives the references. I'm not  
17          going to go through them. There were a number of them.

18          The same was true in 1993 and in 1994; same range,  
19          same discounts, no change.

20          So what do we see from a comparison of the rates as  
21          they actually were and the changes in them? The  
22          resemblance between the bilateral rates for Mastercard  
23          and Visa's UK MIFs is obvious and striking, in  
24          particular, the increase in bilaterals at the 1.3% level  
25          around 1993/1994 following the 1993 increase in Visa's

1 standard UK MIF from 1.1 to 1.3.

2 Equally striking is the absence of any resemblance  
3 between the 1.3 and 1 rates UK -- for the UK -- for the  
4 bilaterals, and the EEA MIFs in this period, which range  
5 from 0.5 to 1% until 1994.

6 In 1994, you will note, just looking down the  
7 categories -- sorry, 1995, apologies. Sorry, 1995, you  
8 will note that there is a -- sorry, just one moment.  
9 Let me just check. 1994 for Visa, there is a new  
10 secured electronic category and in 1995, there is then  
11 a new secured electronic category for the EEA MIF. You  
12 will note that that category does not get introduced in  
13 the UK.

14 MR JUSTICE ROTH: Sorry, which -- we're on page --

15 MR SMOUHA: So on page 3 {A/18.1/3} --

16 MR JUSTICE ROTH: Yes, in 1994 --

17 MR SMOUHA: '94, Visa EEA MIF --

18 MR JUSTICE ROTH: Yes.

19 MR SMOUHA: -- introduces a new secured electronic category  
20 with a rate of 0.6%.

21 MR JUSTICE ROTH: Well, I think it's the fact that it can go  
22 up to 0.9 that's new, I think, because --

23 MR SMOUHA: Sorry, that --

24 MR JUSTICE ROTH: -- it had 0.6% in '93.

25 MR SMOUHA: Sorry, let me start again, sir, because I'm not

1           being comprehensive. In 1994 for Visa EEA --

2           MR JUSTICE ROTH: Yes.

3           MR SMOUHA: -- there are a number of changes. So standard  
4           changes from 1 to 1.2.

5           MR JUSTICE ROTH: Yes.

6           MR SMOUHA: Electronic changes from 0.6 to a range of 0.6 to  
7           0.9 and then as well, there is introduced a new category  
8           of secured electronic, which there wasn't in 1993, and  
9           that at a rate of 0.6.

10          MR JUSTICE ROTH: Yes.

11          MR SMOUHA: In 1995 for Mastercard EEA, there is a change in  
12          standard rate, increase to 1.15% from what had been the  
13          range 0.5 to 1. There is a single rate for electronic.  
14          So it had been 0.5 to 1, but it is now 0.9. And then  
15          Mastercard EEA also introduces a new secured electronic  
16          category with a rate of 0.75%.

17                 That category is not introduced in the UK. As you  
18          see, 1996, nothing -- it doesn't then feature in  
19          bilaterals, and then when the rate is set in 1997, it  
20          doesn't appear either.

21                 So there is no change in the bilaterals that reflect  
22          in any way what's happening in relation to the  
23          Mastercard EEA MIF both as to rates or as to categories.

24                 Now, we've set out the reasons for this at some  
25          length in our written opening, what we say are reasons

1           that are -- and why those rates were in the bilaterals  
2           as they were and why it is readily apparent that there  
3           was absolutely no relevance or impact of the EEA MIFs.

4           We say, first, what the banks did in fact is obvious  
5           from the agreements they reached on the structure and  
6           the level of rates which you've just looked at in the  
7           bilaterals table, taking into account also Visa's rates  
8           and the EDC cost studies.

9           The cost studies and Visa's rates were, of course,  
10          doubly important because they also informed the  
11          so-called reference rates which were set by MEPUK from  
12          1994 onwards, which were also at 1.3 and 1%, and you'll  
13          be hearing evidence about the reference rates from the  
14          witnesses.

15          Third, and of equal importance, there is no  
16          evidence, no evidence at all, of banks taking the  
17          EEA MIFs into consideration when reaching their  
18          bilateral agreements. None was identified to you in  
19          Mr Merricks' written opening and none was identified to  
20          you orally yesterday.

21          They were not a factor. They were not a minimum.  
22          They were not a floor. They were not guidance. They  
23          were just not a cause or a factor at all.

24          What we see in the contemporaneous documents is, as  
25          we saw with Debit Mastercard, we see consideration of

1 UK-specific market considerations, consideration of  
2 competitive factors, in particular Visa, reference to  
3 costs and cost studies, and the absence of reference to  
4 EEA MIFs when discussions take place about factors that  
5 are being considered in bilateral negotiations.

6 PROFESSOR WATERSON: You have not mentioned the cost  
7 studies -- I mean, well, you mention them, but you  
8 didn't make a point on them. I'm struggling to  
9 understand your point on the cost studies.

10 MR SMOUHA: Our point on the cost studies was only in terms  
11 on the evidence, and we'll see this in a second in  
12 a couple of documents; that they were taken into  
13 consideration. I don't put it higher than that and  
14 I don't need to put it higher than that because I don't  
15 have a case to prove as to how different factors may or  
16 may not have been weighted. And, sir, you're going to  
17 hear evidence about that indeed from -- in relation to  
18 cost studies.

19 But, as I say, I identified at the outset that they  
20 were a factor. They were taken into consideration. We  
21 see references in the documents to costs and the cost  
22 studies being considered.

23 PROFESSOR WATERSON: Well, I'll await that evidence. Thank  
24 you.

25 MR SMOUHA: Can we look then at a couple of examples of

1 evidence in relation to what was considered and what  
2 wasn't considered; {C3/160/1}.

3 MR JUSTICE ROTH: Can we put the table away at the moment or  
4 do you wish to come back to it?

5 MR SMOUHA: Yes, we can. Thank you, sir. I should have  
6 anticipated that.

7 Sir, these are the minutes of a special meeting of  
8 the Rules & Conciliation Committee of MEPUK on  
9 7 May 1996, which deal -- which discussed interchange  
10 fees, including reference rates.

11 First of all, note the list of attendees. They're  
12 from NatWest, RBS, Midland, which, of course, later  
13 HSBC, Barclays, TSB, Bank of Scotland and so on.  
14 Together, those banks accounted for almost the whole of  
15 the market.

16 The first discussion item is "UK Interchange Cost  
17 Update 1996", and there's no need to read now the  
18 first paragraph, but you will note at the bottom of the  
19 page the subheading "Review of the draft formal Report  
20 from Edgar, Dunn & Co dated 20th February, 1996". So  
21 here we are straight into a consideration of cost  
22 studies:

23 "Mr Griffin ..."

24 So Mr Griffin is from Edgar Dunn. He appears at the  
25 top:

1            "... recapped the earlier results ..."

2            And then those are set out.

3            If we go over the page to page 2 {C3/160/2}, what  
4            Mr Griffin was doing was going through the draft formal  
5            report from Edgar Dunn discussing findings as to certain  
6            elements of costs, and then you will see that he gives  
7            Edgar Dunn's breakdown for costs for 1995. So you see  
8            this in -- where the figures are. He's -- page -- it  
9            says "Page 6", which must be referring to page 6 of the  
10           draft report that he's presenting:

11           "Breakdown

12           "1995 Electronic, 1.09%.

13           "1995 Standard, 1.45%."

14           Then if we go to page 4 {C3/160/4}, under the  
15           heading "Interchange Fees/Costs":

16           "Mr Hawkins pointed out that the rates, namely  
17           1.46% Standard and 1.09% Electronic were, he believed,  
18           higher than the competition. Mr Griffin stressed that  
19           his report concerns costs whereas figures being quoted  
20           for VISA were fees and he underlined the danger in  
21           comparing costs with fees. Mr Hawkins acknowledged that  
22           there was no process in the UK for determining fees,  
23           rather than costs, for the MCI scheme. Mr Strachan  
24           asked whether the MEPUK Board would be comfortable in  
25           discussing fees and Mr Ashe-Taylor advised that UK Rules

1           were best put in place by EPI. Mr Nelson was asked  
2           whether EPI had the authority to introduce UK Domestic  
3           Interchange Fee rates. He felt that EPI would accede to  
4           a request from the MEPUK Board to introduce fallback  
5           rates which would apply in the absence of bi-lateral  
6           agreements, but he would check to confirm.

7           "If confirmed, it appeared that the way forward  
8           would be for R&CC to suggest rates to MEPUK Board; Board  
9           would support the proposals and then request EPI to  
10          introduce a UK Domestic Rule. Mr Griffin referred to  
11          the challenge on interchange rates mounted by the Retail  
12          Consortium some two years ago. At that time, the  
13          challenge was successfully resisted and he asked whether  
14          this suggested way forward would be likely to stand up  
15          to a similar challenge. Mr Ashe Taylor said that he  
16          would review the previous complaint and see whether  
17          issues raised in that complaint would be likely to  
18          recur."

19          So one sees this all arising out of a discussion of  
20          the cost figures which Edgar Dunn had -- Mr Griffin has  
21          presented to them.

22          If we then go to the top of page 5 {C3/160/5},  
23          second --

24          MR JUSTICE ROTH: Before you jump --

25          MR SMOUHA: Sorry.

1 MR JUSTICE ROTH: -- the reference to the Commission at the  
2 bottom of page 4, that's the -- this is 1996. This is  
3 the -- is that the Monopolies Commission or the  
4 European Commission or are we not sure?

5 MR SMOUHA: We don't know. Well, I say we don't know --

6 MR JUSTICE ROTH: Yes. Well, Mr Hawkins might vaguely  
7 remember.

8 MR SMOUHA: Yes, good point, sir. We can ask him.

9 MR JUSTICE ROTH: Yes.

10 MR SMOUHA: Top of page 5 {C3/160/5}, second indent:

11 "Mr Ashe-Taylor sounded a note of warning that in  
12 discussing interchange categories and rates, members  
13 should bear in mind the need to be able to demonstrate,  
14 in court if necessary, that they had come to decisions  
15 independent of other schemes."

16 Then under the heading "Interchange Fees":

17 "The debate then turned to consideration of fees,  
18 both current and to be proposed.

19 "Mr Hawkins proposed the following ..."

20 Standard -- well, the current is 1.3% and he -- the  
21 cost-based, so that's the EDC figure, 1.46%, and he  
22 proposed 1.35%. For electronic, current was 1.  
23 Edgar Dunn costs shown at 1.09%. Mr Hawkins proposed  
24 1.05%.

25 Yes, sorry, Mr Cook has pointed out the reference to

1 "Current", what was currently 1.3 and 1, that is the  
2 reference rates that MEPUK had set essentially as  
3 guidance, and Mr Hawkins is proposing a change to the  
4 reference rates to increase them from 1.3 to 1.35 and  
5 from 1 to 1.05.

6 Now, a couple of points, sir.

7 MR JUSTICE ROTH: Before you start making your point, I am  
8 just trying to understand what's going on. They have  
9 commissioned a cost study, which I understand, but when  
10 they're talking about -- what you showed us on page 2,  
11 those are the costs, are they, that 1.09 and 1.45 that  
12 you refer to?

13 MR SMOUHA: Yes, so if you go back to page 2 {C3/160/2} --

14 MR JUSTICE ROTH: Yes.

15 MR SMOUHA: -- they're the ones which Mr -- which must have  
16 been set out on page 6 of the Edgar Dunn report which  
17 Mr Griffin is taking the board -- sorry, the committee  
18 through.

19 MR JUSTICE ROTH: And that's overall costs, is it?

20 MR SMOUHA: Yes.

21 MR JUSTICE ROTH: Then the -- I'm trying to --

22 MR SMOUHA: So in other words, Mr --

23 MR JUSTICE ROTH: Because it's referred to as rates.

24 MR SMOUHA: It's clear that that's what those figures are.

25 It's clear that those are the figures that have come out

1 of the cost study. So what Mr Hawkins is doing -- and,  
2 sir, for present purposes, I don't want to get into  
3 matters that Mr Hawkins can be asked about, but it's  
4 clear that what's happening here is that Mr Hawkins is  
5 proposing an increase in the reference rates in the  
6 light of the Edgar Dunn analysis. The costs in relation  
7 to standard and electronic are at 1.46 and 1.09.

8 PROFESSOR WATERSON: Can you help me here? These costs,  
9 these are clearly above the rates that are talked about,  
10 so in what sense are the costs influencing the rates?

11 MR SMOUHA: Sir, again, in relation to this discussion, if  
12 I may, can I suggest I shouldn't venture that in terms  
13 of the -- because Mr Hawkins is going to be giving  
14 evidence in relation to that.

15 And the reason -- sir, again, I would emphasise that  
16 for our purposes and for the tribunal's purposes in  
17 terms of considering what you have to consider, you do  
18 not need to and should not be determining, in relation  
19 to any particular period or any particular rate being  
20 set, what were the relative weighing of factors such as  
21 the competition or cost studies, which, of course, may  
22 have been in relation to different banks and individuals  
23 in the MEPUK discussions.

24 They may have had different views about how  
25 important Visa was, how important cost studies were. It

1           doesn't matter. What is the reason for looking at this  
2           material? There is only one reason for looking at it.  
3           It is: do we see anything at all that refers to the  
4           EEA MIF? Do we see that being a factor in any respect  
5           at all? To which the answer is no.

6           MR JUSTICE ROTH: Well, I see one can do it on a purely  
7           negative way, but I think sensibly one looks at it in  
8           the positive way as well, saying: well, what were the  
9           factors that led to the decision? I think your point is  
10          we don't have to weigh those factors precisely, but  
11          I think we want to get a sense of what were the  
12          significant factors that were influencing the decision.

13          MR SMOUHA: Absolutely, and I hope, sir -- when I set out my  
14          nine points, point seven --

15          MR JUSTICE ROTH: Seven --

16          MR SMOUHA: Point seven is Visa, competitive considerations.

17          MR JUSTICE ROTH: And point eight is --

18          MR SMOUHA: And point eight is cost --

19          MR JUSTICE ROTH: So --

20          MR SMOUHA: So that's exactly my point; contemporaneous  
21          evidence of those factors being considered. I'm not  
22          shying away from that. Absolutely not. I'm --

23          MR JUSTICE ROTH: So the answer --

24          MR SMOUHA: It's the weight point, which is --

25          MR JUSTICE ROTH: -- to the question is that you don't know

1           necessarily what weight, but it was taken into account  
2           in a significant way.

3       MR SMOUHA:  Exactly.  Of course, let's be realistic about  
4           this.  The best way to prove the negative in relation to  
5           something not being considered and not a factor is by  
6           showing those matters that were considered, and that's  
7           why we absolutely do address that and positively.

8           The only thing which is not necessary to do, because  
9           it's simply irrelevant to the causation question, is to  
10          decide in relation to any particular decision what the  
11          factors -- what the significance or weight was of  
12          particular factors as against each other.

13          You're not -- there's no -- you're not deciding  
14          whether Mr Hawkins' proposal was driven only by the cost  
15          figures or competitive considerations, which are also  
16          mentioned, or how those weigh between each other.

17       MR JUSTICE ROTH:  And when they talk about their proposals  
18          on page 6, I think, if we can go to page 6, please, of  
19          this document {C3/160/6}, "Proposals to MEPUK Board",  
20          the paper and so on, proposing a structure, a range of  
21          rates would be quoted.  These are all sort of guidance  
22          rates or reference rates.

23       MR SMOUHA:  Correct, yes.  So -- and what I want to do now  
24          is now go on to see what happens when this goes to the  
25          board, so --

1 MR JUSTICE ROTH: So just to be clear, initially, I got the  
2 impression there was a period with all the bilaterals  
3 and then come 1997, you've got a UK MIF being set. In  
4 fact, in the earlier period, MEPUK was issuing guidance  
5 rates to the members for the purpose of their bilateral  
6 negotiation; is that right?

7 MR SMOUHA: I don't think it would be -- I don't think it  
8 would be correct to characterise it as issuing in the  
9 sense of there being a document. That's one of the  
10 issues, because they clearly thought that they should  
11 not document it as formal guidance and, also, one  
12 doesn't have a document which says, "These are the  
13 reference rates".

14 The -- Mr Merricks says in relation to that, "Oh,  
15 well, then how did the banks who were negotiating  
16 bilaterals even know about these?" To which the answer  
17 is, well, how did they know about it? Because --

18 MR JUSTICE ROTH: Well, they're all sitting there.

19 MR SMOUHA: -- they're all sitting there on MEPUK.

20 MR JUSTICE ROTH: Yes, but it is effectively a sort of  
21 guidance to them. That may be why they were so careful  
22 to have a solicitor sitting there with them as to what  
23 they can and cannot do.

24 MR SMOUHA: That appears to be -- that appears to be exactly  
25 it, sir, on the evidence.

1 MR JUSTICE ROTH: Because, they -- you know, they go on to  
2 say: when should it come in? Bottom of page 5  
3 {C3/160/5}:

4 "... any changes in the rates should come into  
5 effect in January 1997."

6 Well, that's not talking about costs, is it?

7 MR SMOUHA: No.

8 MR JUSTICE ROTH: So they were, as it were, guiding their  
9 members of what they should do regarding interchange  
10 fee. We're not addressing at the moment whether there  
11 was -- how that fitted with competition law at the time.  
12 That's not now before us. But it means that the  
13 bilateral negotiations, there was this common -- there  
14 was some common guidance behind it, even if they didn't  
15 call it guidance or some reference points.

16 MR SMOUHA: Precisely so, sir.

17 MR JUSTICE ROTH: And I don't know when that really started  
18 or whether that -- but we can ask Mr Hawkins, who was  
19 deeply involved, whether that went right back to '92.  
20 Yes, I see. Thank you.

21 MR SMOUHA: As you'll also see, it's sometimes described as  
22 a reference rate. It's sometimes described as  
23 a fallback rate and -- but clearly it was either as  
24 guidance -- on documents, either as guidance or a factor  
25 in terms of what was considered by MEPUK to be

1 appropriate; a matter that, as it were, was hanging over  
2 every bilateral negotiation in a way that EEA MIFs were  
3 absolutely not.

4 Now, that proposal that we see here from Mr Hawkins  
5 to increase the level of fees because of increased costs  
6 was rejected by the board, by the MEPUK board. And it's  
7 interesting to see why they rejected it because the  
8 reasons for rejection were nothing to do with EEA MIFs.  
9 They don't get referred to.

10 And, secondly, it's interesting because the board's  
11 discussion shows the understanding of MEPUK and the  
12 banks that the reference rate that they were discussing  
13 and setting was the fallback rate that would apply in  
14 the event of an arbitration.

15 Now, of course, Mr Merricks submits that the rules  
16 provided for something different, but what matters is  
17 not who has the better of the argument in 2023 as to  
18 what the correct legal interpretation of Mastercard or  
19 Europay Rules might be or might have been had it arisen  
20 for determination. What matters is what did the banks  
21 understand the position to be when they negotiated  
22 bilaterals?

23 And the board discussion of the R&CC's proposal that  
24 Mr Griffin had brought forward in the R&CC to increase  
25 rates is a good example and illustration of that

1 understanding.

2 If we can go to the board minutes -- yes, that may  
3 be -- sir, would that be an appropriate moment to have  
4 our mid-morning break?

5 MR JUSTICE ROTH: Yes, and we'll come back. Are you on  
6 time? We've encroached on you a bit.

7 MR SMOUHA: Yes, we will be on time, one way or t'other.  
8 (11.50 am)

9 (A short break)

10 (12.05 pm)

11 MR SMOUHA: The board discussion of R&CC's proposal to  
12 increase rates is at {C3/268/1}, which should be on the  
13 screen, the board meeting of 8 August 1996.

14 We can see the discussion of the proposal at page 9  
15 {C3/268/9}, minute 53/96, and you will note the heading,  
16 "Adoption of 1997 Arbitration Fallback Rates". And then  
17 the discussion:

18 "Mr Godfrey opened the discussion by stating that he  
19 would resist any proposal for an increase in the  
20 fallback rates as he did not believe they were  
21 sustainable in the marketplace. He also commented that  
22 a full review of the card industry may take place  
23 shortly at the instigation of the [DTI].

24 "Following a lively debate, it was agreed not to ask  
25 EPI to change the arbitration process and fallback rates

1 and that arbitration should continue to be handled by  
2 MasterCard. Mr Hawkins was asked to convey the thanks  
3 of the Board to the R&CC Interchange Sub-Group."

4 So as far as the bank members of the MEPUK board are  
5 concerned, they appear to have understood that they were  
6 setting reference rates which would operate as fallback  
7 rates in the event of arbitration.

8 MR JUSTICE ROTH: What does that mean? Someone is going to  
9 explain that at some point.

10 MR SMOUHA: Sir, as I say, that's certainly appropriate for  
11 Mr Hawkins and maybe other witnesses to be asked, but,  
12 as I say, in terms of an understanding, in terms of what  
13 they're referring to, it's clear they're referring to  
14 the reference rates. They're rejecting a proposal to  
15 increase them and they have some understanding that  
16 these have something to do with what -- with the  
17 arbitration process, if it happens.

18 The important point in relation to the reasons for  
19 rejection: Mr Godfrey's reference to them not being  
20 sustainable in the marketplace, in other words,  
21 a competitive-- UK domestic competitive considerations.

22 MR JUSTICE ROTH: And EPI are who?

23 MR SMOUHA: Europay.

24 So what happens? We know bilaterals continue to be  
25 negotiated on the basis of reference rates of 1.3 and 1,

1 which is reflected in all of the bilaterals in the  
2 bilaterals table for 1997, and then, of course, with  
3 effect from 1 November 1997, MEPUK sets the MIF, which  
4 is set at 1.3 and 1.

5 Let me show you another example and rather germane  
6 to a submission my learned friend made yesterday. At  
7 the transcript reference {Day1/50:22}, my learned friend  
8 said this:

9 "... as I say ... we don't have, of course,  
10 disclosure from the banks which record their  
11 negotiations, so we don't have any disclosure which  
12 record their negotiations."

13 Now, of course my learned friend is correct that we  
14 do not have general disclosure from the banks, but we do  
15 have an example, and a very good one, of documents which  
16 record the negotiations of a bilateral. This is at  
17 {C2/34/1}.

18 This is a letter from Mr Clements of NatWest to  
19 Mr Williamson, the treasurer of HFC Bank, dated  
20 31 December 1993, and you will see from the first line  
21 that it is responding to HFC Bank's bilateral proposals  
22 in a letter of 24 December 1993, which one has to say is  
23 rather sad that these dedicated bankers were having to  
24 write letters on Christmas Eve and New Year's Eve to try  
25 and get things settled, presumably, by year end.

1           Anyway, can we just see what it says:

2           "Thank you for your letter of 24 December 1993  
3           containing your bilateral interchange fee proposals in  
4           respect of MasterCard and Visa Card ... UK domestic  
5           transactions emanating from cards issued by HFC Bank and  
6           acquired by National Westminster Bank. Please note we  
7           act for Ulster Bank Limited, a subsidiary of the  
8           NatWest Group, where they are, similarly, an acquirer,  
9           and they are also, therefore, included in the  
10          arrangements now addressed. Our response to your letter  
11          is as follows:

12                 "Point of Sale Transactions

13                 "MasterCard and Visa credit cards ...

14                 "We agree with the rates you suggest of 1.3% of the  
15          transaction value for standard (paper) transactions and  
16          1% of the transaction value for electronic transactions,  
17          until 31 March 1994 and to be reviewed again by that  
18          time."

19                 Then says they agree with the general description of  
20          electronic transactions, and then:

21                 "Whilst these rates, now agreed between us, will be  
22          automatically recognised in the Visa processing system,  
23          as they mirror the UK default rates for that scheme,  
24          I know that you are aware that this is not the case for  
25          domestic MasterCard transactions where it is necessary

1 to submit bilateral interchange fee instructions to  
2 Europay, for systems implementation."

3 And then over the page {C2/34/2}, page 2, there's  
4 reference to the various forms and then the last  
5 three lines of that top paragraph:

6 "I should point out to you that, in the meantime and  
7 until effected in Europay's system, the current  
8 MasterCard International fallback rate of 1% for all  
9 transactions will automatically apply."

10 "... the current MasterCard International fallback  
11 rate of 1% ..."

12 Now, sir, this is valuable evidence, almost 30 years  
13 old, of the process of agreeing bilaterals in action and  
14 involving the biggest acquirer, NatWest, which had  
15 a 32.5% shareholding of MEPUK.

16 Sir, do you want the reference for the hard copy of  
17 this letter?

18 MR JUSTICE ROTH: Do we have the letter the other way to  
19 which he's replying, the Christmas Eve letter?

20 MR SMOUHA: No, we do not. We'll double-check, but no, we  
21 don't. This -- the hard copy of this one is in the  
22 first volume.

23 MR JUSTICE ROTH: Yes, but it does get me to ask the  
24 question again, the question I asked before the break  
25 about Visa, because I thought I'd understood that I was

1 told that Visa did have a UK MIF --

2 MR SMOUHA: Well --

3 MR JUSTICE ROTH: -- but here we are from -- I think you  
4 said by 1991, but it's clear that here we have two banks  
5 negotiating a bilateral for Visa and what they say in  
6 the letter suggests that what Visa had was maybe  
7 a UK fallback rate, but not -- but it was not  
8 a definitive rate.

9 MR SMOUHA: No, that's not -- well, my understanding of  
10 what's being said here is that MIF have got -- sorry,  
11 Visa have got a MIF and which will therefore be set in  
12 the systems, in the Europay system, to apply --

13 MR JUSTICE ROTH: We're not in Europay, but in the Visa  
14 system.

15 MR SMOUHA: Sorry, in the Visa system, there will be --  
16 because Visa have set a MIF, that system will apply the  
17 MIF, unless they are told that something different has  
18 been agreed bilaterally. And as I understand what's  
19 being said here is because the rate they are agreeing is  
20 at the level of the Visa MIF, that will automatically be  
21 recognised because "as they mirror the UK default rates  
22 for that scheme", so that must be a reference to the  
23 Visa MIF.

24 MR JUSTICE ROTH: Yes, I see.

25 MR SMOUHA: So they're saying, "We don't need to worry about

1 notification of what we're agreeing to for the Visa  
2 processing system, because it's the same rate. However,  
3 we do need to notify Europay of what we're agreeing in  
4 relation to Mastercard because otherwise" -- and then  
5 this is what he is saying is his understanding.  
6 Otherwise, he understands that Europay will apply the  
7 current Mastercard International fallback rate of 1%.

8 And that is important because my learned friend's  
9 submission is that the Mastercard and Europay Rules,  
10 when referring to "international interchange fee",  
11 should be interpreted as referring to the EEA  
12 intra-regional MIF. We say that, as you know from our  
13 submissions, when correctly interpreted, "international  
14 interchange fee" in the rules is referring to the  
15 Mastercard International inter-regional rate.

16 Well, here we have a document in which NatWest  
17 expressly say and refer to Mastercard International  
18 fallback rate. The "Mastercard International"  
19 descriptor tells you that he is referring to the  
20 inter-regional rate set by Mastercard in the US. Now,  
21 sir --

22 MR JUSTICE ROTH: Why is that so clear? I mean, it's not  
23 the UK, but, as we know, the EEA rate was basically 1%.

24 MR SMOUHA: No, the key -- what is clear from -- is the  
25 reference to Mastercard International. Yes, and of

1 course, sorry, the position in relation to the EEA MIF  
2 at that time was there wasn't a single 1% rate because  
3 there were lots of -- it was 0.5 to 1%, depending on  
4 which discounts applied.

5 MR JUSTICE ROTH: Well, there was one discount, I think, of  
6 0.5 --

7 MR SMOUHA: No, three, I think. No, no, I think --

8 MR JUSTICE ROTH: -- of authorisation requests generated for  
9 100% of electronic transfers. That's what footnote 17  
10 says to the table.

11 MR SMOUHA: Yes, there's the first sentence of footnote 17.  
12 Then the next one {A/18.1/2}:

13 "Paper based transactions were also subject to  
14 a reduced interchange fee in certain circumstances where  
15 the local floor limit for a transaction category was  
16 below the intra-European floor limit ..."

17 And then -- and petrol.

18 MR JUSTICE ROTH: Oh, it's petrol, yes. Yes. Yes, I see.

19 MR SMOUHA: Now, sir, I know you have this well on board,  
20 but very importantly, we say the question around the  
21 rules and the interpretation of them, we say the  
22 question for you is not: what is the correct  
23 interpretation of them as a legal question? The  
24 question is: what was the understanding of banks when  
25 negotiating bilaterals?

1 MR JUSTICE ROTH: Yes.

2 MR SMOUHA: So in this regard, this document --

3 MR JUSTICE ROTH: Yes, we've got that point.

4 MR SMOUHA: You've got it. The other points one gets from  
5 this document are, first of all, the adoption and  
6 agreement of 1.3% for standard and 1% for electronic,  
7 consistent with the prevailing change across a large  
8 number of bilaterals that were moving from 1% in 1993 --  
9 1% standard in 1993 to 1.3% in 1994.

10 Secondly, the reference to Visa. So you have the  
11 mirroring of Visa's 1.3 and 1.

12 And then the last point I can make off this document  
13 is the point I've made off all the documents; that there  
14 is no and never is a reference to the EEA MIF as  
15 a factor at all in relation to the rates that they are  
16 agreeing. Even if, which I do not accept, there was any  
17 ambiguity about the reference at the end to  
18 Mastercard International fallback rate, that is in the  
19 context of a discussion about notification and systems.  
20 It is not any indication that there has been any  
21 consideration of the EEA MIF in relation to the choice  
22 and agreement of the rates which were being agreed in  
23 this bilateral.

24 Sir, that brings me, but I have made this point and  
25 foreshadowed, to the submission made by Mr Merricks that

1 throughout 1992 to 1997, the bilaterals era, it was the  
2 EEA MIF that applied as a fallback in the absence of  
3 a bilateral rate.

4 Sir, we have -- we don't shy away from the --  
5 altogether from the argument as to what the rules mean.  
6 We have -- on the contrary, we have developed at  
7 considerable length and detail in our written  
8 submissions in paragraphs 41 to 53 our analysis, which  
9 we say demonstrates that Mr Merricks' submissions on the  
10 interpretation of the 1989 Mastercard Rules and the  
11 1993 Mastercard Rules and the 1991 Eurocard Rules and  
12 the 1993 Eurocard Rules is wrong.

13 But it really matters not. It is clear that in this  
14 trial, what this trial is all about -- exclusively about  
15 facts and, therefore, about what, as a matter of fact,  
16 was happening in the bilaterals era and what the banks  
17 understood.

18 There is no purpose whatsoever in the Tribunal  
19 hearing and determining, in effect, the construction  
20 summons that asks, for historical interest alone, what  
21 the proper interpretation is of two sets of rules that  
22 operated in tandem but which, as we readily accept, were  
23 not crystal clear and their interface was potentially  
24 confusing. The correct legal answer is irrelevant.

25 In fairness to Mr Merricks' submissions, my learned

1 friends accept in paragraph 42 of their written  
2 submissions that ultimately, the question for the  
3 Tribunal turns on what happened in fact, not on the  
4 question of interpretation.

5 And, again, in our written submissions, we've  
6 identified a large number of documents which  
7 Mr Merricks' submissions do not address, which run  
8 counter to the suggestion that there was any  
9 understanding that the EEA MIF would be applied as  
10 a fallback under the rules pending arbitration. And in  
11 paragraph 50 of our submissions, we identify documents  
12 from 1992, 1993, and 1996 that show that even Europay  
13 did not have that understanding.

14 So, sir, what we will ask you to find at the  
15 conclusion of the trial and for -- and on the basis of  
16 the evidence, which we have developed very fully in our  
17 written submissions, is, first, that bilateral  
18 agreements were ubiquitous in this period: see  
19 paragraphs 58-64 of our written submissions, four pages  
20 of analysis of the evidence replete with  
21 cross-references to extensive contemporaneous evidence  
22 which really has not been answered at all.

23 Second, they were negotiated -- the bilaterals were  
24 negotiated by reference to three factors: competitive  
25 conditions, in particular Visa, cost studies based on

1 UK costs and reference rates.

2 Third, there was no general understanding that the  
3 EEA MIF applied in fallback or default which somehow  
4 informed negotiations.

5 Fourth, the EEA MIF was irrelevant to those  
6 negotiating -- who were negotiating bilaterals, and  
7 irrelevant to MEPUK in considering what it called the  
8 reference rate, which was the closest thing to any kind  
9 of guidance that was in play.

10 And, finally, that the great majority of bilateral  
11 agreements were agreed at levels and in a structure  
12 reflecting/mirroring Visa's UK MIFs, in other words --  
13 and which were significantly different in both structure  
14 and level from the EEA MIFs. In other words, no factual  
15 causation.

16 My learned friend told you twice yesterday that your  
17 decision as to the role of the EEA MIF, if any, in  
18 bilateral negotiations is potentially decisive against  
19 Mr Merricks. Now, the way she put it, of course, was  
20 the question for decision of the interpretation of the  
21 rules and we say the question is a factual one as to  
22 whether the EEA MIF had any role in fact in the agreeing  
23 and setting of rates in bilaterals, which depends on the  
24 understanding of the banks.

25 But we completely agree that this point is

1 potentially decisive against Mr Merricks' whole case.  
2 As my learned friend put it in relation to Mr Merricks'  
3 case on the early period, if the Tribunal found against  
4 Mr Merricks on this key point, she said:

5 "We accept that we would not be able to establish  
6 but for causation in respect of the early period as the  
7 mechanisms on which we rely would collapse, so  
8 Mr Merricks' case on the early period would fall down at  
9 this preliminary stage".

10 We agree. The transcript references are  
11 {Day1/46:21} and {Day1/62:24}.

12 Sir, let me turn very briefly then to deal with the  
13 direct application issue. So this is Mr Merricks' case  
14 that there was a direct application of the EEA MIF to  
15 a substantial proportion of transactions at the  
16 processing stage within Europay's internal systems.  
17 Now, this is a different issue, of course, from the  
18 causation mechanism such as guidance and floor.

19 We submit that taking all the evidence into account,  
20 the Tribunal can safely conclude and should conclude  
21 that if there were any such transactions to which the  
22 processing system applied the EEA MIF, they would not  
23 have been material in volume and had no or negligible  
24 impact on fees.

25 Let me just give you the references in our

1 submissions to pull them together. I'm not going to go  
2 over those points. Paragraphs 19 to 20, 57, 91 to 99,  
3 104 and 184.

4 All except the last of those references deal with  
5 contemporaneous evidence. Paragraph 184 deals with  
6 Mr Parker's expert analysis in his reply report,  
7 annex A, paragraph A.18, where he concludes that there  
8 is no evidence -- no evidence -- that any UK domestic  
9 transactions took place at the EEA MIF rates during 1995  
10 to 1997.

11 Obviously, if you accept our submission on this  
12 point, then you don't need to be concerned with the  
13 issue that my learned friends have raised about what the  
14 issue is for determination at this trial and whether  
15 there was always planned or expected to be a future  
16 quantification trial of direct application. If you  
17 accept our submission that there were no material volume  
18 of transactions, then that's the answer.

19 MR JUSTICE ROTH: On what you said about Mr Parker, I mean,  
20 that's -- you said "no evidence that took place".

21 That's to say he's reviewed the documents and that's  
22 his --

23 MR SMOUHA: No, no --

24 MR JUSTICE ROTH: He is saying no evidence --

25 MR SMOUHA: It's a matter of analysis. (Pause)

1           Mr Cook will say something about that when -- he is  
2           going to say something about the expert evidence.

3           MR JUSTICE ROTH: Yes.

4           MR SMOUHA: It's {A/21/57}. It's in the annex,  
5           paragraph A.18 and it's at (b).

6           MR JUSTICE ROTH: Yes, I see. It's a conclusion he's  
7           reached from looking at weighted average.

8           MR SMOUHA: Exactly so.

9           MR JUSTICE ROTH: Yes.

10          MR SMOUHA: Yes, also (c); that if there had been a material  
11          proportion of transactions, then there would be  
12          a notable jump in the weighted average, but the average  
13          actually fell.

14          MR JUSTICE ROTH: Yes.

15          MR SMOUHA: Sir, as I say, if you accept -- if you make  
16          a finding, as we say you should, as to there being no or  
17          no material volume of transactions to which the EEA MIF  
18          was directly applied, then obviously there isn't  
19          a difficulty or isn't even an issue, as it were, of  
20          quantification of proportion.

21          But let me just say in relation to that, in relation  
22          to the issue which, sir, you asked my learned friend  
23          about yesterday and the suggestion there might have been  
24          some expectation on the other side that there could be  
25          some sort of later quantification hearing, sir, that

1 issue is fairly and squarely within the scope of this  
2 trial.

3 The evidence -- all the evidence that there is, with  
4 ever -- sorry, with whichever limitations of information  
5 there are is what it is, and it's for the Tribunal to  
6 determine that issue. We don't accept at all that there  
7 can ever have been any basis for thinking that that  
8 somehow would be a further phase to determine something  
9 which, if there was, there couldn't be any further  
10 evidence or disclosure to come in relation to it.

11 In relation to the transaction data, sir, the  
12 position is what it is. If it doesn't exist, it doesn't  
13 exist. So there's no going back on that.

14 I do, though, sir, want to just make the position  
15 absolutely clear. When there was a hint that somehow,  
16 perhaps on the other side, they may have been coming  
17 into this trial thinking that there could have been  
18 somehow a revisiting of the question in relation to  
19 disclosure of transaction data, the position is not that  
20 it was said that it existed but was not proportionate to  
21 disclose. The position -- I'm going to give you the  
22 references, but I'm not sure it's in the bundle yet, but  
23 we can add it in.

24 The relevant witness statement was the  
25 second witness statement of Mr Sansom of

1 12 September 2022, and what Mr Sansom said in his  
2 witness statement was, at paragraph 56(a):

3 "It is unlikely that reliable transaction data  
4 exists for the claim period and it would be difficult  
5 and expensive to determine what transaction data does  
6 exist."

7 And then at paragraph 59:

8 "Based on the discussions my team has had with  
9 Mastercard employees, I understand that Mastercard's  
10 primary data repository suffered a significant  
11 inadvertent loss of data during a planned software  
12 upgrade that took place in 2013."

13 Not, as my learned friend described it yesterday,  
14 a deliberate destruction of data:

15 "As a result of ..."

16 MR JUSTICE ROTH: I don't think there was any suggestion it  
17 was deliberate destruction.

18 MR SMOUHA: Sorry, I may have misheard.

19 MS DEMETRIOU: I was drawing -- of course we knew that that  
20 was the position back at the CMC, but what we've now  
21 been told very recently is that there was a planned  
22 deletion of data in 2011. I wasn't making  
23 a suggestion --

24 MR SMOUHA: I misunderstood. Sorry, I apologise. I do  
25 apologise. I misunderstood that reference.

1           And then he said in the same paragraph, 59:

2           "As a result of this data loss, the view of the  
3 individuals who have responsibility for managing that  
4 data repository is that Mastercard no longer holds  
5 complete or reliable transaction level data for the  
6 period prior to 2011."

7           So, sir, it is what it is. That is the limitations  
8 of evidence. If we are right that there was no material  
9 volume, that's then the end of it. If you reject that  
10 submission, then you have to determine what Mr Merricks  
11 contends would be, they say, a substantial proportion of  
12 the volume.

13           Sir, that is all I wanted to say on the bilaterals  
14 period. I can deal very swiftly with 1997 to 2004.  
15 There isn't very much that I wanted to add to what we've  
16 said in our written submissions.

17           And in relation to how MEPUK went about setting the  
18 UK MIFs, the same points apply as in the bilaterals;  
19 competitive landscape, nature of costs that MEPUK had to  
20 consider were key considerations. That hadn't changed  
21 just because MEPUK was now formally setting MIFs instead  
22 of reference rates and, above all, Visa's rate of  
23 1.3% standard and 1 electronic had not changed since  
24 1993. MEPUK continued to consider those factors rather  
25 than giving any consideration to the levels of the

1 EEA MIF. It was exactly the same as what had come  
2 before.

3 The weighted voting and hierarchy arguments, which  
4 appear to be directed mainly at establishing a basis for  
5 argument in the counterfactual, we've dealt with those  
6 fully in paragraphs 144 to 145. Essentially, the  
7 documentary and witness evidence do not show any  
8 instance where a bank sought to use its clout to force  
9 a higher UK MIF whether because what the EEA MIF had  
10 been set at or otherwise.

11 And in relation to that, sir, you will be in  
12 a position just to make findings of fact as to that; the  
13 existence of the rule, but there being no evidence of it  
14 having had any significance at all in circumstances  
15 where across the whole period, 1997 to 2004, there was  
16 nothing contentious within the MEPUK board. The minutes  
17 show all decisions being agreed without any indication  
18 of opposition.

19 Infection. Sir, I don't need to add anything more.  
20 The points that indeed you, sir, made to my learned  
21 friend in relation to that show the difficulties with  
22 that.

23 And finally for my part before I pass over to  
24 Mr Cook, with apologies to him for not having given him  
25 the amount of time that I said I would, but the

1           Mastercard era, 2004 to 2009, when Mastercard itself  
2           took over responsibility for setting UK MIFs, for the  
3           reasons I explained yesterday, our understanding was/is  
4           that the only allegation pursued in relation to that  
5           period is the infection allegation; paragraph 139 of  
6           Mr Merricks' submissions.

7           And there are any number of evidential points, as  
8           we've set out in our submissions, paragraphs 157 to 159,  
9           why there cannot be said to have been any causal effect,  
10          if there was, from a previous period carrying through  
11          it. It makes no sense at all on the evidence.

12          So, sir, in sum, there is nothing in Mr Merricks'  
13          factual case in the contemporaneous evidence. All of it  
14          is fundamentally inconsistent in all periods and apart  
15          from the factual evidence -- also on the expert  
16          evidence, as to which, if I may, unless, sir, members of  
17          the Tribunal, you have any further questions for me,  
18          I would hand over to Mr Cook just to address you on  
19          Mr Coombs' reports.

20       MR JUSTICE ROTH: No, thank you very much.

21       MR SMOUHA: Thank you, sir, and again apologies to you --

22       MR JUSTICE ROTH: No.

23                 Mr Cook.

24                         Opening submissions by MR COOK

25       MR COOK: Sir, the plan had been that I'd address you on the

1 expert evidence a little bit. I think it's going to be  
2 very much the focus on the little bit given the time and  
3 the availability and the issues have obviously -- those  
4 are obviously matters we've dealt with -- well, we've  
5 dealt with them in our written opening and, of course,  
6 in terms of -- they will be matters to be explored in  
7 cross-examination, of course.

8 MR JUSTICE ROTH: Yes. We wanted just to be clear. The  
9 arrangement you all had is that Mr Merricks should have,  
10 what, half a day to cross --

11 MR COOK: Yes.

12 MR JUSTICE ROTH: That's the understanding; is that right?

13 MS DEMETRIOU: Yes. I was rather hoping that they would  
14 finish by 12.30 so I wasn't under a huge amount of  
15 pressure, but I think --

16 MR JUSTICE ROTH: Well, we can sit until 5 o'clock if you --

17 MS DEMETRIOU: If we need it. That's very kind.

18 MR JUSTICE ROTH: So you continue until 1 o'clock.

19 MR COOK: That is very kind, sir. Thank you.

20 Sir, just a couple of themes to deal with in terms  
21 of where we get to with the economic evidence. My  
22 learned friend relied heavily in her opening on the  
23 theories about incentives, issuers and acquirers, which  
24 is based on Mr Coombs' evidence in his reports, and it's  
25 particularly on his causation report, paragraphs 3.2 to

1 3.22.

2 And, essentially, there are two themes that  
3 Mr Coombs has there. First, that issuers had no  
4 incentive to agree lower rates than the default.  
5 Essentially, they're the ones getting the money, so why  
6 would they agree lower? And acquirers had no incentive  
7 to agree higher rates than the default. Essentially,  
8 they are the party paying, so why would they agree to  
9 pay more?

10 Sir, there's similar logic -- that logic applies to  
11 both bilateral rates and also setting of the UK MIFs  
12 from 1997 onwards.

13 So that's the first theme; issuer and acquirer and  
14 incentives. And the second one is Mr Coombs' evidence  
15 that Visa, he says, as a matter of economic theory, was  
16 largely not a relevant concern for Mastercard, so  
17 Mastercard wouldn't have worried about matching  
18 interchange fees to Visa.

19 And we say it's immediately apparent that both of  
20 those themes of Mr Coombs' evidence have already been  
21 largely ditched or wholly ditched by my learned friend.  
22 She acknowledged, and this was page 57, line 19 of the  
23 transcript yesterday {Day1/57:19}, that in the factual  
24 world, Mastercard did consider Visa's UK MIFs to be  
25 relevant and took account of them.

1           There's still a dispute about how important that  
2 was, but that's completely contrary to Mr Coombs' theory  
3 that Visa would not have been a relevant concern for  
4 Mastercard. Frankly, the argument they wouldn't have  
5 been a concern makes no commercial sense at all. They  
6 were the other key player at the time.

7           Secondly, my learned friend acknowledged, and it was  
8 page 16, line 23 onwards {Day1/16:23}, that payment  
9 cards are a two-sided market and she says this places  
10 some limitations on the incentives of issuers and  
11 acquirers respectively, and that's an important  
12 acknowledgement since it follows from that  
13 acknowledgement that there may be good reasons why  
14 issuers would accept lower rates or acquirers would  
15 accept higher rates.

16           And, of course, that's the theme of art, the  
17 economic case coming from Mr Parker, which is in  
18 a two-sided market, everybody has an incentive in the  
19 scheme being successful. Put crudely, a bigger pie is  
20 better for everybody and, therefore, the incentive is to  
21 get the right interchange fee that makes the scheme  
22 successful as a whole. There isn't this conflict  
23 between conflicting views because everyone wants the  
24 same successful scheme.

25           But we say, of course, Mr Coombs -- sort of the

1           acknowledgement by my learned friend about Mr Coombs'  
2           theories still don't go far enough. Mr Coombs put  
3           forward theories, but he made no attempt at all to  
4           analyse the data about the actual interchange fee rates  
5           during the claim period to see if his theories were  
6           correct. And, as you've heard from my learned friend  
7           Mr Smouha, that's a continuing theme of this case from  
8           Mr Merricks. The case is based on theory, but there's  
9           no attempt to sort of test those theories or make good  
10          those theories by reference to the actual rates and  
11          actually what happened.

12                 But Mr Parker has done exactly that analysis. He's  
13          looked at the interchange fees agreed or set in the UK  
14          and the EEA and considered whether those facts are  
15          consistent with Mr Coombs' economic theories. That's  
16          Mr Parker's reply report at paras 317-328. And he  
17          concludes Mr Coombs' economic theories about what's  
18          likely to happen, Mr Coombs said as a matter of theory,  
19          are simply contradicted by the data about what did in  
20          fact happen.

21                 Mr Smouha has taken you through the detail. You  
22          don't get bilateral agreements at the EEA MIFs' rates.  
23          They're mostly above, but some are below. The first  
24          UK MIF set in November '97 was set above the EEA MIFs.  
25          The subsequent UK MIFs were generally different from the

1 EEA MIFs and, in general, you don't see parallel changes  
2 taking place at any point.

3 So we say simply these theories don't survive  
4 confrontation with the facts of this case and they're  
5 obviously contradicted by those facts, and Mr Parker  
6 explains why, which is those simplistic theories for  
7 Mr Coombs just ignore the two-sided aspect of this  
8 market, which doesn't mean that there is this conflict  
9 between issuers wanting high and acquirers wanting low.  
10 They want something which is successful for the scheme  
11 as a whole; the right level for the scheme as a whole.

12 My learned friend suggested that what we said in our  
13 opening submissions about two-sided markets was contrary  
14 to our pleadings, contrary to our evidence. With  
15 respect, nothing could be further from the truth.

16 What we say -- and my learned friend took you to  
17 bits of the defence. What she didn't show you was the  
18 paragraph that directly addresses this, and that's  
19 paragraph 67A(vi), particularly subparagraph (2) of  
20 that. So 67A(vi)(2) and the reference is {A/4/32}, sir.

21 It starts saying:

22 "It is denied that UK issuing banks had no incentive  
23 ... to agree a UK MIF below the rate of the EEA MIF.  
24 The incentives ... on a number of factors ..."

25 And then (2), depended on:

1           "Market conditions, since the incentive for both  
2           issuing banks and acquiring banks in setting a Domestic  
3           MIF (regardless of its relative level compared to the  
4           EEA MIF) is to set a Domestic MIF which allows the  
5           Mastercard scheme to operate successfully in that  
6           country, particularly in the light of the competition  
7           ... from other card networks ..."

8           We go on then to explain why and that, again,  
9           an issuing bank may therefore prefer a lower interchange  
10          fee if that will make the scheme competitive.

11          So that is the theme. That's very much there. It's  
12          in our original pleading. It's not an amendment. So  
13          that is the thesis that lies behind it and that's  
14          an economic theory which we say is demonstrably correct  
15          in light of what you see happen in terms of the setting  
16          of the interchange fees by the banks, either bilaterally  
17          or multilaterally, and then, from 2004 onwards, by  
18          Mastercard.

19          And that's on credit cards and absolutely again,  
20          what you see in relation to Debit Mastercard, which is  
21          Mastercard setting, or Maestro, which is the UK banks  
22          setting, they wanted the right interchange fee. If that  
23          happened to be higher, lower or similar to the EEA MIF;  
24          that was simply no part of the equation. You wouldn't  
25          have the wrong interchange fee merely because the

1 EEA MIF was at a particular level.

2 So that point is very much there on our pleading.

3 It was suggested that Mr Parker's evidence was contrary  
4 to this. It was a slightly surprising submission.

5 Mr Parker walks through these arguments. It's in his  
6 reply report, which is {A/21/21} and it's paragraphs 3.9  
7 to 3.14, where he explains and works his way through,  
8 which I'm afraid will come as no shock to  
9 Professor Waterson, but to the rest of us perhaps more  
10 informative, a distinction between a one-sided market,  
11 but even then, the fact that sometimes people have  
12 an incentive to accept lower -- or have to accept lower  
13 prices to get more business, of course.

14 But then the position is, of course, different in  
15 a two-sided market. We pick up at paragraphs 3.12, over  
16 the page {A/21/22}, onwards that when you got  
17 a two-sided market, because you have the need for there  
18 to be exactly the two sets of customers for every  
19 transaction, both sides, issuer and acquirer, have the  
20 same incentive to ensure that the interchange fee  
21 ensures a scheme is competitive for both business,  
22 because a card scheme without merchants is useless to  
23 cardholders and a card scheme without cardholders is  
24 useless to merchants.

25 So you want to try and ensure you can grow the pie

1 as much as possible and everyone has that shared  
2 incentive. That's exactly what Mr Parker explains and  
3 exactly what we set out in our opening submissions. So  
4 our case there is entirely consistent with Mr Parker's  
5 evidence.

6 My learned friend relied upon document, I think it  
7 is, {C18/37/70}, and this was Mastercard's response to  
8 the European Commission, which was suggested was  
9 contrary to what we're now saying. I'm afraid it takes  
10 a little bit of unpacking, this document, but just --  
11 I invite the Tribunal to read it in due course and we  
12 will explain it more in our closing submissions if  
13 necessary.

14 The short point essentially is where it comes out is  
15 exactly the same. The Commission's thesis, which we  
16 see -- or as Mastercard understood the Commission's  
17 thesis, which we see at 181, was the idea that all the  
18 banks -- it's the third line -- had an interest in  
19 a high interchange fee. So that's third line on to  
20 fourth line. And they were saying everyone wants high  
21 interchange fees because that is -- we see at the top of  
22 the page because it's guaranteed revenues for all. It's  
23 the third line at the top of the quotation.

24 We say that's wrong. Interchange fees is not  
25 guaranteed revenues for all. Of course, acquirers are

1 paying and issuers are receiving.

2 It goes on at 182 to talk about the short-term  
3 financial interests in having a lower interchange fee  
4 for acquirers and a higher interchange fee for issuers,  
5 but then it goes on in the middle of that paragraph,  
6 about seven or eight lines down, the relevant -- the  
7 line starts:

8 "... but it is a cost for 'net acquirers'."

9 And it's the middle of that line:

10 "There is therefore no 'commonality of interests' in  
11 a high level of interchange between the banks  
12 represented on the European Board; their only common  
13 interest is that the fees be set at the  
14 transaction-maximising rate."

15 So that is no different, unpacked a bit more  
16 perhaps, than what we say now. It is not the case, and  
17 this was the Commission's theory, that everyone wants  
18 a high rate. Everyone wants the right rate and  
19 sometimes that's low or certainly significantly lower  
20 than the EEA MIF rate, and sometimes that may be higher,  
21 depending on market conditions.

22 But that is what Mastercard was saying then and that  
23 is what Mastercard says now. So there's no  
24 contradiction between what we've said before or what we  
25 say now. It is simply the shared interest in growing

1 the scheme, not about whether the fee is intrinsically  
2 low or high, insofar as one can put any meaning on that  
3 term at all.

4 So we say essentially, the economic theory that's  
5 put against us simply fails to take account of economic  
6 theory of two-sided markets and the conflict with the  
7 data in any event. Our theory has been entirely  
8 consistent and it reflects what we see and what  
9 Mr Smouha has taken you through in terms of what  
10 happened in practice for all three schemes that were  
11 operating at the relevant time, two debit, one credit.

12 So that's in relation to the incentives point.  
13 Briefly then, the data analysis that one gets from the  
14 experts.

15 A noticeable admission from my learned friend's oral  
16 opening was any real reliance upon Mr Coombs' weighted  
17 average MIF analysis, and that's sections 5 and 6 of  
18 Mr Coombs' causation report, so his first report. And  
19 that's a particularly important omission because that's  
20 the only time that Mr Coombs' case takes any real  
21 account of the actual data. That analysis, as you know,  
22 we say is simply flawed.

23 And briefly just the four points. One, none of the  
24 allegations or the economic theory suggests any reason  
25 why you get correlation for weighted average MIF rates,

1 not -- because that's not looking at the levels. That's  
2 just looking at the weighted average, which depends upon  
3 weightings.

4 Two, the critical conclusion -- it's at  
5 paragraph 6.25 of Mr Coombs' causation -- is that over  
6 the claim period as a whole, correlation coefficients  
7 are marginally to moderately negative, but not  
8 statistically significant, i.e., no correlation over the  
9 claim period.

10 And the only way, third point, that Mr Coombs finds  
11 correlation is what we say is essentially cherry-picking  
12 period. He takes the data that helps and ignores the  
13 data that doesn't help. He excludes the three years in  
14 the middle, 2001 to 2003. He describes that as  
15 a structural break. Of course, if that's the case,  
16 that's the death knell for the infection argument if  
17 there's a structural break in the middle. And he also  
18 ignores the pleaded one-year run-off period from 2008 to  
19 2009, though, of course, the infection argument now  
20 amounts to a 12-year run-off period.

21 And we say that's just simply a question of ignoring  
22 data which doesn't help the story. When you look at all  
23 the data, the answer is no correlation, so he has to  
24 exclude the bits that make a difference. And his  
25 explanations for excluding those period; well, there's

1           no explanation for excluding the one-year run-off period  
2           and in terms of --

3           MR JUSTICE ROTH: Sorry to interrupt you, Mr Cook, and I may  
4           be misremembering, but I thought the one-year run-off is  
5           to do with the MSC, not the MIF.

6           MR COOK: No, sir, there are two -- you granted permission  
7           for it. There's two types of run-off period.

8           MR JUSTICE ROTH: Ah, yes.

9           MR COOK: So you granted permission for a one-year  
10          interchange fee run-off period, the idea that the MIF  
11          gets set to zero in June 2008, but you considered it was  
12          at least pleadable --

13          MR JUSTICE ROTH: Yes, that the UK MIF --

14          MR COOK: -- that the UK MIF had -- there was ongoing effect  
15          on the MIF which lasted a year. So that is the case  
16          where they say -- and that's the issue for this --

17          MR JUSTICE ROTH: Yes, you are quite right. I had  
18          misremembered.

19          MR COOK: And then there was a two-year MSC run-off period,  
20          which is not a matter for this trial at all.

21          MR JUSTICE ROTH: Yes.

22          MR COOK: So the argument is that there is this correlation,  
23          this causative effect, for that one-year period, but  
24          that's just simply not tested at all by Mr Coombs. So  
25          it's a startling omission, we say. But nonetheless,

1           there is no explanation for excluding that.

2           The explanation for excluding the middle three years  
3 of the claim period is -- relies upon factors which were  
4 equally true at other parts of the claim period. He's  
5 just trying to find data to support the thesis, not the  
6 other way round.

7           But we say the most fundamental problem is that even  
8 for those two, we say, cherry-picked periods considered  
9 by Mr Coombs, the rates of the EEA MIF and the UK MIFs  
10 are largely unchanged during those periods. So changes  
11 in the weighted average of interchange fees over time  
12 are essentially entirely due to weighting.

13           And Mr Parker has looked at the data and explains  
14 what you get is an increase in electronic transactions  
15 during the 1990s, and that electronic transactions are  
16 those which effectively there was an online checking  
17 that you had -- that was a valid card and you had the  
18 available funds or the available credit facility. So  
19 there was an increase in those kind of electronic  
20 transactions in the 1990s and then an increase in chip  
21 tech transactions in the 2000s.

22           So all the analysis shows is that the same  
23 technological trends in the payment markets took place  
24 on the continent and in the UK over similar periods.  
25 While that's probably not a great surprise, but

1           certainly it is utterly uninformative of any of the  
2           issues for this Tribunal to deal with. It tells the  
3           court absolutely nothing about the EEA MIFs having  
4           a causative effect upon UK interchange fees. And that  
5           is the only data analysis that Mr Merricks has put  
6           forward and it simply doesn't support any case at all on  
7           correlation, let alone on causation.

8           Now, Mr Parker has done rather more data analysis  
9           and he's obviously done three kinds. He's looked at the  
10          data and that's where he's identified a whole series of  
11          contradictions/contraindications on the data compared to  
12          the theories. He's done some, with appropriate -- to be  
13          fair, with caveats he's done some econometric analysis  
14          and he's done that -- he makes clear there aren't a huge  
15          number of data points here, so he has concerns about it.  
16          But nonetheless, he's none the econometric analysis and  
17          that shows absolutely no relevant association between  
18          the UK MIFs and the level of the EEA MIFs for comparable  
19          categories. So Mr Parker concludes the econometric  
20          analysis doesn't provide any support at all for the  
21          pleaded causation allegations.

22          And the third of his analysis, as Mr Smouha has just  
23          explained, is his consideration of the direct  
24          application analysis, and the conclusion there is --  
25          those are put in both positive and negative terms. So

1 no evidence of any transactions at the EEA MIF rate, but  
2 also, the data is consistent with all of the  
3 transactions taking place at the principal bilateral  
4 rates of 1.3 standard and 1% electronic. So it's both  
5 positive and negative there and it supports Mastercard's  
6 case in both directions.

7 Sir, and then briefly then in terms of the VoC  
8 issues. You've heard the issue between the parties  
9 concerns on-us transactions. Essentially, the dispute  
10 is about the proper scope of the issue which is before  
11 the Tribunal.

12 And we say the proper basis of the issue before the  
13 Tribunal is the pleaded case, and Mr Merricks' case, and  
14 it's paragraph 98 of the claim form, is that the  
15 infringement caused the interchange fees paid by  
16 acquiring banks to issuing banks on both cross-border  
17 and domestic transactions to be higher than they would  
18 have been absent the infringement.

19 That's defined as the overcharge. So higher  
20 interchange fees is the overcharge. The allegation is  
21 then that's passed on -- that overcharge is passed on by  
22 acquiring banks to businesses in higher MSCs, and then  
23 by businesses to consumers in higher prices.

24 We say that's the pleaded case and that's what the  
25 Tribunal needs to consider and, therefore, Mr Merricks

1 needs to show there were interchange fees on on-us  
2 transactions which were higher than they would otherwise  
3 have been.

4 And there is an evidential dispute, which is we  
5 accept the proper matter for the Tribunal to consider  
6 and determine, which is if transactions were processed  
7 by Europay, Mr Dhaene has given evidence that then  
8 an interchange fee would have applied. If he's right,  
9 then an interchange fee applies.

10 We rely on the evidence of Mr van den Bergh and  
11 Mr Sideris. The banks generally didn't process -- or  
12 generally processed on-us transactions themselves  
13 because if Europay processed them, a fee was payable.  
14 So, obviously, it was cheaper to do it in-house. And in  
15 those circumstances, there just is no scope for  
16 interchange fees to be payable.

17 MR JUSTICE ROTH: But if there is -- this could happen often  
18 in, say, a group where you have different subsidiaries.  
19 You have a charge from one to the other and that is then  
20 passed on in the MSC that the acquiring side charges its  
21 merchant. Then why isn't that within the scope of this  
22 claim?

23 MR COOK: Well, the short answer to that, sir, is, firstly,  
24 you say "if". Firstly, if we're talking about different  
25 subsidiaries, so different entities, then you might have

1           payments, yes. But if you're talking about  
2           one entity --

3           MR JUSTICE ROTH: Yes, and why isn't it different if there  
4           is an internal fee being charged within the way the bank  
5           prepared accounts for different parts of its business  
6           that they both have to show, as sections of a business  
7           often have to do, that they are -- what their costs are  
8           and what their revenues are and meet certain targets?

9           MR COOK: The short answer to that is had they advanced that  
10          claim early on, there would have been no objection to  
11          that claim at all. It would have been one that we would  
12          then have tried to test, look for evidence to see what  
13          in fact happened to see if there is evidence to support  
14          that and to support the level, because, of course, the  
15          claim is there's got to be a causative effect on that  
16          level.

17          The issue is that that is something that comes out  
18          only now in opening submissions, and in the reply served  
19          the same day as the opening submissions, so that is not  
20          how the case has been advanced. So, there has not been  
21          disclosure. There has not been evidence addressing that  
22          point.

23          So it's not, sir, that we say that that wouldn't  
24          have been an arguable way to run the case, it's just not  
25          how the case was advanced until such a late stage that

1 it's simply not possible to be dealt with.

2 And the same point we say in relation to the other  
3 one, which is the MSC argument. Again, if the same MSC  
4 applied, that you can basically sort of not worry about  
5 the internal accounting. And, again, that's not the way  
6 the case was run, not the way it was pleaded, and there  
7 is no evidence on those issues.

8 So my learned friend characterised this as  
9 Mastercard having no answer. But it's not a case of us  
10 having no answer to it, it's a case where a point is  
11 coming so late that there is no disclosure or evidence  
12 on the issue. And effectively it's put as, you know, if  
13 these things happened-- if it's right that there were  
14 these transfers.

15 The point is, sir, we simply don't have the data to  
16 test those important "if" points, and that is simply too  
17 late to raise those points. They had an opportunity --  
18 they fully re-pleaded their claim back at the end  
19 of May. If they'd raised it at that point then that  
20 might have been possible, but it could have been raised  
21 at that stage. It would have been very difficult, but  
22 it's simply far too late to raise it on 26 June and  
23 think this can be dealt with within this trial.

24 So we say, sir, it's simply too late. Not because  
25 the points are unarguable if they had been raised in



1 drafted in their own language."

2 And if you look at any of your -- Mastercard's  
3 witness statements, I think, but let's take Mr Sideris'  
4 first witness statement on {A/11/2}, paragraph 4:

5 "This statement has been prepared following  
6 discussions with Freshfields. Freshfields prepared the  
7 first draft of this witness statement and I then  
8 reviewed it and revised it in an iterative process ..."

9 That is not the way that trial witness statements  
10 should be prepared in this Tribunal or, indeed, as you  
11 well know, there's nothing unique to the Tribunal. That  
12 statement -- that Practice Direction is very much  
13 equivalent to the Practice Direction for trial witness  
14 statements in the High Court. It does not appear to  
15 have been followed.

16 MR SMOUHA: Well, sir, all I can say is in relation to what,  
17 sir, you said about the position being the same in other  
18 courts, certainly it's not my understanding that the  
19 reference in the Practice Direction to matters being --  
20 words being in the witness' own words means that the  
21 witness is supposed to do the drafting.

22 MR JUSTICE ROTH: Well, that's what -- doing something in  
23 your own words means that you -- it's not prepared for  
24 you and given to you, written by someone else, which you  
25 then review, which is what happened here.

1 MR SMOUHA: It is, sir --

2 MR JUSTICE ROTH: That's how I understand it.

3 MR SMOUHA: Sir, there may be a misunderstanding:

4 "Freshfields prepared the first draft of this  
5 witness statement ..."

6 In the second sentence of paragraph 4.

7 MR JUSTICE ROTH: Yes.

8 MR SMOUHA: That is after the discussions with Freshfields  
9 that are referred to in the first sentence.

10 MR JUSTICE ROTH: Yes, I'm not suggesting they sort of made  
11 it up --

12 MR SMOUHA: No, no. No, no. Sorry, sir --

13 MR JUSTICE ROTH: -- but they -- I mean, writing it in your  
14 own words means that you can dictate it to someone or  
15 you can -- but not that it's actually written for you  
16 based on after -- that's the way statements used to be  
17 prepared before the Practice Direction. It was -- the  
18 whole point of the Practice Direction was to get away  
19 from that.

20 MR SMOUHA: Sir, certainly the distinction, as I have  
21 understood it, and I'm not claiming any special  
22 knowledge about this, but I was on the consultation  
23 committee that prepared the reports chaired by  
24 Mr Justice Andrew Baker that led to the Practice  
25 Direction.

1 MR JUSTICE ROTH: Yes.

2 MR SMOUHA: The principal practice that was desired to be  
3 changed was the practice of solicitors preparing draft  
4 witness statements off documents and then having  
5 discussions with witnesses in relation to that.

6 And certainly it is my understanding, but I am  
7 saying, sir, this is my personal understanding in  
8 relation to the objective of the provision in -- as  
9 I say, I am not speaking to the tribunal's rules, but in  
10 relation to what appears in the Practice Directions in  
11 the Chancery Division and in the Commercial Court --  
12 well, actually in the Business and Property list where  
13 this started, is that the references to being expressed  
14 in the witness' own words and that being expressly, as  
15 it were, in that formulation, is directed at the -- is  
16 not directed at requiring the witness to prepare a draft  
17 of their own witness statement and that it is perfectly  
18 appropriate -- and certainly my understanding from,  
19 I think, all the cases in which I've been involved since  
20 the Practice Direction in which I'm aware of what's  
21 being done by the professions is that the draft -- that  
22 the proofing of a witness, within all the very important  
23 new limitations in relation to the identification of  
24 documents and so on, is currently done generally by  
25 solicitors.

1           In other words, the witness is proofed, but that  
2           what is happening in terms of the preparation of a draft  
3           by the solicitors is a draft using the words that the  
4           witness has in their interviews -- in their proofing,  
5           used. That is what one is trying to get at.

6           MR JUSTICE ROTH: No, I think that's entirely right. It's  
7           not quite the impression that that paragraph gave, but  
8           if what you're saying is that's what happened, in any  
9           event, we're not saying -- we're not going to exclude  
10          any of the statements. There's no question --

11          MR SMOUHA: No. It's more important than that, sir.

12          I would not -- I wouldn't want the Tribunal to have any  
13          concerns about it, so if I may, I have Mr Sansom behind  
14          me. Can I --

15          MR JUSTICE ROTH: Yes.

16          MR SMOUHA: May I take specific instructions on that?

17          MR JUSTICE ROTH: Yes, I think that would be helpful.

18          MR SMOUHA: If you would just give me a moment, sir.

19          (Pause)

20          Sir, yes, that is confirmed. So the process has  
21          been done on the basis of the interviewing, the proofing  
22          of the witness, verbatim notes made of that interview,  
23          the preparation of the first draft of the statement by  
24          Freshfields being done on the basis of those verbatim  
25          notes; in other words, with the intent of capturing the

1 witness' own words, and that the review -- Mr Sansom  
2 confirmed to me that the review process has also  
3 involved the witness making -- in each case making  
4 changes to that draft, again to reflect their own  
5 wording.

6 So that the objective has been at all times to  
7 arrive at a witness statement which, so far as possible,  
8 is expressed in the witness' own words and drafted in  
9 their own language.

10 MR JUSTICE ROTH: Yes, thank you. Well, we're reassured and  
11 understand that.

12 MR SMOUHA: I'm grateful. I'm grateful, sir, for the  
13 opportunity to have that clear. Sir, is there --

14 MR JUSTICE ROTH: And I obviously wanted to raise that with  
15 you because it's got -- it's no reflection at all on  
16 Mr Sideris or, indeed, any of the other witnesses.

17 MR SMOUHA: Indeed, but, sir, if I may say so, I'm very glad  
18 that you did because obviously the whole point of the  
19 new Practice Direction is to enhance the value and  
20 assistance to the court of the witness statement, and we  
21 obviously would not want, and it wouldn't be in  
22 Mastercard's interest, for the Tribunal to have any  
23 reservations on that front.

24 MR JUSTICE ROTH: Yes, thank you.

25 MR SMOUHA: Sir, can I ask Mr Sideris to come forward?

1 MR JUSTICE ROTH: Yes.

2 MR SMOUHA: If I may call him.

3 MR JUSTICE ROTH: Yes.

4 MR JEAN SIDERIS (affirmed)

5 Examination-in-chief by MR SMOUHA

6 MR SMOUHA: Good afternoon, Mr Sideris. Could we please  
7 have on the screen {A/11/1}.

8 Mr Sideris, you have made two witness statements for  
9 the purposes of these proceedings and this trial, and  
10 you should see there on the screen the cover page,  
11 first page, of your first witness statement. Do you see  
12 that?

13 A. Yes.

14 Q. And please if we could go to page 35 --

15 MR JUSTICE ROTH: I think 34, is it?

16 MR SMOUHA: Sorry, 34 {A/11/34}. Thank you, sir.

17 And can you please confirm that you signed this  
18 witness statement, signing both the confirmation of  
19 compliance and the statement of truth, on 24 March 2023?

20 A. Yes.

21 Q. And can I ask you, please, whether there are any  
22 corrections or additions which you wish to make to this  
23 statement?

24 A. No.

25 Q. And then can we please go to your second witness

1 statement at {A/13.4/1}. Do you see there the cover  
2 page of your second witness statement?

3 A. Yes.

4 Q. Thank you. If we could go, please, to page 14  
5 {A/13.4/14}, and can you confirm, please, that that is  
6 your signature, signing the confirmation of compliance  
7 and the statement of truth on your second witness  
8 statement on 19 June 2023?

9 A. Yes.

10 Q. And are there any corrections or additions which you  
11 wish to make to this statement?

12 A. No.

13 Q. And can you please confirm that the contents of your  
14 two statements are true?

15 A. Yes.

16 MR SMOUHA: Thank you.

17 MR JUSTICE ROTH: Mr Sideris, you've been looking at them on  
18 screen. You'll probably be asked some questions about  
19 what you said in them shortly. If you would prefer to  
20 have paper copies of your statements, if you find that  
21 easier, I'm sure that can be arranged. If you're happy  
22 with them on screen only, it's a matter for you.

23 A. If I can, I would rather have them. Otherwise, it's  
24 fine.

25 MR JUSTICE ROTH: Yes, I think it might be helpful for the

1 witness to have his own paper copy of his own witness  
2 statement.

3 MR SMOUHA: I would certainly agree, sir.

4 MR JUSTICE ROTH: If someone could provide Mr Sideris  
5 with --

6 MR SMOUHA: If there's a hard copy bundle A --

7 MR JUSTICE ROTH: He could have the bundle, I would think,  
8 with the other statements.

9 There will be other documents, Mr Sideris, you'll be  
10 asked about which will come up on screen. If you want  
11 to see a paper copy of those, it can probably be  
12 arranged, but if you're able to deal with the others on  
13 screen, I think that's helpful because there are a lot  
14 of documents in this case and mostly we're dealing with  
15 them electronically.

16 A. Yes.

17 MR SMOUHA: Thank you, Mr Sideris. If you wait there,  
18 Ms Demetriou will have some questions for you.

19 Cross-examination by MS DEMETRIOU

20 MS DEMETRIOU: Good afternoon, Mr Sideris. You're presently  
21 a director at Edgar, Dunn & Company, aren't you?

22 A. Yes.

23 Q. And from 2002 to 2011 you held various roles at  
24 Mastercard Europe; that's right, isn't it?

25 A. That's correct.

- 1 Q. And from 1997, you explain that MEPUK set MIFs for  
2 UK domestic transactions until 2004; yes? So UK MIFs  
3 were set domestically in the UK from 2007 to 2000 --  
4 from 1997 to 2004.
- 5 A. I believe I joined Mastercard in 2002, so I can only  
6 talk about from 2002.
- 7 Q. But when you joined in 2002, then UK MIFs were being set  
8 by MEPUK; that's correct?
- 9 A. That's correct.
- 10 Q. And from 2004, Mastercard Europe had responsibility for  
11 setting the UK MIFs.
- 12 A. Yes.
- 13 Q. And throughout your time at Mastercard Europe,  
14 Mastercard set the EEA MIF; that's right, isn't it?
- 15 A. Yes, to the extent that it was approved by the board of  
16 Mastercard prior to the IPO, yes.
- 17 Q. And you worked at Mastercard Europe during the  
18 Commission investigation into Mastercard's  
19 EEA interchange fees; correct?
- 20 A. That's correct.
- 21 Q. And were you involved in -- were you involved in that  
22 investigation on Mastercard's behalf?
- 23 A. Of course.
- 24 Q. So you helped, what, with responding to requests for  
25 information and so on?

1 A. Yes, among the others, yes.

2 Q. Now, if we look at your -- so you've explained in your  
3 statement that an interchange fee is a fee that's  
4 generally paid by the acquiring bank to the issuing  
5 bank; correct?

6 A. Yes.

7 Q. And if we look at your first statement at paragraph 59,  
8 you're talking there about -- so paragraph 59 is on page  
9 {A/11/13}. That's at the bottom of the page and you're  
10 talking there about setting the EEA MIF and you say in  
11 that first sentence, you say -- you see that:

12 "... the main challenge ... we faced ... was  
13 balancing the interests of net-issuing and net-acquiring  
14 countries."

15 Yes?

16 A. Yes.

17 Q. Now, I want to show you the -- so what you mean there is  
18 the net issuing countries had different incentives to  
19 the net acquiring countries; yes?

20 A. Yes.

21 Q. And if we look at Mr Parker's expert report -- Mr Parker  
22 is Mastercard's expert economist. Can we go to  
23 {A/16/26}, paragraph 2.48. Maybe that could be made  
24 bigger. Let's have a look at that.

25 So Mr Parker is here describing incentives in

1 a bilateral negotiation between banks; yes? So he says:

2 "An individual bank (Bank A) entering a bilateral  
3 negotiation with another bank (Bank B) to set  
4 an appropriate [interchange fee] would wish to set the  
5 most profitable fee for that bank. Each bank's  
6 individual incentives would depend on its net  
7 issuing/acquiring position vis-à-vis the other bank.  
8 Suppose Bank A is a net issuer and Bank B a net  
9 acquirer. Assuming that this negotiation is a one-off  
10 with no impact on other negotiations:

11 "... Bank A would seek the highest possible  
12 [interchange fee], subject to achieving agreement ...

13 "... Bank B would seek the lowest possible  
14 [interchange fee], subject to achieving agreement."

15 Do you agree with that as a basic proposition? Do  
16 you agree that in a bilateral negotiation, the bank  
17 which is a net acquirer vis-à-vis the other bank  
18 generally has an incentive to pay a lower interchange  
19 fee on the transactions between those banks?

20 A. That seems logical.

21 Q. Okay. And then if you then have a scenario of  
22 a multilateral negotiation where a group of banks are  
23 agreeing on a multilateral interchange fee which binds  
24 them all, in that situation, you presumably agree that  
25 a bank which is a net acquirer overall, in other words

1           its acquiring business is larger than its issuing  
2           business, would generally have an incentive to achieve  
3           a lower MIF in those negotiations; yes?

4           A. Yes.

5           Q. And for a bank which had a large issuing business and  
6           either no acquiring business or a smaller acquiring  
7           business, then the converse is true, isn't it? So in  
8           a multilateral negotiation, they would generally have  
9           an incentive to achieve a higher MIF; yes?

10          A. Yes.

11          Q. Now, let's look at what Mastercard said to the  
12          European Commission in response to its statement of  
13          objections and see if you still agree with what it said.  
14          So if you go to {C10/371/1}. So you can see this is  
15          Mastercard's submissions to the European Commission in  
16          response to the Commission statement of objections; yes?

17          A. (No audible answer).

18          Q. Then if we turn to page 33 {C10/371/33} and if we look  
19          at paragraph 127, we see here that what is being  
20          evaluated are alternatives to the default MIF; yes?  
21          That's the heading, and the submission raises the  
22          question. So the question here is whether there are any  
23          practical alternatives to the default MIFs. Do you see  
24          that in paragraph 127?

25          A. Yes.

1 Q. And then at 128, what's said is there are at least  
2 four -- in theory four options; do you see? And there  
3 are then some bullet points and the second is:

4 "Bilateral negotiations with issuers setting fees in  
5 default of an agreement ..."

6 And the third is:

7 "Bilateral negotiations with the acquirers setting  
8 fees in default of an agreement ..."

9 Yes? So you see what is said there.

10 A. (Witness nods).

11 Q. And then let's look at what Mastercard said to the  
12 Commission would be the result of those options. So  
13 could we go to page 34 of this document, paragraph 130  
14 {C10/371/34}. So:

15 "In the second scenario, in the absence of any  
16 bilateral agreement, the issuer would be entitled to set  
17 the interchange fee."

18 Then you see at paragraph 131:

19 "In such a scenario, the issuer would not have any  
20 incentive to lower the level of the interchange fee  
21 (compared to the current default MIF)."

22 Yes:

23 "This would only be economically sensible if the  
24 reduction in the interchange fee was offset by  
25 an appropriate rise in the financial volume of

1 transactions entered into by that issuer's cardholders.  
2 This would not be the case, since the impact of one  
3 issuer's interchange fee on the MSC is small and the  
4 interchange fee has no direct impact on cardholders who  
5 will have no knowledge of it. As a result, a unilateral  
6 reduction of the interchange fee by an issuer simply  
7 means that it would receive lower revenues from its  
8 transactions. Therefore, there is no reason to expect  
9 that issuers would reduce the interchange fee  
10 unilaterally."

11 And you'd agree with that still, wouldn't you,  
12 Mr Sideris? So it's true, isn't it, that issuers  
13 wouldn't normally want to reduce interchange fees below  
14 the fallback, below the default, because that would mean  
15 lower revenues for them?

16 MR JUSTICE ROTH: You seem to be asking these questions for  
17 Mr Sideris' opinion. He's not -- he was never -- as  
18 I see it, he's worked at Mastercard. I think he may  
19 have worked at some point at Visa, but never for  
20 an issuer or an acquirer.

21 MS DEMETRIOU: Well, he has worked at Mastercard and Visa,  
22 sir --

23 MR JUSTICE ROTH: But not at a bank.

24 MS DEMETRIOU: No, and I'm asking his view because  
25 Mastercard --

1 MR JUSTICE ROTH: Well, he has an opinion, but it's not  
2 factual evidence; it is opinion evidence.

3 MS DEMETRIOU: Well, lots of his statement is opinion  
4 evidence, sir, and I need to be able to challenge it.

5 MR JUSTICE ROTH: Yes, you're not at the moment challenging  
6 his statement.

7 MS DEMETRIOU: No. Alright.

8 MR JUSTICE ROTH: You can ask these questions, but we are  
9 going to get some witnesses from Mastercard who actually  
10 worked for banks, I think.

11 MS DEMETRIOU: Sir, yes, and I'll ask them similar  
12 questions.

13 MR JUSTICE ROTH: It may be more appropriate.

14 MS DEMETRIOU: Yes, okay.

15 So can I just ask you, Mr Sideris, whether you agree  
16 with that statement, so whether you agree with what  
17 Mastercard said to the Commission at that time?

18 A. Sorry, can you please repeat the question?

19 Q. Yes. So what Mastercard said to the Commission at that  
20 time, you can see in paragraph 131, is that the issuer  
21 wouldn't have any incentive to lower the level of the  
22 interchange fee compared to the current default MIF, and  
23 can I ask whether you agree with that or not?

24 A. Well, it depends, actually. I don't -- I don't agree.  
25 An issuer might agree to reduce interchange fees if, as

1 a result, there was more transactions and, therefore,  
2 more revenue as a whole.

3 Q. And what's being said here by Mastercard is that that  
4 wouldn't be the case in respect of an individual issuer  
5 because -- so they say here it would only be  
6 economically sensible if the reduction in the  
7 interchange fee was offset by an appropriate rise in the  
8 financial volume of transactions entered into by that  
9 issuer's cardholder, which is the point you're making,  
10 but then Mastercard says this wouldn't be the case since  
11 the impact of one issuer's interchange fee on the MSC is  
12 small and the interchange fee has no direct impact on  
13 cardholders who have no knowledge of it. So do you see  
14 the point and do you agree with it?

15 A. Not entirely, actually. It depends on which kind of  
16 interchange we're talking about. So if we're talking  
17 about cross-border interchange, obviously, any single  
18 bank would have a minor impact on the total cross-border  
19 interchange fees, but if we're talking about domestic  
20 transactions, a significant -- a large bank would have  
21 significant impact on domestic interchange. So it  
22 depends.

23 Q. Right. Now, let's have a look -- let's go back to  
24 paragraph 59 of your witness statement that I took you  
25 to, so {A/11/13}. Here, as I said, you're describing

1 the process at paragraph 59 of setting the intra-EEA MIF  
2 and you're talking about the challenge you face about  
3 balancing the interests of net issuing and net acquiring  
4 countries; yes? And what you do is explain that banks  
5 from countries in Southern Europe had lots of incoming  
6 cross-border transactions so they would have wanted  
7 a lower interchange fee; yes?

8 A. Yes, that's correct.

9 Q. And banks from Northern European countries tended to be  
10 the issuing banks for such cross-border transactions;  
11 yes?

12 A. Not -- not exactly. They were representing, you know,  
13 their country, so it's not that they were issuing banks;  
14 they were northern banks.

15 Q. Well, let's just look at what you say. So you say  
16 there:

17 "... banks from countries in southern Europe, which  
18 were more reliant on tourism (and so had a lot of  
19 incoming cross-border transactions by foreigners),  
20 preferred lower cross-border rates to the banks from  
21 northern European countries (whose customers were more  
22 often making cross-border transactions abroad)."

23 So what you are saying is that they were more often  
24 the issuing banks; yes?

25 A. Excuse me?

1 Q. The banks --

2 MR JUSTICE ROTH: Perhaps, Ms Demetriou, if you read the

3 first sentence of paragraph 59, that might --

4 MS DEMETRIOU: I had read it, sir, but I'll read it again.

5 MR JUSTICE ROTH: Perhaps read it again, because that might

6 help.

7 MS DEMETRIOU: So, Mr Sideris, why don't you read

8 paragraph 59 to yourself --

9 A. "I recall that, in this period ..."

10 Q. No, you don't have to read it out loud.

11 A. Oh, sorry.

12 Q. No, just to yourself just to give you the opportunity to

13 have a look at it again. (Pause)

14 A. Yes.

15 Q. So I'm just trying to, first of all, establish what

16 you're saying. So you're saying there that you faced --

17 the main challenge that you faced in setting the

18 intra-EEA MIF was balancing these competing interests;

19 yes?

20 A. That's correct.

21 Q. And the competing interests were between net issuing and

22 net acquiring countries; yes?

23 A. Yes.

24 Q. And what you're saying is that it tended to be banks

25 from countries in Southern Europe which were the net

- 1           acquiring countries; yes?
- 2       A.   Yes.
- 3       Q.   And banks from countries in Northern Europe that
- 4           tendered to be the net issuing countries, yes?
- 5       A.   Yes.
- 6       Q.   And there -- they were in conflict because the banks
- 7           from the southern countries wanted lower MIFs and the
- 8           banks from the northern countries tended to want higher
- 9           MIFs; yes?
- 10      A.   Yes.
- 11      Q.   Now -- and you knew -- so in your role at
- 12           Mastercard Europe, you were aware of those conflicting
- 13           interests; yes?
- 14      A.   Yes.
- 15      Q.   And that's because they would have expressed that view
- 16           to you, the banks, or you just would have known that
- 17           that's what they wanted?
- 18      A.   I didn't have any direct contact with the banks, so
- 19           I would have known it.
- 20      Q.   It went without saying. You didn't need them to tell
- 21           you because you would have appreciated that those were
- 22           their interests, yes?
- 23      A.   Probably that, and also that was what other people told
- 24           me.
- 25      Q.   What sort of other people?

1 A. My boss.

2 Q. Your boss. What was the name of your boss?

3 A. Luc Gillain.

4 Q. I'm so sorry?

5 A. Luc Gillain.

6 Q. So he would have had contact with these banks, would he?

7 A. Yes.

8 Q. So if an interchange fee, if MEP -- sorry, if

9 Mastercard Europe was proposing to set a cross-border

10 MIF that looked quite high, then some of these acquiring

11 banks would have gone to your boss, would they, and

12 said, "No, no, that looks too high, we want it to come

13 down a bit"? Is that the kind of conversation that

14 would have taken place?

15 A. There is an error in what you're saying. You're talking

16 about acquiring banks and I'm talking about net

17 acquiring countries and net issuing countries. They're

18 not the same.

19 Q. Alright. Well, let's stick with what you say. So let's

20 stick with the net acquiring countries; yes? So you say

21 that your boss would have had contact with these -- with

22 banks from those countries.

23 A. Yes.

24 Q. And your boss would've been aware as what the banks from

25 those countries wanted; yes?

1 A. Yes.

2 Q. And that's why you say this was a big challenge. You  
3 were trying to balance these competing interests; yes?

4 A. Yes.

5 Q. In fact, you say it was the main challenge; yes?

6 A. That's what I say, yes.

7 Q. And how would your boss have known that those were their  
8 competing interests? Presumably they would have  
9 vocalised what they wanted to your boss, who would have  
10 told you; is that correct?

11 A. They vocalised it during the board meetings or the BMAC  
12 meetings, yes.

13 Q. Right. So you were in no doubt that the net acquiring  
14 countries wanted lower MIFs and the net issuing  
15 countries wanted higher MIFs. You were in no doubt  
16 about that.

17 A. Yes.

18 Q. And it was difficult to balance out those competing  
19 interests. That's why you say it was a challenge.

20 A. It was a challenge. I'm not saying it was difficult or  
21 easy. I'm just saying it was a challenge.

22 Q. It was a main challenge.

23 A. That's what I said.

24 Q. And in terms of vocalising what they wanted, if  
25 Mastercard Europe were proposing or would have proposed

- 1 a MIF that was too high, then those net acquiring  
2 countries or banks from those net acquiring countries  
3 might have sought to challenge that; no?
- 4 A. So if we were proposing an interchange that was deemed  
5 too high, there would be a vote and the net acquiring  
6 countries would have probably been against it.
- 7 Q. But before you got to the vote, you'd be trying to  
8 balance out the competing interests; yes? You wanted to  
9 do this consensually, didn't you?
- 10 A. I don't really recall the process of how we actually got  
11 there, but I probably -- we took into account  
12 vocalisations of members during previous discussions  
13 that we knew that -- what they -- where they stood, and  
14 we would put forward interchange proposals. Some --  
15 some of them got approved, some of them didn't.
- 16 Q. But in formulating the proposals, you would've taken  
17 into account those competing interests in advance,  
18 wouldn't you, to try and avoid conflict? That's right,  
19 isn't it?
- 20 A. To some extent, yes, but interchange is about conflict.  
21 At the end of the day, the right interchange is a level  
22 where nobody is happy.
- 23 Q. I think we see a flavour of that from the documents and  
24 I think it follows from what you're saying that there  
25 was never any agreement between every bank that there's

1           one right level; yes? There was lots of conflict about  
2           what the right level would be, lots of agreement and  
3           discussion and so on.

4           A. Yes, that's true.

5           Q. Now, you refer in your first witness statement to the  
6           75% rule. Do you remember referring to that? We can  
7           see it at {A/11/6} at paragraph 25 at the bottom. So  
8           you talk about a local country association:

9                     "If a local country association had invoked the  
10                    75% rule ..."

11                   Yes?

12           A. Yes.

13           Q. And I just want to show you the Eurocard Rule Book from  
14           March 2002, so these would have been in force when you  
15           started your employment. So if we go to {C8/356} and if  
16           we could look at page 3 under the heading "Domestic  
17           Rules" {C8/356/3} and if we look at that  
18           first paragraph:

19                     "Any domestic rules applicable to all domestic  
20                    transactions in a country, including centrally acquired  
21                    domestic transactions, must be agreed by a group of  
22                    Members ... representing, during the year preceding the  
23                    agreement, at least 75% of each of the  
24                    Eurocard-MasterCard issuing and acquiring domestic  
25                    volumes in the country. Domestic rules will remain in

1 effect until changed or challenged. If domestic rules  
2 are challenged because the group of Members agreeing to  
3 them no longer meets the 75% threshold, the  
4 international rules will apply in their place, as from  
5 the date when Europay has determined that the  
6 75% threshold is no longer met."

7 And that's what you're referring to, isn't it, when  
8 you talk about the 75% rule; yes?

9 A. Yes.

10 Q. And when we see, first of all, the reference to  
11 "domestic rules applicable to all domestic transactions  
12 in a country" in the first line, that would include  
13 domestic MIFs; yes?

14 A. Yes.

15 Q. Now, the effect of this rule was that any bank or group  
16 of banks representing over 25% of acquiring volume could  
17 challenge the domestic rules; yes?

18 A. Yes, or issuing as well.

19 Q. Or issuing, correct. And if they did, it says the  
20 international rules will apply in their place. And to  
21 be clear about what the international rules are, if we  
22 scroll up and look under the heading of "Scope" on the  
23 same page, that says that -- so if we look at the  
24 second paragraph:

25 "The specific Eurocard Rules which differ from the

1 standard MasterCard Rules are described in this manual.  
2 In all cases, the Eurocard Rules override the MasterCard  
3 Rules."

4 And then we see the Eurocard Rules apply to  
5 intra-European transactions, etc, etc, and then the  
6 last paragraph:

7 "The above mentioned Rules are applicable to  
8 intra-European Eurocard-MasterCard transactions and, by  
9 default, to domestic transactions."

10 So that's what's meant by the international rules;  
11 yes?

12 A. Yes.

13 Q. And then let's see what the Eurocard Rules say about  
14 interchange fees, and if we go to page 35 {C8/356/35} of  
15 this document and if we look at rule 6.2.2.3, "Order of  
16 Precedence", we see:

17 "Bilaterally agreed interchange and service fees  
18 always prevail over fallback interchange ... fees.

19 "In the absence of bilaterally agreed interchange  
20 and service fees, the fallback interchange ... for the  
21 country must be applied to domestic ... transactions."

22 Yes?

23 And then:

24 "In the absence of either bilateral agreed  
25 interchange fees ... or fallback interchange ... fees,

1 the intra-European interchange ... fees will be applied  
2 to domestic ... transactions."

3 So those are the order of precedence of the rules;  
4 yes?

5 A. Yes.

6 Q. And during the time that you were employed by  
7 Mastercard Europe, so from 2002, there were no bilateral  
8 UK domestic interchange fee agreements, were there, that  
9 you're aware of, no bilateral agreements?

10 A. Honestly I don't remember. I think there might have  
11 been one or two.

12 Q. Alright. And you presumably agree, do you, that if  
13 banks representing 25% of UK acquiring domestic volumes  
14 challenged the UK MIF, then the intra-EEA MIFs would  
15 apply, yes, on the basis of this rule?

16 A. Yes.

17 Q. Are you aware -- you might not be because it was before  
18 your time, but are you aware before the 75% rule, there  
19 was a similar rule that required 90% agreement?

20 A. No.

21 Q. And the 75% rule was there, wasn't it, because  
22 Mastercard Europe wanted to ensure that any domestic  
23 rules carried the support of the large majority of  
24 licensees in the relevant country?

25 A. I don't know why they were there.

1 Q. You don't know. Okay.

2 Now, if we go to bundle {XC22/75/1}. So this is  
3 a confidential -- I'm not sure -- sir, this is  
4 a confidential document. It may be -- Mr Smouha wants  
5 to say something.

6 MR SMOUHA: No, no, I want to say something --

7 MS DEMETRIOU: Ah, to me?

8 MR JUSTICE ROTH: Yes. (Pause)

9 MS DEMETRIOU: Mr Smouha is saying -- and that's the basis  
10 on which I was proposing to proceed. I was going to  
11 point out the relevant parts of the document without  
12 reading them out.

13 MR JUSTICE ROTH: Yes.

14 So, Mr Sideris, apparently this document is  
15 confidential to Mastercard. It's been disclosed in the  
16 proceedings. So counsel, Ms Demetriou, will ask you  
17 some questions pointing you to the relevant paragraph,  
18 but please don't read it out or repeat what it says  
19 unless you are actually asked to do so. Thank you.

20 MS DEMETRIOU: So this is {XC22/75/1}, and this is the  
21 Mastercard's response to the Commission's request for  
22 information. And if we go to page 6 {XC22/75/6} and if  
23 we can please -- we may need to go to the previous page,  
24 actually, to get the context -- no, it's actually  
25 page 6.

1           And then if you count down three paragraphs, can you  
2 see a sentence saying:

3           "The above scenario ..."

4       A. Yes.

5       Q. If you don't mind just reading that to yourself, please.

6           (Pause)

7       A. Yes.

8       Q. Were you aware of this at the time having taken place?

9       A. I don't remember. I joined after that.

10       Q. You don't remember any -- you weren't involved in -- you  
11 don't remember any discussion about this at the time?

12           You can't remember now anything about it?

13       A. I don't remember. As I said, I joined in September.

14           Maybe it was mentioned, maybe not. I really don't  
15 remember.

16       Q. Okay. If we look at page 21 {XC22/75/21}, this is the  
17 letter that was referred to in that paragraph. Do you  
18 see the name of the company at the top?

19       A. Yes.

20       Q. So do you see that that letter indicates that the  
21 interchange fee is going to cease to apply? Do you see  
22 at the end of the second paragraph, it says that the  
23 company wants to put an end to this interchange? And  
24 then in the third paragraph, it explains what's going to  
25 apply instead; yes? Which is the intra-EEA MIF. Do you

- 1           see that?
- 2       A.   Yes.
- 3       Q.   And if we look at {B/28/1}, this is a schedule of  
4           EEA MIFs and you can see for 2002, which is the same  
5           year, the base rate was 1.3; yes? So the 1.35 domestic  
6           interchange fee mentioned by the company we just saw was  
7           higher than this; yes?
- 8       A.   Yes.
- 9       Q.   So the consequence of them giving notice or triggering  
10          the rule was to reduce the applicable interchange fee.  
11          Do you see that?
- 12      A.   Yes. Well, actually, there's only the base rate; right?  
13          I don't know -- if you show me the other rates. There's  
14          many rates in the table.
- 15      Q.   Well, I think the precise rate doesn't matter, but the  
16          point of triggering the rule and defaulting to the  
17          intra-EEA MIF, the point of that would be to achieve  
18          a lower rate; yes?
- 19      A.   I don't know. I need to see all the rates to be able to  
20          tell you.
- 21      Q.   Alright. Yes. Well, if we look at the column in 2002,  
22          so we saw the rate that was being disapplied. The  
23          domestic rate was 1.35 and if we look at all of the  
24          rates in the column for 2002, they're all lower than  
25          that, aren't they?

1 A. Yes.

2 Q. So you would accept, would you, in these circumstances  
3 that the effect of this was to default to the lower  
4 rate?

5 A. If I may ask to see the previous rate -- the previous  
6 document you shared.

7 Q. Yes, so that was at --

8 A. The termination document, the termination of the  
9 domestic MIF document.

10 Q. Yes, so {XC22/75/21}, page 21. Thank you. (Pause)

11 A. Okay, thank you.

12 Q. And if we look at the statement of objections, so  
13 {C16/215/173} and if we look at paragraph 12.14, we can  
14 see in the middle of that paragraph:

15 "A petrol station owner, a large variety store chain  
16 and an airline replied that Bank Card Company was still  
17 a 'monopolist' acquirer for VISA and MasterCard in  
18 Belgium."

19 So that company seems to have had a significant  
20 acquiring business in Belgium; yes? So do you agree  
21 that it was likely in its interests to reject the higher  
22 domestic MIF in favour of the lower intra-EEA MIF?

23 (Pause)

24 So, Mr Sideris, my question was quite  
25 straightforward; that we've seen they triggered

1 a default from the 1.35 level to the lower  
2 intra-EEA MIF.

3 A. Yes.

4 Q. We've seen them described as a monopolist acquirer, at  
5 least -- and so assuming that they have a large  
6 acquiring business, I think it follows from your  
7 previous responses that you would accept that they have  
8 an incentive to achieve a reduction in the rate from  
9 1.35 to 1.3.

10 A. Are you talking about Citibank?

11 Q. I'm talking about Bank Card Company.

12 A. I'm not sure I follow, sorry.

13 Q. Right, okay. The letter that we saw, if we go back to  
14 the letter, which is at {XC22/75/21} --

15 MR JUSTICE ROTH: Is it confidential who the letter is from?

16 MR SMOUHA: No. I can give some clarification just in  
17 relation to confidential material, which will help and  
18 not slow things down.

19 The first thing is that the documents that are in  
20 the XC bundle, it is not the entirety of the document  
21 which is confidential. The confidential material is  
22 highlighted. So if you don't see any highlighting,  
23 don't worry.

24 MS DEMETRIOU: That's helpful.

25 MR SMOUHA: And sorry we've not been able to say that

1 earlier.

2 Secondly, it is not that it's Mastercard's  
3 confidential information; it's the confidential  
4 information of third parties, mostly banks, gathered  
5 from them in the regulatory investigations and disclosed  
6 to Mastercard on the regulatory file.

7 MR JUSTICE ROTH: So this document, which is not  
8 highlighted, is not confidential?

9 MR SMOUHA: Correct.

10 MR JUSTICE ROTH: Right. Well, that will make  
11 Ms Demetriou's task easier. Thank you.

12 MS DEMETRIOU: Thank you. That makes it a lot easier.

13 So we've seen that this is a letter from Bank Card  
14 Company, yes, and that what they're doing is they're  
15 saying they no longer want the 1.35% interchange fee.  
16 They want to put an end to it, yes, and what's going to  
17 apply is the intra-EEA default; yes? And what I was  
18 showing you in the --

19 THE SHORTHAND WRITER: I'm sorry, but can -- I'm not taking  
20 down nods, so --

21 A. Yes, sorry.

22 MS DEMETRIOU: Of course, yes.

23 So, I'm sorry, Mr Sideris, I'm just responding to  
24 your nods, but the transcriber is quite right. If you  
25 don't mind just saying "yes" or "no" --

1 A. Sorry for that.

2 Q. Thank you.

3 So if we -- so we've looked at the Commission  
4 statement of objections, and the statement of objections  
5 seems to indicate that they have a large --

6 Bank Card Company had a large acquiring business; yes?

7 MR JUSTICE ROTH: Would you like to be shown that again?

8 I think perhaps could we bring back --

9 MS DEMETRIOU: Yes, so it's {C16/215/173}.

10 A. To my recollection, Bank Card Company was -- I don't  
11 remember exactly what they were doing, but they were on  
12 the acquiring side.

13 Q. Okay.

14 A. I don't remember if they were also on the issuing side,  
15 to be honest.

16 Q. No, but here -- so your recollection seems to accord  
17 with what the Commission is noting; that they're  
18 an acquirer. They've been spoken about as a monopolist  
19 acquirer, but anyway, leave that aside. You remember  
20 them being -- having a significant acquiring business.  
21 So that would explain, wouldn't it, why they would have  
22 an incentive to get rid of the 1.35% domestic MIF and  
23 default to the lower intra-EEA MIF; yes?

24 A. Potentially, yes.

25 Q. Now, if we go to {C10/429/36}, please. This was

1 a UK cost study produced by EDC dated September 2002.  
2 And if we go to page 45 {C10/429/45}, EDC here explains  
3 where the data -- where its data has come from and if we  
4 look at the top of the page, it says:

5 "The sample represented around 90% of the MasterCard  
6 acquiring volume in the UK and just over 55% of  
7 transactions on the issuing side."

8 And then below that, it says that the sample was  
9 increased to include monoline issuers. So monoline  
10 issuers are issuers that didn't have an acquiring  
11 business; correct?

12 A. Yes.

13 Q. And smaller issuers who have been increasing their  
14 overall market share over the last few years.

15 And then in the table below, EDC says that their  
16 study includes eight issuers and five acquirers; yes?

17 A. Yes.

18 Q. So that means that those five acquirers represented  
19 90% of acquiring volume. We see that at the top of the  
20 page; yes?

21 A. Yes.

22 Q. And the eight issuers represented 55% of issuing volume;  
23 yes?

24 A. Yes.

25 Q. So it appears that the acquiring market was concentrated

1 in a smaller number of banks. Would you agree with  
2 that?

3 A. So it would seem, yes.

4 Q. And we can see that all the banks listed in the  
5 acquiring column are also listed in the issuing column,  
6 yes, apart from Girobank?

7 A. Yes.

8 Q. So do you agree that because the issuing column  
9 represents 55% of issuing volume and the acquiring  
10 column represents 90% of volume, it seems very likely  
11 that several of the banks in acquiring column will be  
12 net acquirers; correct?

13 A. No. This is not automatic.

14 Q. So you don't think that any of those banks in the  
15 acquiring column would have been net acquirers; is that  
16 your evidence?

17 A. I'm not saying I don't think; I said I don't know.

18 Q. You don't know. Alright.

19 Let's have a look at {C9/411}. These are joint  
20 written representations of MEPUK, Mastercard  
21 International and Mastercard Europe in response to the  
22 OFT's supplementary rule 14 notice. So this is dated  
23 2 May 2003.

24 And if we go to page 10 {C9/411/10}, figure 2.2 at  
25 the top illustrates how Mastercard's four-party scheme

- 1           operated; yes? You see that diagram?
- 2       A. Yes.
- 3       Q. And you can see the box in respect of issuers states
- 4           there are approximately 60 in the UK. Do you see that?
- 5       A. Yes.
- 6       Q. And you can see that the box in respect of acquirers
- 7           states that there are eight acquirers in the UK. So
- 8           there are many more issuers than acquirers; yes?
- 9       A. Yes.
- 10      Q. And of the named acquirers, several of them are issuers
- 11          too; yes?
- 12      A. Yes.
- 13      Q. So we see that RBS Group, Barclays and HSBC are all
- 14          listed as both issuers and acquirers; yes?
- 15      A. Yes.
- 16      Q. Now, the overall volumes have to balance out, don't
- 17          they? The issuing and acquiring volumes, they all have
- 18          to balance out, don't they?
- 19      A. Overall, yes.
- 20      Q. Yes. So given the fact that there are many more issuers
- 21          than acquirers and given the fact that some of those
- 22          issuers are monoline issuers who don't have any
- 23          acquiring volume, it follows logically, doesn't it, that
- 24          most of these acquirers will be net acquirers; yes?
- 25      A. No, you could have one acquirer that has 99% of the

1 market. I'm --

2 Q. You could have one of them.

3 A. You could have one acquirer, let's say -- you can take  
4 RBS Group. It could be 90% of the market in acquiring.  
5 Does it mean that Barclays, HSBC, Lloyds and Bank of  
6 Scotland would be net acquiring? Not automatically.

7 Q. Right, so -- but you would accept that at least -- so  
8 your case is that at least one of them has to be a net  
9 acquirer; is that right?

10 A. Yes, probably.

11 Q. Right. And it's unlikely just to be one, isn't it,  
12 because they would have to have a huge amount of the  
13 acquiring volume?

14 A. I can speculate, but I don't know.

15 Q. You don't have any recollection about how this worked?

16 A. No.

17 Q. Alright. Now, coming back to the operation of the  
18 75% rule, take a hypothetical scenario; yes? So let's  
19 imagine that the year is a year that you were there, so  
20 say 2003, and a group of domestic issuers have managed  
21 to assemble quite a lot of support to produce draft  
22 board papers to vote through a domestic MIF of, let's  
23 say, 2% for most transaction categories.

24 So my question is, first of all, do you agree that  
25 net acquiring banks would be incentivised to resist

1 raising the MIF in that way?

2 MR SMOUHA: Sir, I'm sorry to interrupt, but that question  
3 is -- both could only go to the counterfactual,  
4 certainly not a question directed to a question of fact,  
5 and it also appears to be asking for an opinion in  
6 relation to --

7 MR JUSTICE ROTH: It's a rather complicated question.

8 I'm not quite sure really what you're seeking to ask the  
9 witness. You're putting a hypothesis, which is not  
10 a factual question.

11 MS DEMETRIOU: Sir, we obviously have a case as to how this  
12 rule -- how incentives interacted with this rule, and  
13 that's what I'm trying to put to the witness.

14 MR JUSTICE ROTH: But I don't think the witness had any  
15 experience of seeing the rule at work because he wasn't  
16 involved with the UK.

17 As I understood, the witness said -- correct me if  
18 I'm wrong -- that you only became involved with the UK  
19 when, in 2004, the part of Mastercard where you were  
20 working the MCE took over setting the UK domestic MIF;  
21 is that right?

22 A. Yes.

23 MS DEMETRIOU: Sir, right --

24 MR JUSTICE ROTH: So asking him to give an opinion on -- you  
25 have asked, because he does say something about

1 incentives, about acquirers' -- net acquirers'  
2 incentives and net issuers' incentives and he's agreed  
3 with you on that, but then to put a -- I really don't  
4 think --

5 MS DEMETRIOU: Sir, that's fair enough. I'll leave that be  
6 and move on.

7 I want to turn to a document which was written  
8 before you joined Mastercard, but I want to see whether  
9 you agree with what's said in it, please. So it's at  
10 {C5/370}. So this is a 1999 Q&A document and I just  
11 want to look at something at the bottom of the page.

12 So if we go to -- sorry, if we go to page 2 and the  
13 very bottom of page 2 {C5/370/2}. And the backdrop to  
14 this it's seeking -- this paper is seeking to justify  
15 a process where the intra-EEA fees are increased for  
16 magnetic strip transactions while lower fees are  
17 introduced for chip and PIN transactions so as to  
18 incentivise a movement to chip and PIN.

19 If we look at the bottom of the page, it says:

20 "Why playing with cross-border Interchange? Don't  
21 you understand that this is not the key driver for  
22 getting countries to migrate to Chip, that it is rather  
23 the Domestic considerations? In the meantime, you  
24 damage the International acceptance."

25 And the response that's there says:

1           "Cross-border Interchange is important. First, it  
2 sets a direction for the whole scheme, with impacts on  
3 domestic markets as well, in particular those applying  
4 the cross-border Interchange domestically."

5           So I just want to see whether you agree with the  
6 points that are being made here. So the first point the  
7 author is making is that intra-EEA rates particularly  
8 impact on domestic markets which apply those rates to  
9 domestic transactions directly. You'd presumably agree  
10 with that proposition.

11       A. Yes.

12       Q. And the second point that's being made is that even in  
13 respect of markets where the rates don't apply directly,  
14 it sets the direction for the whole scheme. Do you  
15 agree with that proposition?

16       A. Not entirely. So it sets a direction. What does  
17 "direction" mean? There is the structure of the rates  
18 and there is the actual value of the rates. I think  
19 what this document is trying to achieve -- again,  
20 first time I see it -- is introduction of new tiers in  
21 face of new technology, which was EMV at the time, and  
22 therefore the objective seems to be that they want to  
23 send a message on what incentives could be like between  
24 the different tiers rather than saying, you know, the  
25 intra-European should be the actual rates for domestic

- 1 transactions that don't apply it.
- 2 Q. But in terms of setting a direction, we know that the  
3 intra-EEA rates do set a direction in the sense that if  
4 there isn't 75% agreement, then domestic rules will be  
5 disapplied and the intra-EEA MIF will apply; yes? So we  
6 know in that sense it sets a direction.
- 7 A. I don't call that a direction -- I would say it's  
8 a fallback rate that would apply in case of no bilateral  
9 or domestic agreements.
- 10 Q. Alright. And it sets a direction as well, doesn't it,  
11 because Mastercard Europe is the regional authority and  
12 so domestic jurisdictions would know what  
13 Mastercard Europe was doing at a strategic level; yes?
- 14 A. So domestic jurisdictions would know what the  
15 intra-European rates would be, yes, that's correct.
- 16 Q. They would know whether they were rising or falling.
- 17 A. Rising or falling of what?
- 18 Q. Whether the rates, the EEA MIFs, were rising or falling  
19 or staying the same, they would know that.
- 20 A. They would know that.
- 21 Q. And the banks would know that too, wouldn't they?
- 22 A. Of course, yes.
- 23 Q. So an acquiring bank who saw that an intra-EEA MIF was  
24 lower or falling might use that to argue for a lower  
25 domestic MIF in principle; yes?

1 A. Potentially.

2 Q. Now, if we look at {C10/92/21}, we can see here the  
3 terms of reference for the European Interchange  
4 Committee, the EIC, and you used to sit on that  
5 Committee, didn't you?

6 A. Yes.

7 Q. And this is a document from 18 August 2003, so it's  
8 before Mastercard takes control, direct control, of the  
9 setting of the UK MIFs; correct?

10 A. Yes.

11 Q. And under "Vision" -- do you see that -- it says:

12 "In accordance with MasterCard strategy, develop,  
13 review and make recommendations to MasterCard Europe  
14 senior management on intra-European interchange programs  
15 and, where appropriate, domestic interchange programs  
16 for potential submission to the European Boards."

17 And under "Objectives", it says that an objective is  
18 to:

19 "Review interchange at European level, by region, by  
20 market and by product on a regular basis and recommend  
21 the required repositioning."

22 So do you agree that the EIC, even in 2003, has  
23 an overall function of providing strategic oversight at  
24 a European level?

25 A. The main objective of the EIC at the time was to set

1 cross-border interchange fees and, by default, domestic  
2 in case a cross-border would apply. I think this  
3 document opened the door to potentially a situation  
4 where a group of banks could ask Mastercard to set  
5 domestic rates in their country, and that was just  
6 holistic just to make sure that if it has -- if it had  
7 happened, we'd be able to do it.

8 Q. So I think you're agreeing with my question, aren't you,  
9 that looking at these objectives, that the EIC, as well  
10 as setting intra-EEA MIFs, had a function of providing  
11 strategic oversight at the European level?

12 A. "Strategic oversight", I don't know what that means.

13 Q. Well, strategic oversight -- it says here:

14 "Review interchange at European level, by region, by  
15 market and by product on a regular basis and recommend  
16 the required repositioning."

17 So there was strategic input coming from the  
18 European level, wasn't there?

19 A. As I said, the role of the EIC was to make  
20 recommendation for intra-EEA interchange fees.

21 Q. Well, this is suggesting it was a bit wider than that.  
22 Are you disagreeing?

23 A. It is open for the possibility of local banks asking  
24 Mastercard to set domestic rates in their country, yes.

25 Q. Right. Alright.

1           Now, in November 2004, Mastercard took direct  
2           control over setting the levels of UK domestic MIFs,  
3           yes?

4           A. Yes.

5           Q. And to be clear on who's taking the decisions on  
6           UK domestic interchange fees from that point, the  
7           domestic fees were discussed by the Interchange Fee  
8           Team, the IFT, which was overseen by you; correct?

9           A. Yes.

10          Q. And presented to the EIC and sent to the chief operating  
11          officer for approval; yes?

12          A. Yes.

13          Q. And as far as the intra-EEA MIFs were concerned, the  
14          decision-making, at least from 2006 to 2008, was  
15          effectively the same as that, wasn't it?

16          A. Yes.

17          Q. And it was slightly different, wasn't it, from 2004 to  
18          2006 in the sense that it was initially -- it was the  
19          same in that it was initially being decided by the IFT  
20          and the EIC, but the difference at that stage was that  
21          the Mastercard Europe board also needed to approve the  
22          IFT's proposals, yes --

23          A. Yes.

24          Q. -- on the advice of the Business and Marketing Advisory  
25          Committee?

- 1 A. Yes.
- 2 Q. So from 2004, it was the very same Committees deciding  
3 on the EEA MIFs and the UK MIFs; yes?
- 4 A. Yes.
- 5 Q. And primary -- so primary responsibility for developing  
6 proposals and making a preliminary decision on both the  
7 intra-EEA MIFs and the domestic MIFs rested with the  
8 IFT, managed by you, and the EIC, from 2004 to 2008;  
9 yes?
- 10 A. Yes, for all countries and all cross-border rates.
- 11 Q. So those Committees would obviously have been conscious  
12 of the direction of travel at the intra-EEA MIFs level  
13 when thinking about domestic MIFs.
- 14 A. Sorry, can you please repeat the question?
- 15 Q. Yes. I mean, you -- it's the same people on the same  
16 Committees, so you would've known about what the  
17 intra-EEA MIFs -- what was being decided for those when  
18 you were looking at domestic MIFs; yes?
- 19 A. So I knew about it, yes, but in my team, you didn't have  
20 the same people working on all same countries and all  
21 same cross-border rates. So it could be different  
22 people within my team that work on different cases.
- 23 Q. But they still would have known what the intra-EEA MIFs  
24 were.
- 25 A. The manuals were available to everybody, so I assume

1           they could read them, yes.

2           Q. And you were in charge.

3           A. I was in charge.

4           MR JUSTICE ROTH: Can I just ask: you said various countries  
5           you were dealing with. We know, from 2004, one was the  
6           UK. What were the other, can you remember,  
7           domestic MIFs that your team or the IFT were dealing  
8           with at this point?

9           A. Over the period?

10          MR JUSTICE ROTH: Yes.

11          A. I recall we worked on many countries. Just off the top  
12          of my mind, I remember France, where we set the fees  
13          much lower than the intra-EEA. I think it was around  
14          55 basis points, and that was to compete with the local  
15          scheme there. It was in Poland. It was in Italy,  
16          I think. Many other countries where we -- when we  
17          disconnected the interchange fees cross-border from the  
18          domestic, there was the opportunity to optimise it, yes,  
19          so ...

20          MR JUSTICE ROTH: The countries you particularly remember,  
21          France, Poland, Italy, and then came the UK.

22          A. No, UK came first.

23          MR JUSTICE ROTH: UK came first.

24          A. Yes.

25          MR JUSTICE ROTH: Right. Thank you.

1 MS DEMETRIOU: Can we look please at {C13/362/1}. So this  
2 is an email dated 6 December 2004, so it's shortly after  
3 Mastercard has taken direct control of the UK MIF; yes?  
4 And it's from Etienne -- I want say "Goose", but  
5 I'm sure that's not how you pronounce it. How do you  
6 pronounce his name?

7 A. Etienne Goosse.

8 Q. "Goosse", thank you. So it's from Etienne Goosse, who's  
9 the Mastercard Europe head of corporate affairs, and we  
10 see at the top of the email:

11 "The Global Board decision to delegate to Management  
12 the setting of the domestic MIFs in the UK raises a ...  
13 number of issues which are ... addressed below ..."

14 And we can see in the penultimate -- the last but  
15 one bullet point that there's to be a formal -- "First  
16 formal domestic UK MIF review". Do you see that towards  
17 the bottom?

18 A. Yes.

19 Q. And the final bullet point says:

20 "Long term evolution: to be part of the overall  
21 review of MIF [setting] in Europe and globally."

22 Yes?

23 A. Yes.

24 Q. So would you agree that Mastercard's intention is to  
25 take a view of MIF setting in the UK which is part of

- 1 a broader European strategy?
- 2 A. At the time -- I think at the time when the email was  
3 sent, it was about the UK. There were discussions,  
4 obviously, with the European Commission. There were  
5 antitrust and competition law issues around the setting  
6 of the interchange. At this time, I am not aware that  
7 the vision was to take over for all countries, but  
8 obviously this came later.
- 9 Q. Well, Mr Sideris, I think the point I'm putting to you  
10 is that when Mastercard was looking at UK domestic MIFs  
11 from 2004, it wasn't doing so in a way which was sealed  
12 off from its strategy in the rest of Europe, was it? It  
13 was taking it into account in the context of its broader  
14 European strategy.
- 15 A. I don't agree. The -- at the time the -- of the taking  
16 over of the UK MIF, my recollection is there was an OFT  
17 investigation and I believe the management thought it  
18 would be, from a legal perspective, better off to have  
19 interchange fees in the UK being set by Mastercard  
20 rather than the UK members.
- 21 Q. And when Mastercard Europe were looking at UK, once it  
22 took over setting UK interchange fees, it had regard to  
23 what it was doing in the rest of Europe, didn't it?
- 24 A. I don't know. As I said, I am aware of what happened  
25 for the UK at the time it happened and what happened for

1 the rest of Europe when it happened later on with the  
2 IPO, but I cannot tell you whether, at the time when we  
3 set the UK MIF, there was already a vision that I was  
4 aware of to do it all around Europe.

5 Q. Alright. Let's have a look at {C14/363/1}. So this is  
6 a report produced for the meeting of the EIC on  
7 1 June 2005. Do you see that at the top of the page?

8 A. Yes.

9 Q. And at the bottom of the page, it says that -- we see it  
10 recorded that Mastercard's taken -- has authority to  
11 establish the UK domestic MIFs; yes?

12 A. Yes.

13 Q. And then if we go to page 2 {C14/363/2}, under the  
14 heading "Future Trends for e-Commerce", it's said here  
15 that it's believed that UCAF transactions will take off,  
16 so it's anticipated that there's the potential for a big  
17 rise in UCAF transactions amongst UK consumers; yes?

18 A. So UK transactions, in order to happen, need to have  
19 both consumers and merchants on board. So what I read  
20 here is that indeed at that time we believed that UCAF  
21 transactions will take off, meaning that consumers will  
22 use them, as well as merchants. We develop the right  
23 technology on their end.

24 Q. And if we look at the paragraph just -- so the  
25 third paragraph in that section:

1           "There is therefore a need to implement changes in  
2           the UK to reflect the strategy developed for support of  
3           SecureCode implementation in Europe. This was delayed  
4           at the end of 2004 ... but the expectation is that  
5           MasterCard will move to a similar structure for the UK."

6           So do you agree that the structure of the UK MIFs is  
7           being amended to bring them into line with the European  
8           structure?

9           A. So the structure of the UK was amended to actually  
10          implement the SecureCode, the 3DS technology. That was  
11          a global initiative -- it was also a European  
12          initiative -- to develop a new technology and fight  
13          fraud and reduce fraud for e-commerce transactions and  
14          it was rolled out everywhere.

15          Q. So I think -- just going back to my question, I think  
16          your answer is yes, isn't it, that you agree that the  
17          structure of the UK MIFs was being changed to align with  
18          what was going on in Europe?

19          A. I don't fully agree. To the extent of these two new  
20          tiers were introduced, these were introduced to align  
21          with the industry initiative of 3DS rather than, you  
22          know, the overall strategy of Europe to align  
23          interchange fees.

24          Q. Well, it's said there -- I didn't think this was going  
25          to be a controversial question. It's said there:

1           "There is ... a need to implement changes in the UK  
2           to reflect the strategy developed for support of  
3           SecureCode implementation in Europe."

4           So there seems to be some strategy that's been  
5           developed in Europe; yes?

6           A. For SecureCode, yes.

7           Q. Yes.

8           A. And it was global. That's what I said.

9           Q. Alright. So you're saying not just in Europe, but  
10          globally.

11          And what's being said here is there is a need to  
12          effect changes -- to implement changes in the UK to  
13          reflect that strategy; yes?

14          A. Yes, correct.

15          MR JUSTICE ROTH: I think what -- Mr Sideris, as

16          I understand, the point you're making there was --  
17          excuse me. You were accepting there was a strategy to  
18          encourage the introduction of this technology across  
19          Europe and indeed beyond. In that regard, there was  
20          a general strategy across Europe, but you're saying it  
21          doesn't mean it went beyond that particular initiative.

22          Is that the point you're making?

23          A. Exactly, yes.

24          MS DEMETRIOU: And if we look at page 4 of this document --

25          sorry, the page before {C14/363/3}, we see under the

1 heading "Further UK MIF Review" -- do you see that? So:

2 "The above strategy will be further reviewed ... The  
3 above proposal only focuses on the introduction of the  
4 two new UCAF tiers ..."

5 So, pausing there, the review that's happened so far  
6 has only really focused on these two new  
7 UCAF categories; yes?

8 A. That's correct, yes.

9 Q. And then it says:

10 "A complete MIF structure and rate review will be  
11 undertaken after the completion of the UK domestic cost  
12 study ..."

13 So there's going to be a further review to come;  
14 yes?

15 A. Yes.

16 Q. And if we go to {C14/363/4}, we see that the  
17 first bullet point there is that the proposed fees aimed  
18 to start aligning UK domestic MIF structure with the  
19 European one; yes?

20 A. In view of SEPA, yes.

21 Q. And the fourth bullet point says that:

22 "The Merchant UCAF tier is positioned at the same  
23 fee level as the Electronic tier, consistently with the  
24 European approach ..."

25 Yes?

1 A. Yes, that's what it says.

2 Q. So it's fair to say, isn't it, that the European  
3 approach is driving these decisions; that's right,  
4 isn't it?

5 A. So not entirely. When we set the European interchange,  
6 the cross-border interchange for the UCAF tiers, we  
7 looked at incentivising, both on the issuing and the  
8 acquiring side, the take-up of 3DS technology, and there  
9 was a level between these new -- two tiers, the merchant  
10 UCAF and merchant -- full UCAF, comparing it to the base  
11 tier, which was the tier they would get in case there  
12 was not a 3DS transaction and there was a logic about  
13 how you put the level, one compared to the other one.

14 So when we set domestic interchange fees in the UK  
15 and other countries, the logic was there, but you would  
16 probably have seen the rates themselves were not the  
17 same as the ones in Europe.

18 Q. Yes. Let's have a look at that. So if we go to  
19 {C15/152/1}, so this was a document prepared for an EIC  
20 Committee meeting in September 2005. If you see in  
21 section 1, there's a proposal to endorse various  
22 interchange fees set out in those tables; yes?

23 A. Yes.

24 Q. So in the table on page 1, we see there's two new UCAF  
25 tiers. Can you see that? So that's the second table.

1 A. Yes.

2 Q. And they were introduced in June.

3 And then we have a proposal to delete a number of  
4 other categories and reduce -- so let me just check that  
5 I have the right document. Yes, that's right. So it's  
6 the second table.

7 Do you see that there's a proposal to delete some of  
8 the other categories? So you have current and proposed  
9 then you see there's an "N/A, N/A, N/A" for three of the  
10 categories.

11 A. Yes.

12 Q. And to reduce the standard rate from 1.3 to 1.2; do you  
13 see that in the last row?

14 A. Yes.

15 Q. And then if we go to the background on page 2  
16 {C15/152/2}, that explains that these decisions,  
17 Mastercard's taken responsibility in-house, and we see  
18 that this is the second stage of the review. Do you see  
19 that, third paragraph:

20 "This proposal represents the second step of the  
21 UK Domestic Interchange Fees review ..."

22 A. Yes.

23 Q. And then if we go to page 3 {C15/152/3}, section 3.1,  
24 you see:

25 "The aim of this proposal ..."

1           This is the second sentence:

2           "... is to reduce the number of tiers and start  
3 aligning with the intra-European structure in view of  
4 SEPA."

5           So the domestic -- I think, just pausing there, the  
6 domestic fee categories are being amended in order to  
7 match the intra-EEA categories; correct?

8       A. Yes.

9       Q. And that this was all about simplifying the UK fee  
10 structure so it became more similar to the EEA MIF  
11 structure; correct?

12      A. Partially correct. It was simplified because it didn't  
13 make sense to have all these tiers that didn't attract  
14 many transactions. It was extra cost for Mastercard to  
15 do so. It -- it was extra risk of making errors of  
16 having different tiers, especially when they didn't  
17 attract a lot of transactions.

18      Q. And it's an example of management that is dealing with  
19 MIFs across Europe, or at least with the intra-EEA MIFs  
20 and MIFs for some other European countries, taking  
21 a more strategic top-down view of what's appropriate;  
22 yes?

23      A. No, it was just simplifying the tier structure in the  
24 UK, because this didn't make sense at that time for the  
25 UK.

1 Q. Yes, but you did it by reference to the tier structure  
2 for the intra-EEA MIFs; yes? You weren't starting with  
3 a blank piece of paper.

4 A. Not entirely true because afterwards, we introduced  
5 tiers in the UK that were not in the EEA.

6 Q. Well, Mr Sideris, at this stage, you were simplifying  
7 things so that it matched up with the intra-EEA  
8 category; yes? That was the purpose of this change.

9 A. So the purpose of this change was to get rid of the  
10 tiers that didn't make sense for the UK --

11 Q. No --

12 A. -- and to simplify it, not to make it closer to the EEA.

13 Q. So that was just a coincidence, was it?

14 A. That's just a coincidence.

15 Q. Just a coincidence, right.

16 Now, we see listed on the page the categories that  
17 are being removed, and the bottom bullet point explains  
18 the reduction in the standard fee from 1.3 to 1.2. So  
19 do you see that:

20 "Reduce standard rate by 10 [basis points] in order  
21 to accommodate for the inclusion of volumes related to  
22 cancelled tiers and keep similar weighted average  
23 interchange rate."

24 Yes?

25 A. That's correct.

1 Q. So what they were doing -- what was being done here was  
2 that the weighted average -- you wanted to keep the  
3 weighted average the same and so that's why a reduction  
4 was being made in the standard rate; yes?

5 A. Yes, that's correct.

6 Q. So it's correct that decision-makers did look at  
7 weighted averages as targets; correct?

8 A. Weighted average, amongst many other things, like tier  
9 rates themselves and weighted average as well.

10 Q. Okay. Now, I think we can see from these two reviews  
11 that you didn't want to depart very far from the rates  
12 that you inherited in 2004, did you?

13 A. I'm not sure I say that anywhere.

14 Q. Well, I'm just asking you now to answer my question. So  
15 we don't see you departing very far from the rates that  
16 you inherited in 2004.

17 A. So maybe that's a fact.

18 Q. And you regarded the 2004 rates as the starting point  
19 for your review; yes? You weren't starting with a blank  
20 sheet of paper and working out from scratch what would  
21 be appropriate.

22 A. So when we set domestic interchange and any interchange,  
23 there's many things we take into account. Competitive  
24 aspect is one of them. Cost study is another one.  
25 Situation in a country for Mastercard is another one.

1 I would say the rates that were in existence prior to  
2 the changes were a point of data that was there and we  
3 were making sure that, you know, the new rates were the  
4 ones that actually made sense for the country.

5 Q. But you took the view that the old rates were working  
6 well, broadly, didn't you?

7 A. Well, if we did, then we wouldn't have changed anything  
8 [sic]. I believe we changed many things, so --

9 Q. But that's why you change the weighted -- that's why  
10 you wanted to keep the weighted average static, because  
11 you thought it was all okay.

12 A. The main reason why we wanted to keep the weighted  
13 average is because we were getting rid of some  
14 transactions tiers that would otherwise fall into the  
15 basic standard tier and we didn't want to increase the  
16 interchange and impact the merchants and the acquirers.

17 Q. Yes, because you thought that the level that you had in  
18 2004 in terms of the weighted average was the right  
19 level, so that's why you wanted to keep the weighted  
20 average the same; yes? That's why you made this  
21 adjustment in the base points to compensate, as you say,  
22 for the deletion of the other tiers.

23 A. So what is the exact question -- sorry, could you  
24 repeat?

25 Q. The exact question, Mr Sideris, is that you regarded the

1 rates in 2004 as appropriate. You thought the weighted  
2 average hit the right balance, and that's why, when you  
3 made these adjustments by -- when you deleted these  
4 tiers, you reduced the standard rate so as to keep the  
5 weighted average the same.

6 A. So as I -- as I already responded, the reason why we  
7 reduced it is to make sure that there was no negative  
8 impact on the acquiring and merchant side.

9 Q. So I think you're agreeing with me that you thought the  
10 rate in 2004 was the right rate and you didn't want to  
11 have any adverse impact and so you wanted to keep the  
12 weighted average static; yes?

13 A. We want to avoid that it goes up.

14 Q. Alright. Now, if we go to page 4, section 3.2.1 this  
15 time {C15/152/4}, you see a reference to MasterCard  
16 World Signia; yes?

17 A. Yes.

18 Q. And we can see here a proposal to implement the  
19 World Signia intra-European structure and rates for  
20 UK domestic transactions; yes?

21 A. Yes.

22 Q. And if we go to the table at {A/18.1/10}, please, we can  
23 see at the top of the page -- well, actually, if we go  
24 back to page 8 because that, I think, has the heading  
25 {A/18.1/8}, we can see these tables are for Mastercard

1 World Signia credit cards and Visa cards; yes? So these  
2 are the tables.

3 And if we go to page 10 {A/18.1/10}, what we see is  
4 that there is a change, yes, in the UK rates? So if you  
5 compare 2005, the UK and the EEA rates, you see base and  
6 standard, 1.3 and 1.9; yes?

7 A. Yes.

8 Q. And then if you go to 2006, the UK ones change to come  
9 up to the EEA rate; yes? That's 1.9.

10 A. Yes.

11 Q. And then 2007, you see it's again 1.9 and 1.9.

12 A. Yes.

13 Q. So these -- what we're seeing here, consistently with  
14 the document I just showed you, is an increase in the  
15 UK MIFs to match the EEA MIFs for these cards; yes?

16 A. So an increase in the UK MIFs to have the right rate for  
17 World Signia, which was at the same level as consumer at  
18 the time.

19 Q. Right, but if we go back to that document on page 4, so  
20 it's {C15/152/4}, you see there that:

21 "It is proposed to implement the World Signia  
22 intra-European structure and rates for UK domestic  
23 transactions."

24 So this is an example, isn't it, of Mastercard  
25 driving forward the harmonisation of the EEA and

1 UK structure and rates that we saw as a strategic  
2 objective?

3 A. No, that's not correct.

4 Q. And it's not correct, is it, either that the UK fees for  
5 Signia have essentially been set on the basis of the  
6 long-standing EEA fees for that card?

7 A. Excuse me?

8 Q. Do you agree that the UK fees for Signia have been  
9 essentially set on the basis of the long-standing EEA  
10 fees for that card?

11 A. The UK World Signia rates were set at the level which  
12 was the same level and same structure than the ones we  
13 had for intra-EEA. That's correct. It's a fact. But  
14 we didn't do it to harmonise. We just did it because it  
15 made sense for the UK market to have this level and this  
16 structure at that time.

17 Q. Well, there's none of that in this document, is there?  
18 Because all this document says is:

19 "It is proposed to implement the World Signia  
20 intra-European structure and rates for UK domestic  
21 transactions."

22 So it rather looks like you're seeking to match the  
23 EEA rates in the UK.

24 A. We are saying we are proposing:

25 "... to implement the World Signia intra-European

1 structure and rates for UK domestic transactions."

2 Yes, and the reasoning is why? Because it made  
3 sense for the UK.

4 Q. So if the EEA rate had been something totally different,  
5 you would have still moved up the UK rate to 1.9, would  
6 you?

7 A. If the sorry, if the what? The UK or ...

8 Q. So if the EEA rate -- you -- what we've seen is  
9 an alignment, a substantial move of the UK rate to the  
10 EEA rate, and they match, so a move from 2005 to 2006.  
11 So are you saying that it's just coincidence that  
12 they're both at 1.9?

13 A. I'm saying it -- we had weighting rates in the UK that  
14 were deemed to be too low to be competitive on the  
15 premium range of card, and the rates we implemented were  
16 the same rates and same structure that we have for  
17 intra-European because they made sense for the UK.

18 Q. And --

19 A. If they didn't make sense for the UK, if the  
20 World Signia in Europe were something else, maybe we  
21 would have done something else for the UK.

22 Q. And there's no cost study, is there, explaining why it  
23 makes sense for the UK?

24 A. I don't remember if there was a cost study at this  
25 stage.

- 1 Q. No, no other analysis indicating why it's appropriate  
2 for the UK.
- 3 A. I don't remember if there was at that time.
- 4 Q. Now, let's look at the same document. If we go down the  
5 page to Mastercard World card, this is a proposal to  
6 introduce World card and it's at this stage a new  
7 product, isn't it, which doesn't exist either in the UK  
8 or the EEA; correct?
- 9 A. Yes.
- 10 Q. If we look at page 5, please, final paragraph  
11 {C15/152/5}, we see at the bottom of the page:  
12 "Both the structure and rates for the World Card  
13 program will be aligned on the intra-European ones."  
14 Yes?
- 15 A. Yes.
- 16 Q. So as I've said, this is -- there's no product on the  
17 market, so this doesn't refer to actual intra-European  
18 rates. It's the recommendation. It's the proposal for  
19 the intra-European rates; yes?
- 20 A. So this proposal was for the UK; right?
- 21 Q. This -- what I'm asking you about is it says that the  
22 structure and the rates for the World card programme  
23 will be aligned on the intra-European ones and the  
24 question -- it's just a short question, really -- is  
25 that there wasn't yet a European card on the market, so

1           when this paper talks about the intra-European rates,  
2           it's talking about a proposal for an intra-European  
3           rate; yes?

4       A.   Yes.

5       Q.   Okay.  And if we go to {C15/349/1}, this is a paper  
6           presented to the EIC on 8 December 2005, so just after  
7           the document we've just been looking at, and you can see  
8           the subject line -- you can see the subject line at the  
9           top of the document, "Domestic Fallback Interchange on  
10          New Product Releases"; yes?  And then "For Discussion",  
11          it says:

12                 "... this paper uses World card as an example ..."

13                 And what's being discussed is the authority to  
14                 mandate a specific product interchanged domestically.  
15                 Do you see that in the first paragraph?

16       A.   Yes.

17       Q.   And then you can see under paragraph 2 that Mastercard  
18           has agreed internally that a blended interchange rate of  
19           1.49% would be justified for the World card, and that  
20           rate was calculated on several factors, including the  
21           targeted spend levels and expected features and benefit  
22           cost to the issuer; yes?

23       A.   Yes.

24       Q.   So that's the rate that Mastercard considers will be  
25           appropriate across Europe; correct?

1           A. No. Actually, when we made the recommendation for 1.49,  
2           we took into account the countries that were in the  
3           pipeline for potential world launch. From recollection,  
4           UK was one of them. I believe there was also France and  
5           Germany. So there were a few countries that we took  
6           into account when make the analysis and recommendation  
7           for the cross-border interchange for World Card. Out of  
8           that pool of countries, I recall the vast majority of  
9           the opportunity was from UK.

10          Q. Alright. So what you're saying is you looked at the key  
11          countries and you worked out the best rate that would  
12          apply for Europe; yes?

13          A. Yes, and this rate was based on, essentially, UK banks.

14          Q. Alright. We'll come to that in a minute.

15                 But the 1.49% is the rate -- is the Europe-wide rate  
16                 this you're proposing, and then if you look at what's  
17                 said about the effect of this decision, so it says:

18                         "... assuming that MasterCard ... adopts the  
19                         1.49% interchange on a intra-European basis ... the  
20                         effect of this decision would be implemented in Europe  
21                         as follows ..."

22                 And if we go down, we see that there are two -- can  
23                 we just scroll, please, down the page -- that there are  
24                 two options:

25                         "For those applying the Intra-European Fallback ...

1 the new rates defined ... will be applicable [but]  
2 "For ... members applying specific intra-country  
3 interchange fees, MasterCard will advise them that a new  
4 product will be launched and a new interchange  
5 structure/rate will apply. We will inform them ... they  
6 have two options ..."

7 And if we go to the next page {C15/349/2}:

8 "They communicate specific intra-country rates for  
9 this ... product.

10 "If they do not want specific rates ... then [the  
11 fallback] rates apply."

12 But then we see that there's a problem with this.  
13 If we go down the page -- sorry, let's just look at the  
14 paragraph now at the top of the page. It says:

15 "Under this current policy, MasterCard Europe's  
16 World Product would have wide variation by country in  
17 terms of fundamental economics."

18 And there is then a table.

19 And if we scroll down further, we see:

20 "Due to the wide variation ... the fundamental  
21 product ... becomes unsustainable for our issuers ..."

22 And if we go over the page {C15/349/3}:

23 "... and many of our markets. As a result of the  
24 variation in domestic interchange rates it is almost  
25 impossible to roll out any type of new product with any

1 kind of standardized ingredient requirements.

2 "This calls into question why new products would by  
3 default fall back onto the standard domestic interchange  
4 in our markets as opposed to the European Intra-Regional  
5 Interchange which has been carefully calculated to  
6 reflect the value of the product to the payment  
7 industry."

8 And if we see -- so just to unpack that, is this --  
9 am I understanding this correctly? Mastercard wants to  
10 launch a card with particular features and benefits that  
11 will be attractive to consumers and attractive to  
12 issuers; yes?

13 A. Yes.

14 Q. And the divergences in domestic interchange fees make  
15 that virtually impossible; yes?

16 A. I don't fully agree.

17 Q. Well, that's what the paper says.

18 A. I know that's what the paper says.

19 Q. Well, whoever wrote it must have thought that; yes?

20 A. It was a thought.

21 Q. Just a thought, okay.

22 And if we see what Mastercard want to do, what they  
23 want to do -- if we look down the page, please, we see  
24 again "Impact Analysis":

25 "... this volatility makes standardizing a minimum

1 level of benefits and features virtually impossible."

2 It's not just a view, is it, Mr Sideris? Someone  
3 actually carried out quite a lot of analysis to work  
4 this out.

5 A. So I agree somebody made some analysis, yes.

6 Q. Right. If we go to page --

7 MR JUSTICE ROTH: Can I understand? This document, if one  
8 goes to the first page, page 1 of the document  
9 {C15/349/1}, at the top, so this is -- as I understand  
10 it, this is a paper prepared for the Committee. Is that  
11 what it is, Mr Sideris?

12 A. Yes, sir.

13 MR JUSTICE ROTH: It says "For Discussion" on that subject.  
14 And this will be what's come out of your team, would it,  
15 or who would put this forward for discussion?

16 A. That would have been done in co-ordination between the  
17 product group and my team; the product group that was in  
18 charge of developing new products.

19 MR JUSTICE ROTH: Then it goes to the Committee for them to  
20 consider and discuss.

21 A. To discuss, yes.

22 MR JUSTICE ROTH: Thank you.

23 MS DEMETRIOU: And then if you go to page 4, please -- in  
24 fact, let's go back to page 3 to see the context of  
25 this, bottom of page 3 {C15/349/3}. We've seen the

1 statement I just took you to:

2 "... volatility makes standardizing a minimum level  
3 of benefits ... impossible."

4 Then if we go to page 4 {C15/349/4}, what we see  
5 are, on page 4, the pros and cons of mandating domestic  
6 interchange on new product launches, and you see the  
7 pros include enabling you, Mastercard:

8 "... to be more proactive in setting the price  
9 strategy of our products, and ... consistently  
10 [mandating] product features throughout the region and  
11 thereby [building] up 'reference products'."

12 And then in terms of the cons, what's being said is,  
13 well, Mastercard might not have authority to do that, so  
14 there's a legal issue, and some members will feel  
15 they're not being consulted.

16 But the clear message that this document is sending  
17 out is that it's damaging, isn't it, to have  
18 differential interchange fees for this new product  
19 because it doesn't allow you to launch a consistent and  
20 coherent product? That's what the paper is saying.

21 A. Yes, but this was a view of the product team, who wanted  
22 to have a simple approach to developing the product.  
23 The reality is that I don't believe, from recollection,  
24 that we actually did it at the end, and we ended up  
25 having to have a -- the mandate for the new product

1 being a basis points cost for the issuer that would be  
2 applicable to each country separately, depending on the  
3 interchange that will be applicable in each country.

4 Q. Yes, and what actually happened, I think you explain in  
5 your statement, is that the 1.49 rate was accepted as  
6 far as the UK was concerned, but in the end, it was  
7 voted down at European level; correct?

8 A. That's correct.

9 Q. And what you've said in your statement and what you've  
10 explained to the Tribunal is you say this 1.49 rate was  
11 based on certain data from key countries and to be fair  
12 to you, let me take you to the document you refer to in  
13 your statement. That's at {C14/348/1}.

14 And that's the document you refer to. It's dated  
15 1 June 2005 and it's talking about the new World card  
16 and it's explaining -- and if we scroll down, what we  
17 see throughout the document is that, I think as you  
18 explained, there are certain key countries that the card  
19 is going to target first of all; yes? So Germany,  
20 France, Italy, Spain and the UK.

21 A. Yes.

22 Q. So what you have -- if we scroll down the document, if  
23 we can go to the next page {C14/348/2}, is we can see in  
24 that table, for example, there's data from each of those  
25 key countries, and it's on the basis of that data that

1 the European rate of 1.49 is determined; yes?

2 A. Yes.

3 MS DEMETRIOU: Okay.

4 MR JUSTICE ROTH: Would that be a sensible moment to take  
5 a break?

6 MS DEMETRIOU: It would be, sir, yes.

7 MR JUSTICE ROTH: So we'll come back at 3.55.

8 So we'll take a short break for your benefit, for  
9 the benefit of everyone, in particular for the benefit  
10 of the transcriber, but you mustn't discuss your  
11 evidence or the case with anyone over our ten-minute  
12 break.

13 (3.45 pm)

14 (A short break)

15 (3.57 pm)

16 MS DEMETRIOU: Mr Sideris, I want to go back to a document  
17 we looked at before relating to UCAF. It's at  
18 {C15/152/6}, page 6, please.

19 So you remember we looked at this document, and if  
20 we look at 3.3 at the bottom of this page, we see that:

21 "The average MIF level which will result from the  
22 above changes ... will be well below the latest measured  
23 costs (1.63% in the 2002 UK domestic cost study). The  
24 2005 UK domestic ... cost study has currently not been  
25 finalized."

- 1           Yes? So that's the timing of things.
- 2       A. Yes.
- 3       Q. So the interchange fee proposals in this paper, which  
4           are from the end of -- well, Q3 2005, have all been  
5           produced before the 2005 cost study results are known;  
6           yes?
- 7       A. Yes.
- 8       Q. And a decision is going to be made on these fees without  
9           knowing the results of the cost study; correct?
- 10      A. I believe we received an indicative cost study result.
- 11      Q. Well, it says they will be exposed during the meeting,  
12           and the results -- if we compare the levels of the  
13           proposed MIFs with the most recent cost study, 1.63, we  
14           can see they're well below the cost study figures,  
15           aren't they?
- 16      A. Excuse me, can you please repeat?
- 17      Q. Yes. So the proposals are well below the cost study  
18           figures from 2002, which are 1.63.
- 19      A. Yes.
- 20      Q. So they weren't actually being set on the basis of those  
21           cost studies, were they, these proposals? They weren't  
22           being made on the basis of the cost studies.
- 23      A. So what -- I believe what is said here is that at the  
24           time we drafted the paper, we didn't have the results of  
25           the 2005 UK cost study. We put in the paper the

1 reference to the previous cost study and as I read,  
2 which I didn't remember exactly what had happened, but  
3 as I read, it says that during that meeting, we will be  
4 providing the indicative cost study results for 2005.

5 MR JUSTICE ROTH: Yes, that's what it says. I think the  
6 question you're asked is: you don't say, "Well, we can't  
7 make a proposal until we get some indicative cost  
8 results". You are nonetheless making a proposal without  
9 yet knowing the results of the new cost study and you  
10 know the results of the old cost study and it seems  
11 you're making a proposal that's well below it. So it's  
12 not based -- that what's being proposed is not based on  
13 the cost study; is that fair?

14 A. The moment we wrote the paper, from, again, reading what  
15 it says, I understand that we did not have the latest  
16 cost study out of hand, but there is always a time  
17 between the drafting of the proposal, sending around,  
18 few -- maybe a week or two before to the Committee. By  
19 that time, again from reading what is said, I understand  
20 that we were waiting for Edgar Dunn to get the  
21 indicative cost study and at the time of debating it at  
22 the EIC, we would have had both the proposal and the  
23 cost study, which was not in the paper at that time.

24 MR JUSTICE ROTH: So, in other words, when the actual  
25 decision is taken, you will have information from the

1 cost study, but you were able to make a proposal --

2 A. Yes.

3 MR JUSTICE ROTH: -- which clearly is not based on the cost

4 study because you didn't have it.

5 A. Exactly. That's correct.

6 MS DEMETRIOU: I'd like to take you -- I think we can see

7 this most easily from the expert evidence relied on by

8 Mr Merricks. If we go to {A/14/38}. So this is a table

9 which matches up costs reported in the EDC cost studies

10 with the level at which the UK domestic interchange fees

11 were set; yes?

12 A. Yes.

13 Q. And if we look down at those figures, then we can see

14 that they're very different, aren't they? So the

15 figures of the interchange fees are very different to

16 the cost figures, if you just scan all the way down;

17 yes? So take the average figures and you look down.

18 A. Yes, they are different --

19 Q. Yes.

20 A. -- except for '97, I guess.

21 Q. And, in fact, the 2005 blended cost figure was even

22 higher. It was 2.11, just going back to the point I was

23 putting to you earlier. So had that been shown to you

24 in the meeting, you would have seen even more of

25 a divergence between the proposal and the costs, the new

1 cost figures. Do you remember that or not?

2 A. I don't remember what was the result at that time, to be  
3 honest.

4 Q. Okay. And if we go to the agree/disagree statement  
5 between the two experts, so at {A/22/19}, so row 26. So  
6 Mr Parker -- the question is:

7 "Was there a relationship between UK Domestic IFs  
8 and EDC cost studies?"

9 And Mr Parker, who is Mastercard's expert, says he  
10 doesn't find a correlation between the level of the  
11 UK interchange fees and the level of costs, and then he  
12 says:

13 "There is factual evidence that the EDC cost studies  
14 were seen by Mastercard as indicating the maximum level  
15 at which interchange fees could be set."

16 So do you agree that, at most, the results of the  
17 cost studies were seen as indicating a maximum level at  
18 which interchange fees could be set; in other words,  
19 a ceiling?

20 A. Yes.

21 Q. Okay. And that was true both of the EEA MIFs and the  
22 UK MIFs; yes?

23 A. Yes.

24 Q. And let's go to the Commission decision, so {A/27/61}  
25 and if we first of all go to the next page, so 62, and

1 look at recital 175 {A/27/62}, so:

2 "MasterCard recognises that the cost-study is 'a  
3 relatively simple analysis'. In doing the cost study,  
4 MasterCard tries to answer the question: 'How high could  
5 interchange fees go before we would start having either  
6 serious acceptance problems, where merchants would say:  
7 we don't want this product anymore, or by merchants  
8 trying to discourage the use of the card either by  
9 surcharging or discounting for cash ..."

10 Do you accept that the European cost studies were  
11 a relatively simple analysis?

12 A. I don't really know what to answer. I didn't do them  
13 myself, so -- so I can't really answer that.

14 Q. You can't answer that question. Yes.

15 Well, Mr Sideris, you're now at EDC; yes? So let's  
16 look at paragraph 22 of your statement at {A/11/5}. So  
17 you say that:

18 "In the process of setting all of the MIFs in which  
19 I was involved, [Mastercard] adopted a clear and  
20 consistent approach ..."

21 And it says:

22 "... that the MIF in question should be set at or  
23 changed to a certain level, while checking the proposed  
24 figure against the results of any relevant cost study  
25 that had been performed by EDC for that particular

1 market ... to make sure that the proposed figure was not  
2 higher than the indicated cost."

3 So that's consistent with what you just said about  
4 it being a ceiling, but then you say:

5 "By the time of my involvement in setting MIFs,  
6 including the EEA MIFs and the UK MIFs, those MIFs were  
7 well-established, and [Mastercard] had a good sense of  
8 how different markets would react ... They had been set  
9 by reference to cost studies for a number of years, such  
10 that when we were looking to change the MIFs or  
11 introduce new tiers of MIFs we could assume that the  
12 existing rates had been set taking costs into account,  
13 at a level that generally reflected costs or was below  
14 cost. Given this, commercial considerations and market  
15 expectations were at the fore of our minds when looking  
16 to change the MIFs or introduce new tiers of MIFs, and  
17 we then used the EDC cost studies as a cross-check."

18 So am I understanding you correctly? You're saying  
19 that when you became involved in all of this, you  
20 assumed that the MIFs that you were looking at up to  
21 that point had been set on the basis of cost studies.

22 A. Yes.

23 Q. So what you were looking at at that stage, when you were  
24 considering whether or not to change them, were  
25 commercial considerations rather than costs because --

- 1           primarily; yes?
- 2           A. Commercial consideration and costs.
- 3           Q. But you were assuming at that point that the figures --
- 4           the rates up to that point had been set by reference to
- 5           costs; yes?
- 6           A. Yes.
- 7           Q. So when you say you don't know whether or not the
- 8           European cost studies were a relatively simple analysis,
- 9           had you not addressed your mind to that question?
- 10          Because in this paragraph of your statement, you seem to
- 11          be saying that you relied on the levels of the MIFs
- 12          being set by reference to cost studies.
- 13          A. Sorry, what is your question?
- 14          Q. So had you addressed your mind to how robust those cost
- 15          studies were?
- 16          A. I didn't.
- 17          Q. You didn't. So you just assumed, did you, when you
- 18          started -- when you started your role at looking at
- 19          MIFs, you just assumed, as you say at paragraph 22, that
- 20          the existing rates had been set taking costs into
- 21          account? You didn't ask yourself whether that had been
- 22          done robustly; is that your evidence?
- 23          A. Yes, I didn't.
- 24          Q. You didn't. Okay.
- 25                 Now, going back to the Commission decision, please,

1 so {A/27/61}.

2 Well, actually, before we do that, are you -- so  
3 the Commission was obviously not very impressed by the  
4 cost studies. Were you aware that the OFT also had  
5 concerns about the cost studies and methodology? Were  
6 you aware of that at the time?

7 A. I don't remember. Maybe, maybe not.

8 Q. So you have no recollection either way?

9 A. What I remember is that at some time, the Commission  
10 expressed concerns about the cost studies and asked us  
11 to audit them with an independent auditor, and this is  
12 when we started to do that and we used Ernst & Young for  
13 that. But I don't recall whether the OFT had similar  
14 concerns or not.

15 Q. Alright. Let's look at the Commission statement of  
16 objections at {C10/98/33}. At paragraph 125, you see  
17 that the Commission is also concerned about the quality  
18 of the data. Do you remember that concern? Do you  
19 remember that the Commission expressed concerns about  
20 the quality of the data that was being used at that time  
21 by EDC?

22 A. I remember there was concern. I didn't remember exactly  
23 on what parts they had the concern.

24 Q. Do you remember that the EDC cost studies were not  
25 looking at like-for-like data? They were using

1 different samples from different banks. Do you remember  
2 that?

3 A. No. To be honest, I don't remember.

4 Q. Alright. So I think -- is this a fair reflection of  
5 your evidence at paragraph 22; that you assumed that the  
6 existing rates had been set -- had been set taking costs  
7 into account? That's what you say; yes?

8 A. Yes.

9 Q. You knew that there had been costs studies that had been  
10 carried out.

11 A. Yes.

12 Q. You knew that there had been concerns expressed by the  
13 Commission about data and methodology.

14 A. I'm not sure I knew it at that time.

15 Q. Right. You didn't enquire into the robustness of those  
16 cost studies; is that correct?

17 A. That's correct.

18 Q. Alright. Now, if we go to paragraph 37 of your first  
19 statement, so {A/11/9}, there you talk about Visa and  
20 you say that Mastercard's aim was to be relatively close  
21 to whatever rates Visa had in that specific market; yes?

22 A. Yes.

23 Q. But then you explain it wasn't the only consideration  
24 that Mastercard took into account; correct?

25 A. Correct.

1 Q. And if we look at paragraph 41 of your statement on  
2 page 10 {A/11/10}, let's see what you say there. So you  
3 say:

4 "In terms of how [Mastercard Europe] gathered  
5 intelligence on the interchange fees of our  
6 competitors ..."

7 Your internal policy, which you followed, was that  
8 you were not permitted to discuss interchange rates with  
9 member banks or competitors, but you were allowed to  
10 collect market feedback; yes?

11 So you were aware then at the time that  
12 Mastercard Europe had to be careful how it gathered  
13 intelligence on the interchange fees of its competitors;  
14 correct?

15 A. Correct.

16 Q. And obviously that would include Visa, Visa's  
17 interchange fees; yes?

18 A. Yes.

19 Q. And that's because you knew at the time, didn't you,  
20 that it would be an infringement -- a violation of  
21 competition law for Mastercard and Visa to discuss what  
22 their rates were; yes?

23 A. No, I was not aware of why -- I am not a lawyer myself,  
24 so I knew we were not allowed to discuss with Visa, yes,  
25 that's obvious.

1 Q. Right. So what is it that you're agreeing to in my  
2 question? You didn't know that it was competition law  
3 that stopped you discussing? You knew that you weren't  
4 allowed to discuss rates.

5 A. Yes.

6 Q. But you didn't know it was competition law that was the  
7 relevant law.

8 A. That was the rule, so we applied the rule.

9 Q. So you knew about competition law?

10 A. No, I knew about competition law since I worked at  
11 DG COMP before, but the fact is that there were rules  
12 within Mastercard that told us that we're not allowed to  
13 discuss anything with Visa, so obviously we stick to  
14 that.

15 Q. Well, Mr Sideris, when did you work at DG COMP?

16 A. I worked in DG COMP from 1997 to roughly 2000.

17 Q. Alright. So you must have picked up quite a bit about  
18 competition law when you worked at DG COMP; yes?

19 A. Yes, that's what I said.

20 Q. So can we agree then, when we look at paragraph 41, that  
21 when you say you weren't permitted to discuss  
22 interchange fees with member banks or competitors, that  
23 you would have known that that was because competition  
24 law prohibited it? Can we agree that you would have  
25 known that?

1 A. I knew that, but the reason why we were not doing it is  
2 because the rules, internal rules, said we couldn't do  
3 it.

4 Q. But why did the internal rules say you couldn't do it?

5 MR JUSTICE ROTH: (Overspeaking) the rules would be drafted  
6 with taking account of competition law if Visa were your  
7 biggest competitor.

8 A. Probably, but at the end of the day, I didn't do the  
9 rules, right?

10 MR JUSTICE ROTH: No, I understand that. I appreciate that.  
11 I'm not sure whether this is worth pursuing.

12 MS DEMETRIOU: Alright. So -- but you would have known as  
13 well, wouldn't you, that as well as not being able to  
14 discuss interchange fees with Visa, you had to be very  
15 careful about trying to find out what Visa's interchange  
16 fees were through the banks; yes?

17 A. Very careful, yes, that's correct.

18 Q. And I think it follows from this that you had policies,  
19 internal rules and policies, in place to try and ensure  
20 that everyone took care; correct?

21 A. Yes.

22 Q. So is it fair to say then that Mastercard could never be  
23 sure that it had full information about Visa's rates?

24 A. Yes.

25 Q. And, also, Mastercard could not always be sure that the

1 information it did have about Visa's rates was  
2 100% accurate.

3 A. Yes, but we were not -- so the way it worked, I mean, at  
4 the time, is banks would eventually talk to us about the  
5 rates of the competition, whether it was Visa or Amex,  
6 and I'm sure they were doing the same on the other side.  
7 So we were aware of what was the Visa rate, but we could  
8 never be aware that there was nothing that has changed  
9 very recently that we wouldn't have picked up. But over  
10 a certain, you know, period of time, eventually  
11 everybody knew everybody's rates.

12 Q. So how does that fit, Mr Sideris, when you say at  
13 paragraph 41 that you weren't permitted to discuss  
14 interchange rates with banks?

15 A. Proactively.

16 Q. Sorry?

17 A. Proactively. We weren't allowed to proactively ask for  
18 Visa interchange rates, but if we receive them  
19 passively, then it was deemed to be fine, according to  
20 our rules.

21 Q. Right. So that was what your rule said, was it; that  
22 you can passively receive information and act on it, but  
23 you can't proactively seek it?

24 A. Yes.

25 Q. So you were dependent on -- in terms of your knowledge,

1           you were dependent on whether a bank gave you some  
2           information, but, as you say, you could never be  
3           100% sure that that was accurate or up to date.

4           A. Yes, that's correct.

5           Q. And that limitation, if I can put it that way, is  
6           something that you would have borne in mind, yes, as  
7           a sophisticated company?

8           A. What do you mean?

9           Q. Well, that limitation on your knowledge, the fact that  
10          you could never be 100% sure that you knew exactly what  
11          the rates were or if something had changed, that's  
12          something you would have borne in mind at the time.

13          A. We knew there was a limitation, but whether there was  
14          a concern, I wouldn't say so because I don't remember  
15          that rates changed very often, especially for  
16          cross-border rates.

17          Q. Alright. Well, let's look at the Visa exemption  
18          decision at {H/2/1}, please. This is dated  
19          22 November 2002 so shortly after you joined; yes? And  
20          if we go to --

21          A. Shortly previously I joined, actually.

22          Q. Sorry, yes, that's right.

23                 So if we go to page 2 and recital (3) {H/2/2}, so we  
24          see that:

25                 "[This] decision relates to the intra-regional

1 inter-change fee scheme of Visa ... for consumer  
2 cards ..."

3 Then if we go to recital (9), again, we see what  
4 this decision relates to. So these are Visa's -- these  
5 fees are equivalent to the Mastercard intra-EEA MIFs;  
6 yes?

7 A. Roughly, yes.

8 Q. Yes, and if we go to page 4 {H/2/4}, recital (17), you  
9 see that Visa is going to -- has to carry out a phased  
10 reduction of the level of the ad valorem per transaction  
11 MIFs applicable to certain types of credit and deferred  
12 debit cards.

13 And if we go to recital (19), we see the period for  
14 that. So the reductions will leave the weighted average  
15 MIF at 0.7% by 2007; yes? And then if we look at  
16 footnote 14, we can see that that's going to be carried  
17 out in stages. Do you see that? So it's 2002, there's  
18 a staged reduction up to 2007 and you end up at 0.7%;  
19 yes?

20 A. Yes.

21 Q. Now, let's have a look at -- so we've got that phased  
22 reduction there. Let's have a look at Mastercard's  
23 equivalent EEA MIF. So if we go to {B/28/1}, we see  
24 that the base is unchanged. So if we look at 2001 to  
25 2006, the base rate is unchanged at 1.3%; yes?

1 A. Yes.

2 Q. Now, there's a reduction in 2007 and that's helpfully  
3 explained in your witness statement at paragraph 83, if  
4 we just remind ourselves of that. It's at {A/11/20}.  
5 So what you say there is that -- you say that:

6 "... one of the reasons we proposed reducing the EEA  
7 base rate was because the planned introduction of the  
8 World EEA MIFs (with their comparatively high MIFs)  
9 would have increased the weighted average EEA MIFs for  
10 consumer cards generally. [You] wanted to avoid any  
11 significant increase in the weighted average ... MIFs  
12 ... in order to avoid a negative reaction from merchants  
13 and further regulatory scrutiny, and so to prevent this  
14 increase, the IFT proposed to reduce the EEA base rate  
15 for consumer cards."

16 Yes? That's the reason for that reduction that we  
17 saw in 2007.

18 A. Yes.

19 Q. And we can see -- we've looked at this already, but we  
20 can see from what the World EEA MIFs are -- we've got  
21 those figures at paragraph 80 of your statement at  
22 {A/11/19}. So what you're doing here is you're  
23 explaining that the reduction in the intra-EEA base rate  
24 was a pragmatic step to offset the introduction of the  
25 higher World EEA MIFs to try and avoid any increase in

1 the weighted average; correct? That's what you're  
2 explaining.

3 A. Yes.

4 Q. If we go back to {B/28/1}, please, we can see that  
5 enhanced electronic is unchanged. If we start at 2001,  
6 it's unchanged. From 2001 to 2007, it's 0.95%; yes?

7 A. Yes.

8 Q. And then chip is unchanged from 2001 to 2007 at 0.8%;  
9 correct?

10 A. Yes.

11 Q. And then merchant UCAF was introduced in 2002 and that's  
12 unchanged. It stays at 0.95% until 2007. And, equally,  
13 full UCAF was introduced in 2002, and that stays at  
14 1.15%; correct?

15 A. Yes.

16 Q. So there wasn't any reaction, was there, to the  
17 substantial changes in Visa's intra-EEA MIF following  
18 the exemption decision; that's correct, isn't it?

19 A. Yes.

20 Q. And then if we look at some of Visa's -- Mastercard and  
21 Visa's domestic MIFs over the same period, so these are  
22 the domestic MIFs, if we go to {A/18.1/6}. So let's  
23 look at 2006 first of all, and we see that the weighted  
24 averages at the bottom of the page are 0.92% and 0.81%.  
25 And then at 2007, for some reason, there's a blank for

1 Mastercard, but we have the weighted average from  
2 Mastercard's defence at 0.9% and the Visa UK MIF is  
3 0.78%. So, again, they're not at the same level, are  
4 they?

5 A. They are not at the same level.

6 Q. And when you look up those columns at the different  
7 categories, there are significant divergences; correct?

8 A. Between Mastercard and Visa?

9 Q. Yes.

10 A. Yes.

11 Q. And I think what this shows is, and I think you accept  
12 this, to be fair to you, in your statement, that  
13 Mastercard was not seeking parity with Visa. It didn't  
14 consider that it had to be at exactly the same level as  
15 Visa's MIFs, did it?

16 A. No.

17 Q. That wasn't a commercial necessity, was it?

18 A. To be at exact parity? No.

19 Q. No. And, indeed, you explain in your witness statement,  
20 if we look at paragraph 39 on page {A/11/9}, that in  
21 competing with Visa, you would look at the proposition  
22 you were offering holistically; correct? So you  
23 would -- so competition with Visa was not only about  
24 interchange fees. It would include things like  
25 licensing fees paid by banks, advertising, sponsorship.

1           There was a bigger picture; correct?

2           A.   And product fees and switching fees and brand fees and  
3           all these, yes.

4           Q.   Yes.  And you've explained in detail the process that  
5           Mastercard adopted to set interchange fees, which  
6           involved a number of different committees, commissioning  
7           of cost studies; yes?

8           A.   Yes.

9           Q.   Weighing the demands of issuers and acquirers we  
10          established; yes?

11          A.   Yes.

12          Q.   And all of that wouldn't have been necessary if your  
13          policy had simply been to attract Visa's MIFs, but that  
14          wasn't your policy, was it?

15          A.   Our policy was to be aware of the competition, whether  
16          it was Visa or anybody else.

17          Q.   It was a factor amongst others that Mastercard took into  
18          account --

19          A.   Excuse me?

20          Q.   It was one of the factors Mastercard took into account.

21          A.   It was one of the factors, yes.

22          Q.   Alright.  So I want to look at something different now.  
23          Can we look at Mr Dhaene's statement {A/13/36}, and this  
24          is paragraph 89.  He is talking about on-us transactions  
25          and he says, from his recollection:

1            "... if the on-us transaction went over the European  
2 network and there was no specific arrangement in place  
3 with regards the applicable interchange fee, from  
4 a technical systems perspective, the intra-EEA fee would  
5 have also applied to those transactions. As mentioned  
6 previously, the intra-EEA fee was the standard rate  
7 applied to domestic and cross-border transactions in the  
8 absence of anything else being inputted into the system.  
9 If, however, the transaction did not go over the  
10 European network, whether or not an interchange fee was  
11 applied to the transaction was a matter for the bank in  
12 question to decide."

13            And you comment on this in your second statement, so  
14 let's get that up at {A/13.4/11}. And you say there  
15 at -- you say that your recollection -- sorry, at  
16 paragraph 36 at the bottom of the page you say your  
17 recollection is in practice -- so you refer back to  
18 paragraph 89 of Mr Dhaene's statement and you say:

19            "However, my recollection is that in practice the  
20 majority of on-us transactions were processed by the  
21 banks themselves, and for good reason. It cost banks  
22 less to process those transactions internally as they  
23 did not have to pay switching fees to Mastercard or  
24 Visa."

25            Now, can the Tribunal take it from your statement

1           that you don't dispute that from a technical systems  
2           perspective, the default position was that  
3           an interchange fee was charged if it went over the  
4           European network?

5       A.   So for on-us transactions, if they were processed by  
6           Mastercard, the -- there would be an order of the  
7           interchange fee programme that would be applied, which  
8           would be the same as any other transaction, bilateral  
9           first, then domestic, then cross-border. So if it was  
10          a cross-border transaction, an on-us transaction  
11          cross-border transaction, it would get the cross-border  
12          rate. If it was a domestic on-us transaction, it would  
13          get a domestic rate, and if there was no domestic rate,  
14          it would get the cross-border rate.

15       Q.   Okay, thank you. Then you say the majority of on-us  
16           transactions were processed by the banks themselves, so  
17           I think you would accept, wouldn't you, that some on-us  
18           transactions were not processed by the banks themselves;  
19           correct?

20       A.   This is correct. It happened in case of mergers, one  
21           bank acquiring another bank. There are some on-us  
22           transactions which would be processed through  
23           Mastercard, yes.

24       Q.   Alright. Let's look at {C2/255/1}, please.

25       PROFESSOR WATERSON: Could I just ask before that --

1 MS DEMETRIOU: Of course.

2 PROFESSOR WATERSON: -- these switching fees, what were  
3 they?

4 A. There is authorisation clearing settlement fees.  
5 Essentially, it would be fees paid by issuers and  
6 acquirers to the schemes, Mastercard/Visa, for doing the  
7 authorisation clearing settlement of the transaction.

8 PROFESSOR WATERSON: I see. Thank you.

9 MS DEMETRIOU: If we could go to {C2/255/1}, please. This  
10 is headed "Domestic Bilateral Agreement set up for  
11 NatWest Bank" and in the -- if we go to the very bottom  
12 of the page, we should be able to see the date, which is  
13 1 August 1994.

14 And if we go to the ninth row, can you see that  
15 NatWest is listed there; yes?

16 A. Yes.

17 Q. So this specifies bilateral interchange fees between  
18 NatWest and NatWest, doesn't it?

19 A. So it seems, yes.

20 Q. So that must relate to on-us transactions; correct?

21 A. Probably.

22 Q. And then if we go to {C3/51.1/1}, this is an internal  
23 Europay memorandum dated 21 December 1995 and that says:  
24 "I understand ..."  
25 This is the second paragraph:

1            "... that Tony Lee has today decided to cease  
2 routing [NatWest] acquired 'On-Us' traffic  
3 (authorisations and clearings) from EPS-Net preferring  
4 to interface directly with [FDR]."

5            So this refers to authorisations and clearings, so  
6 that's -- that could involve the application of  
7 interchange fees; correct?

8            A. Unless it was a bilateral, which I don't know.

9            Q. So what we can see that the current position is as at  
10 the date of this memo, it looks like NatWest is  
11 currently routing its on-us transactions via Europay,  
12 correct? And they're saying that they're going to  
13 instead interface directly with FDR? Do you see that?

14           A. Yes.

15           Q. So do you recall that NatWest had a substantial  
16 acquiring business?

17           A. Yes, although I don't remember how big they were, but  
18 yes, it was a big player.

19           Q. And then if we go over the page, please, to page 2  
20 {C3/51.1/2}, so the heading there is "[NatWest] As  
21 Acquirer" and then the left-hand column is headed  
22 "Issuer". So the counterparty to NatWest -- that's the  
23 counterparty to NatWest as acquirer; yes? And we see --  
24 in the top row, we see again NatWest, so that must be  
25 an on-us transaction with NatWest on both sides;

1 correct?

2 A. Yes.

3 Q. And we see that this is approximately 35% of the  
4 1995 volume. So that's a significant number of on-us  
5 transactions being processed by Europay; correct?  
6 That's what it looks like.

7 A. 35%.

8 Q. Yes. And then if we go over the page to page 3  
9 {C3/51.1/3}, the heading is "Nat West Acquired  
10 Transactions in 1995" and, again, the second row of the  
11 table refers to NatWest, so that must again be on-us  
12 transactions, mustn't it?

13 A. Probably, yes.

14 Q. And then we see on the far right that the total for 1995  
15 is nearly 30 million on-us transactions. Do you see  
16 that in the "Total" column?

17 A. Yes.

18 Q. So it's reasonable to assume, isn't it, that the  
19 30 million transactions that we see here are being  
20 charged the interchange fee which we saw in the document  
21 entitled "Domestic bilateral agreement set up for  
22 NatWest Bank"? That --

23 MR JUSTICE ROTH: Ms Demetriou, if you want to really pursue  
24 this -- I don't want to stop you, but this is, of  
25 course, 1995, so you are asking for Mr Sideris' help to

1           interpret a document that doesn't relate to his personal  
2           experience. Mr Hawkins, I assume, is the Mike Hawkins.

3 MS DEMETRIOU: Sir --

4 MR JUSTICE ROTH: I assume the Mr Hawkins who is giving  
5           evidence is the Mike Hawkins who is referred to in the  
6           document, so wouldn't it be more appropriate and helpful  
7           to ask Mr Hawkins about it?

8 MS DEMETRIOU: Sir, that's a fair point, except for the fact  
9           Mr Hawkins doesn't talk about on-us transactions at all  
10          and Mr Sideris is one of the only two witnesses that  
11          does talk about on-us transactions. He has been put  
12          forward as a witness responding to Mr Dhaene, so that's  
13          why I'm taking -- that's why I felt I had to put the  
14          case to him.

15 MR JUSTICE ROTH: Well, I don't see there's any objection,  
16          or could be, to you -- Mr Hawkins is giving evidence --  
17          asking him about it. Just because he doesn't deal with  
18          it in his witness statement, it seems to me you're  
19          perfectly entitled to pursue it with him, and he was  
20          there, so he will probably explain it with a bit more  
21          understanding.

22 MS DEMETRIOU: Sir, I agree that I'm entitled to pursue it  
23          with him. I don't know whether he will be in a position  
24          to give evidence on it. I hope he is, but this is one  
25          of the two witnesses that has been put forward by

1           Mastercard to address on-us transactions and so I think  
2           I'd be criticised if I --

3           MR JUSTICE ROTH: As I say, I won't stop you, but I think  
4           you're basically asking Mr Sideris to speculate on the  
5           document which he's reading like we're reading it,  
6           really.

7           MS DEMETRIOU: Sir, in that case, I'll keep it very short,  
8           but I'm going to -- I'm going to shorten what I was  
9           going to put, but I will ask the Tribunal to be a little  
10          patient because I do want to pursue --

11          MR JUSTICE ROTH: As I say, I don't see any objection to you  
12          putting this to Mr Hawkins. I understand that  
13          Mr Sideris has said in the passage that you went to --  
14          if I find it -- that his recollection is that the  
15          majority processed ...

16                 Well, I mean, your recollection is based -- are you  
17          speaking, where you talk in paragraph 36 about your  
18          recollection that in practice the majority of on-us  
19          transactions were processed by banks themselves, is that  
20          your recollection concerning your time at Mastercard?

21          A. Yes.

22          MR JUSTICE ROTH: Yes. I don't know if you heard that,  
23          Ms Demetriou.

24          MS DEMETRIOU: I did.

25          MR JUSTICE ROTH: What the witness said was he's not giving

1 evidence about what happened in 1995.

2 MS DEMETRIOU: No, I did hear that, sir. Thank you.

3 So, Mr Sideris, Mastercard were notified of  
4 bilateral agreements; correct?

5 A. Yes.

6 Q. And those bilateral agreements included some bilateral  
7 agreements that related to on-us transactions. Do you  
8 remember that in the time that you were there?

9 A. I believe so, yes.

10 Q. Now, if we go to -- let's go to Mr Coombs' expert report  
11 on causation, so {A/14/19}. Mr Coombs is the expert  
12 witness called by Mr Merricks. If we look at  
13 paragraph 3.26 and subparagraph (a) at the bottom of the  
14 page, and we see that there what's said is that if the  
15 issuing business -- so:

16 "If the issuing business of a vertically integrated  
17 bank did not receive the same stream of income on its  
18 on-us transactions, it would have been at a competitive  
19 disadvantage in the issuing market."

20 If we go over the page, it says {A/14/20}:

21 "It therefore seems likely that some form of  
22 [interchange fee], or similar internal transfer price,  
23 would have been paid within the bank from its acquiring  
24 to its issuing business."

25 Now, do you agree that for banks where we see

1 interchange fees for on-us transactions specified, do  
2 you agree that those banks could in theory charge those  
3 rates as an internal transfer price?

4 A. In theory, yes.

5 Q. And then if we look at the next paragraph,  
6 subparagraph (b):

7 "Whether or not an [interchange fee] was paid on  
8 an on-us transaction, it is still likely that any  
9 interchange fee overcharge would have affected these  
10 transactions. This will particularly be the case if the  
11 same [merchant service charge] was charged on both  
12 off-us and on-us transactions. Since an interchange fee  
13 overcharge would have affected the level of this uniform  
14 [merchant service charge], it would have led to equally  
15 higher [merchant service charges] for both off-us and  
16 on-us transactions."

17 So do you agree that as a matter of fact, most  
18 merchant contracts didn't impose a different service  
19 charge for on-us and off-us transactions?

20 A. No, I disagree. Actually, I recall that large banks  
21 which were both issuing acquiring and had a lot of on-us  
22 transactions between themselves were using that to  
23 sometimes have an MSC that would be lower than the  
24 interchange fees. I'm not saying this was the case in  
25 the UK, but I know it was something that we have seen

1 across Europe in many countries.

2 Q. Let's go to {C21/322/1}. So this is the  
3 Payment Systems Regulators' final report in  
4 November 2021. If we go to page 31 {C21/322/31} and  
5 paragraph 3.63, can I just ask you to read that  
6 paragraph to yourself rather than me reading it out?

7 A. The first one or --

8 Q. 3.63, the whole of that paragraph. (Pause)

9 A. Yes.

10 Q. Then I'm going to ask you to read 3.64 as well, please,  
11 over the page {C21/322/32}. (Pause)

12 A. Yes.

13 Q. Do you agree that under standard pricing, as described  
14 in this report, the merchant is charged the same for  
15 an on-us or off-us transaction?

16 A. Probably.

17 Q. And do you agree that pricing for merchants would have  
18 been fairly similar, at least in structure, in the  
19 period we're concerned with in this claim; similar in  
20 structure to what we see described here?

21 A. So this report was from 2021?

22 Q. Yes.

23 A. And I suspect things have changed over the last  
24 ten years since the period I was at Mastercard.

25 Q. That's your suspicion, but you don't know. You don't

1           have evidence to that effect.

2           A.   What I remember is there were cases across many European  
3           countries where acquirers were using on-us to actually  
4           have MSC that was lower than the interchange.

5           I remember that.

6           Q.   But you're not in a position to assist us with what  
7           proportion of contracts --

8           A.   No.

9           Q.   -- would have been structured in that way.

10          A.   And it varied from country to country.

11          MR JUSTICE ROTH:   When you say they had an MSC lower than  
12          the interchange --

13          A.   Yes.

14          MR JUSTICE ROTH:   -- yes, it would still be the same MSC for  
15          all transactions that they were acquiring, but it just  
16          would reduce the blend, is that what you are saying,  
17          that led to the MSC?

18          A.   Both, actually, were happening.   In some cases, you had  
19          different terminals at merchants, so when you had  
20          an on-us transaction, you would put it on one terminal  
21          and you will get one rate and an off-us transaction  
22          would get another rate.

23          MR JUSTICE ROTH:   But in other cases, it was just that the  
24          overall MSC was lower, and that was the same for  
25          everyone?

1 A. Yes.

2 MS DEMETRIOU: Mr Sideris, that's taken me to the end of  
3 what I wanted to ask you. Thank you very much. It may  
4 be that Mr Smouha has some follow-up questions, I'm not  
5 sure.

6 A. Thank you.

7 MR JUSTICE ROTH: Yes, Mr Smouha.

8 Re-examination by MR SMOUHA

9 MR SMOUHA: Thank you, sir, just one matter if I may.

10 Mr Sideris, can we go please to {C15/152/1}. You  
11 recall you were asked quite a number of questions about  
12 this document.

13 A. Yes.

14 Q. And if we can go to page 3 {C15/152/3} and just while  
15 I am finding a reference in the transcript to your  
16 answers to questions about this, just remind yourself --  
17 if you would just read through the page which you were  
18 asked questions about. (Pause)

19 A. Yes.

20 Q. Just bear with me a moment, please. (Pause)

21 And I'm just going to read from the [draft]  
22 transcript the questions and your answers to  
23 Ms Demetriou in relation to the questions about this  
24 page and then ask you two follow-up questions.

25 This is at [draft] page -- if we can leave this

1 document on the screen and I'll just give the  
2 transcript -- page in the draft transcript; [draft]  
3 page 122, starting at --

4 MR JUSTICE ROTH: Have you thought about getting a split  
5 screen?

6 MR SMOUHA: Getting a screen, very good. Perfect.

7 So [draft] 122, [draft] line 3. So [draft] line 7:  
8 "So the domestic -- I think, pausing there, the  
9 domestic fee categories are being amended in order to  
10 match the intra-EEA categories."

11 You answered

12 "Answer: Yes.

13 "Question: And this was all about simplifying the  
14 UK fee structure so that it became more similar to the  
15 EEA MIF structure; correct?

16 "Answer: Partially correct. It was simplified  
17 because it didn't make sense to have all these tiers  
18 that didn't attract many transactions. It was extra  
19 cost for Mastercard to do so. It was extra risk of  
20 making errors of having different tiers, especially when  
21 they didn't attract a lot of transactions."

22 Just pausing there, are you able to identify which  
23 of the tiers that you are referring to there, "all these  
24 tiers that didn't attract many transactions"?

25 A. So it was the tiers on the left-hand side, so PAN key

1 entry, CAT, which is cardholder activated terminals,  
2 airlines and internet.

3 Q. Yes, and when you are saying they didn't attract many  
4 transactions, what is it you are referring to in terms  
5 of the information about those?

6 A. Well, these tiers -- well, there was a minority of  
7 transactions that were qualified to be processed under  
8 these tier, and you can see the percentages; 2% of all  
9 transactions for PAN key entry, 0% for CAT, etc.

10 Q. Thank you. And then:

11 "Question: And it's an example of management that  
12 is dealing with MIFs across Europe, or at least with the  
13 intra-EEA MIFs and MIFs for some other European  
14 countries, taking a more strategic top-down view of  
15 what's appropriate ...

16 "Answer: No. It was just simplifying the tier  
17 structure in the UK because this didn't make sense at  
18 that time for the UK.

19 "Question: Yes, but you did it by reference to the  
20 tier structure for the intra-EEA MIFs, yes, you weren't  
21 starting with a blank piece of paper?

22 "Answer: Not entirely true but because afterwards  
23 we introduced tiers in the UK that were not in the EEA.

24 And I'll come back to that. I want to ask you  
25 a question about that.

1           "Question: Well, Mr Sideris, at this stage you were  
2 simplifying things so that it matched up with the  
3 intra-EEA category, yes, that was the purpose of this  
4 change?

5           "Answer: So the purpose of this change was to get  
6 rid of the tiers that didn't make sense for the UK and  
7 to simplify not to make it closer to the EEA.

8           "Question: So that was just a coincidence, was it?

9           "Answer: Just a coincidence."

10          Now, in relation to two parts of that, what I want  
11 to ask you -- in relation, first of all, to, "We  
12 introduced tiers in the UK that were not in the EEA",  
13 can we please look at the MIF table, {A/18.1/5}.

14          Now, would you like a hard copy of this table?

15         A. Yes.

16         Q. You may find it easier while we're working on it.

17                 Are you able -- just before we look into it, are you  
18 able just from memory to recall which category any of  
19 those were that were introduced in the UK?

20         A. I remember this one from memory, which was the charity  
21 tier, so a tier at 0% for charity donations.

22         Q. Right. That -- if we look on page 6 {A/18.1/6}, 2007,  
23 the number is bottom left; yes? Have you got 2007?

24         A. Yes, I have it.

25         Q. Do we see "Approved Charity Waiver", 0%, coming in in

1 2007?

2 A. Yes.

3 Q. And let me just explain to you, Mr Sideris; it's in bold  
4 to indicate it's new.

5 Could you go back to 2004 {A/18.1/5}? Are you able  
6 to -- well, maybe you have no recollection of these.  
7 There were a number of new categories introduced for the  
8 UK, not introduced for the EEA. Are you able to assist  
9 with that? Electronic, card not present, airline,  
10 chip/PIN and chip signature.

11 A. Yes, so chip signature and chip/PIN, I think, were  
12 specific for the UK because at the time, the UK banks  
13 had both and we believed that chip signature was less  
14 secured, so we made an incentive rate to push towards  
15 chip -- chip and PIN.

16 Electronic, it seems, was already there before and  
17 so was card not present and ...

18 Q. You are quite right. Sorry, that's another introduction  
19 of category, forgive me. That's change of rate.

20 A. Yes.

21 Q. Thank you. Then in relation to the removal of  
22 categories that we saw on that document, so if we -- let  
23 me just show you where that is on here. We've got, can  
24 you see, "PAN-Key-Entered"? It's about the seventh or  
25 eighth category down --

1 A. Yes.

2 Q. -- which was present in the UK through -- on this page,  
3 all the way through to 2005. If you go over the page,  
4 we see it removed in 2006 {A/18.1/6}. That's on the  
5 basis of the document we've just seen.

6 Were any others removed?

7 A. Airline, it seems, was removed.

8 Q. Yes.

9 A. CAT, cardholder activated terminal.

10 Q. Thank you, so exactly as we've seen on that document.

11 Now -- I'm afraid it's over the page, but if you can  
12 compare 2005 and 2006, and if we are looking at in the  
13 fourth column, the EEA categories, we have  
14 EEA categories that were not -- in 2005 were not in the  
15 UK and if we look at 2006, they are still in the EEA,  
16 but not in the UK.

17 Was there, either then or subsequently, anything  
18 along the lines that you were asked about,  
19 an implementation to get all the categories of the UK to  
20 match the EEA?

21 A. As I look at it, it doesn't seem so.

22 Q. And from your recollection, was there any such programme  
23 with implementation to get everything to match?

24 A. Not for the UK.

25 MR SMOUHA: No. Thank you.

1           Thank you very much, sir. I don't have any further  
2           questions. The Tribunal may.

3                               Questions by THE TRIBUNAL

4           MR JUSTICE ROTH: Well, just while we have this open, this  
5           schedule, which is very convenient, and where we were  
6           you-- you took over setting the UK MIF in 2004, we've  
7           just seen the internal document and the proposal to  
8           remove certain categories and, therefore, it says to  
9           reduce the standard by 10 base points so that you get  
10          the same weighted average.

11          And one sees that because in 2005 on page 5  
12          {A/18.1/5}, you see the UK standard base is 1.3% and if  
13          we go over the page {A/18.1/6}, in 2006 it comes down to  
14          1.2%. That's what -- I think that's reflecting that  
15          decision; is that right?

16          A. Yes.

17          MR JUSTICE ROTH: But the EEA MIF of Mastercard, which we  
18          see further along in 2005, it was then 1.3% and your  
19          committee is setting that as well, proposing that. That  
20          stays at 1.3%.

21          A. Yes.

22          MR JUSTICE ROTH: It doesn't move. Were you concerned about  
23          reducing the UK MIF when you're not also reducing the  
24          EEA MIF?

25          A. Not at all.

1 MR JUSTICE ROTH: Why not?

2 A. So every interchange consideration had to be taken in  
3 relation to the context and the geography. So UK needs,  
4 domestic needs in general, were set based on UK domestic  
5 considerations. Cross-border was based on cross-border  
6 considerations.

7 Cross-border was -- intra-EEA was about 5% of all  
8 transactions and the intra-regional will be 1 to 2%, so  
9 obviously the cross-border had a -- much less impact on  
10 banks in general, whereas domestic was more important.

11 And at the time we reduced the UK, it was  
12 introduction of World, as we said before, or New World  
13 or World card, which, as we also said, was -- the  
14 proposal was mainly focusing on UK because it was the  
15 country where there was the highest opportunity. So the  
16 cross-border impact of World Card was much less. As it  
17 started, you know, growing, then we started to be  
18 concerned that, you know, the cross-border would also be  
19 impacted, and that's when we actually reduced the  
20 cross-border base also to compensate potential  
21 interchange increase.

22 MR JUSTICE ROTH: Yes, thank you.

23 The other thing I wanted to ask you is if we go to  
24 your witness statement on page 3 of your witness  
25 statement, your first statement {A/11/3}, where at

1 paragraph 8 you describe what you were doing between  
2 2002 and 2011, your roles in MCE and preparing proposals  
3 for the rates at which EEA MIFs and UK MIFs for  
4 November 2004. And then you say, over -- just one  
5 moment. (Pause)

6 And I think you told us that you were also  
7 responsible, or became responsible after -- later in  
8 time for some other countries, and I think you  
9 mentioned, in answer to my question earlier, France,  
10 Poland and Italy as among the countries that you were  
11 concerned with, and then --

12 A. So, excuse me, I was -- after 2011, I moved to  
13 Mastercard France. Is that what you are referring to?

14 MR JUSTICE ROTH: No, I'm talking about when your team, your  
15 interchange fee team, the IFT, you said proposals for  
16 the rates at which EEA MIFs and UK MIFs should be set,  
17 but when other countries in Europe came to have  
18 a domestic MIF during the period that you were dealing  
19 with where you based at Waterloo, I think you said your  
20 team was also responsible for proposals for those  
21 domestic MIFs; and that's right?

22 A. Yes, that's right.

23 MR JUSTICE ROTH: I understood it, yes.

24 And then if we go on to page 33, which is {A/11/33},  
25 that's where you -- paragraph 136:

1           "Throughout my time on the IFT, and in particular as  
2 MCE became responsible for setting domestic MIFs for  
3 more countries across Europe, I was also aware of  
4 domestic MIFs in countries other than the UK. These  
5 varied substantially. Some were much higher than the  
6 EEA MIFs. Some were much lower than the EEA MIFs."

7           Can you give an example of countries where it was  
8 much lower than the EEA MIF, if you can remember?

9       A. Yes. So France was an example I gave you. On debit,  
10 many countries were lower. For instance, there were  
11 countries with zero interchange in the Nordics. The  
12 Netherlands was very low on debit. Belgium was very low  
13 on debit.

14       MR JUSTICE ROTH: What about credit cards?

15       A. Well, France again was low on credit cards.

16       MR JUSTICE ROTH: And why was France lower than the EEA MIF  
17 on credit cards?

18       A. I don't know.

19       MR JUSTICE ROTH: You don't remember, but you were involved  
20 in setting it.

21       A. Yes. Why was -- oh, why we set it lower?

22       MR JUSTICE ROTH: Yes.

23       A. Yes, because we were competing with a domestic scheme  
24 called Carte Bancaire, which had the majority of  
25 transactions in France, and we wanted to incentivise

1 banks to issue Mastercard cards rather than  
2 Carte Bancaire banks -- Mastercard only cards, if I may  
3 say. So we had to set an interchange in France that  
4 would be accepted by acquirers and merchants, but at the  
5 same time be competitive for issuers, which is always  
6 difficult.

7 MR JUSTICE ROTH: If Carte Bancaire had a large share of the  
8 market and you wanted to incentivise banks to issue  
9 Mastercard, that's attracting issuers. You'd think  
10 you'd put it higher, wouldn't you?

11 A. But at the risk of it not being accepted.

12 MR JUSTICE ROTH: By merchants?

13 A. Yes.

14 MR JUSTICE ROTH: So that was -- that was --

15 A. A main concern, yes.

16 MR JUSTICE ROTH: Yes, I see. And can you give any -- can  
17 you remember about any of the other countries because --  
18 if you can't remember. It's a long time ago.

19 A. It's vague. I know there was Italy in the mix, but  
20 honestly, I don't remember what we did there. There was  
21 the whole SEPA discussion on debit, as I said, where we  
22 would compete with domestic schemes in all countries --

23 MR JUSTICE ROTH: Yes.

24 A. -- and the intra EEA MIF just didn't make sense. It was  
25 too high. So we had to have domestic rates for

1            competing, like Carte Bancaire, with other schemes on  
2            debit.

3            MR JUSTICE ROTH: It's a slightly different market, debit,  
4            isn't it, from credit?

5            A. Yes, it is.

6            MR JUSTICE ROTH: Yes.

7            A. But same principles apply.

8            MR JUSTICE ROTH: Are there any questions arising out of  
9            that?

10           Well, thank you very much, Mr Sideris. You are  
11           released as a witness and you can leave the witness box,  
12           and I think we resume on Monday.

13           MR SMOUHA: Monday with Mr Dhaene.

14           MR JUSTICE ROTH: Monday with Mr Dhaene at 10.30.

15           (5.05 pm)

16           (The hearing adjourned until 11am on  
17           Monday, 10 July 2023)

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