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IN THE COMPETITION APPEAL TRIBUNAL Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

The Honourable Sir Marcus Smith (President)
Ben Tidswell
Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS

TRIAL 1

A P P E A R A N C E S

Kieron Beal KC, Philip Woolfe, Oliver Jackson & Antonia Fitzpatrick (instructed by Stephenson Harwood LLP and Scott+Scott UK LLP) on behalf of the Stephenson Harwood LLP and Scott+Scott UK LLP Claimants

Brian Kennelly KC, Jason Pobjoy, Isabel Buchanan & Ava Mayer (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

Sonia Tolaney KC, Matthew Cook KC, Owain Draper & Veena Srirangam (Instructed by Jones Day) on behalf of Mastercard

1 Wednesday, 14 February 2024
2 (10.30 am)
3 THE PRESIDENT: Good morning. Before you begin, Mr Beal,
4 I will say this only once in the course of the trial but
5 these proceedings are being live-streamed on our website
6 and an official recording is being made and there will
7 be a transcript. But anyone who is watching, they are
8 very welcome but they should not make any recording
9 whether audio, visual, transmit or otherwise photograph
10 the proceedings; that would be a serious infringement of
11 the rules and I am sure it will not happen, but I say it
12 nonetheless.
13 With that, Mr Beal, over to you.
14 Housekeeping
15 MR BEAL: Thank you very much. May it please the Tribunal,
16 I appear for the claimants in this matter, the SSH
17 claimants, I am joined by Mr Philip Woolfe on my left,
18 shortly to be King's Counsel as of 18 March 2024,
19 happily that is a non-sitting day, also behind me by
20 Oliver Jackson and Antonia Fitzpatrick.
21 To my right, *Mastercard* are represented by
22 Ms Sonia Tolaney KC and Mr Matthew Cook KC, accompanied
23 by Owain Draper and Veena Srirangam.
24 To their right, Mr Brian Kennelly KC for Visa leads
25 Mr Jason Pobjoy, Isabel Buchanan and Ava Mayer.

1 Could I then please, seeing as it is Valentine's
2 Day, start off with the thoroughly romantic topic of
3 housekeeping. There are three sets of openings which
4 I hope the Tribunal has received --
5 THE PRESIDENT: We received them.
6 MR BEAL: -- which have been uploaded to Opus. There have
7 been some intervening matters to address.
8 Firstly, we have a letter from Visa -- well, from
9 Linklaters on behalf of Visa -- saying that one of their
10 witnesses of fact has made some erroneous assumptions
11 about the applicable law in the course of his witness
12 statement, I think that is Mr Korn. I have spoken to
13 Mr Kennelly about this. Obviously, we both agree that
14 it is not appropriate for the witness to give evidence
15 as to what the law is, but I understand that his point
16 is not necessarily as straightforward as that: he wants
17 the witness to be able to give evidence about why there
18 was a misunderstanding as to whether or not surcharging
19 could apply to certain cards and that is really a matter
20 for him to take up with the Tribunal in the course of
21 his opening.
22 I would suggest that if we can have an idea of what
23 the further witness evidence might look like, it would
24 help us inform our position as to whether or not any
25 objection is taken to it. But if it is simply

1 correcting a factual error, which is something a witness
2 could do in chief, then obviously I am not going to die
3 in a ditch about that.
4 THE PRESIDENT: So nothing for us to do at the moment, you
5 are just --
6 MR BEAL: I am suggesting not at the moment, sir, simply on
7 the basis that it could well be resolved between the
8 parties.
9 THE PRESIDENT: I am grateful.
10 MR KENNELLY: I hesitate to get up so soon. Mr Beal is quite
11 right and Mr Korn needs to correct his factual evidence
12 and so we propose, with the Tribunal's permission, to
13 put in a very short statement from him. It should --
14 ideally Mr Beal would have it as soon as possible. We
15 will try to get it to him by Friday, failing that Monday
16 morning, and obviously we will make whatever adjustments
17 Mr Beal needs in fairness to him to address it.
18 THE PRESIDENT: Well, I must say it seems entirely sensible
19 to have the statement in as soon as possible making the
20 corrections so that Mr Beal knows exactly where things
21 are coming from and we will take it then from there.
22 MR KENNELLY: I am obliged.
23 MR BEAL: We will only trouble you further if we absolutely
24 need to.
25 THE PRESIDENT: I am grateful.

1 MR BEAL: Can I move on to some rejoinder statements from
2 the defendant's experts. We now have a 10th expert
3 report from Mr Holt, again Mr Holt in his 10th report
4 has sought to correct some corrections in writing. We
5 accept that that could have been covered orally in chief
6 and therefore again take no objection in principle to
7 that. To the extent, however, he goes beyond that and
8 raises a critique of some of the evidence given by my
9 expert, Mr Dryden, in his reply report, there is no
10 procedural direction for yet another further round of
11 experts' reports. We have over a thousand pages of the
12 benefit of expert opinion in this case. However, and
13 practically, given that the critique seems modest, it is
14 easier we think for Mr Dryden simply to be permitted to
15 address the point, preferably orally, but if necessary
16 in writing and we will take a view if we may as to
17 whether or not that is appropriate.
18 What of course we do not want and I am sure
19 the Tribunal shares this view, is round after round of
20 experts wanting the last word.
21 THE PRESIDENT: Yes. That does not help and it may assist
22 the experts to know that we consider that the law of
23 diminishing returns in terms of the weight sets in
24 pretty quickly after reply. So, frankly, our thinking
25 is that we are not going to stop this sort of exchange

1 because we regard the experts as helpful professionals
2 trying to put their best opinion forward. On the other
3 hand, if the point was of any great materiality, it
4 would have surfaced earlier and so we probably will
5 regard these things as matters that will get a passing
6 attention no matter what, if it should emerge that
7 a point of genuine importance has arisen late on, then
8 we will make sure that it is addressed by all of the
9 experts because we want to hear what all of them have to
10 say so we will keep a very close eye on that sort of
11 point but for the rest, Mr Beal, I would not worry too
12 much.
13 MR BEAL: Thank you very much, sir. That does move rather
14 nicely on to the next issue which is that last night
15 I received the benefit of a third report from Dr Niels
16 on behalf of *Mastercard*. This is in a different
17 category, we say, and I have three short points to make
18 on it. First, from my perusal overnight of that
19 material in the time available to me it appears that he
20 is trying to adduce fresh evidence of a sensitivity
21 analysis in relation to alternative payment methods in
22 a switching scenario. To the extent that it is fresh
23 evidence, our submission is it is simply too late at
24 this stage and I echo, with respect, the President's
25 point that if it was a good point, it would have

1 surfaced long ago.
2 None of the procedural rules in this very tightly
3 case-managed trial have envisaged experts deciding that
4 they are going to have the last word by putting in
5 a rejoinder or a surrejoinder statement in due course.
6 Secondly, and in any event the point we say has no
7 relevance because it is dealing with what is in effect
8 a switching analysis for the purposes of an overall
9 welfare benefit analysis or comparing average MSCs which
10 lies properly in Trial 3. It is an Article 101(3) issue
11 and we pray in aid for that *Sainsbury's* Court of Appeal
12 at paragraph 162. I will not turn it up now because you
13 will not be surprised to hear I am going to go through
14 the case law with some care later.
15 Thirdly, and practically, my experts have reminded
16 me that the experts' table on evidence requirements pre
17 the Redfern schedules did not identify and thus did not
18 lead to gathering the type of evidence required to
19 perform these calculations with a robustness that is
20 required. Thus, whatever Dr Niels purports to show in
21 his third report cannot be, we say, derived from
22 a robust evidential exercise. Nor is it fair because if
23 the point had been evidentially required, my clients
24 would have been entitled to other sources of evidence in
25 order to test the robustness of the propositions.

1 I have had the benefit of liaising with my experts
2 on this. Mr Dryden of Compass Lexecon has said that in
3 order for a proper analysis of switching effects to be
4 conducted, based on changes to average MSCs, the
5 evidence that would be required, and you will appreciate
6 I am going read this rather than do it from the top of
7 my head, is:
8 "Firstly, the cost to the merchants of the schemes
9 cards; secondly, the cost to merchants of alternative
10 payment means; thirdly elasticity of scheme card usage
11 with respect to the MIF; fourthly the diversion pattern
12 of the lost usage to all other payment means."
13 Now, that is a pretty long list and there simply has
14 not been any detailed focus of the disclosure terms on
15 any of those matters precisely because we take the view
16 that it is a matter for Article 101(3) analysis.
17 Interestingly, and I am not going to go into the weeds,
18 Dr Niels tries to rely in his third report, on an Oxera
19 report from 2016 which was provided to the EU Commission
20 for the purposes of the Article 101(3) analysis.
21 So that is where it all goes legally, we say, and
22 indeed evidentially, but I am simply putting down
23 a marker now and I am going to leave it to my learned
24 friend Ms Tolaney to take a view.
25 THE PRESIDENT: You are putting down a little bit more of

1 a marker because with Mr Kennelly's Mr Korn it was: let
2 us see what he says, but it is probably not going to be
3 a problem but if it is, I will say. Here I think your
4 marker is this should not go in.
5 MR BEAL: Our provisional position certainly unless a formal
6 application is made is we are not going to go quietly on
7 this one.
8 THE PRESIDENT: Obviously we are not going to deal with that
9 now, we will make sure we read Niels 3 and see what it
10 is all about. But we would like that dealt with sooner
11 rather than later so that everyone knows where they
12 stand. So, Ms Tolaney, you have heard what Mr Beal has
13 to say, let him know what the position is. I suspect if
14 you want to get it in, then there will have to be a row
15 about it, I can see where that is going, but we will
16 deal with that when you have worked out just how much of
17 a row it is and how long it will take.
18 MS TOLANEY: I will do that, thank you very much, sir.
19 THE PRESIDENT: Very grateful, thank you.
20 MR BEAL: Finally on housekeeping, happily, I need to deal
21 with the issue of confidentiality. My proposal,
22 certainly in opening, is to try and avoid the
23 confidential material as far as possible. If I do have
24 to refer to something I will principally use guarded
25 language to invite the Tribunal to read it and I hope

1 that the privacy screens on the public screens means
2 that those who are not in the confidentiality ring
3 cannot look over somebody's shoulder and see it. There
4 has arisen overnight a suggestion that we have put
5 something in our written opening that was properly
6 restricted confidential but which was not indicated on
7 Opus to be so when we settled our written opening.
8 We will try and resolve with Visa overnight what the
9 true position is. My understanding is there are three
10 separate rules in issue. I have looked just now at one
11 of them and it appears to be in Visa's public rules but
12 to err on the side of caution, when I am opening on the
13 rules this morning or -- it will be this morning, I will
14 err on the side of caution and simply invite
15 the Tribunal to read those rules so that there is no
16 public statement as to what they actually contain at
17 this stage.
18 THE PRESIDENT: That is very helpful, Mr Beal, and we have
19 a lot of experience of the skill of counsel to navigate
20 these difficult waters. I just want to put down
21 a marker of our own because when one fast-forwards to
22 the judgment, you can expect us to be sensitive to
23 questions of confidentiality and to try to avoid putting
24 those points in the judgment. But you can take it that
25 that will be our approach. And that if in a draft

1 judgment when we circulate it, in a few months' time, we
2 have actually gone to the lengths of quoting what is
3 restricted confidential, we will have done that for
4 a reason and we are not going to be expecting a pushback
5 saying: you cannot refer to this because it is labelled
6 confidential. We will need a better reason than that to
7 revise things and I say that now because that has proved
8 to be something of an issue in other cases where the
9 length of time it has taken to finalise a judgment has
10 been dramatically extended and costs of everyone
11 increased by frankly unhelpful points being taken on
12 questions of confidentiality. It does not affect your
13 client so much as Visa and *Mastercard* but I want that on
14 the record now as the sort of approach that the Tribunal
15 will be taking to these questions.
16 But in court, your course is absolutely the right
17 one, and we do not want to go into private session but
18 we are very happy to read to ourselves things that we
19 cannot say aloud.
20 MR BEAL: Yes, the Tribunal will be cognisant of
21 Mrs Justice Cockerill's recent decision on
22 confidentiality material and confidentiality rings and
23 a tendency towards over protection, but I am not going
24 to make any submission on that at this stage because it
25 adds more heat than light.

1 Opening submissions by MR BEAL

2 MR BEAL: Can I then please start my opening and give you,
3 if I may, a roadmap.
4 Firstly, I propose to make some introductory
5 comments.
6 Secondly, there are one or two -- perhaps three or
7 four -- core documents that I would propose to take
8 the Tribunal to. In particular, and I make no bones
9 about this, the very detailed reports that we have from
10 the Payment Services Regulator, the PSR, partly because
11 we do not have any direct evidence from merchant
12 acquirers in this case. Again, it is too late to moan
13 about that, there were enquiries made. They did not
14 lead to any evidence, we are where we are, but the
15 consequence of that is that some of the very helpful
16 evidence as to how the market works and in particular
17 what Merchant acquirers look like and what they do is
18 available in a public report from the specialist
19 regulator in this field and it is a useful source of
20 information.
21 My third category will be submissions on the
22 appropriate legal principle. With a Tribunal of this
23 experience, I will not belabour that. What I am
24 proposing to do is concentrate on some fault lines
25 between the parties, somewhat unusually, as to what the

1 appropriate legal principles are, and they govern
2 principally what is the consequence of the Commission
3 Decision, be it a settlement decision, a claimant's
4 decision or a full fat infringement decision, and also
5 how do you deal with the test for infringement by
6 object, where there appears to be some divergence.
7 I will then, if I may, deal with the rather
8 extensive regulatory history. I have to deal with this
9 at some point and I have made the decision for better or
10 worse that it is better to deal with it now rather than
11 in closing. That will, I am afraid, take some time
12 because it is quite long.
13 I will then propose to be much shorter in trying to
14 distill the essential points on each of the plethora of
15 issues that we have to get through to simply try and
16 give you a very summary overview of what we say the key
17 issues are and what our answer to those key issues is.
18 There has been some movement on that as you would
19 expect so the issues have narrowed between the parties.
20 Could I then start with my introductory comments.
21 We say here that there are a series of overarching
22 themes. The Tribunal will be well aware of the
23 extensive jurisprudential and regulatory history
24 confirming that the process by which MIFs are set in its
25 legal and economic context is indeed a restriction of

1 competition. In a nutshell, MIFs are not a freely
2 negotiated price between acquirers and issuers in
3 consideration of services rendered by the issuer, they
4 are what the Visa rules describe as a default transfer
5 price.
6 That default transfer price leads to the transfer of
7 very significant funds from acquirers to issuers. That
8 has, we say, the inevitable consequence of setting
9 a floor to the price which acquirers then charge in the
10 relevant product market here, which is the relevant
11 product market of acquiring services to merchants. It
12 is well understood nowadays that acquirers will indeed
13 pass on that charge to Merchants, not least because of
14 IC plus and IC plus plus pricing or MIF plus and MIF
15 plus plus pricing. That is a prevalent form of pricing.
16 You will see have seen from *Mastercard*'s opening that
17 what was an issue for many a month in the CMCs and
18 elsewhere has gone. It is accepted that because of IC
19 plus and IC plus plus pricing there is an appreciable
20 effect of the MIFs producing a floor for MSC charges.
21 And indeed I note and I invite the Tribunal to make
22 a note, it is a confidential document, I will not turn
23 it up. I can leave the Tribunal simply with a reference
24 to {RC-J7.2/6/3} where Visa rules anticipate the use of
25 IC plus pricing. Now, the inevitable consequence we say

1 of setting positive MIFs is accordingly that the
2 Merchant Service Charges paid by merchants will be
3 higher. The MIF is set through collective determination
4 of the schemes with their respective members and that
5 holds good, notwithstanding the initial public offerings
6 that both Visa and *Mastercard* have made. It is a point
7 for comment but no more that the rationale for those
8 IPOs was to avoid anti-trust scrutiny, principally in
9 the United States, but the conclusion from the UK and EU
10 courts has been that it does not change the outcome of
11 the proper analysis from an EU and UK competition law
12 perspective.
13 We say that the object of the MIF as a scheme rule
14 is to co-ordinate the conduct of issuers and acquirers
15 in the price to be paid for settlement and clearing of
16 card payments and that necessarily establishes a minimum
17 price to be paid by merchants for acquiring.
18 Alternatively, we say that the effect of the MIF is
19 to determine other than through effective negotiation
20 a substantial component of the price that is in fact
21 paid by merchants to acquirers for acquiring services.
22 So that ties the acquirer's hands or, to use Mr Dryden's
23 expression in the Supreme Court judgment, sets a reserve
24 price below which the Merchant Service Charges will not
25 fall.

1 In terms of the anti-steering rules, our position is
2 that they reinforce the anti-competitive impact of the
3 MIFs, they operate in conjunction with the MIFs and have
4 an anti-competitive object or effect. It is only if one
5 is looking at restriction by effect that we need to
6 explore the counterfactual scenario so if this Tribunal
7 were to conclude in accordance with our submissions that
8 the MIF represents in the modern economic and legal
9 context a restriction by object, then we can ditch all
10 of the lengthy analysis on counterfactuals.
11 Now, in terms of the counterfactual scenario, the
12 relevant analysis involves holding all relevant factors
13 equal save for stripping out the conduct that is said to
14 give rise to the restriction of competition. Here that
15 involves, we say, stripping out the requirement by
16 default to apply MIFs set by the schemes and the
17 anti-steering rules that support them. Since MIFs
18 inevitably feed into the calculation of the MSC, it
19 follows in a world without MIFs the MSC would be lower,
20 all else being equal. We say that is sufficient here to
21 establish an actual or potential anti-competitive
22 effect. If a core component of the MSC charge is
23 removed, the MSC charge will inevitably be lower.
24 The counterfactuals proposed by *Mastercard* and Visa
25 to try and avoid that consequence we say are neither

1 legitimate nor realistic. In relation to the consumer
2 MIF the courts have found that the appropriate
3 counterfactual is settlement at par with a prohibition
4 on ex-post pricing. That has occasionally been referred
5 to for convenience as a zero MIF but of course zero MIF
6 would still imply a coordinated approach to pricing
7 setting the price at zero. So we say that the better
8 analysis is to simply rely upon the underlying scheme
9 rule that has a default settlement, you have to settle
10 it in order to have a scheme and then says and you
11 cannot charge after the event for it.
12 In other words, it is the absence of the agreement
13 which is contested. Sorry, in the absence of the
14 agreement which is contested, card payments would simply
15 be settled without any MIF being payable. There is no
16 reason in principle why that cannot be applied to
17 consumer cards including in relation to their
18 inter-regional MIFs after the inception of the
19 Interchange Fee Regulation just as it was before. There
20 is nothing in the promulgation of the Interchange Fee
21 Regulation, or the IFR, which leads to a different
22 outcome when properly analysed.
23 Now, I will come on to deal with those points in
24 more detail later because obviously a high degree of the
25 tension between the parties in this case is about those

1 two alternative counterfactuals: the UIFM, so-called,
2 and the bilaterals counterfactual, and the extent to
3 which they are appropriate in the post IFR world.
4 You will also hear from me later that on my legal
5 analysis of the relevant regime. The IFR was revoked
6 and abolished with effect from 1 January 2024 because it
7 was swept up into a post retained EU Law Act reform of
8 assimilated principle legislation, so it has gone.
9 Now, neither the MIFs nor the anti-steering rules we
10 say are objectively necessary because all a payment
11 system needs is a rule for settlement between the payer
12 and the payee and a prohibition on ex-post pricing and
13 indeed that is what the European Commission has
14 consistently been saying since 2002 with the Visa
15 Exemption Decision. The reference for the Tribunal's
16 note is recital 59 which is at {RC-J5/5/11}.
17 In any event we say restrictions of competition by
18 object cannot be treated as an ancillary restraint.
19 I will come on to the case law that confirms that.
20 There is a trilogy of casts involving sports law just
21 before Christmas from the CJEU that helpfully set out
22 the framework analysis.
23 That then is a very high-level summary of our case.
24 What I am going to turn to now is some of the key
25 submissions that have been made by the schemes and these

1 key submissions you will find strangely familiar, indeed
2 if I may be permitted a rubbish joke: Greta Thunberg
3 would be pleased because they have been extensively
4 recycled. They largely consist of points that have been
5 run before in relation to consumer MIFs but which have
6 not been accepted so can I simply highlight perhaps four
7 separate points where recycling has been prevalent.
8 First, that the MIF is somehow needed to balance the
9 system in a two-sided market. As the Commission has
10 repeatedly said those issues arise for consideration at
11 the exemption stage where you have the welfare analysis
12 rather than here, in other words that is for Trial 3.
13 The second point that is often made is that the MIFs
14 somehow contribute to costs which are borne by the
15 issuers from which the merchants benefit. That, with
16 respect, is simply another way of saying the same thing,
17 that the MIF serves a useful purpose for the scheme as
18 a whole. Again, it is for Trial 3, again it is for
19 Article 101(3) analysis.
20 The third point is that the MIF is somehow necessary
21 to enable the schemes to fight off the competitive
22 threat from American Express. As a matter of fact, with
23 the greatest of respect, that competitive threat has
24 been overstated as the EU Commission found in *Mastercard*
25 1 and I will take the Tribunal later to the particular

1 recitals of that decision which confirm that.
2 The Tribunal will want to note as well that when the
3 Reserve Bank of Australia capped interchange fees in
4 Australia, the merchant fees charged by Amex in fact
5 decreased, and that is also confirmed in recital 636 of
6 the Commission Decision and again I will be inviting
7 the Tribunal to read that a bit later on.
8 There is also a passage in a Statement of Objections
9 and this is perhaps the first document I would invite
10 the Opus operatives to turn up, it is {RC-J4/22/31}.
11 Paragraph 57 there, we see:
12 "... Visa Europe is characterised by important
13 network economies, which stem from its large cardholder
14 base and its large merchant acceptance network. Together
15 with *Mastercard*, Visa Europe's issuing and acceptance
16 networks are unique in the EEA."
17 They then refer to the network effects of having
18 that position and they say:
19 "Certain national debit card schemes may have
20 significant market shares in particular EEA countries,
21 but not in the other EEA countries, whereas three-party
22 payment card schemes operate globally, but their market
23 shares are significantly lower than those of Visa Europe
24 and *Mastercard* in all EEA countries."
25 In terms of figures, and we will get this from the

1 PSR report that I will go through shortly, the current
2 market share for Amex -- sorry, the current market share
3 for Visa and *Mastercard* is put at something like 99% in
4 the domestic UK payment market, up from 98% in the
5 previous report in 2021, and the figures from I think
6 2016, even for commercial cards as a subset of a market,
7 put Amex's presence at about 5%, and I will produce the
8 evidence to support those figures shortly.
9 But in any event of course this implies that it is
10 appropriate to consider the commercial success of the
11 schemes either generally for the purposes of objective
12 necessity or for the counterfactual, and with respect
13 that is wrong in law.
14 I have already referred to paragraph 162 of the
15 Court of Appeal's decision. I will be coming back to
16 this theme repeatedly because as we go through the
17 regulatory landscape and the legal decisions that have
18 been taken, it is consistently said you do not worry
19 about how the schemes are going to do commercially for
20 the purpose of analysing whether or not they have in
21 fact through their measures produced an anti-competitive
22 object or effect as a restriction of competition in the
23 market.
24 So all of -- I mean, there is a great deal of
25 submission in the openings about this. Will cardholders

1 switch to a rival? Will they all go to Amex? Will the
2 sky fall in? The Chicken Little defence, one might call
3 it. None of that is legally relevant. Now, we will
4 fight it as a proposition in case we are wrong on that,
5 but it is with a sense of exasperation that we do so.
6 My fourth suggested recycling point is that the
7 counterfactual might realistically involve genuine
8 bilateral negotiations between issuers and acquirers.
9 So you will remember a great deal of time you spent in
10 2016 looking into this very issue only to find that your
11 conclusions were challenged by the card schemes on
12 appeal in the Court of Appeal who took a different view
13 and took the view that a bilateral series of bilateral
14 negotiations in the counterfactual was not the right way
15 to go. The card schemes made extensive submissions
16 against that proposition in that litigation, you will
17 have seen from our written opening that Dr Niels, who
18 has been involved in this area for some time, made
19 similar submissions when the OFT in 2005 decided they
20 were going to use a bilaterals counterfactual and it
21 came before this Tribunal and this Tribunal I think with
22 a certain sense of reluctance said: well, if you are
23 ripping up and starting again then we will have to set
24 aside your decision, and were slightly surprised that
25 the OFT had managed to choose the wrong counterfactual

1 and then had to withdraw the decision. In that
2 particular case, Professor Frankel -- I think then
3 Dr Frankel -- appeared before the OFT suggesting
4 a counterfactual of settlement at par which is the one
5 that was then I think accepted by all concerned at the
6 time to be the appropriate one, and which of course
7 remains the appropriate counterfactual as a matter of
8 common ground for everything other than consumer MIFs.
9 I need to get this very right, if I may say so, because
10 it gets a bit tricky -- the only time that anything
11 other than a settlement at par counterfactual, as
12 I understand it, is considered to be inappropriate is
13 from 9 December 2015 for EEA MIFs through to 1 January
14 2021. Why that date? Because at that stage, suddenly
15 you do not have the IFR applying to UK EEA transactions
16 because of Brexit.
17 So that is the first point.
18 Even for domestic MIFs, the counterfactual analysis
19 necessarily turns on the IFR and with the abolition of
20 the IFR from 1 January 2024 that counterfactual analysis
21 is also inappropriate and therefore the only thing that
22 is left is settlement at par, and because these are
23 ongoing claims, that have relevance.
24 So I have tried to convey here and you will see it
25 in greater detail when we go, I hope not too

1 laboriously, through the regulatory history the same
2 arguments have been run time and time again. There was
3 a Spanish philosopher who became a professor at Harvard
4 called George Santayana who said those who cannot
5 remember the past are condemned to repeat it, and we do
6 say that there is an element of that here because there
7 have been just a series of attempts to rerun the same
8 points with a slightly different package in the hope
9 that, because the MIFs change, the underlying analysis
10 can change.
11 With the greatest of respect, the fact that it is
12 a commercial MIF or the fact it is an inter-regional MIF
13 or consumer MIF does not actually change the pricing
14 dynamic of what is going on. The MIF is simply a price,
15 it is a rate that is charged for a fee. It is the
16 impact of that rate, not its quantum, on a subsequent
17 transaction between the acquirer and the merchant that
18 is the key focus of the competitive constraint and it is
19 the impact on MSCs that is the key point. If the object
20 of all these arrangements is to impact the MSCs then you
21 get an object infringement as well.
22 Now, I of course accept there is an element here
23 which is new, and that is the IFR, and that concerns
24 obviously the impact of the IFR on consumer domestic
25 MIFs and EEA MIFs until Brexit i.e. IP completion day,

1 1 January 2021.
2 We have some short and obvious points to make.
3 Firstly, the IFR is not an exemption decision, it does
4 not say that an appropriate level of the MIF for
5 competition purposes is 0.2% for debit and 0.3% for
6 credit. Its recitals, in particular recital 14, confirm
7 that it does not prejudice the application of
8 competition law. It sets a cap for consumer debit and
9 credit but leaves competitive forces to drive the
10 relevant prices lower if those competitive forces are
11 free to do so.
12 The IFR has never applied to commercial cards or to
13 inter-regional transactions. It is not applied to EEA
14 UK transactions since IP completion day and it has been
15 revoked entirely by the Financial Services and Markets
16 Act 2023 with effect from 1 January 2024
17 What has come in its place, and I will deal with
18 this in due course, is a regime whereby the PSR under
19 some amended regulation can set a direction to payment
20 schemes which could countenance a cap and indeed we will
21 see that the PSR is currently looking at and consulting
22 on whether there should be a cap for intra-EEA or
23 a transaction between what is now an EU or EEA state and
24 the UK. But we have not been able to find, and
25 apologies if we have simply missed it, a direction from

1 the PSR saying that a cap will apply.
2 Now, the IFR is said to generate a new
3 counterfactual analysis which of course, we reiterate,
4 only applies if you find against us that this is not
5 a restriction by object. The two new counterfactuals
6 crucially depend on establishing one of two situations.
7 Firstly, from a competition perspective genuinely
8 unilateral conduct by a single entity which lacks the
9 necessary characteristics of an agreement or concerted
10 practice between one or more undertakings or an
11 association of undertakings, so that what I call
12 genuinely unilateral conduct could of course be subject
13 to a challenge based on what was Article 102 of the
14 treaty, so abuse of dominant position and the chapter 2
15 prohibition in the Competition Act. That is not
16 a matter for this trial, but it shows what sort of
17 genuine unilateral conduct one should be looking at.
18 The alternative way of putting it depends upon
19 genuinely bilateral negotiations which set a price in
20 the relevant product market in a way that is determined
21 by the free forces of competition. If there really is
22 genuine bilateral agreement between an acquirer and
23 a merchant that there should be a MIF paid to the issuer
24 at a certain level, then of course that is the free flow
25 of market forces and there is nothing that can be said

1 against it. If that is right, however, and you do have
2 goodness knows how many individual bilaterally
3 negotiated arrangements then you do not have actually
4 have a scheme, you have a series of ad hoc individual
5 arrangements and indeed we note from the *Mastercard*
6 opening that they suggest that even this counterfactual
7 without the HACR, the Honour All Cards Rule, is
8 inherently implausible.
9 So you need to have a scheme that reinforces the
10 binding effect of genuinely bilateral negotiations at
11 which point of course the dynamics of negotiation come
12 into play and it is anything but genuine because
13 somebody will have the market power, somebody has the
14 whip hand and somebody then, depending on how the
15 default regime is phrased, will be able to exert market
16 power if market power exists. We say that this
17 therefore defaults into a simple analysis of: you have
18 developed a scheme in the counterfactual where all of
19 the market power lies with the issuer, the issuer can
20 ask for whatever MIF it wants and you, the acquirer,
21 have no choice but to pay it, you, the merchant, have
22 a no choice but to take these cards because they are
23 "must take" cards that cover 99% of the UK payment
24 market and therefore whatever the issuer wants gets
25 paid.

1 That is exactly the situation that the
2 Court of Appeal and Supreme Court in *Sainsbury's* said
3 would lead to the collapse of the system and the only
4 reason this time round it is said not to lead to the
5 collapse of the system is because of the intervention of
6 the IFR that makes it capable of being swallowed.
7 Now, the fact that it is capable of being swallowed
8 in terms of fixing what would otherwise be perceived as
9 an exemptible rate, if that is the right analysis, and
10 we do not say it is, that does not change the underlying
11 competitive anti-competitive mechanism of setting the
12 price. So we say ultimately the bilaterals collapses
13 into the UIFM model.
14 Now, the UIFM model is the way that Visa runs its
15 primary case and *Mastercard* I think having initially not
16 adopted it now has chosen it as an each way bet. On
17 proper analysis, we say that it does not constitute
18 unilateral conduct. It is simply replacing one scheme
19 rule with another scheme rule which in practice will set
20 a level for the MIFs which all issuers will charge.
21 That would be both its object and its effect. So it
22 still amounts, we say, to the coordinated setting of
23 a MIF and to the coordinated setting of a substantial
24 part of the MSC.
25 Its purpose, its valid purpose, as I understand it,

1 is to continue to generate a substantial revenue stream
2 which will be paid to issuing banks. Now, if, for
3 example, pushing back on this counterfactual the scheme
4 rules said: well, there is a MIF that must be paid by
5 acquirers to issuers but it is going to be based on
6 a third-party independent metric, say LIBOR, or LIBOR
7 minus whatever calculation mechanism one wants to adopt,
8 that still amounts to a coordinated determination of the
9 price.
10 So too we say therefore if the fundamental premise
11 behind the so-called unilateral model is to produce
12 a MIF rate which mirrors, indeed matches, the maximum
13 permitted MIF rate because of a regulatory cap, that is
14 simply a method of calculating the MIF based on the
15 so-called extraneous circumstances which is inherent in
16 the rule itself.
17 So this is old wine, new bottles; it is exactly the
18 same way of co-ordinating and determining a MIF price in
19 the knowledge that it will form a floor which is no
20 longer in issue, for the MSCs in a substantial part of
21 the market and therefore amounts to an appreciable
22 restriction of competition because it is not open to the
23 merchants and the acquirers to negotiate below it.
24 Their hands are tied and that is a restriction of their
25 competitive freedom.

1 Now, we also say it is an old wine in new bottles
2 that has not worked in New Zealand contrary to the
3 scheme's contention. There are various submissions on
4 New Zealand and I do not propose to develop them in
5 detail at this stage but in essence it led to changes in
6 the scheme rules that in fact the schemes here do not
7 want to countenance; it led to rebates being paid by
8 certain issuing banks to certain key market chartered
9 accountants which again they are not suggesting; and
10 thirdly, it led to an extensive and substantial
11 regulatory intervention when it did not produce any
12 proper change in the competitive landscape which is the
13 *2022 Act in New Zealand*.
14 The second alternative is, as I have said, the
15 revised bilaterals model which is now advanced by
16 *Mastercard*. We do not detect any positive support from
17 Visa for this. What they say is that, well, if
18 *Mastercard* win on this, you have to give us the benefit
19 of it as well and I would do the same in their position,
20 so that is not an implicit criticism.
21 I can tell you I think why they do not support it.
22 Please could I invite the Tribunal to look at page
23 {RC-F4/8/8}, where I hope we will see a witness
24 statement from Mr William Knupp, who is the Senior
25 Vice President of Visa Inc. At paragraphs 27 and 28 he

1 tells us something about how bilaterals might work in
2 the real world. Please could I invite the Tribunal to
3 read 27 and 28.
4 THE PRESIDENT: Yes, of course. (Pause)
5 MR BEAL: It is very important, we say, in relation to this
6 alleged counterfactual to try and understand what, if
7 anything, is actually agreed under it. I will obviously
8 need to come back to this in closing once we have
9 explored this issue with both the witnesses and with
10 Dr Niels, but if you do not have settlement, you do not
11 have a payment system. Visa in its opening submissions
12 paragraph 19.4 has confirmed that its rules require that
13 whenever a cardholder presents a card for payment, the
14 issuer must make a payment to the acquirer to settle the
15 transaction. If you have an issuer that is obliged to
16 settle a valid request for payment made by an acquirer
17 presenting a valid card then the absence of a bilateral
18 agreement will lead to no MIF being charged, the
19 transaction still settling. The reason for that is the
20 default rule will be settlement: you have to pay, you
21 have to accept, it has to be settled. If you have not
22 agreed what the price is going to be, there will be no
23 price.
24 So it must therefore follow that this so-called pure
25 bilaterals arrangement does not actually envisage

1 settling at all, which is very odd for a payment system
2 to have a rule that does not envisage settling.
3 If, however, that current rule to require
4 a settlement is also changed, then what would
5 essentially happen is either the acquirer gives up on
6 the transactions for that scheme, because otherwise he
7 is facing -- it is facing exactly the same one-sided
8 pressure to agree the issuer's fees which are too high
9 that would lead to the collapse of the system as the
10 Supreme Court have found. Or secondly, if the acquirer
11 cannot do that, because the cards are "must take", then
12 of course it is effectively the scheme that is requiring
13 the acquirer to accept the consequences of a requirement
14 for bilateral negotiation, which must mean that you are
15 tying the acquirer's hand to accept whatever offer is
16 put forward by the issuer because he has no choice but
17 to agree that because otherwise you do not have the
18 transaction and he is obliged to settle the transaction.
19 So either way you end up with a position whereby market
20 power is determining the level of the MIF and it becomes
21 a sham negotiation for the purposes of the acquirer.
22 Now, of course if there is no default rule to accept
23 the cards, *Mastercard*'s cards, because this is
24 *Mastercard*'s counterfactual and no default settlement at
25 all, then there is no guaranteed settlement of any

1 particular card. And at the moment, I am afraid we are
2 simply struggling to understand how that can be said to
3 be realistic because if there is no confidence that
4 a card will be accepted and settled then pretty quickly,
5 nobody will use it. Indeed, that was the basis for the
6 finding that it was important to have a settlement at
7 par rule in the Court of Appeal and in the
8 Supreme Court.
9 And indeed we note that in the commission in the
10 *Visa 2* Exemption Decision, which is in many ways
11 prayed in aid by my learned friends as the high
12 watermark of what the competition analysis should be,
13 notwithstanding subsequent developments, it said in
14 recital 59, and perhaps it is worth turning this up, it
15 is {RC-J5/5/11}, bottom left-hand corner, if you could
16 perhaps focus on that. It says "The only provisions" --
17 it must be a bit further down, I think. Recital 59.
18 THE PRESIDENT: The top column.
19 MR BEAL: Top right-hand corner. Thank you. Halfway down
20 that paragraph is the sentence that begins:
21 "The only provisions necessary for the operation of
22 the Visa four-party payment scheme, apart from technical
23 arrangements on message formats and the like, are the
24 obligation of the creditor bank to accept any payment
25 validly entered into the system by a debtor bank and the

1 prohibition on (ex post) pricing by one bank to
2 another."
3 So what they are saying there is essentially that is
4 all you need for a four-party payment scheme. Obviously
5 if you do not have even that level of restriction or
6 requirement contractual obligation then you do not have
7 a four-party payment scheme at all.
8 The counterfactual, we say, therefore on this
9 allegedly pure bilaterals approach crucially depends
10 upon mandatory bilateral negotiations taking place. In
11 circumstances where merchants and acquirers have no
12 choice but to take the card, any bilateral negotiations
13 would be no more than a sham. The hold-up problem would
14 be solved by the scheme rules dictating that the
15 acquirer had to agree whatever the issuer requested up
16 to the regulatory level, i.e. the cap. That continues
17 to be the coordinated setting of price by the scheme in
18 a way that removes a freely negotiated price between the
19 merchant and the acquirer.
20 In support of these counterfactuals both of my
21 learned friends for their respective clients have relied
22 heavily on the findings of this Tribunal and the
23 Court of Appeal in the *Dune* case. I need to deal with
24 aspects of that reasoning when I address specific issues
25 in particular on inter-regionals later. But I would

1 like to say at this stage that part of the reasoning
2 accepted by the CAT and the Court of Appeal concerned
3 what was said to be the lack of an appreciable
4 restriction for, for example, commercial cards and
5 inter-regional MIFs on the basis that they were such
6 a small amount of the overall MIF paid that went into
7 the MSC that it did not lead to an appreciable
8 restriction of competition. That has been disavowed by
9 *Mastercard*, we say rightly, in its opening submissions
10 and Visa has simply, as far as we can see, let it sink
11 under the water gently with no trace remaining.
12 Now what the CAT and the Court of Appeal in *Dune*
13 were dealing with was, as this Tribunal well knows, a
14 summary judgment application. The ratio of each
15 decision is that the counterfactuals for post IFR
16 inter-regional MIFs and commercial cards is a matter to
17 be addressed at this trial, which is why we are
18 addressing it. Indeed, that is why we have issues 3, 4
19 and 5. While the scheme submitted that the IFR was
20 a game changer, that proposition was very much left to
21 be determined at this trial. Could we turn up, please,
22 in {RC-J5/44/20}, the decision of the CAT. Please could
23 I invite the Tribunal to read paragraph 44. (Pause)
24 THE PRESIDENT: Yes.
25 MR BEAL: At paragraph 50, page 23 {RC-J5/44/23} under the

1 second substantive paragraph beginning "Secondly ...",
2 it says:
3 "... as we have observed, the CAT's conclusions were
4 based on there being no default MIF with settlement at
5 par and it was in that situation that CAT found that
6 bilateral agreements would emerge."
7 That is referring to the *Sainsbury's 2016 CAT*
8 decision. Then it says:
9 "*Mastercard* seeks to distinguish its bilaterals
10 counterfactual on the basis that there would be no
11 default settlement rule at all. Whether that is, in
12 reality, a meaningful distinction, or whether in
13 circumstances under the IFR the same analysis elaborated
14 by Phillips J in the Sainsbury v Visa judgment ... would
15 apply, is in our view a matter for trial."
16 Now, in the Court of Appeal, which is in
17 {RC-J5/46/18}, paragraphs 41 and 42, Newey LJ found that
18 it was arguable in a post IFR world that the two
19 alternative counterfactuals would potentially be
20 a thought experiment and exist.
21 Could I invite you please to read paragraphs 41 and
22 42. {RC-J5/46/18-19}
23 THE PRESIDENT: Yes.
24 MR BEAL: Can I try and encapsulate what, with respect,
25 I think his Lordship was driving at there. If you have

1 a scenario where you are positing that there is
2 a restriction of competition you take that restriction
3 of competition out, the measure in question, and you
4 look at what the situation is in the alternative
5 counterfactual world that you are considering. That is
6 a thought experiment that is done routinely. You cannot
7 moan about there being a restriction of competition in
8 the counterfactual if it is there in any event, because
9 otherwise you end up with a circular proposition, and
10 that is what I understood his Lordship to be saying.
11 It has been suggested that we are trying to fall
12 into the same trap of repeating that circularity. Can
13 I explain to you why we are not? Our case is not that
14 somehow if you strip out this infringement of
15 competition, namely the setting of the MIF such that it
16 provides a floor to the MSC, you are left with an
17 inherent competition concern. What we are saying is
18 that these counterfactuals put forward by the defendant
19 schemes in themselves amount to an unlawful restriction
20 of competition and what you cannot do in the
21 counterfactual is envisage a set of arrangements which
22 would themselves be unlawful.
23 What we say is that the way that the arrangements
24 are envisaged by the schemes in their counterfactual
25 world still continues to lead to a coordinated approach

1 to setting the MIF, it still leads to the MIF being
2 collectively set by scheme rules and it still leads to
3 the MIF determined by those scheme rules acting as
4 a floor to the Merchant Service Charge charged by
5 acquirers to merchants. So that is simply another way
6 of co-ordinating a scheme so that it amounts to unlawful
7 price setting in a manner that has been found to be
8 unlawful by the Commission, the EU Courts, the
9 Court of Appeal and the Supreme Court in *Sainsbury's*.
10 Now, it was this particular argument: i.e. is it
11 lawful to do what you are doing in the counterfactual,
12 that was expressly left open by Newey LJ at
13 paragraphs 47 and 48. My learned friends' opening
14 submissions focus very heavily on 41 and 42, what they
15 do not go on to look at is 47 and 48 which is at
16 page 20. Please can I invite you to read those.
17 {RC-J5/46/20}
18 THE PRESIDENT: Yes.
19 MR BEAL: And then at paragraph 49, page {RC-J5/46/21} his
20 Lordship said:
21 "I have not been persuaded that the CAT's decision
22 to refuse judgment in respect of UK, Irish and intra-EEA
23 consumer MIFs can be faulted. Of course, it may in the
24 end transpire that the arrival of the IFR did not change
25 the appropriate counterfactual or that, even if it did,

1 it can be seen using the alternative counterfactual(s)
2 that the rules providing for those MIFs remained
3 restrictive of competition."
4 That is our case. Nothing to do with a circularity
5 or vice argument.
6 Indeed, if we look, please, at paragraph 70 and 71,
7 page 27 {RC-J5/46/27}, we see a recital from the
8 Supreme Court's decision in paragraph 99 of the
9 *Sainsbury's* judgment:
10 "... of 'a minimum price floor for the MSC' being
11 fixed as a result of 'the collective agreement to set
12 the MIF'. The word 'set' might be thought inapt once
13 Visa Inc is deciding the MIFs, but the thrust of the
14 Supreme Court's reasoning is unaffected. By joining the
15 Visa scheme, issuers and acquirers will alike have
16 committed themselves to its default MIFs and, in
17 consequence, have fixed a minimum price floor for the
18 MSC. It is true that the market in which competition is
19 said to have been restricted is the acquiring market and
20 that the agreement or concerted practice which the CAT
21 held to have existed extended beyond acquirers, but
22 I cannot see why that should matter.
23 "In all the circumstances, it appears to me that the
24 CAT was right to conclude that Visa has no real prospect
25 of founding a successful defence of the claims against

1 it on Visa Inc's acquisition of Visa Europe."
2 That is a separate issue for Issue 2 as to the
3 impact if any of Visa Inc's acquisition of Visa Europe.
4 But the core point is if where we are end up in the
5 counterfactual world remains a collective agreement to
6 set the MIF in a way that gives rise to a minimum price
7 floor as a matter of proper analysis, then you still end
8 up with a restriction of competition and that
9 counterfactual is for that reason not legitimate. That
10 is not to succumb to the circularity of the argument in
11 *Dune*. Imagine, for example, that a cartel is found to
12 have fixed prices for the supply of computer screens,
13 picking an example entirely at random, a defendant
14 cannot resist a finding of anti-competitive conduct by
15 saying: oh, well if we had not cartelised the market by
16 fixing the price, we simply would have allocated
17 customers between us thus de facto producing an increase
18 in price and an overcharge to purchasers of computer
19 screens. Or, for example: Well, if we had not been
20 able to fix price or share customers, we simply would
21 have shared production markets. That is equally
22 invalid.
23 So what you cannot do in a counterfactual is posit
24 a world in which you have restriction of competition
25 which is then said to alleviate the effect of what is

1 otherwise plainly a restriction of competition.
2 But the short point from *Dune* we say is it is all up
3 for grabs here, because there was no ratio finding that
4 any of these arguments were correct.
5 Now, if I can step back from the detail for
6 a moment, please. It is strikingly odd that the scheme
7 should think it is competitive to involve themselves in
8 setting a default transfer price which it said must be
9 paid by acquirers to issuers. The schemes do not
10 operate a trading platform like a physical market, they
11 are not acting as an intermediary for a sale from the
12 merchant to its customer, so the customer agrees to pay
13 the merchant, the merchant agrees to take payment by
14 payment card, the role of the scheme is essentially to
15 ensure that the payment is properly settled as between
16 the cardholder and the merchant.
17 That does of course involve the interaction of the
18 customer's bank with the merchant's bank but the costs
19 of the scheme in facilitating that clearing and
20 settlement process are covered by the scheme itself. We
21 have seen and we know that the schemes charge processing
22 fees and they charge scheme fees for the use of the
23 scheme. What is odd, we say, is that this MIF has to be
24 paid by acquiring banks to issuing banks is over and
25 above all that, it is simply a transfer of funds from

1 acquirers to issuers in circumstances when everyone
2 knows it is going to be transferred on to the merchants.
3 Now, putting it the other way round, you can readily
4 expect people using a payment scheme to pay the scheme
5 for providing the payment machinery, the process of
6 settlement and clearing. You do not expect that scheme
7 to dictate what one party to the scheme, the acquirer,
8 pays independently to another part of the scheme, the
9 issuer.
10 Now, a cardholder, we say, would expect to arrange
11 for the specific costs of the mean of payment to be
12 ascertained with his or her bank. If I use a credit
13 card I would seek to know in advance what the annual fee
14 was for owning that card, how much I was going to have
15 to pay by way of credit if I did not settle it within
16 the month, what are the residual charges, for example,
17 for statements or so on. And on the other side of the
18 equation, a merchant would expect to negotiate fully
19 with a merchant acquirer as to what the charges for
20 acquiring services were. I would want to know if I was
21 a shop how much I was going to pay for the terminal, how
22 much I was going to be charged for each transaction that
23 was processed, if there were any residual charges, how
24 chargeback was going to be dealt with. These are the
25 sorts of things I would want to know about and I would

1 want to be able to negotiate those freely.
2 What is stark in this case is that you will hear
3 from each of the merchants who give evidence that there
4 is no negotiation over a core component of the price
5 that they pay and that is the MIF. It is probably one
6 of the few variable costs over which they have no
7 control. The only other one I can think of would be VAT
8 which is of course a statutory tax at a much higher
9 rate. I do not want to bleed into Trial 2 issues, but it
10 is different.
11 So acquirers are simply presented with
12 a fait accompli and acquirers tell merchants it is
13 non-negotiable. There is a striking piece of evidence
14 on this which is unfortunately confidential. So I am
15 going to now try and chart the choppy waters of
16 confidentiality, it is {RC-J2.4/98/16}. When I say 2.4,
17 that is my individual reference for which file it is in
18 so it will not come up as 2.4 {RC-J2/98/16}. This is
19 such an effective system, it has not flashed up on my
20 screen.
21 THE PRESIDENT: We have it now.
22 MR BEAL: Page 16 is a presentation on payments
23 modernisation from a particular merchant and
24 the Tribunal will see that the relevant costs are
25 indicated, the players are identified in the left-hand

1 column, the role is identified in the middle column and
2 then the relevant costs that are going to be paid by the
3 merchant are identified in the final column and they
4 separate out three different types of costs and you can
5 see from the bar chart in question that a very
6 significant chunk of that is interchange fees which are
7 passed through. They are passed through because that
8 particular merchant was on IC plus or IC plus plus
9 pricing. So there is nothing that the merchant can do
10 about that and it has to like it or lump it.
11 We say that there is nothing intrinsic in the use of
12 debit or credit cards as a means of payment that means
13 a MIF must be paid.
14 Coming at things perhaps from a quaint historic
15 angle, means of payment might involve cash, cheque,
16 debit or credit card or electronic payment. You do not
17 expect a bank receiving a cheque to be interested in
18 boosting the ability of issuing banks to furnish their
19 account holders with chequebooks. It is simply part and
20 parcel of what you have with a current account with a
21 bank and indeed I remember from the 1980s that you could
22 not actually use a cheque without a cheque guarantee
23 card that you then had to use to verify your identity
24 and confirm the signature. So that was all part and
25 parcel. You had the chequebook, you had the cheque

1 guarantee card and it was part and parcel of owning an
2 account. The idea that shops would subsidise banks to
3 be able to issue me with a chequebook and a cheque
4 guarantee card seems very odd.
5 There is no suggestion either that by issuing
6 a cheque guarantee card the banks were somehow
7 conferring a fraud prevention service on shops and we do
8 not -- or did not historically -- see any interchange
9 charges for the use of cheques, at least in the UK. You
10 will hear from Professor Frankel that that is exactly
11 where interchange came from in the United States because
12 cheques were issued, they would then go through four or
13 five different states collecting these interchange fees
14 as a way of generating revenue before the United States
15 authorities intervened and stopped that practice.
16 To take another example, more modern, electronic
17 transfers, electronic transfers that, for example,
18 I make using my bank account to pay my fees to the law
19 library in Dublin. I have to use an international
20 account now because it is post Brexit. I have to use
21 a SEPA payment exchange. There is a provision whereby
22 I can allocate who pays for the costs of using that
23 system. It is either paid by me or paid by the
24 recipient or it is allocated on an equal basis between
25 the two. You have Faster Payment System or CHAPS, they

1 each have a provision whereby they can allocate who is
2 going to be responsible for the associated payment
3 scheme fees. What they do not do is say: by the way,
4 can you also pay the receiving bank a chunk of money so
5 that it can promote the use of electronic payment
6 systems? That does not feature in those schemes.
7 So it is a particularly strange part of the credit
8 and debit payment system that it does nonetheless
9 require this exchange of funds, this subsidy to the
10 issuing bank in order, so the defendants say, to justify
11 its existence.
12 The scheme here we say is interposing itself between
13 the issuing bank and the merchant acquirer and saying
14 through the scheme rules what the payment should be in
15 circumstances where it is abundantly clear that that
16 cost will be passed on to the merchant and the merchant
17 has no realistic say in the outcome.
18 Indeed, the entire purpose of the arrangement is to
19 generate an income stream for issue banks. I do not
20 think that is controversial, it is encapsulated in
21 recital 499 of the Commission Decision in *Mastercard 1*,
22 the schemes do not tell the issuing banks how to use
23 that subsidy. The issuing banks themselves do not
24 earmark that subsidy and say: right, we are going to use
25 this for card scheme promotional measures, we are going

1 to use this for fraud detection work. The issuing banks
2 simply take it as a chunk of revenue, very nice to have,
3 everyone likes money, they use it as they see fit.
4 And we say that Visa, at least in its opening
5 submissions at paragraph 37, is surprisingly candid
6 about the purpose of the MIF being to provide a subsidy
7 to the issuing bank.
8 The problem of course is that acquirers have
9 insufficient incentives and insufficient market power to
10 constrain that price that is set by the schemes.
11 Recital 502, for example, of the *Mastercard* decision
12 made clear that the basis for setting the MIFs was
13 simply the endurance of merchants to pay the fee, so
14 push it as far as you can until the shops say no.
15 So we end up in a position whereby merchants are
16 subsidising banks for the privilege of the issuing bank
17 providing its own customer with a debit or credit card
18 and acquirers cannot take any meaningful steps to say no
19 to that subsidy and indeed the entire objective of the
20 scheme rules is to require the acquirer to transfer that
21 money to the issuers, having collected that money from
22 the shops.
23 Now the justification for that has changed over time
24 and we do make the fundamental point that the
25 justification is not for this trial, but it is being

1 elaborated and deployed so we will need to engage with
2 it. But the justification is either that this is
3 intended to cover some sort of costs that are latent and
4 transferred from the issuers to the acquirers or that it
5 is somehow to balance the system so as to find an
6 optimal price and that itself is a strange concept, why
7 is the scheme telling the issuer what an optimal price
8 is for an alleged purported contract between itself and
9 the acquirer. It is interfering in somebody else's
10 contractual affairs, seemingly, where there is no direct
11 contract, as we understand it, between the acquirer and
12 the issuer. But in any event it is setting itself as
13 this judge of what the correct and optimal price is for
14 a particular transfer of value.
15 Now, in truth, we say that the MIF is a relic of
16 a bygone era where issuing banks and acquiring banks
17 were the same. You had a common pool of banks, indeed
18 there was an "issuer must acquire" or an "acquirer must
19 issue" rule, which meant that you had to do both aspects
20 of issuing and acquiring to be part of the scheme.
21 In other words, everyone was part of the same club,
22 they were all issuing, they were all acquiring, and the
23 idea that somebody might have more or less issuing or
24 more or less acquiring might mean that there was
25 a transfer of value between people which was not

1 necessarily reflected in their overall benefit from the
2 scheme as a whole and that is where we think this
3 concept of inherent value must have arisen.
4 All of that has gone, of course, though because
5 certainly, from the financial crisis in 2008/2009 many
6 of the acquirers are separate from issuing banks. There
7 are only two issuing banks in the UK that still have an
8 acquiring service and that is Lloyds and Barclays,
9 everyone else, all of the other acquirers, are separate.
10 Now, what has however been a hangover from that
11 relic, from that historic relic, is a tendency to price
12 according to the elasticities of the cardholder and the
13 merchant and because price with the cardholder is more
14 flexible, i.e. the cardholder will more readily reject
15 a request for payment than a shop, because the shop has
16 to take the card, then you get this imbalance in the
17 elasticity of demand between the two and that leads to
18 the price falling inevitably on the more inelastic
19 demand because you can charge more and get away with it.
20 The Commission in *Mastercard 1* at recital 548 noted
21 that such a mechanism of shifting costs and revenues
22 between the issuing and the acquiring banks was not
23 objectively necessary. Why did they find that? Well,
24 they found that the services that were supposedly being
25 transferred could be remunerated directly by the

1 respective customer groups, in other words the acquirer
2 could be paid by the merchant and the issuing bank could
3 be paid by the cardholder.
4 If we look, as we will, at recital 551, which I hope
5 is at {RC-J5/11/153}, the Commission posit -- I'm sorry,
6 it is the next page, it is going to be 154
7 {RC-J5/11/154}, top of the page there, the Commission
8 posits what a freely negotiated system would look like,
9 with profit maximising issuing and acquiring, issuing
10 banks charging cardholders, acquiring banks charging
11 merchants, scheme owner charging issuing and acquiring
12 banks the scheme fees, cardholders obtaining from their
13 issuing bank payment cards that are priced in
14 a transparent manner and merchants able to negotiate the
15 Merchant Service Charge. So that is what it would look
16 like if there was not this in-built competitive skew in
17 the systems themselves.
18 What we also see at paragraph 612, while I have it
19 here, that should be page 170 {RC-J5/11/170} is
20 reference to a slew of funds -- that is paragraph 612 at
21 the bottom -- available to the issuing bank which they
22 can call upon to finance their activities, so for
23 example they can charge cardholders for issuing the card
24 holding the card, and:
25 "Issuing banks obtained considerable non-MIF related

1 revenues from cardholders which they would put at stake
2 by raising cardholder fees to excessive levels ..."
3 So, for example, credit card payments, the usual
4 panoply of charges that a bank is able to charge to its
5 cardholders and do not forget, with respect, to take
6 into account there is a reason why banks give their
7 customers cards; it is so that they can use their bank
8 account and the banks gets the benefit of cardholders'
9 funds when they have cardholders' deposits in the
10 current account. So they get the benefit of the money
11 being kept in a current account and they get the use of
12 that money and they are able to invest that money, that
13 is the traditional banking model. If indeed you have to
14 give a customer a card so that it can use the current
15 account then that is just an ordinary and natural course
16 cost of doing business.
17 Now, the suggestion that the MIF represents
18 a considered and weighted reallocation of costs was in
19 fact rejected at paragraph 616 at page 171. The
20 Commission there found no intrinsic link between the
21 two. {RC-J5/11/171}.
22 In any event, this justification which is often
23 repeated is simply, with respect, irrelevant to the
24 issues in Trial 1. The sole issue for trial 1 is
25 whether the MIF and supporting rules constitute

1 restriction of competition. Issues about the rationale
2 for the scheme or its justification are for Trial 3.
3 Now, we had provisionally suggested that these
4 issues be heard together which arguably might make more
5 sense but that was resisted by the schemes who wanted
6 this to be heard first so we said fine, we will hear
7 this first. The Tribunal endorsed that view so we are
8 where we are. But what, with respect, the schemes
9 cannot do is try to use this process to try and shoehorn
10 in Article 101(3) issues, have them determined at this
11 stage under the guise of looking at restriction of
12 competition. The reason they cannot do that, is, one,
13 it legally impermissible and, two, it is foreshadowing
14 the proper exercise that needs to be done in due course
15 at Article 101(3) stage.
16 Now, the principal basis on which the card schemes
17 are trying to merge these two particular streams of
18 analysis is through recourse to a claim of objective
19 necessity. With respect, that submission is simply
20 wrong because they have applied the wrong test derived
21 from the findings of the CJEU in *Mastercard* and the
22 Supreme Court and the Court of Appeal in *Sainsbury's*.
23 Again, the repeated refrain has been that the sky
24 will fall in if we are not able to set MIFs and that is
25 (1), not borne out by the evidence, we say; and (2), it

1 is inconsistent with the approach that was adopted in
2 the *Visa 2* decision in 2002 which dealt with Visa
3 intra-EEA MIFs.
4 At that stage of course the *Visa intra-EEA MIF* for
5 a while was below that set by *Mastercard*, Visa's
6 business carried on regardless and the sky did not fall
7 in.
8 *Mastercard* itself had zero MIFs so-called for EEA
9 transactions from December 2007 until undertakings were
10 accepted by the Commission in 2009 but again its world
11 did not fall in: it carried on doing business.
12 That defence of: we simply will not survive as
13 a commercial proposition was rejected in the Commission
14 Decision and I do not need to turn that up, see recitals
15 555 to 557 in *Mastercard 1*. And those Commission
16 Decisions have repeatedly referred to other payment
17 schemes which have been able to function perfectly well
18 with a default rule of settlement at par, i.e. so-called
19 zero MIF.
20 It was also rejected in *Sainsbury's* Court of Appeal,
21 just for your note, paragraph 162 and 198 to 209 but
22 I will come back to that in a moment.
23 I am reaching the end of my opening observations,
24 I am afraid it has taken me a little longer than I had
25 hoped but we end up with the main question for this

1 Tribunal on our submission being why the same analysis
2 on restriction of competition for domestic MIFs and EEA
3 MIFs prior to 2015 cannot simply be applied to the post
4 IFR period and why cannot it be applied to
5 inter-regional MIFs and commercial MIFs? We say that is
6 the key issue.
7 Now, for the post IFR period, MIF structure and the
8 rules do not change. All that is changed is that there
9 is a regulatory cap set by an extrinsic event, namely
10 the IFR. That cap is not a proxy for an exemptible
11 level of MIF, but even if it were, we have not gone
12 through the analysis of working out whether it is the
13 proper exemptible level because that is for Trial 3;
14 that is not for now.
15 We say that the appropriate counterfactual remains
16 settlement at par and that the scheme rules should
17 oblige issuers to settle the transaction but without
18 entitling them to demand a positive interchange fee for
19 doing so. Inter-regional MIFs are simply a different
20 MIF rate that is applied to the same card. It is
21 a consumer card. It is going to be a consumer card that
22 happens to be used -- if it is issued in America, it is
23 used in London, if it is issued in London it happens to
24 be used in New York. An inter-regional fee will be due
25 but it is the same underlying card. So it is just

1 a different MIF rate on a given card, the mechanics of
2 how that MIF rate is set does not change and its impact
3 on the MSC does not change. So all of the core
4 components of the restriction of competition analysis
5 remain exactly the same.
6 Now, we will hear a series of evidence as to how the
7 world would fall in if these card companies were not
8 able to -- sorry, the payment schemes were not able to
9 charge inter-regional MIFs, and it no doubt produces
10 a decent income stream for issuing banks. But we say
11 none of that is relevant to the mechanics of what
12 constitutes a restriction of competition through the
13 scheme rules themselves and how the MIF is set.
14 Commercial cards are not in a different acquiring
15 market, the acquiring market requires acquirers to
16 settle all cards and indeed that is one of the facets of
17 the Honour All Cards Rule. True, commercial MIFs are
18 higher and true, commercial MIFs are typically stripped
19 out in a Merchant Service Agreement so that the higher
20 MIF is identified. But that is a difference of amount,
21 not a difference of principle.
22 And we say none of the claimed differences actually
23 goes to the objective effect of the price fixing that is
24 inherent in the scheme rules.
25 In terms of anti-steering rules, these have

1 consistently been recognised to reinforce the
2 anti-competitive effect of the MIF, and I will be going
3 through the regulatory findings that make that good.
4 We accept of course that if there was no MIF
5 whatsoever then the claim for damages would be
6 materially different because there would be no change in
7 the amount that we were paying from what we should have
8 paid. But the fact that the anti-steering rules
9 collectively deprive the merchants of a meaningful
10 option of rejecting these "must take" cards is what we
11 are focused on for our claim against those rules. So
12 they reinforce the charge that we end up paying that we
13 say we should not charge. Obviously if there were no
14 charge, chances are we would not be here: it is not to
15 say they do not have an anti-competitive effect, it just
16 means it would not produce any loss for our claim.
17 In terms of pure analysis and market power the
18 evidence will show that Visa and *Mastercard* are "must
19 take" cards and the MIF is a "must pay" charge as
20 dictated by the scheme.
21 As a pleading point, Visa admits that merchants are
22 not in a position to constrain the level of the MIFs.
23 For your reference that is the Welcome Break defence at
24 paragraph 56, sub-paragraph (c). That is to be found at
25 {RC-C2/20/20}. And in contrast if we look for example

1 at the {RC-C2/20/24-25}, paragraph 73 of that defence,
2 we see that the efficiencies are pleaded -- if we could
3 go over, please, to the next page -- there, all the
4 sorts of things that are relied upon as a reason why the
5 MIF must exist in that section of the pleading is
6 dealing with, as we see, from paragraph 72, exemption
7 under Article 101(3).
8 Now, I hope that is the only pleading point I will
9 take because ultimately the issues have been framed,
10 they are the issues, they arise for determination and
11 individual pleadings simply give the Tribunal and indeed
12 us the context in which that issue arises. But we do
13 say it is telling that quite a lot of the submissions
14 that you have been required to read from the openings go
15 to the pleaded issues that are for 101(3) analysis.
16 Could I come on please to deal with some core
17 documents.
18 THE PRESIDENT: Indeed. Mr Beal, we will try and take
19 a morning and afternoon shorthand writer break. If that
20 is a convenient moment?
21 MR BEAL: This is a perfect opportunity to do so.
22 THE PRESIDENT: In that case, we will rise until five past
23 midday. Thank you.
24 (11.53 am)
25 (A short break)

1 (12.05 pm)

2 THE PRESIDENT: Mr Beal.

3 MR BEAL: With your permission I will now move on to look at

4 some of the core documents. I am going to be in bundle

5 {RC-J6/2/5} for some time, starting at page 5. This is

6 the final report from the PSR in November 2021.

7 The Tribunal may well have looked at quite a lot of this

8 material because it was the subject of a CMC back in

9 September. But if I could crave your indulgence to ask

10 you to cast your eye over bits of it and we will go as

11 quickly as we may. Page 5 has a breakdown of the major

12 players in card payment schemes and at 1.7 at the bottom

13 is stays merchants can buy card acquiring services from

14 acquirers or payment facilitators which also offer other

15 goods and services. Merchants need to accept card

16 payments such as terminals.

17 The five largest acquirers are then identified and

18 then the largest payment facilitators are identified

19 including for example PayPal, Square and SumUp.

20 The distinction will become apparent but payment

21 facilitators essentially are not acquirers, they feed

22 into acquirers and acquirers then acquire transactions.

23 Could the Tribunal then please cast an eye over 1.8

24 to 1.13 on page 6 {RC-J6/2/6}.

25 THE PRESIDENT: Yes.

1 MR BEAL: At page 10 {RC-J6/2/10} top of the page, second
2 bullet, it says:
3 "For the largest merchants (with annual card
4 turnover above £50 million), our pass-through analysis
5 was inconclusive for those on standard pricing because
6 the IFR had little effect on their average interchange
7 fees. Merchants on IC++ pricing, which are typically
8 the largest merchants, received full pass-through of the
9 IFR savings, and we estimate that the benefit of the
10 savings to these merchants was around £600 million in
11 2018."
12 Now, just putting that in context that is of course
13 the effect of the cap coming in for debit and credit
14 consumer MIFs, estimated to be around 600 million in
15 2018.
16 There is an issue which the PSR is investigating as
17 to whether or not the level of pass-through is as direct
18 for those on standard charges: did acquirers pass on the
19 benefit of that saving to those on standard contracts?
20 The evidence was more inconclusive.
21 But of course, happily this issue has gone because
22 it goes to appreciability and that is the subject matter
23 of, if we may say so, a sensible concession.
24 Paragraph 1.16, I am not in a position to say
25 whether it is coincidental or not but the analysis

1 reveals also that scheme fees charged by the schemes
2 have increased significantly over the period.
3 A substantial proportion of those increases was not
4 explained by changes in volume, value or mix of
5 transactions.
6 Paragraph 3.3 at page 15 {RC-J6/2/15}, there is some
7 causes of recent growth in payments are identified,
8 contactless is attributed to part of it, change in
9 shopping preferences, increasing levels of card
10 acceptances amongst businesses and somewhere there is
11 a reference to the pandemic, where of course use of cash
12 decreased.
13 Paragraph 3.7 at page {RC-J6/2/16}, shows that the
14 majority of businesses in the UK accept card payments,
15 in some sectors cards are the most frequently used
16 payment method and in 2020 credit and debit cards
17 accounted for 80%, 73% and 73% of spontaneous payments
18 in certain sectors. It is true in other sectors for
19 example utility bills and mortgage payments, that is
20 mostly done by direct debit.
21 At paragraph 3.10, page 17 {RC-J6/2/17} the PSR has
22 an eye to the future, it recognises an increasing use of
23 digital payments or electronic payments but it says it's
24 not at the stage yet to move the dial. Payment cards
25 remain the preferred means of payment as accepted by

1 merchants.
2 And that is relevant to the extent to which it is
3 appropriate to consider alternative means of payment, it
4 is common ground in this case that the relevant product
5 market is the acquiring market for card payments but
6 Dr Niels does seek to suggest it is appropriate to
7 consider other means of payment such as, for example,
8 electronic payments or digital apps and that will have
9 to be explored in evidence, notwithstanding seemingly
10 the agreement on what the relevant product market is.
11 3.13 then says:
12 "Our market review focuses on the supply of
13 card-acquiring services in relation to *Mastercard* and
14 Visa, which are both examples of four-party card payment
15 systems. Together, transactions involving *Mastercard* and
16 Visa cards accounted for around 98% of all card payments
17 at UK outlets in 2018, both by volume and value."
18 And there is an issue as to whether or not volume or
19 value, or there was an issue as to whether or not volume
20 or value was the right one, again I think that went to
21 the now conceded --
22 PROFESSOR WATERSON: I think you misspoke you said 80%.
23 MR BEAL: Did I? I'm sorry, if I did say that it was
24 clearly wrong. 98%.
25 And then 3.18 and 3.19 at page 19 {RC-J6/2/19} show

1 the types of fees that are payable. So we know
2 interchange fees are charged, scheme fees and acquirer
3 revenue also feature in the MSC. then we see that the
4 variables that go into determine a particular
5 interchange fee are identified, so location, card
6 payment system, channel, etc. Means of payment i.e.
7 chip and PIN versus contactless versus signature.
8 At 3.20 to 3.22 there is a description of the roles
9 that the acquirer plays so bottom of page 19 flipping
10 over to page 20, {RC-J6/2/20}, could I ask the Tribunal
11 please to cast an eye over the entirety of page 20, save
12 for the footnotes. (Pause)
13 And into the top of page 21 {RC-J6/2/21} there are
14 costs relating to the on-boarding process, anti-money
15 laundering checks and so on that the acquirers bears.
16 It is strikingly absent from the evidence before the
17 Tribunal about the acquirer's side of the picture, for
18 the reason I identified earlier. It is spilt milk and
19 there is nothing I can do about it, but we do not have
20 a representative from Worldpay or Elavon here to
21 describe the very real costs that they bear in running
22 the acquiring services that they offer. This is the
23 best proxy I can find to give their version of events.
24 3.25, we move on to payment facilitators. This
25 features evidentially principally I think at the

1 instigation of Dr Niels who suggests that it is relevant
2 to take into account other sources of payment
3 notwithstanding the agreement on the relevant product
4 market. So he, for example, has looked at PayPal and
5 Klarna and various other people. Klarna at least is an
6 example of a facilitator and indeed PayPal is as well.
7 So these payment facilitators still need an underlying
8 payment source to run.
9 So with somebody like PayPal when you log on to the
10 PayPal account, at the risk of giving evidence, you have
11 to enter a debit card or a credit card to be able to use
12 the PayPal device in the same way as Apple Watch or
13 Apple Payment or Google Pay. Other sources of payments
14 are available. But the point is each of them run on the
15 rails of another payment product and for these
16 particular payment products, that will be a debit or
17 credit card from Visa and *Mastercard* in 98% of cases.
18 Paragraph 3.34, {RC-J6/2/23}, deals with most small
19 and medium-sized merchants accepting other payment
20 methods.
21 "However, as we noted in paragraph 3.10, cards are
22 an important payment method. We have not seen any
23 evidence of reasonable substitutes for *Mastercard* and
24 Visa cards for merchants, which would exert a
25 competitive constraint on the supply of card-acquiring

1 services for these cards."

2 So our case is that this is admissible evidence of

3 a survey and a report conducted by the regulator of this

4 industry, who has said other payment methods do not

5 operate as a competitive constraint on supplies of

6 acquiring services for *Mastercard* and Visa cards.

7 Paragraph 3.37, next page, page {RC-J6/2/24},

8 evidentially makes the point I made earlier that at or

9 around 2009, I think I attributed it to the financial

10 crash, but in fact it also happened to be the

11 deregulation came in with the Payment Services Directive

12 or PSD1, that allowed non-banks to provide payment

13 services. We will see, I think somewhere, that this was

14 roughly about the same time in any event that NatWest as

15 a condition of or possibly Royal Bank of Scotland as an

16 condition of -- it was NatWest actually -- getting the

17 financial subsidy support from the Government because of

18 the financial crash decided or determined that it would

19 get rid of its acquiring business, which was Streamline,

20 and that was then acquired by Worldpay and Worldpay

21 became an acquirer that did not have an issuing bank

22 associated with it.

23 Paragraph 3.39, page 24 {RC-J6/2/24} recognises the

24 introduction of the IFR and it gives a potted summary of

25 what the IFR requires. I am going to come back to look

1 at the individual provisions of the IFR.
2 And at paragraph 3.42, page 25, {RC-J6/2/25}, one
3 sees in the second bullet caps on interchange fees for
4 payments to and from the EU are no longer covered by the
5 UK or EU legislation and that is because of Brexit. So
6 what happened was the amendments to the IFR changed the
7 concept of a transaction taking place in the Union to
8 a transaction taking place within the UK so it did not
9 cover transactions between the EU and the UK.
10 3.43, then, at the bottom of the page, page 25,
11 makes good the point I was just making about the
12 intercession of the financial crisis leading to
13 divestment of some of the main acquirers and we see at
14 the top of the page 26 {RC-J6/2/26} the evidential basis
15 for the point I made about RBS -- now NatWest -- selling
16 its acquiring business, RBS Worldpay, to private equity
17 firms.
18 It then describes how Worldpay has been acquired by
19 various people since. Bottom of that page:
20 "Payment facilitators buying providers of e-commerce
21 platforms and other payment facilitators."
22 So there has been consolidation in the payment
23 facilitation market that has not fed into a new brand of
24 acquirer necessarily.
25 There has been market entry by Adyen and we will see

1 that at page 27, 3.44, {RC-J6/2/27}. First bullet:
2 "... a number of acquirers are currently operating
3 under temporary permissions while they apply for
4 authorisation ... Adyen began offering card-acquiring
5 services to UK merchants in 2012 and currently serves
6 the UK under the temporary permission ..."
7 We will see somewhere that the evidence is that
8 Adyen made reasonable progress in this market and has
9 acquired market share.
10 Page 28, {RC-J6/2/28}, paragraph 3.49 the largest
11 acquirers are identified and at the top of page 29,
12 {RC-J6/2/29}, the largest payment facilitators are
13 identified. At 3.52 in the Figure, one sees that the
14 big five acquirers -- namely, Barclaycard, Elavon,
15 Global Payments, Lloyds Bank, Cardnet and Worldpay --
16 account for about 90% of transactions.
17 At paragraph 3.53, page 30, {RC-J6/2/30}, first
18 bullet:
19 "Two providers — Barclaycard and Worldpay —
20 accounted for [70-80]% of card transactions by volume
21 and [60-70]% of card transactions by value ..."
22 We move on then to look at paragraph 3.63 and
23 onwards, page 32, at the pricing of card acquiring
24 services and the other products. Please could I invite
25 the Tribunal to read from 3.63 to the bottom of 3.67 on

1 the next page. (Pause)

2 {RC-J6/2/32-33}.

3 THE PRESIDENT: Yes.

4 MR BEAL: We are going to come on to look at some typical

5 Merchant Service Agreements with Elavon, Worldpay,

6 Barclaycard, so that you will see the different types of

7 pricing that are engaged. I have tried to select three

8 or four to show you a spread.

9 Paragraph 3.71, {RC-J6/2/34}, confirms:

10 "Most acquirers that use standard pricing do not

11 publish their prices. Instead, the price they quote to a

12 merchant is determined by the information that a sales

13 agent collects about the merchant's characteristics

14 during the sales process, such as [its] actual or

15 expected annual card turnover ... "

16 And typically there will be a contractual clause in

17 place where if the pattern of sales transactions from

18 a given merchant on one of these contracts changes over

19 time there is an adjustment because otherwise the

20 acquirer is logged into data that is not realistic.

21 Page 42, please, paragraphs 4.10 to 4.11

22 {RC-J6/2/42} focuses on large merchants and says that

23 large merchants typically use acquirers direct; they do

24 not use payment facilitators:

25 "Figure 5 shows the shares of supply of providers

1 serving large merchants as measured by the proportion of
2 merchants served. Two [in particular] Barclaycard and
3 Worldpay — provide card-acquiring services to ..."
4 A substantial number, I am not sure whether that is
5 confidential or not so I will not read it out.
6 Then Adyen, AIB Merchant Services, Lloyds Bank
7 Cardnet et cetera together serve also a substantial
8 number but a lower number.
9 Paragraph 4.15, page 44 {RC-J6/2/44}, shows the
10 typical competitive dynamic for acquirers, so acquirers
11 generally compete for largest merchants by approaching
12 them directly or by bidding in response to tenders.
13 Acquirers that are fully or partially owned by or have
14 a referral relationship with banks also receive large
15 merchant referrals from the banks.
16 We see at page 56, paragraph 4.49 {HC-J6/2/56},
17 a section dealing with large merchants. Please would
18 the Tribunal be kind enough to read 4.49 through to
19 4.53.
20 THE PRESIDENT: Yes, of course. {RC-J6/2/56-57}. (Pause)
21 Yes, thank you.
22 MR BEAL: Could we then move, please, to page 76,
23 paragraph 5.14 {HC-J6/2/76}, the PSR's analysis was that
24 overall acquirers may not have fully passed on IFR
25 savings to merchants. Acquirers may have passed on

1 nearly all the scheme fee increases to merchants. So in
2 their responses to the interim report, a number of
3 people agreed with the findings that acquirers had not
4 fully passed through the reduction but had passed
5 through increases. In a sense, that is perhaps
6 unsurprising as commercial behaviour, but not for
7 resolution here. I simply make the point that, well,
8 with IC plus and IC plus plus contracts, which the
9 majority of my clients are on, the pass-through is
10 automatic whether it is positive or negative.
11 5.16, {RC-J6/2/77}:
12 "... aggregate view does not distinguish between
13 merchants of different sizes. As noted above, before we
14 launched this market review stakeholders told us they
15 were particularly concerned about IFR savings not being
16 passed on to smaller merchants."
17 As I have indicated, that issue largely went to
18 appreciability and that is no longer an issue that need
19 detain us.
20 Page 91, please {RC-J6/2/91}. I will just touch on
21 this relatively briefly. We see from 5.60 by reference
22 to a figure 11 that *Mastercard* and Visa scheme fees as
23 a percentage of card turnover more than doubled between
24 2014 and 2018 and at page 95 {RC-J6/2/95}
25 paragraph 5.77, we see confirmation of the finding in

1 the body of the text of the summary we read earlier,
2 which is a substantial proportion of those increases are
3 not explained by changes in the volume, value or mix of
4 transactions.
5 So at face value, it looks as though the response of
6 the schemes to diminished revenue under the IFR regime
7 has been to increase scheme fees. There is
8 a correlation.
9 The PSR also gave some useful data in an annex 1 to
10 this report which starts at tab 3 of the same bundle,
11 page 1, but if we could go please to page 4 of that
12 document, and paragraph 1.8 confirms that debit cards
13 are the most used payment card in the UK and -- 98% --
14 sorry, yes, it should say 98%. I think we are on
15 paragraph 1.8. {RC-J6/3/4}. Bottom of the page there,
16 thank you, under "Debit Card", 98% of the UK population
17 holds a debit card.
18 We then see at page 5, paragraph 1.12 {RC-J6/3/5}
19 details about the definitions that were used by the PSR
20 which broadly followed the definitions set out in the
21 IFR, in particular distinguishing between consumer cards
22 and commercial cards and at page 9, paragraph 1.3
23 {RC-J6/3/9-11} there is quite a useful description of
24 a dynamic payment service. In our written opening, we
25 have referred to a CJEU judgment and a VAT case that

1 goes through this, a case called *Bookit* but actually
2 this is quite a useful section. If the Tribunal please
3 read 1.30 at page 9 through to 1.35 at page 11.
4 THE PRESIDENT: Yes, of course.
5 MR BEAL: We see the nuts and bolts of the payment transfers
6 that take place within the system. {RC-J6/3/9-11}.
7 THE PRESIDENT: Yes, thank you.
8 MR BEAL: Sorry, page 14, paragraphs 1.4 to 1 -- I will
9 start again 1.45 to 1.46 {RC-J6/3/14}, there is
10 a reference to the risks that acquirers carry. So
11 acquirers have a series of different risks that they
12 bear; regulatory risk, card payment system risk,
13 reputational risk. They also, see 1.46, carry out due
14 diligence on merchants as part of the onboarding process
15 and there will be circumstances in which they have
16 a credit risk; for example if they pay out on a charge
17 back but their customer, the shop, has in the meantime
18 become insolvent or it was fraudulent, then they bear
19 the credit risk on that charge back payment.
20 We see slightly distinct treatment of Amex
21 transactions at page 17 {RC-J6/3/17}. Paragraph 1.59
22 says that when -- generally when an American Express
23 card is presented to pay for goods or services in a
24 shop, the merchant's POS terminal captures the card
25 details and transmits them to Amex for authorisation.

1 Amex in its capacity as issuer decides whether to
2 approve and in some cases the transaction does not get
3 authorised. American Express, in its capacity as an
4 acquirer, then sends to the response to the merchant and
5 if the transaction is authorised the sale can proceed.
6 So Amex is always the acquirer. What sometimes
7 happens is that a Elavon or a Worldpay will have an
8 arrangement with Amex where it acts as essentially
9 a payment facilitator and it sends the batch file of
10 transactions for that shop for that day to Amex to then
11 acquire and settle.
12 We see at 1.61 and 1.62 the role of acquirers in
13 assisting American Express payments. So acquirers do
14 not acquire but they assist merchants in accepting
15 American Express cards by either acting as a reference
16 source to Amex or providing the card acceptance products
17 or batching up American Express card transaction data at
18 the top of page 19.
19 So in essence American Express is always its own
20 acquirer and I think since 2017 it has not co-branded
21 with any other business to offer, for example, a credit
22 card, Amex credit card because it did not want to be
23 accused of being in a four-party situation. There was
24 case law on that, it went to the Court of Justice.
25 Page 32 {RC-J6/3/32}, at paragraph 1.100 we have

1 some biographical details, if one can call it that, of
2 the five largest acquirers. So for example with
3 Barclaycard, we see Barclay card's trading name
4 Barclays Bank plc. It is an example of an acquirer also
5 being associated with an issuing bank. It offers, see
6 1.110, card acquiring services, terminals and so on,
7 card readers and it also facilitates, last sentence: the
8 acceptance of payments using American Express.
9 On the next page, page 33, there is similar details
10 of the other acquirers and the role that they play.
11 At the top of page 34, paragraph 1.118 there is
12 a reference to Worldpay and Worldpay acting through both
13 Worldpay UK Limited and Worldpay BV and I will come on
14 to explain the significance of BV in that context
15 because it is relevant to the cross-border acquiring
16 rule. When Visa reduced its intra-EEA MIF in response
17 to the commitments decision in 2014, acquirers set up
18 entities in other European states so that they could
19 benefits from that lower MIF and benefit to merchants
20 who use those cross-border acquirers were the subject of
21 comment, and I will come on to deal with that. Most of
22 it is confidential, but I will come on to deal with that
23 this afternoon.
24 Page 47 {RC-J6/3/47}. Paragraph 1.172 shows the
25 pricing options available from each of the acquirers,

1 IC plus plus, IC plus standard and fixed. We see for
2 example that relatively new entrant Aegean only offers
3 IC plus plus pricing and the rest offer a mixture at the
4 top of page 48.
5 At page 49, we see the factors that the acquirers
6 take into account when pricing for their services.
7 Please could you read 1.176 through to 1.178, so the
8 bottom half of page 49. {RC-J6/3/49}.
9 Over the page at page 50, there are various examples
10 in red, and therefore I am not going to read them out,
11 of payment points being split out by the various
12 acquirers to account for, for example, commercial or
13 consumer cards or debit or credit or standard pricing
14 versus anything else, etc., but I do not need to dwell
15 on that at the moment.
16 At page 79, paragraph 1.334, there is a recognition
17 that in four-party card payment schemes, like Visa and
18 *Mastercard*, acquirers must comply with scheme rules as
19 a condition of their participation in those schemes and
20 are responsible for ensuring that their merchants and
21 the payment facilitators they work with comply with
22 those rules:
23 "Scheme rules govern much of the activity of
24 acquirers and payment facilitators."
25 At page 82, there is a long section on alternatives

1 to *Mastercard* and Visa. Please could I invite
2 the Tribunal to read 82 and 83 in their entirety. It
3 deals in particular with the position of Amex vis-à-vis
4 *Mastercard* and Visa, to put the matter neutrally for the
5 moment. {RC-J6/3/82-83}. (Pause).
6 THE PRESIDENT: Yes.
7 MR BEAL: That is the basis for the submission I made
8 earlier that other payment systems and indeed Amex do
9 not operate as a competitive constraint on the prices
10 set by Visa and *Mastercard* via those schemes.
11 Since then, the PSR has published an interim report
12 in December last year dealing with the proposal for an
13 interim cap on MIFs charged between EU and UK -- on
14 EU-UK transactions. It is to be found in bundle
15 {RC-J5/51/1}, starting, please, at page 4, paragraph 1.2
16 {RC-J5/51/4}.
17 There is a provisional finding that for fees paid by
18 UK acquirers to EEA issuers:
19 "... we have provisionally found that we cannot rely
20 on competition to be an effective constraint on
21 *Mastercard* and Visa card schemes (card schemes) when
22 they are setting UK-EEA consumer CNP outbound IFs ..."
23 Just breaking out the acronyms. CNP is card not
24 present and outbound IFs is outbound interchange fees.
25 Those are fees paid when an EU issued card is used in

1 Marks & Spencer.
2 Could I then please invite you to read the executive
3 summary at 1.13 and -- sorry 1.3 and 1.4.
4 THE PRESIDENT: Yes. (Pause).
5 MR BEAL: The key provisional findings are then set out over
6 quite a long stretch, but it will enable me to take some
7 of the substantive findings a bit more quickly if
8 the Tribunal would bear with me and read the bottom of
9 page 5 through to the bottom of page 7. {RC-J5/51/5-7}.
10 (Pause)
11 So some common themes emerging there. This reflects
12 the decision that the schemes took in around
13 October 2021 when no longer facing the regulatory
14 constraint of the IFR and the caps to bring into play
15 higher fees for EEA UK MIFs, and they basically set it
16 as parallel to the commitments that each had given to
17 the EU Commission for inter-regional MIFs, so equated
18 EEA transactions with inter-regional transactions,
19 notwithstanding for example that in the EU EEA there is
20 a single European payment area, which has a harmonised
21 platform and which has been working perfectly well for
22 years, so the transactional costs associated with
23 clearing and settling European payments are much lower.
24 Now, that didn't stop the card schemes raising
25 arguments that the costs were substantially different

1 post Brexit, that other payment methods provided
2 a competitive constraint, and that what they were doing
3 was simply responding to the need to improve their
4 scheme's success, all of the themes that this Tribunal
5 is being asked to consider, even though we say they are
6 not legally relevant, have been considered by the PSR
7 and have been rejected and rejected as recently as
8 December 2023.
9 So it is with that in mind and that dig, and
10 I recognise it is a dig, I am now going to look at some
11 of the detail, if I may, of the provisional findings
12 that the PSR has made. I do not propose to go back
13 through their analysis of the industry background
14 because a lot of that has already been covered. But
15 I would like to pick up on some additional points of
16 detail. At page 7, paragraph 1.13 -- sorry, we have
17 just read that they have identified the costs.
18 At page 8 {RC-J5/51/8}, the conclusion is reached,
19 at the top, that the markets are not working well for
20 service users and at page 10, {RC-J5/51/10} we have some
21 updated data. Paragraph 2.3 continues to describe cards
22 as the most popular non-cash payment method:
23 "This increasing popularity is due to a combination
24 of increasing digitisation, the growing use of
25 contactless payments, mobile and online banking, and the

1 lockdown restrictions ..."

2 Data showed that debit and credit cards accounted
3 for 57% of total payment volumes in the UK and predicted
4 that their cards will account for 61% of all payments
5 from 2031. Other data showed that the total value of
6 retail transactions in the UK by card was 90%, by card
7 number, and 82% by volume and *Mastercard* and Visa
8 together accounted for 99% of all UK debit and credit
9 cards both by volume and value. That is the updating
10 figure from the 98% that was given in the final report
11 in 2011.

12 We see the justification that is given by the card
13 schemes for the increases at page 19, paragraphs 3.6 to
14 3.8. {RC-J5/51/19} It confirms in 3.6 that:

15 "*Mastercard* and Visa set the default IF level ...
16 that merchant acquirers pay to issuers and, in turn,
17 merchants pay through the MSC ... While issuers and
18 acquirers can bilaterally negotiate lower IFs, this
19 happens rarely."

20 In their responses to the Treasury consultation
21 *Mastercard* and Visa said that IFs represent a mechanism
22 to distribute costs to the payment services across the
23 two sides of the scheme and then *Mastercard* gave the
24 justification that interchange was a small fee typically
25 paid to recognise the value being given to merchants and

1 Visa said interchange supports the issuer's ability to
2 issue and manage cards and digital credentials. Those
3 justifications were rejected by the PSR on a preliminary
4 basis in this report.
5 At page 21, {RC-J5/51/21} we see in paragraph 3.19
6 that issuers receiving these funds by way of the MIFs:
7 "... simply used them as additional income all UK
8 issuers asked said they that do not consider individual
9 sources of card revenue such as UK EEA IF revenue in
10 making their decisions on rewards for cardholders or on
11 investments including in fraud prevention. They make
12 decisions more holistically at card portfolio level."
13 At page 24, {RC-J5/51/24}, there is a convenient
14 table that indicates the differential MIF rates set
15 depending on whether the issuer is inside the EEA or
16 inside the UK and also by time i.e., pre-IP completion
17 day and then afterwards and one does not need to be
18 a mathematical genius to see that there is a five-fold
19 increase in MIF rates as a result simply of the fact of
20 not having the EU IFR apply to the transaction any more.
21 At 3.37, page 25, {RC-J5/51/25}, a point is made
22 that whilst there had been historically exemption
23 decisions and negative clearance decisions taken by the
24 Commission, in 2007 the European Commission found that
25 *Mastercard* IFs applicable within the EEA had been in

1 breach of Article 101 since May 1992 and *Mastercard* had
2 not provided sufficient proof that any of the first
3 three Article 101(3) exemption criteria were met.
4 It then recognises at the top of page 26
5 {RC-J5/51/26} that the *Mastercard 1* Decision marked
6 a shift from the previous exemption decision given to
7 Visa in 2002. Now, I say this and I am labouring that
8 point because in their written openings, the card
9 schemes alight upon those earlier decisions and say
10 that: ha ha, that shows nothing was wrong. The answer
11 is that the Commission thinking in this area has evolved
12 and later regulatory decisions show that they have taken
13 a very different view to the propriety of interchange
14 fees.
15 Could we then please move on to page 28,
16 paragraph 3.45. There are some findings made about the
17 impact or relevance of the commitments decisions, please
18 could I simply invite the Tribunal to cast an eye over
19 that. (Pause) {RC-J5/51/28}
20 THE PRESIDENT: Yes.
21 MR BEAL: 3.48, page 31, {RC-J5/51/31}, gives the timings of
22 these changes. In essence at the end of 2020 shortly
23 before IP completion date *Mastercard* said it would be
24 increasing its inbound IFs for consumer card not present
25 transactions. March 2021 Visa then followed suit for

1 both inbound and outbound and in April 2022 *Mastercard*
2 increased outbound IFs for CNP transactions. So we see
3 contemporaneously taken decisions, roughly, by the card
4 schemes changing their pricing decisions in the light of
5 the non-application of the IFR. At 3.57,
6 paragraph 3.57, page 33 {RC-J5/51/33} the consequence of
7 that was as has been indicated in the summary an extra
8 cost per year to merchants of somewhere between
9 £150 million to £200 million.
10 Chapter 4 from page 35 onwards {RC-J5/51/35} looks
11 at competitive constraints, and in a nutshell finds that
12 there are not any. So the first section deals with the
13 ability of acquirers to constrain any increases and
14 finds that there is not so. Page 38, paragraph 4.26,
15 {RC-J5/51/38}:
16 " ... our provisional view is that UK acquirers'
17 responses do not provide an effective competitive
18 constraint on increases in UK-EEA outbound IFs."
19 And then there is a section dealing with the ability
20 of merchants to constrain these price increases and I am
21 afraid it is quite a long section, but it is probably --
22 if you would not mind casting an eye over at least
23 pages 38 to 40. It is no doubt quicker for you to read
24 than for me to go through it.
25 THE PRESIDENT: Yes. {RC-J5/51/38-40} (Pause)

1 MR BEAL: The Amazon example there is quite telling, if you
2 have got the countervailing bargaining power of
3 a Leviathan like Amazon, then you are able to negotiate
4 an arrangement by threat of not taking Visa credit
5 cards.
6 But for people who do not have that countervailing
7 bargaining power, you do not.
8 So the provisional view that is then formed at
9 paragraph 4.40 is:
10 "... given the must-take status of *Mastercard* and
11 Visa, very few, if any, UK merchants can be expected to
12 respond to an increase in UK-EEA outbound IFs by
13 declining the card brand as a whole. Accordingly,
14 changes in card acceptance do not provide a mechanism
15 whereby profitability of the increase in IFs could be
16 undermined ... the potential for a merchant to decline
17 the card brand or limit its acceptance does not provide
18 an effective competitive constraint."
19 And that is probably a convenient moment to pull up
20 stumps, at least for the morning session. I am going to
21 come, if I may, after lunch to look I hope slightly more
22 briefly at the remaining findings in this powerful
23 report before looking at a handful of Merchant Service
24 Agreements to give the Tribunal a flavour of the type of
25 contractual arrangements out there, looking at the

1 summary of the scheme rules before moving on to the
2 legal tests to be applied and I hope therefore by the
3 end of the afternoon to have gone through the legal
4 tests and looked at the regulatory decisions.
5 If I have made it that far, then I have a clean run
6 tomorrow morning to look at the issues and drill down on
7 the individual issues. If I haven't made it that far,
8 I will let the Tribunal know.
9 THE PRESIDENT: That would be very helpful, Mr Beal. Thank
10 you very much, we will resume in that case at 2 o'clock.
11 (12.59 pm)
12 (The short adjournment)
13 (2.00 pm)
14 THE PRESIDENT: Mr Beal, good afternoon.
15 MR BEAL: I left the Tribunal on the edge of its seat at
16 page 41 of this particular bundle, which for the benefit
17 of Opus, it is there, good. {RC-J5/51/41}.
18 From paragraph 4.41 onwards, the PSR went on to look
19 at whether or not the increase in the MIF could be
20 avoided by other means.
21 The conclusion that was reached on page 42 at 4.47
22 {RC-J5/51/42} was that:
23 "Cross-border acquiring is currently not an option
24 for UK merchants engaging in e-commerce with the EEA, so
25 UK merchants [cannot] use it to mitigate the increase in

1 UK-EEA CNP IFs."

2 Merchant relocation was then considered next but the

3 conclusion that was reached at page 45, paragraph 4.70

4 {RC-J5/51/45} was that whilst the available evidence

5 indicated that relocation had helped and may continue to

6 help a few large merchants avoid or at least mitigate

7 the increases, the available evidence also showed that

8 relocating is likely to be a possibility only for very

9 large merchants and not for anyone else.

10 Then looked at steering, see paragraph 4.73 on that

11 page onwards, where it looked at consumer steering

12 towards alternative payment methods. That was then

13 analysed over several pages including what acquirers and

14 what the schemes said. The conclusion that was reached

15 at page 50, paragraph 4.106 {RC-J5/51/50} was that:

16 "The availability of alternative payment methods

17 depends on the location of both the consumer initiating

18 the payment and the merchant receiving it. Our

19 provisional view is that, in the UK-EEA context, UK

20 merchants who want to engage in retail e-commerce with

21 the EEA and EEA consumers who want to make purchases at

22 UK merchants must take both *Mastercard* and Visa."

23 So it was a "must take" card in that context.

24 At paragraph 4.108 and 4.109, the PSR concluded that

25 PayPal and Klarna were not alternative ways of avoiding

1 these particular charges. That was for Klarna at least
2 on the basis it facilitated card-based transactions and
3 that is what it did. In other words, they were run on
4 the rails of Visa and *Mastercard*.
5 At 4.112 on page 51, {RC-J5/51/51} the PSR and the
6 rest of that page reached the provisional conclusion
7 that for UK merchants who wished to engage in
8 international trade with the EEA they had to take both
9 *Mastercard* and Visa they were "must take" brands for
10 merchants engaging in UK EEA transactions and very few
11 alternatives to them existed. There was therefore only
12 a very limited constraint on their pricing.
13 There was then a reference to the ban on surcharging
14 in 4.113, which I will come on to deal with as a legal
15 submission a bit later on.
16 The short point is you can surcharge permissibly up
17 to a certain level of costs but customers did not like
18 it and that was the view that was reached.
19 At page 53, paragraph 4.124, {RC-J5/51/53}, the
20 provisional view was therefore reached that merchants'
21 responses do not provide an effective competitive
22 restraint on the increases that had been seen.
23 There is then a long section in chapter 5 starting
24 at page 55 {RC-J5/51/55} on the stated rationale for the
25 increases. This trespasses into what we say is 101(3)

1 territory, rather than raising anything directly
2 relevant for us but it is of note that the rationales
3 put forward by the card schemes were all rejected by the
4 PSR, for example at page 74, paragraph 106-108,
5 {RC-J5/51/74}, the provisional view was reached that
6 increases in interchange fees may increase the
7 attractiveness of card-to-card issuers:
8 "In light of the available evidence, we currently
9 consider that *Mastercard* and Visa wanting to remain
10 attractive to issuers ... is a reason why the card
11 schemes raised their outbound IFs after the UK’s
12 withdrawal ..."
13 5.108:
14 "We therefore provisionally conclude that schemes
15 have a commercial incentive on the issuing side to raise
16 IFs."
17 So the dynamic that is emerging is there is
18 a commercial incentive on the card schemes to put these
19 increases in place when they can and there is not
20 a sufficient countervailing constraint on the acquirer's
21 side.
22 At 5.112, the provisional view reached by the PSR
23 was there was no evidence of any benefit to merchants
24 from these increases:
25 "... and we do not currently consider that the

1 higher fees help merchants make better-informed
2 choices."
3 At 5.115, page 75, {RC-J5/51/75} the card schemes
4 made a series of statements about the value of their
5 schemes to people including issuers, cardholders and
6 merchants and the PSR concluded at 5.116 rather
7 trenchantly:
8 "We have not seen in internal documents,
9 contemporaneous to the setting of the higher [MIFs]
10 levels, any evidence supporting the above
11 representations."
12 And similarly at page 76, {RC-J5/51/76} having set
13 out the *Mastercard* stated benefits of the scheme and
14 these increases, 5.118 said:
15 "We have not seen in internal documents,
16 contemporaneous to the setting of the higher IF levels,
17 any evidence supporting the above representations."
18 Therefore, the overall view at 5.119 was that:
19 "Though the card schemes have said that IFs provide
20 a value transfer from acquirers and are essential in
21 balancing the costs and incentives of issuers,
22 cardholders, merchants and acquirers, we have not seen
23 any evidence that they sought to 'balance' the costs to
24 and incentives of issuers, cardholders, merchants and
25 acquirers in deciding to increase outbound IF fees."

1 That is a very potted history of obviously quite an
2 in-depth chapter but it summarises the point this when
3 actually a regulator drills down into the purported
4 justifications for the MIF and in this case the increase
5 in MIFs, it does not hold water.
6 At page 78, {RC-J5/51/78}, paragraphs 5.134 and
7 5.135 then essentially recognises that what has
8 motivated this is the desire to earn more money,
9 commercial incentives.
10 They provisionally conclude that the two card
11 schemes have strong commercial incentives on the issuing
12 side to increase such fees and that the potential
13 benefits and reasons for them, whilst they have been put
14 forward, they have seen no persuasive evidence to
15 indicate that these increases were necessary or
16 appropriate. This suggests that the card schemes have
17 been able to extract the value from the increase to the
18 benefit of issuers with no comparable increase in value
19 for other participants.
20 The reason I have been through that at some length
21 is because it is part of our case that the theory of
22 harm behind these arrangements has been there since at
23 least 2002, it has been maintained and recognised by
24 a series of regulatory decisions in the intervening
25 period and it is still presents as the regulator has

1 acknowledged.
2 Can I then please come on to look at a selection --
3 it is only going to be three, in fact, I have cut down
4 the number over lunch -- of some Merchant Service
5 Agreements.
6 The first please is confidential, {RC-J2/8/4}. This
7 is an example of a pretty short MSA for one of the Big
8 Five acquirers. So it is a form that is filled in in
9 manuscript with the merchant's details on it. You can
10 see who the merchant is three or four lines down at the
11 top of the page on the screen.
12 At page 4 there is a box setting out the MSCs that
13 are payable and the Tribunal will be able to see who is
14 paying what on what basis, both on an ad valorem rate
15 percentage and a fee per transaction in pence. So that
16 is a pretty early example of a -- I do not mean to be
17 dismissive but it is a pretty short form.
18 THE PRESIDENT: Yes. What date is it?
19 MR BEAL: So the date of that is not indicated.
20 THE PRESIDENT: No matter. I entirely agree it looks very
21 early.
22 MR BEAL: 1 January 2010, I am told. That is the date that
23 is given on the index. Anyway, happily we do have more
24 detailed examples of the craft.
25 MR TIDSWELL: Just before you move on, which type of

1 contract is this because it splits out the different --
2 MR BEAL: It does and this is a point I am actually trying
3 to make which is that even on standard contracts, which
4 this in theory is, it still has a breakdown of the
5 individual headline rates --
6 MR TIDSWELL: Yes.
7 MR BEAL: -- both by reference to the card scheme and debit
8 versus credit and they have a different split of ad
9 valorem and per pence transactions.
10 MR TIDSWELL: It also talks about a Merchant Service Charge
11 rather than the interchange fee, so it is not actually
12 specific. But one presumes that these are actually
13 interchange fees rather than ...
14 MR BEAL: This will be a combination -- and in a sense this
15 is why it is a blended rate. This will be a combination
16 of the acquirer margin, the scheme fees and the
17 interchange fees, all of which get loaded into this MSC
18 that is being charged.
19 MR TIDSWELL: Yes, I see.
20 MR BEAL: But this is an example of even within a fully
21 blended contract in that sense you still have gradations
22 between different types of cards.
23 MR TIDSWELL: Yes, I understand, thank you.
24 MR BEAL: And we do not see it in this one but it is quite
25 common as well to have the split between commercial

1 cards and consumer cards. And what that will reflect,
2 even in a blended contract of course, is the underlying
3 costs are different because the MIF is different.
4 We can see an example at {RC-J2/7/25} of a contract
5 with a different merchant that has a different way of
6 approaching this. This is, as one can see, a different
7 merchant acquirer one that is no longer in the market,
8 I do not think. It has become -- the version of the
9 acquirer is in the bottom left-hand side of that screen
10 which you cannot quite see but if we move down, yes,
11 there is a name on the bottom left there which is the
12 modern day entity, the entity on the right is not
13 engaged in it but going back, please, to the top of
14 page 25, we can see this is a card processing agreement
15 between the two entities indicated. It has some various
16 definitions, the business details are given and turning
17 over to page 26, {RC-J2/7/26}, there is then a table
18 that splits out the two different card schemes, payments
19 again not by reference to the MIF but by reference to
20 a final figure.
21 You will see that the reference to the MIF is given
22 in the box that says "Interchange" and under that there
23 is the word "pass-through".
24 So that simply says whatever comes in goes out. And
25 you will have recognised that that is a Merchant Service

1 Agreement that applies to an entity that is based in
2 Ireland rather than the UK.
3 If we then turn, please, in bundle {RC-J1/25/1}, we
4 have the same entity in its modern form with a more
5 modern version of this Merchant Service Agreement, I am
6 just seeing if I can find the date of this. Yes, the
7 date of this is given at page 6. So that is
8 October 2020. Going back, please -- sorry to leap
9 around -- to page 1, it is a more fully fleshed out
10 Merchant Service Agreement between an acquirer and a UK
11 company, this time, and we see at page 2 {RC-J1/25/2},
12 a more delineated break out of the individual charges
13 and payments.
14 So there is some service details some acronyms at
15 the top of page 2, at the bottom of page 2 there are
16 card types, floor limits and other services delineated.
17 And then top right-hand corner of page 3, at the top
18 of the page, {RC-J1/25/3} there are some other card
19 types that are identified, so this particular acquirer
20 is also offering acquiring services for other card
21 payments. At the bottom of page 3, we see the service
22 charges that are being levied, the service charges
23 relate to effectively the acquirer's own services and
24 you will see that the ad valorem rates are the ones that
25 are there given. So in a sense that is the acquirer

1 margin aspect of it, the service charge.
2 Turning over the page, to page 4, {RC-J1/25/4}, you
3 then find broken out card scheme fees and those are all
4 then identified. There is then an example of quite
5 a detailed Merchant Service Agreement and this will be
6 the final one I turn to, it is in this bundle, tab 27,
7 please, starting at page 1 {RC-J1/27/1} it is a 2021
8 Merchant Service Agreement, but it is drafted much more
9 like a standard commercial contract. So at page 4 we
10 can see who the agreement is between. {RC-J1/27/4}
11 In recital B under "Background", it indicates what
12 the company wants to do and what the services it wants.
13 At pages 18 and 19, {RC-J1/27/18}, a whole series of
14 definitions are given over to the agreement. Those
15 terms will be thoroughly familiar to this Tribunal. It
16 makes provision for example to deal with counterfeit
17 fraud at page 20 {RC-J1/27/20} and then excessive
18 chargeback and so on. So there is a mechanism by which
19 the acquirer can deal with fraudulent transactions with
20 the merchant. There is essentially a disciplining
21 mechanism in place: if there are too many charge-back
22 requests made of a given merchant, the merchant will be
23 penalised and start paying an elevated rate -- can be
24 penalised and pay an elevated rate.
25 At page 93, {RC-J1/27/93}, we then have Appendix 2

1 which is the pricing and that sets out the settlement
2 and payment terms that the merchant agrees with the
3 merchant acquirer.
4 Page 94 {RC-J1/27/94} we then see a breakdown,
5 a full detailed breakdown, of what is meant by
6 "interchange fees", "scheme fees" and "processing fee"
7 and the agreement indicates what each of them covers.
8 Interchange fees are said to cover the fees set by the
9 card schemes which are paid in full to the card issuers
10 with no additional charges from the merchant acquirer in
11 question. In contrast, the processing fee covers the
12 merchant acquirer's transaction processing costs,
13 overheads and margin.
14 So the two of them are split out and then there is
15 some additional service charges identified in terms of
16 the rates themselves, that is dealt with at page 97
17 {RC-J1/27/97} and there is an embedded link to the
18 *Mastercard*'s charges.
19 In terms of the clauses themselves that deal with
20 the obligation to settle and pay, those really start at
21 clause 3, page 29 {RC-J1/27/29}, so under clause 3, the
22 service provider agrees to provide the service on
23 merchant acquiring terms, clause 5 at page 31
24 {RC-J1/27/31} confirms that the merchant shall pay the
25 charges. And the merchant acquiring terms are then

1 dealt with at page 71 {RC-J1/27/71} in Schedule 2.
2 Just scanning through that, if we may, just looking
3 at the subheadings, it sets out a series of obligations
4 for the merchant acquirer, a series of obligations for
5 the merchant and then at the bottom of page 72, the
6 merchant acquiring service charges and the merchant
7 agrees to pay the charges in relation to the merchant
8 acquiring services in accordance with this agreement and
9 we have seen what those charges are.
10 Clause 5.4 deals with an express variation which is
11 permitted for changes in the interchange fees and the
12 scheme fees set out in the table we have just looked at,
13 so page 73, paragraph 5.4 of schedule 2 leads to an
14 automatic change in the pricing regime if the card
15 schemes change their fees from time to time.
16 Clause 8.1 at page 77 {RC-J1/27/77} deals with
17 chargebacks and it is acknowledged that a card issuer or
18 an account provider may have the right from time to time
19 to refuse to settle and that is defined as a chargeback.
20 So if the cardholder says: I never received these goods
21 or the goods were defective, there is a chargeback
22 procedure that can be put in place at which point the
23 acquirer has to claw back the money from the merchant
24 and that gives rise to the credit risk we have already
25 seen in the PSR details.

1 Pages 86 to 87, {RC-J1/86-87}, we see that
2 chargebacks in fact cover fraudulent transactions save
3 in certain circumstances.
4 So some of the responsibility for dealing with fraud
5 is also shared with the acquirer and passed on to the
6 merchant and essentially if there is a charge-back
7 transaction as a result of a fraudulent transaction, the
8 merchant has to be able to prove, see clause
9 paragraph 6.1.3 has to provide evidence that the account
10 holder has authorised payment and provide essentially
11 evidence that the proper procedures were used. There is
12 then a procedure by which if the shop -- if the merchant
13 thinks that the chargeback request is not a valid one,
14 the shop can send the merchant acquirer into battle for
15 it in disputation with the issuing bank so you can end
16 up with a procedure whereby the merchant acquirer says
17 "Look, I am obliged to pay this chargeback but I will
18 make representations on your behalf to try and get it
19 overturned".
20 Then at the top of page 88, {RC-J1/88}, there are
21 what I have described as penalising provisions in place.
22 That is not meant to be pejorative: it simply means if
23 there are excessive chargeback claims or excessive fraud
24 claims, that leads to a change in status of the
25 merchants and a different -- well, for a start they go

1 into what is called an excessive fraud programme, see
2 page 91, {RC-J1/27/91} and secondly there are different
3 charges that then emerge from the arrangements to cater
4 for it.
5 In bundle {RC-J2/65.1/1}, I hope that there is
6 an invoice from a merchant acquirer to one of its
7 merchants. So we can see there the merchant invoice
8 statement, it summarises the transaction charges and
9 then identifies what the charges are as a result of that
10 produces an invoice total. That is the sort of
11 statement that merchants routinely receive from their
12 merchant acquirers telling them please to pay the
13 charges.
14 That is a pretty whistlestop tour through some of
15 the commercial contracts, but I hope it gives a flavour
16 of the arrangements that you have not really seen
17 concentrated on at this stage because the focus has
18 largely been on legal issues thus far. I do not know to
19 what extent our witnesses will be asked about these
20 types of arrangements, we will find out.
21 THE PRESIDENT: No, it is certainly helpful to see with
22 granularity what we have been talking about in the
23 aggregate, so thank you.
24 MR BEAL: Perhaps more direct is to now have a quick look at
25 the scheme rules. The Tribunal will find this in RC-J7.

1 J7 is broken into six different subfolders.
2 Can we start with {RC-J7.1/6/4}. Now, my
3 understanding is that this particular page is in fact
4 partly available in a public document and partly not, so
5 rather than read any of it out, could I please simply
6 invite the Tribunal to read page 4. (Pause)
7 THE PRESIDENT: Yes.
8 MR BEAL: The section that begins 1.9.1.2 is in fact
9 available in a public form, hence why I was able to
10 describe the interchange reimbursement fee as a default
11 transfer price earlier.
12 *Mastercard*'s general MIF rule is not confidential
13 for the purposes of this proceeding, it is at tab 10,
14 page 1 in this bundle {RC-J7.1/10/1} and the general
15 MIF rule can be seen at paragraph 8.3.
16 Please would you read 8.3. (Pause) That refers to
17 a European rule, that particular rule can then be seen
18 at page 3 which provides the modification.
19 {RC-J7.1/10/3}
20 The next set of rules to consider is the
21 cross-border acquiring rules or the central acquiring
22 rule depending on the scheme. The first of those is in
23 bundle {RC-J7.2/6/3}. This is a confidential section of
24 the rule. Please could I invite the Tribunal to read
25 the first half of that page. (Pause)

1 THE PRESIDENT: Yes.
2 MR BEAL: A definition of a cross-border acquired
3 transaction is given at the top of page 2.
4 {RC-J7.2/6/2}
5 THE PRESIDENT: Yes.
6 MR BEAL: The *Mastercard* CAR can be seen behind tab 8 of 7.2
7 and if we look at page 3, please. {RC-J7.2/6/3} There
8 is a section 1.7.3.7, which has the terms of the rule.
9 Again, please would you be kind enough to read that.
10 (Pause)
11 THE PRESIDENT: Yes.
12 MR BEAL: The Visa Honour All Cards Rule, or HACR, is at
13 7.3, tab 6, page 1 {RC-J7.2/6/1} and the rule starts at
14 1.5.4.2 and then continues overleaf to halfway down
15 page 2. {RC-J7.2/6/2} I should add that all these rules
16 are taken from 2023, there have been changes over the
17 years but where they are material, we will make
18 submissions on them.
19 The Visa HACR -- sorry, that was the Visa HACR. The
20 HACR for *Mastercard* is 7.3, tab 8, page 4. Sorry,
21 page 3, can we start at. {RC-J7.3/8/4}
22 So there is a general Honour All Cards Rule at
23 page 1, {RC-J7.3/8/1} which is for global and then that
24 is subject to specific rules for the Europe region, the
25 Europe region rules then begin at page 3 with the Honour

1 All Cards Rule. {RC-J7.3/8/3} It gets quite convoluted
2 but I think it is sufficient for present purposes that
3 if the Tribunal would please read from 5.11 through to
4 the bottom of page 4. (Pause)
5 The *Mastercard* non-discrimination rule is at bundle
6 7.4, tab 5, page 1. {RC-J7.4/5/1}.
7 One sees in the second paragraph down there the
8 discrimination rule:
9 "A Merchant must not engage in any acceptance
10 practice that discriminates against or discourages the
11 use of a Card which is by definition a *Mastercard* card
12 in favour of any other acceptance brand."
13 The EEA rule can then be seen at page 2 under 5.12.1
14 {RC-J7.4/5/2} and it prevents the direct or indirect
15 prevention of the use of a *Mastercard* card in the
16 United Kingdom, amongst other places.
17 We then move on to the surcharging rules, the
18 current formulation of Visa's surcharging rule is in
19 bundle J7.5, tab 4, page 1, {RC-J7.5/4/1} and in essence
20 under 1.5.5.2:
21 "A Merchant must not add any amount over the
22 advertised or normal price to a Transaction unless
23 applicable laws or regulations expressly require that
24 a Merchant be permitted to impose a surcharge. Any
25 surcharge amount, if allowed, must be included in the

1 Transaction amount and not collected separately."
2 In the Europe region it says:
3 "The Merchant must clearly communicate any surcharge
4 amount to the cardholder and the cardholder must agree
5 to the surcharge amount."
6 *Mastercard*'s equivalent rule is at J7.5, tab 7,
7 page 1 {RC-J7.5/7/1}.
8 Under 5.12.2:
9 "A Merchant must not directly or indirectly require
10 any cardholder to pay a surcharge or any part of any
11 Merchant discount or any contemporaneous finance charge
12 in connection with a Transaction."
13 There is no caveat there, for to the extent that
14 applicable law allows
15 And the surcharge is defined as:
16 "A surcharge is any fee charged in connection with
17 the Transaction that is not charged if another payment
18 method is used."
19 Moving on to co-badging or co-branding rules, these
20 are to be found in bundle J7.6. Visa's current one is
21 confidential, that is -- I am sorry, it is said to be
22 confidential, therefore I will not mention it as an
23 issue there because in fact we think it is available in
24 the public rules. {RC-J4/89.2/189-190} but let us not
25 dwell on that for the moment. Instead can we go to

1 {RC-J7.6/3/3}, I beg your pardon and there we see
2 a provision at the top of the page. Please could I ask
3 the Tribunal to read that. (Pause)
4 The general *Mastercard* rule can be seen at
5 {RC-J7.6/6/1}. That general rule prevents a card being
6 branded with a series of other named card payment
7 systems. That is subject to the -- I am sorry that was
8 {RC-J7.6/5/1}. Tab 5, sorry, is the first one, that is
9 the use one sees at the bottom. The use of marks on
10 *Mastercard* cards.
11 Then there are a series of other payment schemes
12 identified so:
13 "Except as expressly permitted by *Mastercard*, none
14 of the following marks, or any similar or related mark,
15 may be added to a *Mastercard* card."
16 We see the payments card in question. That is
17 modified for the Europe region, see page 2, and then the
18 Europe modification region is tab 6, page 2
19 {RC-J7.6/6/1-2} where it is restricted to the entity
20 identified at the bottom, namely American Express.
21 Then page 2 has the restrictions on the use of marks
22 on Maestro Cirrus cards and also marks on *Mastercard*
23 cards with some modifications. The way that these rules
24 are typically enforced in a Merchant Service Agreement,
25 I did not go through them all, is to have a general

1 clause requiring compliance, sometimes that is broken
2 out into a specific obligation to comply with specific
3 rules. So if one turns up briefly, please,
4 {RC-J2/45/1}, we can see a Merchant Service Agreement
5 from 2013. I said 2.3 because it is my internal but it
6 is tab 45, bundle J2.
7 The first page should be a Merchant Services
8 Agreement between a merchant and an acquirer.
9 Then {RC-J2/45/20}, we have seen some examples of
10 some of the obligations imposed on merchants by Merchant
11 Service Agreements, this one then breaks out a specific
12 obligation in 3.1(c) to follow the honour all valid
13 cards without discrimination rule. Then in 3.1(d), not
14 to add any surcharges unless expressly permitted under
15 law. So we find that some of the MSAs then track the
16 specific scheme rules in terms of imposing the
17 obligation directly on the merchant and that of course
18 is a scheme rule obligation on the merchant acquirer if
19 they are complying with the scheme rules.
20 Happily, that brings to an end unless the Tribunal
21 has any questions for me, some of the core documents and
22 I am proposing now to move on to the legal tests. This
23 is dealt with in our skeleton argument.
24 PROFESSOR WATERSON: Could I just ask, I am not clear on
25 this and this may come up later, but can an acquirer

1 acquire both for Visa and *Mastercard* or must it acquire
2 for only one of those?
3 MR BEAL: It typically acquires for both because merchants
4 typically take both. I think the evidence will be there
5 are not many merchants who take one rather than the
6 other uniquely, they are both "must take" cards for
7 merchants and merchants reflect that in the acquiring
8 services they need. There is more of a disjunction
9 between Amex and other cards. It is as I have indicated
10 with the PSR report, MSAs can and do charge for
11 acquiring Amex cards but they do so as a payment
12 facilitator, not as an acquirer, so you do see that
13 broken out in some of the MSAs. But whenever it is an
14 AMEX charge, what that is reflecting is that the
15 acquirer has a separate agreement with Amex to act in
16 the intermediary capacity that the PSR has identified.
17 I think all of the MSAs in the bundle -- and I will
18 be corrected if I am wrong -- have separate charges for
19 Visa and *Mastercard*, and they break them out then by
20 reference to consumer credit and consumer debit and most
21 of them break out commercial MIFs as well -- not
22 commercial MIFs, sorry, commercial MSCs, MSCs on
23 commercial cards as a basic proposition.
24 Legal tests. So this is addressed in our opening at
25 paragraphs 55 to 83 but I am not proposing to go through

1 each of those authorities, you will be pleased to hear,
2 because there is a broad measure of agreement certainly
3 between Visa and ourselves as to the appropriate
4 principles. There are, however, two differences and can
5 I identify what I think those two differences are.
6 Firstly, the test for an object infringement and,
7 specifically, its impact on both objective necessity and
8 the counterfactual. So if you have an object
9 restriction, do you get into the counterfactual, full
10 stop? That is one issue. Secondly, if you have an
11 object restriction is it capable of being subject to the
12 ancillary restraint rule, which is the related but
13 different issue?
14 The second broad legal issue where there is
15 divergence is the nature of a Commission settlement and
16 commitment decisions.
17 Now, *Mastercard* in its opening, amongst other places
18 paragraph 223, says that you need to look at
19 counterfactuals even when examining the restrictive
20 object of the agreement and with respect we say that is
21 not right in law. In support of our proposition we
22 direct the Tribunal to the *Lundbeck* Court of Justice
23 case, it is at bundle {RC-Q3/59/1} is where it starts.
24 This is where I have to go, much to my horror, to the
25 electronic version, because the bundles only arrived

1 quite recently. Please could we look at paragraph 6,
2 which if you give me a moment I will tell you what the
3 page number is. {RC-Q3/59}. Forgive me a moment, my
4 laptop is not playing ball.
5 Yes, paragraph 6, that is paragraph 6 in the main
6 judgment ... yes, it is page 53, please. {RC-Q3/59/53}.
7 This sets out the background to the dispute and
8 there is then a summary taken from the General Court's
9 judgment. Would the Tribunal please read that summary
10 on page 54. It gives the core attributes of the
11 underlying dispute. (Pause) {RC-Q3/59/54}
12 At paragraph 15 on the next page, that is page 55,
13 {RC-Q3/59/55}, it is internal 15 for the General Court's
14 decision, it identifies the relevant product as the
15 anti-depressant medicinal product containing the API
16 known as Citalopram, so that was the pharma product in
17 issue. Internal to the General Court's decision 61-63,
18 which is at page 64, {RC-Q3/59/64} one sees the
19 Commission's Decision based on the agreements that have
20 just been summarised. One sees there that the
21 Commission considered the agreements considered
22 a restriction of competition by object, the two
23 agreements had been a single and continuous infringement
24 and the Commission relied in particular on various
25 factors, namely that at the time of concluding those

1 agreements, *Lundbeck* and Merck were at least potential
2 competitors in the UK. *Lundbeck* was giving substantial
3 money to Merck during the infringement. Transfer of
4 value was linked to the acceptance by Merck of the
5 limitations on market entry and the transfer value
6 approximated to the profits that Merck would have made
7 if it had been permitted to enter the market.
8 So at face value you have got an agreement
9 purporting to represent a patent dispute resolution,
10 which is masking an agreement not to enter a market by
11 a generics company which would lead to alleged patent
12 infringement by the proprietor of the right.
13 The General Court, summarised in paragraph 9 of this
14 judgment, dismissed the application, that is at page 68
15 of the report. {RC-Q3/59/68}
16 One of the reasons the General Court gave was that
17 it was always open to -- I am sorry, no, it simply
18 dismissed the application, that is all we need to worry
19 about at the moment.
20 Paragraph 114 is where the Court of Justice's
21 analysis begins on restriction by object, and one sees
22 that at page 84. {RC-Q3/59/84}
23 The relevant reasoning at 114, page 84, is as
24 follows: that characterisation of a restriction by
25 object must be adopted when it is plain from the

1 examination of the agreement concerned that the
2 transfers of value provided for by it cannot have any
3 explanation other than the commercial interest of both
4 the holder of the patent at issue and the party
5 allegedly infringing the patent not to engage in
6 competition on the merits, since agreements whereby
7 competitors deliberately substitute practical
8 co-operation between them for the risks of competition
9 can clearly be characterised as restrictions by object.
10 That is the characterisation that the court gave.
11 At paragraph 124, page 86, {RC-Q3/59/86} the court
12 found that *Lundbeck*, the proprietor of the right, could
13 not argue that:
14 "... in order to establish that the agreements at
15 issue should not be characterised as 'restrictions by
16 object', that those agreements pursued legitimate
17 objectives since their purpose was to protect *Lundbeck*'s
18 new process patents by recourse to a legitimate and
19 commonplace means of dispute resolution, or that they
20 were responding to an asymmetry of risk between
21 manufacturers of originator medicines and manufacturers
22 of generic medicines."
23 So in other words, it is no good looking for
24 a motive or rationale or an underlying reason for the
25 arrangement in place. What you have to do is look at

1 what the arrangement is doing as a matter of practical
2 reality on the ground and if it is stopping new market
3 entry or entry by a generics competitor in a particular
4 market that is a restriction on competition no matter
5 what the underlying justification may be and one of the
6 concerns that was raised here was, well, if we let the
7 new entrant come in and then sued them for patent
8 infringement, we would never get the measure of damages
9 that we should do because it does not reflect the true
10 value because of the litigation risk and so on. Answer
11 from the court: none of that is relevant.
12 At paragraph 130, same page, one of the points that
13 had also been taken is, well, the regulatory authorities
14 had always been quite equivocal as to who what we were
15 doing with this was right or wrong. Answer from the
16 court, endorsing the General Court's approach, was: you
17 do not have to have a regulatory decision finding an
18 object infringement before you find an object
19 infringement and the fact that the Commission had maybe
20 not given entirely clear steers on that was nothing to
21 the point.
22 At paragraph 131, the core test is set out including
23 by reference to the *Generics* case that:
24 "In order for a given agreement to be characterised
25 as a 'restriction by object' all that matters are the

1 specific characteristics of that agreement ... from
2 which any particular harmfulness of that agreement for
3 competition can be inferred, where necessary as a result
4 of a detailed analysis of that agreement, its objectives
5 and the economic and legal context of which it forms
6 part."
7 In other words, this is an analysis that is
8 conducted on the basis of prima facie of the contractual
9 arrangements in its economic and legal context and you
10 look to see what the mechanism of the contractual
11 arrangement is and what its intended purpose and object
12 is.
13 137 to 138 at page 87, {RC-Q3/59/87}, then confirmed
14 that it is no part of this analysis that you look at the
15 alleged pro-competitive effects of the agreements at
16 issue.
17 What they say at 138 was:
18 "Although, in its action for annulment ... *Lundbeck*
19 did indeed submit that the Commission made a manifest
20 error of assessment by incorrectly assessing the
21 efficiency gains of the agreements at issue in the
22 context of the application of Article 101(3) ... the
23 fact remains that [paragraphs] of the judgment under
24 appeal, by which the General Court rejected that plea,
25 have not been challenged in the present appeal, and that

1 no reference has been made to the reasoning set out in
2 those paragraphs in an effort to call into question the
3 characterisation of those agreements as 'restrictions by
4 object' ..."
5 So the efficiency analysis took place at 101(3)
6 stage and it could not bleed into a critique of the
7 object finding that had also been made.
8 At 139 to 140, rather than reading these out if
9 I could please invite the Tribunal to read those two
10 paragraphs.
11 THE PRESIDENT: Of course.
12 MR BEAL: They deal with the absence of the requirement for
13 a counterfactual analysis where you have found
14 a restriction by object. (Pause) {RC-Q3/59/88}
15 So if you conclude in accordance with our submission
16 that the setting of the MIF in its manifold forms in
17 this case is an object restriction then we do not get
18 into the UIFM or bilaterals counterfactuals, you just do
19 not get there. I appreciate of course that you are
20 going to hear argument over the next six weeks on those
21 and you will rule on them, but that is my threshold
22 submission at this stage.
23 And then at 141, we see that there is no need for
24 a full effects analysis if there is a practice that is
25 a restriction by object. It is only necessary to

1 establish that the practice revealed a sufficient degree
2 of harm to competition in the light of its economic and
3 legal context. You do not have to examine the effects
4 of it as such.
5 Now, in terms of what sort of conduct can amount to
6 a restriction on competition, the next case is in bundle
7 {RC-Q3/10/1} and that is the Verband Der Sachversicherer
8 case.
9 We find the factual background set out at page 30.
10 {RC-Q3/10/20} Paragraphs 2 and 3 refer to the fact that
11 the applicant was an association whose object was to
12 promote the business interests of the insurers in the
13 Republic of Germany and the contested decision stated
14 that the applicant's recommendation, the association had
15 issued a recommendation to insurers telling them to do
16 certain things in the insurance premium world, that its
17 recommendation to re-establish stable and viable
18 conditions, following effectively industry-wide issues
19 was an infringement by object and that negative
20 clearance and exemption was refused.
21 Paragraph 26, page 34, {RC-Q3/10/34}, thank you,
22 shows the nature of the decision that was taken. Please
23 would you read that paragraph. (Pause)
24 THE PRESIDENT: Yes.
25 MR BEAL: Paragraph 30 at the bottom of page 35

1 {RC-Q3/10/35} confirms that the court was viewing the
2 recommendation itself as a mandatory requirement to set
3 a collective flat rate and across the board increase in
4 premiums. Notwithstanding it was described as
5 a non-binding recommendation, that was the result it
6 intended and shortly after the recommendation was
7 notified many of the association members decided to
8 include in their contracts of reinsurance the same
9 risks, a special premium calculation clause. So
10 a non-binding recommendation had been issued, it had
11 been sent out to the association members, it had
12 essentially directed a mandatory change to the pricing
13 and the members had then followed that.
14 Paragraph 32 confirms at page 36 {RC-Q3/10/36} that
15 the recommendation regardless of its precise legal
16 status therefore constituted the faithful reflection of
17 the association's resolve to co-ordinate the conduct of
18 its members on the German insurance market in accordance
19 with the terms of the recommendation. Therefore it was
20 a decision within the scope of Article 101(1).
21 39 to 41 at page 37, {RC-Q3/10/37} set out the
22 reasons why the Commission was right to find that this
23 produced a restriction by object. Please can
24 I therefore invite the Tribunal to read paragraphs 39 to
25 41.

1 THE PRESIDENT: Of course. (Pause)
2 MR BEAL: The next reference please is in the *Allianz*
3 *Hungaria* case, that is {RC-Q3/42/33} and I just wanted
4 to go to one particular paragraph which is paragraph 42.
5 This was a case dealing with two different aspects
6 of the market. It concerned car repair services and the
7 car repair garages were being retained by insurance
8 companies to carry out repairs for insured vehicles but
9 at the same time the garages were then brokering
10 insurance agreements on behalf of those insurance
11 companies where people came to have their cars repaired
12 so it was a sort of one-stop shop in principle for two
13 different services.
14 Paragraph 42 recognises that whilst it was necessary
15 to take into account the fact that this type of
16 agreement was likely to affect not only one but two
17 markets, in this case those of car insurance and car
18 repair services, and that its object must be determined
19 with respect to the two markets concerned, so you have
20 to look at the object in principle from both sides of
21 the market, nonetheless, when the conclusion is reached
22 at paragraphs 49, 50 and 51, the findings of an object
23 infringement in that market essentially through
24 a setting of recommended prices were then transposed
25 into a coordinated pricing strategy. It is sufficient

1 that in fact only one of those markets is injured by the
2 conduct in question. That is at the bottom of
3 paragraph 51 at page 34. {RC-Q3/42/34}
4 What that said was that the relevant conduct could
5 be considered as:
6 "... a restriction of competition 'by object' within
7 the meaning of that provision, where, following a
8 concrete and individual examination of the wording and
9 aim of those agreements and of the economic and legal
10 context of which they form a part, it is apparent that
11 they are, by their very nature, injurious to the proper
12 functioning of normal competition on one of the two
13 markets concerned."
14 So, yes, you look at object for both markets but
15 then it is sufficient to find that the object
16 infringement is in one of those two markets.
17 THE PRESIDENT: But this was not a two-sided market, this
18 was just --
19 MR BEAL: No, it was just two separate markets that happened
20 to be co-located.
21 THE PRESIDENT: By the same -- potentially available by the
22 --
23 MR BEAL: Yes. Right, the next authority, in fact, is one
24 of three and it is the sports authorities from December.
25 I am wondering if that might be a convenient moment

1 to take a short break which is roughly halfway through?
2 THE PRESIDENT: Yes, that would be very helpful. We will
3 resume, then, at 10 past.
4 MR BEAL: Thank you.
5 THE PRESIDENT: Thank you very much.
6 (3.03 pm)
7 (A short break)
8 (3.16 pm)
9 THE PRESIDENT: Mr Beal.
10 MR BEAL: The Court of Justice in December ruled on an
11 appeal from the General Court in the *International*
12 *Skating Union* case, it is at {RC-Q3/62/17} if we could
13 pick it up, please, at page 17. In this case, the
14 General Court had found a restriction of competition as
15 a result of some sporting rules that the ISU put in
16 place whereby they had to give consent for any competing
17 competition being run to the World Skating Championships
18 but they did not have a set of clear criteria by which
19 a competing competition could be allowed to proceed and
20 there were sanctions in place for skaters if they chose
21 to skate for a competing competition without having got
22 the permission of the ISU first.
23 The issue was: does that constitute a restriction by
24 object of competition? The answer to that at paragraphs
25 99 and 100 was to start looking at the difference

1 between an object restriction and an effects restriction
2 and at 99 the court said it is appropriate to begin by
3 looking at object. If at the end of that you find that
4 there is an anti-competitive object you do not have to
5 look at effects. It is only if the conduct is found not
6 to have an anti-competitive object you need at the
7 second stage to examine its effect.
8 The analysis between the two, see paragraph 100,
9 differed and it differed both in terms of the concepts
10 behind the different legal rules but also the
11 evidentiary requirements. In terms of the sort of
12 conduct that could be a restriction by object,
13 paragraph 103 at page 18, {RC-Q3/62/18} identified the
14 classic cartel type situations, paragraph 104.
15 Paragraph 104 then said without necessarily being
16 equally harmful to competition other types of conduct
17 may also be considered to have an anti-competitive
18 object, for example horizontal agreements other than
19 cartels such as those leading to competing undertakings
20 being excluded from the market, inter alia, and it is
21 cited, the *Lundbeck* decision that we have just looked
22 at, but then it said:
23 "... or certain types of decisions by associations
24 of undertakings aimed at co-ordinating the conduct of
25 their members in particular in terms of prices."

1 And it cited the *Verband der Sachversicherer*
2 decision that again we have just looked at.
3 So that can be a classic object infringement and of
4 course we say in our submission that the pricing
5 arrangements that are put in place by the schemes as an
6 association of undertakings aimed to co-ordinate prices,
7 namely the MIF, but they also aimed to co-ordinate,
8 because it is an inexorable inference from that
9 co-ordination, they aimed to co-ordinate the MSC that
10 will be charged to merchants, because it is the MSC
11 charged to merchants that produces the income stream
12 that these rules are designed to transfer from the
13 acquirer to the issuer.
14 Now, in contrast to that, the question of effects is
15 then dealt with at paragraphs 109 and 110, page 19.
16 {RC-Q3/62/19} Paragraph 109, the concept of
17 anti-competitive effect is dealt with broadly in
18 contradistinction to an object, so it is conduct that
19 leads to an actual or potential effect, leads to
20 a prevention restriction or distortion of competition
21 which is appreciable.
22 In paragraph 110 we have the corollary of the point
23 I made earlier by reference to *Lundbeck* that it is only
24 when you are dealing with effects that you need to look
25 at the counterfactual and we have the classic definition

1 there of the counterfactual which is looking at the way
2 competition would operate within the actual context and
3 then contrasting that with what would take place in the
4 absence of the agreement decision et cetera or concerted
5 practice in which that conduct is liable to produce its
6 effects so you would identify those effects, whether
7 they are actual or potential, and you take all relevant
8 facts into account.
9 At paragraph 111, the court went on to set out the
10 quite detailed case law on the extent to which sporting
11 rules are a thing apart, or regulatory rules are a thing
12 apart, so the *Wouters* decision for the Dutch bar being
13 organised jointly with Dutch accountants, Meca-Medina,
14 which is the classic anti-doping case dealing with
15 sports regulatory rules. But they are all examples of
16 the ancillary restraint doctrine of objective necessity.
17 So if you have a regulatory rule that you simply have to
18 put in place like an anti-doping rule, you come out of
19 the scope of Article 101 entirely, and that has been
20 recognised.
21 Paragraph 113 says:
22 "By contrast, [that] case law ... does not apply
23 either in situations involving conduct which, far from
24 merely having the inherent 'effect' of restricting
25 competition, at least potentially, by limiting the

1 freedom of action of certain undertakings, reveals a
2 degree of harm in relation to that competition that
3 justifies a finding that it has as its very 'object' the
4 prevention, restriction or distortion of competition.
5 Thus, it is only if, following an examination of the
6 conduct at issue in a given case, that conduct proves
7 not to have as its object ... [the] distortion of
8 competition that it must then be determined whether it
9 may come within the scope of that case law."
10 In other words, if you find an object restriction
11 you do not get into objective necessity. What do you
12 get by way of justification? Well, the answer is given
13 in 114 which is as regards conduct having its object,
14 the restriction of competition is only if Article 101(3)
15 applies and all the conditions are met you get the
16 benefit of an exemption.
17 So in short that is the court saying in terms:
18 object means you do not get into the counterfactual;
19 object also means you cannot rely on objective
20 necessity.
21 As I have indicated this case was one of a trilogy
22 of cases all given on the same day. There was also
23 a reference judgment in the Royal *Antwerp* case dealing
24 with the home-grown players rule as applied through
25 UEFA, and that is at {RC-Q3/63/14} starting, please, at

1 page 14.
2 One of the issues in this case was the impact of
3 territorial restrictions and at paragraph 81, at the
4 bottom of that page, page 14, there is a preliminary
5 finding on the status of UEFA as an association of
6 undertakings and what the court said was that you can
7 have the association of undertakings found liable for
8 an impact on competition, even if the people giving
9 effect to that rule are different from that association
10 itself. So in other words, if you are a sports
11 governing body like UEFA and you set rules for the
12 national leagues, which they do, and those national
13 league rules then have an effect on the ground with
14 football clubs, then that is sufficient to establish the
15 restriction of competition, even if it is not the
16 association itself that is directly liaising with the
17 football clubs in question, if they have a consequential
18 impact on the activity of undertakings who are engaged
19 at grass roots level with the players and so on.
20 So in the present case, see paragraph 82, that
21 direct or indirect engagement by the members of the
22 association with the rule that has been set at
23 association level was met because what was happening
24 here was that UEFA was requiring national leagues to
25 adopt the home-grown players rule and it was that

1 interface that then led to the restriction on
2 competition.
3 Paragraph 91, the court noted, as we have already
4 seen they essentially repeated the decision that was
5 made in the ISU case that certain types of decisions by
6 associations of undertakings aimed at co-ordinating the
7 conduct of their members, in particular in terms of
8 prices, could be treated as a restriction by object.
9 In 95, the court then dealt with the market
10 partitioning nature of object restrictions. Please
11 could the Tribunal read paragraph 95.
12 THE PRESIDENT: Yes.
13 MR BEAL: So this may be where lawyers and economists
14 diverge because the EU has always set its stall against
15 compartmentalising the single market into markets
16 regardless of whether or not there were any economic
17 efficiencies from doing so or not. It simply does not
18 like this type of compartmentalisation. It sets its
19 stall against it and it says it is prohibited as an
20 object restriction.
21 We then see in paragraph 97 {RC-Q3/67/17} that that
22 concept of object has been used for different forms of
23 agreement that aim or tend to restrict competition
24 according to national borders, whether that involves
25 preventing or restriction parallel trade, ensuring

1 absolute territorial protection or limiting in other
2 forms cross-border competition in the internal market
3 and the reason I am obviously focusing on that as an
4 adjunct to the object analysis is because of the
5 cross-border acquiring rule and the central acquiring
6 rule and the impact that has had on the ability of
7 acquirers in a state other than UK to offer acquiring
8 services to merchants in the UK.
9 I will come back to deal with that now tomorrow
10 morning, when giving my submissions on the individual
11 issues.
12 Those are the only observations I have got at this
13 stage to deal with in terms of object. Can I move on,
14 please, to characterisation of Commission Decisions and
15 I am going to start with the decision at {RC-Q2/13/6}
16 picking it up, please, at page 6.
17 This was a case involving settlement decisions in
18 the Trucks litigation, page 6, paragraph 2 in the
19 Court of Appeal's judgment identified the issue.
20 "The question raised by these appeals is whether it
21 is an abuse of process for the appellants, in defending
22 the follow-on damages claims ... CAT, to put the
23 respondents to proof of facts that are set out in the
24 decision."
25 The decision in question was a settlement decision.

1 Now, Rose LJ at paragraphs 8 and onwards dealt with
2 the effect of it being a settlements decision, that is
3 at page 7. {RC-Q2/13/7} Please could I invite
4 the Tribunal to read paragraphs 8 through to 13 which
5 give a run-down of the settlement procedure and what it
6 entails. (Pause)
7 THE PRESIDENT: Yes.
8 MR BEAL: So you have a statement of objections that comes
9 in, if you want to settle you say: right, we are going
10 to make our settlement offer on the basis of that
11 statement of objections, if there are bits you do not
12 like, then you have to come back out of the process and
13 start again.
14 Now, that led Rose LJ at paragraphs 48 and onwards,
15 which is page 18, {RC-Q2/13/18} to conclude that the
16 relevant findings were therefore binding on the person
17 who has offered to settle. Page 18, there is a section
18 on that again at paragraph 48 and then goes all the way
19 through to paragraph 51.
20 I apologise, it is a long section, but would you
21 please read those paragraphs, that is page 18 and
22 page 19 essentially?
23 THE PRESIDENT: Yes. (Pause) Could we just have the bottom
24 of 51? Thank you.
25 MR BEAL: And then at 57, page 21, {RC-Q2/13/21}, Her

1 Ladyship found that this submission that non-essential
2 facts are as matter of EU law to be treated as
3 non-binding in any way is in my judgment misconceived.
4 So essential facts and non-essential facts were both
5 binding, Article 16, see paragraph 55, prevented the
6 court reaching a contrary conclusion and the four
7 propositions can be derived from paragraphs 48 to 51,
8 which you have just read.
9 Firstly, the consequences of the settlement decision
10 are that you are taken to agree to the findings that are
11 in the decision.
12 Secondly, that you are taken to have agreed to the
13 findings in the decision and also the findings of fact
14 made in the statement of objections because the nature
15 of the settlement process is that the statement of
16 objections feeds into what you are admitting and it
17 enables the Commission to issue a shorter form decision
18 than it otherwise would. The motivation for admitting
19 the facts is not the court's concern and it is not open
20 to the settling party to suggest that the admission was
21 made for a limited purpose.
22 The final finding made by the court was that it
23 would be an abuse of process to try and resile from that
24 process.
25 That is settlement decisions. In contrast,

1 commitments decisions are dealt with in two separate
2 decisions. The first of those is at bundle
3 {RC-Q3/53/1}, it starts at page 1 at least. It is the
4 *Gasorba* case and if we could go immediately please to
5 page 17, paragraph 25. {RC-Q3/53/17} The court ruled
6 that the wording of Article 9 of the modernisation
7 regulation was such:
8 "... that a decision taken on the basis of that
9 Article has in particular the effect of making binding
10 commitments, proposed by undertakings, to meet the
11 competition concerns identified by the Commission in its
12 preliminary assessment. It must be found that such a
13 decision does not certify that the practice, which was
14 the subject of concern, complies with Article 101 TFEU."
15 Paragraph 26 then recognises that it is open to
16 a national court to conclude that the practice that is
17 covered by a commitments decision does infringe
18 Article 101 and in doing so it proposes, unlike the
19 Commission, to find that an infringement has been
20 committed.
21 Paragraph 28 then said it follows that a decision
22 taken on the basis of Article 9, i.e. a commitments
23 decision, cannot create a legitimate expectation in the
24 party committing to that decision as to whether or not
25 their conduct complies with Article 101.

1 We then see in paragraph 29 that national courts
2 cannot, however, simply say: well, it has no effect
3 whatsoever, this decision. They are still a decision of
4 the Commission and the principle of sincere co-operation
5 therefore, and the objective of applying EU law in
6 an effective and uniform way, requires the national
7 court to take into account the preliminary assessment
8 that has been carried out by the Commission and regard
9 it as an indication, if not prima facie evidence of, the
10 anti-competitive nature of the agreement in question.
11 What does that mean here? Well, we have a series of
12 commitment decisions that are in issue that I will come
13 on to. This court can and should take them into account
14 and it is, we say, appropriate for the court to find on
15 the basis of the indications given in the preliminary
16 view that there has indeed been an infringement of
17 Article 101(1) because it is a necessary implication
18 from the commitments that have been accepted by the
19 Commission. If it was simply the case that there was no
20 infringement of Article 101(1) then they would not have
21 accepted any commitments at all, they would have given
22 effectively either negative clearance back in the old
23 days or a finding of inapplicability or simply saying
24 nothing on it one way or the other. They would not have
25 required a commitment to change conduct.

1 Now, this area is in fact a one-way street because
2 the next decision I am proposing to go to says whilst it
3 is open to this court to find that there is indeed
4 a breach of 101, it is not open to this court to find
5 that there was not a breach of Article 101, so it is on
6 a ratchet. That is {RC-Q3/58/1}, it is the
7 Group Canal+ case and starting, please, at page 3.
8 {RC-Q3/58/3}. So the relevant facts are set out at
9 paragraphs 3 to 6 at page 3. There were a series of
10 clauses in broadcasting agreements effectively dealing
11 with territorial restrictions on some Paramount TV
12 channel broadcasting in both the UK where Sky was
13 involved in broadcasting arrangements and then in the
14 EEA where other broadcasters such as Canal+ were also
15 engaged.
16 At paragraph 6 we see Paramount had proposed
17 commitments to the EU Commission who were concerned
18 about the territorial split in the arrangements and the
19 compartmentalisation of the broadcasting market and
20 Canal+ was not very happy with the commitments decision
21 and it wanted to challenge it.
22 The effect of the clauses is set out at the top of
23 page 4, {RC-Q3/58/4} the bottom part of paragraph 8:
24 "... the relevant clauses are first, the clause
25 requiring broadcasters to prevent the downloading or

1 streaming of audiovisual content outside the licensed
2 territory ..."
3 So there was a demarcation of national markets for
4 broadcasting purposes through the Paramount agreements
5 with different broadcasters in different territories.
6 At page 5, paragraph 9, {RC-Q3/58/5} the
7 General Court dismissed the action that was brought by
8 Group Canal+ and at page 14, paragraph 78, {RC-Q3/58/14}
9 we see the essential complaint that was made relevantly
10 for these purposes by Canal+ on appeal, it was said that
11 the General Court had infringed the contractual rights
12 of third parties by holding that the contested decision
13 does not affect the possibility for Group Canal+ to
14 bring an action before the national courts in order to
15 enforce its contractual rights. That is a slightly
16 convoluted way of saying the following: the
17 General Court had found that it did not need to quash
18 the decision because it was always open to Group Canal+
19 to say before a national court that its rights were
20 still enforceable, so the question becomes: Is it open
21 to Canal+ to bring national proceedings which will
22 somehow undermine the commitments decision that has been
23 given by Paramount. The answer to that starts at
24 page 14, paragraphs 84 to 85, which indicates as we have
25 seen from the *Antwerp* case that compartmentalisation of

1 a single market along national lines is something that
2 sticks in the craw of EU competition law, they are
3 liable to jeopardise the proper functioning of the
4 single market.
5 Paragraph 88, Canal+ argued that the Commission had
6 effectively cut across its commercial freedom and that
7 the decision it had taken was disproportionate on that
8 basis. In reply to that, the General Court had found
9 that it was not disproportionate because it was still
10 open to Canal+ to enforce its contractual rights before
11 a national court and insist that its contractual rights
12 were recognised even though a commitments decision had
13 cut across them.
14 At paragraph 108, page 18, {RC-Q3/58/18} one sees
15 a consideration of the effect of the commitments
16 decision and there is quite a long section here that
17 begins at 108 and ends at 114, which deals with the
18 essence of the reasoning as to why it was not open to
19 a national court to declare conduct to be free from any
20 competitive constraint or concern if a commitments
21 decision had been given. Please would the Tribunal read
22 108 to 114. (Pause)
23 THE PRESIDENT: Yes, yes, I understand.
24 MR BEAL: The upshot of that is really the meat is in
25 paragraphs 113 and 114, which is whilst the court --

1 this court can find that conduct was indeed
2 anti-competitive, even if it is covered by a commitments
3 decision, it could not declare that the arrangements in
4 question did not infringe Article 101(1).
5 That has obvious repercussions for the application
6 of the commitments decision by the Commission in this
7 case which covers the setting of MIFs for the period
8 through to 2024, for inter-regionals certainly and
9 earlier periods for the domestic one as well for Visa.
10 I am going to come on now to deal with your
11 permission with the regulatory history and I am going to
12 start, if I may, with the *Visa 2* exemption Decision.
13 This is in bundle {RC-J5/5/1}. Recital 11 at page 3
14 confirms that the intra-EEA MIF had been set by the Visa
15 EU board and applied by default to all EU inter-regional
16 Visa card transactions. Recital 12 confirms that the
17 MIF was introduced by Visa in 1974 for the separate
18 region and the MIF had been gradually increased over
19 that period.
20 Recital 13 then states:
21 "As from its introduction, the MIF set by the Visa
22 EU Board has been set as a percentage of net sales.
23 Despite the carrying out of a cost study for reference
24 purposes, the Visa EU Board has been free to set the MIF
25 at any level it considers appropriate, independently of

1 any specific services provided by issuing banks to the
2 benefit of acquiring banks."
3 At paragraph 16 we see that on 27 June 2001, Visa
4 had, in response to the Commission's concerns, issued
5 a modified MIF scheme and that had been further
6 clarified with -- in conjunction with the Commission.
7 Recital 17:
8 "Under the modified scheme, Visa will reduce the
9 overall level of the intra-regional MIF applicable to
10 consumer card payments in the Visa EU Region through the
11 introduction of a fixed rate per transaction MIF for
12 debit cards (13). Visa will also carry out a phased
13 reduction of the level of the ad valorem per transaction
14 MIFs applicable to certain types of credit and deferred
15 debit cards."
16 Essentially at 17 and 18 we see that Visa had
17 proposed substantial reductions in the MIFs to be
18 applied at intra-EEA levels.
19 Visa also committed, see recital 21, page 4,
20 {RC-J5/5/4}, to certain costs base studies to work out
21 what methodology should be used for calculating the
22 fees. That is also confirmed at page 5, recital 24.
23 {RC-J5/5/5}. There was a complaint that had been
24 received by EuroCommerce, that is at recital 28, page 5,
25 and EuroCommerce in particular had pointed to a number

1 of payment schemes that had no interchange fee payable
2 as part of the payment schemes saying you therefore do
3 not need it, why is it there?
4 Page 9 recital 45 confirms that as I have indicated
5 it is quite common for a Visa card to be offered as part
6 of a banking service. It says there at page 9:
7 "A Visa card is usually (but not invariably) linked
8 to a bank account but is not normally a bundled product,
9 which would be inevitably included in a package with a
10 bank account. A Visa card can therefore be considered as
11 a distinct product. On the acquiring side, Visa
12 acquirers (which may be banks or entities owned by
13 banks) sign merchants for all of the services necessary
14 for the merchant to accept Visa cards: these normally
15 include providing authorisation, processing, crediting
16 merchants' accounts, software and technical backup
17 services, clearing and settlement with the issuing
18 bank."
19 At page 10, {RC-J5/5/10}, paragraph 50, recital 50,
20 we find the Commission's rejection of a suggestion that
21 cheques are in the same product category, so they are
22 being dealt with separately, and they confirm that
23 cheques would need a cheque guarantee card.
24 Recital 58 is part of the Commission's analysis
25 about the objective necessity argument and we see

1 recital 58 says in terms:
2 "The Commission disagrees with the arguments put
3 forward by Visa that its MIF falls outside the scope of
4 Article 81(1). ... the Commission doubts whether it is
5 correct that none of the Visa members can`carry out the
6 project or activity covered by the cooperation.' It
7 seems that at least the Visa Group members and larger
8 banks in Visa are capable of offering a card payment
9 system alone. This is proven for example ... Diners'
10 Club..."
11 It then went on in recital 59 to look at the
12 question of objective necessity. Please can I invite to
13 you read that paragraph, which is important because of
14 course this Visa Exemption Decision is relied upon quite
15 considerably by the card schemes in this case.
16 THE PRESIDENT: I think we need the whole page to see the
17 last bit of 59.
18 MR BEAL: 59 and 60.
19 THE PRESIDENT: And 60, very good. (Pause)
20 Yes.
21 MR BEAL: So the headline in recital 60 is that this is not
22 an ancillary restraint, therefore, it does not fall
23 outside the scope of Article 81(1) as it then was.
24 Importantly Visa had itself admitted that the Visa
25 scheme would exist without the MIF and moreover

1 arguments about the commercial endeavour or the
2 commercial benefits of the network were for Article
3 101(3) stage, not at this stage.
4 All you needed for a valid payment scheme was
5 an acceptance by the creditor bank of the obligation to
6 pay the debtor bank, or the other way round it may be,
7 and the prohibition on ex-post pricing.
8 Now having dealt with the argument that you do not
9 get into 101(1) at all the Commission then looked at: is
10 there a restriction and the answer to that is given at
11 recital 64 through to 68 on page 12. {RC-J5/5/12} Again
12 please can I invite you to read 64-68. (Pause)
13 The Commission then dealt with appreciability at
14 page.
15 PROFESSOR WATERSON: Just to come back on that. At 66:
16 "All Visa banks issue Visa cards and are thus
17 competitors on the Visa issuing market. Some Visa banks
18 are also acquirers and compete with each other on the
19 Visa acquiring market."
20 If no acquirers are Visa banks, does it make
21 a difference?
22 MR BEAL: No. There is not such a thing really as a Visa
23 bank. What we have is a Visa member and that Visa
24 member is either an issuing bank or it is an acquiring
25 bank. This is simply saying you can have people who are

1 both issuing banks and acquiring banks and an example of
2 that is Barclaycard. So Barclaycard is an acquirer
3 payment system run by Barclays Bank, Barclays Bank also
4 issues debit and credit cards to Barclays Bank holders.
5 So both of those are members of the scheme, the Visa
6 scheme, and they both owe obligations to the Visa scheme
7 and in that sense I suppose they are a Visa bank because
8 they offer Visa cards, but that formally does not
9 matter.
10 What the Commission is there describing is that yes,
11 you can have people who are both an issuer and acquirer
12 but they are separate markets, they are separate
13 sides -- they are separate markets and the fact that
14 they are related to one another does not mean that you
15 do not have a restriction on competition.
16 Now, this is obviously 2002. Since then, we have
17 seen with the PSR from 2008 and 2009, you had the
18 payment services directive that relaxed the restraint on
19 who could be a payment services provider, so it was
20 non-banks as well as banks, and then with the financial
21 crisis quite a lot of the players divested themselves of
22 their acquiring outfits, so you ended up with
23 a situation where non-issuing banks entered the market
24 and the likes of Worldpay, Global Payments, Elavon, none
25 of those have issuing arms to them.

1 I hope that answers your question. If it does not,
2 let me know and I will try and find a better answer but
3 that is the best answer I can give at the moment.
4 PROFESSOR WATERSON: I think it answers it, yes. But I was
5 just wondering whether it was necessary or it did not
6 matter, or whatever, that you had what they call Visa
7 banks on both sides.
8 MR BEAL: Well, in answer to that question it does not have
9 to be a bank. It can be a payment services provider and
10 I realise that is a technical answer, but it is
11 accurate.
12 PROFESSOR WATERSON: Yes.
13 MR BEAL: You always need -- in order to settle on
14 a particular scheme, you will always need to have
15 somebody who is affiliated to the scheme on the issuing
16 side because they badge their card with the Visa brand
17 and on the acquiring side you will need to have somebody
18 who is affiliated to the Visa scheme as an acquirer
19 willing to settle those Visa cards for payment.
20 In answer to an earlier question the reality is that
21 all acquirers acquire for both Visa and *Mastercard*
22 because they have 98, 99% of the market.
23 PROFESSOR WATERSON: But only issue one or issue both?
24 MR BEAL: They do not have to be an issuer at all.
25 PROFESSOR WATERSON: No, no.

1 MR BEAL: Of the big two, Worldpay is not an issuer and
2 Barclaycard is, but Barclaycard is not an issuer because
3 that is a brand name for the acquiring side of things.
4 Barclays Bank plc is the issuing bank that has the bank
5 accounts with millions of people in the United Kingdom.
6 PROFESSOR WATERSON: Yes.
7 MR BEAL: Now, in terms of appreciability at page 13,
8 {RC-J5/5/13}, paragraph 71, we see that the Commission
9 was looking at the impact of this restriction of
10 competition in the relevant market which was the
11 acquiring market and it said even though the MIF may not
12 be the only component of the MSC, it is by far the main
13 cost component representing, according to EuroCommerce,
14 about 80% of the MSC:
15 "The MIF effectively imposes a floor to the MSC.
16 Moreover, the economic impact of the MIF is very
17 substantial. With over 145 million Visa cards in the EU
18 region, over four million merchants accepting Visa cards
19 and about 5.25 billion Visa transactions a year, of
20 which about 10% are inter-regional transactions,
21 the revenue for issuing banks arising from the Visa
22 intra-regional MIFs amounts to..."
23 Figures redacted, but it is fair to say it is quite
24 chunky and, accordingly, paragraph -- sorry, recital 73,
25 I must keep on saying recital, not paragraph -- the

1 answer was an appreciable restriction on competition.
2 The rest of the decision is engaged with issues
3 about exemption and so therefore not for now. We may
4 have to come back to it in 2025 for Trial 3 if we get
5 there.
6 Next is the *Mastercard 1* Decision. I am acutely
7 conscious that this Tribunal would have read this
8 decision at length and on repeated occasions, but I have
9 unfortunately to go through it. I will do so as quickly
10 as I can. It is in {RC-J5/11/5}.
11 Could we start, please, at page 5. Page 5 gives an
12 executive summary of recitals 2 to 4. Please would
13 the Tribunal cast an eye over those.
14 At recitals 5 to 9, the Commission moved on to
15 reject the application for an exemption under
16 Article 101(3), as it is now.
17 Of note in recital 6, the Commission looked at the
18 alleged pro-competitive efficiencies that were said to
19 have been established by having this scheme, that was in
20 the context of the Article 101(3) analysis and at
21 recital 9, it found that the methodologies used by
22 *Mastercard* for implementing its framework in practice
23 were unconvincing as they do not sufficiently reflect
24 the underlying theory:
25 "The methodologies suffer from considerable

1 shortcomings as they establish an imbalance between card
2 issuing and merchants acquiring solely on the basis of
3 cost considerations while omitting to consider the
4 banks' revenues, as well. Moreover, contrary to the
5 merchant demand analysis, *Mastercard* does not even
6 attempt to quantify the willingness to pay of
7 cardholders and simply assumes the relative
8 unwillingness of this customer group to pay for the
9 convenience of using payment cards."
10 So it is looking at the balance between the two
11 sides of the payment system and saying that *Mastercard*
12 had not established a justification sufficient to meet
13 the Commission's requirements for the funds moving from
14 the acquiring side to the issuing side to pay for
15 whatever perceived optimal benefits were given as
16 a result.
17 At the top of page 7, {RC-J5/11/7} recital 10, we
18 see that *Mastercard*'s cost based benchmarks included
19 cost items that are neither intrinsic in the payment
20 functionality of the card nor related to services that
21 clearly benefit the customer that bears the expense of
22 this MIF. Without further evidence..."
23 *Mastercard* could not submit that it could safely be
24 assumed that its pricing was optimal in the sense of
25 efficiency maximising.

1 At page 16, paragraph 33, {RC-J5/11/16} there is
2 a summary of the *Visa 2* Decision that we have just
3 looked at and at recital 33 it records the last couple
4 of sentences:
5 "The Commission characterised the MIF as
6 an agreement between competitors which restricts the
7 freedom of banks individually to decide their own
8 pricing policy and distorts the conditions of the
9 competition on the Visa issuing and acquiring markets."
10 Page 18, recital 44, the Commission concluded at the
11 top of page 19, {RC-J5/11/19} -- sorry, that the IPO
12 from *Mastercard* had not changed things and it said in
13 the last sentence on that recital:
14 "The Licence agreements concluded between
15 *Mastercard* Inc and International Inc and the members
16 banks before the IPO remain unaltered after the IPO.
17 Unanswered. Banks, moreover, are still grouped within
18 different classes of membership ... after the IPO."
19 That was the membership concept after the IPO. And
20 it had remained largely unchanged.
21 Page 20 {RC-J5/11/20}, recitals 50 through to 54
22 deal with decision-making. I do not think we need to
23 dwell on this because the issue of who sets the rate is
24 not in issue with *Mastercard* in issue 2, 2.6.
25 Recital 58, page 22, {RC-J5/11/22} confirmed that:

1 National Fora of Member Banks in Europe had a role to
2 play and it says:
3 "Besides retain 'key' decision-making powers within
4 the European Board. European banks also retain
5 significant powers to co-ordinate their businesses in
6 sub regional boards ... [in the form of] 'fora' of
7 member banks."
8 Those national fora existed in, amongst others, the
9 UK.
10 59 says similar encouragement was given to Irish
11 banks to take decisions at local level.
12 At page 23, {RC-J5/11/23} paragraph 61, one sees
13 that local arrangements on domestic fallback interchange
14 fees are possible, so you do occasionally have
15 *Mastercard* entities setting *Mastercard* UK rates for
16 example.
17 Then at page 24, paragraph 64, {RC-J5/11/24} there
18 is a reference to the IPO which took place on
19 25 May 2006.
20 So that is the date. All of these claims subject to
21 the Volvo issue, postdate that and that is why there is
22 no relevant dispute for the purposes of Issue 2 in this
23 case. Well, plus the June findings, of course.
24 At page 26, {RC-J5/11/26} the specific treatment
25 given to the entity which is *Mastercard* Europe SPRL and

1 we see in recital 76 the rationale is identified for the
2 IPO and it is said:
3 "One key reason for the IPO of *Mastercard* was to
4 modify the organisation's governance to allow its member
5 banks and the legal entities managing it to better
6 address intensifying regulatory and legal scrutiny of
7 the *Mastercard* MIF."
8 In other words, without being too blunt about it,
9 they were hoping that they would get less hostile fire
10 from regulatory bodies and indeed claimants if they made
11 it look as if it was a unilateral decision taken by an
12 incorporated company following IPO and indeed that was
13 one of the arguments that was raised with the Commission
14 then subsequently.
15 If we then, please, look at page 36 and
16 paragraph 99, {RC-J5/11/36} we see confirmation of that
17 point, the banks themselves were a driving force behind
18 the IPO.
19 "They agreed to it as they knew that the new
20 management of the Global Board would continue to act in
21 their common interest. While the European banks were
22 aware that they would lose control over the body setting
23 intra-EEA fallback fees, they consented to the change in
24 the organisation's governance with the expectation that
25 the independence of the global board would reduce each

1 individual's bank exposure to regulatory scrutiny and
2 antitrust litigations ..."
3 Now, I am not simply raising this ad hominem against
4 a company. This is relevant because of course one needs
5 to bear in mind the assertion by Visa backed by
6 *Mastercard* that the UIFM, which apparently transfers
7 power unilaterally to banks, is something that the banks
8 will go along willingly with and that is something
9 I will need to test with the witnesses, not least given
10 the member banks' traditional reluctance to be caught up
11 in antitrust scrutiny.
12 At page 38, {RC-J5/11/38}, recital 107 to 108, we
13 see references to indicia of market power.
14 At page 41, {RC-J5/11/41}, paragraph 15 it is found
15 that the acceptance network of Visa is also very strong
16 and between the two card schemes there is a duality in
17 essence because they are both ubiquitous as payment
18 schemes. We see that the acceptance networks are
19 therefore very strong. So merchants are largely signed
20 up to these two card schemes, they have to be members of
21 those two card schemes, as we will hear from our
22 witnesses and that gives rise to market power.
23 At page 43, recital 118, {RC-J5/11/43} the
24 Commission confirms that it is also dealing in part with
25 the effect of the Honour All Cards Rule which enhances

1 the restrictive effects of the MIF. So with respect, as
2 we have adopted in our claim, the Honour All Cards Rule
3 serves to reinforce the anti-competitive object or
4 effect of the MIF itself.
5 We see in recital 119 that the MIF is necessarily
6 anchored in the scheme rules. Next up, page 44
7 {RC-J5/11/44} there is a description of the role of the
8 intra-EEA MIF as a fallback for cross border payments
9 and also as a domestic fallback if the members at
10 *Mastercard* and Maestro in the relevant area have not
11 agreed between themselves a separate domestic
12 (inaudible).
13 Recital 138 at page 48 {RC-J5/11/48} confirms the
14 finding we have seen endorsed by the PSR subsequently,
15 namely that *Mastercard* generally does not oblige issuing
16 banks to use proceeds from interchange fees in any
17 particular way, this also applies to the intra-EEA MIFs.
18 It does not verify in a systematic manner how issues
19 banks use proceeds from interchange fees so it is not an
20 earmarked pot of money that is going for a specific
21 purpose.
22 Now, the justification for these arrangements
23 changed somewhat during the course of the investigation.
24 One sees at page 51, {RC-J5/11/51} recital 147, that it
25 was initially pitched as being reimbursement for the

1 issuer's costs relating to transactions which are not
2 reimbursed elsewhere and it was designed as a form of
3 compensation scheme. So, this mirrors the point I was
4 making earlier, that if one looks at this as a historic
5 relic of an all-inclusive club of both issuers and
6 acquiring banks, you can see why they are concerned
7 about people not free-riding on the overall payment
8 scheme. The difficulty comes with that justification as
9 soon as you have acquirers who are not part of the same
10 club because they are separate commercial entities, that
11 issuing power gets translated into a power against an
12 independent entity that is nothing to do with the
13 overall club and that is part of the theory of harm.
14 So we then see that concept of price or a fee for
15 a service or an allocation of cost reimbursement for
16 services provided, transmogrifies in 148 and 149 into an
17 attempt to say that what is being provided here is in
18 fact a joint product. So it says in 149 *Mastercard* see
19 acquirers and issuers as co-operating partners of
20 a joint venture supplying a joint product. *Mastercard*
21 argues that together with its issuers and acquirers it
22 provides card payment services simultaneously and the
23 distinct services can be defined as a co-operation
24 enabling service or a demand co-ordinating service. So
25 this is moving away from the concept of price, no doubt

1 because it had resonance in terms of competition if they
2 were collectively fixing a price.
3 Then finally the next stage in the evolving analysis
4 to try and meet the Commission's concerns is in 152,
5 page 53 {RC-J5/11/53} where it says *Mastercard* believes
6 there is an interchange fee which maximises system
7 output.
8 So this is a sort of surrogate Pareto waiting in the
9 wings to tell everyone what the socially welfare
10 efficient price is and it says:
11 "An 'optimal' interchange fee level would reflect
12 each side's elasticity of demand, issuers' and
13 acquirers' respective costs and the relative strength of
14 the network effects".
15 So that is the argument that is now being put
16 forward: we are providing an optimal price for a system,
17 ignore the fact that the people involved in that system
18 are not setting the price for themselves.
19 And then paragraph 153, we see *Mastercard* saying
20 that it had indeed always qualified the MIF as mechanism
21 to balance demands and they had not meant what they said
22 when they described it as a price.
23 Turning then please to page 57 and recital 174,
24 {RC-J5/11/53} the Commission started digging into the
25 detail of the so-called justification and it looked at

1 the cost studies that *Mastercard* had put in place so in
2 essence what had happened here, because *Mastercard* is
3 setting the price, the Commission said to *Mastercard*:
4 how are you setting that price? What are you relying
5 on?
6 The answer came back from *Mastercard*: we have done
7 these cost studies. When the Commission dug into those
8 cost studies they found actually that they did not serve
9 to identify and measure specific issuing costs so they
10 were not looking at the costs that the issuing banks
11 incurred and which had to be allocated to the acquirers,
12 they were simply looking at the willingness of merchants
13 to pay, so it was an output-based assessment rather than
14 a cost-based assessment and that of course was
15 consistent with looking at the elasticity of demand
16 between cardholders and merchant, merchants will wear
17 it, cardholders will not, therefore we will stick the
18 cost on to merchants.
19 Recital 182 then looked at internal minutes of
20 meetings which had concentrated on the competitive
21 position vis-à-vis Visa and we see in 183, page 60
22 {RC-J5/11/60}. The weighing of the pros and cons for
23 an increase of fees was not something that was actually
24 discussed at board meeting level, neither merchant
25 demand nor network externalities were mentioned as

1 drivers for setting the actual fee in question.
2 187, page 61, {RC-J5/11/61} we see that *Mastercard*
3 had been anticipating price increases over a number of
4 years. They had already planned a steady increase of
5 the MIF over the subsequent years and they must have
6 qualified their countervailing force as non-existent so
7 they are recognising that they can push through price
8 increases on a sustained basis over a number of years.
9 At 189 on the bottom of that page, there was
10 a suggestion that the board in its justification had
11 failed to recognise the effect of its own rules:
12 "Under the HACR once a merchant accepts *Mastercard*
13 branded credit cards, then it is obliged to accept all
14 types of such credit cards, whether they are chip and
15 PIN cards or signature-based cards."
16 It is said that *Mastercard*'s interpretation of the
17 minutes was illogical.
18 At recital 194, at page 64, {RC-J5/11/64} the
19 Commission identified that the competition between Visa
20 and *Mastercard* had the effect of driving up MIFs because
21 they were both competing with issuing banks to give them
22 a sum of money, which the issuing banks welcomed and
23 that necessarily drove MIFs higher and higher.
24 Page 66, {RC-J5/11/66} recital 202. *Mastercard* kept
25 its level of intra-EEA MIF high and unchanged for nearly

1 five years, even after Visa had been the beneficiary of
2 the commitments decision that we have just looked at, so
3 Visa had agreed to cap its intra-EEA MIF at a certain
4 level. In response to that, *Mastercard* remained
5 unchanged. So you had this disparity of something Visa
6 complained about and subsequently you had this disparity
7 between the MIF rates that Visa were offering and
8 *Mastercard* were offering and interestingly, over that
9 period, Visa carried on doing business profitably and
10 *Mastercard* carried on doing business profitably.
11 So the suggestion that a death spiral will result if
12 there is a disparity in MIF rates I am afraid is simply
13 not borne out by the evidence that we have on the face
14 of this decision.
15 Recital 209 deals with the Honour All Cards Rule and
16 identifies its impact.
17 At {RC-J5/11/76} recital 244, there is a section
18 dealing with cardholder fees. This identifies other
19 forms of revenue that issuing banks can tap into in
20 order to pay for their services and their overall
21 business operation and again it deals with the obvious
22 things like charging currency conversion fees, credit on
23 credit cards, penalty fees for late payment, but
24 significantly C245 issuers also obtain revenues through
25 the *Mastercard* MIF.

1 And the *Mastercard* MIF has the effect of determining
2 to a large extent the final price merchants pay for
3 accepting cards, so that is the floor finally.
4 Page 81, recital 264, {RC-J5/11/81}, the Commission
5 essentially found that issues of balance in the system
6 were a matter for Article 101(3). So they need to look
7 at the different demands for cardholders and the
8 different demands of merchants and their elasticities of
9 demand was something that went to welfare maximisation
10 and therefore Article 101(3).
11 At page 83, recital 274, {RC-J5/11/83}, the
12 Commission declined to treat a two-sided or interrelated
13 market as a single product. So that argument was
14 rejected and instead the market definition is dealt with
15 at recitals 279 and 280, page 85, {RC-J5/11/83} where
16 the Commission distinguished between an upstream system
17 or network market and downstream markets consisting of
18 issuing and acquiring markets.
19 Now, within this market, see page 91, {RC-J5/11/91}
20 recital 307, the Commission did not include alternative
21 payment methods because they concluded see recital 307
22 that:
23 "The supply and demand side analyses shows that card
24 acquiring services are neither sufficiently
25 substitutable with cash and cheque related services, nor

1 with bank giro or direct debit services. The Commission
2 therefore retains as relevant product market for
3 assessing the MIF the market for acquiring payment card
4 transactions."
5 They left open whether that should be further
6 subdivided.
7 The consequence of that, page 93, {RC-J5/11/93}
8 recital 316 was that the relevant product market in this
9 case is the market for acquiring payment cards. That,
10 as I understand it, is the market that the experts are
11 agreed on in principle with the caveat that Dr Niels
12 wants to bring in considerations of alternative payment
13 methods for reasons that I will need to explore with
14 him.
15 At page 103, {RC-J5/11/103} I am passing over the
16 fact that they found the market was national in scope
17 because that again is not controversial in this case.
18 Page 103, paragraphs 350 onwards, the Commission
19 looked at the reasons why IPO -- post IPO *Mastercard*
20 remained an association of undertakings.
21 That conclusion was then definitively reached at
22 recital 367, which is at page 107, {RC-J5/11/107} where
23 the Commission says:
24 "In conclusion the *Mastercard* payment organisation
25 remains operating as an 'association of undertakings' in

1 Europe after the IPO."
2 Page 110, {RC-J5/11/110} having dismissed the
3 suggestion that rates setting outsourced to the board
4 would allow them to escape competition laws, see
5 page 109 recital 379, you cannot simply outsource to
6 an independent board rate setting and then escape
7 competition constraints.
8 Turning back to recital 382 at page 110, last couple
9 of sentences:
10 "The decisive question here is whether overall it is
11 in the common interests of the banks that some entity or
12 person, whom they entrust with the decision-making
13 powers, establishes through the MIF a minimum price
14 which merchants in Europe must pay for accepting
15 *Mastercard* branded payment cards. This is the case."
16 That has resonance we say for both of the
17 counterfactuals asserted by the payment schemes in this
18 case because both of them ultimately rely upon
19 entrusting to somebody the setting of a de facto rate
20 for a MIF which will then be routinely followed in
21 a coordinated manner by participants in the scheme.
22 And we see at page 113, recital 393, {RC-J5/11/113}
23 that the *Mastercard* scheme continued to be run for the
24 benefit of the issuing banks.
25 397 to 398 at page 114 {RC-J5/11/114} dismissed the

1 suggestion that because of the incorporation of
2 *Mastercard* Inc and its role in rate setting this was
3 unilateral conduct. So even though they were trying to
4 package this as a unilateral rate setting by
5 *Mastercard* Inc following the IPO that was rejected. The
6 findings on object, there was no definitive finding on
7 object, it is fair to say, but there were some strong
8 hints this was a restriction by object and if
9 the Tribunal would be kind enough to read recitals 401
10 through to 407, at page 115, {RC-J5/11/115}, that is
11 probably then me done for the day so we will end up on
12 object and move on to effect tomorrow. (Pause)
13 So I accept of course that there is no definitive
14 finding of object infringement in this case but that is
15 essentially a pragmatic conclusion from the Commission
16 saying because the effects can be so clearly
17 demonstrated, they do not need to reach a definitive
18 conclusion on whether or not it is also a restriction by
19 object. We will see tomorrow morning now that the
20 Commission has evolved its view on that and is more
21 willing now in terms a MIF that is set is a restriction
22 by object, they have done so for inter-regional MIFs.
23 Inter-regional MIFs are charged on the same consumer
24 credit and debit cards as were in issue in this case.
25 So one of the big questions in this case is: what is

1 so different about inter-regional MIFs versus every
2 other type of MIF that the Commission can find that one
3 is an object infringement and the others are not, if
4 that were being suggested?
5 So in terms of progress, I am hoping to finish by
6 lunchtime tomorrow and I am hoping that overnight I will
7 ensure that happens, although I am slightly behind where
8 I was hoping to be.
9 THE PRESIDENT: Mr Beal, you let us know if there is any
10 major difficulties and we can adjust the timetable as
11 necessary, but I am not getting a sense that that is
12 needed at the moment.
13 MR BEAL: The good news in this sense is that I understand
14 from my learned friend Mr Kennelly that there is
15 a number of our witnesses who are not required by either
16 Visa or *Mastercard* to be called as witnesses.
17 THE PRESIDENT: I see.
18 MR BEAL: So we do have slack already built in next Tuesday
19 and Wednesday.
20 THE PRESIDENT: That is helpful to know.
21 MR BEAL: But I am hoping I will not need it.
22 Housekeeping
23 THE PRESIDENT: That is useful to know in any event but we
24 will obviously keep an eye on the timeframe because what
25 we do not want is people being squeezed unnecessarily.

1 We value oral submissions greatly and we value the oral
2 evidence we receive greatly.
3 Before we rise, two short housekeeping matters.
4 First, I don't know if you have easily to hand your
5 written opening submissions and the diagram that you
6 have got there in paragraph 11, page 7. I mean it is
7 one of many such diagrams that we have seen in this case
8 and over the years.
9 MR BEAL: Yes.
10 THE PRESIDENT: Seeing through your submissions, the
11 agreements that you took us to earlier this morning, it
12 struck me this it would be useful to know not merely the
13 contractual links and the flow of fees, but also given
14 that we are talking about payment systems, the way in
15 which monies move from the payer to the payee, just so
16 that we can get some flesh on the skeletal bones of:
17 this is how it works. I do not anticipate it to be
18 controversial but I think a degree of granularity about
19 how those monies move would be of some background
20 assistance, so not urgent but it would be useful to
21 have.
22 MR BEAL: Yes, there was the section in the PSR that dealt
23 with the batch filing system and I can certainly take
24 the Tribunal tomorrow to the *Bookit* decision of the
25 Court of Justice which talks about how the merchant

1 acquirer basically pulls together all the transactions,
2 collates them, puts them into a request that then gets
3 transferred by the banking system to the issuer's bank.
4 I do not know off the top of my head whether that is
5 routed through the schemes directly.
6 THE PRESIDENT: That is the sort of question that I am
7 asking. One knows how it works --
8 MR BEAL: Yes.
9 THE PRESIDENT: -- at both ends, but in terms of just what
10 happens in the middle, it would be just useful to know
11 in similar spirits to the way you showed us those
12 agreements.
13 MR BEAL: Can I be candid: I am not sure I know the answer
14 to that. I am hoping my learned friends do because it
15 is their system.
16 THE PRESIDENT: I am sure they do and this is a request to
17 all parties and please do not do it super fast, it is
18 something which I am just -- feel it is something that
19 I would be helped by as a matter of background. If it
20 becomes more than background, we will obviously let you
21 know.
22 So the second point is a rather more mechanical one.
23 In other cases, I have been assisted, but only if it was
24 well within Opus's capabilities, of having, as it were,
25 a day file for each day's hearing which contains the

1 transcript of the day as thin as possible, so
2 MinUscript, and the page -- not the document -- that we
3 were taken to during the course the day so that one can
4 in the order they were taken, to just refresh one's
5 memory as to what is going on. I know one gets it
6 electronically on Opus, but a single file like that if
7 it is not too much trouble, and only if it is not too
8 much trouble, would be of assistance. We have decided
9 to save the trees and keep them in my room so it is just
10 one file that is needed.
11 MR BEAL: So it would be a physical copy of each document
12 I referred to?
13 THE PRESIDENT: A physical copy of each page of each
14 document. So if you are referring to, as you are, some
15 pretty hefty documents, we do not want the whole thing,
16 but the page and then we can just tie the transcripts to
17 the page. As I say, these appear in the margins of the
18 electronic Opus documents, so it is a request that is
19 made only if it is not a great deal of trouble.
20 MR BEAL: Can I take instructions on that?
21 THE PRESIDENT: Yes, again.
22 MR BEAL: We will do everything we can to be helpful. Let
23 me take instructions.
24 THE PRESIDENT: That is very helpful, thank you, Mr Beal.
25 Subject to that, we will say 10.30 tomorrow morning.

1 Thank you very much.

2 (4.32 pm)

3 (The hearing was adjourned until 10.30 am

4 on Thursday, 15 February 2024)

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