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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

Friday, 8 March 2024

(10.30 am)

THE PRESIDENT: Ms Tolaney, good morning. Before you embark upon further questions, just timetable for today. I do indeed have a 2 o'clock meeting which I have been helpfully reminded of this morning.

What we thought we could do is run until, say 12.15, have a half hour break for lunch, resume at 12.45 and run through to 2 o'clock and that way you will get three hours, which I think is the most we can profitably squeeze out of the day, but we probably do not need a break because there will only be an hour and three quarters in the morning and roughly the same in the afternoon. So if that is of any assistance --

MS TOLANEY: It is, thank you very much.

THE PRESIDENT: Thank you.

MR NEIL ALISTAIR DRYDEN (continued)

Cross-examination by MS TOLANEY (continued),

MS TOLANEY: Thank you. Good morning, Mr Dryden.

A. Good morning.

Q. I am going to turn now to interregional and commercial card MIFs and can we start by just putting this in context. I think we can agree that interregional MIFs are default interchange fees that apply to transactions with cards issued by an issuer located in one region,

1 which are used at a merchant located in another region?

2 A. I agree.

3 Q. Commercial card MIFs are default interchange fees that
4 apply to commercial card transactions?

5 A. I agree.

6 Q. I think you also agree with Mr Holt and Dr Niels that
7 interregional and commercial card MIFs do not have the
8 object of restricting competition?

9 A. Yes, I am almost slightly careful on object. I think
10 I say that I can see a potential case for object as
11 regards the MIFs in my report. But ultimately -- and
12 I set out what the argument would be, but then I do not
13 advance it because I leave that for others.

14 Q. If we just go to the joint expert statement just to
15 remind you. That is at {RC-H5/1/8}, please. You see
16 the areas of agreement --

17 A. Yes.

18 Q. -- and areas of disagreement there; can you see that?

19 A. I can.

20 Q. Then if we look at page 12 as well, {RC-H5/1/12}.

21 A. Yes.

22 Q. You can see "Restriction by Object":

23 "Three experts (Mr Holt, Mr Dryden and Dr Niels)
24 agree that commercial card MIFs do not have the object
25 of restricting competition."

- 1 A. Yes.
- 2 Q. That is why I was saying I think you agree with them
3 that interregional and commercial card MIFs do not have
4 the object of restricting competition as reflected in
5 that statement?
- 6 A. That is right, I agree. The only caveat I gave is that
7 within my report I set out the argument for how they
8 might be considered by object before then saying that I
9 as I --
- 10 Q. You do not advance it, I think, is the point.
- 11 A. Correct.
- 12 Q. You have agreed that there.
- 13 A. Exactly right.
- 14 Q. So your analysis is concerned only with whether these
15 MIFs restrict competition by effect and whether they are
16 objectively necessary?
- 17 A. That is correct.
- 18 Q. I think we also agree that that requires an analysis of
19 the counterfactual to establish what would have happened
20 without positive interregional and commercial card MIFs?
- 21 A. I agree.
- 22 Q. The counterfactual that we are considering is where the
23 interregional and commercial or commercial MIF is zero?
- 24 A. I agree.
- 25 Q. So can I start with a point that affects your analysis

1 on both interregional and commercial cards and again
2 just to orient us, can we go to your report, please,
3 your first report, at paragraph 4.46, that is
4 {RC-H2/1/35}. So you refer there to six essential facts
5 identified by the Supreme Court as the factual basis of
6 the CJEU's judgment in that litigation, the Sainsbury's
7 litigation?

8 A. That is correct.

9 Q. Looking at the sixth fact --

10 A. Sorry, just to be slightly pedantic, this is the
11 Supreme Court.

12 Q. Sorry, in the Mastercard --

13 A. I am sorry?

14 Q. Go on. You say.

15 A. Yes. This is the Supreme Court identifying essential
16 facts that indeed were part of the Court of Justice's
17 finding that those past MIFs were infringing.

18 The subtlety is I think there are additional
19 essential facts to be found in the CJEU judgment. So
20 that is why I say here they include the following. The
21 Supreme Court is identifying essential facts that are
22 among those that were the essential facts that were the
23 basis of the Mastercard decision.

24 Q. Yes, and I think you actually consider whether the
25 conclusion as to what the correct interpretation of the

1 Supreme Court's judgment in Sainsbury's is correct in
2 your report, do you not?

3 A. I do not quite understand that question, sorry.

4 Q. Well, if we go on to paragraph 4.51, over the page,
5 page 36, please, can you see the heading "The correct
6 interpretation of the Supreme Court's sixth fact"?

7 A. That is right.

8 Q. So you go on to consider that in particular?

9 A. Yes.

10 Q. But all of those points, whether they were additional
11 facts or the correct interpretation of the six facts are
12 legal questions, do you accept that?

13 A. Of course, I accept that, ultimately interpreting the
14 essential facts in the CJEU judgment underpinned by the
15 Commission's decision and interpreting the subset of
16 those essential facts, as I see it in the Supreme
17 Court's judgment, is a matter for the Tribunal.

18 It is worth pointing out I think that the experts,
19 the questions for the experts in this case asked us
20 specifically to consider whether the essential facts
21 that had been identified applied to the interregional
22 and commercial card MIFs, so I necessarily had to list
23 what I think the essential facts were which entailed my
24 interpretation of these judgments.

25 But I agree of course that ultimately that

1 interpretation is a matter for the Tribunal.

2 Q. Thank you. There is no criticism, Mr Dryden. What I am
3 just trying to hone in on is that what I want to focus
4 on with you is the economic perspective and whether it
5 makes sense, in particular, to focus from an economic
6 perspective to look only at Merchant Service Charges on
7 Mastercard and Visa transactions in the counterfactual
8 or a wider market and I think that is the question
9 I want to focus on with you --

10 A. I understand.

11 Q. -- not the legal interpretation.

12 A. I understand.

13 Q. So in the counterfactual where the interregional or
14 commercial card MIF is zero in principle I think you
15 would agree with me that issuers or cardholders may
16 switch to another form of payment?

17 A. I agree.

18 Q. So let us take a simple example. Let us assume
19 a merchant who is putting through 100 interregional
20 transactions with Mastercard cards a day in the factual
21 world but, in the counterfactual world, the merchant
22 finds that they are putting forward or putting through
23 rather I should say 30 transactions with Mastercard
24 cards and 70 with Amex cards because the cardholders
25 have switched.

- 1 A. I understand.
- 2 Q. So we have the same 100 transactions in both the factual
3 and the counterfactual but we see a different split
4 between the payment methods because of switching?
- 5 A. I understand.
- 6 Q. The merchant's costs on the 30 Mastercard transactions
7 in the counterfactual may have decreased because of the
8 relevant MIF being zero, but their overall cost in
9 respect of the same 100 transactions, taking the 70 into
10 account as well, would have increased because they are
11 now putting through more transactions on Amex which is
12 a more expensive card?
- 13 A. I agree. I think perhaps in line 7 you meant to say
14 "decreased" but subject to that I agree.
- 15 Q. So I said the Mastercard transactions have decreased,
16 the 30 ones, and the 70 have increased?
- 17 A. I agree. On the transcript it is coming up as
18 "increased".
- 19 Q. Right. Thank you. So although you are calling it the
20 market wide Mastercard or Merchant Service Charge, what
21 we are trying to ascertain by this approach is how the
22 merchant's costs would have changed in the
23 counterfactual in respect of the same 100 transactions
24 that would have been carried out in the factual.
- 25 A. I understand.

1 Q. That is what Dr Niels' approach is because it looks at
2 how the merchant's overall costs would have changed in
3 the counterfactual taking account of diversions to all
4 alternative payment methods?

5 A. I understand.

6 Q. So the question I want to put to you in that context
7 then is surely it makes economic sense to ask in the
8 counterfactual what the merchant's costs would be in
9 respect of the same 100 transactions that we see in the
10 factual?

11 A. I think ultimately it makes economic sense to look at
12 that question. The question is where to locate the
13 analysis, whether to locate it in the 101(1) stage of
14 the analysis or whether to locate it in the 101(3) stage
15 of the analysis and I think there is a number of factors
16 that could influence the debate about where it is best
17 to put it and I considered in my report some of those
18 factors and I considered that at least one key factor
19 and I consider it makes more sense from my perspective
20 to locate it at the 101(1) stage.

21 If you locate it in the 101(3) stage, it is quite
22 close to the -- to the application of the merchant
23 indifference test in some ways.

24 PROFESSOR WATERSON: I hesitate to intervene, Ms Tolaney,
25 but why is it that there has been this huge switch in

1 your example?

2 MS TOLANEY: We are going to come on switching if it is all
3 right to put the question. But broadly it is because it
4 would be more attractive to use Amex in circumstances
5 where issuers do not get the revenue stream and so on
6 and so forth.

7 PROFESSOR WATERSON: Right, but it obviously depends on the
8 magnitude of the switch.

9 MS TOLANEY: It does. But all we are considering at the
10 moment is not why they would switch. Mr Dryden has
11 accepted they may switch. It is the scope of what you
12 compare between the factual and the counterfactual to
13 assess the restriction of competition.

14 PROFESSOR WATERSON: Yes, thank you.

15 MS TOLANEY: So, Mr Dryden, when you were talking about the
16 debate between Article 101(1) and 101(3), but you only
17 get into 101(3) once you determine there is
18 a restriction of competition or once rather it has been
19 determined there is a restriction of competition?

20 A. That is correct.

21 Q. The question is then in the counterfactual, where
22 interregional or commercial card MIFs are zero, if
23 merchant costs increase in respect of the hypothetical
24 100 transactions, are you suggesting that would be
25 a restriction of competition?

1 A. Yes.

2 Q. You are?

3 A. Yes, and let me explain why. It is because there is
4 a version, and I will stress a version because counsel
5 is putting a different view of the world, but there is
6 a version that goes as follows in terms of the essential
7 facts for identifying a 101(1) restriction which is --
8 and I will just go through those essential facts.

9 First of all, the MIFs have to be a floor on the
10 MSCs, I think that is now agreed. Second, the MIFs of
11 Visa and Mastercard have to be passed through into harm
12 if MSC of Visa and Mastercard, that is the contentious
13 issue, whether we just limit to the schemes' MSCs but
14 that if limiting to the schemes' MSCs that is
15 uncontroversial.

16 Then there is the issue about whether the schemes
17 are setting -- whether merchants have the ability to
18 resist the MIFs of the -- and the consequent MSCs and
19 the answer to that I think is no.

20 Then you have the question of whether competition
21 among schemes exerts a downward discipline on MIFs and
22 I think that the answer to that is no; in fact,
23 competition amongst schemes can exert an upward pressure
24 on the MIFs and then the question sticking to the CJEU's
25 essential facts is whether overall the -- the schemes

1 have market power in setting their -- their MIFs into
2 this market which I think, if they are not constrained
3 by merchants and they are not constrained by other
4 schemes, the answer is yes. So there is a version
5 where -- and then finally appreciability.

6 So there is a version where if you satisfy that set
7 of essential facts you have a restriction in 101(1),
8 because essentially some prices are being set into the
9 market by big players on that market in circumstances
10 where they are exerting market power and not being
11 constrained and then you go over 101(3) to find out if
12 there is a justification for the MIFs at the factual
13 level or at some lower positive level and at that later
14 stage of the analysis, you can -- house the analysis of
15 whether a benefit of the higher MIFs of the schemes is
16 that they prevent or what would otherwise be a degree of
17 switching to more expensive alternatives and that could
18 be cash, which is the merchant indifference test, or it
19 could in principle at that stage of the analysis be
20 Amex.

21 So that is, to my mind, that is a coherent way of
22 going about the analysis and it is a consistent way of
23 going about the analysis in terms of my understanding of
24 how it has been done so far. But I completely take your
25 point. I do not disagree with the idea that that

1 switching has to be taken account of somewhere.

2 Q. So I think there is quite a lot of conflation so can
3 I break it down, please.

4 A. Of course.

5 Q. Your narrow approach on my hypothetical is to look only
6 at the 30 transactions in the counterfactual, the 30
7 Mastercard transactions, you ignore the 70 that were
8 switched to Amex?

9 A. That is right. I mean, in my -- I think that is
10 a consequence. It is not quite how I would -- the way I
11 would have thought of it.

12 Q. But that is what follows from your analysis?

13 A. But I think it follows.

14 Q. Now, assuming a certain level of pass-through by
15 acquirers to merchants, it would always be true that if
16 the interregional or commercial card MIF is zero, then
17 Mastercard or Visa's Merchant Service Charges would be
18 lower in the counterfactual?

19 A. Yes. I mean obviously I agree with that.

20 Q. Right.

21 A. We spent a very large part of the autumn with that being
22 a contentious issue, but it is now agreed and to my mind
23 it is obvious.

24 Q. Yes, and that is the analysis of the second factor of
25 the six essential facts identified in the Sainsbury's

- 1 Supreme Court case?
- 2 A. I will take your word on the numbering, but, yes.
- 3 Q. Yes, it is whether the MIF has the effect of setting
4 a minimum price floor for the Merchant Service Charge?
- 5 A. Yes, there is floor and pass-through are the two, but
6 I think they are closely related.
- 7 Q. But assuming that there is a floor effect the schemes'
8 Merchant Service Charge would always be lower in the
9 counterfactual where the MIF is zero?
- 10 A. Yes.
- 11 Q. So restricting your analysis to the six facts of the
12 scheme's Merchant Service Charge gives no meaning to the
13 sixth fact independent from the second fact?
- 14 A. I am sorry. The...
- 15 Q. You can see the six facts in your report at
16 {RC-H2/1/35}, paragraph 4.46 (f).
- 17 A. Well, I --
- 18 Q. The two collapse into each other, do they not?
- 19 A. Yes, but I also think some of the CJEU's essential facts
20 collapse into each other.
- 21 Q. Let us focus on the question. On your analysis, the
22 second and the sixth fact collapse into each other?
- 23 A. To some extent that might be right, I mean, as an
24 initial reaction.
- 25 Q. So can I have a look at why you say you only should look

1 at the scheme's Merchant Service Charge in the
2 counterfactual rather than the market wide and you
3 address this in 4.63 of your first report, which is at
4 page 38 of the document on screen.

5 A. Yes.

6 Q. It is under the heading "Whether the 'market-wide'
7 interpretation makes sense from an economic
8 perspective".

9 A. Yes.

10 Q. You say in paragraph 4.64 that looking at the
11 market-wide Merchant Service Charge risks
12 underenforcement within the Article 101(1) framework and
13 you say:

14 "In particular, even if the market-wide Merchant
15 Service Charge were higher in the counterfactual with
16 zero MIFs than in the factual, due to substitution to
17 Amex..."

18 Just pausing there. That is my hypothetical example
19 I have just given you.

20 A. Yes.

21 Q. You go on to say:

22 "... this does not mean that the market-wide
23 Merchant Service Charge is higher at levels of MIFs that
24 are positive but below the factual."

25 A. Yes.

1 Q. Now, can I explore that with you by reference to what
2 Mr Holt says?

3 A. Of course.

4 Q. Mr Holt's report addresses this, it is his ninth report,
5 {RC-H4/4/67}. We are looking at paragraph 264, please.

6 A. Yes.

7 Q. So let me -- if you read that to yourself. (Pause)

8 A. Yes.

9 Q. So his point is that on your narrow approach of looking
10 at only the 30 transactions, if I can call it that,
11 there is a countervailing risk of overenforcement
12 because if you focus only on Merchant Service Charges
13 for the scheme at issue even a new entrant four-party
14 scheme may be unable to justify its MIF?

15 A. Yes. Can we -- could you refresh my memory of what is
16 at the top of the next page?

17 Q. Yes, please do go over. I was about to say he develops
18 the point in paragraph 265, so please do take your time
19 and read that. (Pause).

20 A. Yes, thank you. Can we go back to 264?

21 Q. Of course.

22 A. I mean, there is a quite a lot in these. Can I go sort
23 of sentence by sentence and just give my reaction?

24 Q. You can, but may I first put my questions and then if
25 you want to add to it then by all means?

- 1 A. Of course.
- 2 Q. Mr Holt's example demonstrates that on a narrow approach
3 you only ask if the scheme's Merchant Service Charge
4 increases or decreases when the MIF is zero?
- 5 A. Correct, that is what is being addressed.
- 6 Q. If one assumes, though, that MIFs are substantially
7 passed through to Merchant Service Charges a scheme's
8 MSC is always bound to be lower in the counterfactual if
9 the MIF is zero?
- 10 A. Indeed. That is what I spent, as I have referred to
11 already, a large part --
- 12 Q. Exactly.
- 13 A. -- of the end of last year trying to --
- 14 Q. Exactly.
- 15 A. -- saying.
- 16 Q. But if a new entrant to the market charges very low
17 interchange fees on your narrow approach of only looking
18 at the MSCs of a particular scheme in the
19 counterfactual, you would say even then there is
20 a restriction of competition?
- 21 A. On the part of the new entrant, no because the new
22 entrant would not be -- would not be appreciable.
- 23 Q. But you would find a restriction of competition on your
24 analysis even if market outcomes were worse for
25 merchants in the counterfactual because their costs in

1 respect of the same transactions have increased?

2 A. Yes, but it is inherent in Article 101(1) that you can
3 be identifying something as a restriction of competition
4 that is ultimately demonstrated to be good for the
5 customer because otherwise Article 101(3) would be
6 redundant. So there is no -- no tension there.

7 101(1) identifies the restriction of competition and
8 then you go off to 101(3) to find out either if it can
9 be fully justified, so the factual level of the MIF can
10 be justified, or if it could be partially justified, so
11 some -- the factual MIF was too high but some lower
12 positive level of the MIF is exemptible.

13 So I do not see a tension there. It is inherent in
14 the sort of two-step structure of 101.

15 Q. But is it not unreal economically to suggest that where
16 the outcome is worse for the merchants in the
17 counterfactual because their costs have increased that
18 there is a restriction of competition in the better
19 world of the factual because that is where your analysis
20 comes out?

21 A. But then we should -- everything until this point in the
22 way these cases have been done has been on a false
23 construct because then to avoid that risk the merchant
24 indifference test should have always been shifted
25 forward from Article 101(3) into Article 101(1).

1 Q. Well, put aside your analysis of 101(1) and 101(3)
2 because that is actually a matter for the Tribunal and
3 answering the original question. We could go back to
4 the transcript, it is at line 14: Is it not unreal
5 economically to suggest that where the outcome is worse
6 for the merchants in the counterfactual because their
7 costs have increased that there is a restriction of
8 competition in the better world of the factual?

9 A. No, because you have the problem that I identify in my
10 report, which is -- or at least the problem that
11 I identify in my report, which is that the -- we could
12 be in a world where at the factual level of the
13 interchange fee, and this is a hypothetical, we could be
14 in a world where at the factual level of the interchange
15 fee that entails some overall cost to merchants
16 including their other payment means and it could
17 hypothetically be the case that it is zero MIF the total
18 cost on the merchants could be higher if there is enough
19 switching to other more expensive payment means. That
20 is a possibility.

21 Now, one approach would be to say okay that is
22 enough for me to say no 101(1) restriction and obviously
23 that is then the end of the story. However, that risks
24 underenforcement because even although the cost on the
25 merchant set no MIF may be higher, it may be that the

1 total cost on the merchants at significant lower but not
2 zero MIFs may have been lower and, you know, that is the
3 problem and Article 101(3) is well designed to assess
4 that problem because Article 101(3) has
5 a proportionality aspect whereas 101(1) as it is done
6 here is binary and, therefore, the risk is that in
7 a sense 101(1) on counsel's approach creates the
8 possibility for the schemes of sort of in one bound they
9 are free, even if they have very high MIFs that are
10 detrimental to merchants whereas going into the 101(3)
11 realm allows for checking that the MIFs are not
12 disproportionately high.

13 Q. But it is fair to say that you have not done the
14 analysis that you are positing of some other
15 possibility?

16 A. Yes, but that is the whole point which is not to do the
17 analysis because it belongs in 101(3). If you end up
18 doing the analysis to make good -- it does not quite
19 work to say you have to do the analysis because then you
20 are bringing all of the analysis into 101(1).

21 Q. But on your analysis that has been done, so the evidence
22 before the Tribunal, at the moment as I say the upshot
23 of your analysis is counterintuitive on an economic
24 perspective because you come out saying a scenario that
25 is worse for merchants is -- leaves the factual as

1 anti-competitive, a restriction of competition even
2 though the counterfactual provides merchants with
3 a worse outcome?

4 A. But I do not have -- I do not -- I have not advanced
5 analysis showing that merchants have a greater total
6 cost burden with zero MIFs than with the factual level
7 of MIFs.

8 Q. You accept that is possible?

9 A. I do accept it is possible because you have, well...
10 I am -- I am sceptical about it in both cases. I think
11 is a -- and I have -- I am sceptical about it in both
12 cases.

13 But the point is even if I considered that that was
14 the case, in other words that the merchant's total cost
15 burden would be greater with zero MIFs, I would still be
16 saying that we have to go to 101(3) because otherwise
17 the risk is that the interchange fees are far too -- are
18 far too high relative to how -- where they should be for
19 a -- for internalising the externality that I talked
20 about in the concurrent session.

21 Q. So going back to your report, you focus in paragraphs --

22 A. Sorry, I am sorry to interrupt and -- and too high for
23 dealing with switching to an unregulated scheme like
24 Amex.

25 Q. We will come on to switching in a moment, Mr Dryden.

1 In your report at 4.67 and 4.6, you discuss various
2 points including the 101(1) and 101(3) debate.

3 A. Yes.

4 Q. These are legal points and I am not going to engage with
5 you on them. So if we could then go please to 469 you
6 say that it might be a reason and -- sorry, I should
7 bring that up on screen. It is {RC-H2/1/39}. You say
8 that it might be a reason not to focus on the
9 market-wide MSC if Amex were not part of the same market
10 as Mastercard and Visa.

11 A. Yes.

12 Q. But you reject that reason.

13 A. I -- I somewhat reject that, that reason. Yes, this is
14 in the legal chapter I think.

15 Q. It is. But you say, first of all, Amex is in the
16 relevant market and, secondly, you accept that the issue
17 should not turn on a technicality of market definition?

18 A. Yes. So let me just explain my position on market
19 definition in terms of Amex's inclusion or not.

20 So in the chapter we are in, in the chapter we are
21 in now, the legal chapter, I say that I think the better
22 reading of the Commission's decision in Mastercard is
23 that Amex is in the market. I say that -- I say that
24 the Commission is not explicit, they do not have sort of
25 a definitive statement saying in or out so it is

1 implicit but I think the better reading is Amex is in.

2 I then go to my own market definition exercise from
3 sort of first principles and then I say that I think the
4 better -- that the analysis leads me to think that Amex
5 should be out.

6 I then proceed, essentially everywhere in my
7 reports, on the premise out of those two options that it
8 is in. Essentially assuming Amex -- that point against
9 myself in spite of -- in spite of my economic assessment
10 and I finally say that if we were ever to reach the
11 point where anything turned on Amex being in or out,
12 then I think it would be important to consider it
13 further.

14 Q. Which would mean that you would consider all 100
15 transactions on my example?

16 A. Everything is a bit -- everything is interconnected,
17 101(1) and 101(3), the market definition, etc. If --
18 and market definition is a tool.

19 I think there is a economic case for Amex not being
20 part of the market, not being part of the acquiring
21 market and it is compatible with the...

22 So let me explain sort of two variants of the
23 approach to 101(1) that I gave earlier, which itself is
24 only one variant of how you do all of this. So the --
25 the first variant is Amex is not in the acquiring market

1 because it is not a -- it is not providing third party
2 acquiring services. So then you have a situation where
3 as far as the essential fact of higher MSCs go in the --
4 in the affected restriction of competition market goes
5 Amex by -- it follows from the market definition that
6 Amex is out.

7 It does not mean that Amex has no role to play in
8 the 101(1) analysis because it still comes into the
9 fact, the essential facts about whether scheme
10 competition constrains the MIFs and about whether Visa
11 and Mastercard have market power in setting their MIFs.
12 So it is not absent from the analysis, but it is not in
13 the market definition.

14 An alternative approach is that Amex is in the
15 market. I have explained in my report why I do not
16 think that quite makes sense and at that point there are
17 two options. One, which I prefer, is even if Amex is in
18 the market you still just look at the MSCs of the
19 schemes who are party to the agreement. That is my
20 preferred approach.

21 The alternative approach counsel is advancing is the
22 idea -- is a two-fold proposition a) Amex is in the
23 market and b) you also take it into account at the
24 101(1) stage when you are looking at the total cost
25 burden on merchants in the counterfactual.

1 Q. So just to be clear, I am going to move on from this
2 topic, but are you saying that you now want to amend
3 your report at paragraph 4.69 in which you say in
4 terms --

5 A. Yes.

6 Q. -- that, "I consider it is better to consider Amex as
7 part of the market"?

8 A. I think my report could have been clearer, but I think
9 if it is read fairly and if read fairly then what I said
10 earlier is the case. I say the following things,
11 I think: number one the better reading, in my opinion,
12 the fairer reading of the Mastercard decision is that
13 Amex is in; secondly, my economic analysis tends towards
14 putting Amex out for reasons I have given; thirdly,
15 I proceed on the basis that it is in and; fourthly, if
16 this were ever to matter, which on my approach it does
17 not, at that point it is worth considering in more
18 detail because it could have a fundamental -- it could
19 in those circumstances have a bearing on the outcome.

20 Q. Right. I will move on but I may come back to that
21 topic.

22 MR TIDSWELL: If you are moving on, can I just ask?

23 MS TOLANEY: Of course.

24 MR TIDSWELL: Just on your variant where Amex was in the
25 market but you decide that it should not take it into

1 account in the way that Ms Tolaney suggested, what is
2 your reason for that?

3 A. Yes, so the reason for that would be that even in
4 a world where Amex is in you have a situation where you
5 have Mastercard and Visa, their MIFs are a floor to
6 their MSCs, their MSCs are higher in the factual than in
7 the -- are higher because of the MIFs, that merchants do
8 not have the ability to resist those higher MSCs of Visa
9 and Mastercard, that scheme competition, including from
10 Amex, is not a downward restraint on the MIFs but in
11 fact is a further source of upward pressure, that taking
12 those things combined the schemes have market power in
13 setting of their -- setting their IFs into the acquiring
14 market with consequences for the MSC and that that is
15 enough to find a restriction and, finally, that the
16 schemes Mastercard and Visa are appreciable on the
17 acquiring market and that those things in combination
18 are enough to say there is a restriction of competition
19 irrespective of the switching to Amex within the market
20 because the switching to Amex within the market point is
21 better handled in 101(3) because there you have
22 a proportionality consideration that you -- that just is
23 not -- does not kind of operate within the 101(1)
24 paradigm; in other words, making sure that the MIFs,
25 even if they have some beneficial role of stopping

1 switching to Amex, having been pushed excessively high
2 against that purpose.

3 MR TIDSWELL: Yes, that is very helpful. I just wanted to
4 make sure I had understood that was your position, but
5 I wanted to make sure it applied to that particular
6 situation.

7 So what you are effectively saying is whether it is
8 in the market or not when you come to the counterfactual
9 you are applying the six facts.

10 A. That is correct.

11 MR TIDSWELL: You are saying that is sufficient and it is
12 not necessary to look at switching because it is
13 a 101(3) issue?

14 A. That is correct.

15 MR TIDSWELL: Yes. Okay, thank you.

16 MS TOLANEY: I am coming on now to switching.

17 I want to start by asking you some differences
18 between interregional transactions and consumer
19 transactions. So, first of all, there are higher levels
20 of cardholder fraud in interregional transactions,
21 I think you would agree with that?

22 A. I -- I -- it is not within my knowledge, but I --
23 I think I have heard that from the -- from the -- I have
24 seen that in the evidence.

25 Q. Yes, I think you accept it in fact on that basis in your

1 report?

2 A. Yes.

3 Q. But the second difference between domestic and
4 interregional transactions is that a majority of
5 interregional transactions are card not present
6 transactions?

7 A. Yes.

8 Q. The higher levels of fraud mean that issuer costs are
9 higher because issuers still need to pay merchants for
10 fraudulent transactions by cardholders?

11 A. Yes.

12 Q. Now, in your first report you say that interregional
13 functionality is not something like a standalone
14 product, which needs to be funded by MIF income and just
15 to show you that, that is at {RC-H2/1/79},
16 paragraph 8.36-8.37.

17 A. Yes.

18 Q. You say at paragraph 8.37 that it is an attribute of
19 a consumer payment card?

20 A. Yes.

21 Q. But you are presumably aware that there are many markets
22 where Visa or Mastercard are co-branded with domestic
23 card schemes such as Cartes Bancaires in France?

24 A. I do not know the extent of that.

25 Q. But you accept that there may be some co-branding?

- 1 A. Yes, we can proceed on that assumption.
- 2 Q. So the issuer would be offering a card which has two
3 acceptance brands, Cartes Bancaires and Mastercard --
- 4 A. Yes.
- 5 Q. -- and the domestic transactions are put through
6 Cartes Bancaires?
- 7 A. Yes.
- 8 Q. And the cross-border transactions are put through in
9 this example Mastercard?
- 10 A. Yes.
- 11 Q. So that is an example where an issuer is offering
12 through a co-branded or co-badged card cross-border
13 acceptance via Mastercard as a standalone product?
- 14 A. I do not think it is a standalone product in those
15 circumstances because the consumer who is obtaining this
16 card and who has an interest in doing domestic and
17 international transactions is -- is still viewing the
18 interregional functionality as an attribute of that card
19 and the issuer has an interest in maintaining that
20 functionality not only for the benefit of the
21 interregional transactions they get done but for the
22 benefit of the overall attractiveness of the card
23 including, therefore, the domestic transactions that get
24 done.
- 25 Q. But the domestic scheme is offering a card with only

1 domestic functionality?

2 A. I think that is true by definition.

3 Q. Issuers can also issue payment cards that cannot be used
4 for particular categories of transactions, that is
5 right?

6 A. I do not know for sure, but I am happy to assume that is
7 the case.

8 Q. Well, we have had a number of references to EFTPOS in
9 this trial but that is a limited function card and it
10 cannot be used over the Internet or for contactless
11 transactions?

12 A. I understand.

13 Q. So at least in theory, therefore, interregional
14 functionality is severable?

15 A. Yes, but I do not think the logic quite follows.

16 So if I have an issuer, going back to counsel's
17 earlier example, if I have an issuer who has got a card
18 that is co-branded and it has domestic functionality and
19 interregional functionality from the perspective of the
20 cardholder, this is a card that has attributes including
21 domestic and interregional functionality.

22 The existence of some cards around the world that
23 only have domestic functionality is not a proof point
24 against the interregional functionality being an
25 attribute of that card.

1 Q. No and neither is it proof that you would say of whether
2 or not it is attractive. But the target of my questions
3 is your report saying that it is not a standalone
4 product. So just on that limited question I am saying,
5 well, it could be?

6 A. Theoretically it could be a standalone product, but I am
7 saying it is not --

8 Q. Right.

9 A. -- really from my understanding of how -- I am saying it
10 is not and it seems more -- it seems more, in general it
11 seems that interregional functionality on cards will be
12 an attribute of a card that also has domestic
13 functionality.

14 Q. So just --

15 THE PRESIDENT: Ms Tolaney, just help us on this. This
16 constraint on functionality, it is imposed by whom?

17 MS TOLANEY: On the issuer, by the issuer.

18 THE PRESIDENT: I know who it is imposed on, but how is it
19 imposed?

20 MS TOLANEY: But it is imposed by the issuer.

21 THE PRESIDENT: By the issuer.

22 MS TOLANEY: Exactly.

23 THE PRESIDENT: So how does that get implemented?

24 MS TOLANEY: How does that...?

25 THE PRESIDENT: Get implemented.

1 MS TOLANEY: Well, I am coming on to ask questions that
2 might happen in the counterfactual now.

3 THE PRESIDENT: Well, I understand that, but it is going to
4 be, I think, necessary for us to understand the
5 counterfactual how the constraint on functionality that
6 you are postulating actually works. I mean. If the
7 issuer simply says: I do not want you, cardholder, to
8 use your card for international transactions. But if
9 you go to a merchant abroad and the card works, then it
10 is not much of a constraint.

11 So if, on the other hand, there is a constraint
12 which operates through the technology --

13 MS TOLANEY: Exactly, that would be the premise.

14 THE PRESIDENT: So --

15 MS TOLANEY: So a bit like EFTPOS, which is a limited
16 function card which cannot be used.

17 THE PRESIDENT: Not all EFTPOS cards are limited function.

18 MS TOLANEY: Right, but there may be hypothetically a card
19 that is issued which is purely for domestic use and is
20 branded in that way.

21 THE PRESIDENT: Well, I understand that, but branded is one
22 thing. It does seem to me that it is important that we
23 understand -- it may not be for now -- but we will want
24 to understand very clearly how that constraint on use is
25 used because frankly if it is simply a: Please do not

1 do this but the card still works --

2 MS TOLANEY: No, it would not be that.

3 THE PRESIDENT: -- then I am not very interested in your

4 example.

5 MS TOLANEY: No and I am not positing that example at all.

6 THE PRESIDENT: If, on the other hand, it is a situation

7 where the constraint is embedded let us say in the

8 acquirer's technology so that I take my domestic only

9 card, try to pay in an international merchant, a

10 non-domestic merchant the card goes in and it just does

11 not work and there is no choice on anyone then

12 I understand the point and you are putting the

13 technological constraint in that way --

14 MS TOLANEY: Exactly.

15 THE PRESIDENT: -- to the witness.

16 MS TOLANEY: Exactly.

17 THE PRESIDENT: Well, provided that is made good on the

18 technological side, at some point in the trial, then

19 I am happy for you to proceed.

20 MS TOLANEY: Exactly.

21 PROFESSOR WATERSON: Can I just add on this point?

22 MS TOLANEY: Of course.

23 PROFESSOR WATERSON: Are we talking about a card issued in

24 Britain or a card issued in some other country?

25 MS TOLANEY: Well, I think we may be focusing on both in

1 this example, but --

2 PROFESSOR WATERSON: Right. Factually, are there any cards

3 issued in Britain of this sort?

4 MS TOLANEY: I am -- we will look at that, but at the moment

5 the best example we can give you is Solo cards.

6 PROFESSOR WATERSON: Right, thank you.

7 THE PRESIDENT: Well, this obviously is not a matter for

8 either you or for Mr Dryden because it is technical

9 stuff, which I think does matter but we will proceed on

10 the basis that we will accept for the sake of the

11 questions that it is technically possible --

12 MS TOLANEY: Yes.

13 THE PRESIDENT: -- to silo different cards in different

14 ways, whether they are issued abroad or in the

15 United Kingdom, or whether there are other forms of

16 siloiing that you want to put, that is fine. But we do

17 want it made absolutely clear for us how that is done so

18 that we can gauge the plausibility of the example that

19 you are putting.

20 MS TOLANEY: Indeed.

21 A. May I just make a remark arising from some of those

22 comments?

23 THE PRESIDENT: Please do.

24 A. So the first point to make is the -- when I say that it

25 is not a standalone product, it is an attribute, that

1 does not depend on the -- on the -- whether it is or is
2 not possible to switch off interregional functionality
3 on a card. I understand that may be important for other
4 reasons.

5 But the non-standalone point arises because -- in
6 the following sense, which is simply this, which is if
7 the issuer decided to switch off or degrade
8 interregional functionality, does that just have
9 consequences for the interregional transactions done
10 with that card or does that have consequences for the
11 overall demand for the card, and, therefore, also for
12 the issuer's competitiveness in the domestic part of the
13 card offer?

14 So it is coming -- so my analysis is not resting on
15 is switch off possible or not possible. It is resting
16 more on the demand interlinkage between the
17 interregional and the domestic transactions.

18 THE PRESIDENT: Fair enough, Mr Dryden, and those may be
19 answers that you will give to Ms Tolaney when she
20 presses you on those.

21 What I was concerned about was the anterior
22 assumption that in the question to you was implied and
23 not express, namely that it was actually possible to do.

24 So proceed now on the basis that it is technically
25 possible to silo cards in that way such that if I try to

1 pay in a certain way but it is prohibited by whichever
2 entity the scheme prohibits it, such that I simply
3 cannot use the card for that prescribed purpose, proceed
4 on that basis. You may say: Even on that basis, the
5 answer is not as counsel is suggesting. Well, that is
6 great, but I think it is only fair to you and indeed
7 only fair to us that that premise be clearly articulated
8 and later made good.

9 A. That is very helpful.

10 MS TOLANEY: I think, sir, just to clarify I think -- I may
11 be corrected, but I think the working premise has been
12 that this would all be possible and exactly as Mr Dryden
13 is saying the question is would it happen, would it be
14 desirable? But we will certainly get you the technical
15 side of it.

16 THE PRESIDENT: Fair enough. I do not anticipate it being
17 controversial, but it does seem to me that it may make
18 a difference how it is done and by whom it is done.

19 So let us leave it there. We have put down the
20 marker and I do not think you need delay us any further
21 in terms of the questions to the witness.

22 MS TOLANEY: Thank you. So, Mr Dryden --

23 A. If I can just make one second point arising from this
24 discussion on Professor Waterson's point, question about
25 the UK. I mean, a curious thing about the interregional

1 MIF part of the case is the restriction of competition
2 is said to occur in the acquiring markets in the UK and
3 Ireland. But these -- but the issuing side in that case
4 is in a sense everywhere but the UK, so it is -- and in
5 fact outside of the region the UK is in. So it is in
6 America, it is everywhere else really apart from here.

7 Of course it does not mean that we cannot learn
8 something useful from the UK, but strictly it is the
9 other issuing markets that would be then relevant.

10 PROFESSOR WATERSON: Thank you. I just wanted to be clear
11 about the example.

12 A. Yes.

13 MS TOLANEY: Going back now to the sort of hypotheticals
14 I think is the best way to put it.

15 Mr Dryden, an issuer, may I suggest, may want to
16 issue a card without interregional functionality if it
17 would allow the issuer to offer a cheaper product to
18 cardholders and the issuer perceived there was demand
19 from cost-sensitive consumers?

20 A. I think that is -- that is possible.

21 Q. I think what you say is that although that is possible,
22 interregional functionality is highly attractive to
23 cardholders and you refer to some evidence from Mr Korn
24 in your report, but I think it is fair to say that you
25 have not carried out any analysis yourself to identify

1 which consumers view interregional functionality as
2 particularly valuable?

3 A. Yes. So I think, I mean, two points here. I think the
4 lack of evidence point originates a little bit with me.
5 It is a point that I have made.

6 So the factual witness statements that I looked at
7 in the latter part of last year deal with the issue of
8 if -- if interregional MIFs were zero, how would the
9 issuers respond? And the way that the factual witnesses
10 dealt with that was entirely premised on sort of the
11 costs of interregional transactions and the
12 interregional MIFs and my reaction to that in my report
13 was that is a very incomplete analysis and a very
14 strange analysis frankly. Because the idea that an
15 issuer would only decide on the pros and cons, so the
16 costs and benefits of providing interregional
17 functionality on a card, without regard to the knock-on
18 demand that has for the card overall, including all of
19 the domestic transactions, seemed to me a highly
20 incomplete analysis that did not really make sense.

21 So it was sort of -- it was my point, if I can say
22 that, in my first report to say that this is a very
23 strange gap in the factual witness statements when they
24 come to address this question. I note that Mr Knupp
25 I think it was, when he gave evidence on this point,

1 confirmed my view because I think in many ways it is
2 a bit of a statement of the obvious; that -- that indeed
3 interregional functionality is an attribute of the card
4 scheme.

5 Q. I just want to focus on the question I asked if you do
6 not mind, which is simply, you yourself have not carried
7 out any analysis to identify which consumers view
8 interregional functionality as being particularly
9 valuable?

10 A. I have not done my own analysis.

11 Q. No, and interregional functionality will have particular
12 value to those customers who make a lot of interregional
13 transactions or expect to do so?

14 A. I agree.

15 Q. Somebody who is particularly concerned with
16 interregional functionality may also be somebody who is
17 likely to be sensitive to the costs of those
18 transactions?

19 A. There is going to be a whole distribution curve of
20 highly sensitive to highly insensitive people. I do not
21 know the shape of that curve.

22 Q. Because you have not done the analysis?

23 A. I have -- no, I have not done an analysis. The analysis
24 here would be not only of this sensitivity that counsel
25 is identifying, but the demand interlinkages in each --

1 on the issuing side between -- between the different
2 functionalities of a card.

3 Q. But at the other end of the spectrum somebody who never
4 travels, or travels rarely, may consider that
5 interregional functionality has no value at all and does
6 not want to pay for it?

7 A. That is true, but they are not generating any
8 interregional transactions. So I think they are sort of
9 irrelevant for the analysis.

10 Q. Well, not if they decide that they are going to switch
11 cards because they do not want to be charged for a
12 functionality they do not use.

13 A. But it is not too clear to me how a -- well, two things.

14 One is even with MIFs at their factual level one
15 could have cards that do not have interregional
16 functionality catering to people if they somehow can be
17 more cheaply provided catering to consumers who have no
18 intention of travelling and no willingness to pay for
19 interregional functionality. So, yes.

20 I have forgotten my second point, sorry.

21 Q. Do not worry. But if --

22 MR TIDSWELL: If I may. I think just the premise of the
23 question and I think it may be Mr Dryden's second point
24 is, I do not understand why the cardholder would be
25 charged for the interregional functionality if they did

1 not use the card.

2 MS TOLANEY: I am just going to come on to that. That was
3 my follow-up question which is: if issuers have to
4 impose or increase any cardholder fees to cover the
5 costs of interregional functionality in the
6 counterfactual where there is no income stream from
7 MIFs, then those who do not use that functionality may
8 be more inclined to switch.

9 MR TIDSWELL: Sorry. If I may, I think that is a slightly
10 different question than the one I asked and the question
11 you just asked, which was not in the counterfactual but
12 in the factual why an issuer would -- because I think
13 you were putting to Mr Dryden that there might be some
14 reason for a cardholder to switch if they had
15 interregional functionality on the card and did not use
16 it, and it was not clear to me what the driver for that
17 would be because there is no cost associated, as far as
18 I understand it, there is no cost associated with having
19 an interregional card, a card with interregional
20 functionality that you do not use. It is only when you
21 use it that you get --

22 MS TOLANEY: The premise was that there would be fees
23 imposed either way.

24 MR TIDSWELL: Well, but I am not sure -- that is really my
25 question. Mr Dryden should answer that question, but it

1 was not clear to me why you were putting that to him,
2 what the basis for that was.

3 MS TOLANEY: I was going to develop that, but I will do in a
4 moment.

5 I will let you answer the question.

6 A. So Mr Tidswell did indeed make my second point.

7 Q. Yes.

8 A. But I also agree with what has just been said, which is
9 if the -- if the fee that is being increased is a fee
10 that the cardholder incurs every time they make an
11 interregional transaction because it is related to the
12 transaction, then the -- then the person who does not
13 make interregional transactions is unaffected and they
14 are not going to switch. It would have to be some
15 overall card fee.

16 Q. But I think the reason I was positing this, and we will
17 come on to, Mr Dryden's analysis is that there would be
18 a cross subsidy and it would not be -- no one would mind
19 the cross subsidy of subsidising the costs of
20 interregional transactions if you do not -- even if you
21 do not use them and I am going to explore that with you.

22 THE PRESIDENT: Well, no, but I am now lost because the
23 point Mr Dryden is making is that if you have an
24 interregional fee that is transaction dependent, in
25 other words it is only when you execute an interregional

1 transaction that you pay, then if you do not do
2 interregional business you do not pay and no question of
3 subsidisation or anything arises.

4 So it is only if you are postulating a fee that is
5 independent of use of the card, a fee that is related to
6 a use that you are expressly not using that your example
7 runs.

8 MS TOLANEY: Yes.

9 THE PRESIDENT: It seems to me a rather odd example on that
10 basis because why would I, a cardholder, pay for
11 functionality that I expressly am not getting?

12 MS TOLANEY: Exactly. I am coming on to this.

13 THE PRESIDENT: Right.

14 MS TOLANEY: Mr Dryden's case is that even if there is a
15 card, an overall cardholder fee I think, he does not
16 accept people would necessarily switch. But I was going
17 to develop this.

18 It may be I put the first question that Mr Tidswell
19 picked up badly, but I am trying to just develop this
20 slowly by building blocks.

21 THE PRESIDENT: All right. Okay, let us see how we go,
22 but ...

23 MS TOLANEY: The question I wanted to put in this context
24 was unless interregional functionality is separately
25 priced and pays its own way, there will be a cross

1 subsidy from those customers who do not value the
2 functionality to those who do?

3 A. No, I do not think that is correct and that is not the
4 point that I have been making.

5 Q. Right.

6 A. So I think there is kind of two dimensions of cross
7 subsidy, which I think we are now touching on in the
8 discussion.

9 Q. Yes.

10 A. So one would be cross subsidy between cardholders who
11 use interregional functionality and those who do not and
12 have no interest in it and that is not my point.

13 The other is, in effect, the cross subsidy -- and we
14 will maybe come back to that word -- within a card
15 proposition to cardholders who value the interregional
16 functionality but also value the domestic functionality.
17 So then if you reduce the interregional MIF there is not
18 a reason why the reduction in the interregional MIF has
19 to manifest itself in a worsening of the -- only or
20 specifically in the interregional aspect of that offer.
21 It can be also in relation to the non-interregional
22 domestic part of that offer.

23 Q. But that is where my questions were coming at - of if
24 there is somebody who does not use the interregional
25 functionality and essentially the domestic element of

1 the card is cross subsidising that use, it will make the
2 card less attractive to those people at the very least?

3 A. Yes. But issuers, I mean they proliferate a huge number
4 of cards targeting different segments of demand.

5 So there -- no doubt, there would be card offers
6 that are customised and targeted on those people.

7 Q. But that is not a question about what the issuers would
8 think in this scenario. It is the question about what
9 the cardholders would think about in this scenario, that
10 subset of cardholders.

11 A. Yes, but the premise of your question is going back to
12 the case that I said I am not making, so it is the cross
13 subsidy between the people who do use interregional
14 functional as well as domestic and those who are purely
15 domestic. Whereas I am saying that what happens is when
16 the interregional MIF falls to zero any impact that has
17 on the attractiveness of the issuer offer for those
18 cards that are catering to interregional and domestic
19 does not have to entirely manifest itself on the
20 interregional part of the offer because it is a joint
21 product. There is a combined demand.

22 Q. But that is why I was picking at that -- sorry,
23 Mr Dryden, I will not labour it. You are saying it is
24 a joint demand and I am giving you a subset who do not
25 have any demand for the interregional function, they do

1 not have that joint demand?

2 A. Yes, I understand. But it is a joint demand for those
3 who demand it jointly and it is not for those who do
4 not.

5 Q. But that subset is not a joint demand and that is why
6 I was saying that surely that would render the card less
7 attractive if Visa imposed for the interregional element
8 because it was not paying its own way?

9 A. No, I disagree. They would just get a different card
10 offer.

11 Q. So that would require them to not -- to take a different
12 card that did not have the interregional functionality,
13 is that the point?

14 A. For example.

15 Q. Right. But we were talking about therefore it is
16 a standalone product. We go back round the circle.

17 A. I do not think anything that has been said undermines my
18 only point here, my only point here, which is if
19 interregional MIFs are reduced issuers who are issuing
20 cards that cater to people who want to use the cards for
21 interregional and domestic transactions, any change in
22 PQRS of that card need not only manifest itself on the
23 interregional part of the card.

24 I do not think anything has undermined that idea.

25 Q. Can we go to your first report, please, at page 214, it

1 is D.54. I will give the full reference, sorry,
2 {RC-H2/1/214}.

3 It is paragraphs D.54 to D.56 I want to look at.
4 Obviously some of the information here is confidential,
5 so please do not read the figures out, but if you could
6 read those paragraphs to yourself and just refresh your
7 memory. (Pause)

8 A. Yes.

9 Q. So you can see there some data on the level of MIF
10 income for non-UK non-EEA issuers, at paragraph D.54.

11 A. Yes.

12 Q. Then the UK acquired MIF income accounted for by
13 interregional MIFs at D.55?

14 A. Yes.

15 Q. They are significant amounts, are they not?

16 A. Yes, all of the quantities in this case are significant.

17 Q. I think you would agree that it is important to take
18 into account that a substantial proportion of all MIF
19 income comes from interregional transactions?

20 A. Yes. I think the proportion of -- of, just as counsel
21 said, the proportion of MIF, of total MIF income that
22 comes from interregional transactions is significant.

23 Q. So losing MIF income means issuers lose substantial
24 revenues?

25 A. Yes, it is a significant -- the -- repeating myself --

1 the interregional MIFs are significant.

2 Q. That is why if you lost as an issuer those revenues you
3 would need to find some other way to meet the costs of
4 interregional functionality?

5 A. Well, I think that assumes a hypothecation of the
6 interregional MIF to the provision of the interregional
7 functionality that does not really exist.

8 The -- what has to be true, what is true is that if
9 the interregional MIFs are reduced to zero then on the
10 issuing side issuers who are issuing cards that have
11 interregional functionality and are used for
12 interregional transactions, they have lost a revenue
13 stream, and then in the face of the lost revenue streams
14 they have to reoptimise and there are lots of -- lots of
15 ways in which that reoptimisation can happen. It can
16 be -- it can be the issuer sacrificing some of their
17 profit, it could be the issuer scaling back on
18 marketing. It could be the issuer increasing fees, not
19 limited for the reasons I was giving to interregional,
20 or it could be reducing rewards for the reasons I have
21 given earlier not limited to interregional transactions.

22 So when you take away the revenue stream -- and
23 decline rates has been mentioned as well. I am not
24 saying I agree with that, but, you know, that has been
25 given as another reaction. So when you take away

1 the revenue stream there is a host of reactions that are
2 basically a reoptimisation on the part of the issuers.

3 Q. So I think the answer, Mr Dryden, that is very helpful,
4 but I think the answer to my question was in the absence
5 of that revenue stream, issuers would need to find some
6 other way to meet the costs of interregional
7 functionality and I think the answer to it is: yes?

8 A. Yes. I prefer the way that I put it because it avoids
9 the impression of hypothecation. But -- but -- so
10 I repeat the answer I have given.

11 Q. Well, as you say, two of the options you mentioned are
12 increased cardholder fee, which is one of the reasons
13 I was trying to explore that in different ways, or
14 issuers may decline more transactions in the hope of
15 reducing fraud costs?

16 A. Mm-hm.

17 Q. Correct?

18 A. Yes. Sorry, I understand what is being put.

19 Q. Yes. Now, on that basis going back to without poking
20 this, if either or both of those eventualities happened,
21 so cardholder fees were increased and let us say it is
22 an overall fee taking the President's question, or
23 transactions were being declined more that is going to
24 make the card less attractive to certain users?

25 A. That is correct.

1 Q. So the actual question is whether issuers could provide
2 a competitive interregional offering without interchange
3 fee revenues, correct?

4 A. I do not think that is quite -- I do not think that is
5 quite the question because as I have explained in the
6 concurrent session and subsequently, I can take any
7 arbitrary level of MIF as my starting point and have it
8 flowing across to the issuing side and it will fund
9 whatever offers it funds on the issuing side, and
10 I could take today's MIF and I could double it and it
11 would flow across. The issuing offers would become that
12 much more attractive.

13 But the current level of the MIF is a function of
14 the must take properties of the cards on the acquiring
15 side and therefore there is nothing sort of sacred about
16 the current level of the issuer's offers that has to be
17 protected. The question is what is the efficient level
18 of the MIF so that the issuing side is being correctly
19 subsidised if it needs to be subsidised.

20 Q. Well, I think in your report what you say is that cross
21 subsidy is the answer, which is why I mentioned cross
22 subsidy. Can we have a look at {RC-H2/1/213}, and that
23 is D.48.

24 A. Yes.

25 Q. But cross subsidy would mean the issuers had to offer

1 either a more expensive or a less attractive product to
2 cardholders generally?

3 A. So just in case this becomes confusing subsequently. We
4 have just jumped -- I was a second ago talking about the
5 subsidy flowing from the acquiring side to the issuer
6 side.

7 Q. I understand that.

8 A. So we are now talking about a completely different
9 notion of cross subsidy. Just to avoid confusion.

10 So now we are back on the question of whether it is
11 or essentially in my mind whether it is or it is not the
12 case that in offering the interregional functionality on
13 a card that also has domestic functionality the issuer
14 is going to take into account that the quality of the
15 interregional functionality also affects the demand for
16 the card overall and therefore the demand for the
17 domestic functionality.

18 So I think that is a kind of joint product issue and
19 one can view that as embodying some notion of a subsidy,
20 but I think it is the right -- within that card offer --
21 but I think it is -- I think it is the right way to
22 think about demand for those cards.

23 Q. Just to be clear, Mr Dryden, I am focusing at the moment
24 on the issuer and the revenue stream and offering the
25 card. I know you want to come on to the acquiring side

1 and we are going to do that, but I am focusing on this
2 at the moment --

3 A. Sorry to interrupt. My answer a second ago was purely
4 on --

5 Q. I agree. I was just responding to your saying that we
6 have moved topics. I am sticking on this one topic and
7 the topic that I am still pressing on is what issuers
8 would want to do in terms of increasing fees or
9 declining and so on, which we will look at, would
10 ultimately be a factual question?

11 A. I agree with that.

12 Q. Because it might depend on how profitable the rest of
13 the customer relationship is to the issuer?

14 A. Well, I very much agree with that.

15 Q. Now, I think your basic position from what we have
16 explored this morning is that interregional
17 functionality would be considered to be sufficiently
18 valuable that issuers would continue to offer it and
19 absorb the loss of revenue stream through other means?

20 A. Yes, I think at least some issuers. I am not saying
21 every single issuer, but I still think there is going to
22 be significant demand on the issuing side and
23 a willingness to pay on the part of consumers for cards
24 that have interregional functionality.

25 Q. Can we have a look at some real-world examples of issuer

1 reactions to loss of revenue to show and test whether it
2 is realistic that they may take steps?

3 A. Of course.

4 Q. The first example is the issuer reaction to the 2019
5 Commitments where there was a substantial increase in
6 decline rates on interregional transactions following
7 those commitments and if we could look at your
8 second report, please, at {RC-H2/2/41} and it is
9 paragraph 8.24. So if you could just remind -- if you
10 could just remind yourself of that, please.

11 A. Yes. (Pause).

12 Q. Also paragraph 8.25 and 8.26.

13 A. Yes.

14 Q. If you let me know when you have read them we will go
15 over the page. (Pause)

16 A. We can turn the page.

17 Q. Thank you. So over the page, you focus there on the
18 evidence of a substantial increase in decline rates, do
19 you not?

20 A. Well, I do not -- Scenario 4 is about decline rates.

21 Q. Yes, exactly.

22 A. So if I am dealing with Scenario 4, then I am inevitably
23 dealing with decline rates.

24 Q. Exactly. That is what the paragraph is addressing.

25 A. Correct.

1 Q. Just pausing there. You are talking about the reduction
2 in interregional MIFs after the Commitments Decisions
3 in April 2019 pursuant to which Mastercard and Visa's
4 commitments were capped.

5 A. Correct.

6 Q. For card not present transactions, which represent the
7 majority of interregional transactions, those caps
8 involve very limited reductions in MIFs?

9 A. Yes, I make this point; they are significantly more
10 limited than reducing to zero.

11 Q. Yes, and we see for credit cards 1.5% of the transaction
12 value and for debit cards 1.15% of the transaction
13 value?

14 A. I cannot see those numbers.

15 Q. Sorry. They come from the Commitments Decisions.

16 A. Okay.

17 Q. Yes, and when we talk about decline rates we are talking
18 about the issuer declining a transaction when the
19 customer tries to pay at a merchant?

20 A. Correct.

21 Q. You note that in the first paragraph of your report, the
22 decline rate increased markedly in the first 12 months
23 after the 2019 Commitments?

24 A. Yes.

25 Q. So from 17% roughly to 46% roughly?

- 1 A. Yes.
- 2 Q. By 2022, the decline rate had fallen to under 21%?
- 3 A. Yes.
- 4 Q. So that is still 3.3% higher than the original 17.7%?
- 5 A. Yes.
- 6 Q. Then you suggest that the decline rate has settled back
7 down to around 21%?
- 8 A. Yes, I do not think I come back to the 21%, do I, again
9 after the -- I say by 2022 the decline rate had fallen
10 to under 21%.
- 11 Q. Yes, so that is where it has landed?
- 12 A. Exactly.
- 13 Q. Yes, but even that is a 3.3% higher figure than before
14 the change?
- 15 A. Correct.
- 16 Q. Which is, in relative terms, about a 19% increase on the
17 prior rate?
- 18 A. Correct.
- 19 Q. It means that over one fifth of transactions are being
20 declined even now?
- 21 A. Correct.
- 22 Q. In paragraph 8.27B, you refer to Mr Knupp's evidence,
23 I think you have mentioned that before.
- 24 A. Yes.
- 25 Q. You suggest that he has not considered whether there was

1 any factor other than the change in MIF which could have
2 contributed to the increase?

3 A. Yes.

4 Q. So could we quickly have a look at Mr Knupp's statement,
5 which is at {RC-F4/7/14}, it is paragraph 48. Is that
6 the wrong reference? Sorry. We will get a --

7 Sorry. We will just try and turn that up. It is
8 {RC-F4/8/14} rather than 7. Thank you.

9 We are looking at paragraph 48. We want to go over
10 the page but if you read the full paragraph and let me
11 know when you are ready to go over. (Pause)

12 A. Yes.

13 Q. Now, over the page, you see that Mr Knupp says that
14 this -- that the decline rate can be specifically linked
15 to the reduced interchange fees because there was no
16 change to the domestic UK acquired decline rates, which
17 remain consistently at or very close to 6%.

18 So you can see that his conclusion is because there
19 is no change to the domestic UK acquirer decline rates
20 that the increase can be specifically linked in the way
21 he suggests?

22 A. Which increase? The increase to 46% or the increase to
23 21%?

24 Q. Well, Mr Dryden, have you identified anything else that
25 caused a dramatic increase in declined transactions?

1 A. So I have not -- I have not analysed this in detail, but
2 just a few points. I -- first of all, this is happening
3 I think in the middle of Covid as well, so I think there
4 could be huge changes in the nature of transactions
5 occurring at this point which may prompt some reaction
6 in terms of decline rates and essentially the
7 following -- if -- I thought to be honest that
8 Mr Knupp's position was that the fairer, from his point
9 of view, the fairer assessment of the impact of the
10 reduced IFR on the decline rates was going from 17.7% to
11 just under 21% and I am not sure it can really be -- on
12 this, I am not sure it can really be true.

13 I am not sure it really hangs together if you are
14 saying he is attributing the increase -- well, let me
15 leave it there.

16 My understanding was his long-run effect or his even
17 medium-term effect was to the 21%.

18 Q. Well, that is, as we have established, that is still
19 one-fifth of transactions more being declined whatever
20 percentage it is?

21 A. Yes, so if I can just make --

22 Q. But the Covid point is a new point. That is not
23 something in your report, is it?

24 A. I -- I think I am operating on the basis which I think
25 is the same basis as Mr Knupp, that really it is -- that

1 the -- if there is an effect, if there is an effect it
2 is 17.7 to 21. But just to make a few more comments.

3 The -- you know, I very much respect Mr Knupp's
4 interpretation of this, but even the 17.7 to the 21
5 could have confounding factors. I do not know. I have
6 just not analysed it.

7 Q. Yes.

8 A. So I am not in a position to say. The PSR, I think
9 I have already mentioned this, the PSR looked at whether
10 there was a relationship between IFR and decline rates
11 and I think they concluded that and they got evidence
12 from the schemes and I think they concluded that there
13 was not.

14 However, somewhat more consistent with counsel's
15 position I can -- I can see that logically there can be
16 a connection between MIFs and decline rates or -- or
17 that there might not be in the following sense, which is
18 when a scheme is deciding whether to accept or decline
19 an interregional transaction they are making essentially
20 an ex-ante assessment of the profitability of that
21 transaction and they are thinking: Well, if I allow the
22 transaction to go through -- sorry, the issuer -- if
23 I allow that transaction to go through, I get the
24 benefit of the fees from the -- I get the benefit of the
25 fees from the transaction. From the cardholder, I get

1 the benefit of the interchange fee, but I have the risk
2 that it is fraudulent and if there are somehow
3 indicators associated with the transaction that it is
4 more likely to be fraudulent, the issuer is more likely
5 to turn it down.

6 If I push the MIF up more and more it is possible
7 that the scheme will choose to accept some transactions
8 because ex-ante they are profitable because they are
9 just attractive, you know, they are subsidised to
10 a greater extent and the limit of the MIF was
11 essentially infinite. The issuer would accept every
12 single transaction regardless of whether it was going to
13 be fraudulent or not because everyone would be
14 profitable. So you can see that there could be
15 a logical relationship. The shape of that relationship
16 for different levels of interchange fee is an evidential
17 thing.

18 But also coming back to what I have been saying
19 about other parameters of competition, like price,
20 quality, range, service the decline rate is not really
21 different from those. There is nothing sacrosanct about
22 the current level of the decline rates. If lower
23 declines is a benefit to merchants then that is
24 a category of benefit that in principle could be used at
25 the 101(3) stage to justify the positive MIF.

1 Q. Well, Mr Dryden, I was testing your evidence, you having
2 accepted the 19% increase in decline rates, that
3 Mr Knupp's evidence was not clear because he had not
4 considered any other factor which could mean the decline
5 rate had increased other than the change in MIF and
6 I show you that his evidence is that that is why there
7 has been an increase in the decline rate.

8 The real question now is --

9 A. But, I am sorry, I think it is -- what I said is still
10 the case. So you have that paragraph, if I am not
11 mistaken, you have that paragraph of Mr Knupp saying it
12 starts at 17.7, it goes up to I think 46 --

13 Q. 46% and then it settles down at a lower figure.

14 A. Yes.

15 Q. But it is still a fifth of transactions being declined?

16 A. That is right. But he is not -- I mean, there is
17 a huge, obviously a huge leap and then a very big
18 reduction coming back to slightly above where you start.
19 He is not -- I think it is still true that he is not
20 discussing any other factors that are influencing
21 that -- the evolution of the decline rate over those
22 two years.

23 Q. That is right because he links it to the change in the
24 MIF and my question to you was you had not analysed
25 anything else it could be to which you said: Well, it

- 1 might be Covid?
- 2 A. No, that is correct. But I -- it is a little bit of an
3 unsatisfactory explanation to say I have got something
4 that shoots way up and then comes way back down again
5 I am linking it to the interchange fee without -- if it
6 is wholly attributable to the interchange fee he is
7 going to have to explain why it went way up and then
8 came back down again and it would be a more satisfactory
9 answer to know that things like Covid with an effect on
10 transaction makes and etc. you are not part of the story
11 that needs to be disentangled.
- 12 Q. But you have not done any analysis that would suggest he
13 is wrong in his conclusion?
- 14 A. I have not analysed the relationship between interchange
15 fees and optimal decline rates, which I think is the
16 issue here.
- 17 Q. The payment guarantee is the guarantee from the issuer
18 which guarantees payment to the acquirer and therefore
19 the merchant in the event of cardholder fraud or
20 default?
- 21 A. Yes.
- 22 Q. So a card, I think you would agree, is not particularly
23 valuable if it gets rejected significantly?
- 24 A. I am sorry, could you repeat the question?
- 25 Q. A card is not particularly valuable if it gets rejected

1 a significant proportion of the time?

2 A. To the cardholder?

3 Q. Correct.

4 A. Yes. The cardholder would, all else equal, the
5 cardholder would prefer their card to be accepted more
6 often; indeed all the time.

7 THE PRESIDENT: Well, Mr Dryden, is there also -- and it may
8 be that you are coming to this -- a wider effect in that
9 if cardholders generally perceive that cards, even if it
10 is not their cards being rejected, that will affect
11 their inclination to use cards?

12 A. I was not coming to that, sir, but I think it is a good
13 point and I can see that there could be some demand
14 effect from just knowing that other people's cards have
15 been rejected.

16 PROFESSOR WATERSON: But presumably a knowingly fraudulent
17 cardholder would be correctly rejected?

18 A. Well, I think the issue with fraudulent transactions is,
19 I mean if the issuer could perceive that the transaction
20 was definitely fraudulent ex-ante they would always
21 decline it. But what they have is some, I guess what
22 they have is some indicators around the transaction; the
23 location, no doubt there is a huge number of metrics and
24 algorithms trying to work out the probability that this
25 is fraudulent.

1 The higher the MIF -- there is a logic that says the
2 higher the MIF the higher the decline rate you are
3 prepared to tolerate because as the MIF gets higher and
4 higher more things (inaudible) profitable because you
5 are willing to tolerate a slightly higher fraud rate
6 that the algorithm is producing. I think it works like
7 that.

8 What we do not know is the sort of shape of the
9 curve which really matters of how of -- in the -- so as
10 the interchange fee comes down, how much it is optimal
11 to change the decline rate.

12 MS TOLANEY: So the President's question was apt because if
13 we look at your report in second report at {RC-H2/2/42},
14 and we are looking at paragraph 8.27 again but
15 subparagraph (b).

16 A. Yes.

17 Q. So you suggest there that the factual witnesses do not
18 provide any evidence that the increase in declines
19 resulted in a shift to other payment methods.

20 But there are only two real possibilities, are there
21 not; either the consumer abandons the transactions that
22 have been declined or they use another payment method?

23 A. I think that is roughly speaking correct.

24 Q. So the evidence on decline rates seems like good
25 evidence that issuers regard MIF income on interregional

1 transactions as important to their willingness to bear
2 the risks and costs of those transactions. I think that
3 follows from what you have just said?

4 A. It is an evidential question and I will not repeat
5 everything that I have just said. In my opinion the
6 decline rate can just be thought of as yet another PQRS
7 parameter. Improving it is attractive to the
8 cardholder. The question is whether it is overprovided
9 because the MIF is too high.

10 Q. Can we go to your first report, please, {RC-H2/1/229}.
11 We are looking at paragraph 110 (d)?

12 A. Yes.

13 Q. You say at the end of that paragraph that you
14 acknowledge the impact of the 2019 Commitments on the
15 overall consumer interregional MIF may have been
16 limited?

17 A. Yes.

18 Q. We know that the levels of reduction of the MIFs were
19 limited?

20 A. Over the sort of blended reduction in the MIF because it
21 was a significant reduction for -- I think you have card
22 present and card not present --

23 Q. That is right.

24 A. -- and a significant reduction for one and not
25 a significant reduction for the other and sort of

- 1 blended it is not a very big reduction.
- 2 Q. Exactly. So we know that for card present transactions
3 MIF will reduce to 0.2% for debit and 0.3% for credit?
- 4 A. Yes.
- 5 Q. Those were substantial reductions, but the card not
6 present transaction MIFs were reduced to 1.15 for debit
7 and 1.5 for credit?
- 8 A. Yes.
- 9 Q. That left interregional MIFs for card not present
10 transactions much higher than domestic MIFs and not very
11 much below their previous levels?
- 12 A. Yes.
- 13 Q. The vast majority of interregional transactions are card
14 not present transactions?
- 15 A. Certainly the majority.
- 16 Q. So the position is that the 2019 Commitments would have
17 had a very limited impact on interregional MIF income
18 for issuers?
- 19 A. A somewhat limited impact and that is what I am saying
20 at this point in my report.
- 21 Q. I think it is a pretty limited impact is what I say, but
22 we do not need to fight about that. But the point is
23 that the decline rates increased by one-fifth even in
24 response to a relatively modest reduction in MIFs rather
25 than a total loss of all MIF income?

1 A. Yes. If you -- if you take the difference between 17.7%
2 and slightly less than 21% it is the lower effect of
3 this, that is -- that is -- there is something in that
4 point.

5 But -- but we just have a whole host of unanswered
6 questions in my opinion. We do not know that the
7 difference between 17.7 and less than 21 is really
8 attributable to this. We do not know to what extent the
9 scheme has reoptimised fully in the light of lower MIF.

10 So -- and I am thinking about this point for the
11 first time -- but I mean there may be -- I mean as
12 a cardholder -- as a cardholder there may also be a kind
13 of cardholder selection issue as well that affects the
14 decline rate. So the basic maths is a 3.3% change in
15 (inaudible) not very big. On interchange fee reduction
16 I am with counsel on the basic maths, but I am saying we
17 do not really know that the increase in the decline rate
18 is attributable to the interchange fee. The PSR could
19 not establish that connection and we do not really know
20 that, even if the scheme is fully reoptimised.

21 Q. Well, I understand your points, Mr Dryden. I am not
22 going to press them any further.

23 But what I would say to you is they have no evidence
24 to the contrary, you have Mr Knupp's evidence and no
25 evidence to the contrary, that there is some other

1 factor that we do not have regard to that would suggest
2 there is some other reason so prima facie there appears
3 to be a link?

4 A. I thought Covid had come up in the discussions on this,
5 but I might be mistaken at least as a possibility. I am
6 not aware of it having been proven as the reason.

7 Q. No, I am not aware it is mentioned in anybody's report
8 but I will be corrected.

9 MR BEAL: I am sorry to rise, but I do not want an incorrect
10 factual premise to be put. Covid was discussed with
11 Mr Knupp in his cross-examination. I will come back to
12 it in cross-examination because I do not want to
13 interrupt.

14 MS TOLANEY: Sorry, I meant the expert evidence.

15 MR BEAL: It is clearly not in his report.

16 MS TOLANEY: Right, yes, it is not in the expert reports is
17 what I was saying. I appreciate that.

18 Can we move to a second example, which is the
19 collapse of Maestro. You refer in your first report to
20 the switching from the Maestro debit to Visa between
21 2000 and 2006. I think you address this in
22 {RC-H2/1/228} and it is paragraph D.110 (b)?

23 A. Yes.

24 Q. As you say there, Maestro lost market share to Visa from
25 2008 because of Maestro's interchange fees being lower

- 1 than Visa's --
- 2 A. Yes.
- 3 Q. -- which led to major banks switching to issuing Visa
- 4 debit cards?
- 5 A. Yes.
- 6 Q. You acknowledge that as evidence that banks do take into
- 7 account interchange fee income when choosing which brand
- 8 of cards to issue with some caveats which we are going
- 9 to come back to.
- 10 A. Yes. I imagine interchange -- if an issuer has a choice
- 11 of schemes whose cards to issue, interchange fee income
- 12 will be part of their choice.
- 13 Q. Maestro lost almost its entire market share over a few
- 14 short years, did it not?
- 15 A. I cannot remember exactly, but I do not disagree with
- 16 that.
- 17 Q. Could we have a look at some of the figures, please. It
- 18 is {RC-J5/24.2/76}. This, to orient you, is in
- 19 Mr Justice Popplewell's judgment as he then was, in the
- 20 AvM proceedings and we are looking at paragraph 238.
- 21 You see here the percentage market shares are set
- 22 out?
- 23 A. Yes.
- 24 Q. We can see in particular in the last sentence:
- 25 "Mastercard's share of the UK debit card market

1 declined from 2008 dropping to only 3% by 2011, whilst
2 Visa's share of the UK debit market increased to 97%, as
3 shown by the graph below."

4 A. Yes.

5 Q. You accept that the dominant cause of the switching to
6 Visa debit was the differential in MIF income between
7 Maestro and Visa, was it not?

8 A. I think it will have been a significant factor. I am
9 not sure that I have said it is the dominant factor and
10 please do not -- I do not want to be misunderstood.

11 I -- I can easily see that interchange could be
12 a significant or could be the dominant factor for some
13 of these examples. Maestro is not the only example.

14 But I hesitate to say it is the dominant factor for
15 a specific example because some of the examples the
16 failing scheme had other problems and I cannot recall if
17 that applies to this one or not.

18 Q. I think I am using your words, but perhaps not with the
19 caveat you have given. If you look at 239 of this
20 judgment, which is over the page, 77, what you are cited
21 as saying is that it was perhaps the dominant
22 contributor.

23 A. Yes. I had forgotten I said that.

24 Q. Yes.

25 A. But it is entirely consistent with what I have just

1 said. I did not say it was. I am happy to agree it may
2 be.

3 Q. Yes, you say it:

4 "... was a very significant contributor, perhaps the
5 dominant contributor to [this] outcome."

6 A. Sorry?

7 Q. Then again at 249?

8 A. What I -- strictly speaking what I said is it would seem
9 to me entirely plausible that it was a very significant
10 contributor, and I obviously accept that it could have
11 been the dominant factor which is I think exactly the
12 same as what I just said.

13 Q. Thank you. Just to show you this, it is the same at
14 paragraph 249, page 81. You see the judge finding on
15 the evidence that: Maestro's uncompetitive interchange
16 fee pricing was a very significant factor in the
17 issuer's decision to switch away, quite possibly the
18 single most influential one, whilst not being the only
19 significant one, this is in line with Mr Dryden's
20 evidence which had already been cited.

21 A. Yes.

22 Q. The difference in MIF rates between Maestro and Visa
23 debit was substantial but not huge, correct?

24 A. That is a bit non-numerical. Substantial but not huge,
25 I am prepared to agree with that.

1 Q. Thank you. Could you go back to your report, please, at
2 {RC-H2/1/228} and we are looking at paragraph D.110 (b).

3 So you say there are differences between this
4 example and the present situation and if we I think go
5 over the page, please, {RC-H2/1/229}. If we can make it
6 a bit larger, please, thank you.

7 So you set out your reasons and if we could take
8 each one. Taking (i), you say Maestro only concerned
9 consumer debit cards and not commercial cards.

10 A. Yes.

11 Q. But you do not have any reason to think issuers of
12 commercial cards would react differently, do you?

13 A. I think what is -- one answer -- there is an answer to
14 that question which is no. So I think the general --
15 the general idea that consumers or commercial customers
16 would react to a worse offering and switch is there for
17 both of them.

18 The difference -- what may be a significant
19 difference or what I think is a significant difference
20 is if in the -- is distinguishing situations where the
21 competitor or both the affected scheme and the
22 competitor are both generalists, so they both have
23 a sort of universal acceptance proposition, versus where
24 the affected scheme is a generalist and the rival is
25 a specialist so has limited acceptance and a kind of

1 niche offer.

2 So the difference does not lie in consumer versus
3 commercial so much as in the nature of the -- nature of
4 the competitor that we are talking about.

5 Q. Well, we will come on to -- I know you have got views on
6 Amex. But just on this example I think you would accept
7 that there is no reason to think commercial -- issuers
8 of commercial cards would act differently per se subject
9 to your specialist point which we will address
10 separately?

11 A. Yes, I would just repeat in what I just said.

12 Q. In (ii) you say the interchange fee differential was on
13 domestic not interregional transactions and again there
14 is no reason why this should matter?

15 A. No, I think that should matter because although it is an
16 empirical issue how much it matters, but if the
17 interchange fee is on the domestic -- for a given
18 interchange fee differential on domestic, that is going
19 to matter more than the same interchange fee
20 differential on interregional transactions because the
21 interregional transaction is not a standalone product in
22 the way that I described earlier. There is joint
23 demand, so the differential is not -- is going to play
24 out in a different way. So one would then have to be
25 a bit careful reading across one example to the other.

1 Q. But what we can see from the Maestro example is that
2 issuers are highly sensitive to price differentials in
3 MIFs because Maestro concerned a difference of 0.09%.

4 A. Yes, that example showed sensitivity.

5 Q. The price differential we are talking about in the
6 interregional counterfactual would be something like
7 1.15%, so that is 9 basis points compared to 115 basis
8 points if you compare the examples?

9 A. I -- I agree that is the numerical comparison. What
10 I am trying to say, you know, I put these examples in.
11 I think there may be even some other examples and I am
12 just saying that one has to be -- it is more complicated
13 than just saying I have got this numerical difference in
14 interchange fee in this example and therefore it reads
15 across to the situation that I am concerned with.

16 Some things may be learned from these, but one
17 cannot just look at the numbers and go: Ah, that level
18 of switching is associated with that level of
19 interchange fee if I transport that to interregional
20 MIFs or to commercial card MIFs in a different market.

21 Q. I am not doing a numerical example in that way,
22 Mr Dryden. I am just simply saying that the Maestro
23 example shows a sensitivity?

24 A. I agree with that.

25 MS TOLANEY: Then at (iii) you say there is a difference

1 to Amex?

2 Q. I am sorry. I meant -- sorry -- I do mean issuers
3 switching to Amex. Yes, I do.

4 A. Okay.

5 Q. Amex also has a strong presence in key sectors for
6 interregional transactions, does it not, like travel and
7 hospitality?

8 A. Yes or at least I would say a significant presence.

9 Q. So you would also expect Amex acceptance to be
10 relatively high amongst large merchants that have a lot
11 of interregional transactions?

12 A. Yes.

13 Q. Could we look at Mr Holt's report please at
14 paragraph 352, that is {RC-H4/3/114}. So you can see
15 here the acceptance rate for Amex in Europe and the UK
16 and what we can see here is in the UK in 2018 the retail
17 banking research estimates that some 82% of all
18 merchants in the UK accept Amex, do you see that?

19 A. I do.

20 Q. That seems to be growing, does it not, because of what
21 Mr Holt says about the new UK merchants signed up
22 to accept Amex cards?

23 A. Yes.

24 Q. Then if we look at paragraph 353, please, Mr Holt sets
25 out data from the Claimant's screening survey an Amex --

1 A. I am sorry, sorry. It may well mean growth. I suppose
2 it depends how many merchants, the rate of churn of
3 merchants because merchants will fail. Some may also
4 stop accepting Amex. So this is consistent with growth.
5 It does not quite prove growth.

6 Q. Yes, but you would accept we have already looked at the
7 statistic of 80%, it is pretty high and it looks like it
8 has grown?

9 A. Well, I would just refer to what I just said.

10 Q. Okay. Go to paragraph 353 where Mr Holt sets out data.
11 It is confidential, so please do not read out the
12 figures but the data is from the Claimants' screening
13 survey on Amex acceptance rates in the interregional
14 segment of the market and what we can see are very
15 substantial acceptance rates, can we not?

16 A. Numbers of -- yes, numbers have been on those acceptance
17 rates.

18 Q. Amex also has a strong market presence amongst affluent
19 cardholders who are, on average, more likely to make
20 interregional transactions?

21 A. Yes. That would be relatively -- relatively overweight
22 I would have thought for those customers.

23 Q. Amex, I think we can agree, charges much higher merchant
24 fees than Merchant Service Charges that are charged by
25 Mastercard and Visa?

- 1 A. Higher, yes.
- 2 Q. If Amex sustained those rates or anything like them it
3 could make available very high MIF income to issuers?
- 4 A. Implicit MIF income, yes.
- 5 Q. Amex's 3.5 party model, also known as its Global Network
6 Service, or GNS, allows financial institutions to issue
7 Amex cards?
- 8 A. That is correct, but I must confess I get a bit lost
9 about where and when GNS operates on the issuing side.
- 10 Q. What I was going to say to you is that given Amex would
11 be incentivised to extend its GNS business model to
12 countries which it does not issue in currently if it saw
13 the potential to grow its market share?
- 14 A. If it saw the potential to grow its market share
15 profitably consistent with its overall strategy, then
16 that -- it may well do that.
- 17 Q. Even if it did not do that it could increase its market
18 share over time through cardholder switching?
- 19 A. Yes. Cardholder switching is the other -- is a route by
20 which Amex can increase its market share.
- 21 Q. Focusing on the issuer and cardholder side. Amex is
22 well placed to take interregional market share from
23 Mastercard and Visa in a counterfactual where there is
24 no interchange fee?
- 25 A. I think it is well -- it is well placed, is better

1 placed than maybe, and I suspect well placed, to capture
2 some of that demand. It is not well placed as things
3 stand to capture another segment of that demand. It
4 really depends on whether the cardholder is satisfied
5 with incomplete acceptance or they also want
6 interregional card that has effectively the promise of
7 universal -- of nearly universal acceptance.

8 Q. Well, I think you are right about talking about Amex's
9 current acceptance rate, but let us say that Amex
10 recognises that it has, in order to develop its market
11 share it needs to have a higher acceptance rate and
12 takes those steps, then it could grow its market share
13 significantly?

14 A. Yes and that choice is obviously already available to
15 American Express. Its incentives could change with
16 a different -- with a change in interchange fees for
17 Visa and Mastercard. Currently it chooses not to pursue
18 a universal acceptance strategy.

19 Q. Now, can we look at Dr Niels' scenarios and, in
20 particular, he considers scenarios about how cardholders
21 might have reacted in the counterfactual where the
22 interregional MIF was zero and in order to understand
23 cardholder behaviour we need to take into account how
24 issuers and Mastercard may have reacted, do you agree?

25 A. Yes.

1 Q. We also need to consider the extent to which this would
2 result in a diversion of transactions to other payment
3 methods in that zero MIF counterfactual?

4 A. In order to understand switching, yes.

5 Q. So Dr Niels in his first report considers the factual
6 evidence and concludes, based on the evidence, that the
7 most likely counterfactual scenario is that Mastercard,
8 or Visa for that matter, would be effectively forced out
9 of interregional transactions. You have seen that?

10 A. I do not see that.

11 Q. I said: you have seen it, but let us look at it.

12 A. I am sorry, yes, I have seen that, yes.

13 Q. I am going to show it to you. If we go to
14 {RC-H3/2/120}, you should see on screen 4.59 --

15 A. Yes.

16 Q. -- of Dr Niels' report, in which he identifies the four
17 scenarios that I think you also then go on to address in
18 your evidence.

19 I will just let you read those to remind yourself of
20 what those are. So one is not being available at all,
21 the second is a percentage fee increase in transaction
22 fees, 3 is no rewards or benefits and then if we go over
23 the page, 4 is the decline rate.

24 A. Yes.

25 Q. Obviously there could be a combination of reactions?

1 A. Yes.

2 Q. Now, in your report you say that all four of those
3 scenarios are premised on a mistaken approach of
4 treating interregional functionality as a standalone
5 product and we have already explored that.

6 A. Yes.

7 Q. But putting Scenario 1 to one side -- just if we go back
8 over the page to remind everyone what that was.

9 A. That is Dr Niels' most likely scenario.

10 Q. But just putting that to one side because it ultimately
11 turns on the factual evidence to the effect that
12 whatever steps Mastercard might take to retain issuers
13 and cardholders it would be unable to have a viable
14 offering for interregional transactions, so that is why
15 I am putting it to one side.

16 If you assume for now that issuers would regard the
17 loss of interregional MIFs as requiring them to take
18 action in relation to interregional functionality rather
19 than it being something that they tolerate because of
20 the other benefits of the cardholder relationship, then
21 Scenarios 2, 3 and 4 are realistic and plausible steps
22 that they might take, are they not?

23 A. Yes, the premise was not quite correct. The -- the
24 wider relationship does not mean you just tolerate it
25 and I think the phrase was used in openings "take the

1 hit". That is not the premise. It is that the issuer
2 might partly take hit, but also it can manifest itself
3 in the non-interregional offering of the cards. So that
4 was what I was saying earlier. But just that was not
5 quite the right way of putting my product attribute
6 point.

7 Q. I understand that, but let us say hypothetically --

8 A. Yes.

9 Q. -- that they decide they want to take action in relation
10 to interregional functionality, then assuming they want
11 to do that --

12 A. Yes.

13 Q. -- 2, 3 and 4 are plausible ways they could do it?

14 A. Well, I would say they are -- I would say they are
15 possible.

16 Q. Yes.

17 A. I mean there is nothing -- there is nothing that says
18 these -- there is nothing that logically rules these
19 out. These are possible reactions in that sense.

20 Q. Well, Scenario 2 is perhaps the simplest because it
21 replaces the loss of MIF income with another transaction
22 fee?

23 A. Mm-hm.

24 Q. Correct?

25 A. Correct.

1 Q. Scenario 3 involves plausible steps to reduce cardholder
2 benefits to reduce the gap between costs and revenue?

3 A. Yes. I hesitate to say "plausible" because we need to
4 look about whether this is a plausible reaction to the
5 lack of MIF income, but it is -- it is a logical
6 possibility.

7 Q. Yes, and indeed you say in your first report at
8 paragraph 5.10, that to the extent that issuers pass on
9 MIFs at least in part to cardholders, for example in the
10 form of reduced card fees or improved interest rates,
11 MIFs may increase the take up and use of payment cards?

12 A. Yes.

13 Q. We are really talking about the converse here?

14 A. Yes.

15 Q. If then we are left with Scenario 4, we have seen that
16 it is likely from the issuers' reaction to the lower
17 MIFs following the 2019 Commitments, that there may be
18 decline rates?

19 A. That may be -- that logically could be the case. My
20 point is only that as far as I am aware, none of these
21 three scenarios is underpinned by modelling or analysis
22 showing that is the optimal reaction.

23 So for example yes, so -- so they are to a degree --
24 to a degree in that sense not underpinned by analysis,
25 but I understand that they are logical possibilities.

1 Q. Well, obviously then Dr Niels goes on to consider the
2 likely rates of diversion to other payment methods in
3 response to these measures so there is some modelling
4 about what might happen on the basis of these measures,
5 correct?

6 A. Yes, but that is confusing two things, I think. The --

7 Q. Well, I understand what you are saying, but what I am
8 saying is once you accept they are plausible then you
9 get the modelling over what then might happen and you
10 have accepted they are plausible.

11 A. I have accepted that they are possible.

12 Q. Right.

13 A. Whether a 1% reaction is the -- is a -- is a plausible
14 or realistic or underpinned reaction to a -- to removing
15 the interchange fee, I do not know because you would
16 need to model or understand the issuing side in America
17 and everywhere elsewhere where this is happening and --
18 and justify that percentage. The percentage is not
19 justified. The percentage is just chosen because it is
20 a round number, 1%.

21 Scenario 3 removes all reward points, all cash back
22 in a rather vaguely defined all other benefits. So the
23 card has been stripped of any points, any cash back and
24 any other benefits. It is a possible reaction.
25 I cannot say it is plausible on the facts because I have

1 not analysed the issuing markets.

2 Q. But in a sense what you are almost saying is that each
3 issuer might take a different view on what its
4 cardholders may tolerate?

5 A. I think that would be the case.

6 Q. Indeed, an issuer might do a whole combination of these
7 things, not just one of them?

8 A. It could indeed do a combination of these things, but it
9 could also -- not necessarily to the extent of each of
10 these scenarios, it might go for a different mix and we,
11 I do not think we really have evidence on the level of
12 the reaction.

13 Q. Now, Dr Niels then, as I say, goes on to assess what
14 then might be the likely rates of diversion and you have
15 made criticisms of his approach I think in your report
16 and in particular criticisms of Dr Niels' methodology in
17 assessing merchant costs in the counterfactual?

18 A. Yes, I think there are three stages to my criticism.
19 One is the scenarios which I can see are logical or
20 possible scenarios, but they are not underpinned. The
21 second criticism I have is this survey that is used to
22 measure the diversions that are said to come from those
23 scenarios and then the third criticism I have is the
24 assumed costs of the alternative payment, payment means
25 to which the transactions are -- are assumed to divert.

1 Q. But it is fair to say that you have not produced
2 an alternative and better estimate on the various stages
3 of that, those criticisms?

4 A. That is true on the first and the second step. On the
5 third step I have in respect of the cost estimates
6 Dr Niels put forward in his first report made some
7 response to those. I have not responded to the cost
8 estimates he used in his addendum.

9 Q. Well, I am going to explore some of your criticisms with
10 you and really to establish how far they go in
11 underpinning the attack on any general conclusion.
12 Obviously, Mr Beal will have the opportunity to go
13 through the criticisms in more detail with Dr Niels, so
14 I am just going to put a few of the crucial points.

15 But the starting point, well, I say the starting
16 point, the end point and the first question is that
17 Dr Niels concludes, does he not, that in all of the
18 scenarios that we have just looked at, 1 to 4, except
19 his lower estimate for Scenario 3 the diversion to other
20 more expensive payment methods would be large enough to
21 mean that the market-wide Merchant Service Charges would
22 be higher than in the counterfactual?

23 A. That is his conclusion and that obviously depends on the
24 three stages, the scenario being a realistic or even
25 correct scenario, the diversion being properly measured

1 and the costs being properly measured.

2 Q. The reason I am pressing on it is I do not think you
3 have identified any error made, despite your criticisms,
4 by Dr Niels that if corrected would change the overall
5 conclusion of his analysis?

6 A. I think there are errors that if corrected would change
7 the overall conclusion of his analysis.

8 Q. Right, we need to explore those.

9 A. But I didn't have an -- I did not -- yes, we can.

10 Q. The reason I ask that is in your second report, you say:

11 "For the avoidance of doubt, I do not have a basis
12 to provide an alternative and better estimate and my
13 comments mainly relate to uncertainty about the
14 reliability and level of confidence in a number of the
15 inputs used."

16 A. Yes.

17 Q. So that is why I was saying I do not think you have
18 identified any alternative and better estimate?

19 A. That is right. So on the scenarios I think -- and we
20 can go back -- on the scenarios I do not think the
21 scenarios are underpinned.

22 And I think Mr, sorry, Dr Niels' preferred scenario
23 which is scenario number 1 the one we are not looking
24 at, I do not think that is realistic at all. On the
25 second stage, the survey, I have not conducted my own

1 survey so I do not have a different set of diversion
2 ratios and on the third stage, I have offered
3 a different view of costs to some extent in my reply
4 report and then the cost issue has moved on in Dr Niels'
5 addendum because he is using some different cost numbers
6 there.

7 Q. So let us have a look at some of the more detailed
8 points and see where this difference lies then.

9 You mention the consumer survey and that is what
10 underpins Dr Niels' analysis to a degree and it is
11 a consumer survey from 2015 and survey participants
12 identified from a list of options how they would respond
13 to the scenarios that we have looked at. That is right,
14 is it not?

15 A. That is correct.

16 Q. Shall we have a look at the survey -- well, you
17 criticise it and let us have a look in your report where
18 you criticise it. That is {RC-H2/2/87}. Sorry, I beg
19 your pardon. Before we go there, I better show you,
20 just to put this in context {RC-H3/2/120}, this is
21 Dr Niels' first report at paragraph 4.59. I just want
22 to show you all the materials to be fair to you.

23 Again he lists that and he has referenced the
24 analysis in Oxera and then you address this in your
25 second report at {RC-H2/2/87}.

- 1 A. Yes.
- 2 Q. It is paragraphs 26-28 in particular that concern your
3 criticism. So looking at paragraph 26 first. You say,
4 and in the first instance I will not read it out, why
5 you consider the results of the survey are unlikely to
6 be representative?
- 7 A. Yes.
- 8 Q. You give certain figures there and that is based on your
9 own analysis of Mastercard data, correct?
- 10 A. Yes.
- 11 Q. Now, can we just look at footnote 385, which I think
12 must be below here. That is where you -- that is the
13 reference?
- 14 A. Yes.
- 15 Q. But you do not say whether this is by volume or value?
- 16 A. That is correct.
- 17 Q. Your criticism is the choice of the relevant
18 cardholders?
- 19 A. Well, it is -- I am not sure it is a criticism of the
20 choice of relevant cardholders. It is just a -- it is
21 a question mark about whether the countries that have
22 been surveyed are going to be representative.
- 23 Q. So can we go to {RC-J3/79}, please. So this is the
24 Oxera 2016 study which addresses the cardholder survey
25 that we are just looking at.

- 1 A. Yes.
- 2 Q. If we could please go to page 79 within this document,
3 {RC-J3/79}, you see the heading and at paragraph A4.5
4 you can see some information about how the sample was
5 selected?
- 6 A. Yes.
- 7 Q. We are told the sample included 2,000 US respondents and
8 500 respondents from Russia and Australia who met these
9 relevant specifications?
- 10 A. Yes, yes.
- 11 Q. Now, at A4.6, you see that the three countries selected
12 span three continents and account for by value 26.3% of
13 Mastercard total credit interregional transactions --
- 14 A. Yes.
- 15 Q. -- and 41.8% of Mastercard total debit transactions in
16 Europe?
- 17 A. Yes.
- 18 Q. So the survey is looking at Europe and not just the UK,
19 correct?
- 20 A. Yes.
- 21 Q. Your criticism in your second report is that the
22 cardholders from Russia, US and Australia are
23 not representative of cardholders making interregional
24 transactions in the UK?
- 25 A. Yes.

- 1 Q. But you do not say in your report which countries you
2 would consider to be representative?
- 3 A. So these three countries are not accounting for 74% of
4 the credit interregional transactions and they are not
5 accounting for 59% of the debit interregional
6 transactions by value.
- 7 Q. But in your report, you do not specify what it is you
8 say would have been a more representative sample?
- 9 A. I do not. I do not, but the 74% and the 59% are coming
10 from somewhere else by definition, I would have thought
11 quite a significant fraction from Asia and the issue is
12 whether the results are representative in light of the
13 omission of countries that collectively account for the
14 majority.
- 15 Q. But this is the best evidence we have, Mr Dryden, in the
16 absence of any other analysis you can conduct of
17 cardholder behaviour?
- 18 A. It is the only evidence, but if I may just make a point
19 on this which is another reason going back to what we
20 discussed this morning, more of a -- perhaps one calls
21 it partly pragmatic, it may also be partly legal. We
22 had a debate this morning about whether the right test
23 of restriction of competition is just the MSCs of
24 Mastercard and Visa or this notion of the market-wide
25 MSC and I gave my reasons why I think it is the former

1 and not the latter.

2 If it is going to be the latter, it entails
3 measuring switching, which is what we are looking at
4 now. In order to measure switching we need to get into
5 the economics of the issuing side all round, if we are
6 dealing with interregional, all around the world in lots
7 of different countries because that is where the
8 switching is coming from. So it is impossible to do the
9 market-wide MSC analysis without gathering evidence on
10 the issuing side internationally. But --

11 Q. But you have not put forward any other analysis in your
12 report, Mr Dryden, to show evidence of different
13 cardholder behaviour?

14 A. So last year, when I got involved in this case,
15 I realised that the analysis of interregional if it was
16 going in the -- at the 101(1) stage if it was going to
17 entail looking at the issuing side would necessitate
18 getting evidence from the issuing side internationally
19 and there was -- and that had huge implications fairly
20 obviously because the experts had to do an evidence
21 of -- a table of evidential requirements and it is
22 a huge expansion of the evidential requirements if you
23 are trying to get evidence on the issuing side in all of
24 these international countries which are bringing
25 interregional transactions into the UK and there was

1 an exchange of correspondence around the time that
2 I raised this issue in which it was decided that that
3 evidence would not be gathered on the issuing side
4 internationally.

5 So I -- I can -- I can see that if one wants to do
6 this type of exercise that is the kind of evidence you
7 need. But that issue was, you know, addressed last year
8 essentially because I raised it. In my mind it is
9 another reason why the weighted average MSC analysis
10 belongs in 101(3) because -- or at least it belongs
11 there if only at that stage one is looking at the
12 issuing side in sufficient depth.

13 Q. Well, on the basis that we have not got any other
14 survey, we have got this before us, so let us have
15 a look at what this study showed. If we go over the
16 page on the study, please, to page 80, and look at A4.9,
17 please:

18 "Overall, the survey reports that cardholders would
19 respond to reductions in the payment card service
20 proposition by making more purchases with alternative
21 payment methods. They are the most responsive to
22 increases in direct transaction fees or increases in
23 decline rate, but they also respond to reductions in
24 benefits."

25 Do you see that?

1 A. I do.

2 Q. So irrespective of whether you think that there could be
3 more information about other cardholders, what we can
4 see is the cardholders surveyed here, the 2,000, there
5 is a very clear conclusion that they would react in this
6 way, correct?

7 A. Well, the first sentence is saying the survey reports
8 that cardholders:

9 "... would respond to reductions in the payment card
10 service proposition by making more purchases with
11 alternative payment methods."

12 Q. Yes.

13 A. I do not think that is a controversial statement. If
14 the cardholder offer is worsened to some degree as
15 premised in the scenarios it will -- there will be
16 a degree of response of switching. So I think the first
17 sentence is obvious. Then they are most responsive
18 to -- sorry -- they are most responsive to increases in
19 direct transaction fees or increases in decline rates,
20 but they also respond to reductions in benefits.

21 I mean that sentence does not make a great deal of
22 sense to me because what it really should say is they
23 are most -- they are most responsive to a 1 percentage
24 point increase in transaction fees, or to the increase
25 in the decline rate, but they also respond to a removal

1 of all cash back rewards and benefits. Do you see what
2 I mean? Because if you change the -- if you change the
3 transaction fee increase from 1% to 0.5% or 2% this
4 sentence might not be true any more.

5 Q. Let us carry on and read this because we will see that
6 I think it is quite clear. A4.10, you see:

7 "Only 17 to 24% of US and Australian respondents
8 would continue to use their Mastercard or Visa in the
9 event of a 1% increase in the current transaction fee or
10 an increase in the decline rate."

11 A. That is the measured effect.

12 Q. Yes. So that is quite a stark statement. Then you
13 look, carry on:

14 "On the other hand, in the event of a reduction in
15 the credit card benefits, between 34% and 42% of US and
16 Australian respondents would continue to use the same
17 card."

18 A. Yes.

19 Q. Right. So that makes good the points in A4.9. You can
20 see the difference in reaction, but there is a reaction
21 in those three different ways, correct?

22 A. Yes. My only point about A4.9 is the comparisons are
23 really premised on the scenarios. They are not general
24 statements about responsiveness to the different
25 parameters.

1 Q. Right. Then you see in A4.10 the results from Russia
2 are slightly different, do you see that?

3 A. I do.

4 Q. What A4.11 goes on to say is that:

5 "... cardholders predominantly respond by switching
6 to cards that they already own, most importantly Amex."

7 A. Yes.

8 Q. Then you see at A4.12:

9 "For example, following a 1% increase in the
10 transaction fee, 24-34% of respondents in the USA and
11 Australia, respectively, stated that they would choose
12 to pay with a card that they already own."

13 A. Yes.

14 Q. "Of this group, the large majority (76-86%) would choose
15 to make the purchase in Europe with Amex."

16 Then the statistic is different in Russia?

17 A. Yes.

18 Q. Then you see A4.13:

19 "The survey also highlights the importance of
20 alternative payment methods, particularly for online
21 transactions."

22 So card not present, correct?

23 A. Yes.

24 Q. "For example between 6% and 21% of US and Australian
25 cardholders would make their purchases online using

1 PayPal, if available, in the event of an increase of 1%
2 in the transaction fee, or a reduction in benefits."

3 A. Yes.

4 Q. "Interestingly the option of paying with PayPal also
5 seems to be well developed in Russia, with 13% of
6 respondents willing to use PayPal in the event of
7 an increase in fee."

8 A. I think -- I think it may be a small point but I am not
9 sure if the PayPal option was adjusting for the loss of
10 the interchange fee.

11 Q. But what we can see is that those survey results show
12 a strong indication of switching to Amex in that case or
13 other methods?

14 A. Well, they provide an indication that is only as good as
15 the scenarios and only as good as the survey. There is
16 one issue with this -- there is a number of issues with
17 the survey. There is one fairly important one that
18 I did not mention in my report because I did not realise
19 it at the time.

20 Q. What, either report?

21 A. In either report.

22 Q. First or second?

23 A. In either report, yes, and that is if I am not mistaken
24 the survey is not allowing the Mastercard cardholder to
25 switch to a different card of Mastercard.

1 Q. What different card of Mastercard are you premising that
2 on?

3 A. So they could be switching to another Mastercard card of
4 the same issuer or another Mastercard card of any other
5 issuer. So the premise here is that the -- is that for
6 example if we are in Scenario 2 and it is a 1% fee
7 increase, the premise is that that fee increase has
8 affected your Mastercard card and that the options for
9 where you go do not include going to any other
10 Mastercard card --

11 Q. Well --

12 A. -- and going to another Mastercard card could be -- of
13 the same or a different issuer, could be a significant
14 response if it was taken account of.

15 Q. Well, there are two points on that, Mr Dryden, are there
16 not? The first is that the survey says it would be
17 another card that the cardholders owned and it seems to
18 be the case that they owned Amex. The second point,
19 Mr Dryden, is what type of other Mastercard do you think
20 they would have in a scenario where you have -- your
21 position is that there is no interregional functionality
22 that could be separated out?

23 A. Yes. So the -- your first point does not really assist
24 I think because the -- my idea is the cardholder could
25 switch to a different Mastercard card of the same or

1 a different issuer. So if a survey is constraining to
2 already owned cards, that is just embedding the problem.

3 If we look at -- if we look at Mastercard and Visa
4 cards they seem to have a -- in terms of the fees on
5 international transactions, they seem to have
6 essentially a bimodal distribution for some reason,
7 either 1% or 3% in the factual. So these cards are
8 charging, depending on what card you have from what
9 issuer, you are either getting charged 1% or 3%.

10 So in Dr Niels' survey when you add a per cent to
11 the fees the 1% cards would be becoming 2% and the 3%
12 cards would be becoming 4% and it is not obvious why the
13 3% cardholder where it becomes 4% and they cannot
14 tolerate the 4% increase would not switch to a -- what
15 was a 1% card and has become a 2% card.

16 Q. Well, if we go to the survey at page 84.

17 A. Yes.

18 Q. Table A4.3.

19 A. Yes.

20 Q. What you see there are the percentages of continuing to
21 use either both your Mastercard or Visa --

22 A. Yes.

23 Q. Apply for an alternative card.

24 A. Yes.

25 Q. So why would it not fall, what you are suggesting might

- 1 fall within either 1 or 2?
- 2 A. The alternative card in the survey seems by
3 construction, if I understand the survey correctly, not
4 to ever be a -- not to be a Mastercard or a Visa card.
5 So that is going to be an Amex.
- 6 Q. What about the first one?
- 7 A. Well, that is your current card. So the first one is
8 your current card and the second one is Amex or Diners
9 or China UnionPay or something like that.
- 10 Q. But it is either Mastercard or Visa. So if you say that
11 they might have different percentages depending on
12 cards, why are you assuming it would be the same?
- 13 A. No because if I am a respondent my options are continue
14 to use my existing card, whether that is a Visa or
15 a Mastercard or get an alternative card and the
16 alternative card options are Amex or Diners or
17 China UnionPay, etc.
- 18 I do not think -- I do not think the survey
19 accommodates the possibility of someone switching from
20 their current Mastercard or Visa card to
21 a different Mastercard --
- 22 Q. To a different Mastercard?
- 23 A. I am sorry?
- 24 Q. To a different Mastercard, you are saying?
- 25 A. Yes.

1 Q. But help me with this. Your different Mastercard would
2 have to have a lower fee and is that because the
3 interregional fee had been stripped out?

4 A. It would have to be a -- it would have to be a more
5 attractive offer. The customer would have to decide
6 that they do not want to keep using their existing card
7 because now something is preferable. In my scenario
8 what has become preferable is another Mastercard or Visa
9 card.

10 Q. Right, which is what I was putting to you this morning
11 might be a reaction of issuers to offer a different
12 Mastercard or Visa but without the interregional
13 function?

14 A. No. It has the interregional function but it just has
15 a different offer.

16 As I was just explaining, if you look at the factual
17 a lot of these Mastercard and Visa cards have -- have
18 fees on interregional transactions that either seem to
19 be 1% or 3%. So if I am on a 3% card and I am
20 responding to this 2016 survey then I am being asked to
21 imagine that the 3% has gone up to 4%. My best reaction
22 to that if I want to leave the card might be to go to
23 a different Mastercard or Visa card which was a 1%
24 interregional fee but has now become 2%. That might be
25 preferred to going to Amex.

1 But the survey does not -- the survey as far as

2 I can tell does not accommodate that kind of switching.

3 Q. Can you just help me with this. What you are positing
4 therefore is a different series of Mastercards but none
5 of which you have analysed as existing or where they are
6 or any information about them?

7 A. Well, the observation that for some reason I do not know
8 the cards the international fees seem to be clustered
9 around 1% or 3% is something one can get in the public
10 domain. We have not, for the reasons I explained
11 earlier, in this stage of the case gathered evidence on
12 the issuing side to properly inform this kind of
13 exercise.

14 Q. So which market are you talking about; 1% or 3% of which
15 market?

16 A. These are markets that have a mixture of 1% and 3%
17 because obviously the -- it would appear that the
18 issuers have a different blend, so the international
19 fee, presumably the one that is offering
20 an international fee of 3%, is more attractive in some
21 other dimensions than the one that is offering
22 an international fee of 1% is less attractive in some
23 other dimensions.

24 Q. This is a whole new hypothesis, Mr Dryden, that is
25 coming out for the first time now. It is quite

1 difficult to engage with it when we have no details of
2 it.

3 A. Correct, counsel, it is fair to say it is a new point,
4 a new point. I did not realise until after my
5 second report that this was a feature of the survey but
6 I think it, or it seems to me quite clear that it is
7 preventing the respondent diverting within the scheme.
8 So it either stays with its existing card or it is
9 leaving the scheme.

10 Q. But I think what we can agree at least is that you are
11 saying that you accept that a reaction would be to
12 change from the more expensive card to something else?

13 A. There will inevitably be some degree of price elasticity
14 of any card to -- there will inevitably be some price
15 elasticity for any card, yes.

16 Q. Can we look at the criticisms that you do make in your
17 report so if we go to {RC-H2/2/87}, please. At
18 paragraph D.27 you make a general criticism that the
19 survey did not follow best practice and then at
20 paragraph 28 you identify your specific concerns?

21 A. Yes.

22 Q. The first concern you identify, I think you identify
23 six, the first concern that you identify is that you say
24 it is not best practice to present increases in price as
25 a percentage to consumers, although I think in your

1 example just now you have just used percentages, because
2 they will find it difficult to monetise the price
3 increase?

4 A. Yes.

5 Q. That is the essence of your criticism?

6 A. Yes.

7 Q. Let us have a look at this. Paragraph 28A is where that
8 criticism is set out and you criticise the question that
9 was put to consumers, which you set out helpfully in
10 your footnote. If we can just go down, please, to
11 footnote 389. That was the question put.

12 A. Yes.

13 Q. Just let the Tribunal read it. (Pause)

14 Your point is that the CMA guidelines state that
15 a survey respondent who is a consumer might not fully
16 understand the impact of a percentage increase?

17 A. Yes.

18 Q. You say it is preferable to identify an increase in
19 absolute terms?

20 A. Yes.

21 Q. But it makes sense to refer to a percentage when one is
22 discussing transaction fees calculated on a percentage
23 basis as you indeed just did in your new example?

24 A. Yes, I fully agree with that. I think this criticism is
25 overstated.

1 Q. So can I move on? You no longer are pursuing this
2 criticism.

3 A. Not -- as long as the -- well, sorry. I may have --

4 THE PRESIDENT: He said overstated. He is not obduring it
5 wholly.

6 MS TOLANEY: Right.

7 A. Let me -- I think I have swung from one extreme to the
8 other. Let me try to land in the middle.

9 Would you pay a 1% increase in your current
10 transaction fee if the transaction fee that the customer
11 is facing is expressed as a percentage, then I think the
12 consumer should be able to comprehend a 1% -- perhaps
13 they should be able to better comprehend a 1% increase.
14 So in other words your transaction fee is going up from
15 1% to 2%.

16 If the transaction fee is monetary then that is much
17 harder to understand. I do not know the mix between
18 monetary and percentage and I am prepared to accept if
19 it can be demonstrated that it is mainly a percentage,
20 I just do not know.

21 Q. Well, and also it is because in fact, if anything,
22 putting the question this way may have led consumers to
23 underestimate the increase and so this is actually --
24 the survey is conservative because here the survey
25 respondents were asked about an increase of 1% in their

1 fees; that is an increase of about 1 percentage point,
2 correct?

3 A. Yes.

4 Q. If we are talking about a percentage increase, which is
5 how much fees increase by relatively to their existing
6 level, then we are talking about a significantly higher
7 figure?

8 A. Yes. There is a degree -- there is something in that
9 point, yes.

10 Q. Yes.

11 A. Unless the customer is themselves converting their
12 thinking of the percentage.

13 Q. Yes, but on your premise they just would not understand.

14 Say the fees increased using your example from
15 3% to 4% that is a percentage point increase of 1% but
16 the fees have actually increased by 33%?

17 A. Yes.

18 Q. So if respondents misunderstood the question, as you
19 suggest they might have done, they actually would have
20 underestimated by how much the fees had increased and
21 yet they still suggested that they would react in the
22 ways that they did?

23 A. That is possible. It links into a slightly bigger point
24 which I make in my report, which is there is a question
25 about what is the optimal kind of survey to be running

1 here. There is a different kind of survey which would
2 present the customer with different, say, three columns
3 with three different cards with different attributes and
4 then ask the customer out of three cards there, with
5 that different mix of attributes which one do they
6 prefer and you essentially show them a whole bunch of
7 combinations and they express their preferences and you
8 derive from that the elasticity that they have with
9 respect to different parameters.

10 So that would be a more -- that could have been
11 a more robust way of doing this kind of exercise. It
12 would make this and various other problems not apply.

13 Q. Can we look at your next criticism in 28B, which is at
14 {RC-H2/2/88}, (b). It is on screen.

15 That is essentially you say that respondents might
16 not have considered the extent to which cards they were
17 using would have come with their own fees for the
18 cardholder?

19 A. Yes.

20 Q. But you acknowledge that the directionality of the point
21 is not clear. So what you are saying is you do not
22 actually know whether this might lead to an overestimate
23 or an underestimate of the switching?

24 A. Yes, that is what I say.

25 Q. Then your next criticism at paragraph (c) is in relation

1 to the decline rate because you say that respondents
2 might not have understood what a decline rate was or its
3 likelihood?

4 A. No, that is not the point. So I am assuming that the
5 customer knows what a decline is, but the question to
6 the customer is just how would you respond to a higher
7 decline rate? So the undefined bit here is higher, not
8 decline rate.

9 Q. Well, what you say -- oh, I see. You say the survey
10 does not appear to define what a decline rate is?

11 A. Yes. Maybe I should say --

12 Q. So what you mean -- but is that not the two --

13 A. I think --

14 Q. -- if they are the same point, then you do not need to
15 repeat decline rate and the likelihood of the being
16 declined because one would be the same as the other,
17 would it not?

18 A. They --

19 Q. Either they are separate points or you said the same
20 thing twice?

21 A. I think there is -- I may be saying the same thing
22 twice. The force of the point, I think if I can just
23 simplify, which I think is quite obvious is the survey
24 asks customers, respondents, how would they respond to
25 a higher decline rate. It does not say how much higher.

- 1 Q. Right.
- 2 A. Therefore, any quantitative result that is obtained from
3 an entirely non-quantitative answer does not in my
4 opinion get us very far.
- 5 Q. But would not survey participants likely have understood
6 higher rate to mean materially higher rate to them, i.e.
7 something they would notice?
- 8 A. Some people may have thought -- thought that.
- 9 Q. Yes, and if anything, that may be to understate the
10 potential scale of the problem for cardholders if we
11 think about the decline rates that follow the 2019
12 Commitments?
- 13 A. I -- I mean I think anything is possible because the
14 question is just framed as higher and it is entirely
15 going to depend on what consumers' perceptions of the
16 current decline rate is and the kind of increase that
17 they are assuming when they answer the question.
- 18 Q. Yes. If anything what the 2019 commitment post-decline
19 rate shows, because it led to one-fifth more
20 transactions being declined and that was with a very
21 marginal increase, decrease, sorry, to the MIF revenue,
22 removing MIFs altogether is likely, if that is right, to
23 lead to a much bigger rate which I accept consumers may
24 not have had in mind?
- 25 A. I -- I really do not know. It is quite a vague

1 question.

2 Q. Well, it may be vague but most consumers would think:
3 Well if, if transactions were declined more to me, would
4 this affect me? Yes.

5 It is not even suggesting they would have to be
6 declined by a fifth more. If anything, this question
7 would underestimate rather than overestimate?

8 A. The first half of counsel's statement I would agree
9 with. It is just directional. If the decline rate is
10 more, would it affect my desire to have a card? Yes.

11 But going from an unquantified question to
12 a quantified answer that is then relied on to come to
13 a weighted average market-wide MSC I think is quite
14 heroic.

15 Q. Then you say next that there is no room for an "Other"
16 response because the survey covers all the likely
17 options and you say that there should be an option of:
18 "I don't know" --

19 A. Yes.

20 Q. -- in (d).

21 Now, can we just look at the options that the survey
22 offered. If we go to {RC-J3/79/83} and if we look at
23 A4.21. The results are reported.

24 A. Yes.

25 Q. Over the page at page 84, we looked at this previously,

- 1 this is the 1% increase question?
- 2 A. Yes.
- 3 Q. We see the options that were offered.
- 4 A. Yes.
- 5 Q. It is difficult to see what "I don't know" response
6 would be relevant to here.
- 7 A. Well, some people, when the question is posed to them,
8 may not know what their response would be.
- 9 Q. But even an uncertain response would be better than:
10 "I don't know" and that is what the survey was directed
11 at?
- 12 A. That is not the usual approach. The usual approach is
13 to capture "don't knows" and then the interpretation of
14 the survey is rather different if the "don't knows" are
15 5% or if the "don't knows" are a much higher per cent.
- 16 Q. But none of these criticisms, we will come on to the
17 next one, but none of these criticisms, Mr Dryden,
18 really undermine this survey. They, with respect to
19 you, seem to be slightly technical best practice points
20 but they do not seem to under -- you are not suggesting
21 they dramatically would alter the conclusions of this
22 survey?
- 23 A. Well, they -- there is the representativeness of the
24 countries which we started with. I do not know that
25 a -- that a balanced sample would not produce -- include

1 I assume a significant weighting or even a majority
2 weighting for Asia would not produce very different
3 results.

4 If I am right, which I think I am, from having dug
5 into this, that diversion to a different card of
6 Mastercard or Visa is being ruled out that could have
7 quite a large directional effect in terms of reducing
8 the proportions staying with the scheme and as
9 a corollary increasing --

10 Q. But there is no evidence of that. You do not even
11 address that in your report. That is not even
12 a criticism you make in your report.

13 A. No because I did not realise it at the time --

14 Q. Right.

15 A. -- and I was clear in saying that that is -- that is
16 something I noticed subsequently and I think that one
17 has a directional effect. The other criticisms many of
18 them are ambiguous in terms of how they affect the
19 results --

20 Q. Well, exactly.

21 A. -- and I have been -- I have been -- I have said as much
22 for some of them.

23 Q. So when did you realise that there was the extra point
24 that you are now suggesting?

25 A. At some point, I would say probably about three weeks

1 ago, plus or minus a week.

2 Q. You did not think to put in a supplemental report?

3 A. I thought we had been given quite a strong steer not to.

4 Q. At paragraph 29 of your report, if we can just --

5 A. If that is the wrong judgment, then I apologise.

6 THE PRESIDENT: But, Ms Tolaney, you have not been
7 prejudiced by this? You have not been prejudiced by
8 this or are you saying you have?

9 MS TOLANEY: Well, I think if the Tribunal are going to give
10 any weight to the remarkably vague evidence then there
11 would be an issue, but at the moment I do not know what
12 the evidence is. But maybe the Tribunal will have to
13 think about that over the weekend.

14 THE PRESIDENT: No, I do not think we are going to do that.
15 We will look at the evidence in the round, but it
16 does seem to me that we have got evolutions in the
17 expert evidence on a number of sides, which is entirely
18 consistent with the expert's duty to give their opinion
19 on the evidence as to changes and that includes points
20 that you spot in material that is vast.

21 MS TOLANEY: Yes.

22 THE PRESIDENT: So my inclination will be to take the same
23 approach as we will be taking with Dr Niels' third
24 report where we will be saying it is entirely
25 understandable that opinion evidence develops, but that

1 we will take into account the ability of the party
2 against whom it is deployed to respond.

3 Now, that is why I am articulating the matter of
4 prejudice because you seem to be making your points
5 perfectly well and I am not sure that we need consider
6 anything over the weekend. We will take the evidence in
7 the round and look at it in our judgment.

8 MS TOLANEY: Well, I am not putting it at the moment.

9 THE PRESIDENT: Okay.

10 MS TOLANEY: Can we go to your report, please, paragraph
11 D.29, {RC-H2/2/89}.

12 A. Yes.

13 Q. You raise the point about diversion to cash?

14 A. Yes.

15 Q. I will not refer to the confidential figures, but your
16 point is that cash tends not to be used for payments in
17 card not present transactions --

18 A. Yes.

19 Q. -- which are more prevalent in interregional
20 transactions?

21 A. Yes.

22 Q. But these are respondents who say they would have
23 switched away from Mastercard, so it is still useful
24 information even if the reality is that they would
25 likely have switched to Amex for example rather than

- 1 cash?
- 2 A. Yes. I think that question is just expressed -- is
3 perhaps implicitly agree with me that the cash response
4 seems a little bit implausible and if the cash response
5 is implausible, it casts a little bit more doubt on all
6 of the responses because if the survey is capable of
7 producing answers that look like they can be right then
8 it casts a further degree of doubt on how reliable it is
9 overall.
- 10 Q. Well, except that the point is the response shows the
11 instinct to switch to a different payment method. What
12 they do not say is they would stay where they were?
- 13 A. Yes, but could we go back to that table we had a short
14 while ago with this switching in response to the 1% fee
15 increase. So if we focus on the USA and online and
16 these are interregional transactions by definition, 14%
17 are switching to cash and the Oxera 2016 answer to that
18 is cash may be paid to the courier on delivery and that
19 is possible that it seems to me more plausible that this
20 is -- that cash has been overstated.
- 21 Q. Well, perhaps you would book a hotel room online and pay
22 in cash when you arrive?
- 23 A. It is possible.
- 24 Q. Exactly. So it does not show it I think to the degree
25 of uncertainty that you are suggesting in your report.

1 Can we go to paragraphs D30 to D31, please, of your
2 report {RC-H2/2/89}.

3 A. Yes.

4 Q. You say that Scenario 3 of Dr Niels' four scenarios,
5 which was the question about reward programmes and cash
6 back and other benefits, you say that was only put to
7 Mastercard or Visa credit cardholders?

8 A. Yes.

9 Q. You criticised Dr Niels for taking results relating to
10 credit card switching and applying them to debit card
11 transactions?

12 A. Yes.

13 Q. In your report at footnote 397 --

14 A. Yes.

15 Q. -- if we go down you use as an example some calculations
16 based on debit cardholders being only half as likely to
17 switch as credit cardholders?

18 A. Yes.

19 Q. You say:

20 "Assuming in Scenario 3 that 50% as many UK debit
21 cardholders would switch away from Visa and Mastercard
22 as credit cardholders..."

23 A. Yes.

24 Q. Just pausing there. You are not saying, are you, that
25 you have any evidential basis to suggest that debit

1 cardholders are much less likely to switch?

2 A. No.

3 Q. In fact, you do not identify in your report any reason
4 for thinking that debit card switching would be
5 dramatically different from credit card switching, do
6 you?

7 A. No, but the point of doing a survey is to discover these
8 things.

9 Q. Okay, but this criticism is entirely speculative.

10 A. Well, it -- it is a fact that Dr Niels has taken the
11 results that pertain only to credit cardholders and
12 applied them to debit cardholders. Sorry, I am not sure
13 if I should say Dr Niels or Oxera in 2016. I am sorry,
14 I think it was Dr Niels using the report.

15 So it is a fact that results that are generated only
16 by credit card responders have been applied to debit
17 card. I am merely saying that that is -- there has to
18 be some doubt about whether that is assumption is
19 correct and that is another non-trivial layer of doubt
20 to be applied when interpreting these survey results.

21 Q. But you have got no reason to suggest the outcome would
22 be different is my point?

23 A. No. But I would repeat, I think this gets a little
24 circular because one does -- if one knew the answers in
25 advance one would not be doing a survey.

- 1 Q. Then in D32.A of your report, you make the point that
2 the survey did not specify the time period over which
3 the behavioural change was being assessed?
- 4 A. Yes.
- 5 Q. But this is a point in the survey being an underestimate
6 of switching rather than an overestimate?
- 7 A. Yes. Can you remind me of the paragraph?
- 8 Q. It is D.32 (a) and I think you fairly suggest --
- 9 A. Yes, sorry I am not seeing it yet.
- 10 Q. Sorry. It is D.32 subparagraph (a).
- 11 A. It is not coming up, but I can remember it. I make
12 a point --
- 13 Q. Yes, no, do read it. I do not want you to feel that it
14 has not been -- it was on the previous page, I think,
15 but it was at the bottom?
- 16 A. I am just not seeing it.
- 17 Q. No, I am not either. I am sorry. There seems to be
18 a gap.
- 19 A. I can -- I can remember it.
- 20 Q. Right.
- 21 A. So the point that it makes is saying that the survey may
22 not be capturing long-run switching responses in
23 response to whatever it is, the 1% fee increase, the
24 declines, etc, and to that extent may be understating
25 switching. So it is a point I am making in the opposite

1 direction; in favour of -- in favour of the points that
2 counsel -- in favour of higher switching.

3 Q. Then you go on to make some detailed points about the
4 cost input chosen by Dr Niels --

5 A. Yes.

6 Q. -- of competing payment methods.

7 I am not going to take you through all of them
8 because they can be explored with Dr Niels. But can
9 I pick up three points in the time we have available.

10 The first is in one important respect you think
11 Dr Niels may have underestimated the costs of a
12 competing payment method, specifically Amex, and you
13 address this in your report at paragraphs D.56-D.57 and
14 that is at page 94 {RC-H2/2/94}. D.57 is confidential
15 and so is part of D.58?

16 A. Yes. So this is a point I make against -- you know, in
17 Dr Niels' favour --

18 Q. I understand that.

19 A. -- if I can put it that way. So indeed I thought he got
20 the Amex cards too low in his first report.

21 Q. He has used the corrected figure in the updated set of
22 calculations which reinforce his conclusions that a cost
23 to merchants would be higher in the counterfactual, has
24 he not?

25 A. That is not correct. So in his first report Dr Niels in

1 my opinion was understating the cost of Amex.

2 I cannot remember what he did in his second report.
3 It may be that in his second report he adjusted it to
4 a figure I agree with, which would be either [redacted]
5 or [redacted], I cannot quite remember.

6 However, what Dr Niels did in the addendum was to
7 then change the cost of Amex again, this time to
8 a figure that I think was [redacted] or thereabouts,
9 taken from a -- and the reason he changed it to
10 [redacted] or thereabouts is that he had seen in
11 Mr Holt's report evidence of an issuer of Amex cards
12 being issued by -- being issued by one issuer that had
13 that level of MSC and in my opinion he has gone from
14 understatement to various very serious overstatement
15 because I do not know why given the choice of the
16 various numbers available for Amex he would go for the
17 very highest one that is available.

18 Q. Well, let us agree, because I am conscious of the time,
19 let us agree for now that in your report what you do is
20 you point out here that there is an underestimate.

21 A. Yes, but that is sort of ancient history by this point
22 because --

23 Q. Right. I understand that. I am just trying to go
24 through the things, the criticisms in this report and
25 I will come back to Dr Niels' third report when we get

1 there.

2 A. Yes.

3 Q. But in this report this was a pro Dr Niels point?

4 A. Correct. I was making a pro Dr Niels point at this

5 point.

6 MS TOLANEY: Right. I think I am being told that there is

7 some points to be made on the table, so I do not know if

8 I need to draw stumps at this point.

9 THE PRESIDENT: Well, maybe we should. It is five to 2 and

10 you are not I think at this stage to rush the witness

11 and I do not want you to rush yourself.

12 MS TOLANEY: Thank you.

13 THE PRESIDENT: That is an appropriate point. You are

14 obviously behind time.

15 MS TOLANEY: Yes.

16 THE PRESIDENT: That is understandable. It is not

17 a criticism, but we will have to work out how we manage

18 that.

19 MS TOLANEY: I agree. I was going to raise that with you,

20 sir, as to find out whether there is any scope for one

21 of the two or three non-sitting days in the timetable

22 which I think is Friday and Monday to be used at all

23 because I am just conscious that we are --

24 MR BEAL: Sir, the difficulty with that is it puts extreme

25 pressure on our closing which is already very tight.

1 THE PRESIDENT: I understand. Look, let us take the weekend
2 to think about how we can adjust matters.

3 Subject to diaries -- and I mean everybody's
4 diaries -- I have no difficulty in shunting all of the
5 closings further down. I appreciate that may not be
6 possible but I am very up for stretching time that way
7 because I do hear, Mr Beal, what you say about time for
8 preparation. But what I suggest is that over the next
9 few days we take stock about how we can find the time
10 because I am not, Ms Tolaney, going to rush you and I am
11 not going to rush Mr Kennelly.

12 MS TOLANEY: Thank you.

13 THE PRESIDENT: You are proceeding perfectly appropriately
14 and I do not want your style to be cramped. So we will
15 make it work but we may have to think quite carefully
16 about what we do to make it work.

17 MS TOLANEY: Thank you very much.

18 THE PRESIDENT: Let us all take stock and we will try to
19 come up with some specific proposals, which I hope will
20 meet with everyone's approval, but you had better each
21 of you think about how that can be done.

22 MS TOLANEY: We will try and liaise.

23 MR BEAL: We will go away and chat. Can I just mention we
24 have applied for permission to rely on a very short
25 two-pager from Professor Frankel. I do not propose to

1 deal with it now but it will need to be sorted out on
2 Monday once Professor Frankel starts giving evidence.

3 THE PRESIDENT: Again, that is contentious therefore?

4 MR COOK: Well, in practical terms we have had
5 an opportunity to look at it during the short
6 adjournment. There may well be some issues we are
7 digesting in the moment in that Dr Frankel -- basically
8 it goes to the question of the so-called settlement at
9 par schemes that Dr Frankel has identified. It appears
10 from my initial reading of it he has added more to his
11 list.

12 You know, trying to find out over the course of the
13 weekend information about an Austrian debit card scheme
14 15 years ago may turn out to be very difficult if not
15 practically impossible. So there may well be an
16 objection to it on that basis, that this is not -- there
17 are points he is just correcting, one of two of them,
18 fine. But if he has added a whole bunch of new schemes
19 we are not going to be realistically able to deal with
20 it on the hoof the kind of schemes we are talking about
21 which are countries that do not speak English where
22 information is difficult to acquire.

23 THE PRESIDENT: Well, the problem is one is damned if one
24 does and damned if one does not. We have got Mr Dryden
25 being told he should have put in a supplemental report

1 when he has thought of a new point and we have Dr Niels
2 being criticised for doing exactly that.

3 I think our response is going to be the same either
4 which way which is we do not play games in terms of
5 being taken by surprise. Late evidence is treated with
6 a high degree of scepticism precisely because it cannot
7 be tested in this way, but we are somewhat disinclined
8 to refuse to admit it because, at the end of the day, we
9 want the complete views of the expert.

10 It may very well be the later expressed views are
11 subject to a healthy degree of skepticism by
12 the Tribunal not because we are in any way doubting the
13 expertise of the expert but because we accept that late
14 views cannot be challenged in the way that earlier views
15 can be.

16 I hope with that assurance, that will assist.

17 MR BEAL: Sir, yes, I will explain on Monday the genesis
18 which is some documents that were disclosed late by
19 Mastercard into the RC-R bundle. But Mr Cook wanted to
20 get his retaliation in first. He has.

21 THE PRESIDENT: He is entitled to, but we will get our, as
22 it were, provisional ruling in first and make clear how
23 we are going to see these things.

24 But I hope therefore in light of those indications
25 you can resolve matters. But we are sensitive to both

1 the importance of the experts putting in their complete
2 rounded views and the absolutely critical importance of
3 the ability of parties wanting to gainsay that evidence
4 being able to do so fairly.

5 MR COOK: I also appreciate, sir, you have to get away right
6 now but we will at some point need to leave 10 or
7 15 minutes of the Tribunal's time to talk about the
8 information request that came through yesterday evening
9 to understand what is the Tribunal to -- in some cases
10 how the Tribunal wants that disaggregated in various
11 ways and things like standard deviation which I suspect
12 will simply be impossible to produce, what it is you
13 would like to understand just seeing if there is some
14 alternative way of getting the material.

15 There is going to be quite a lot of that there where
16 the answer is essentially unless there is publicly
17 available source for a lot of information it is very,
18 very difficult to produce it from --

19 THE PRESIDENT: Mr Cook, that is precisely why we have
20 provided it because we wanted to enable the schemes to
21 think about what could easily be provided because as we
22 explained orally before we sent the table out we are
23 really seeing it as a way of locating the specific
24 factual evidence in the overall context.

25 We heard lots, for instance today, about switching

1 and things like that. Now, how one sees the opinions
2 that are being expressed about likelihood of switching
3 does, it seems to me, get coloured for instance by the
4 number of issuers, the number of acquirers in the market
5 and it is just something that we want to get a sense of.

6 So it is, as I said yesterday, background and we
7 will be very much guided by less the Claimants, more the
8 schemes as to what can be done.

9 So I think what you need to think about is having
10 seen what we are interested in you should both ask
11 yourselves what can be provided and I have in mind as it
12 were a joint set a data set from Visa and Mastercard, as
13 it were, eliding the information they have each got
14 because that will then mean there is a degree of absence
15 of confidentiality in the material because we are
16 presenting an aggregated position for both Visa and
17 Mastercard and that, I think, emphasises the fact we are
18 seeing an effort to understand the payment scheme market
19 as a whole purely as background.

20 I hope that assists, but.

21 MR COOK: It does somewhat, but obviously Visa and

22 Mastercard are not the entirety of the payment scheme
23 market.

24 THE PRESIDENT: Well, of course you are absolutely right.

25 MR COOK: Those kind of questions about what else you --

1 (overspeaking) -- alternatives things like that.

2 THE PRESIDENT: Sorry. There will, I am quite confident, be
3 further questions for information. We are very
4 conscious that Amex needs to be understood as well.

5 But I do not want us to be overloading the parties
6 with too much, so let us take it iteratively. We are
7 focused on the schemes, Visa and Mastercard as they are,
8 we are almost certainly going to be asking about Amex as
9 well. If the parties want to start thinking about that
10 in advance or if they want to think about what
11 additional context they would want the Tribunal to look
12 at then please do consider that because we are likely to
13 be doing that ourselves.

14 So do not take this as the last word even on the
15 content of the table. Certainly do not take it as the
16 last word as to what data we are going to want in the
17 round because we are simply identifying those areas of
18 fact, background fact, which we think we are going to
19 need in order to properly locate the specific evidence
20 we are hearing in our judgment. That is all we are
21 doing.

22 MR COOK: What we might be able to do beginning of next week
23 is give you some idea of what we could readily
24 produce --

25 THE PRESIDENT: That would be very helpful.

1 MR COOK: -- there will an exercise, probably taking days to
2 actually produce that but at least so you can start
3 thinking about if what we can readily produce is not
4 cutting it in terms of what it is actually you are
5 interested in --

6 THE PRESIDENT: Exactly. I think we should start with what
7 can easily be provided because if you say it cannot be
8 done without really material effort, then we do not want
9 it done. So it is very much what data is easily to hand
10 and it may well be in the record.

11 What I want to avoid us doing is having to burrow
12 through reams of information which is not necessarily
13 standardised or consistent. I mean, I am sure we can
14 compile tables like this ourselves from the record but
15 it is going to be something which the parties have no
16 control over, we will be doing on the hoof without the
17 parties' assistance, and that I think is intrinsically
18 unsatisfactory. We will do it if necessary, but I do
19 not think it is the best course for anyone.

20 MR COOK: Obviously our first role is to help the Tribunal
21 with ensuring you are --

22 THE PRESIDENT: Yes, we take your rising in that sense.

23 What we do not want to do is in what is obviously
24 a very stressful and busy time to impose unreasonable
25 additional burdens. So we are really looking for stuff

1 that is low-hanging fruit and if it is not good enough
2 then we will say but chances are that what you can
3 provide us with is likely to be good enough because this
4 is, I say again, background not foreground.

5 MR KENNELLY: Very quickly, sir, in terms of what can be
6 achieved if you gave us an idea as to when ideally you
7 would like to have this, then we can work out what can
8 be achieved with that deadline. I am not pressing you
9 for a hard deadline. Just to give us an idea as to what
10 you have in mind.

11 THE PRESIDENT: We are actually quite relaxed about this
12 because we are listening very carefully to the evidence,
13 we will obviously be re-reviewing it when we write our
14 judgment. So this is something which ideally will
15 happen within the window of the trial but even if it was
16 shortly after the trial finishes that would be fine from
17 our point of view because we do not anticipate this
18 being controversial material. If it was controversial
19 then I do not think we would be asking for it in the
20 first place. It is background. So I do not think you
21 need regard it as something to which you need to devote
22 certainly any frontline resource to within the trial.
23 I think you have got quite enough to be doing anyway,
24 but it is something which I felt ought to be articulated
25 now because we want precisely this sort of dialogue so

