

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1517/11//7/22

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

**MERCHANT INTERCHANGE FEE UMBRELLA  
PROCEEDINGS**

**TRIAL 1**

---

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

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

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

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

1 Wednesday, 13 March 2024.

2 (10.00 am)

3 Housekeeping

4 THE PRESIDENT: Ms Tolaney, good morning.

5 MS TOLANEY: Good morning, please may I call Dr Niels.

6 THE PRESIDENT: Before you do that, I want to address  
7 somewhat tentatively timetable because we have been  
8 giving that some thought, we do not want Mr Beal to feel  
9 under undue pressure before he has even started  
10 cross-examining Dr Niels.

11 So without setting anything in stone, our thinking  
12 is this: we are today 13 March. We have in the  
13 timetable tomorrow, which is the last day of evidence,  
14 but we want to find an extra day. What we cannot do is  
15 sit on the Friday. We can however -- it involves  
16 removing the strike-out in MIFs 2 we can sit on the  
17 Monday and we are proposing long days for that -- in  
18 other words 10 until 5 -- for Monday, 18 March, which  
19 gets Mr Beal an extra day.

20 We then do not sit on the Tuesday and we do not sit  
21 on the Wednesday and this is where it becomes even more  
22 tentative.

23 My thinking is we also do not sit on the Thursday  
24 which gets the three days prep time for the submissions  
25 and let me just say this by way of indication on written

1           submissions.

2           The one thing that counsel regularly forget is that  
3           in order for submissions to be effective, they not only  
4           have to be written but they also have to be read and we  
5           think it would be very helpful if the parties focused  
6           on, as it were, the argument without the references in  
7           their written closings, and once that has been made  
8           clear and we know the battle lines, we have no problem  
9           in subsequent submissions being made, which are just the  
10          granular articulation of the detail that we will need,  
11          because with the best will in the world, we are not  
12          going to look at the references before we write the  
13          judgment and provided the battle lines are clear in the  
14          submissions and they are therefore shorter and less  
15          dense, we are very happy, if the parties are, to have,  
16          as it were, fleshed out the closings which contain the  
17          detailed references which we will obviously need for the  
18          judgment but will not need for closing argument.

19          So we hope that the three days -- really important  
20          three days -- can be used more for thinking about the  
21          way in which the arguments are put as arguments, rather  
22          than saying: and here is another footnote. So we get  
23          the three days that way. We then have a squeeze on  
24          closings because we cannot sit into the Friday the 29th  
25          because that is Good Friday. We can deploy the

1 non-sitting afternoon on Thursday 28 March and what we  
2 get I think is tight but not unduly tight closings which  
3 begin with -- well, with half a day shaved off,  
4 basically because you have either got to have -- you can  
5 either have three days' preparation with a half day loss  
6 on oral closings or you can have two and a half days  
7 prep and draft your closings and the allocated time for  
8 oral closings. I do not think you can have both.

9 So we will leave that to the parties.

10 MS TOLANEY: I think for my part, sir, I would much rather  
11 have a shorter prep and longer time in oral closing.

12 THE PRESIDENT: Yes, it may be that that is a consequence of  
13 your not going first, I do not know. But can we leave  
14 that with the parties to think about? I think the  
15 immediate message, though, is that Mr Beal has got an  
16 extra day, he does not have to ask for it, it is there  
17 and we do not need to worry about the clock too much  
18 when, as I am sure we will, we hit the end of Thursday  
19 without hitting the end of the evidence.

20 MS TOLANEY: Could I just flag one further thing, sir. We  
21 had understood that Thursday 28th in the afternoon there  
22 was a hearing in Merricks which cannot be moved.

23 THE PRESIDENT: Well, we will have to sort that out.

24 MS TOLANEY: Right.

25 THE PRESIDENT: I mean, in a sense they are all interrelated

1 matters, but we will deal with that.

2 MR BEAL: Sir, could I just clarify for the sake of taking  
3 instructions. It is very helpful, the indication that  
4 the tribunal has given, that time can be managed. "Let  
5 not time feat you, you cannot conquer time" as WH Auden  
6 said. The tribunal is not proposing to sit on Monday,  
7 25 March -- cannot sit. My understanding was you could  
8 not sit on Monday the 25th. If that has changed --

9 THE PRESIDENT: Right, hang on, which day did we say you  
10 could sit?

11 MS TOLANEY: 22nd.

12 MR BEAL: Friday 22nd and the idea would be to go down to  
13 a day and a half each for closing?

14 THE PRESIDENT: Yes, I think the problem is we have worked  
15 out what is movable and we are prepared, we are able to  
16 kill two hearings, but that date cannot be done and  
17 neither unfortunately can this Friday.

18 MR BEAL: No, that is fine.

19 THE PRESIDENT: So that is the --

20 MR BEAL: If I put "possible" for Friday 22 March and  
21 everything else stays the same then I know where we are,  
22 I think.

23 THE PRESIDENT: Yes.

24 MR BEAL: Thank you very much.

25 THE PRESIDENT: I think that is right.

1 MS TOLANEY: It does not stay the same.

2 MR TIDSWELL: Not quite the same because we would not be  
3 sitting on Wednesday 20th.

4 MS TOLANEY: Shall I just run through it: we will be sitting  
5 today and tomorrow until 5 o'clock, not sitting Friday  
6 15th, Monday 18th would be sitting.

7 THE PRESIDENT: We would be sitting. Then three days  
8 non-sitting.

9 MS TOLANEY: Tuesday, Wednesday and Thursday.

10 THE PRESIDENT: But that is where we have got room for  
11 negotiation in terms of allocating preparation time for  
12 closing.

13 MR BEAL: So my closings would span that weekend, so that  
14 I would then have the Tuesday 26th morning slot and my  
15 learned friends would have a day and a half after that?

16 THE PRESIDENT: I think that is right. But I think as long  
17 as we have got -- I really do not want to cut into  
18 Dr Niels' time. As long as we are clear that Mr Beal  
19 has got his third day of evidence, the rest we can allow  
20 debate to go on, I have at least opened up the debate.

21 MS TOLANEY: Yes.

22 THE PRESIDENT: As I say, I am not directing anything beyond  
23 the third day of evidence that we need to find, so we  
24 have found that.

25 MS TOLANEY: Thank you.

1 THE PRESIDENT: After that, do take away problems, I am the  
2 last person in the world who should be given  
3 responsibility for the diary because I will get it wrong  
4 and I am sure I have made a number of errors in what  
5 I have said already. But provided we have the extra  
6 evidence day, I am happy for my other errors to be  
7 corrected later on.

8 MS TOLANEY: Thank you very much we will take that away.  
9 I know some people, including myself, have commitments  
10 on the 28th afternoon but we will come back to you.

11 THE PRESIDENT: That is why we flag it early because we all  
12 have commitments and we are moving two hearings to make  
13 it work.

14 MS TOLANEY: Exactly.

15 THE PRESIDENT: There will be some irritated people about  
16 that but we will cross that bridge when we come to it.

17 MS TOLANEY: Thank you very much.

18 MR KENNELLY: Sir, just one short thing for my part, sir,  
19 and I am obliged for the comments you have just made  
20 about the fact that once the evidence day has been  
21 resolved you are open to other suggestions in relation  
22 to how we deal with closings at the end. The one thing  
23 I wanted to check was you suggested, sir, producing a  
24 short written closing and then after the trial a longer  
25 more fully referenced written closing.

1 THE PRESIDENT: Again that is a suggestion, not a direction.

2 MR KENNELLY: Thank you. Because producing -- I entirely  
3 understand where the tribunal is coming from in wanting  
4 that short document but we cannot really produce that  
5 short pithy document without really doing a big job and  
6 then summarising it. It is very hard to do the short  
7 one; that is what our oral submissions will do. But --  
8 and I am not saying that we have to do the written  
9 closing with all the references at any particular time  
10 but it really probably should be one written document  
11 and then one oral closing.

12 THE PRESIDENT: Certainly it is going to be one oral  
13 closing.

14 MR KENNELLY: Yes.

15 THE PRESIDENT: That is obvious. For our part, people work  
16 in different ways but in terms of usefulness to the  
17 tribunal, and it may be ease of working for counsel, but  
18 very much in that order, we find that it is helpful to  
19 have something which is less dense in order to prepare  
20 for the closing arguments and it may very well be that  
21 you have got all the footnotes ready to go but actually  
22 it would help us if that came after the event.

23 Now, I know the problem with that is that you fear  
24 that there will be a reinvention of case after the  
25 event. Well, I think you can certainly take it that we



1           are alive to that risk and will not be entertaining that  
2           sort of gaming of the process.

3           MR KENNELLY:  If what the tribunal has in mind is something  
4           short which would then give you a guide to the key  
5           battle lines and what we are going to address in oral  
6           closing, we may need a page limit or some guidance from  
7           the tribunal because otherwise it could be 10 pages or  
8           50, meaning I will come back to the tribunal with  
9           a request for assistance.

10          THE PRESIDENT:  You can come back.  I am not really one for  
11          page limits because you are advocates, your job is to  
12          persuade and you will know whether 10 pages is enough to  
13          make your point persuasive; 10 pages almost certainly is  
14          not.  But you will equally know that 500 pages is  
15          unlikely to be read with enough attention before the  
16          oral closings begin.

17                 So I am inclined to say this is an area where the  
18          advocates's judgment is key and all we are saying is  
19          that the work that goes into the cross-references is  
20          something which may well be done, you can do it in those  
21          three days, but is not something which is on the  
22          critical path to --

23          MR KENNELLY:  I understand.

24          THE PRESIDENT:  -- making this trial as good as it can be.

25                 We need the references obviously but we do not need them

1 before oral closings.

2 MR KENNELLY: Of course. No.

3 THE PRESIDENT: But we are not having people pull new points  
4 like rabbits out of hats; that is absolutely not going  
5 to happen.

6 MR KENNELLY: I am grateful. I will not take any more of  
7 Dr Niels' time.

8 THE PRESIDENT: Ms Tolaney.

9 MS TOLANEY: May I call Dr Niels, please.

10 DR GUNNAR NIELS (called)

11 THE PRESIDENT: We do not need to swear Dr Niels, you have  
12 already been sworn when you were in the hot tub, that  
13 affirmation continues to hold and for that reason but  
14 only that reason we are not reaffirming you. So  
15 welcome, do make yourself comfortable. There is some  
16 water and I am sure you will be taken to the relevant  
17 documents by Ms Tolaney. You have heard me say to other  
18 witnesses if you need to see other parts of the  
19 electronic documents on screen, just say so, it will be  
20 brought up.

21 A. Thank you.

22 Examination-in-chief by MS TOLANEY

23 MS TOLANEY: Good morning, Dr Niels.

24 A. Good morning.

25 Q. Would you like to pour some water before we start?

- 1 A. I am fine, thank you.
- 2 Q. I am hoping that there is a bundle in front of you with  
3 your first expert report in it.
- 4 A. This is still Dr Frankel's report.
- 5 Q. It has flashed up. Would you like a hard copy as well?  
6 Do we have a hard copy? On the shelf, great.  
7 {RC-H3/2/1}.
- 8 Thank you. Marvellous. Could you please turn to  
9 your first report, that should be for the reference on  
10 screen {RC-H3/2/2}?
- 11 A. I still have the wrong one, because this is Mr Dryden's.
- 12 Q. I am sorry, we should have somebody giving you a bundle.  
13 (Pause)
- 14 A. Thank you, yes.
- 15 Q. Thank you. So do you now have your first report there?
- 16 A. Yes, I do.
- 17 Q. Wonderful. If you could turn to page 265, please,  
18 {RC-H3/2/265}.
- 19 A. Yes.
- 20 Q. Do you see your expert declaration?
- 21 A. Yes.
- 22 Q. Can you please turn to your second report, which is  
23 {RC-H3/3/1}.
- 24 A. Yes.
- 25 Q. Can you see your declaration at page {RC-H3/3/108}?

1 A. Yes.

2 Q. Then finally your third report at {RC-H3/4/1} and do you  
3 see your expert declaration at page 14? {RC-H3/4/14}

4 A. Yes.

5 Q. Taking them all together, are you content to stand by  
6 your declaration to the tribunal?

7 A. Yes, I am.

8 MS TOLANEY: Thank you very much. Mr Beal will have  
9 questions for you.

10 Cross-examination by MR BEAL

11 MR BEAL: Good morning, Dr Niels, can I give the usual  
12 warning.

13 First, I am not going to be addressing those  
14 passages of your reports where you have inadvertently  
15 slipped into making legal submissions.

16 Secondly, where you have relied on witness evidence  
17 and that evidence has either been corrected or is  
18 otherwise to be rejected, I anticipate that you would  
19 accept that your opinion could then change at least in  
20 principle on certain issues?

21 A. In principle, that is possible.

22 Q. Thirdly, given time constraints -- you will appreciate  
23 there is quite a lot of trees have been killed in the  
24 making of all experts' reports in this case -- I am not  
25 going to be taking you to every single individual point

1 but to be absolutely clear, I will be putting my case to  
2 you so that you have an opportunity to comment on it and  
3 so that everyone knows where they stand.

4 A. Understood.

5 Q. Understood. Good. How long have you been acting for  
6 Mastercard now?

7 A. Well, I started in May 2000 because in March 2000,  
8 Mastercard filed the first ever notification of  
9 a vertical agreement or agreement under the new  
10 Competition Act and that was the point when Mastercard  
11 engaged Oxera and me and I have --

12 Q. Since then -- sorry.

13 A. Although it has not been a continuous involvement for  
14 Mastercard for myself, it has been a bit stop/go, but  
15 certainly with the retailer litigations it started in  
16 earnest again.

17 Q. Your relationship, however, has been a close one, has it  
18 not, throughout that period since 2000?

19 A. I am not sure whether I would characterise it as close.

20 Q. Could we look, please, at the first edition of a book  
21 that was produced by you, Helen Jenkins and Mr Kavanagh  
22 this is {RC-R/26/1}, it starts at page 1, so we can look  
23 at the front page. There we are "Economics for  
24 Competition Lawyers", available in all good bookshops.

25 Could we turn, please, to page 7 {RC-R/26/7} and

1 I am just waiting for that to flash up on mine, you will  
2 see that you start going through some of the substantive  
3 arguments about where to place MIFs in the competition  
4 landscape. Can you see that?

5 It says debate in the economics literature about  
6 socially optimal levels. You then talk about 101(1),  
7 101(3) and you deal with the objective necessity  
8 argument by reference to Metropole; can you see that?

9 A. Correct.

10 Q. Going through that page and the next page, {RC-R/26/8}  
11 it is fair to say that you are advancing quite a lot of  
12 the arguments that you are maintaining in your combined  
13 experts' reports in this case; is that fair?

14 A. Yes. So this is the first edition of my book, 2011, and  
15 I think my position is very similar when I wrote this  
16 and, and -- and now.

17 Q. You kindly invited me to the book launch for your third  
18 edition, for which I was very grateful, let us have  
19 a look at that, it is {RC-R/28/9}?

20 THE PRESIDENT: I think I should declare an interest that  
21 I was also invited to the book launch.

22 MR BEAL: Indeed. I think we were both grateful we were not  
23 doing a CMC at 8 o'clock the next morning!

24 THE PRESIDENT: Indeed.

25 MR BEAL: If we look, please, at page 10, 6.76, I just want

1 to see to what extent you have reflected the intervening  
2 period because it is right, is it not, in the  
3 intervening period there has been an awful lot of water  
4 under the bridge?

5 A. Yes, that is right. To be clear, the first two editions  
6 of my book in 2011 and 2016 were written before the  
7 retailer litigations. So in the third edition, which  
8 came out last summer, I cover the outcomes and  
9 discussions in the retailer litigations in a bit more  
10 detail. Yes.

11 Q. If we look at paragraph 6.76 at the top of page 10  
12 {RC-R/28/10} you give a summary of Competition Appeal  
13 Tribunal's decision and that of Mr Justice Phillips and  
14 Mr Justice Popplewell, as they each then were, and you  
15 say:

16 "In 2020, the Supreme Court largely upheld the  
17 Court of Appeal's finding. As regards our main  
18 criticism of the ex-post pricing prohibition  
19 counterfactual the Supreme Court acknowledged this ...  
20 but disagreed with Mr Justice Phillips's economic  
21 experts' argument that there is no magic in the number  
22 zero ..."

23 When you say there they disagreed with the economic  
24 experts' argument, you are referring to the economic  
25 experts instructed by the defendants, are you not?

- 1 A. Correct.
- 2 Q. They in fact accepted the evidence on this issue that  
3 had been given by the Claimants' experts; is that right?
- 4 A. That I do not recall. Yes, I do not recall what the  
5 Claimants' expert said. The reason why I referred to  
6 economic experts here is that in the previous pages  
7 I described the position set out by the economic experts  
8 and Justice Phillips on the magic of the number zero.
- 9 Q. Yes, and you have disagreed with the approach that the  
10 Competition Appeal Tribunal had taken and you approved  
11 the position that Mr Justice Phillips had taken; is that  
12 right?
- 13 A. On this particular point, yes.
- 14 Q. Then if we look at 6.77, you say two conclusions can be  
15 drawn from the Supreme Court case. First, it is said it  
16 is not just economists that you can apply the "ask the  
17 two of them, get three different answers" joke to and,  
18 second -- well, you then say courts can be just as  
19 guilty as forming a range of opinions on the same  
20 matter.
- 21 Now, it is right, is it not, that of course the  
22 Supreme Court's opinion is one opinion to rule them all  
23 because it is the apex of our judicial system?
- 24 A. Indeed. That is right in the UK certainly.
- 25 Q. You are not seeking to suggest, are you, that it is



1 appropriate to think the Supreme Court got the analysis  
2 wrong?

3 A. I have my own economic opinion on that, but in this  
4 case, clearly I am not challenging the Supreme Court  
5 opinion.

6 Q. Of course the Supreme Court had found that the  
7 multi-lateral interchange fees applicable for the period  
8 up to December 2015 on domestic and intra EEA consumer  
9 debit and credit cards were unlawful because they were  
10 anti-competitive?

11 A. Yes, correct.

12 Q. Are you aware of any regulatory body in a free market  
13 economy in the last 10 years that has found that  
14 multi-lateral interchange fees were unfailingly  
15 pro-competitive?

16 A. Sorry can you -- can you repeat that adjective that you  
17 just used?

18 Q. So the adjective starts at the end, as in German,  
19 "unfailingly pro-competitive", but if we then go back to  
20 the premise for the question has any regulatory body in  
21 a free market economy anywhere in the world in the last  
22 10 years reached a conclusion that MIFs are unfailingly  
23 pro-competitive?

24 A. Not that I am aware of. It is important to be precise  
25 which MIFs you are talking about because in this case we

1 are talking about post IFR, commercial, inter-regional  
2 and there are obviously different considerations and  
3 actually new considerations apply that have not been  
4 really analysed very much before.

5 Q. That is going to be the main topic, as you may  
6 understand, of the cross-examination. I would like,  
7 before I get there, just to understand that you are now  
8 fully cognisant of your duties to the tribunal. Could  
9 we look, please, at {RC-J5/24.01/38} and in particular  
10 focus in on paragraph 33. This is from the tribunal's  
11 decision in 2016. You will see that paragraph 33 deals  
12 with the experts. It refers to you being obviously  
13 highly intelligent and articulate, and I am sure that  
14 will be proven true. It then says:

15 "However, there were times during his evidence when  
16 he was unwilling to make concessions on points when ...  
17 such concessions were obviously due. In our view, this  
18 indicated an overly entrenched stance in support of  
19 Mastercard's position."

20 That was in part attributed to the fact you have not  
21 been shown certain factual material.

22 I am sure you would want to learn from that and you  
23 would not adopt in this case in your evidence to the  
24 tribunal an unduly entrenched position; is that right?

25 A. Yes, that is right. There was also a subsequent

1 judgment by Mr Popplewell who also commented on this and  
2 he found no fault with my approach to the duty to the  
3 court.

4 Q. Now, you accept for present purposes that the analysis  
5 proceeds on the basis, does it not, that until the IFR  
6 as I have indicated the UK domestic MIFs were  
7 anti-competitive and could not be justified?

8 A. Apologies, can you repeat that?

9 Q. Yes. We are dealing here with the pre-IFR period for  
10 consumer domestic MIFs.

11 A. I have accepted that as a premise ahead of this case,  
12 yes.

13 Q. Similarly, that is the premise, is it not, for intra-EEA  
14 MIFs on consumer cards pre December 2015?

15 A. Correct.

16 Q. Paragraph 1.38 of your first report, at page 25,  
17 {RC-H3/2/25}, again mine unfortunately is being very  
18 slow but it is flashing up there, 1.35 starts at the  
19 bottom of page -- sorry, 1.38 on page 25. You say:

20 "... the MIF is a competitive tool to grow scheme  
21 usage, to make the scheme competitive vis-à-vis other  
22 card schemes and payment methods, and to attract  
23 issuers. That is to say, the MIF produces  
24 pro-competitive effects in the inter-scheme and issuer  
25 markets. In my opinion, for this reason MIFs cannot be

1 considered to [be a restriction] by object."

2 Of course that analysis is capable, is it not, of  
3 being read across to the earlier pre-December 2015  
4 period for domestic and intra-EEA consumer MIFs?

5 A. Correct.

6 Q. You have not sought to qualify that opinion. What is  
7 the basis for the distinction between the  
8 pre-December 2015 period and subsequently?

9 A. Well, the pre period was not part of the focus here, so  
10 I did not comment on it. I was not invited to comment  
11 on that period. Hence this paragraph 1.38 refers to  
12 the -- well, it is a general point about my  
13 understanding of the competitive dynamics around MIFs.

14 Q. Of course dealing with the pre-December 2015 position,  
15 it is trite, is it not, that the EU Commission found an  
16 infringement of competition law which was upheld by the  
17 General Court and the Court of Justice in Luxembourg?

18 A. Correct.

19 Q. Subsequently in domestic litigation the Court of Appeal  
20 upheld the findings of this tribunal in Sainsbury's to  
21 the effect that there was an infringement to competition  
22 law?

23 A. Correct, although this paragraph refers to restriction  
24 by object, so this comment is to do with restriction by  
25 object. My -- my understanding of the Commission

1 finding and subsequent court findings is that that was  
2 a finding of restriction by effect.

3 Q. You also accept, we have just discussed it, the  
4 Supreme Court then upheld the Court of Appeal; is that  
5 right?

6 A. Yes.

7 Q. Can I just deal with the mechanism for setting the  
8 domestic MIF generally for consumer credit and debit.  
9 Firstly, Mastercard scheme rules require a MIF to be  
10 paid by the acquirer to the issuer; is that right?

11 A. That is my understanding, yes.

12 Q. That sum of money is then deducted by the issuer from  
13 funds which it transfers to the acquirer?

14 A. Yes.

15 Q. The acquirer has no option but to take the money it has  
16 been sent?

17 A. At that point, correct. There is no option.

18 Q. It has no realistic option to request payment of  
19 a higher sum of money for a given transaction?

20 A. At that point, no, it does not.

21 Q. In an IC plus plus, an interchange plus plus contract,  
22 that MIF will be passed to the merchant?

23 A. Correct.

24 Q. The merchant has no realistic option of paying a lower  
25 sum, does it?

- 1 A. At that point it does not, no.
- 2 Q. The rate of the MIF has been set by Mastercard for the  
3 material periods?
- 4 A. That is my understanding, yes.
- 5 Q. The rate of the domestic MIF post December 2015 is still  
6 set by Mastercard, is it not?
- 7 A. Correct.
- 8 Q. The inter-regional MIF from December 2015 until  
9 1 January 2021, so the EEA MIF was still set by  
10 Mastercard?
- 11 A. Correct.
- 12 Q. With Brexit now of course the UK is not part of the EEA  
13 and so the relevant MIF has become an inter-regional MIF  
14 for classification purposes?
- 15 A. That is my understanding.
- 16 Q. The inter-regional MIF is set by Mastercard?
- 17 A. Yes.
- 18 Q. The intra-EEA MIF is still applicable in Ireland, is it  
19 not, because Ireland is still part of the EEA?
- 20 A. Yes.
- 21 Q. That too is set by Mastercard?
- 22 A. Yes.
- 23 Q. The commercial card MIF in its various different  
24 permutations is set by Mastercard?
- 25 A. Yes.

- 1 Q. The essential mechanics of the MIF in terms of how it is  
2 set, how it has an effect on requiring money to be  
3 transferred from the merchant via the acquirer to the  
4 issuer, is the same for commercial cards; correct?
- 5 A. Yes. My understanding is the mechanics is essentially  
6 the same for all the types of MIFs that we are looking  
7 at.
- 8 Q. You have predicted my next question which is  
9 inter-regional MIFs, same answer, correct?
- 10 A. Yes.
- 11 Q. Now, your first report, page 17, paragraph 1.20,  
12 {RC-H3/2/17} you say that there are no previous findings  
13 that Mastercard's inter-regional and commercial card  
14 MIFs restrict competition. When you say findings, do  
15 you mean court or tribunal determinations?
- 16 A. I think I refer to competition authority findings or  
17 and/or court determinations, yes.
- 18 Q. Would you include as a regulatory finding a finding by  
19 the European Commission?
- 20 A. If it is a decision, yes.
- 21 Q. Do you have a hierarchy of decisions from the  
22 European Commission that you are using for this purpose?
- 23 A. No, I do not have any particular hierarchy in mind.
- 24 Q. All of the relevant MIFs that we are looking at, that is  
25 post December consumer debit credit, commercial and

1 inter-regional, are payable by a merchant to an acquirer  
2 when a relevant card is used to purchase goods and  
3 services, correct?

4 A. Yes.

5 Q. So the difference in the individual MIF rate is  
6 attributable to the type of product i.e. the type of  
7 card, and the geography of the transaction?

8 A. Yes.

9 Q. In terms of the logic of the court's previous decision,  
10 about MIFs representing a coordinated approach to  
11 setting a price, that must apply equally regardless of  
12 which form of MIF is in issue, does it not?

13 A. So in my mind the mechanism is the same and therefore  
14 I think the discussion of the mechanism in the various  
15 court judgments is also the same. So in that sense,  
16 I would say yes. It depends also a bit which court  
17 because is it the UK Supreme Court or the  
18 Court of Justice of the EU? They all have slightly  
19 different sort of aspects that they considered.

20 But by and large I think yes, it is the same, the  
21 same logic.

22 Q. In paragraph 2.53 of your first report, that is page 64,  
23 {RC-H3/2/64} you recognise that the Supreme Court in  
24 Sainsbury's and the CJEU in Mastercard have focused on  
25 the fact that the MIF is a way of setting a minimum



1 price floor for the Merchant Service Charge?

2 A. Yes.

3 Q. Sorry, 2.53, that is.

4 Then it is essentially a non-negotiable way by  
5 collective agreement of determining the price, is it  
6 not?

7 A. That is what the Supreme Court said, yes.

8 Q. I think you have accepted that they are all set the same  
9 way, so moving on at 2.54, you say:

10 "It is nonetheless useful to set out the economic  
11 arguments that have previously been put forward to  
12 clarify the points."

13 Those economic arguments that were previously put  
14 forward were naturally rejected, were they not, because  
15 of the findings of anti-competitive infringements that  
16 were made?

17 A. Well, not all the economic arguments have been rejected.  
18 But I think my point here is that given that we are  
19 talking about post IFR, commercial, inter-regional where  
20 different economic considerations apply and indeed  
21 scheme rules which also had not really been analysed in  
22 a lot of detail before, that is why I say it is useful  
23 to set out the economic arguments.

24 Q. Well, let us have a look at one example, paragraph 2.56  
25 on the next page, page 65. {RC-H3/2/65} Can you see

1           that you repeat the comparison between the MIF and  
2           excise tax everyone must pay on an equal basis?

3           A. Yes. This is indeed my point about the effect on the  
4           intensity and nature of competition in the acquiring  
5           market, correct.

6           Q. Well, that comparison was expressly rejected by the  
7           European Commission, was it not, as the Supreme Court  
8           noted. We can see that at {RC-J5/36/19}.

9           A. It was, yes.

10          Q. Okay. You are well ahead of me so we do not need to  
11          dwell on that. The Sainsbury's Court of Appeal rejected  
12          it in terms, did they not, at paragraph 169, which is at  
13          {RC-J5/28/42}.

14          A. Yes.

15          Q. Let us just pull that up to make sure that we have it.

16                 You see it says there:

17                 "In fact, as we have already said above, the  
18                 Commission's decision was explaining why the MIFs were  
19                 not like an excise tax but actually restricted  
20                 competition between acquirers and forced up prices for  
21                 merchants."

22                 So the argument you are saying we should have a look  
23                 at for context has been expressly rejected by the  
24                 Court of Appeal?

25          A. It was rejected in that context, although before that

1           came quite a lot of different arguments and views which  
2           I thought was very interesting. But we are here talking  
3           about the commercial and inter-regional in this specific  
4           context, the question of the cost floor was raised as  
5           a point to be analysed in respect of inter-regional and  
6           commercial in this case.

7           So it is in that context that I set out again the  
8           basic logic of where does that whole thinking and -- and  
9           debate come from on the effects in the acquiring  
10          markets. So I do find it useful to draw out the  
11          distinction between what is the effect of a MIF on the  
12          actual nature and intensity of competition and what is  
13          the effect on the cost floor on which there is then  
14          a discussion in my report.

15        Q.    Could we look in your first report, please,  
16            paragraph 2.47, page 62. {RC-H3/2/62} You say there  
17            five lines, six lines down: you are explaining why it is  
18            important to have high MIFs and you say a natural  
19            experiment in essence was when UK Maestro lost a lot of  
20            its market share 2007. It says:

21                    "The result was a number of banks decided to move to  
22                    Visa, and Maestro moved to having 27 million cards in  
23                    2008 to only 2.8 million in 2011 ..."

24                    Now this was a point that was run before the  
25                    Competition Appeal Tribunal in the Sainsbury's case,

1           could we look at their response. It is at bundle  
2           {RC-J5/24.01/165}. You will see there that at the top  
3           of the page:

4           "Cross-examination also established that Maestro  
5           (though not Debit MasterCard) suffered a number of  
6           shortcomings compared with Visa Debit. [Various  
7           witnesses] all accepted that Maestro had a limited  
8           international acceptance, particularly in the USA.  
9           MasterCard had approximately 23 million locations  
10          worldwide, whilst Maestro had just 10 million ..."

11          So there was an acceptance issue:

12          "Despite these witnesses' explanations that  
13          international spending represented a relatively small  
14          share of spending by cardholders, and the suggestion  
15          that Maestro found acceptance 'where it mattered' ... we  
16          nevertheless consider that this was a major contributory  
17          factor which led to the decision of HSBC and RBS to  
18          reject Maestro in favour of Visa Debit."

19          So this tribunal did not say as a result necessarily  
20          of simply having high MIFs available to you that those  
21          particular issuing banks switched, did they? They also  
22          said it was a major contributory factor that Maestro was  
23          different on the issue of quality?

24          A. That is what the tribunal concluded in this case.

25          I think it is a useful example, that is all I am using

1           it for. The accepted -- I think it is an accepted logic  
2           and an accepted mechanism in this market that issuers or  
3           schemes have to compete with each other in the  
4           inter-scheme market to attract issuers and the  
5           differentials between schemes in the MIF can make  
6           issuers switch and sometimes quite radically so.

7           The two examples that I mentioned in my report are  
8           the Maestro example and the Hungarian example. The  
9           Maestro example has indeed been discussed previously in  
10          cases, the -- the tribunal in the Sainsbury's case said  
11          well it is not clear or we reject the argument that the  
12          switching was because of the interchange differential.

13          The High Court -- one of the two High Court  
14          judgments actually accepted it as an example of  
15          switching by issuers in response to an issuer --  
16          an interchange fee differential. I think it is a useful  
17          illustrative example. That is how -- that is why --  
18          that is how I am using it.

19          Q. I do not want to get unduly legal but of course the  
20          judgment that you are relying upon is the judgment that  
21          was overturned by the Court of Appeal, is it not? The  
22          Court of Appeal also dealt with the Hungarian example  
23          that you have referred to?

24          A. That I cannot recall.

25          Q. Okay, well, as I say, I am not going to go all lawyerly

1 on you if I can avoid it.

2 Can we just focus now, please, on page 48 of your  
3 first report, figure 2.1 {RC-H3/2/48}.

4 Section 2 is obviously dealing with the background  
5 economics and some industry issues. As far as I can  
6 see, this diagram is the only place that you really give  
7 airtime to the question of network fees; is that fair?

8 A. That is right, yes.

9 Q. We do not have a section in your industry background  
10 dealing with cardholder charges?

11 A. Correct.

12 Q. We do not have a section dealing with banking charges  
13 and the other transaction fees that an issuer will see  
14 from a cardholder?

15 A. Correct. Because I wanted to -- I think I even called  
16 this section 2 relevant economic background, I clearly  
17 did not want to rehash economic principles that had been  
18 discussed before and I wanted to focus this economic  
19 section on the actual Trial 1 issues at hand.

20 So the issues of cardholder charges and scheme fees,  
21 etc, were not the main focus and hence, no, I did not  
22 discuss those in this section.

23 Q. You are dealing with revenues and costs for issuing  
24 banks. As a basic premise -- I hope this will not be  
25 controversial -- banks --

1 A. Correct, at a very, at a very high level yes.

2 Q. Banks typically make money, do they not, by receiving  
3 money on deposit and using it either to make loans at  
4 a higher interest rate or for investment purposes in the  
5 investment market?

6 A. Well, now that you raise it, so I think you are  
7 referring here to current accounts; is that right?

8 Q. Current or deposit accounts, they will make a -- they  
9 will make a profit on the margin that they offer from  
10 the --

11 A. Debit cards?

12 Q. Or credit cards as well?

13 A. Okay. So -- well, now that you raise it --

14 Q. Let us --

15 A. No, sorry --

16 Q. No, no, let us --

17 A. You put a premise of banks make a lot of money or they  
18 make revenues. These are issues that the Competition  
19 and Markets Authority looked at in its -- in a banking  
20 market investigation. Also when it comes to credit card  
21 issuing the FCA has looked into this, into the credit  
22 card issuing market and it actually looked at questions  
23 like is there -- on the credit side, is there  
24 a cross-subsidy from revolvers to transactors? The FCA  
25 clearly found that the credit card issuing market is

1 highly competitive and that there is no cross-subsidy  
2 from revolvers to investors to transactors and actually  
3 the FCA would probably frown upon if there was such  
4 a cross-subsidy.

5 That was the FCA's market study. It is not in  
6 evidence here again because I think it was not directly  
7 relevant to Trial 1, but it is worth bringing up in this  
8 context. Equally, the CMA more recently did a banking  
9 market investigation and it looked at what banks do in  
10 current accounts and they looked at the financials and  
11 the revenue streams and one of the findings of the CMA  
12 is that current accounts, yes, come with a lot of  
13 products, as Mr Beal is also pointing to, come with  
14 a lot of products and a lot of revenue streams and  
15 because there are a lot of common costs, there is an  
16 element of pricing flexibility between all these  
17 products, but the CMA did find that all these products  
18 cover the incremental costs and therefore in that sense,  
19 from an economic perspective, there also is not a --  
20 an immediate cross-subsidy there. So the start of the  
21 question that was put to me I would put that in the  
22 context of the authorities have looked at this question.  
23 There is a lot of information out there that informs on  
24 this question.

25 Q. Yes, and no doubt at Trial 3 we will be looking at quite



- 1 a lot of it. You have not dealt, have you, with the  
2 benefits that a bank receives from not having to deal  
3 with cash because it is running electronic payment  
4 services?
- 5 A. Sorry, in what context do you mean the benefits of the  
6 banks?
- 7 Q. Issuing banks issue debit cards, correct?
- 8 A. Yes.
- 9 Q. Their customers use debit cards?
- 10 A. Yes.
- 11 Q. I do not know, it is entirely possible, is it not, that  
12 if all of their customers move from cash to debit cards  
13 for the majority of their transactions that produces  
14 a cash saving at the bank as in they do not have to  
15 handle cash, they do not have to get Securicor to carry  
16 cash to and from bank branches, they can probably reduce  
17 the number of bricks and mortar branches that they have  
18 in the high street, can they not?
- 19 A. Yes, that makes sense.
- 20 Q. None of this has been dealt with in your report either,  
21 correct?
- 22 A. No, indeed.
- 23 Q. No. Similarly, the benefits that cardholders receive  
24 from not having to carry cash or a chequebook around,  
25 especially when travelling abroad, that has not been

1           assessed in your report either, has it?

2           A.   Indeed.

3           Q.   You do not suggest that a chequebook provided, as they  
4           were back in the day, with or without a guarantee card  
5           for a current account necessitated a MIF between banks,  
6           do you?

7           A.   I am not discussing the cash and cheque system. I think  
8           if we are interested in history and the set-up of cheque  
9           systems there are -- there are certain other sort of  
10          features of the system as a whole, some of which do, do  
11          look similar to interchange fee. But no, I have  
12          definitely not looked at the cheque system here.

13          Q.   Could we look, please, at paragraph 2.5 of your first  
14          report, you give some examples of -- that is  
15          {RC-H3/2/43}.

16                 You give some examples of two-sided platforms here,  
17          so you give classic example for example of a newspaper  
18          or a media platform bringing together two sides of the  
19          market. You then give an example of online travel  
20          agents and shopping centres.

21                 Now, you will appreciate, will you not, that hotels  
22          and holidaymakers are connected via an online travel  
23          agency and that is an intermediary function, correct?

24          A.   That is an intermediary function by a two-sided  
25          platform, yes.

- 1 Q. Amazon also operates as an intermediary, does it not,  
2 putting purchasers and sellers together on its  
3 electronic platform?
- 4 A. Yes. Amazon does a number of things, but one of the  
5 things it does is provide a marketplace indeed where it  
6 puts together or it brings together sellers and buyers,  
7 and indeed it is a seller itself as well.
- 8 Q. We heard yesterday about advertisers and readers having  
9 access to a newspaper for different purposes and getting  
10 different things from it; correct?
- 11 A. That is a very common example as well. These days a lot  
12 of digital media platforms equally bring advertisers and  
13 readers or viewers together.
- 14 Q. Advertisers are not required by newspapers to pay  
15 anything to readers, are they?
- 16 A. Generally not, no.
- 17 Q. Hotels marketing via online platforms do not have to pay  
18 anything to the holidaymaker, do they?
- 19 A. Not to the holidaymakers but they -- they like  
20 advertisers they pay the platform, yes.
- 21 Q. Amazon does not require its sellers to make funds  
22 available to consumers, does it?
- 23 A. Not to consumers, no. It -- the sellers will pay Amazon  
24 a commission.
- 25 Q. Now, the payment system does not act as an intermediary

1           in that sense, does it; it is not bringing two  
2           contracting parties together?

3       A. It absolutely does. It brings together the merchant and  
4       the buyer in the shop. It allows the bringing together  
5       in the sense of it allows them to make a transaction.  
6       That is why in the literature these two-sided platforms,  
7       or at least one big category of them are often called  
8       transaction platforms because they facilitate, they are  
9       matchmaking platforms that facilitate the transaction  
10      between the two sides, whether it is the use of a hotel,  
11      or making a payment.

12      Q. What the payment system does is it provides services to  
13      two separate legs in the diagram that we have all seen  
14      and those services go to two sides; correct?

15      A. They -- they go to two sides and maybe at some point we  
16      can have a look at the helpful diagram again. They --  
17      they provide services.

18      Q. So the two are --

19      A. But in the context of a scheme and ultimately it brings  
20      the two sides together because it allows the two sides  
21      to transact with each other.

22      Q. When you say it allows two sides to transact with each  
23      other, it is certainly not a classic agency  
24      relationship, is it, what you are saying is it allows  
25      a payment to be made. The details of the underlying

1 transaction are very much for the merchant and the  
2 cardholder?

3 A. What do you mean by "classic agency relationship" in  
4 this context?

5 Q. Like an online travel agency is a market platform which  
6 brings together a purchaser with a seller and --

7 A. But it has nothing to do with an agency relationship.  
8 From an economic perspective, the economic -- the  
9 fundamental economic feature is the same for all these  
10 platforms in that they connect the two sides of users  
11 with each other. Those users then transact with each  
12 other, whether it is making the payment with a payment  
13 system or -- or doing the hotel booking and then using  
14 the hotel, they connected with each other.

15 I would not draw a distinction between a classic  
16 agency relationship and other relationships.

17 THE PRESIDENT: The connection is just buying and selling  
18 though?

19 A. The --

20 THE PRESIDENT: When you say the users connect with each  
21 other, it is simply a transactional -- I, one user, am  
22 buying a good or service from another user who is  
23 selling that good or service to me?

24 A. Yes. Yes, indeed buying and selling but that  
25 relationship can also be -- again that relationship can

1 encompass a lot of things like the booking of the hotel  
2 and then the actual consumption, you know, the use of  
3 the hotel, all of that comes together in a -- the  
4 platform allows to bring that together and then --

5 THE PRESIDENT: Yes, but is that not all comprised within  
6 the definition of the product that is being sold? Is  
7 that not all comprised within the product that is being  
8 sold? I mean, obviously if I buy a hotel room --

9 A. Yes.

10 THE PRESIDENT: -- there will be all sorts of detail  
11 regarding how long I am staying, what room I get, but  
12 that is --

13 A. Indeed.

14 THE PRESIDENT: -- nothing to do with the payment scheme,  
15 that is simply to do with the service that I am buying  
16 through the payment scheme.

17 A. Yes. Correct.

18 THE PRESIDENT: Yes.

19 A. Yes.

20 MR BEAL: So similarly with a gift voucher scheme, for  
21 example, you would not say -- if I am a company that  
22 issues gift vouchers as a form of employee reward of  
23 which there are plenty in the market -- that I am  
24 engaged in a matchmaking service between a given  
25 customer and a given seller, would you?

- 1       A. A gift voucher scheme --
- 2       Q. Imagine an old-fashioned paper voucher that you get  
3       given that you can use in multiple retail outlets, not  
4       just dedicated stores. An employee reward scheme gives  
5       me a common or garden multi purpose voucher, that I can  
6       use in a variety of retail outlets. So that is the  
7       premise. I do not think it is an unrealistic one?
- 8       A. No, so those -- my understanding of those types of  
9       scheme is that they are also two-sided platforms in that  
10      they need to make sure that they -- on one side they get  
11      a lot of employers signed up to using their vouchers, on  
12      the other side they need to have merchants signed up  
13      to -- who accept those vouchers for payment.
- 14      Q. But you would not say that the voucher scheme is acting  
15      as an intermediary for any given transaction that takes  
16      place in any of those retail outlets, would you?
- 17      A. I still struggle a bit with the use or definition here  
18      of "intermediary". The -- the voucher scheme, if you  
19      like, is a platform, in that sense it is an intermediary  
20      that brings together or that needs to bring both sides  
21      on board, so the economic characteristics of that  
22      intermediary are again similar to many of the  
23      characteristics here of payment platforms. Of course  
24      there are always differences in the detail of  
25      operationally how these platforms operate or the actual

1 transaction that takes place.

2 But the fundamental economic characteristics of  
3 two-sided platforms needing both sides on board and  
4 therefore having skewed pricing structures, that is  
5 common across all these platforms.

6 Q. The payment system here, payment cards are simply being  
7 used as a substitute for cash, are they not?

8 A. Well, simply being used as a substitute for cash, yes,  
9 but that also applies to these other platforms. Hotel  
10 booking, let us say Booking.com, is simply being used as  
11 an alternative as a substitute for customers calling the  
12 hotels, looking for hotels directly. Two-sided  
13 platforms compete with other channels, some of which are  
14 direct.

15 Q. Cash of course itself is a promissory note from the  
16 Bank of England: I promise to pay the bearer £10?

17 A. Yes.

18 Q. Cash of course is settled at par, is it not,  
19 throughout -- at the retail stage because it is legal  
20 tender?

21 A. Yes.

22 Q. Why should merchants have to pay for incentives offered  
23 by issuing banks to attract cardholders on the issuing  
24 side of the business?

25 A. That is a normative question. I can answer it from an



1 economic perspective. It is just the result of the  
2 economic dynamics that you get in -- in payment systems,  
3 we have been through this. These payment systems are  
4 two-sided platforms; they have a skewed pricing  
5 structure so as to bring most more merchants and more  
6 users on board. They tend to start charge more on the  
7 merchant side, so you do get inevitably merchant paying  
8 more than cardholders.

9 There is also a line of or a discussion point not so  
10 much perhaps for 101(1), but more for 101(3) is that  
11 merchants also certainly benefit from cards and they  
12 actually save costs by accepting cards as opposed to  
13 other payment systems. Now, that is partly a discussion  
14 for 101(3) and therefore I have not gone into that, but  
15 when you asked me the question normatively, why should  
16 merchants pay, I would also say well they benefit from  
17 it.

18 Of course, the benefit they get and the willingness  
19 to pay is also relevant in 101(1) when it comes to the  
20 analysis of the counterfactual and the bargaining  
21 dynamics but I am sure we will come to that.

22 Q. Now, you have given the example of Booking.com, let us  
23 just have a think about that. If I go on Booking.com  
24 and I am looking for a hotel in Spain, I look at the  
25 hotels on offer, I compare them for quality and

1           availability and I agree to pay the price that they are  
2           requesting for a hotel room; correct?

3           A. Yes.

4           Q. The hotel goes on to Booking.com and says; I have these  
5           rooms available, they are available for this price on  
6           these dates; correct?

7           A. Yes.

8           Q. So there is a free negotiation between me and the hotel  
9           as to the price I am prepared to pay for the hotel room?

10          A. Well, that depends because obviously there is such  
11          a thing as, dare I say it, the most-favoured-nation  
12          clauses, so there are -- there are certain or other  
13          conditions that the hotels do agree with the platforms  
14          so what sort of prices do you put on it.

15                 So I would not say the booking platform is just the  
16          advertising channel for the hotel and then the rest is  
17          sorted out between the hotel and the holidaymaker.  
18          These platforms come with a range of functions,  
19          sometimes the actual transaction, the booking, is made  
20          via the platform in which case the platform gets  
21          a commission also on the price.

22                 So it is a bit more complicated and a bit more  
23          nuanced and also varied in practice as to how this  
24          works.

25          Q. If I do not want to pay £600 for a two-star hotel

1            somewhere on the coast of Spain, I would simply not pay  
2            that price; correct?

3            A. Well, you have a choice of other accommodations.

4            Q. Where do the merchants have the choice about the MIF  
5            that is produced via the payment system in this case?

6            A. Well, they do not have a -- once they, once they accept  
7            Mastercard or Visa they -- they agree to pay the MIF,  
8            so -- or the MSC so at that point they do not have  
9            a choice.

10          Q. Dealing with Amex, Amex charges both the retailer and  
11          the cardholder for the services provided by the Amex  
12          payment system, does it not?

13          A. It does.

14          Q. If the merchant does not want to use Amex, it does not  
15          have to pay Amex's MSC?

16          A. Yes, merchants have that choice.

17          Q. Can we look please at paragraph 2.14 of your first  
18          report, which is page 46. {RC-J3/2/46} You recognise  
19          there, as far as I can see, that Amex is its own  
20          acquirer; correct?

21          A. Yes.

22          Q. So Amex does not, for example, compete with Worldpay,  
23          does it, to acquire Mastercard or Visa transactions?

24          A. Sorry, can you repeat that question?

25          Q. Yes, Amex is not competing in the acquiring service

1 market with Worldpay to acquire Mastercard and Visa  
2 transactions?

3 A. It is competing with Worldpay to acquire merchants but  
4 it does not do it on behalf of Visa and Mastercard, it  
5 does do it on behalf of itself, that is right.

6 Q. So the range of acquiring services that Amex is able to  
7 offer is limited to its own transactions; correct?

8 A. I believe that is correct, I believe it is more the  
9 acquirers who then offer themselves additional services  
10 to the merchants.

11 Q. When, for example, Worldpay agrees to use its terminals  
12 to accept Amex transactions, it has a separate agreement  
13 with Amex to do that, does it not?

14 A. I do not know the details of that. But I presume that  
15 some sort of arrangement of that nature would be in  
16 place.

17 Q. At paragraph 2.15 of your first report, which is  
18 page 47, {RC-H3/2/47} you talk about balancing the two  
19 sides of the payment system and that is a common theme.

20 In 2.17 you then suggest that the interchange fee  
21 represents some form of reward for issuers providing  
22 a service; is that right?

23 A. Sorry, can you point me to the ...

24 Q. 2.17, you say:

25 "The acquirer receives £99 from the issuer ... The

1 issuer either reduces the cardholder's balance ... or  
2 provides a credit facility ... and so keeps revenues ...  
3 These revenues will contribute to the costs and margins  
4 of the issuer, which incurs costs in providing services  
5 that also benefit the merchant, such as the guarantee  
6 against fraud ..."

7 So what you seem to be implying is that the  
8 interchange fee is some sort of reward to the issuers  
9 for a service they provide?

10 A. Well, you can put you can use the term reward but  
11 I think I am clear here what I am saying, what those  
12 revenues contribute to. They contribute to the costs  
13 and the margins of the issuers, the issuers incur  
14 certain costs in providing the services, including  
15 fraud, etc where I say that also benefits the merchants  
16 because they benefit both, because the scheme as a whole  
17 benefits merchants and cardholders and some of those  
18 functions in the system are performed by issuers.

19 Q. Could we look, please at {RC-J5/28/21}. Can we look  
20 particularly please at paragraphs 72 and 73. It is  
21 dealing here, is it not, with the test for objective  
22 necessity and we see six lines up from the bottom of the  
23 paragraph 72, it says:

24 "It follows that the ancillary restriction must be  
25 essential to the survival of the type of main operation

1           ... All questions of the effect of the absence of the  
2           restriction on the competitive position of the specific  
3           main operation and its commercial success fall outside  
4           [that] doctrine."

5           It then says:

6           "Those questions of competitive effect of the  
7           absence of the restriction are to be considered, if at  
8           all, under Article 101(3)."

9           It refers to the Cartes Bancaires decision and in  
10          particular paragraph 126 there says:

11          "The question of knowing whether the restrictive  
12          effects of the measures on the issuing market would be  
13          counterbalanced by the alleged restrictive effects on  
14          competition on the payment systems market that would  
15          occur in their absence, should be examined within the  
16          context of Article 101(3)."

17          Can you see that?

18          A. Yes.

19          Q. Then in 74, further down, it says:

20          "It follows, in our judgment, that Popplewell J was  
21          wrong to conclude that the issue of whether, in the  
22          absence of the restriction in question ... the  
23          MasterCard scheme would survive."

24          That was one of the issues or it was one of the  
25          matters that could be considered under the ancillary

1 restraint doctrine and he was also wrong to hold that  
2 Metropole etc had been implicitly disapproved.

3 What those paragraphs are saying, are they not, is  
4 that questions of balance, bringing to the force through  
5 the interchange fee are for the 101(3) stage?

6 A. Well, it depends which aspect of the balance you are  
7 looking at. So if it is about the merchant, the  
8 benefits to merchants, etc, I agree that you know that  
9 that is definitely something that you would look at in  
10 more detail under 101(3) but the fundamental premise of  
11 interchange as a balancing mechanism, I think that is  
12 just relevant to understand also the economic context,  
13 the economic rationale for interchange and that is  
14 a question of 101(1) and including asking what would  
15 happen in a counterfactual.

16 So understanding the competitive rationale of the  
17 MIF is in my mind relevant to look at from the very  
18 start. So including 101(1).

19 Q. Could we look, please, at {RC-J5/11/131}. Could you  
20 skim read, please, paragraph -- recitals (454) to (458)  
21 on that page rather than me reading them out which will  
22 be laborious. (Pause)

23 A. Yes.

24 Q. That is again suggesting, is it not, that questions  
25 about the effect on the issuing side of the market are

- 1 not for the 101(1) stage?
- 2 A. Again, I would say it depends which specific effects you  
3 look at. When it comes to the rationale of interchange  
4 fees and assessing counterfactuals under 101(1), it is  
5 relevant to look at the overall scheme and the workings  
6 of the scheme.
- 7 Q. Could we turn, please, to page 171, {RC-J5/11/171},  
8 check I have got the right -- hopefully it is recitals  
9 (616) to (619), yes there it is. Could you read (616)  
10 to (619) which goes over the page, please. (Pause)
- 11 A. Yes.
- 12 Q. So again that is confirming, is it not, that this  
13 question of bringing balance to the force, the Jedi  
14 Mastercard, is not for this trial?
- 15 A. I think when it comes to using this balancing mechanism  
16 as a -- as a -- for the question of what is the right  
17 level of MIF, then yes, then you are in 101(3)  
18 territory. But here in this -- let us bring it to this  
19 specific case.
- 20 In the -- for inter-regional and commercial MIFs  
21 when it comes to counterfactual analysis, and in  
22 particular starting with what the factual witnesses said  
23 about the competitive dynamics you get, it is very much  
24 relevant to understand the basic premise that a lot of  
25 these costs are incurred by issuers to compete in the --



1           in their market, in the issuing market, and that is  
2           therefore in that sense relevant to look at in the  
3           analysis for this trial as well.

4       Q.   So for the 101(3) issue, you would need to be able to  
5           measure, would you not, the nature and extent of the  
6           positive externality that merchants derive from  
7           a payment system?

8       A.   I think for 101(3) you need to at least sort of broadly  
9           measure certain things like the -- well, the externality  
10          which in economics jargon here refers to the relative --  
11          the costs of the various payment methods to merchants or  
12          indeed the issuer costs.

13      Q.   Well, if you are concentrating on the positive  
14          externality that merchant derives but does not pay for,  
15          then surely you have to be looking at the avoided costs  
16          of the merchant, do you not; that has nothing to do with  
17          issuing cost whatsoever?

18      A.   No.   But those are two relevant inputs and indeed two  
19          relevant alternative ways of getting to some sort of  
20          level of MIF but that is, you know, an acceptable level  
21          of MIF.  We have had those discussions partly in the  
22          past but they are very much for Trial 3.

23      Q.   None of the material properly presented to the tribunal  
24          at this stage deals with that issue, does it?

25      A.   It -- it does not deal with precise quantification of

1 issuer costs for example of those materials but the  
2 economic principles that we have discussed and the other  
3 experts as well I think are very much relevant for  
4 understanding the competitive dynamics and therefore  
5 counterfactual in the inter-regional and commercial  
6 cards market.

7 Q. Now, some large merchant acquirers do not have  
8 an issuing operation, do they, such as Worldpay or  
9 Elavon?

10 A. Yes.

11 Q. So the interaction of Worldpay and Elavon with the other  
12 acquirers is a competitive one?

13 A. They compete, yes.

14 Q. The fact that other acquirers also have an issuing arm  
15 does not mean that the process is a collaborative one  
16 for Worldpay, does it?

17 A. I do not know if I can comment about it, but -- about --  
18 on that, but I -- I accept the premise. What do you  
19 mean by "collaborative"?

20 Q. I mean they are not coming together and agreeing, for  
21 example, that Worldpay should have to shoulder some of  
22 the issuer's costs?

23 A. That is right, yes.

24 Q. Now, you nonetheless go through and itemise some of  
25 those costs, do you not, at page 48 of your first

1 report, {RC-H3/2/48} so for example guarantee against  
2 fraud and cardholder default, a so-called interest free  
3 period and then rewards for cardholders and so on.

4 But in terms -- just dealing with those one by one,  
5 in terms of the fraud guarantee, acquirers have to bear  
6 the costs of merchant fraud, do they not?

7 A. In -- when it comes to fraud as a system, as a whole --  
8 again, I am not a fraud expert, but clearly in the  
9 ecosystem as a whole there are costs incurred to prevent  
10 fraud. I am not an expert on what exactly is classed as  
11 merchant fraud or cardholder fraud or a combination of  
12 the two, but my understanding of the factual evidence is  
13 that more of the fraud costs are borne by the issuers,  
14 indeed some costs are borne by the acquirers as well.  
15 But my understanding is that the balance of these costs  
16 still very much falls on the issuing side, but that is  
17 a factual question.

18 Q. That is a factual question for which we have no detailed  
19 data from the issuing banks at all, correct?

20 A. I think at this stage in evidence I believe that is  
21 right, yes.

22 Q. Acquirers have a credit risk, do they not, from the  
23 charge-back procedure?

24 A. I think that is right.

25 Q. The terms on which an issuing bank chooses to give

1 credit or not is a matter for the issuing bank and its  
2 cardholder, is it not?

3 A. Yes.

4 Q. Debit card payments involve immediate settlement and  
5 therefore no credit is given?

6 A. Correct.

7 Q. How does the contribution which Barclays makes, for  
8 example, to a reward scheme, so that its cardholder can  
9 get a cheaper holiday, help merchants?

10 A. Well, at a general level, reward schemes do encourage  
11 usage of the card and they do encourage therefore  
12 spending at merchants.

13 Q. But if we are trying to identify the positive  
14 externality, which is the justification for the  
15 merchants paying something to the issuing side of the  
16 market, that does not go to that issue, does it?

17 A. I think we need to be clear here what is meant by  
18 positive externality, and the word externality has been  
19 used in a number of contexts here, so -- and let me just  
20 explain two and then we can maybe explore with Mr Beal  
21 what he refers to.

22 So I have talked about two-sided platforms and  
23 the -- the key distinguishing feature of that is being  
24 the positive demand side externalities between the two  
25 sides, so that is one use of externality in the sense

1           that the more merchants are signed up, the more  
2           cardholders find it attractive. The more cardholders  
3           there are, the more merchants find the scheme  
4           attractive, so that is the positive externalities purely  
5           arising from the demand side externalities in two-sided  
6           platforms.

7           Then in the literature -- Mr Dryden has referred to  
8           it -- there is something called the merchant  
9           externality, which is the externality that at the point  
10          of sale the cardholder chooses which payment methods to  
11          use, and thereby imposes costs on the merchant, and the  
12          merchant not having any say in that at that point, at  
13          the point of sale, other than surcharging, so that is an  
14          externality and that -- that reasoning on that  
15          externality has led people like Rochet and Tirole to  
16          develop the merchant indifference test, which very much  
17          tries to make up for that or internalise that  
18          externality, so the point being that, in that logic of  
19          the Rochet and Tirole model, the MIT model,  
20          an interchange fee is efficient and is allowed up to the  
21          point where it makes merchants indifferent between  
22          accepting cash and cards or, in a more realistic  
23          setting, between other payments and cards.

24          So in that sense, the MIF does internalise the  
25          externality very much as well.

1 Q. Could we look, please, at {RC-J5/35.01/30-31}. I am  
2 just trying to locate, as a factual matter at this  
3 stage, while we are looking at background, some annual  
4 fees that are paid for certain select products.

5 If you see at the bottom of that page, there is  
6 a reference to American Express. Can you see that?

7 A. Apologies, can I just clarify, are these fee -- fees  
8 paid by cardholders?

9 Q. It says "Annual fees of selected card products". My  
10 inference is that they are the cardholder fees paid  
11 annually, for example, to American Express.

12 A. Yes.

13 Q. They vary by reference to the figures we see on the  
14 right-hand side of that page. I do not think this is  
15 confidential because it is RBR, so it varies from £60 to  
16 £595, depending on the product, can you see that?

17 A. Yes.

18 Q. With a couple having zero charges. Then if we go,  
19 please, to page 36-38, {RC-J5/35.01/36-38}, there are  
20 hopefully some APR figures, starting at page 36, the  
21 second paragraph up from the bottom, there is a section  
22 that begins:

23 "Most of the largest UK banks have issued both Visa  
24 and Mastercard cards since 1989 ..."

25 A process referred to as duality, and it has become

1 the model across Europe:

2 "Nationwide was the only large bank issuer with a  
3 Visa-only portfolio in 2018 ..."

4 We then come on to look at card scheme affiliations  
5 and then at 38, there are some APR figures.

6 A. Sorry what are you referring to?

7 Q. I am trying to find them. I have given myself the wrong  
8 reference. (Pause).

9 Well, we will move on because I cannot find that.  
10 I will come back to it.

11 Could we please look at paragraph 2.28, page 52 of  
12 your first report. I found the reference. I am sorry,  
13 I was going blind {RC-J5/22.3.1.2/36}.

14 That is typical annual fees, I think it is  
15 a European figure, given in euros, for different  
16 countries -- can you see that? -- for Mastercard, and  
17 then coming down, annual fees for Visa and then next  
18 page, American Express. Do you see that? This is  
19 giving us the European figures for cardholders' fees.

20 A. Yes.

21 Q. Then the APR rates that I was chasing down, we can see  
22 those at page 38. {RC-J5/22.3.1.2/38} Can you see  
23 those? So typical rates of interest on credit card  
24 products by country, 2015, you have a breakdown for  
25 American Express varying from not applicable through low

1 figures of 2% in Turkey, up to 52% in the UK; can you  
2 see?

3 A. Yes.

4 Q. So Amex makes money from its cardholder fees and its  
5 interest payments, does it not?

6 A. It does.

7 Q. Coming back, please, to paragraph 2.28 of your  
8 first report, page 52, {RC-H3/2/52}, you say there that:

9 "... a four-party scheme requires acquiring banks to  
10 deal with issuing banks ... As a result, there need to  
11 be terms on which [they] deal with each other ..."

12 So you need to have a series of rules, do you not,  
13 for any payment system to work?

14 A. Yes.

15 Q. You need to have a means of ensuring that payment is  
16 received by the merchant; otherwise, it will not be able  
17 to complete the transaction?

18 A. Yes.

19 Q. You need to have a means of getting the money from the  
20 cardholder to the merchant?

21 A. Yes.

22 Q. You have to have a mechanism, therefore, for the  
23 authorisation of a fund transfer from the issuing bank  
24 to the bank of the merchant?

25 A. Yes.



- 1 Q. There need to be rules for the clearing of multiple  
2 transactions, because no system can operate at an  
3 individual transaction level, can it?
- 4 A. Yes.
- 5 Q. That clearing has to then be accompanied by a settlement  
6 in due course, either gross settlement or net  
7 settlement?
- 8 A. Yes.
- 9 Q. It makes sense, given that we are not dealing with an  
10 individualised transaction, for those transactions to be  
11 batched into daily files or weekly files, depending on  
12 the system?
- 13 A. Yes, I am not an expert on how the actual processing  
14 works in clearing and settlement systems, nor whether --  
15 which bits take place within the context of the scheme  
16 agreements that we are talking about here or outside.  
17 But I -- I can accept that that is an efficient way of  
18 doing it.
- 19 Q. You obviously need to make provision for charging for  
20 the costs of the scheme that provides clearing,  
21 settlement and payment facilities, correct?
- 22 A. Apologies, can you repeat that?
- 23 Q. Yes. At some point the scheme will need to be paid for  
24 providing clearing, settlement and payment facilities?
- 25 A. If it is the scheme that carries out that particular

1 function, then yes.

2 Q. You need to have a rule, do you not, that either  
3 confirms settlement at par or describes a way in which  
4 other fees are charged?

5 A. I think -- I think the scheme needs to make that clear  
6 in a rule, yes.

7 Q. When we move on to other schemes, for example the faster  
8 payment scheme that is operated for electronic fund  
9 transfers in the UK, typically that says that each of  
10 the transferor and the transferee bear their own costs,  
11 correct?

12 A. I do not know the details, but I can accept that that is  
13 correct.

14 Q. If we look, please, at paragraph 2.30, page 53 of your  
15 first report, {RC-H3/2/53}, you recognise there,  
16 I think, that if bilateral negotiation is permitted, you  
17 have to deal with what happens if negotiation does not  
18 succeed; correct?

19 A. Sorry, let me just -- where do you get that last ...?

20 Q. The last sentence says:

21 "This means that different acquiring and issuing  
22 banks are free to agree bilaterally on their terms, but  
23 in the absence of such an agreement the default terms of  
24 dealing, including the default interchange fee, will  
25 apply."

1       A. Yes, I think I am describing here the actual factual  
2           situation, how these schemes have been set up. I cannot  
3           now recall whether I am saying this is always  
4           necessarily the case.

5       Q. If you simply had a scheme that said: we will transfer  
6           the money that is represented by the price paid in the  
7           underlying transaction, that would be a default rule  
8           capable of dealing with a situation in which negotiation  
9           had fallen apart?

10      A. It would potentially be a rule that, that sets the --  
11         yes, that -- that sets the terms of what is currently  
12         being agreed by -- through interchange. I do not know  
13         the economic desirability or characteristics of such  
14         a rule but that is a potential rule. I have not thought  
15         about it a lot.

16      Q. It is essentially a default settlement at par really, is  
17         it not?

18      A. Yes, you can have a rule that is default settlement at  
19         par. If that is what you mean, then, yes, I agree.

20      Q. I am simply describing functionally what is a settlement  
21         at par scheme.

22                 You obviously recognise that when I use the magic  
23                 language of default settlement at par, that is something  
24                 that is both a realistic and viable counterfactual?

25      A. It depends again what, what interchange you are talking

1           about, post IFR, commercial, inter-regional. I have  
2           commented extensively in my report as to why I think the  
3           settlement at par is not a suitable counterfactual for  
4           any of those three.

5           Q. Well, it was accepted to be a suitable counterfactual,  
6           was it not, in the Court of Appeal in the Sainsbury's  
7           case and the Supreme Court in the Sainsbury's case?

8           A. For domestic and intra-EEA it has been, yes.

9           Q. It has been accepted to be the correct counterfactual  
10          for commercials and inter-regionals in this case?

11          A. I am not -- not sure about that.

12          MR BEAL: Well, that is on the written openings of  
13          Mastercard --

14          THE PRESIDENT: I see, right.

15          MR BEAL: -- as I read them. They say the counterfactual is  
16          default settlement at par for commercial cards and for  
17          inter-regionals.

18          THE PRESIDENT: I am grateful, that is the acceptance that  
19          counsel is referring to.

20          MR BEAL: I can take you to the paragraphs when we come on  
21          to deal with commercial.

22          THE PRESIDENT: No, no, I just wanted Dr Niels to know --

23          MR BEAL: Where I am taking it from.

24          THE PRESIDENT: -- where the acceptance came from.

25          A. Okay. Now I understand, yes. What I do, of course, in

1 my report is I still explore the consequences of -- for  
2 commercial and inter-regional, for that -- for that  
3 counterfactual, and I show that actually the outcome is  
4 worse.

5 THE PRESIDENT: Dr Niels, there is absolutely no obligation  
6 on your part to accept anything that is said. We are  
7 interested in your expert opinion, and the inconsistency  
8 with what lawyers might say is something we will deal  
9 with later on. We want your opinion.

10 A. Thank you.

11 MR BEAL: Can I just confirm, in terms of formal definition  
12 of the market, the one we are working to, regardless of  
13 nuance, is the market for acquiring services in the UK  
14 and Ireland, is that right?

15 A. I think it is helpful, as I think all the experts have  
16 agreed to -- to, well, first of all, not really get hung  
17 up in too much detail on exactly the boundaries of the  
18 relevant market. But I think it is helpful to look at  
19 three markets in this context, the inter-scheme,  
20 inter-system market, the acquiring market and the  
21 issuing market, because the dynamics in all of those,  
22 they are related but they also play a role in our  
23 counterfactual analysis.

24 Q. Can I just concentrate on what the restriction of  
25 competition is here. The restriction of competition

1           that is alleged is the coordinated setting of the MIF,  
2           which establishes a substantial component of the  
3           Merchant Service Charge; correct?

4           A. Correct.

5           Q. That is a price; correct?

6           A. That is a what, sorry?

7           Q. That is a price. The Merchant Service Charge is a price  
8           for a service?

9           A. Yes.

10          Q. That service is taking place between acquirers and  
11          merchants in the acquiring services market, correct?

12          A. Yes.

13          MR BEAL: That is probably a convenient moment, sir.

14          THE PRESIDENT: I am grateful.

15          PROFESSOR WATERSON: Could I just come back on a couple of  
16          points that came up during this interesting discussion.  
17          First of all, when we talk about the merchant  
18          indifference test of Rochet and Tirole, is that more  
19          appropriate, in your opinion, in this case or in 101(3)?

20          A. No, the -- the merchant indifference test as such is  
21          relevant for 101(3) and actually, well, also for the IFR  
22          regulation, it formed the basis for that.

23                 I understand legally there is still a bit of  
24          discussion as to whether it is accepted for 101(3) or  
25          not but I would say it is one of the relevant ways of

1 looking at it.

2 Of course my analysis of the merchant costs in the  
3 counterfactual has some similarities with the MIT but it  
4 is very much part, in my mind, of the 101(1)  
5 counterfactual analysis.

6 PROFESSOR WATERSON: Thank you. The other point that came  
7 up, which I just wanted to ask you about, you talked  
8 about most-favoured-nation in the context of  
9 Booking.com, but I believe there has been some legal  
10 debate about that in other countries, if not in Britain,  
11 and indeed I know that -- from personal experience, that  
12 it is possible for some hotels to get a better rate than  
13 on Booking.com by booking with them directly. So do you  
14 accept those?

15 A. Yes, in the hotel market you get those dynamics as well.  
16 Yes.

17 PROFESSOR WATERSON: Thank you.

18 MR TIDSWELL: While we are at it, do you mind if I just ask  
19 a quick question as well. You were asked about  
20 two-sided platforms and about the position of the  
21 merchant and the cardholder in the scheme. In your  
22 view, does it make any difference to the analysis that  
23 neither the merchant nor the cardholder are actually  
24 parties to the scheme?

25 A. No, I do not -- I do not think it makes a difference.

1           So they are -- in the ecosystem they are part of it but  
2           they are the two users that the platform is bringing  
3           together, so in that sense, it is like other two-sided  
4           platforms, just like the hotel and I as a holidaymaker,  
5           we are not part of the Booking.com ecosystem as such but  
6           we are the users. So I would say yes, they are not  
7           formally part of the scheme as such but they are the two  
8           relevant groups of users.

9           MR TIDSWELL: Is that right? Because I am entering into  
10          a direct relationship with the platform, if I book  
11          a hotel, as the holidaymaker? So that is different, is  
12          it not, from the merchant who has no direct relationship  
13          with the scheme at all?

14          A. Yes, although maybe in that sense an acquirer -- the  
15          moment the acquirer accepts Mastercard, you could say,  
16          well, it has sort of made -- not directly, of course,  
17          via the -- merchant I should say. If a merchant -- the  
18          moment a merchant accepts Mastercard indirectly via the  
19          acquirer you could say that that is a relationship at  
20          that point between the merchant and Mastercard as  
21          a scheme. The acquirer is in that sense just an  
22          intermediary. Likewise, when I decide to carry  
23          a Mastercard card in my wallet, I am the one deciding  
24          that and I am the one deciding whether to use my  
25          Mastercard or my Visa card.



1 MR TIDSWELL: So you can actually distinguish different  
2 levels in the operation of the ecosystem because at one  
3 level the scheme is facilitating simply just the  
4 settlement of a payment obligation between issuer and  
5 acquirer -- put aside the IAF for a minute, and it is  
6 just the payment obligation that arises from clearing,  
7 and so you can see the ecosystem as being that small or  
8 you can make it larger, in which case you are bringing  
9 in then a separate transaction, which is the one you  
10 identify, which is the transaction the customer makes in  
11 the merchant's shop, for example? It is possible to  
12 distinguish them, is it not?

13 A. Yes, absolutely. It is possible to distinguish them and  
14 both of them are part of that ecosystem and, indeed, in  
15 this ecosystem you have multiple transactions, as  
16 followed from the President's picture as well and -- and  
17 that just all but they are all interrelated.

18 So the scheme, yes, at one level provides the  
19 functionality, sort of facilitates the interaction  
20 between the issuers and the acquirers in terms of the  
21 settlement of the payments, etc. But at a broader  
22 level, indeed, the scheme, what it provides is  
23 a platform that brings -- ultimately brings together the  
24 two sides of users, merchants and cardholders, which the  
25 issuers and acquirers then very much benefit from. That

1 creates an addressable market for them.

2 MR TIDSWELL: Thank you, that is very helpful.

3 THE PRESIDENT: We will rise for 10 minutes. Thank you very  
4 much.

5 (11.33 am)

6 (A short break)

7 (11.48 am)

8 THE PRESIDENT: Mr Beal.

9 MR BEAL: Thank you very much. Dr Niels, if you recall,  
10 shortly before the transcriber break, we were dealing  
11 with the structure of the acquiring services market, and  
12 you were happily, from my perspective at least, agreeing  
13 with some propositions I was putting to you.

14 A. Yes.

15 Q. They were trying to define the factual scenario that we  
16 are considering in order to work out whether there is  
17 a restriction of competition; that was the aim behind  
18 those questions, as you probably understood.

19 Now, having delineated the factual, it is right, is  
20 it not, that the counterfactual analysis takes the  
21 factual situation, removes what is alleged to be the  
22 restriction of competition and then thinks  
23 hypothetically about what the consequences would be;  
24 correct?

25 A. Yes, that is the general approach to counterfactual.

1 Q. In order to compare like with like, it is therefore  
2 important that the overall structure of the factual that  
3 I have given to you is also maintained in the  
4 counterfactual, is it not?

5 A. Yes, as much as possible, yes.

6 Q. Could we look, please, in your second report at  
7 paragraph 1.6 so that is {RC-H3/3/5}. You say here:

8 "There is one point of divergence among the experts  
9 in relation to which payment methods are included in the  
10 definition of the inter-system market".

11 Just pausing there -- sorry, you then say:

12 "This may matter for the counterfactual analysis  
13 ..."

14 Why does the inter-system market, which is the  
15 scheme on scheme competition, matter for  
16 a counterfactual that is looking at the acquiring  
17 services market as we have just defined it?

18 A. Because in that counterfactual there are dynamics that  
19 necessarily also take place in the inter-system and on  
20 the issuing side, that is because we have an  
21 interrelated system here, so any changes in the  
22 counterfactual that you make have consequences in all  
23 three markets, and, therefore, you all need to take  
24 those into account.

25 Q. At paragraph 2.5 at page 18, please, of this

1 second report, {RC-H3/3/18}, you say, four lines down:

2 "In my switching analysis, I assessed the likely  
3 counterfactual costs to merchants from issuers and/or  
4 cardholders switching to a range of alternative payment  
5 methods, including cash."

6 In answer to a question I put to you earlier, you  
7 agreed that cash and cheques was not something that you  
8 had been analysing for the purposes of market  
9 definition?

10 A. Not for the purpose of market definition but clearly  
11 cash is one of the alternative payment methods that  
12 I analyse in my counterfactual analysis, and by  
13 analysis, I mean also I calculate the cost of cash to  
14 merchants.

15 Q. This reveals, does it not, a fundamental logical, if  
16 nothing more, flaw, if you are trying to compare factual  
17 with counterfactual and you are keeping the parameters  
18 the same, if you then change the parameters in the  
19 counterfactual?

20 A. What parameters am I changing?

21 Q. Well, you are moving markets for a start. You are going  
22 from acquiring services market where a price is paid to  
23 inter-scheme market and on to substitutes for payment  
24 cards which are not in issue in the factual?

25 A. But the counterfactual here is -- for inter-regional and

1 commercial, it is removing the MIF altogether; that  
2 has -- so yes, I agree, let us just only look at that,  
3 let us only remove the MIF. That has consequences for  
4 competitive dynamics across the system as a whole, not  
5 just on the acquiring market, it has consequences on the  
6 scheme at the scheme level -- and we have heard that all  
7 from the factual evidence. It has consequences,  
8 therefore, also on what issuers do in that  
9 counterfactual and that -- and then how cardholders  
10 react to that by switching and, therefore, it does also  
11 have consequences going back, completing the circle, on  
12 the acquiring side.

13 THE PRESIDENT: Dr Niels, you were in court yesterday when  
14 we had a conversation with Professor Frankel?

15 A. Yes.

16 THE PRESIDENT: You presumably, therefore, heard the points  
17 that we made to him regarding the different factors that  
18 might inform choices of the different persons in the  
19 ecosystem. So might it be the case that a cash  
20 alternative is altogether irrelevant when one is  
21 considering the choices available to an acquirer in  
22 terms of what services they issue or products they buy  
23 but that cash might be relevant to the customer who is  
24 choosing which payment vehicle they might utilise when  
25 dealing with the merchant?

1       A. Yes. I was -- I was here yesterday, and I think that is  
2       actually a helpful way of looking at it. I am not  
3       proposing we look at the diagram here.

4       THE PRESIDENT: No, no, we have --

5       A. But it is a helpful way of looking at it, because  
6       indeed, at each of those nodes, one needs to consider  
7       what sort of choices do people have and what sort of  
8       choices do people make, in the factual and in the  
9       counterfactual, and it is precisely -- so I am talking  
10      about exactly the same counterfactual as Mr Beal is, in  
11      terms of we are trying to assess that counterfactual of  
12      no MIF, but in order to assess the effects in the round  
13      of that, you do need to look at all those nodes in the  
14      system and there you do find -- I have described the  
15      logic just now in terms of the schemes and issuers need  
16      to take action and, therefore cardholders. So yes, the  
17      node of the cardholders, in this case for commercial and  
18      inter-regional, I am lumping them together, they -- they  
19      may react in a certain way to changes made by the  
20      issuers in that -- in response to that counterfactual of  
21      no MIF and one of their alternatives may well be cash.

22             Therefore, that comes back to the merchant side  
23      because if that cardholder starts to use cash, that  
24      merchant, who also accepts cash, then, for that payment,  
25      incurs the cost of cash, and my conclusion, of course,

1 is the cost of cash is factually and, in my  
2 calculations, higher than the cost of card, so the cost  
3 is higher. But just to point here we are talking still  
4 about the relevance, so -- so there the cost of cash and  
5 cash comes in for the merchant as well.

6 THE PRESIDENT: But taking it to the absolute extreme -- and  
7 I appreciate no one is saying this -- if one is  
8 supposing a state of affairs where actually the  
9 customers of merchants simply forsake cards and move to  
10 cash because they -- the counterfactual assumption  
11 impels that, then merchants will obviously, because they  
12 want to sell things, forsake cards themselves and begin  
13 to process cash, and the acquirer market simply  
14 disappears.

15 A. In that extreme, yes.

16 THE PRESIDENT: In that extreme, yes. I mean, I am putting  
17 it extremely to make the point, but the fact is the  
18 acquirers just go out of business, that is the  
19 consequence of the counterfactual assumption in that  
20 case, extreme though it is; there is simply no market  
21 for the products that acquirers are offering to  
22 merchants.

23 A. Correct, although with the -- so purely the acquiring  
24 market, in that narrow sense, the acquirers as  
25 a business model that disappears but, obviously, there

1 is still a market in which merchants need to talk to  
2 providers of payment services, so -- to which payment  
3 methods they accept, so they will still negotiate with,  
4 say, Amex or PayPal etc, so in that wider acquirer  
5 merchant service market they are still there, but the  
6 acquirers in Visa or Mastercard, they would disappear in  
7 that extreme.

8 THE PRESIDENT: Yes, that is entirely fair. I mean, it  
9 depends on how extreme an assumption you make. If we go  
10 back to the assumption that I foisted on  
11 Professor Frankel yesterday, that every card transaction  
12 carried with it a tax of, say, £5 a transaction, or, you  
13 know, you can make it even more extreme, £1,000  
14 a transaction, what will happen if that applies to every  
15 card, Amex, Visa, Mastercard, everything, is that the  
16 market will die, not because of anything that the  
17 acquirers have done but simply because the demand that  
18 they get from merchants vanishes. In that situation,  
19 you can define the market at the acquirer level as you  
20 wish but the market is just dead. Now, I know we are  
21 not at that extreme, but that is why you have got to  
22 look at the ecosystem which takes everything, all the  
23 players, one needs to look at the ecosystem as a whole.

24 A. Yes, absolutely, that is absolutely right and -- and in  
25 a way, my scenarios for inter-regional and commercial,



1           they are not as extreme but some of them are quite  
2           extreme, so there is quite a diminishing of the card  
3           offering by Mastercard and Visa and that is precisely --  
4           so what do consumers do, even in your extreme example,  
5           they switch to other payment methods and therefore  
6           merchants have to do that as well.

7       MR BEAL: Just carrying on that thought experiment, then.

8           On your case, imagine -- well, it is your case, is it  
9           not, that a payment scheme that does not have a MIF is  
10          not going to be commercially viable?

11       A. Again, it depends on which MIF you are talking about,  
12       post IFR or commercial or inter-regional.

13       Q. Let us imagine -- ignore for a moment pre-December 2015.  
14       Imagine that there is a MIF charged for a debit card  
15       transaction and that MIF is no longer paid for a debit  
16       card transaction so that no MIF revenue derives from  
17       debit payment cards at all?

18       A. Yes.

19       Q. As I understand it, on your case, nobody would issue  
20       debit payment cards full stop?

21       A. Well, on my case, I have been clear about the  
22       competitive dynamics that arise, that if -- it depends  
23       also a bit what, what other schemes do. So --

24       Q. I am not talking about schemes. I am talking about any  
25       four-party scheme that depends upon a MIF to issue

- 1 a debit card, which is your case.
- 2 A. Okay. So in your -- so in that situation, all the  
3 four-party schemes --
- 4 Q. Yes.
- 5 A. -- are forced to not charge the MIF. Yes, then -- then  
6 those four-party schemes become a lot less competitive  
7 in that wider payment method market and a lot less  
8 attractive to issuers to issue their cards. Now,  
9 whether -- I do not think I put sort of a quantum on it,  
10 whether that means total annihilation or significant --  
11 significant hampering in overall competitiveness and  
12 attraction of the scheme. I do not think I go that far  
13 in this case.
- 14 Q. Would people go back to using checks, for example?
- 15 A. I -- I think that is unlikely here but --
- 16 Q. What about cash?
- 17 A. Some people might, but certainly there are other payment  
18 methods out there that people would use instead.
- 19 Q. Could I ask you, please, to look in {RC-J5/36/30}, and  
20 could we concentrate, please, on paragraph 103. You  
21 will see there that the Supreme Court is dealing, is it  
22 not, with the terms of competition between the real  
23 world, in which the MIF sets a minimum or reservation  
24 price for the MSC, and the counterfactual world, in  
25 which there is no MIF but settlement at par.

1           It then deals with that analysis. It is right, is  
2           it not, that the counterfactual that the Supreme Court  
3           looked at was simply a situation in which the whole of  
4           the MSC was open to competitive bargaining?

5           A. Yes. Because the counterfactual that it looked at was  
6           this ex-post or settlement at par, in essence, ex-post  
7           pricing prohibition, so no MIF at all, and therefore,  
8           yes, the MIF, when it comes to the acquirer's costs,  
9           there is no MIF, so therefore there is -- that bit falls  
10          away as an input cost for acquirers, so therefore it  
11          does not need to be negotiated over.

12          Q. Nobody has suggested in the Supreme Court, what are you  
13          doing, Supreme Court? You are looking at the wrong  
14          thing, you should be looking at people switching to  
15          Amex, the viability of our consumer debit and credit  
16          MIFs. All of that is going to go if this interchange  
17          fee is not available for the issuers.

18                 That was not an argument that was put, was it?

19          A. I cannot recall if it was an argument put in the -- to  
20          the Supreme Court. I certainly think there are people  
21          who have been saying that the Supreme Court -- or that  
22          there is a justification for MIF, even in these  
23          circumstances.

24          Q. Well, a variant of the argument was put in the  
25          Court of Appeal but they rejected it, and it was not

- 1           even advanced in the Supreme Court.
- 2           A. Yes.
- 3           Q. But you are saying it now comes back in because it is  
4           appropriate to widen up the scope of the counterfactual  
5           to include far more than is included in the factual  
6           analysis for the purposes, not of 101(3) analysis but  
7           for 101(1) analysis.
- 8           A. I -- I have -- I have put it back in. I am not putting  
9           forward a legal case as to why -- whether it should be  
10          in or not, but my -- my reasoning for why this is  
11          relevant in a counterfactual -- so the counterfactual --  
12          I am not changing the counterfactual, I am accepting  
13          that the counterfactual for commercial and  
14          inter-regional is again this settlement at par, so zero  
15          MIF. But what I do then is to analyse, well, what then  
16          happens in that situation, in the context of  
17          inter-regional and commercial, and that had not been  
18          analysed before and that was the relevant question I was  
19          asked to consider --
- 20          Q. So you are --
- 21          A. -- in this case.
- 22          Q. You are not focusing on a counterfactual in which you  
23          expand the market or you change the focus, what you are  
24          saying is the consequence in the counterfactual of  
25          having zero MIFs is a state of affairs in which MSCs are

- 1 lower, correct?
- 2 A. The consequence of the counterfactual is a state of  
3 affairs in which, well, not the MSCs, because that  
4 was -- bring it back to this case, commercial and  
5 inter-regional, the state of affairs is MIFs are zero,  
6 and I have then, based on the factual evidence in terms  
7 of what -- how the schemes and issuers would react,  
8 I have then analysed what would happen in that  
9 counterfactual to merchant costs. That is the analysis  
10 I have done.
- 11 Q. Yes, and the -- because of the large chunk of merchant  
12 contracts that are IC plus plus, where pass through is  
13 automatic of an increase or decrease in the MIF, you end  
14 up with an appreciable reduction in the Merchant Service  
15 Charges paid for the transactions in question, if the  
16 MIF is reduced to zero; correct?
- 17 A. That I agree with. Yes.
- 18 Q. What we do not see in the Supreme Court is analytically  
19 distinct question of what are the consequences in the  
20 broader ecosystem as a result of this change, correct?
- 21 A. I cannot now recall -- so correct it is not in the  
22 Supreme Court. I cannot now recall the discussions  
23 of -- of those consequences that came prior.
- 24 Q. What you do not find in the Supreme Court or the  
25 Court of Appeal is a suggestion at the Article 101 stage

1           it is appropriate to look at the consequences of the  
2           counterfactual holding true, to see what the impact may  
3           be on the broader ecosystem?

4           A. I agree that that is not something the Court of Appeal  
5           and Supreme Court covered.

6           Q. Are you aware that the PSR has found no evidence of  
7           reasonable substitutes for Mastercard and Visa, in any  
8           event, for merchants?

9           A. I -- I am not aware, but I think I -- I recall something  
10          along those lines, yes.

11          Q. Let us see it, just so it is not suggested I am pulling  
12          a fast one, {RC-J6/2/23}, please, paragraph 3.34. So  
13          this is the November 2021 report. At 3.34 there, and  
14          3.35, just scan that, if you would. (Pause).

15          A. Yes.

16          Q. The PSR has also concluded in its interim December 2023  
17          report that other payment methods do not provide  
18          a competitive constraint on Visa and Mastercard payment  
19          cards. Have you read that?

20          A. Sorry, where is that?

21          Q. {RC-J5/51/50}. This is the 2023 December interim  
22          report.

23          A. Yes, correct.

24          Q. I am going to move from general background on to  
25          issue 3. Now, could we look, please, in your

1 first report at paragraph 3.15, which is at page 73.

2 {RC-H3/2/73}. You will see halfway down that page:

3 "It was common ground before the Supreme Court ..."

4 That effectively default settlement par was the  
5 correct counterfactual for UK MIFs before December 2015.

6 Can you see that?

7 A. Yes.

8 Q. That would not have been common ground, would it, if  
9 settlement at par was not a viable system for  
10 a counterfactual?

11 A. Correct.

12 Q. In your second report, please, at paragraph 3.9, which  
13 is page 22, {RC-H3/3/22}, you maintain the suggestion  
14 that a default settlement at par necessarily involves  
15 effectively a price. This is a recycling, is it not, of  
16 the zero is still a price argument?

17 A. Yes.

18 Q. You are aware that the Court of Appeal in Sainsbury's  
19 disagreed with that argument?

20 A. Yes, I have my own view on that.

21 Q. Could we look back in your first report, please,  
22 paragraph 3.16, page 76. That cannot be right. No, it  
23 is, it is just not page 76. Page 73. {RC-H3/2/73} As  
24 I have this -- and tell me if I am wrong -- your case is  
25 essentially that for consumer EEA and domestic MIFs, the

1 IFR, the Interchange Fee Regulation, has made all the  
2 difference; is that right?

3 A. Yes.

4 Q. Are you aware that the IFR was not a competition  
5 decision?

6 A. Yes.

7 Q. Indeed, it was expressed to be without prejudice to the  
8 position under competition law?

9 A. Yes.

10 Q. It is a regulatory measure, is it not, that simply caps  
11 interchange fees within the EEA to certain rates for  
12 certain types of transaction?

13 A. Yes.

14 Q. It therefore sets a price cap?

15 A. Yes.

16 Q. In essence, it was a rapid regulatory response to  
17 a perceived problem of high MIFs, is that right?

18 A. I do not know how rapid it was. But it was certainly  
19 a response to the concern about high MIFs, yes.

20 Q. Could we look, please, in bundle {RC-J5/18/28}. Can you  
21 see a paragraph that begins "Interchange fees ..."  
22 Would you mind just reading that to yourself. (Pause)

23 A. Yes.

24 Q. So it was a response to a perceived issue in the market  
25 which was considered to be detrimental, even if it was



1 not a competition decision; correct?

2 A. Yes.

3 Q. It was clearly aimed, was it not, at the MIFs payable in  
4 four-party schemes such as Visa and Mastercard?

5 A. Yes. I believe it also covers the Amex GNS scheme in  
6 countries where Amex had a above 3% market share.

7 Q. Now, you are familiar, are you not, with the Cellophane  
8 fallacy, whereby if your factual includes a position  
9 where there is already market power and your  
10 counterfactual does not take that into account, then you  
11 are at risk of getting the wrong answer?

12 A. Well, Cellophane fallacy is a specific problem in market  
13 definition where, if you already have monopoly power and  
14 you do the snip test on that price, on the monopoly  
15 price, then you may wrongly define the market too  
16 widely. I have not really sort of applied that logic in  
17 the -- in the context of a counterfactual.

18 Q. Well, that is what I am coming on to put to you, which  
19 is why would that logic not apply, if you are trying to  
20 consider a factual and a counterfactual. Let me make  
21 that more concrete perhaps.

22 If you include in the counterfactual a measure which  
23 was intended to partially cure what was perceived to be  
24 a market problem, are you not at risk then of skewing  
25 the proper analysis?

1       A. This is very abstract but I do not think so. I think  
2       the beauty of counterfactual analysis is that you strike  
3       out from the factual the particular rule or agreement  
4       that you are concerned about and then you see what  
5       happens.

6       Q. What if, for example, the IFR, rather than setting caps  
7       at 0.2 and 0.3, had set a cap at 1%, are you saying it  
8       would therefore not any longer be a competition problem,  
9       if you had MIFs all the way up to 1%?

10      A. I am not sure about the premise of the question. My --  
11      my -- where I bring in the IFR is that it -- it  
12      fundamentally changes the way you look at the  
13      counterfactual, the bilaterals and UIFM counterfactuals  
14      for post IFR.

15      Q. But when we are looking at a claim that had been  
16      brought, for example, against Mastercard in 2007, there  
17      was no IFR in place, was there?

18      A. Correct.

19      Q. The answer to that claim was you, Mastercard, cannot  
20      have an exemptable MIF at the level that you have got it  
21      at, correct?

22      A. The answer ultimately from the Supreme Court was the  
23      MIFs are a restriction of competition. I think the  
24      question of the exemptable level of MIF is still to be  
25      decided, indeed in Trial 3.

- 1 Q. Yes, and the IFR, I am assuming you will say, has not  
2 determined what the exemptable level of the MIF would  
3 be?
- 4 A. Correct, legally it has not.
- 5 Q. Therefore, if in fact the exemptable level is below 0.2  
6 and 0.3, the IFR should not prevent that finding being  
7 made, should it?
- 8 A. If that were a finding, yes. I agree.
- 9 Q. If you, therefore, include the IFR in your analysis, you  
10 are baking in, are you not, a partial response to  
11 a competitive problem?
- 12 A. I do not follow that -- that premise at all. The IFR,  
13 post IFR, becomes just a relevant factor in the factual  
14 because it is there and, therefore, it has a -- in my  
15 analysis, a major impact also in the counterfactual. It  
16 is just there. The IFR, the decision, the regulatory  
17 decision was made to cap interchange fees and, of  
18 course, you can still apply competition law to it but  
19 the cap is there, the cap determines a lot of decisions  
20 in the factual and -- and likewise in the  
21 counterfactual.
- 22 Q. So on your analysis, if a measure which is intended to  
23 alleviate but not cure competition restriction ends up  
24 removing the claim that there has been any restriction  
25 of competition at all, that is a satisfactory outcome,

1 is it?

2 A. Yes, absolutely, because regulating -- regulating  
3 prices, price capping is an alternative to applying  
4 competition law. A policy decision was made -- and  
5 I have commented in the past that this is actually  
6 a sensible policy decision, if you are really worried  
7 about too high MIFs, to regulate them, I would say,  
8 rather than applying 101.

9 So it is a satisfactory policy outcome currently  
10 that -- that these interchange fees are capped under the  
11 IFR.

12 Q. So you would have a claim --

13 A. If that --

14 THE PRESIDENT: You continue. I was trying to avoid the car  
15 crash of a question overriding your answer, so do  
16 continue.

17 A. So if, if -- so I would not be concerned about if that  
18 meant that, therefore, you could not attack those same  
19 levels of MIF under competition law any more.

20 MR BEAL: I am sorry, I did not mean to interrupt you.

21 Now, the presence of a price cap, of course, does  
22 not logically mean that you cannot have co-ordination on  
23 prices below the cap, does it?

24 A. In general, I think that is -- that is correct.

25 Q. It would be, for example, an anti-competitive

1 restriction if parties agreed explicitly to price at  
2 a level that just happened to be below the cap. If you  
3 have horizontal price fixing by people at a price below  
4 the cap, that would be a bad thing?

5 A. Potentially, if the alternative was competition that led  
6 to even lower levels, then, then yes.

7 Q. Imagine, for example, that the 15 biggest pay day  
8 lenders who have their interest rates capped by  
9 legislation all agreed to fix their price at a certain  
10 APR that was below that cap but still substantial, that  
11 would be horizontal price fixing, would it not?

12 A. Yes.

13 Q. In paragraph 1.42, page 26 of your first report,  
14 {RC-H3/2/26}, you refer to what is said to be the logic  
15 behind the Commission's counterfactual. That is in the  
16 Mastercard I case. You say that part of that logic was  
17 to solve the hold-up problem. Is that an expression  
18 that is used expressly by the EU Commission in the  
19 Mastercard I decision?

20 A. You mean the term "hold-up"?

21 Q. Yes.

22 A. I cannot recall whether that was used expressly, but the  
23 Commission decision certainly refers to the hold-up  
24 problem, and indeed, it explicitly calls the ex-post  
25 pricing prohibition a solution to the hold-up problem.

1 Q. What it was doing was simply recognising that zero MIF  
2 systems could exist in the counterfactual world, was it  
3 not?

4 A. It did that, but the chain of logic was very much  
5 started from the problems of the bilaterals, and maybe  
6 this is a -- useful point also to address the tribunal's  
7 first question on that list of questions at the hot tub,  
8 that we did not get round to -- to discussing on  
9 bilaterals.

10 So -- so on bilaterals, there are two main points of  
11 debate and they are the competitive dynamics that you  
12 get and the practicalities. Now, maybe I set aside for  
13 the moment the practicalities, but the competitive  
14 dynamics that you get, it is -- and I have been always  
15 consistent on both -- both of those and both of those  
16 are fundamentally impacted by the IFR, but the  
17 competitive dynamics point is that it has been  
18 a commonly accepted approach and a natural question to  
19 ask, if you strike out multi-lateral negotiations, what  
20 happens in the bilateral, in bilateral negotiations  
21 between issuers and acquirers?

22 It is a commonly accepted dynamic that, in that  
23 situation, the issuers have a certain degree of  
24 bargaining power because the acquirers need to deal with  
25 them. That leads to the issue of issuer hold-up, it has

1 also been called the "Cournot complements" problem by  
2 economists, and in my mind -- or my position has  
3 traditionally -- has always been that that dynamic leads  
4 you to higher -- either to an outcome where the  
5 bilaterally agreed interchange fees are higher than the  
6 MIF or it leads you to an outcome where these  
7 negotiations issuer hold-ups spiral out of control and  
8 the whole thing does not work any more.

9 Under either scenario, the competitive outcome is  
10 worse than with the MIF, so that is why I have always  
11 said the MIF is not -- is not a restriction of  
12 competition, and then the Commission found this other  
13 solution, which is the ex-post pricing prohibition,  
14 which it expressly calls, as I said, a solution to the  
15 hold-up problem, to the issuer hold-up problem. Now, my  
16 position on post IFR is that, because of the IFR cap,  
17 you do not have the hold-up problem any more and  
18 therefore you do not need a solution for it and  
19 therefore bilaterals become again a viable and realistic  
20 counterfactual.

21 Q. If MIFs are removed from consideration in the  
22 counterfactual, it would follow, would it not, that  
23 there is nothing for the IFR to bite on in terms of the  
24 MIFs?

25 A. Correct. If the counterfactual was zero MIF, then the

1 IFR becomes non-binding, correct.

2 Q. Of course, what you have described in terms of bilateral  
3 negotiations crucially depends on the existence of the  
4 Honour All Cards Rule, does it not?

5 A. It assumes the existence of the Honour All Cards Rule.  
6 I think even in the proposition by Mr Dryden that he has  
7 put forward, even if you remove that Honour All Cards  
8 Rule, you get slightly more complicated negotiating  
9 dynamics but, even in that situation, my position is  
10 that you would still very likely to end up at the -- at  
11 the levels of the cap.

12 Q. Paragraph 3.17 of your first report, page 74,  
13 {RC-H3/2/74}, you say the IFR constrains the amount  
14 which issuers can demand in the hold-up. It follows  
15 from that, does it not, that the hold-up still exists,  
16 it is just that its effects are diminished?

17 A. So hold-up in the sense that the issuers still have  
18 a degree of buyer power, yes, and Dr Frankel also  
19 qualified it as it seriously minimises. I agree it  
20 becomes a matter of degree but fundamentally a lower  
21 degree than before and capped by that 0.3. So up to 0.3  
22 or 0.2 the issuer still has that buyer power to get it  
23 up. That is exactly the reason why I say that you end  
24 up, in that post-IFR counterfactual, at that level of  
25 0.2, 0.3.



- 1 Q. Therefore, due to the HACR, the issuer can still hold  
2 out for whatever it wants and the acquirer has no choice  
3 but to accept it?
- 4 A. Yes, at points -- up to the point of 0.2 and 0.3.
- 5 Q. Now, if you are going to accept from me that the  
6 Supreme Court, at the paragraph 103 that we looked at,  
7 was saying that the counterfactual must be one where the  
8 whole of the MSC is open to competitive bargaining, that  
9 would not be this position, would it?
- 10 A. If -- if you wanted to read it across literally, that  
11 particular statement, then I probably accept the  
12 proposition, but I struggle a bit to follow that logic.
- 13 Q. Now, in contrast, if the rule was simply a prohibition  
14 on ex-post pricing, issuers and acquirers would have to  
15 negotiate to achieve a MIF price?
- 16 A. Sorry, can you repeat that?
- 17 Q. If we are starting from a proposition that there is no  
18 ex-post pricing possible, then the only way of getting  
19 a MIF price is for free negotiation between an issuer  
20 and an acquirer, correct?
- 21 A. Yes, or -- well, I do not know if in that counterfactual  
22 it would even be possible to have that bilateral  
23 negotiation for a higher MIF but it would be unlikely to  
24 arise, yes.
- 25 Q. Well, it would be open to an issuer and an acquirer to

1           agree to negotiate a MIF, but what you are saying is,  
2           because of the way that the default rule is structured,  
3           the chances of any acquirer agreeing to pay any MIF  
4           would be slim?

5           A. I think the chances would be slim for -- for bilateral  
6           agreements for a positive MIF if the -- if the rule has  
7           been set at settlement at par, yes.

8           Q. Of course, the CJEU in Mastercard recognised that  
9           default settlement at par was a viable counterfactual in  
10          the sense that it would not lead to the collapse of all  
11          the four-party schemes?

12          A. Well, I think, interestingly, the CJEU asked -- raised  
13          the question whether this was a realistic counterfactual  
14          but, because there were no other -- no other proposed  
15          counterfactuals, it accepted the counterfactual from the  
16          General Court and the European Commission. So I do not  
17          think the CJEU discussed it at length, or had sort of  
18          a lot of evidence that it was a viable counterfactual,  
19          but it accepted it as the counterfactual, and I agree  
20          with that.

21          Q. In your second report, at paragraph 1.14, page 14,  
22          {RC-H3/3/8}, you conclude that, post the IFR, MIFs are  
23          not a restriction by object. Can we see that?

24          A. Sorry, which paragraph?

25          Q. I think it should be 1.14. Page 14.

- 1 A. Correct.
- 2 Q. The reasoning for that is then fleshed out in your  
3 first report, at paragraph 3.48 to 3.51, which is at  
4 page 86. {RC-H3/2/86}
- 5 A. Yes.
- 6 Q. The same reasoning, does it not, is applied by you to  
7 all of the MIFs that we are considering here?
- 8 A. Correct.
- 9 Q. I think you have accepted there is no material  
10 difference in the way that the MIFs are set as  
11 a mechanic, is that right?
- 12 A. Correct.
- 13 Q. So in terms of that mechanic, we know, do we not, that  
14 it has certain features -- we have been through them --  
15 namely a particular MIF is set by the scheme?
- 16 A. You mean in a factual?
- 17 Q. Yes.
- 18 A. Yes.
- 19 Q. That ends up being passed through to Merchant Service  
20 Charges in a way that the merchant has no ability to  
21 negotiate?
- 22 A. Yes, for IC plus plus contracts in full; for blended  
23 contracts, there is a bit more debate about what  
24 exactly -- how much exactly is passed on but, yes.
- 25 Q. The object of that arrangement is to produce a revenue

1 stream to be payable by the acquirer to the issuer,  
2 having been derived from the merchant?

3 A. Yes.

4 Q. Could we look, please, at {RC-J4/80/72}. This is the  
5 Supplemental Statement of Objections from 2017 for Visa,  
6 and hopefully we can look at recital (250). Could you  
7 read, please, (250) and (251). (Pause)

8 A. Yes.

9 Q. Then scrolling down, please, to (252), there is an  
10 unequivocal confirmation that price fixing is  
11 a restriction by object. Can you see that?

12 A. Yes.

13 Q. So the conclusion that was then subsequently reached at  
14 260 and 261 was that by virtue of effectively dictating  
15 a core component of the MSC that was paid by merchants,  
16 the setting of the MIF, the imposition of a MIF was  
17 a form of restriction by object?

18 A. Yes, I am happy to accept that that was the conclusion  
19 in this document. Yes.

20 Q. We see at recital (263) that the Commission  
21 provisionally finds, because it is a Supplemental  
22 Statement of Objections:

23 "... that it is evident from the very content of  
24 Visa's rules that the inter-regional MIFs fix a major  
25 component of the price that acquirers charge to

1 merchants for acquiring services. That price component  
2 is common to all acquirers under the Visa scheme and  
3 hence restricts competition on price on the acquiring  
4 market."

5 So it was finding, was it not, albeit provisionally,  
6 that this was an object restriction of competition?

7 A. I am just looking for the word "by object" here. But if  
8 it is the "by object" finding, then, yes, I can see what  
9 the Commission said here.

10 Q. Well, if you want to go back to the underlying  
11 reasoning -- we skimmed over it perhaps -- 260, 261, it  
12 was that the mechanism we have described, and you agreed  
13 with, was a means by which the rules, effectively, were  
14 setting a key parameter of competition in the acquiring  
15 market?

16 A. Yes.

17 Q. At 262, it says:

18 "The inter-regional MIFs are also similar to  
19 a recommended minimum price ..."

20 It is on that basis, is it not, that they went on to  
21 conclude at 262-263 that there was a restriction by  
22 object?

23 A. Again, I am willing to believe that the Commission  
24 refers here to by object restriction, but I cannot see  
25 that in paragraph 263.

1 Q. If you go to 264 -- if you are objecting to the absence  
2 of the words "by object", then if we look at 264, it  
3 says:

4 "When assessing if Visa's rules ... amount to  
5 a restriction of competition account must ... be had to  
6 the objective or purpose of the rules."

7 Just pausing there. That would be the objective  
8 object, will it not, not the subjective motivation, from  
9 a competition analysis -- point of view of competition  
10 analysis?

11 A. Sorry, is that a question?

12 Q. That was a question to you, yes.

13 A. Sorry, what was the question?

14 Q. The question is: when we are looking at the object or  
15 purpose of the rules, what matters is the objective  
16 construction of them, not any subjective motivation?

17 A. Oh I agree, yes.

18 Q. Then if we scroll over to the first two lines on the  
19 next page, page 76, {RC-J4/80/76}, it says:

20 "The fact that an alleged restriction may also  
21 pursue a legitimate objective does not preclude its  
22 being regarded as a restriction by object."

23 Do you see that?

24 A. I see that, yes.

25 Q. Then at 266 -- well, perhaps read 266 and 267. (Pause)

1 A. Yes.

2 Q. Finally, at 269, over the page, {RC-J4/80/77}:

3 "The existence of these clearly anti-competitive  
4 objectives support a finding that the Visa scheme's  
5 rules on inter-regional MIFs restrict competition 'by  
6 object', regardless of the potential existence of other,  
7 possibly legitimate, objectives to enhance the  
8 efficiency of the Visa scheme."

9 So the overall conclusion that was reached was that  
10 this was a restriction by object, was it not?

11 A. Yes, that is the conclusion that the Commission reached  
12 in this document.

13 Q. Then to save having to go back to it later, if we look,  
14 please, at recital (272) and (273), the Commission deals  
15 with objective necessity and finds that there was no  
16 objective justification or necessity for the scheme,  
17 correct?

18 A. Yes.

19 Q. At (273) in particular, it finds that any assessment of  
20 a countervailing benefit should be dealt with at 101(3)  
21 stage, correct?

22 A. Yes.

23 Q. Now, at recital (283), the Commission went on to look at  
24 other features of the two-sided market which it said  
25 reinforced the position, and I want to go through each

1 of these and see whether or not you accept that they  
2 apply equally to the post-December 2015 consumer MIFs?

3 A. Yes.

4 Q. So perhaps if you would be kind enough to read recital  
5 (283) and then I will come back to deal with the points  
6 of detail. (Pause)

7 A. Yes, just go over the page.

8 Q. Yes, top of the next page, please, if you want to read  
9 the final sentences.

10 A. Yes, I see what the Commission is saying. It is making  
11 a lot of points and a lot of steps, so I am happy to go  
12 through those.

13 Q. Yes, so let us just break down those steps. Firstly,  
14 inter-regional MIFs, like domestic MIFs  
15 post December 2015, are set by Mastercard on behalf of  
16 issuers and acquirers?

17 A. Yes.

18 Q. Merchants are not involved in that process?

19 A. Correct.

20 Q. Cards are a must take nature?

21 A. Well, this whole point of must take, I think there is  
22 sometimes a danger of the labelling. There is  
23 a spectrum between must take, should take or very  
24 attractive to take. So one needs to be a bit careful  
25 with this labelling of must take nature. But, I --



1 I would accept that Visa, or in this case Visa and  
2 Mastercard, are, at the very least, very attractive and  
3 important for merchants to take and to accept in the  
4 market context, yes.

5 Q. The only constraint on setting a MIF in principle was  
6 the merchant's ability to refuse cards altogether,  
7 correct?

8 A. That is one constraint. There are potentially others.

9 Q. What others are you thinking of?

10 A. Well, there is the -- sorry, is this merchants or  
11 acquirers? There is the -- there is potentially the  
12 negotiation between acquirers and the scheme or between  
13 merchants and the scheme and -- or indeed steering, as  
14 we have discussed. But those are theoretical  
15 possibilities. I think in terms of what is realistic,  
16 I think the -- what is stated here is that this is by --  
17 where is the sentence again? Only limited. Yes, I  
18 would say that is the -- the main or -- yes, the main  
19 possibility that they have here, the ability to refuse  
20 cards.

21 Q. That situation is inherently different from a normal  
22 competitive process, where negotiations take place  
23 between independent parties with opposing interests.

24 A. Well, again, it depends on what you mean by normal  
25 competitive process and where -- where in the ecosystem

1           you are.

2           Q. Well, should a normal competitive process not normally  
3           involve negotiations between issuers and acquirers  
4           without the interference of the scheme?

5           A. I do not think so. Well, in my view at least, to me it  
6           is a very normal competitive process that payment  
7           systems have evolved as these two-sided -- I repeat  
8           myself, as these two-sided platforms that are looking  
9           for a skewed pricing structure. Amex, PayPal, others,  
10          they all do that. Visa and Mastercard, they need the  
11          interchange as a mechanism to -- to shift these costs.

12                 So, therefore, yes, within the -- within the system,  
13          you have the need for either a MIF or bilateral  
14          negotiations. But none of -- none of that is really  
15          sort of easily comparable to what is a normal  
16          competitive process, that is my point.

17          Q. In practice, the final point of similarity was that you  
18          would not expect bilateral agreements on the applicable  
19          interchange fee to be very comparable at all, would you?

20          A. If -- if the MIF has been set multilaterally, as it has  
21          in the factual, traditionally, as a default rule and  
22          with the possibilities for bilaterals, then those  
23          bilaterals in that context are rare. I agree with that.

24          Q. Could we look at {RC-J4/22/100}. At the bottom of this  
25          page, there is a recital (290), where it says:

1           "As Visa Europe acknowledges, the setting of  
2 interchange fee rates is not akin to a contentious  
3 process such as a price negotiation where opposing  
4 interests of buyers and sellers meet."

5           So on. So Mastercard must be in the same position,  
6 must it not, as the one that Visa has acknowledged?

7       A. Yes, I am not privy to the detail on this, and I am  
8 willing to accept. But one also has to look at  
9 different time periods. Indeed, I read with interest  
10 the Merricks judgment of a few weeks ago, which  
11 described that process in quite a lot of detail, how  
12 acquirers and issuers got together and sort of the  
13 interests and how they were discussed.

14       Q. Could we then come to decisions that more specifically  
15 mention Mastercard. The first is a Statement of  
16 Objections from 9 July 2015. Please can we look at  
17 {RC-J3/73/54}, and we see a section beginning "The  
18 content of Mastercard's rules on inter-regional MIFs"  
19 and so on.

20           Could we then scroll through to paragraph 229. I am  
21 hoping it is the conclusion, which will make it a bit  
22 shorter.

23       A. Sorry, which paragraph?

24       Q. Recital (229). My system is very slow, I am afraid. It  
25 is catching up.

- 1 A. Yes, I see that. {RC-J3/73/71}
- 2 Q. Sorry, I am just waiting for my screen to load. You see  
3 the conclusion that is reached, the punchline is:  
4 "The Commission therefore considers that  
5 Mastercard's rules on inter-regional MIF is a decision  
6 by an association of undertakings that restricts  
7 competition by object ..."  
8 Can you see that?
- 9 A. Yes.
- 10 Q. Moving on to the decision proper, that is at  
11 {RC-J5/31/10}.
- 12 A. Yes.
- 13 Q. If we look please at recital (33), it refers back to the  
14 Statement of Objections that we have just looked at,  
15 where the preliminary conclusion was reached that  
16 Mastercard's rules on inter-regional MIFs amounted to  
17 horizontal price fixing, fixed a significant component,  
18 and so on:  
19 "The Commission also came to the preliminary  
20 conclusion that the objective of Mastercard's rules ...  
21 is to fix a part of the price charged to merchants and  
22 to restrict competition to the benefit of Mastercard and  
23 its members/licensees, primarily the issuers."  
24 Now, that was classified then as restriction of  
25 competition by object. Can you see that?

1 A. Yes. I see that the Commission is referring to what it  
2 said in its SO.

3 Q. That was part and parcel of a decision by the Commission  
4 to accept commitments that had been offered by  
5 Mastercard to cure, seemingly, up to a point, that  
6 problem, correct?

7 A. Yes. Well, part and parcel, this is in the decision so,  
8 yes, I do not know to what extent this played a role in  
9 the final decision.

10 Q. This is the final decision.

11 A. Yes --

12 Q. This is the decision accepting commitments by  
13 Mastercard --

14 A. (Overspeaking).

15 Q. In order to address --

16 A. But what I'm saying is I do not know what you mean by  
17 part and parcel, so I am saying it is included in the  
18 decision, yes, I agree with that.

19 Q. Now, when MIFs are set, the schemes must know, must they  
20 not, in this day and age, that they are going to be  
21 passed on for the lion's share through to large  
22 merchants who have IC plus plus contracts?

23 A. Yes.

24 Q. So it must, therefore, follow that it is a necessary  
25 consequence of the MIF arrangements that Mastercard has

1 put in place that a significant part of the price paid  
2 by the merchant will have been fixed by the scheme?

3 A. Yes.

4 Q. The necessary consequence of that is a large revenue  
5 stream will be made available from merchants via  
6 acquirers to issuers?

7 A. Yes.

8 Q. That is a process that is beyond the merchant's control?

9 A. Yes.

10 Q. Can you think of many situations in a freely competitive  
11 market where that sort of arrangement holds?

12 A. Well, I -- I would say yes, many -- all other payment  
13 methods that we have seen do exactly the same thing.  
14 They charge, they set a price on the merchant side  
15 and -- and implicitly or -- well, not -- yes, so  
16 implicitly charge -- use that to be able also to charge  
17 less on the cardholder side.

18 So when it comes to the organisational aspect in  
19 terms of there are independent competitors involved, who  
20 then sort of are portrayed as price fixing, I agree,  
21 that is very specific to four-party schemes. But the  
22 mechanism whereby the merchants do not have a choice or  
23 are willing to pay those very high fees and they  
24 ultimately end up in attractive offerings or free  
25 offerings to the consumers, that is a very common

1           phenomenon in payment markets.

2           Q. Now in paragraph 3.12, page 23 of your report -- sorry,  
3           your second report, second report, paragraph 3.12,  
4           page 23, {RC-H3/3/23}, you suggest that if there is  
5           a counterfactual with bilateral negotiations in it, that  
6           is a point of distinction with the Supreme Court's fifth  
7           factual point, is that right?

8           A. Correct.

9           Q. You say that is derived from the Court of Justice  
10          judgment in Mastercard, which states that, in the  
11          counterfactual, there would ultimately be no bilateral  
12          negotiations, is that right?

13          A. Correct.

14          Q. Can I walk you through what the Supreme Court in fact  
15          was dealing with on that point. It is {RC-J5/36/24}.  
16          At paragraphs 68 to 70, we can see the way the argument  
17          is being put because it is under a heading "Visa and  
18          Mastercard's arguments". Can you just cast an eye over  
19          that, please. (Pause)

20          A. Yes.

21          Q. So the Commission had, as part of its consideration of  
22          a transitional period, said, well, of course, you would  
23          have bilateral negotiations and they would effectively  
24          negotiate away the MIF. That was said to be a factual  
25          distinction because Mr Justice Phillips had found that

1           there would be no bilateral agreements in the  
2           counterfactual and, on that basis, see paragraph 72, it  
3           was said that Mastercard Court of Justice decision was  
4           factually distinguishable.

5           The answer to that was given by the Supreme Court at  
6           paragraph 73, page 25, {RC-J5/36/25}, which is that the  
7           arguments involved a misunderstanding or  
8           a misinterpretation of the Commission decision. The  
9           reasoning for that is then fleshed out in paragraph 75.

10          Can you read paragraph 75, please. (Pause)

11          A. Yes.

12          Q. 76 was then the Commission went on to look at what was  
13          effectively a transitional process, whereby:

14                 "Acquiring banks would eventually end up setting  
15                 their MSCs merely by taking into account their own  
16                 marginal cost plus a certain mark up."

17                 The transient nature of that competitive process  
18                 showed that it was not part of the Commission's thinking  
19                 that there would in fact be bilateral agreements in the  
20                 counterfactual. Can you see?

21          A. Sorry, I do not see your last point that you were making  
22          about the bilaterals.

23          Q. So if you look at 76, it says:

24                 "It is correct that the Commission went on in  
25                 recital (460) to describe the competitive process



1 involved if there were bilateral negotiations over  
2 interchange fees, but the ultimate point it was here  
3 making is that the process would be transient and that  
4 'acquiring banks would eventually end up setting their  
5 MSCs merely by taking into account their own ...'"

6 Effectively acquirer cost, correct?

7 A. Yes.

8 Q. So the bilateral agreements that were in contemplation  
9 of the European Commission were simply a transitional  
10 stage towards a steady state of no MIFs going into the  
11 MSC, correct?

12 A. Yes, correct.

13 Q. Then at 77 and 78, we see that the Supreme Court is  
14 referring to findings from the Mastercard General Court  
15 and the Court of Justice, which essentially looked at  
16 this concept of pressure being brought to bear, by which  
17 the MIFs would effectively be negotiated away. Can you  
18 see that?

19 A. Yes.

20 Q. Now, if we could pick up, please, Mastercard  
21 General Court decision, {RC-J5/16/18}. Can we look,  
22 please, at paragraph 130. Four, five lines down it  
23 says:

24 "The applicants also take the view that the  
25 Commission wrongly concluded that, in the absence of the

1 MIF, bilateral negotiations would be held between  
2 issuing banks and acquiring banks and that such  
3 negotiations would in due course lead to the  
4 disappearance of interchange fees, and, moreover, that  
5 the Commission took the prohibition of ex-post pricing  
6 into account in its reasoning."

7 That complaint was then rejected. Could I ask you  
8 then, please, to read 133 and 134 further on on that  
9 page. (Pause)

10 A. Yes.

11 Q. Then if we take it, please, to paragraph 142 on page 20,  
12 {RC-J5/16/20}, we see an argument is advanced that zero  
13 MIF is still a price and, therefore, that still  
14 represents a co-ordination of pricing, and at 143 that  
15 submission is rejected. Can you see that?

16 A. Yes.

17 Q. That the Commission:

18 "... was legitimately entitled to find that a  
19 Mastercard system operating without a MIF would remain  
20 economically viable ..."

21 It followed from that, did it not, that because the  
22 effect of the MIF was to impose a substantial component  
23 of the MSC price, the absence of the MIF would mean that  
24 that restriction of competition was removed in the  
25 counterfactual?

- 1 A. Yes, that was the reasoning.
- 2 Q. Could we then go back, please, to the Supreme Court  
3 judgment at paragraph 93, which is {RC-J5/36/26}. This  
4 is part of the six criteria by which you have analysed  
5 the Supreme Court's decision, paragraph 93. The six  
6 factors.
- 7 A. Yes.
- 8 Q. We were looking at the fifth one and the fifth one was  
9 in the counterfactual there would ultimately be no  
10 bilaterally agreed interchange fees. What the  
11 Supreme Court there is describing is a transitional  
12 process of bilateral negotiation that leads ultimately  
13 to no MIFs going into the Merchant Service Charge,  
14 correct?
- 15 A. I believe based on the -- sort of the discussion that  
16 came before this in the various cases, I think that is  
17 a conclusion one could -- one could draw. I am not here  
18 to challenge how exactly the Supreme Court -- what it  
19 meant by bilaterals here.
- 20 Also, my analysis is clear that I think bilaterals  
21 are, from an economic perspective, a relevant  
22 counterfactual. I am not doing a legal analysis as to  
23 whether point 5, criterion 5 by the Supreme Court  
24 applies or not. My understanding is, because it refers  
25 to bilaterals and I am saying bilaterals are a realistic

1 counterfactual in post-IFR world, that therefore this  
2 condition 5 also would not hold. But -- but my ultimate  
3 economic conclusion does not rest on that.

4 Q. So it would follow, if you had a genuine system of  
5 bilateral negotiation, what the Supreme Court is  
6 envisaging, surely, is that, over time, the competitive  
7 uncertainty between the players would drive bilateral  
8 agreements on MIFs out of existence?

9 A. Well, this is one of the situations. Again, the -- this  
10 is commonly accepting the bilateral -- the issuer  
11 hold-up problem, and I described earlier there are two  
12 scenarios in the bilateral world without a MIF. One is  
13 that you end up -- in these bilaterals, you do  
14 ultimately reach agreements and you end up with  
15 bilaterals that are higher or the system of negotiations  
16 has so much uncertainty it spirals out of control and  
17 there is the collapse.

18 But both of those factors -- so that is the reason  
19 why I have always said, well, multi-lateral is a better  
20 way of doing things and therefore not a restriction.  
21 But in -- in the post-IFR world that problem does not  
22 arise any more and of course the -- the Supreme Court,  
23 this, this assessment by the Supreme Court, which  
24 recognises the problem potentially of the bilaterals, is  
25 in the pre-IFR world.

1 Q. Now, the -- we have accepted, have we not, that genuine  
2 bilateral negotiations producing a MIF are rare,  
3 uncommon, very rare, let us choose an adjective.

4 A. They are -- they are currently rare, but they have  
5 existed in particular in a domestic context. Indeed the  
6 Merricks judgment describes how pre-1997 bilaterals was  
7 the way that MIFs were set in the Mastercard scheme.

8 Q. The reason why they are so rare is because the number of  
9 negotiations required by a large number of issuers and  
10 acquirers makes it unworkable, does it not?

11 A. So certainly, it -- so the debate about practicality  
12 internationally, or in the US as we heard Dr Frankel  
13 say, you have so many issuers and acquirers it becomes  
14 impractical.

15 In domestic schemes the problem becomes a lot more  
16 tractable. Of course you still have a lot of, even in  
17 the UK, a lot of issuers and a lot of acquirers and  
18 still a lot of agreements, although there is a degree of  
19 concentration which means that the largest acquirers and  
20 the largest issuers capture together a lot of -- a big  
21 proportion of the market. There are figures on that.

22 But again my point here is that with the IFR that  
23 dynamic changes. So reaching an agreement with the IFR,  
24 providing such a clear focal point for the negotiation  
25 and the IFR limiting the range over which you can even

1 negotiate to zero to 0.3, which is a much narrower range  
2 than what we had before, and then the competitive  
3 incentives on issuers, the remaining issue holder, in my  
4 mind those are the reasons why it is practical to have  
5 bilaterals in that situation post IFR with that clear  
6 focal point and you end up again at that level of the  
7 IFR cap.

8 Q. Dr Niels, please can we just deal with this in stages  
9 and hopefully before the short adjournment.

10 Firstly, let us just deal with pure bilaterals as  
11 a concept rather than in the context of the IFR and  
12 I put to you that the large number of negotiations  
13 required made it unworkable. Can I ask you, please, to  
14 look in {RC-J5/28/44}. This is part of the CAT's  
15 decision in the Sainsbury's case and I hope at  
16 paragraph 178 we will see the recital of some evidence  
17 that was being given in this.

18 So we see that the CAT was considering four options  
19 for issuers -- this is the Court of Appeal, sorry, in  
20 Sainsbury's -- at 178 is reviewing what the CAT was  
21 considering below, one which was to negotiate bilateral  
22 interchange fees with acquirers and so on.

23 At 180, the Court of Appeal said:

24 "We agree that the counterfactual adopted by the CAT  
25 had to be in accordance with the requirements laid down

1 by the CJEU. In these circumstances, we cannot see any  
2 proper basis for the CAT's conclusion on this issue.  
3 The CJEU's decision plainly approved a counterfactual in  
4 the same factual circumstances as the Mastercard ..."

5 With a prohibition on ex-post pricing.

6 At 182, page 45, {RC-J5/2/45}, the CAT purported to  
7 place greater reliance on the factual rather than the  
8 expert evidence.

9 We see at the bottom of that paragraph:

10 "Dr Gunnar Niels, Mastercard's expert, said that, if  
11 the default MIF was zero, there would be no negotiation  
12 of positive bilateral interchange fees because the  
13 merchants would insist on ..."

14 Short term benefits.

15 So that appeared to be the position you were  
16 adopting there, is that right?

17 A. Yes. I was surprised to see this referenced also in the  
18 openings because this is a -- this is referring to  
19 a completely different counterfactual altogether and my  
20 commentary on that. This was the tribunal's  
21 counterfactual in Sainsbury's.

22 If you recall that was an entirely different  
23 situation. That was a counterfactual in which it was  
24 posited that Visa would still have its MIF, Mastercard  
25 would not have its MIF, Mastercard would have to have

1 a default zero MIF and then it was posited by  
2 the tribunal that in that situation, there would still  
3 be an incentive on merchants and/or acquirers to  
4 negotiate bilaterally with Mastercard so as to keep  
5 Mastercard in the market.

6 My -- my comment on that was always there is  
7 a collective action problem there among merchants and  
8 acquirers and therefore it is not viable; that -- that  
9 is the comment that is referred to here.

10 But to say that this was my comment on the  
11 bilaterals counterfactual in general is -- is just  
12 misplaced.

13 THE PRESIDENT: Dr Niels, just to be clear, and it will  
14 obviously be necessary for me in particular to read what  
15 was said in Sainsbury's first instance, the reason you  
16 are saying the situation is different is because the  
17 counterfactual before the tribunal in Sainsbury's had  
18 asymmetry between the position as between Visa on the  
19 one hand and Mastercard on the other?

20 A. Correct.

21 THE PRESIDENT: In that what was permissible for Visa in the  
22 counterfactual was not permissible for Mastercard?

23 A. Correct.

24 THE PRESIDENT: Very well, we will re-read Sainsbury's in  
25 that light, but we understand where this is coming from.



1 MR BEAL: Yes. It is also right, is it not, that when the  
2 OTF decided on bilaterals as a counterfactual in 2005,  
3 2006 Mastercard appealed to the CAT and the OFT withdrew  
4 its decision?

5 A. Correct.

6 Q. Coming back to, as I said I would, having looked at the  
7 purely bilateral situation in the presence for example  
8 of either a default settlement or in the presence of an  
9 asymmetric counterfactual, if we now plug back in the  
10 IFR the reality remains, does it not, that the version  
11 of bilateral negotiation that you envisage in the  
12 counterfactual still does not lead, does it, to the full  
13 negotiation of the entire MSC between the acquirer and  
14 the merchant?

15 A. Sorry, can you repeat that last bit of the premise?

16 Q. Yes. You are relying on the IFR to drive an outcome to  
17 the bilateral negotiation whereby the interchange fee is  
18 maintained in existence?

19 A. Yes.

20 Q. So to the extent that the Supreme Court in fact 5 was  
21 envisaging that bilateral negotiations ultimately would  
22 enable free negotiation for the entirety of the MSC,  
23 that is not what your bilaterals counterfactual  
24 produces?

25 A. Correct. I go back to first principles and I cross out

1 multi-lateral and then explore what happens in  
2 bilateral, yes.

3 Q. The whole premise of your counterfactual is to try and  
4 find a way to maintain very substantial revenue  
5 transfers from merchants via acquirers to the issuing  
6 banks for competitive gain, for the competitive reasons  
7 that you have identified for Mastercard?

8 A. Well, I am not trying to maintain anything. I can now  
9 see in the transcript the question which helps. But  
10 I am not trying to maintain anything myself.

11 But my -- my premise in the counterfactual is it is  
12 a natural question to ask to go back to bilaterals and  
13 what would happen now. The IFR, as I said, makes a big  
14 difference and, yes, one of the reasons why you end up  
15 at the level of the IFR cap is indeed that for the  
16 scheme and for the issuers this is an important revenue  
17 stream that it can then use to compete in the -- on the  
18 issuing side of the market.

19 Q. But it is important to understand, is it not, that the  
20 bilaterals counterfactual you are advancing is not  
21 intended, and indeed you would not advance it if it did,  
22 it is not intended to lead to a situation in which the  
23 interchange fee is negotiated out of existence?

24 A. It is not intended to do that. I also do not understand  
25 the concept of interchange fee negotiated out of

1 existence because all the incentives in the scheme would  
2 be such that you would want a positive interchange fee.

3 MR BEAL: Sir, I see the time. That is not the end of  
4 issue 3, it is not probably the end of the beginning of  
5 issue 3, but we are making progress.

6 THE PRESIDENT: It may be the beginning of the end.

7 MR BEAL: Yes.

8 THE PRESIDENT: We made the offer yesterday and before to  
9 other cross-examiners, would it assist if we started at  
10 twenty to?

11 MR BEAL: At the moment I am still on course to finish with  
12 both my witnesses in the allotted time I had of  
13 three days, so I am making good progress by that  
14 reckoning. If the tribunal would like the benefit of  
15 a shorter lunch and if I can draw stumps earlier than  
16 5.00 pm then that is what I will do, if I am making good  
17 progress by 5.00 pm. That would certainly be very  
18 helpful and it means that the tribunal does not  
19 hopefully have as long a day, and the transcriber does  
20 not have as long a day as we have had recently.

21 THE PRESIDENT: Let us do that in that case. We will resume  
22 at 20 to 2.

23 (1.03 pm)

24 (The short adjournment)

25 (1.40 pm)

1 THE PRESIDENT: Mr Beal.

2 MR BEAL: Thank you. Please could we bring up {RC-F4/8/8}.

3 Dr Niels, this is a witness statement from Mr Knupp;  
4 can you see that?

5 A. Yes.

6 Q. What we see is that he describes the practicalities of  
7 implementing bilateral arrangements. Are you familiar  
8 with this evidence?

9 A. Yes.

10 Q. His position is, is it not, that it would simply be  
11 impractical to put in to the Visa payment system a  
12 number of data points required to enable bilateral  
13 negotiations to be properly dealt with at a system  
14 level?

15 A. I think he deals here with the practicality problem and  
16 I think he -- what I can see here he refers to the  
17 global discussion. As I said earlier, globally I would  
18 fully accept that it is practically unfeasible to have  
19 bilaterals. I cannot now recall what Mr Knupp's  
20 position was on domestic schemes.

21 Q. Well, you have said -- this is paragraph 3.21  
22 {RC-H3/2/75} of your first report -- you have said that  
23 you can look back to consider the way it has operated in  
24 the past and if we look, for example, at footnote 62 on  
25 page 75, you refer to the Maestro system having what is

1           called a pure bilateral agreement mechanism. Can you  
2           see that?

3           A. Yes.

4           Q. Could we please look at {RC-M1/1/12}, it is one of the  
5           aspects you cite. This is dealing with the Maestro  
6           system, it is in Mr Koboldt's evidence in the Asda case.  
7           Essentially the Maestro system involved a negotiation  
8           which, if it broke down, would be subject to  
9           a Mastercard interchange fee until such time as there  
10          had been an arbitration; is that right?

11          A. Yes, I am not familiar, I -- I can accept if this is  
12          factually correct, then that is correct.

13          Q. Could we look then, please, at {RC-M1/4/7} you see at  
14          the bottom of the page it says, paragraph 29 in  
15          Mr Douglas's witness statement:

16                 "The domestic rules for Switch and Maestro provided  
17                 that interchange fees would be set bilaterally between  
18                 each pair. However, in the event that an agreement  
19                 could not be reached, the level would be determined by  
20                 arbitration with a default interchange fee applying in  
21                 the interim."

22          A. Yes.

23          Q. It then says:

24                 "However, bilateral rates were generally agreed at  
25                 around the level of the default rates since this was

1 expected to be the outcome of any arbitration."

2 This was a Maestro rules arbitration. Are you  
3 familiar with what those rules provided?

4 A. Not in detail, no.

5 Q. Could we look, please, in Mr Willaert's first witness  
6 statement, paragraph 25.11, which is {RC-F3/1/10}, this  
7 does not deal with the Maestro rules point because we do  
8 not have a copy of those rules but I am moving on, just  
9 so there is no confusion.

10 But at 25.11, it is important to see what  
11 Mr Willaert says about the prospects for bilateral  
12 agreements. Have you read this witness statement?

13 A. If this is the one for the current case, then yes.

14 Q. It is.

15 A. Yes.

16 Q. He distinguishes, does he not, between bilaterals that  
17 are agreed in advance and bilaterals that are agreed  
18 after the event?

19 A. Yes.

20 Q. Negotiation after the event is not really a negotiation,  
21 is it? Once the payment -- once the transaction has  
22 taken place, and an obligation to pay has arisen, it is  
23 very difficult to think of that leading to sensible  
24 negotiations as to price.

25 A. Well, I agree, yes.

- 1 Q. He says that. On his evidence at the bottom of the page  
2 it seems to default more into the issuer deciding how  
3 much money to remit to the acquirer rather than any form  
4 of genuine negotiation; correct?
- 5 A. Yes, correct.
- 6 Q. That is precisely because the acquirers and issuers have  
7 signed up to a payment scheme where they agree that the  
8 payment card can be used and once that payment card is  
9 used, the obligation to pay arises, correct?
- 10 A. Yes.
- 11 Q. So we end up with a situation where whatever the issuer  
12 decides to charge is the price that is set?
- 13 A. Are you now referring to the --
- 14 Q. To the MIF?
- 15 A. -- ex post -- after the settlement?
- 16 Q. After the event yes.
- 17 A. After the event. Yes.
- 18 Q. Of course that is consistent, is it not, with the  
19 Commission's observations over the years about ex-post  
20 pricing leading to conflicts that would imperil the  
21 system. You do not have a genuine system of agreement.
- 22 A. It is consistent with my logic and the accepted logic of  
23 the issuer hold-up problem and therefore in this logic  
24 you would end up at the IFR caps, yes.
- 25 Q. Now, therefore in order to have meaningful bilateral

1 negotiation, you have to agree the situation in advance,  
2 do you not?

3 A. Generally when talking about bilaterals it is probably  
4 more sensible or plausible that these negotiations take  
5 place in advance between an issuer and acquirer so that  
6 they have something -- that they have an agreement in  
7 place for when actual transactions happen. I think that  
8 is more commercially sensible than doing it after  
9 a transaction takes place.

10 Q. We do not have the final figures yet but in the UK and  
11 Ireland, we would be looking at, I do not know, 50, 60,  
12 70 issuers?

13 A. That is probably about right. Yes.

14 Q. A good number of acquirers; correct?

15 A. Yes, there is a good number of acquirers.

16 Q. Of course we are dealing here not just with UK and  
17 Ireland but also EEA, so we have to span out the  
18 analysis, do we not, to issuers and acquirers throughout  
19 the EEA?

20 A. I -- I had not -- in my assessment I had not really  
21 considered bilateral negotiations also to have to take  
22 place for -- for intra-EEA with acquirers and issuers  
23 outside the UK. In my analysis, I had very much focused  
24 on these being then domestic MIF settings for the UK and  
25 for Ireland.



- 1 Q. In relation to this bilateral negotiation between the  
2 thousands of issuers and acquirers in the EEA, assuming  
3 you could then sensibly plug that into a payment system  
4 on the technical basis, as Mr Knupp has addressed, you  
5 are then in a position, are you not, where you still  
6 have to have default MIF rates for every other MIF that  
7 is set by the scheme itself?
- 8 A. Well, if you are asking about the intra-EEA, as I said,  
9 I have not addressed the issues of where it is  
10 thousands --
- 11 Q. I am asking now about inter-regionals and commercial  
12 cards. You are not applying this system to commercial  
13 card MIFs or inter-regional MIFs?
- 14 A. No, my discussion on bilaterals is purely in the context  
15 of the post IFR MIF.
- 16 Q. So the scheme that you are envisaging will have a pure  
17 bilaterals agreement, as you call it, for intra-EEA and  
18 domestic MIFs and then a separate system by which the  
19 scheme sets the rules for commercial cards and the  
20 inter-regional MIFs?
- 21 A. Yes, that is probably the implication, I had not thought  
22 about it so explicitly. But yes, my -- the focus of my  
23 bilateral post IFR MIF is on the main domestic MIF  
24 setting.
- 25 Q. Then there comes a point -- 1 January 2021 -- where post

1           Brexit intra-EEA MIFs are no longer applicable to the UK  
2           market and so you have the entire UK market switching  
3           from a pure bilateral arrangement to a set by default by  
4           the scheme arrangement; is that right?

5           A. That could well be the case. I do not know if that is  
6           a factual technicality in the counterfactual or whether  
7           it is factually the case. But again that is not the  
8           level of detail I have looked at for my bilateral  
9           analysis.

10          THE PRESIDENT: I am so sorry to interrupt, Mr Beal, but can  
11          we go back to the answer just given on [draft] page 118  
12          beginning at line 8 where you were asked:

13                 "Question: So the scheme ... will have a pure  
14                 bilaterals agreement ... for intra-EEA and domestic MIFs  
15                 and then a separate system ..."

16                 You say "yes", do you have that in front of you?

17          A. Yes, I do.

18          THE PRESIDENT: I am grateful. Just how is that going to  
19          work in the counterfactual? I mean, are you  
20          postulating, as it were, kind of cross-subsidisation  
21          where you have a multi-function card which is dealing  
22          with some transactions which have MIFs in them because  
23          they are not part of the counterfactual and some  
24          transactions that are not or are you assuming a card  
25          that is only used for a specific type of transaction so

1           that you can understand the effects of the assumption  
2           that you are making? How intellectually am I supposed  
3           to envision this?

4           A. Yes, and to be honest I have not really thought about  
5           that level of detail. I have very much focused on the  
6           question of post IFR MIFs. At that point, probably what  
7           I had in mind, I do not know if I have said it  
8           explicitly, but post IFR MIFs in this case focus on the  
9           entire MIF but actually mostly actually on the -- well,  
10          what we had before the pre-IFR MIFs, the domestic MIFs  
11          that have been litigated over, what happens to those  
12          post IFR MIFs.

13                 That has been my focus. I can see for  
14          inter-regional and commercial, I have not taken that  
15          focus. I have taken a different approach of just  
16          asking, well, what -- what happens in the settlement at  
17          par counterfactual for those? I have not combined the  
18          two. I can think through if there was a cap on  
19          inter-regional and commercial, then that cap would have  
20          a similar effect possibly on bilaterals but I can also  
21          see differences, in particular inter-regional. Then you  
22          are back to the thousands of issuers and acquirers and  
23          bilaterals is just not a very feasible counterfactual.

24          THE PRESIDENT: Okay, that may be the answer to the  
25          question, it is just that seems to be a further wrinkle

1 in terms of how we articulate the counterfactual and  
2 I am very grateful that you have brought that out  
3 because it had rather passed me by, thank you.

4 MR BEAL: We are then in a position where a merchant which  
5 joined the scheme and accepted Mastercard cards would  
6 need to have agreements with one or more acquirers where  
7 all of the relevant cards were covered by a bilateral  
8 agreement, correct?

9 A. I am not sure whether every issuer and every acquirer  
10 needs to have an agreement with all other issuers and  
11 acquirers for the scheme to work, so that with that  
12 caveat --

13 Q. The Honour All Cards Rule would require a merchant to  
14 accept any card presented to it by any customer,  
15 anywhere in the EEA.

16 A. Yes, correct, so for acquirers, indeed, if there is  
17 an Honour All Cards Rule, they need to accept all the  
18 cards by all issuers.

19 Q. Therefore from the merchant's perspective agreeing  
20 something in advance you need to know that your acquirer  
21 has got in place every single agreement with every  
22 issuer everywhere in the EEA?

23 A. Well, can you repeat the question -- from whose  
24 perspective are you now --

25 Q. Well, I am approaching it from the merchant's

1 perspective because they are the people I represent and  
2 that is the focus of my enquiry.

3 So we are in a position where imagine you are  
4 a retailer in London and you are in the wonderful new  
5 world of this counterfactual. You want to agree  
6 an agreement with a merchant acquirer so that you can  
7 take debit cards from anyone from the EEA who is  
8 spending in your shop. So that is the premise.

9 In order to get that agreement, your acquirer has to  
10 secure an individual agreement with every issuer in the  
11 EEA, correct?

12 A. Yes, in the bilateral counterfactual, yes.

13 Q. Because if they do not, then you have no way of  
14 accessing the Mastercard scheme. You are not going to  
15 get access to the scheme unless you have a bilateral  
16 agreement with every issuer?

17 A. Yes, so the merchant has to have an acquirer who has  
18 those agreements in place. Obviously a merchant can  
19 choose between different acquirers.

20 Q. Yes, and my understanding of the counterfactual rule  
21 that Mastercard have drafted to try and cover this  
22 scenario is that you do not get access to the clearing  
23 system of Mastercard unless you have a bilateral  
24 agreement in place with every issuer?

25 A. That is -- yes, I accept that as a statement, yes.

1 Q. Now, what they have done is said: well, you can of  
2 course contract out of the settlement aspect of that but  
3 you cannot contract out of clearing, can you, because if  
4 you contract out of clearing settlement and payment, you  
5 are in a position where you do not have a scheme at all?

6 A. Again I am not on top fully of the details of how  
7 clearing and settlement works. I know that as we  
8 discussed also on Wednesday and in some of the factual  
9 evidence that there has been a regulatory push for  
10 separating out the scheme operations from the clearing  
11 and settlement or from at least the physical settlement  
12 processes.

13 Q. Let us --

14 A. So therefore I cannot really comment on whether -- with  
15 a particular agreement in place, yes or no on clearing  
16 or on settlement, whether you do not have a scheme or  
17 not. What I do know what I have assumed is that the --  
18 the actual physical settlement of payments at the end,  
19 there will be a solution in place so that is not  
20 a critical factor in reaching an agreement on bilateral.  
21 That is my assumption also during the hot tub on  
22 Wednesday, it was asked of all the experts whether it  
23 really mattered for the economic assessment what the  
24 exact clearing and settlement arrangements were and  
25 I think my view was no and I think the other experts

1           agreed with that as well.

2           Q. Now, what I am putting to you is really exploring  
3           exactly how your counterfactual works so I do have to  
4           trespass on these issues to some degree. Bear with me  
5           and I will try and give you a stylised example. Imagine  
6           that you have one merchant, one acquirer and one issuing  
7           bank.

8                     Now, it is perfectly possible on your counterfactual  
9           for the acquirer to reach a paired agreement with the  
10          issuing bank; is that right?

11          A. Yes.

12          Q. As I understand Mastercard's case, they say: well, the  
13          acquirer and the issuing bank can simply do a deal  
14          between the two parties; correct?

15          A. Sorry, can you repeat that again?

16          Q. Well, the issuing bank and the acquirer, according to  
17          Mastercard's counterfactual case, are capable of simply  
18          reaching a bilateral agreement between them for both  
19          payment and settlement?

20          A. Yes.

21          Q. So they would agree bilaterally what the MIF would be  
22          and then they would agree between them to settle the  
23          sums that are due; is that correct?

24          A. Yes.

25          Q. Now, there is a legal issue as to whether or not

1 Mastercard is insisting also on or is permitting  
2 clearing to be dealt with bilaterally between the  
3 issuing bank and the acquirer and on my reading of their  
4 draft rule, clearing has to take place through the  
5 system. Now.

6 Let us just explore what happens if clearing does  
7 not take place through the system.

8 You are in a situation where you have, as I have  
9 said, one acquirer, one issuing bank and they agree also  
10 to clear all the transactions for that one merchant  
11 between themselves. Have you got that concept in your  
12 head?

13 A. Yes, can I just clarify what you mean by "clearing" and  
14 "settlement" in this context because there is some  
15 confusion sometimes or different usage of terminology --

16 Q. Yes.

17 A. -- between clearing and settlement. Indeed in the  
18 equities market "clearing" and "settlement" are two  
19 different infrastructures, generally, so what do you  
20 mean by "clearing" and "settlement"?

21 Q. There are two different infrastructures here in  
22 a similar sense to the financial services market because  
23 clearing involves essentially getting details of the  
24 transactions that have been authorised by the issuing  
25 bank to the acquirer, getting details of those



1 authorisation codes, compiling them together and then  
2 working out what funds have to go to which party. So  
3 imagine that is the clearing process and it involves  
4 authorisation of a transaction and then some form of  
5 central recording, the fact that a transaction has taken  
6 place. In my stylised example, imagine that there are  
7 100 transactions per day for the merchant and those 100  
8 transactions have to be processed between the acquirer  
9 and the issuing bank. The question I am coming on to,  
10 finally, is to say: if all of those transactions are  
11 routed from the acquirer to the issuing bank and are  
12 cleared pursuant to a bilateral agreement between them  
13 and are then settled pursuant to a bilateral agreement  
14 between them and the terms of payment are settled  
15 pursuant to a bilateral agreement between them, where  
16 does the scheme come in at all?

17 A. So I think this -- all this description is still  
18 referring to the actual physical process of clearing and  
19 settlement as described. I accept that. But the actual  
20 transaction we have to remember takes place in the  
21 context of a scheme, so to answer the question where  
22 does the scheme take in, come in, the transaction is  
23 still taking place under the Mastercard umbrella under  
24 the scheme of Mastercard.

25 Q. How?

- 1 A. That is a -- because the acquirer, the -- from the  
2 cardholder's perspective, the card that they have in  
3 their wallet is a Mastercard card --
- 4 Q. But they have agreed to --
- 5 A. -- and the acquirer puts in --
- 6 Q. Sorry I am going to interrupt, if I may --
- 7 A. Yes.
- 8 Q. -- because I think it is very important to drill down  
9 into exactly what you are saying. The authorisation  
10 codes for a payment card are sent directly to the  
11 issuing bank pursuant to a bilateral agreement, the  
12 authorisation comes back pursuant to a bilateral  
13 agreement. There is then a day file which batches  
14 together the 100 transactions and the parties have  
15 agreed bilaterally between them that a certain sum of  
16 money will be sent by the issuing bank to the acquirer  
17 deducting a 0.5% MIF. Where does the scheme come into  
18 that process?
- 19 A. So the scheme comes in, as I said, in the -- from a --  
20 from the branding or the perception perspective at the  
21 merchant and the cardholder. For the merchant and  
22 cardholder what they are doing is still very much paying  
23 or agreeing a transaction with a Mastercard card.
- 24 Q. Well, they may be --
- 25 A. For the cardholder and the merchant, it is in many ways

1           irrelevant whether to what extent -- you know, where the  
2           actual processes take place. From the -- the cardholder  
3           is not thinking I've got --

4       Q. Dr Niels, how functionally -- once it is all bilaterally  
5           agreed, how functionally is Mastercard involved in the  
6           transfer of money from the issuing bank to the acquirer?

7       A. Again I cannot really comment on it.

8       Q. What you are describing in terms of branding may mean  
9           the parties who have taken it off grid are in breach  
10          somehow of the IP rights that Mastercard may own but  
11          they are not on the hypothesis that it is all agreed  
12          bilaterally?

13      A. I do not understand what you are talking about with the  
14          off-grid and IP rights. What I am saying is the payment  
15          itself is still -- in that hypothetical the issuer and  
16          acquirer have agreed all the physical processes  
17          described between themselves, I accept that, but the  
18          merchant and the cardholder to them, they have signed up  
19          to Mastercard ultimately. They are not saying I am  
20          paying -- I am using Barclay payments network now.

21               For them, it is still Mastercard. That is what I am  
22               saying, there is still a scheme and also my focus as  
23               I said before on bilaterals is purely about that first  
24               part of the negotiation, about the fee, the interchange  
25               fee.

1 THE PRESIDENT: Dr Niels, let us take it in stages and let  
2 us bring up [draft] page 127, line 2 and your answer  
3 there. Now, what you are being asked is: what does the  
4 scheme bring to the party in this bilateral  
5 counterfactual? Your answer is -- you are bringing up  
6 branding, not counsel, your answer is: well, it comes  
7 in, as I said, from a branding or the perception  
8 perspective of the merchant and the cardholder for the  
9 merchant and cardholder for what they are doing.

10 So you are saying, well, it is all appearance. Now  
11 -- no, no, you are going to get a chance to answer; I am  
12 setting out why I am puzzled.

13 So let us leave on one side how the bilateral  
14 process might be branded, it might be branded as a sort  
15 of Mastercard or Visa or whatever it is process, but it  
16 is still a bilateral settlement.

17 What in substance -- leaving on one side appearance,  
18 what in substance does the scheme do?

19 A. Again this question does go a little bit to what are all  
20 the activities in the ecosystem and there are lots of  
21 activities, all the way indeed from branding to the  
22 physical side of things and a lot of things in the  
23 middle. I am not the expert to say these are exactly  
24 the functions and in the hypothetical that has been put  
25 to me all these -- these clearing and settlement

1 functions, they strip out everything but the brand.

2 I cannot really comment on it.

3 My -- my understanding of the scheme as a wider  
4 ecosystem that it is, it is not just the physical  
5 transfer of money. There is a whole framework around it  
6 which includes the -- maybe branding and perception is  
7 a bit too soft. It includes the commercial side of  
8 promoting the payment scheme as a whole, achieving that  
9 universal recognition and acceptance. So I --  
10 I struggle a little bit with having that overview of all  
11 the activities in a scheme that in the hypothetical  
12 would be stripped out and then saying: well, what would  
13 be left of the scheme.

14 THE PRESIDENT: Okay.

15 MR BEAL: Could we look, please, at {RC-R/21/4}.

16 This is the way that Mastercard has put what your  
17 bilateral would involve and they say in the fourth line  
18 down:

19 "In relation to clearing the rule makes clear that  
20 Mastercard will only clear transactions where  
21 a bilateral agreement is in place, so Mastercard knows  
22 what sums are due between the parties."

23 Just pausing there. If the parties never tell  
24 Mastercard about the transaction, then the scheme is  
25 simply not involved, is it?

- 1 A. I -- I cannot comment on that. I do not know.
- 2 Q. So in a purely bilateral situation where everything is  
3 between the parties you have a series of goodness knows  
4 how many bilateral arrangements between the thousands of  
5 players in the EEA market all individually clearing  
6 transactions between them. That does not sound like  
7 a very sensible idea, does it, Dr Niels?
- 8 A. You are focusing again on the intra-EEA and I have --  
9 I have to accept my analysis really focused on the  
10 domestic setting of the domestic MIF in a domestic  
11 context where you have UK issuers and UK acquirers.
- 12 I accept from a practicality perspective that  
13 intra-EEA MIFs where again you are down to thousands of  
14 issuers and acquirers, it is -- it becomes very  
15 difficult to agree on bilaterals.
- 16 But my position remains for domestic where the  
17 numbers are more tractable and where you have the IFR as  
18 a -- as a focal point and limiting the range, narrowing  
19 the range of negotiation, as I have said before, that in  
20 that situation you can achieve bilaterals.
- 21 Q. Now, can I just test this proposition because it may  
22 save a bit of time with questioning. As I understand  
23 it, you accept that your counterfactual would not work  
24 or would not be sensible without having the HACR in  
25 place, correct?

1       A. No, I do not think so, I have explained -- it is more  
2       the other way round. I have explained why I think the  
3       Honour All Cards Rules is entirely sensible to include.  
4       It is an inherent part of the scheme and therefore I --  
5       my primary position is that in the bilaterals you have  
6       the HACR in place but I have as a sensitivity also  
7       assessed Mr Dryden's proposition that without the HACR  
8       what would happen then and my conclusion remains -- the  
9       dynamics are slightly different but my conclusion  
10      remains that even in that situation, with the IFR in  
11      place, that is where you would end up even in those  
12      negotiations.

13      Q. Can we look, please, at Day 9, tab 67, page 11. This is  
14      part of the evidence of Mr Willaert. You will see there  
15      that -- it may begin at page 10:

16             "Question: So in short, if a merchant had  
17      countervailing buyer power it could put pressure on its  
18      acquirers, especially if it was an acquirer that was  
19      also an issuer of cards to get a better deal; is that  
20      fair?

21             He says:

22             "Answer: Yes, this seems to be what this is talking  
23      about, yes."

24             Then -- is this Day 9? Sorry, page 67, line 11.

25             Sorry, I think I gave the wrong reference. {Day9/67:11}

1 I am referring the witness to paragraph 9 of his  
2 witness statement where he says:

3 "Question: "'Bilateral agreements alone without any  
4 form of support would not, in my view, work because of  
5 the uncertainty inherent in them both for existing  
6 issuers/acquirer pair and new entrants.'

7 "Just pausing there, when you say 'any form of  
8 support' you mean you need to have some default rule  
9 that will force one or other of the hands because  
10 otherwise bilateral negotiation by itself will not drive  
11 an outcome; is that fair?

12 "Answer: Correct, yes."

13 So it necessarily follows, does it not, that if you  
14 have a default settlement rule, that would give power --  
15 to put it in crude terms, give power to the acquirer to  
16 be able to walk away from a bilateral negotiation  
17 because they know that they are going to get paid in  
18 full for a given transaction; is that correct?

19 A. I accept that as a premise, yes.

20 Q. Conversely, if you want to be able to get a solution  
21 that supports the issuing banks, you need to have the  
22 HACR in place, do you not?

23 A. The -- yes.

24 Q. Indeed Mastercard has previously informed the  
25 European Commission that without the HACR to underpin



1 the system, its payment system would not exist, we can  
2 see that at {RC-J3/73/90}.

3 Fifth line down:

4 "Mastercard has stated that the Honour All Cards  
5 Rule is important to Mastercard's brand value and to the  
6 cardholder since without it, the card loses value ...  
7 According to Mastercard, 'the Honor All Cards Rule  
8 enables a worldwide payment system ... to exist' ..."

9 A. Yes.

10 Q. So that was the way it was putting it then. Of course,  
11 in the absence of the Honour All Cards Rule, if  
12 a merchant has countervailing bargaining power it can  
13 extract a better negotiated outcome than it -- such as  
14 it can achieve; correct?

15 A. So we are jumping here a little bit between post IFR and  
16 HACR in general. So are your questions referring back  
17 to the post IFR situation that Mr Dryden put -- proposed  
18 in terms of post IFR bilaterals but without a HACR or  
19 are you asking about the HACR in general?

20 Q. I mean, I am still in your hypothetical bilateral  
21 situation. I put to you that your bilateral situation  
22 necessarily requires in order to get the issuing bank  
23 power that you need necessarily requires the HACR to be  
24 in place?

25 A. No, I do not agree with that.

1 Q. I know you said that so I am coming on to deal with your  
2 suggestion that you strip out the HACR and it still  
3 works. What I am putting to you is that if you strip  
4 out the HACR it is open to individual acquirers with  
5 a degree of countervailing power in the purchasing side  
6 to negotiate a position whereby they get a better deal?

7 A. Yes, and that is exactly the situation where the IFR  
8 makes a huge difference relative to the situation  
9 pre-IFR. The IFR in that negotiation provides this  
10 focal point. We have -- sort of in a way it actually  
11 substitutes a little bit for a default rule, it becomes  
12 the focal point. It is in many ways a default rule in  
13 itself or at least from an economic perspective, it  
14 plays that function in the negotiation.

15 So let us take that negotiation and go through it  
16 step by step. Indeed, as the President -- you know, you  
17 helpfully want to look at what are the options for each  
18 of them. So let us take that negotiation in my  
19 counterfactual and in the one -- so with and without  
20 a HACR.

21 So with HACR, if you allow me to start with HACR and  
22 then we can see how that changes without the HACR.

23 So with HACR bilaterals on the issuing side, each  
24 issuer, we know the incentives for each issuer are still  
25 to get as high MIF as possible, the scheme wants to --

1 still needs to compete to attract issuers, so the scheme  
2 will want to set -- will very much like the -- the  
3 interchange fee to also get to that level. But here it  
4 is the issuers who negotiate. The issuer will still  
5 have a degree of bargaining power, the issuer hold-up  
6 power still remains up to the point of the -- of the IFR  
7 cap.

8 So the issuers -- on the issuing side the bargain is  
9 very much it goes all the way up to 0.3, 0.2. Then on  
10 the -- so then let us see what happens on the other  
11 side, where you have the acquirers first and then the  
12 merchants. The acquirers in that situation -- and we  
13 have discussed some of this in the factual evidence as  
14 well, I think, the acquirers individually when they  
15 negotiate with the issuers they need to make sure that  
16 they have an attractive proposition to merchants because  
17 they still want to attract merchants.

18 So it is not credible in this situation for  
19 an acquirer to hold out and refuse to or threaten to  
20 walk away from Mastercard because then that acquirer  
21 risks losing merchants because merchants will not sign  
22 up with it.

23 So acquirers have very much the incentive to accept  
24 the 0.2/0.3 that is on the table. Merchants in turn in  
25 that situation -- there are two main considerations.

1 Again, 0.2, 0.3 is on the table so that is actually  
2 a narrow range of negotiation, relative to previously or  
3 the current factual where the interchange fees were much  
4 higher.

5 Do merchants really have an incentive? We do not  
6 see much merchant direct negotiation in the factual  
7 either. But equally, we have also seen in the evidence  
8 what merchants are paying for other payment methods. So  
9 that consideration also comes in to play as well. The  
10 other payment methods are actually universally more  
11 expensive to merchants than cards.

12 So in that negotiation dynamic it is not really  
13 credible for merchants to say: I am going to walk away  
14 from you as a scheme to a cheaper payment method because  
15 there are none, there are no cheaper payment methods.

16 So in that dynamic, merchants would also accept the  
17 0.2/0.3 that is on the table, especially if you compare  
18 to what they pay for other payment methods. So that is  
19 with the HACR.

20 I can now go through, if you like, without the HACR.

21 Q. Could I ask you about your report and bring it back to  
22 your report, please. Your second report,  
23 paragraph 3.27, page 27. {RC-H3/3/27}

24 You say:

25 "Mr Dryden explains that Mr Willaert ... considers

1 that 'in the absence of the Honour All Issuers element  
2 of the HACR, acquirers could pay lower interchange fees  
3 to small and new issuers'."

4 You then say:

5 "However, as Mr Willaert explains, this would put  
6 small issuers at a competitive disadvantage when  
7 competing with large issuers for cardholders."

8 So Mastercard's evidence, endorsed by your review of  
9 that evidence, is that it would be open to merchants and  
10 therefore acquirers to agree with new entrants and  
11 smaller issuers, something that is not the  
12 take-it-or-leave-it 0.2/0.3 rate that you were otherwise  
13 pinning your hopes on; correct?

14 A. Yes, this is without a HACR, this is one dynamic that  
15 arises without a HACR. But if that were to arise, if  
16 smaller, and I think this has also been discussed  
17 before, if you make a temporary situation where smaller  
18 issuers indeed sort of are forced their hand in that  
19 negotiation and give in because they are keen to sign up  
20 merchants, but in turn if you take the competitive  
21 dynamics of the scheme, the market as a whole again,  
22 those smaller issuers over time because they have less  
23 revenue from interchange than the larger issuers, they  
24 become less competitive. So over time they would  
25 disappear, so you get that dynamic with -- the smaller

1 issuers temporarily have lower interchange fees due to  
2 merchant buyer power, but that is not a sustainable  
3 equilibrium in the market.

4 Q. Mr Steeley from Marks & Spencers, do you remember his  
5 evidence? He confirmed that he would be prepared to  
6 talk to a new issuer, prepared to innovate their product  
7 to get a deal in Marks & Spencer stores in order to give  
8 that issuer a leg-up for card acceptance in the UK  
9 market. That is a credible situation, is it not,  
10 clearly?

11 A. Yes, but in my understanding of the competitive dynamics  
12 I would doubt how much of that leg-up would -- would be  
13 sustainable because the logic there is that that small  
14 issuer, the leg-up would be: oh, I am accepted in  
15 Marks & Spencer, for example, but that issuer still has  
16 to attract cardholders and if it does not have that full  
17 interchange revenue from that -- the 0.3, 0.2 that all  
18 its main rival issuers have, it cannot compete as  
19 vigorously on the cardholder market and we saw that that  
20 is a highly competitive market where small differences  
21 matter to cardholders.

22 Q. So if we look, please, at {RC-J3/58/2}, I think --  
23 I cannot remember if this is a confidential document or  
24 not. I do not think it is. But if I could simply  
25 invite you to read the bottom of the page, the last two

1 paragraphs.

2 A. Yes.

3 Q. That is an example, is it not, of Mastercard offering  
4 lower rates to start approaching a new market with a  
5 view to market entry so they are discussing bringing in  
6 a new business debit product with a lower MIF to avoid  
7 surcharging on the existing business card offering?

8 A. Yes, this is again then jumping to the commercial market  
9 where the dynamics can be different, so I have not got  
10 my head round how it would be exactly in -- in the  
11 situation we are talking about, but I see this as  
12 an example of what is put forward.

13 Q. Turning over the page to the top of page 3,  
14 {RC-J3/58/3}:

15 "Given the specific characteristics of the UK market  
16 where merchants surcharge, especially credit cards, and  
17 the competition has a business debit product with  
18 'debit' rates with which it captured almost 100% of the  
19 business ... the proposed approach is to introduce [a  
20 particular product] with 'debit' rates that are much  
21 lower than current commercial 'credit' rates but still  
22 competitive with Visa ..."

23 So it is proposing to adopt a lower interchange fee  
24 in order to break into a market segment that Mastercard  
25 wants to capture, that is what is happening here, is it

1 not?

2 A. I am willing to accept that as a premise. I still  
3 struggle a bit with the context, you know, what is the  
4 time period of this document? With which market does it  
5 refer to? Also the first sentence says "the specific  
6 characteristics of the UK market where merchants  
7 surcharge" where my understanding or my factual analysis  
8 shows that the UK market is not one where merchants  
9 routinely surcharge. So I struggle a bit to understand  
10 the exact context here.

11 Q. Now, in reality, you need the HACR in place, do you not,  
12 in order to be able to guarantee for your purposes that  
13 the negotiation will go all the way to the maximum IFR  
14 level?

15 A. No, I -- I do not agree. Well, I agree with the first  
16 part of the premise; that you need the HACR in place,  
17 that is my position. It is entirely sensible especially  
18 the Honour All Issuers aspect of the HACR. That is so  
19 inherent to any four-party scheme, you need that in  
20 place. In that sense, I would say you need it in place.  
21 But in the very hypothetical situation where you do not  
22 have it in place post IFR and you get bilateral  
23 negotiations in the range between zero and 0.3, my -- my  
24 answer to Mr Dryden's proposition has been that even in  
25 that situation, the competitive dynamics lead you still



1 to in all likelihood interchange levels at 0.2, 0.3 at  
2 the level of the cap.

3 Q. If we look at your second report, paragraph 3.29,  
4 page 28, {RC-J3/3/28} you say:

5 "In terms I consider that without both the HACR and  
6 a MIF the scheme is unlikely to be able to function  
7 because there would be material uncertainty that could  
8 destabilise the scheme in the UK and Ireland and as  
9 such, the counterfactual without the HACR is not  
10 realistic."

11 So I am slightly surprised that you have changed  
12 your evidence?

13 A. I have not changed my evidence at all. I have always  
14 said that this is my primary position, that  
15 a counterfactual without a HACR is not realistic but  
16 I have -- in order to show the tribunal what the  
17 implication would be, I have addressed Mr Dryden's  
18 proposed alternative without a HACR. I do not -- I do  
19 not like that alternative particularly, I have arguments  
20 against it, but I have presented an analysis showing  
21 that even in that situation you could still in the  
22 negotiation itself end up at the same level of the caps.

23 Q. Could we look, please, at {RC-J5/3/7} this is an  
24 economics paper that is looking at the negotiating  
25 position, Small and Wright, from 2002 and they are

1 looking at the negotiating position.

2 If we look, please, at the section beginning  
3 "Bilateral bargaining and the hold-up problem", do you  
4 have that?

5 A. Yes.

6 Q. What the authors there explain, do they not, that if the  
7 HACR and the no surcharge rule are maintained issuers  
8 are put in a very strong bargaining position?

9 A. Yes, that is the core of the issuer hold-up problem and  
10 that is commonly accepted and I accept it and I have  
11 referred to this as one of the key papers indeed  
12 identifying it more formally for the first time.

13 Q. Then page 11, please. {RC-J5/3/11} There is a section  
14 midway down the page that begins "This analysis shows"  
15 and then they have a model:

16 "... this implies issuer X will not only be able to  
17 capture half the revenue ... but also half the profit  
18 that bank Y earns ...

19 They then say:

20 "We have demonstrated a serious hold-up problem  
21 arises from bilateral bargaining under the Honour All  
22 Cards Rule. The asymmetric bargaining power that arises  
23 from issuers having hold-up power is used in the next  
24 section to show how this leads to an escalation of  
25 interchange fees."

1 Can you see that?

2 A. Yes.

3 Q. So the economic theory underpinning your bilateral is  
4 that it will lead to asymmetric bargaining power and  
5 escalation in interchange fees; correct?

6 A. Yes.

7 Q. Please then can we look at the next paragraph:

8 "... we demonstrated that under bilateral bargaining  
9 between an issuer and an acquirer and ... the  
10 maintenance of the Honour All Cards Rule, the issuer  
11 will have a much stronger bargaining position ..."

12 That implies, does it not, that if absent the Honour  
13 All Cards Rule, the bargaining position would be weaker?

14 A. Yes.

15 Q. Could we then please look at page 17. {RC-J5/3/17} The  
16 conclusion. Halfway down that page:

17 "We have studied the impact ... Our analysis was  
18 motivated by the concerns of competition authorities ...  
19 Our main result is that bilateral negotiations when  
20 applied in the context of the "Honour All Cards" Rule  
21 and a lack of merchant surcharging lead to some very  
22 undesirable outcomes."

23 That was the conclusion that they reached in the  
24 paper that you endorsed; correct?

25 A. Yes.

1 Q. "Our models predict that moving to bilateral bargaining  
2 would induce substantial transaction costs, that issuers  
3 would hold-up acquirers, and that the resulting dynamic  
4 would result in interchange fees which are even higher  
5 than the level set by an association of card issuers and  
6 acquirers that maximises the joint profits ..."

7 A. Yes.

8 Q. That is something you inescapably walk into with your  
9 bilaterals counterfactual; correct?

10 A. Indeed, this is exactly the logic that I described  
11 earlier, this is exactly why I concluded from this very  
12 last sentence bilaterals that are even higher than the  
13 level set by an association, so that are higher than  
14 multi-lateral, that is exactly why I have always  
15 maintained that the issuer hold-up problem in bilaterals  
16 shows already in itself that bilaterals are better than  
17 or lead to worse outcome than multi-laterals and  
18 therefore multi-laterals are not a restriction of  
19 competition against the counterfactual of bilaterals.

20 I have been through the history of why then instead  
21 of bilaterals it became ex-post pricing etc.

22 Here, post IFR we are back to bilaterals and I am  
23 saying a key difference here is the IFR makes a key  
24 difference in that the hold-up problem does not apply  
25 any more or it applies all the way up to 0.2/0.3 so you

1 can rely on bilaterals again as a realistic  
2 counterfactual.

3 Q. But you are structuring this counterfactual so the  
4 market power exists entirely in the hands of the issuers  
5 who you foresee, indeed you reasonably expect,  
6 confidently expect, will drive interchange fees up to  
7 the level of the cap that is set by regulation. The  
8 reality is that there is no room therefore for  
9 negotiation at all, is there?

10 A. Yes. I agree. Or rather the negotiation to the extent  
11 it takes place very rapidly gets you to the 0.2/0.3. So  
12 the outcome -- I think this is also important just to  
13 remind ourselves here that the outcome that in the  
14 bilaterals with HACR you get the negotiations and you  
15 end up at the 0.2/0.3 because of the IFR caps, that is  
16 commonly accepted among the experts as well, the  
17 discussion we have had is about -- one of the  
18 discussions is about: well, should you have the HACR or  
19 not?

20 Q. That sham negotiation process essentially gives the  
21 merchants no option but to accept whatever the issuer is  
22 prepared to state is the maximum which in this case --

23 A. I would not -- I would not judge this bilateral  
24 counterfactual on whether the negotiation is actually  
25 a real negotiation or a sham negotiation or

1 a negotiation that rapidly leads to a certain outcome.

2 I judge this bilateral on -- this counterfactual on the  
3 economic outcomes that it generates, i.e. the level of  
4 MIFs that you get.

5 Q. But, objectively speaking, the entire purpose of it is  
6 to produce MIFs at the level of the regulatory cap?

7 A. I am not sure that you can describe that its purpose is  
8 to achieve it. The effect is to achieve it.

9 Q. Well --

10 A. Maybe if one were to or people thought about this from  
11 the beginning or a scheme that is thinking about it will  
12 of course take into account what is the likely effect  
13 and may well be reassured that the likely effect is that  
14 you end up at the cap and therefore --

15 Q. You --

16 A. But, again, the -- the subjective intent of the scheme  
17 in this in my mind as an economist is not relevant.

18 Q. I am not after the subjective intent; I am after the  
19 natural and logical consequence of the model that you  
20 are putting forward.

21 Can I ask you to confirm that your client's  
22 witnesses accepted that the whole point of the  
23 counterfactual was to maintain a substantial revenue  
24 stream. Can we look, please at Day 9, page 218, line 9  
25 {Day9/218:9}. It is put by my learned junior that in

1 fact the overall objective of the new -- sorry, that is  
2 the new unilateral system, but I think the point holds  
3 good -- would be to secure a stream of interchange  
4 revenue for issuing banks. Can you see that?

5 A. Yes, I forget now which witness this was but I accept  
6 the general premise that it is seen as a system to  
7 secure a stream of interchange revenue for issuing  
8 banks, yes.

9 Q. Indeed if we look at your first report, paragraph 3.26,  
10 page 77, {RC-H3/2/77} it is part of your analysis, is it  
11 not, that this MIF revenue stream to issuers is  
12 critical?

13 A. Yes, I reflect here what the witnesses have said.

14 Q. In contrast to this bilateral that you are positing, the  
15 reality is that a default settlement at par is both  
16 a viable and realistic counterfactual; that is right, is  
17 it not?

18 A. It is another counterfactual, I do not dispute that. In  
19 my mind post IFR the bilaterals are also a viable and  
20 realistic counterfactual and -- and again I went back to  
21 first principles, the first question you ask from first  
22 principles is if you do not have multilaterals, what  
23 happens with bilaterals, therefore I went back to  
24 bilaterals.

25 Q. At paragraph 3.24, page 76 of your first report,

1 {RC-H3/2/76} you suggest that a pure bilateral scenario  
2 is more realistic than settlement at par. But in fact  
3 what the witnesses say is that it is -- it would be  
4 commercially preferable from Mastercard's perspective  
5 for the MIF revenue to carry on being generated;  
6 correct?

7 A. Yes, I can see the economic logic of that, yes.

8 Q. So what you are actually saying is from Mastercard's  
9 point of view it is more commercially preferable; that  
10 does not imply which one is more realistic, does it?

11 A. Correct, except to the extent that the concept of  
12 "commercially preferable" is very much part of the  
13 thinking of counterfactuals. Even in the ex-post  
14 pricing prohibition discussion it was put in terms -- at  
15 least by some parties -- of: this is commercially  
16 preferable to the scheme than letting the scheme  
17 collapse in these bilaterals negotiations.

18 So this notion of "commercially preferable" to me is  
19 a natural part of thinking about counterfactuals and not  
20 sort of undesirable or rejectable in its own right.

21 Q. The collapse of the scheme does not need to be in  
22 contemplation, does it, because you have just accepted  
23 that default settlement at par is both viable and  
24 realistic. So that is always an option and it will  
25 always save the scheme from collapse?



1 A. Yes. But, but in -- my thinking on counterfactuals  
2 would be that what is the most realistic one? Well,  
3 part of the answer to that is which -- which one would  
4 be most realistically adopted by the scheme itself  
5 because that is still part of the thinking in the  
6 counterfactual analysis, including for the ex-post  
7 pricing prohibition where the thinking was that  
8 Mastercard would impose that scheme. So thinking  
9 hypothetically what -- what Mastercard would  
10 commercially prefer is very much a relevant  
11 consideration and if it prefers bilaterals over the  
12 non-settlement and it thinks that bilaterals are  
13 feasible, then I would say that makes it realistic.

14 Q. It is right, is it not, for inter-regional MIFs, you  
15 have accepted that the counterfactual -- when I say  
16 "you" I mean you and your client have accepted that the  
17 counterfactual is default settlement at par?

18 A. My analysis of inter-regional MIFs assumes indeed and  
19 accepts that the counterfactual we all look at is  
20 settlement at par.

21 Q. The Commitments decision for Mastercard in 2019 produced  
22 a cap on the MIFs enforced by the EU Commission?

23 A. Sorry, can you clarify which? I am willing to accept  
24 but I cannot now recall what that decision exactly  
25 referred to about the cap was, if you can remind me of

1           that.

2           Q. It was 0.2 and 0.3 for card present transactions from  
3           memory and 0.15 and 0.5 for card not present  
4           transactions debit and credit?

5           A. Yes.

6           Q. Roughly those figures, I hope they are right. I will be  
7           told no doubt if I am wrong. So you have a system where  
8           there is a regulatory intervention and a cap has been  
9           imposed; correct?

10          A. Yes.

11          Q. Nobody has suggested at any stage flipping into  
12          a bilaterals counterfactual for those MIFs?

13          A. Correct and I also have not analysed that possibility.

14          Q. We know, do we not, that all EEA/UK transactions are  
15          inter-regional post Brexit?

16          A. They are now categorised as such, yes.

17          Q. So on your analysis, the bilaterals counterfactual is  
18          appropriate and realistic up until 31 December 2020, but  
19          suddenly inappropriate after that?

20          A. In my analysis, the bilaterals counterfactual is  
21          appropriate and realistic for domestic transactions. As  
22          I have said, I have actually not really considered the  
23          intra-EEA transactions in that -- in this -- in this  
24          part of my analysis.

25          Q. Is it fair to say also that just more generally, as

1 a general matter, you have not explored or looked at the  
2 countervailing buying power of large merchants such as  
3 Amazon or HMRC when they use payment cards?

4 A. I have not explicitly addressed it but it is certainly  
5 part of my thinking of the -- of the incentives and  
6 competitive dynamics that you get both for post IFR but  
7 also inter-regional-regional and chairman.

8 Q. I am going to move on to the UIFM counterfactual. Could  
9 we look please at paragraph --

10 PROFESSOR WATERSON: Could I --

11 MR BEAL: I am sorry yes, of course, Professor.

12 PROFESSOR WATERSON: -- just come in here, since we are  
13 moving away to a slightly different area.

14 You have twice I think mentioned Merricks, the  
15 Merricks judgment that you have read and so I think it  
16 might be useful in the context of bilaterals to look  
17 briefly at that. So just to tell others about the  
18 history of the scheme, until 1989 there were two  
19 domestic credit card schemes in the UK, Barclaycard and  
20 Access, and Barclaycard's arrangement was an exclusive  
21 one and Access was a group of banks but they traded  
22 exclusively within themselves.

23 Then in 1989 Barclays became a Mastercard Eurocard  
24 licensee and that meant that that rather unbalanced the  
25 system and at that stage the various changes took place

1 in the market but the -- there were multiple banks  
2 participating in the scheme and acting as both issuers  
3 and acquirers in an unbalanced way and so they then,  
4 according to what we were told -- it became necessary to  
5 have UK domestic interchange fee arrangements and these  
6 started as bilateral arrangements but moved into a host  
7 arrangement, essentially.

8 Of course here we are talking about a very limited  
9 number of banks prior to competition, no monoline  
10 issuers and no acquirers who were not issuers.

11 So it was a much more straightforward system. In  
12 that system, I think it is fair to say bilaterals worked  
13 for a while but not for long. So you would accept that  
14 your bilaterals would involve a rather more complex set  
15 of negotiations?

16 A. Yes, I accept that certainly in terms of sheer numbers  
17 of agreements that are needed. But the one factor of  
18 course that makes it significantly less complex is the  
19 IFR cap.

20 PROFESSOR WATERSON: I thought you would say that, yes.

21 MR BEAL: Thank you very much. So moving on to the UIFM,  
22 please can we look in your report, GN1/3.28/78.  
23 {RC-H3/2/78} You refer to Mr Willaert's preference for  
24 a UIFM counterfactual as a fall-back should the need  
25 arise. It is right, is it not, that this is not

1 something that Mr Willaert ever developed in his  
2 planning exercises to deal with the risk that the  
3 EU Commission would find that there was an infringement  
4 of competition for MIFs.

5 A. I cannot comment on that factually. I can understand it  
6 as a premise, but, yes, it is a factual question.

7 Q. Can we look, please, at {RC-M1/3/7}, we are going to  
8 look at some in a sense battle plans that Mastercard had  
9 up its sleeve. Option 2 was the Hybrid New Business  
10 Model; can you see that?

11 A. Yes.

12 Q. It essentially envisaged collecting funds through  
13 an increase in the acquiring volume fee, creating a fund  
14 from those increased fees to pay financial incentives  
15 but leaving room for commercial negotiation with both  
16 issuers and merchants in exchange for incremental  
17 business. It was said to be similar structure that Amex  
18 had adopted.

19 Could we then, please, look at {RC-M1/5/8}. What  
20 I understood to be the nail in the coffin of this  
21 particular proposal was the Commission's response,  
22 starting at paragraph 25, to the new hybrid model:

23 "The first option of a new (reduced) interchange was  
24 not acceptable ..."

25 As the standard of proof has not been met.

1           "The second option of substituting Intra-EEA default  
2 interchange fees with domestic ... was not acceptable as  
3 it was 'merely cosmetic, without substantive merit'."

4           Then:

5           "The third option of replacing the [EEA MIF] with  
6 the fee based incentive system (i.e. HNBM), Mastercard  
7 had not provided ... sufficient details and [the  
8 Commission] therefore 'cannot eliminate the possibility  
9 that the formulas would be used to replicate the MIF'."

10           The reality is that the UIFM does that precisely,  
11 does it not, it replicates the MIF through a different  
12 set of packaged rules?

13       A. Well, it leads to the same outcome. As I have said in  
14 my report, the UIFM post IFR would also lead you to  
15 a situation where all the issuers would set the MIF at  
16 the cap, so in that sense it replicates the MIF.

17           But the process is different and maybe therefore on  
18 technicalities it has a different treatment under  
19 Article 101 or the law. So that is the extent that  
20 I can comment on this.

21       Q. Let us explore -- you have formulated the idea of a UIFM  
22 and you have a concept of it in your head and indeed it  
23 is partially in your report. Can we just understand  
24 what it would be. It would be a scheme rule that was  
25 drafted by Mastercard to put in place this new model; is

- 1           that correct?
- 2       A.   Yes.
- 3       Q.   It would have a default zero MIF unless an issuer
- 4           notified a higher rate?
- 5       A.   Yes, I cannot remember the detail but I am accepting
- 6           that as a premise, yes.
- 7       Q.   The issuers are then free to establish their own MIFs up
- 8           to the extent of any cap?
- 9       A.   Yes.
- 10      Q.   The cap would be set by the IFR for consumer cards in
- 11         your counterfactual; is that right?
- 12      A.   Yes.
- 13      Q.   The confident assumption -- indeed, expectation -- would
- 14         be that all issuers would set at the cap, that is what
- 15         you have just said?
- 16      A.   Yes.
- 17      Q.   The scheme would necessarily set a price floor for the
- 18         Merchant Service Charge at the level of the cap?
- 19      A.   Subject to the debate around the exact meaning of price
- 20         floor yes, but, yes that MIF would be the level that the
- 21         acquirers would treat as an input for setting the MSC,
- 22         so yes.
- 23      Q.   We have just seen Ms Devine's evidence -- she was
- 24         recognising that the purpose or the point of having this
- 25         model would be to maintain the existing flow of revenue

1 streams to issuing banks; correct?

2 A. Yes.

3 Q. Now, I fully take on board your point. This is in GN2,  
4 paragraph 3.11, page 22, that any motive may be  
5 irrelevant but of course here we are looking at the  
6 objective aims of the arrangement, are we not?

7 A. Yes, motive, aids, yes, exactly. Sorry, can you look --

8 Q. Page 22?

9 A. Can you look at the point in my report that you refer  
10 to.

11 Q. 3.11, page 22. You say you do not consider the alleged  
12 motive; well, we are not saying motive has anything to  
13 do with it. You then say at the bottom of that page.

14 "I do not consider that there is anything  
15 intrinsically anti-competitive about a four-party scheme  
16 preferring an outcome that is likely to promote the  
17 commercial success of the scheme."

18 Just pausing there, that depends very much, does it  
19 not, on whether or not the effect of the scheme as  
20 envisaged is to produce a coordinated pricing response  
21 that then establishes a substantial component of  
22 somebody else's price of a service which is not free to  
23 be negotiated at any stage?

24 A. I stand by what I say here and in the proposition that  
25 you have just made, I do not recognise the term



1 "coordinated" here in this context.

2 Q. The people who run the scheme would be putting in place,  
3 would they not, an arrangement whereby the outcome,  
4 almost the preconceived outcome, would be a MIF rate  
5 that was set at the regulatory cap?

6 A. Yes.

7 Q. That is as a result of the agreement of the parties to  
8 that scheme for that particular MIF rate to be applied?

9 A. No, the agreement is to sign up to the scheme and then  
10 you get these and then the issuers can set their own  
11 unilateral interchange rates.

12 So the price setting as such is not collective in  
13 that sense. So I do not -- I do not understand the  
14 premise. I fully accept that the scheme does set a rule  
15 which enables that, that is inherent as well. But I do  
16 not -- I would not make the jump to this therefore again  
17 amounting to a multi-lateral price setting arrangement.

18 Q. Let us just imagine you have a scheme rule, which says  
19 the people who are party to the scheme will settle on  
20 the terms, set by the scheme, so an interchange fee will  
21 be payable, and we will have a third party determine  
22 what that MIF rate is, so imagine a LIBOR interest style  
23 arrangement which is a MIF arrangement rather than  
24 a market one. But imagine that you have a third party,  
25 who simply says the MIF rate will be X.

1           If you have a scheme rule that says we will apply  
2           the third party's determination of what the MIF rate is,  
3           then that scheme is necessarily directing what the price  
4           will be for a substantial component of the MSC, is it  
5           not?

6           A. In that hypothetical, yes.

7           Q. Can I just then ask some practical questions. At this  
8           stage, I think we are having to assume, are we not, that  
9           there would be default settlement at par for commercial  
10          cards and inter-regionals but you would then have this  
11          unilateral model for domestic rates and intra-EEA rates  
12          until Brexit, is that right?

13          A. Yes.

14          Q. Then post Brexit, presumably, that would no longer apply  
15          because you would have the inter-regional issue, so you  
16          would go back to having a default rate set by the  
17          scheme, is that right?

18          A. Yes, I do not quite follow that -- that bit and the --  
19          the distinction here for inter-regional ... I accept  
20          that there is a category change between intra-EEA and  
21          inter-regional for the UK after Brexit, but in the  
22          scheme of things -- we are talking about here about MIFs  
23          in general, so yes, that is a small caveat that one  
24          needs to take into account when thinking about this  
25          but --

1 Q. Of course, for Ireland, Ireland would still be in the  
2 EEA, so you would be in a position where you are having  
3 a UIFM for Irish domestic MIFs, Irish intra-EEA MIFs and  
4 UK domestic MIFs but settlement at par for everything  
5 else?

6 A. Yes, that is possible.

7 Q. Have Mastercard given any thought whatsoever to how this  
8 exercise would work in terms of its scheme rules?

9 A. I cannot answer that question.

10 Q. You are not aware of any drafted guidance or drafted  
11 rule which would try and put in place how on earth this  
12 system would work?

13 A. In relation to the UIFM specifically?

14 Q. In relation to the UIFM?

15 A. No, I am not aware.

16 Q. It is essentially, is it not, a formula to replicate the  
17 effect of the old default MIF?

18 A. That is -- may be one way of characterising it. I --  
19 I think it is essentially a helpful alternative  
20 counterfactual. All the counterfactuals we are talking  
21 here are hypothetical. This is a useful model, which  
22 has some grounding in what schemes have done elsewhere  
23 in the world, so for me it was a useful thought  
24 experiment to think through what would happen in the  
25 UIFM.

1 Q. Can I qualify that to this extent, you say it is  
2 a thought experiment, can I say it is an afterthought  
3 experiment, because if we look at the defence in  
4 Pendragon, {RC-C1/3/22}, paragraph 50 -- and this was  
5 a pleading that was dated September 2020 -- it does not  
6 even feature. Halfway down page 50:

7 "Once the caps in the IFR came into effect ..."

8 It says:

9 "... Mastercard could have left interchange fees to  
10 be negotiated bilaterally, since bilateral negotiation  
11 would have been viable ..."

12 That is the only counterfactual on the table at that  
13 stage.

14 A. Sorry, which stage is this?

15 Q. September 2020.

16 A. Yes, I have no comment on this. For me it was not an  
17 afterthought because it was a thought that came up  
18 before this Trial 1. This was as put forward in the  
19 issues that were put to the experts, so I have assessed  
20 it in that context.

21 Q. I think you would recognise, would you not, that the  
22 New Zealand experience raises very real practical issues  
23 with what this model might produce? Specifically it  
24 would produce competitive inefficiencies and market  
25 failures.

1 A. Can you specify what market failures and  
2 inefficiencies --

3 Q. You have reviewed the New Zealand experience. I have  
4 been through it with about four witnesses, and you have  
5 been here at the tribunal, I think, for almost all of  
6 the sitting days. So you have heard me go through the  
7 Ministry of Business reports on multiple occasions.  
8 I put to each of those witnesses that the Ministry of  
9 Business had identified competitive failings in the  
10 retail payments market in New Zealand. Do you remember  
11 that evidence?

12 A. Well, I cannot now remember what competitive failings --

13 MS TOLANEY: I think if the witness is being asked to  
14 comment on specific criticisms, he needs to know what  
15 they are. I cannot remember them and I was here too.

16 THE PRESIDENT: That is very helpful, Ms Tolaney.

17 MR BEAL: As it happens, I am coming on to look at the  
18 documents. I was hoping to short-circuit it, but  
19 I cannot, so I will face the challenge head on, if  
20 I may.

21 THE PRESIDENT: I am grateful.

22 MR BEAL: Are you aware that the New Zealand legislature  
23 intervened to cap rates in New Zealand?

24 A. Yes.

25 Q. Have you seen the reports prepared by the Ministry of

1 Business in New Zealand?

2 A. I have not read it in detail. I saw it coming up in the  
3 evidence.

4 Q. Could we look first, please, at {RC-J3/85/1}. Mine is  
5 just loading. Could we look, please, at page 7.

6 {RC-J3/85/7}. Could you read, please, paragraph 11.

7 (Pause)

8 A. Yes.

9 Q. Could you then, please, read over the page to the end of  
10 13 and 14.

11 A. Yes.

12 Q. There is then a section, paragraph 17, "Emerging  
13 inefficiency in the debit card market". Can you see  
14 that? {RC-J3/85/8}

15 A. Yes.

16 Q. Paragraph 22, {RC-J3/85/9}, there you look at the impact  
17 on small businesses and the fact that smaller merchants  
18 are having to pay a price for this new system:

19 "The interchange charged for small merchants can in  
20 some cases be two and a half times the interchange rates  
21 for the largest 'strategic' merchants."

22 There is a concern about a growing differential  
23 between the two.

24 A. So, yes, I see all the concerns. What I am not clear  
25 about is whether -- and I -- is whether these are

1 concerns in general with interchange and the problems it  
2 generates, which are the same concerns that have been  
3 raised elsewhere, or whether these are concerns  
4 specifically attributed to the UIFM. I just cannot  
5 judge from this, so if you ask me, does the New Zealand  
6 Ministry flag market failures and concerns, yes, it  
7 does. But I cannot tell from this whether they are  
8 specific concerns that arise because of UIFM, as opposed  
9 to the previous regime of multilateral interchange fees.

10 Q. You are aware, are you not, that the Commerce Commission  
11 reached a negotiated settlement with the issuing bank in  
12 New Zealand and the schemes?

13 A. Yes.

14 Q. The outcome of that was that the schemes put in place  
15 a version of a unilateral model which has some similar  
16 characteristics to the UIFM that we are discussing?

17 A. Yes.

18 Q. Having initially thought that would achieve a more  
19 competitive situation, in 2016 the Ministry of Business  
20 is preparing this report to say things have not worked  
21 out as they might have hoped, correct?

22 A. Yes, so what this -- if that is correct, then what this  
23 reflects is that, despite having intervened and imposed  
24 the UIFM, the Ministry is still unhappy about the level  
25 of the MIF, so the concerns here are still about the

1 level of the MIF. So therefore, if there is a doubt  
2 about the UIFM being a workable model, here what they  
3 express is there is doubt about does it help in putting  
4 interchange down and apparently it does not enough.

5 What this does not -- what I do not see here is  
6 comments about the practicality or workability of UIFM,  
7 and I thought the line of questions was directed at  
8 that.

9 Q. It is right as well, is it not, that under the UIFM --  
10 we have just seen a reference there to strategic  
11 merchants. The evidence I went through yesterday in  
12 re-examination with Dr Frankel is that large merchants  
13 were able to secure rebates, for example, from the  
14 issuing banks?

15 A. I cannot recall the evidence, but I accept that -- that  
16 that may have occurred, yes.

17 Q. Also, we saw that there had been a collective group of  
18 smaller retailers, who had banded together to secure a  
19 more favourable outcome for them as well. Do you  
20 remember that?

21 A. I remember the mention of that, yes.

22 Q. Could we look, please, at {RC-J3/85/36}.

23 Under paragraph 131, it says:

24 "Issuers are free to charge interchange below the  
25 cap. We understand that generally, issuers charge the



1 maximum allowable interchange, with two exceptions."

2 Then there are whole categories of merchants, such  
3 as charities, in which issuers notify the schemes that  
4 they wish to charge a lower rate. Then there is also  
5 the example of large merchants negotiating directly with  
6 the issuing side of the merchant's acquirer to have them  
7 charge a lower rate.

8 So there are -- there were in New Zealand --  
9 situations in which, for various reasons, countervailing  
10 market power was brought to bear and a rate was set that  
11 was below the cap?

12 A. Yes. It also says at the end of the second bullet:

13 "It is unclear how often these negotiations actually  
14 result in lower interchange being applied."

15 Q. Of course, to the extent that the report is right, that  
16 as a general tendency, issuers would set at the cap, and  
17 not below, that would necessarily be part of the aim and  
18 objective, would it not, of adopting this UIFM as  
19 a counterfactual model?

20 A. Again, aim and objective, I am not clear, but for  
21 a scheme looking at the option of UIFM or  
22 non-settlement, I would say it is much more attractive  
23 and preferable to have the UIFM in place and, therefore,  
24 it is a more realistic counterfactual than a zero MIF.

25 Q. If the scheme puts in place what is effectively a scheme

1 of arrangement, whereby the almost inevitable  
2 consequence is that a price will be set at a cap, and  
3 that price will then feed into another price, you would  
4 accept, would you not, that that is almost preordained  
5 in terms of the impact on the Merchant Service Charge?

6 A. I would say, yes, that is the very likely effect of  
7 setting a price at the cap. It is also the effect of  
8 setting the cap in the first place, which is  
9 a regulatory intervention which -- which allows a MIF to  
10 be set at a certain level.

11 Q. I am going to move on now to inter-regional fees.  
12 I think we have established, have we not, that it is now  
13 accepted by Mastercard that inter-regional MIFs do have  
14 an appreciable effect on the Merchant Service Charges  
15 payable by merchants?

16 A. Yes.

17 Q. That was pretty much an inevitable finding, was it not,  
18 once the prevalence of IC plus plus pricing for large  
19 merchants became known?

20 A. I have always seen it as a legal matter that could still  
21 do with some useful evidence, hence we did -- all the  
22 experts did an extensive exercise on this question of  
23 the -- how MSCs relate to MIFs, the cost floor question,  
24 the pass on question.

25 The appreciability, I understand, certainly from

1 a legal perspective, that with so many interchange plus  
2 plus contracts, that may be a way of interpreting the  
3 legal question of appreciability and, therefore, this --  
4 this is no longer an issue. But I have set out my views  
5 clearly and the factual analysis I have carried out on  
6 the question of how inter-regional MIFs relate to MSCs  
7 and what I therefore conclude regarding cost floor, but  
8 I accept that is no longer in issue here.

9 Q. Could we look, please, at {RC-J3/73/76} and pick it up  
10 at recitals (249) to (252). This is part of the  
11 Statement of Objections which was sent to Mastercard as  
12 part of the Mastercard II investigation, and we see that  
13 the Commission, in (249), is identifying that the impact  
14 of the MIFs on pricing is particularly obvious in  
15 contracts where there is a MIF plus or a MIF plus plus  
16 contract. Halfway down the page, a third of the way  
17 down the page, it says large corporations presumably  
18 choose IC plus plus contract pricing because it results  
19 in the lowest MSC.

20 So it can have come as no surprise, can it, that  
21 a substantial proportion of large merchants were on MIF  
22 plus plus pricing?

23 A. No, not as a surprise, but we also know -- and we saw  
24 from, for example, the PSR enquiry is that actually the  
25 vast majority of merchants by number are not on these

1 IC plus plus. Indeed, the numbers as they work out,  
2 between [redacted] of merchants are on blended contracts  
3 or standard contracts and there the question of pass  
4 on -- well, the question of pass on, we come back to in  
5 Trial 2, but the questions of costs flow and pass on are  
6 less obvious than under the IC plus plus contracts. So  
7 I accept -- so that is why all the experts did quite  
8 a bit of analysis on this. I accept that, at present,  
9 that is no longer an issue. But I considered it to be  
10 a very much relevant analysis.

11 Q. Just on the logic of number of merchants versus value of  
12 merchants' transactions, you have said that [redacted]  
13 of merchants are on blended contracts. You would accept  
14 though, would you not, that that [redacted] of merchants  
15 do not account for anything approaching the majority of  
16 the value of transactions?

17 A. Yes, the numbers on that are clear.

18 Q. If one was defining a market, it would be highly  
19 unusual, would not it, to -- say there is a market of  
20 100 very high value players and then there is a thousand  
21 very small value players, it would be very unusual to  
22 define the market parameters by reference to the  
23 thousand small players who have --

24 A. Equally, when you look --

25 Q. -- no market power?

1       A. Equally, when you look at competitive effects in such  
2       markets, you do not want to overlook what is happening  
3       with the smaller players. In this case, it is quite  
4       a few, it is [redacted] of individual merchants.

5       THE PRESIDENT: Dr Niels, I am sorry to interrupt you, but  
6       I am beginning to get a little concerned about the  
7       mismatch between the facts and the facts on which you  
8       are giving your expert opinion. So just going back  
9       a couple of pages to the transcript, [draft] page 167,  
10      what you say at line 9 is:

11             "Answer: So I accept -- so that is why all the  
12      experts did quite a bit of analysis on this. I accept  
13      that, at present, that is no longer an issue."

14             That is entirely my understanding; that this has  
15      been something that occupied the parties and  
16      the tribunal in the run-up to trial but does not engage  
17      the tribunal attention now.

18      MR BEAL: I will move on. Unless you want the witness, of  
19      course, sir, to continue.

20      THE PRESIDENT: No, I understand your position, Mr Beal.  
21      But do you, therefore, need, given that the facts are  
22      not any longer as you are stating them before  
23      the tribunal because we are going to decide this case on  
24      the evidence, do you need to change your report to  
25      reflect that fact?

1       A. I do not think -- to be clear, I do not think the facts  
2       have changed, because the facts are clear and agreed  
3       between the experts -- and by facts, I refer what is the  
4       proportion of -- of transaction revenue value that the  
5       large merchants on ICC contracts represent, how many --  
6       another fact is how many merchants -- what proportion of  
7       merchants by number are on blended contracts.

8               Those facts are all agreed and, therefore, not in  
9       issue and not in contention. What was in issue was the  
10      interpretation of those facts, what they mean for cost  
11      floor etc. So on -- on that -- on that note, I have  
12      said my opinion on how I interpret.

13      THE PRESIDENT: I see.

14      A. But the facts have not changed.

15      THE PRESIDENT: Thank you, Dr Niels, that is very clear from  
16      your position. Mr Beal, I want to put down a bit of  
17      a marker for everyone that we are not really in the  
18      business of accepting facts outside the scope of expert  
19      opinion, whether they are in a joint report or not. We  
20      will take the evidence of the facts as they are.

21      MR BEAL: I fully anticipate this tribunal will decide for  
22      itself.

23      THE PRESIDENT: Well --

24      MR BEAL: -- what the relevant facts are.

25      THE PRESIDENT: Indeed, and we have expert economists to

1 opine on matters of expert economics, not on how the  
2 facts are in an industry on which they are opining, so  
3 it may not matter, and clearly Dr Niels is very happy to  
4 maintain his position on the basis of the facts as have  
5 been stated in the joint report. We will leave it  
6 there. It may not matter, but I just want to register  
7 a degree of unease about this.

8 MR BEAL: If I may say so, it is one I share and it is  
9 another point I was going to come on to, which is in  
10 your second report, Dr Niels, at page 47,  
11 paragraph 4.48 -- and I do not mean this in  
12 a disparaging way at all -- you are saying that in the  
13 inter-regionals counterfactual, it is not appropriate or  
14 realistic to have a counterfactual that is default  
15 settlement at par. Now you have accepted today that is  
16 the position, and indeed it is the pleaded position --  
17 or the submitted position now of Mastercard.

18 Did you want to amend what you say in your report to  
19 reflect the fact that your client, seemingly, does not  
20 support that position?

21 A. So what I have done -- so I do not see a need to because  
22 this is not about what is the right counterfactual as  
23 such but rather -- in the context of inter-regional and  
24 commercial, but rather what is the result, what would  
25 happen in such a counterfactual? That is what I focused

1 my analysis on. So I have accepted that the  
2 counterfactual is the -- for inter-regional and  
3 commercial, the -- the settlement at par.

4 But then -- so in a way, maybe I am going to  
5 a bigger loop here of -- of assessment and conclusions  
6 because, having assessed what would happen in those  
7 counterfactuals -- and I am referring to my analysis of  
8 the schemes' reaction to it, the cardholder reactions  
9 then to it and therefore the costs to merchants, that is  
10 my basis for saying, in such a counterfactual, even if  
11 we all accept it, you would get these other competitive  
12 dynamic, which would mean that there would be  
13 consequences to the market.

14 So maybe it is too subtle to say it is a different  
15 counterfactual, maybe I should not say it is not an  
16 appropriate counterfactual. Rather, what I have done is  
17 I have taken that as a counterfactual and I have  
18 analysed the effects of it, in the specific context of  
19 inter-regional and commercial, and that analysis,  
20 I would posit -- I stand by and I think it is relevant  
21 for the tribunal to consider. Equally, of course, it is  
22 a legal question of whether it is a relevant analysis  
23 for your purposes for Article 101(1).

24 THE PRESIDENT: Thank you.

25 MR BEAL: I wonder if that is a convenient moment to take



1 the transcriber break, because we have been going for  
2 about an hour and a half.

3 THE PRESIDENT: You are quite right, Mr Beal. Thank you for  
4 the suggestion and we will rise for 10 minutes. Thank  
5 you very much.

6 (3.11 pm)

7 (A short break)

8 (3.26 pm)

9 THE PRESIDENT: Mr Beal.

10 MR BEAL: Dr Niels, now, looking at the counterfactual for  
11 inter-regionals what we have to do, do we not, is assume  
12 that the inter-regional MIFs will not be charged on UK  
13 and Irish transactions in order to remove what is  
14 alleged to be the restriction of competition?

15 A. Yes.

16 Q. That means, does it not, that in respect of those  
17 transactions which were inter-regional, and for which  
18 merchants were using a payment card that was  
19 inter-regional in nature, they would not be paying MIFs  
20 on their MSCs?

21 A. Yes, to the extent the MIF reduction gets passed on to  
22 merchants.

23 Q. Again, IC plus plus pricing, it is accepted, I think, by  
24 you that that would happen?

25 A. Yes.

1 Q. So it would follow for certainly those large merchants  
2 with IC plus plus acquiring contracts that, in the  
3 counterfactual world, there would be less restriction on  
4 competition because the pricing element of the MIF would  
5 be removed?

6 A. Yes. They would -- they would get to pay lower MSCs on  
7 the remaining card transactions, yes.

8 Q. Now, your analysis does not look at that, does it,  
9 instead it looks at what the knock-on consequences would  
10 be elsewhere?

11 A. Well, my analysis looks at that, at the effect on the  
12 MSCs paid on the remaining card transactions, but it  
13 also looks indeed at the effects of the merchants'  
14 payments for the other payment methods that cardholders  
15 switch to in this counterfactual.

16 Q. This switching analysis is not something that the  
17 Commission conducted, is it, in the Statement of  
18 Objections for the Mastercard II investigation?

19 A. Correct.

20 Q. They explored things in the way I have suggested, did  
21 they not, which is that you recognise that the MIFs in  
22 the counterfactual do not exist and that was sufficient  
23 for them to conclude that there was a restriction of  
24 competition comparing the factual with the  
25 counterfactual?

1 A. Yes.

2 Q. It was surely a great failing then, was it not, of the  
3 Commission not to have conducted this analysis, on your  
4 case?

5 A. Well, I think my analysis is insightful and a good  
6 analysis to do in -- in this counterfactual, especially  
7 having based myself on the factual evidence from the  
8 schemes and the issuer that, in that counterfactual of  
9 zero MIFs, there would be reactions on the -- on the  
10 scheme and issuer side and those reactions would in turn  
11 trigger responses by cardholders and trigger changes in  
12 merchant costs. So, as an economist, I consider it to  
13 be very relevant to look at those -- to look at that  
14 counterfactual.

15 Q. What the Commission did -- let us perhaps turn this up.  
16 It is {RC-J3/37/92}. Perhaps we should start at  
17 page 91, recital (299). It is {RC-J3/73/1} it should  
18 start at. Let us just check we have the right one.  
19 Yes, that is it. Then please can we turn to page 91.  
20 I am sorry if I misspoke. {RC-J3/37/91}

21 We see there, at the bottom of the page, recital  
22 (299):

23 "In conclusion, the Commission provisionally  
24 considers that the hypothetical scenario for the  
25 assessment of the effects of Mastercard's rules on

1 inter-regional MIFs ... is a situation:

2 "(1) where issuers and acquirers could conclude  
3 (pre-transaction) bilateral agreements ...

4 "(2) where such bilateral agreements would be very  
5 few.

6 "(3) where the inter-regional MIF is set to zero,  
7 Mastercard's rules prohibit ex-post pricing ..."

8 Or at least have no specific rule on which payment  
9 will be paid on an interchange basis. Then (4):

10 "Where, given the difficulties of concluding  
11 bilateral agreements, the large majority of  
12 inter-regional transactions would be settled without any  
13 interchange fee."

14 So that is what they are looking at. Do you see?

15 A. Yes.

16 Q. Then over the page, 301 and 302, {RC-J3/73/92}, that  
17 would result in lowering prices for acquiring services  
18 and:

19 "Since there is a direct link between the  
20 interchange fees and the MSCs, this can be expected to  
21 decrease prices for acquiring services."

22 The upshot of that would be -- see 304 at the  
23 bottom:

24 "... there would be no transparency between  
25 acquirers as to what MIFs their competitors pay, i.e. as

1 to the inter-regional MIF costs of the other acquirers.  
2 In such a situation, acquirers have an incentive to  
3 negotiate as low an interchange fee as possible ... the  
4 lower the interchange fee, the more scope for ..."

5 Them to meet demand.

6 So the conclusion then at 307 and 308, is that  
7 essentially that situation would not lead to a situation  
8 that was negotiated away in any way, and we see at the  
9 end of recital (307):

10 "This would ensure that Mastercard and its licensees  
11 do not use the interchange fees as a way to extract  
12 funds from merchants without there being any identified  
13 and corresponding benefits."

14 A. Yes.

15 Q. That is being pitched by the European Commission as  
16 a situation which is less restrictive of competition  
17 than the situation that would exist in the factual,  
18 correct?

19 A. Yes, and therefore, what I essentially do is, if we go  
20 back to the helpful overview steps, 1, 2, 3, 4, that the  
21 Commission identified in that counterfactual, I have no  
22 reason to dispute any of that.

23 Q. I think that was page 91, if that helps. Recital (299).

24 A. Yes, so 1, 2, 3, 4, I have no reason to disagree, and  
25 I see what the Commission therefore concludes from this.

1           What my analysis shows is there is a 5 here because, in  
2           that situation, the factual evidence indicates that  
3           there would actually be a reaction by the scheme and by  
4           issuers and that would trigger the further effects that  
5           I have analysed. So therefore, in my opinion, this  
6           is -- I can see this analysis but it is therefore an  
7           incomplete analysis of what would actually happen in  
8           this counterfactual.

9           Q. Could we look, please, at page 114. I hope to bring up  
10          recital (390). {RC-J3/73/114} It talks in (390) about  
11          how the interchange fee could be agreed bilaterally:

12                 "... but in any case, because of the Honour All  
13          Cards Rule, which obliges merchants to accept all  
14          Mastercard cards of one and the same brand, acquirers  
15          will have to acquire transactions with cards issued by  
16          issuers with which it has not entered into a bilateral  
17          agreement."

18                 It then says:

19                 "It has been claimed that the default MIF is  
20          objectively necessary since without it Mastercard's card  
21          system could collapse since the issuer could hold the  
22          acquirer 'hostage' and impose an excessive interchange  
23          fee."

24                 The Commission, however, provisionally considered  
25          that the inter-regional MIFs are not objectively

1           necessary as a default mechanism for the settlement  
2           because it could be sorted by a prohibition on ex-post  
3           pricing, is essentially the reason that is held there.  
4           Can you see that?

5           A. Yes.

6           Q. Then 392, {RC-J3/73/115}, we see:

7                   "Moreover, the Commission considers that  
8           Mastercard's rules obliging acquirers to pay  
9           an interchange are not objectively necessary for the  
10          settlement of the transaction as such."

11          Skipping down from the quote:

12                   "Mastercard has confirmed that this rule obliges  
13          issuers to settle transactions and to pay the amount of  
14          the transaction to the acquirer."

15          It then says:

16                   "The acquirer's obligation to pay the interchange  
17          fee intervenes only in a second step, once the  
18          transaction is settled ... therefore, the issuer is  
19          unable to hold the acquirer hostage on the basis of the  
20          interchange fee or to refuse to settle the transaction  
21          on this ground and the inter-regional MIFs that apply in  
22          the absence of a bilateral agreement, is not objectively  
23          necessary for the settlement of the underlying  
24          transaction."

25          In conclusion at 394:

1            "... inter-regional MIFs are not objectively  
2            necessary for the settlement of the underlying  
3            transactions ..."

4            Do you see that?

5            A. Yes.

6            Q. It then looked at whether or not the transfer of funds  
7            from acquirers to issuers was objectively necessary.  
8            This, as I understand it, forms part of the similar  
9            reasoning to the reasoning you are adopting, which is we  
10           need to look at the consequences on a different market,  
11           the issuing market, and what people would do in that  
12           issuing market and what that would mean for prices for  
13           MSCs more generally, as I understand your analysis. Is  
14           that how it works?

15           A. Yes, that is exactly right, yes.

16           Q. Then at 395-397 -- please can you cast an eye over  
17           that -- the response from the Commission is essentially,  
18           is it not, see in particular 397, that this issue about  
19           transfer of funds and impact on the issuing business and  
20           so on is not for this stage of the analysis. In  
21           particular, at the end of 397, it says: {RC-J3/73/116}

22           "In other words, while the reduction in the benefits  
23           conferred on cardholders or the profitability of the  
24           card issuing business might be expected in the absence  
25           of the transfer of funds, it is reasonable to conclude



1           that such reduction would not be sufficient to affect  
2           the viability of the Mastercard scheme.

3           "These conclusions remain valid in the  
4           inter-regional context."

5       A. Yes, so I accept that this is what the Commission here  
6       states, that the court said, so it in a way rejects --  
7       it in a way does consider what would happen in that  
8       counterfactual, in terms of are there scheme reactions,  
9       but it sort of says, well, it does not affect the -- the  
10      conclusion that it is not objectively necessary. But  
11      I do not -- I think the premise of the question was: do  
12      you see that the court says it is not relevant to look  
13      at it in -- at this part of the legal assessment. That,  
14      I cannot see from this paragraph. It may well be the  
15      case, but I cannot see it.

16           Also I would say this 398, these conclusions remain  
17      valid in the inter-regional context, in my opinion, with  
18      all respect to the Commission, but that is a bit of  
19      a leap in logic, not having seen all the evidence that  
20      we have seen in the current case, especially the factual  
21      evidence of what the factual witnesses say they would do  
22      in such a context.

23      Q. Well, if the Commission is not considering transfer of  
24      funds at the objective necessity stage, it necessarily  
25      follows that they will revert back to that at the 101(3)

1 stage, does it not?

2 A. Apologies, but where does it say that the Commission  
3 considers it to be irrelevant for this stage, as opposed  
4 to it rejects this affecting the viability of  
5 Mastercard?

6 Q. Well, it is saying that it cannot be established that  
7 the scheme would cease operation; that is the conclusion  
8 they reach, so it does not affect the operation of the  
9 scheme because it is not terminal to the scheme. That  
10 is the paragraphs we have just looked at.

11 A. But therefore, it is being considered as part of this  
12 part of the legal test.

13 Q. Well, as I understand it, you do not say that the  
14 absence of inter-regional MIFs for UK and Irish  
15 transactions would be terminal for the scheme.

16 A. That is correct. There is -- there is always a degree  
17 between terminal or making it significantly less  
18 competitive etc. That is a matter of degree, and  
19 I am -- I fully understand that the legal test draws the  
20 line somewhere, the objective necessity test, and that  
21 is not for me to opine. What I have put forward as  
22 evidence is the -- is the degree of competitive  
23 disadvantage that would arise and therefore the  
24 consequences of what would happen to the propositions  
25 and cardholder switching etc.

1           But whether -- it is indeed a legal question whether  
2           that then applies to -- how the test of viability or  
3           objective necessity applies.

4       Q. Can I just establish some propositions with you.

5           I mean, obviously, the Commission's conclusions were  
6           de facto accepted by Mastercard because they offered  
7           commitments to the EU Commission, which the Commission  
8           accepted. But that is a legal proposition, so I am not  
9           inviting your comment on that. Can I just check,  
10          however, your response to certain propositions.

11          Firstly, the share of consumer inter-regional  
12          transactions by value remains relatively small, does it  
13          not?

14       A. It is small relative to overall MIF revenue, and there  
15       are figures on this in the various expert reports.

16       Q. I think that is your evidence, paragraph 4.7, page 92.

17           The figures at the top of that page are marked as  
18           confidential, so I am not proposing to say what they  
19           are, although it does appear to stem from quite a long  
20           time ago, but, look, that is not for now.

21          Second proposition is cardholders continue to value  
22          inter-regional functionality. That is correct, is it  
23          not?

24       A. Cardholders generally value inter-regional  
25       functionality, yes.

- 1 Q. As a basic proposition, if they value something, they  
2 might well be prepared to pay for it, correct?
- 3 A. They might well be, relative to the other options they  
4 have, yes.
- 5 Q. We know, do we not, that quite a lot of cards in this  
6 country bear international transaction fees, which  
7 cardholders do pay?
- 8 A. There are international transaction fees in most card  
9 schemes, yes.
- 10 Q. Benefits from inter-regional transactions exist for  
11 issuing banks who generate those transaction fees from  
12 the use of the card, correct?
- 13 A. Apologies, can you repeat that?
- 14 Q. You have just accepted that transaction fees exist.  
15 Indeed, you say, as I understand it, you understood that  
16 they were prevalent, I think that you said they were  
17 used in many schemes. I do not want to misquote you.  
18 But I am simply going by ear on what you just said.
- 19 A. Yes, I mean in the sense that there are fees, for  
20 example, for currency conversion etc, not -- not  
21 transaction fees as such necessarily.
- 22 Q. I think we looked at some evidence -- I do not propose  
23 to go there with you. Let us just see if we can do it  
24 without having to turn something up. Barclaycard,  
25 I think, were charging 2.99% for international

1 transactions --

2 A. That may well be right, yes.

3 Q. -- on Barclaycard.

4 Obviously, once one aggregates all those  
5 transactions accruing to a Barclay card -- other cards  
6 are available -- they make a substantial revenue stream,  
7 do they not?

8 A. Yes.

9 Q. In terms of looking at costs of inter-regional  
10 functionality, now, bearing in mind we are in the  
11 post-Brexit world, as I understand it your suggestion  
12 that there are divergent fraud costs for domestic and  
13 EEA transactions versus inter-regional transactions,  
14 must now cover, must it not, the position between the UK  
15 and member states of the EU?

16 A. I think, on the whole, my understanding from the factual  
17 evidence that we have heard is that overall there are  
18 cost difference between domestic transactions and  
19 international transactions, which includes intra-EEA  
20 transactions. There may be a spectrum of that cost  
21 difference -- that, I do not have information on --  
22 but -- but by and large, there are differences, yes.

23 Q. That involves a degree of aggregation, does it not,  
24 which does not make sense once disaggregated?

25 A. But it does make sense for the current purposes because

1 we are talking about inter-regional MIFs and -- and  
2 necessarily, we are talking at a certain level of  
3 aggregation here because we are talking about  
4 inter-regional transactions in the UK and Ireland from  
5 the rest of the entire world.

6 Q. Well, we are not any more talking about UK and Ireland  
7 versus the rest of the world, are we, because the  
8 transaction between, say, Dublin and Belfast will now  
9 engage an inter-regional rate?

10 A. Correct.

11 Q. Did you recalibrate your analysis to take into account  
12 Brexit?

13 A. I did not recalibrate my analysis to take into account  
14 Brexit.

15 Q. Are you aware that the analysis from the  
16 European Commission, when looking at inter-regional  
17 MIFs, has recognised that there is nothing in terms of  
18 the basis upon which the inter-regional MIF is set that  
19 reflects a specific cost allocated for a specific  
20 purpose?

21 A. I think that is a general statement. I cannot comment  
22 on it. I do not understand where that statement comes  
23 from.

24 Q. There is nothing in the Mastercard rules, are there,  
25 that require inter-regional MIF revenue to be dedicated

1 to a particular function or service?

2 A. I think that is right. I think in the previous question  
3 there is a reference to an understanding of costs.  
4 Again, this is factual but my understanding is that,  
5 when Mastercard traditionally set interchange fees, it  
6 did have regard to cost studies and those cost studies  
7 would have identified also differences in costs between  
8 domestic transactions and inter-regional transactions.  
9 That is all I am sort of able to comment.

10 Q. Could we look, please, in {RC-J3/73/128}. Picking it up  
11 at recital (448) at the top of that page, it says:

12 "As concerns the cost allocation argument, the  
13 Commission has already held in its 2007 Mastercard  
14 decision that this argument is opaque. The Commission,  
15 moreover, held this argument is doubtful in the light of  
16 Mastercard's statement that in practice the scheme does  
17 not allocate costs."

18 It then refers to footnote 512. Could we look down  
19 at that, please. That cites the testimony given by  
20 Mastercard's Associate General Counsel of a hearing in  
21 2006, that said:

22 "We are not specifically allocating any cost. It  
23 may be useful to measure somebody's costs. But we are  
24 not allocating specific costs. Is that clear?"

25 So what I am putting to you is that it was no part

1 of Mastercard's case before the European Commission that  
2 the inter-regional MIF was being allotted, allocated to  
3 a particular service or function?

4 A. I think that is correct. The cost allocation arguments,  
5 I am not relying on that either. What I consider  
6 relevant for inter-regional MIFs in particular is the  
7 factual evidence that costs are generally higher for  
8 inter-regional transactions than for domestic  
9 transactions. But that is a level -- that is at quite  
10 a general level and that also does not involve any cost  
11 allocation exercise.

12 Q. Could we go back up, please, to recital (449) and look  
13 at the last sentence. It says:

14 "However, the cost studies that Mastercard provided  
15 to the Commission focus only on the issuing side and do  
16 not consider acquirers' costs."

17 A. Yes, that is factually correct.

18 Q. Could we then, please, turn to page 129, {RC-J3/73/129},  
19 recital (452). Top of that page:

20 "Several of the EIC's documents ..."

21 Just pausing there, that is the body that sets the  
22 interchange rate, is that right? EIC?

23 A. I do not know, but I am happy to accept that.

24 Q. Are you familiar with the way that Mastercard sets its  
25 MIFs?



- 1 A. At a very general level, but what is the EIC here?
- 2 Q. It is the interchange committee that Mastercard has.  
3 European Interchange Committee?
- 4 A. European -- yes.
- 5 Q. "Several of the EIC's documents contain proposals for  
6 increasing the inter-regional MIFs as well as cost  
7 analysis or cost studies of the issuers' costs.  
8 However, these documents do not show a correlation  
9 between the increases in the MIFs and the issuers'  
10 costs. Indeed the documents do not demonstrate that  
11 an increase in the issuers' costs motivated the increase  
12 of the MIFs. Nor do they explain whether and to what  
13 extent the issuers' costs were covered by the cardholder  
14 fees and which outstanding part of the costs needed to  
15 be covered by an increase in the level of the MIFs. In  
16 the most recent EIC documents such cost studies are not  
17 mentioned at all."
- 18 That gives a rather negative view, does it not, of  
19 the value of the exercise that you are saying has to be  
20 done because, ultimately, these MIF rates are not being  
21 set by reference to any cost allocation or  
22 cost-balancing exercise, they are just being set by the  
23 EIC at a rate that they determine?
- 24 A. Well, I agree with the premise here, and I see what is  
25 being said here. I think you also said what I say must

1 be done. I am not saying that, for what I propose, my  
2 analysis of inter-regional fees, it is necessary to do  
3 a cost analysis at all. I also have again -- I have  
4 referred to the Merricks judgment, which does contain  
5 a useful discussion on this topic in terms of what role  
6 did the cost study play in Mastercard's MIF setting, and  
7 again, I am not the factual -- this is factual evidence,  
8 but my reading of what is also described in the judgment  
9 is that the costs did play a role but not in  
10 a determinative or correlative way.

11 Q. Could we look, please, at {RC-J5/51/7}. This is part of  
12 the PSR's provisional determination from December 2017.  
13 We see second bullet down:

14 "Our current view is that the card schemes do not  
15 balance the costs and the interests of all service users  
16 when setting IF levels. There is no obvious constraint  
17 on ... these prices ..."

18 Then next bullet down:

19 "We currently consider that, when they decided to  
20 increase UK-EEA consumer CNP outbound IFs, Mastercard  
21 and Visa did not ensure that the interests of all users  
22 were taken into account."

23 Next bullet down:

24 "... it is unclear what other factor, or change in  
25 circumstances, apart from the political shift ..."

1           Led to the change in IF levels.

2           Next bullet down:

3           "... we do not consider ... that the IF levels  
4           applicable before the increases carried any obvious  
5           risks, undermined or otherwise adversely affected the  
6           operations ..."

7           Then last bullet, in bold:

8           "Our current view is that Mastercard and Visa have  
9           raised UK-EEA consumer ... outbound IFs higher than  
10          levels that would have been calculated if the most  
11          commonly established methodology to calculate [fees] had  
12          been used ... we are concerned that, if left  
13          unregulated, Mastercard and Visa may have an incentive  
14          to continue to raise [those MIFs] while UK merchants  
15          cannot avoid or benefit from them."

16          Next, at 1.13:

17          "We are concerned that the upward pricing pressure  
18          is evidence of a lack of effective competition ..."

19          So on.

20          So it is recognising, is it not, there is simply no  
21          demonstrable evidence to justify the very large spike  
22          that we saw post Brexit in the intra-EEA -- well,  
23          intra-EEA becoming inter-regional as a MIF rate?

24          A. I cannot comment on the very large spike, and I see what  
25          the PSR says on this. I have focused my analysis of

1 inter-regional MIFs actually the other way round. What  
2 would happen in the counterfactual when these MIFs --  
3 when these MIFs were to disappear. So I have not formed  
4 a view on the current inter-regional MIFs, how they were  
5 set or whether they were specifically justified by  
6 a certain method or another.

7 Q. Well, you are concentrating very much in your evidence  
8 on the purported benefit of a MIF revenue going to  
9 discharge specific costs that you say bring benefits.  
10 That is your evidence.

11 A. Yes.

12 Q. Now, can we see whether that stacks up from an economic  
13 perspective. Please can we look at {RC-J5/14.8.01/8},  
14 so this is part of the Tirole paper from 2011, which  
15 I am sure you are familiar with. Halfway down that  
16 page, can you see there is a reference to "two  
17 externalities between end-users":

18 "The merchant may not take a card that the  
19 cardholder would like to use, implying a loss of surplus  
20 by the [cardholder].

21 "Conversely, the cardholder may prefer a means of  
22 payment that the merchant finds costlier than  
23 an alternative payment method. The cardholder then does  
24 not internalise the extra cost he imposes on the  
25 merchant."

1           Can you see that?

2       A. Yes.

3       Q. At page 15, the second paragraph, {RC-J5/14.8.01/15},  
4       there is a reference there to:

5           "The issuer cost ( $C_i$ ) to be used as a benchmark for  
6       the regulated IF unfortunately bears little relationship  
7       with the theoretically correct level, which focuses on  
8       the acquirer/merchant side rather than on the issuer  
9       side."

10           So this is Professor Tirole, is it not, rejecting  
11       the suggestion that you use issuer side analysis to find  
12       the optimal or best level for the MIF; he is saying you  
13       ought to be focusing on the merchant acquirer side?

14       A. Yes, so this is where Professor Tirole and I actually  
15       differ in opinion, because I do think, like  
16       Professor Tirole and many other economists, that one  
17       useful way of looking at this optimal level of MIF is  
18       the merchant indifference tests, which, in essence,  
19       looks at the costs of comparator pricing payment  
20       methods. But the other method of looking at what is an  
21       optimal level of pricing is very much looking at issuer  
22       costs, and there are -- issuer costs played a role in  
23       the original Baxter paper, so there is a bit of a debate  
24       still in the literature, and there have also been papers  
25       since, for example by Professor Julian Wright, that

1 still provide a justification theoretically why issuer  
2 costs are relevant.

3 In my mind, both are useful ways of looking at -- at  
4 the MIF. One is -- and this is also mirrored in price  
5 regulation generally. One is mirrored in price  
6 regulation based on comparators, so you look at what is  
7 the relevant cost of other payment methods, that is the  
8 merchant indifference test. Another way of regulating  
9 price is by looking at cost, so having regard to the  
10 issuer cost method, so this is where I differ from  
11 Professor Tirole. I do think there is a theoretical and  
12 practical justification for looking at issuer costs as  
13 well.

14 Q. Now, you mentioned Professor Wright. Can we go, please,  
15 to {RC-J5/17.002/34}. This is a paper by somebody by  
16 the name of M Rysman and J Wright. Is that the J Wright  
17 that you are talking about?

18 A. Yes.

19 Q. Can we look, please, at Section 6.2. There is a section  
20 that begins "What regulatory cap to set?" Can you see  
21 that?

22 A. Yes.

23 Q. It says:

24 "Supposing interchange fees are to be regulated, how  
25 should the regulatory cap be set?"

1           It says:

2           "Existing regulators ... have used narrowly defined  
3 issuers' variable costs to determine the cap on allowed  
4 interchange fees. The problem with this approach is it  
5 is not supported by any economic theory. None of the  
6 existing models that work out optimal interchange fees  
7 ... imply interchange fees based on issuers' costs will  
8 be optimal, or will indeed increase welfare relative to  
9 unregulated fees. This is the consensus reached in  
10 surveys of the literature."

11           Pausing there. So you say you differ from  
12 Professor Tirole on this point, so some of his papers  
13 are better than others, but even putting that to one  
14 side, you are therefore differing, are you not, from the  
15 consensus of the economic literature?

16       A. The economic literature, it is true, has sort of landed  
17 on the merchant indifference test being an appropriate  
18 approach for thinking about MIFs and the welfare effects  
19 and setting caps.

20           Yes, I do think that there is still merit in the  
21 traditional cost based methods. There are economic  
22 arguments in favour for it.

23       Q. Could we look then, please, at page 35.

24           {RC-J5/17.002/35} Second paragraph down, or third  
25 paragraph down says:

1           "The relevance of the Baxter ..."

2           Can you see that?

3       A.   Yes.

4       Q.   So you have to work out -- it is saying this approach  
5           should require you to work out the avoided costs to  
6           merchants of accepting cards and subtracting from this  
7           the cost the acquirer faces in processing the card  
8           transaction.  It says:

9           "While far from straightforward, this is something  
10          that can potentially be calculated from detailed studies  
11          of merchants' costs.  Indeed, the European Commission  
12          ..."

13          Is adopting that approach, it says.

14          So rather than focusing on issuers' costs, what the  
15          two learned authors are saying is we should be looking  
16          at merchants' costs and working out what the avoided  
17          costs are because that cures the positive externality  
18          that Mr Dryden identified, correct?

19       A.   There is a number of different things here.  This goes  
20          to -- I think I was confused because the start of the  
21          paragraph is about the Baxter framework being  
22          measurable.  I would say yes, in principle, that is  
23          measurable.  I referred, at the hot tub, to the mini  
24          Baxter and the maxi Baxter studies that actually Oxera  
25          carried out 20 years ago now.  But what happens when you



1 do the MIT test, that is when you look at merchant costs  
2 because you look at merchants' costs of accepting the  
3 various payment systems.

4 So to the extent we are having a debate here about  
5 which of the methods are practical, well, I would say  
6 both methods are difficult and complex but both methods  
7 have been applied in practice by measuring certain  
8 costs. The MIT measures the merchant costs -- and  
9 I have carried out such analysis as well in other  
10 contexts. The traditional cost based approach uses the  
11 three issuer costs as a proxy for the overall balance in  
12 the system of the costs that are more incurred on the  
13 issuer side than on the acquiring side.

14 But they are all complicated and complex exercises  
15 that require a lot of data and information from the  
16 relevant companies.

17 Q. Professor Wright is an associate at Oxera, is he not?

18 A. He is, yes.

19 Q. Can we look at paragraph 4.4, page 115 of your  
20 first report, {RC-H3/2/115}. You cover there the  
21 measures that might have been put in place if  
22 inter-regional MIFs had not been available under the  
23 Mastercard scheme.

24 Could we look then, please, having grounded you in  
25 that point, can we look at {RC-J3/76/4}. So this is

1 part of an, ironically, Project Jedi presentation, no  
2 doubt bringing balance, and we see that there is  
3 a series of business strategies that are being adopted  
4 to cater for the fact that inter-regional interchange  
5 might not be available, and we see, under the table on  
6 the left, 1(a) to (g).

7 I am told that this is marked "Confidential". I do  
8 not think I have said anything undue at the moment, but  
9 I was about to. So that is very helpful, thank you to  
10 Mr Woolfe, soon to be KC. Could we look, please, at the  
11 options there. Did you consider any of these options  
12 when looking at what Mastercard might do in the event  
13 that there were zero MIFs available under the scheme?

14 A. No, not these specifically, no.

15 Q. Now, you will obviously understand that we have  
16 a different legal position from you on whether or not it  
17 is appropriate to look at switching and so on and what  
18 the consequential effects might be elsewhere other than  
19 on the acquiring market. But putting that to one side  
20 for the moment, in order to make good your propositions,  
21 you have to establish three things, is that right? Let  
22 me tell you -- what I am putting to you is you do have  
23 to establish three things and let us see if you agree  
24 with me. First, you have to identify what steps  
25 Mastercard would have taken in the face of zero MIFs

1 being available for inter-regional MIFs in the UK and  
2 Ireland?

3 A. Yes.

4 Q. Second, you then need to look at switching, that is when  
5 faced with zero MIFs for inter-regionals in the UK and  
6 Ireland, either issuing banks would switch their choice  
7 of scheme for the provision of the card or cardholders  
8 would switch to cards offered by a rival such as Amex?

9 A. Yes.

10 Q. Thirdly, in the light of that switching behaviour, you  
11 then have to analyse the costs of transactions by those  
12 cardholders with merchants in the UK and Ireland and  
13 ascertain whether they would decrease, increase or stay  
14 the same, correct?

15 A. Yes.

16 Q. Now as a general point in relation to Amex, you accept,  
17 do you not, that its acceptance levels are lower than  
18 for Visa and Mastercard?

19 A. Yes, but one should -- in my opinion, one should not get  
20 the impression that Amex has very limited acceptance.  
21 We have seen the figures that Amex actually has, at the  
22 very least, 80% or even higher acceptance in the UK,  
23 which is, in my mind, a very high acceptance rate, and  
24 then in particular we also saw from the factual evidence  
25 that Amex has very high acceptance in those sectors

1 where you get most inter-regional spend.

2 Q. In relation to Amex, it does not have a policy that is  
3 aiming at universal acceptance, does it?

4 A. I do not know, but I -- I can imagine that it does not.

5 Q. Could we look please at {RC-J3/129/6}. This is  
6 the May 2023 Nilson report and it deals with -- sorry,  
7 my screen is slowly coming into focus. It deals with,  
8 top left-hand corner:

9 "American Express credit card purchase transactions  
10 had a 4.61% market share of all global network credit  
11 products in 2022 ... JCB ... had a 2.53% share ...  
12 Diners ... had a 1.72% share ..."

13 Can you see that?

14 A. Yes.

15 Q. Then in terms of total volume of transactions, the  
16 global purchase figure was roughly 41 trillion; can you  
17 see that, in the third paragraph down on the left-hand  
18 side?

19 A. Yes.

20 Q. Then at top right-hand corner, based on the value of  
21 transactions, Visa and Mastercard cards combined  
22 accounted for just shy of 55% of total volume. UnionPay  
23 cards generated just under 40% and American Express, JCB  
24 and Diners combined accounted for 5.24%. Can you see  
25 that?

1       A. Yes, what I do not know -- what I cannot tell  
2       immediately from looking at these figures is whether  
3       this refers to all card payments or whether this refers  
4       to inter-regional card payments. My understanding is an  
5       inter-regional Amex is a relatively stronger competitor  
6       by market share than is suggested by these figures here.

7       Q. This is giving a global figure for purchases of goods  
8       and services, across the globe, and it is attributing an  
9       Amex share to that, jointly with JCB and Diners, which  
10      is around 5%. So if that is the level of usage,  
11      globally, of Amex, JCB and Diners, it follows, does it  
12      not, that the use of those cards is going to be  
13      commensurate wherever they are used across the globe?

14     A. But for inter-regional transactions there is also  
15     evidence that Amex has a higher share of overall  
16     inter-regional transactions. I can also jump ahead to  
17     the survey evidence that I relied on, which was  
18     cardholders in the US, Australia and Russia, and of  
19     those three 3,000 cardholders surveyed -- or of the  
20     2,500 surveyed in the US and Australia, 50% had an Amex.  
21     So for them, in my logic, or in the analysis, switching  
22     to Amex was very much a relevant consideration.

23     Q. Can I ask you, please, just to keep in your mind for  
24     a moment the 41 trillion figure because I will be coming  
25     back to it. Could we then look, please, at the next

1 page, page 7. {RC-J3/129/7} On the right-hand side, we  
2 have a different proxy; rather than value, we have  
3 global network cards in circulation, and you will see  
4 that figures are given for UnionPay, Visa, Mastercard  
5 and Amex. Whilst Amex has, as I understand it,  
6 0.13 billion cards in circulation, that covers only 0.8%  
7 of the total cards issued globally?

8 A. Yes, I have no reason to doubt these figures.

9 Q. Visa, in contrast, and Mastercard have between them in  
10 excess of 41% of the share of global issued cards,  
11 correct?

12 A. Yes.

13 Q. You are aware that Mastercard is not viewed as a must  
14 take card by a significant number of merchants?

15 A. Sorry, do you mean Mastercard or Amex?

16 Q. Sorry, I meant American Express.

17 A. I am not so sure about that, actually. I do not know  
18 what the basis would be for saying that. Amex is  
19 accepted quite widely, as we -- as we have just covered.

20 Q. Now, in terms of what would Mastercard do if there were  
21 zero MIFs for inter-regionals in UK and Ireland, the  
22 four scenarios you have relied upon are set out at GN1  
23 at paragraph 4.59, page 120, so your first report,  
24 page 120. Focus, please, on paragraph 4.59  
25 {RC-H3/2/120}. I just want to look at the realism or

1 otherwise of some of these scenarios. So scenario 1,  
2 that focuses, does it not, on Mastercard or Visa not  
3 being available at all for inter-regional payments?

4 A. Yes.

5 Q. So that is effectively, is it not, a shut-down of all  
6 use of Mastercard or Visa cards in Europe for  
7 transactions outside Europe -- sorry, for cardholders  
8 based outside Europe?

9 A. Yes.

10 Q. Given that we are in a situation where, on the analysis,  
11 only the UK and Irish MIFs would be affected in the  
12 counterfactual, they are the ones that are going to  
13 zero, are you seriously suggesting that Mastercard would  
14 shut down its global or indeed even EU operation for the  
15 sake of those two markets?

16 A. First of all, I am based -- I am basing myself here on  
17 the factual evidence from the scheme witnesses in  
18 particular, so I cannot -- I am not -- I have not --  
19 I am not the one who has come with up with this  
20 scenario. This is based on factual evidence.

21 Secondly --

22 Q. Can I pause you there.

23 A. Secondly --

24 Q. Sorry, I am going to interrupt because it is important  
25 for me to understand this. Your job is, as

1 an independent and impartial witness, to give the best  
2 evidence you can to the tribunal and to help  
3 the tribunal; correct?

4 A. Yes.

5 Q. It must, therefore, follow that you at least appraise  
6 the witness evidence --

7 A. Absolutely.

8 Q. -- to work out how realistic it is?

9 A. Absolutely, I have.

10 Q. Sorry for interrupting, I just wanted to establish we  
11 are on the same page.

12 A. Yes, but what I am saying is I have relied heavily here  
13 on the factual evidence, what the witnesses say they  
14 would do in this scenario. So this is a good example of  
15 how factual evidence and economic experts complement  
16 each other, so I have certainly appraised those -- that  
17 factual evidence -- so I have done two things: I have  
18 taken that factual evidence and I have appraised it  
19 against my own understanding of the economic dynamics,  
20 the competitive dynamics that you get in this market  
21 and, from that perspective, I consider all of these  
22 scenarios to be realistic options in line with my  
23 understanding of the competitive dynamics that you can  
24 get.

25 The second thing I then did, as the economic expert,



1 is to measure the effects of the specific actions that  
2 the factual witnesses say they would take and try to  
3 quantify them, so that is where the factual evidence and  
4 the economic expert evidence complements each other.

5 Q. We are going through the three stages one by one, so  
6 this is what are the options, how realistic are they.  
7 Next stage will be switching, third stage will be costs,  
8 just so there is no mystery. What you are saying  
9 effectively is that the many thousands of international  
10 issuers who exist in the Mastercard regime would find  
11 their inter-regional functionality switched off, in  
12 order to protect, or deal with, transactions that took  
13 place in the UK and Irish markets?

14 A. I think -- and this is my second point that I was going  
15 to come to -- there is some ambiguity when we say  
16 Mastercard and Visa not being available at all for  
17 inter-regional payments. You could interpret that as  
18 not being available for when you go to the UK or  
19 Ireland. So in this scenario, it could also be the case  
20 that what the issuers do is switch off the  
21 inter-regional functionality for the UK and Ireland  
22 only. I am saying that because I think the premise of  
23 the question was would they really do that for the whole  
24 of Europe just for the UK and Ireland. You could  
25 envisage this also to be a scenario where they just do

1           it for the UK and Ireland.

2       Q. The survey did not confine its attention to the UK and  
3       Ireland.

4       A. The survey did not, and I have to go with what the  
5       survey did, but as -- but the survey is the second step,  
6       as you rightly pointed out. The first step is to assess  
7       what are the kind of scenarios that you should consider  
8       and -- and this is one.

9       Q. Of that 41-trillion purchase market that we looked at  
10       globally, what percentage of that is accounted for by  
11       transactions in Ireland?

12      A. I -- I cannot work out the math. But a small part.

13      Q. What about the UK?

14      A. Somewhat larger. But still small.

15      Q. In terms of the UK, we do have some evidence, if we look  
16       at {RC-J5/56.3/3}, top right-hand corner, "Value of  
17       transactions in the UK", and bear in mind this is value  
18       of all debit and credit transactions in the UK,  
19       including overseas issued cards, and that is obviously  
20       important.

21            If we look at total card spending -- this is  
22       latest November 2023, so I anticipate that this is  
23       a monthly figure, and it is 73.3 billion. Can you see  
24       that?

25      A. Yes.

1 Q. If we convert that at the prevailing US/pound rate, will  
2 you take my word for it that is about USD 94 billion?

3 A. That sounds right, yes.

4 Q. There is no reason at all to trust my maths but even  
5 I can multiply 94 by 12 and produce a figure of  
6 USD 1,128 billion.

7 A. Sorry, why would you divide by 12?

8 Q. Multiply by 12. Did I say divide? I am sorry, I meant  
9 multiply.

10 So monthly figure, times it by 12, you get an annual  
11 figure of 1,128 billion.

12 A. Yes.

13 Q. 41 trillion -- and this is where my maths does get more  
14 challenged -- is effectively USD 41,000 billion.

15 A. That sounds right.

16 Q. 1 trillion is 1,000 billion so 41 trillion is 41,000  
17 billion, and the figure I gave you just now is  
18 1,128 billion -- and this is where I do divide. If you  
19 divide 1,128 billion by 41,000 billion, then you get  
20 2.75% and, of course, that is assuming I am building  
21 into that not simply the value of the UK purchase prices  
22 for overseas issued cards, which is the relevant one,  
23 but also domestic as well, so on a very, very  
24 conservative estimate, the UK's percentage of the global  
25 purchasing market is roughly 2.75% absolute maximum.

- 1 A. On that basis, yes, I have no reason to disagree with  
2 that.
- 3 Q. You would accept, would you not, that Ireland must be  
4 orders of magnitude lower than that?
- 5 A. Yes.
- 6 Q. There is no way, is there, that Mastercard and Visa  
7 would shut down their entire inter-regional system,  
8 functionality, in order to protect revenues said to stem  
9 from UK and Ireland on that basis? You would be cutting  
10 off your nose to spite your face, would you not?
- 11 A. I am not sure whether we are talking about cutting off  
12 the entire inter-regional functionality or whether we  
13 are talking just shutting off the bit that says when you  
14 go to the UK or Ireland you cannot use this card but you  
15 can use it everywhere else.
- 16 Q. That is a fair point, Dr Niels, and that makes much more  
17 sense, so assume we have shut off functionality so it's  
18 just UK and Ireland, why is an issuer in South Africa,  
19 for whom probably 95, 96% of its card transactions are  
20 based in South Africa or surrounding countries, going to  
21 give two hoots about the impact of the use of those  
22 cards in the UK and Ireland?
- 23 A. Well, the premise generally here of this scenario is --  
24 or the reason why they would think about shutting off in  
25 the first place is that the associated interchange

1 inter-regional MIF revenue that comes with these  
2 transactions is also substantial.

3 Q. Well --

4 A. That is the reason why, rather than continue to offer  
5 the service but do not get any of those revenues any  
6 more and considering alternative options, including  
7 switching it off, that is the relevant considerations  
8 that the factual witnesses have considered.

9 Q. I have picked South Africa deliberately because it is  
10 a country with associations with the UK, so it would not  
11 be unfamiliar to have South African tourists here, but  
12 it does not have perhaps as many tourist as France,  
13 Australia or some other Commonwealth countries, but it  
14 is therefore chosen by me to be roughly middling in  
15 terms of potential impact. A South African bank, if it  
16 is told, "I am sorry, you do not have -- your cards are  
17 not going to have inter-regional functionality in  
18 Ireland," is not going to stop issuing cards, is it?

19 A. I think it might. You could also put the reasoning the  
20 other way round. The South African bank that wants to  
21 offer a card to its consumers going abroad, but then  
22 those consumers go abroad and use the card but then it  
23 does not get any interchange revenue any more from the  
24 UK and Ireland, may find it very unattractive and may  
25 well say, "I am going to switch it off for the UK and

- 1 Ireland."
- 2 Q. But the proportion of revenue that the South African  
3 bank would derive from that is going to be  
4 infinitesimally small, is it not? Irish transactions  
5 for a South African bank, in terms of the overall global  
6 revenue that the bank achieves, just simply from card  
7 payment transactions, domestically and in every other  
8 country of the world, it is ridiculous, is it not, to  
9 suggest that they would cut off their nose to spite  
10 their face in that way?
- 11 A. I do not think it is ridiculous, because you have to  
12 compare the relevant dimensions. The income stream for  
13 Ireland is also small but it will fall to zero, and the  
14 income stream previously for the UK will fall to zero.  
15 That is my understanding of the factual evidence. That  
16 makes the schemes and the issuers think twice before  
17 continuing to offer the functionality.
- 18 Q. So let us go back to what you just said about  
19 cardholders wanting this functionality. Are you  
20 seriously suggesting a South African issuing bank would  
21 say to a cardholder, "I am sorry, you cannot use the UK  
22 and Ireland because we are not prepared to wear the  
23 absence of MIFs for those transactions," even though  
24 that would cause customer friction with the cardholder?
- 25 A. I think that is one of the -- that is a scenario that is

1           envisaged as a possible reaction, so that is captured by  
2           the scenario 1 that we talked about.

3       Q.   Of course, we know, do we not, that the South African  
4           issuing bank will derive foreign transaction fees from  
5           the card use in Ireland which it can use to offset the  
6           loss of the MIFs?

7       A.   Well, then you get into the question again of can you  
8           use existing revenues to offset. I think that is  
9           a separate question that we should address at some point  
10          separately. But -- but the notion that there is  
11          a significant amount of interchange fee revenue lost,  
12          I think that is a very relevant consideration for the  
13          issuer. So if you put it the other way round, the idea  
14          being, in this counterfactual, a significant amount of  
15          revenue falls away from interchange -- yes, you have  
16          other revenues, but a significant amount of revenue  
17          falls away, you will think twice and you are going to  
18          reconsider your options in your offering to your  
19          cardholders. That is the fact -- that is the narrative  
20          that comes out of the factual evidence. I have no  
21          reason to doubt it.

22                I cannot pinpoint exactly what each reaction will  
23                be. Therefore, I think it is actually quite useful to  
24                look at four scenarios, they are not precise reactions,  
25                there can be combinations of the scenarios. But I think

1           it is very much a relevant scenario where issuers decide  
2           not to simply continue offering the same functionality  
3           because they do not get the revenue any more and  
4           therefore that is no longer a contributor to the costs  
5           they incur.

6           Q. Next scenario is paying a 1% increase in the transaction  
7           fee. There is no evidential basis, is there, for the  
8           reason that figure was selected?

9           A. No, it is a hypothetical figure that was put in the  
10          survey but it is a useful way of testing the price  
11          sensitivity of cardholders.

12          Q. So you are assuming here, are you not, that the price  
13          increase would be passed through to the cardholder in  
14          a way that perhaps, arguably, you have not been so  
15          tolerant of pass through when it is on the acquirer  
16          side?

17          A. Sorry, can you --

18          Q. You are assuming pass through of a cost, an increase in  
19          the transaction fee, that is a cardholder cost with the  
20          issuing bank, correct?

21          A. Yes, my basic premise and logic here is that the issuing  
22          competitive dynamics that you get everywhere, but also  
23          in this case, is that the issuing market is competitive  
24          so, therefore, the revenue that they get from  
25          interchange revenue is used to make their offering to



- 1 cardholders more attractive. So in that sense, I do  
2 assume issuer pass on. Yes.
- 3 Q. The third scenario involves the cardholders not  
4 receiving any rewards or other benefits from using  
5 a card in the EU. Is that right?
- 6 A. Yes, indeed, that is another type of reaction again that  
7 is also mentioned in the factual evidence, so that is  
8 another type of reaction that might occur, yes.
- 9 Q. It says not receiving any rewards or other benefits.  
10 Two points: firstly, that is not confined to the UK and  
11 Ireland, is it? In terms of the survey question?
- 12 A. Correct, that is a bit ambiguous, yes.
- 13 Q. Secondly, what the witnesses actually say is that there  
14 would be a scaling back of the offered benefits, not  
15 their abolition. I can take you to the witness  
16 evidence, if you need it.
- 17 A. Yes, it is a matter of degree, that is true, yes.
- 18 Q. Scenario 4 relates to decline rates. That survey  
19 question did not say what the decline rate was, did it?
- 20 A. Correct. It indicated higher decline rates but did not  
21 specify the exact degree.
- 22 Q. It did not require the respondent to think that he or  
23 she would be affected by a specific number of declines?
- 24 A. Correct.
- 25 Q. Now, in terms of the second stage, we then move on to

1 switching. Now, your case must necessarily depend on  
2 either cardholder switching or issuers switching; is  
3 that right? Those are the only two switchings that are  
4 going to happen?

5 A. Yes, but what I then was able to analyse was the  
6 cardholder switching so I have actually in a way been  
7 conservative because I have not considered issuer  
8 switching as such.

9 Q. Right. So having not considered issuer switching, did  
10 you look at whether or not it was feasible to constrain  
11 the use of regionality so that you could basically turn  
12 off the tap for UK and Ireland?

13 A. I did not look at that.

14 Q. Could we look at {RC-J4/89.2/178}. This hopefully  
15 brings up the Visa rule for issuance of domestic use  
16 only cards. I am going to deal with Visa and then  
17 Mastercard and if we look, please, at rule 4.1.1.5:

18 "An Issuer must not issue a consumer Credit Card or  
19 a consumer Debit Card that is restricted to use only in  
20 the country of issuance. With prior Visa approval, an  
21 Issuer may issue a Prepaid Card that is restricted to  
22 use only in the country ..."

23 A prepaid card, that is, and then there is no  
24 separate regional relevant rule.

25 So it would not be possible, would it, for a Visa

1 issuer to restrict inter-regional functionality for the  
2 entire globe?

3 A. If, if this rule is in place and remains in place, that  
4 is correct, yes.

5 Q. As I understand it, the witness evidence that you rely  
6 upon was all predicated, was it not, on the absence of  
7 inter-regional functionality for the entire globe?

8 A. I am not sure if that is correct as a statement.  
9 I mean, the factual -- the witness evidence says what it  
10 says, it talks about inter-regional functionality in  
11 general. I do not know if it is as precise as  
12 identifying exactly how it would work in practice nor  
13 indeed whether a rule of this type would be amended or  
14 not.

15 Q. In the counterfactual, we would end up with a position,  
16 would we not, where the fees generated on card use for  
17 UK and Ireland on your analysis would be zero but  
18 inter-regional revenue would be generated for the 198  
19 countries that exist elsewhere?

20 A. In that scenario, yes.

21 Q. Of course the use of the card would also generate other  
22 revenue both in the issuing jurisdiction and in its use  
23 in those other countries?

24 A. Yes.

25 Q. It would also satisfy the demand of the cardholder for

1 universal international acceptance; correct?

2 A. Sorry, I now get confused between the premises. Is the  
3 UK or Ireland available or not? If the UK and Ireland  
4 is not available, then it does not fulfil that customer  
5 need.

6 Q. Let me qualify that: Almost universal international  
7 acceptance?

8 A. Yes.

9 Q. Could we look, please, at {RC-J4/89.2/124}. This again  
10 is a Visa rule but we find here that even if a card is  
11 used outside of its proper zone, even if it is used --  
12 even if there is a geographical restriction, then  
13 1.7.6.11 halfway down that page, two-thirds of the way  
14 down the page says:

15 "An issuer must pay the acquirer the amount due for  
16 a transaction occurring with the use of a valid card.  
17 This includes transactions resulting from the  
18 geographically restricted card use outside the country."

19 So if my putative South African tourist pitches up  
20 in Dublin and makes a contactless transaction, Visa will  
21 be obliged to recognise the payment transaction;  
22 correct?

23 A. I think under this current wording of the rule, yes.

24 Q. Was it ever suggested to the Mastercard witnesses that  
25 they would need to break out this potential wrinkle of

1           restricting the geographical scope of the cards to UK  
2           and Ireland specifically and nowhere else?

3           A. Sorry, is the question was it ever suggested to --

4           Q. Well, if you are focusing, as it seems you are, on UK  
5           and Ireland and that is a basis for distinction,  
6           presumably you would have relayed back to your factual  
7           witnesses that you wanted that issue covered, would you  
8           not? I mean, I do not want to go into discussions  
9           taking place within the legal team but if it was an area  
10          for knowledge to be gained, you would have asked for  
11          that knowledge to be made available to you?

12          A. No, I did not in -- in this case.

13          Q. I did say I would come back to the Mastercard rule, that  
14          is {RC-J3/130/130}. This is a rule against selective  
15          authorisation and we see under 6.4:

16                 "Without the express prior written approval of  
17          Mastercard, a customer must not launch or maintain  
18          a card programme that has the effect of selectively  
19          authorising transactions."

20                 Then two paragraphs down at the end of the numerical  
21          list:

22                 "An issuer's authorisation decision must be made on  
23          the basis of an individual transaction and not on the  
24          basis of a merchant or terminal country location,  
25          acquirer country location, transaction type, acceptance

1 environment or other similar factors except as permitted  
2 by the standards."

3 So Mastercard sets its stall, does it not, against  
4 this selective regional geographical no-go zone that you  
5 are postulating?

6 A. Yes, I think that is the thrust of this rule, yes.

7 Q. Right, let us turn to cardholder switching. Visa and  
8 Mastercard are ubiquitous cards in the global market,  
9 are they not, for payment cards?

10 A. Yes, I think that is fair to say.

11 Q. Issuers derive significant financial benefits from  
12 inter-regional transactions?

13 A. Yes.

14 Q. Cardholders greatly value foreign functionality, so the  
15 card becomes more attractive when it can be used abroad?

16 A. Yes.

17 Q. Cardholders generally would want universal global  
18 acceptance?

19 A. I think generally, yes.

20 Q. So in the counterfactual, issuing banks would still want  
21 to offer universal functionality and there would still  
22 be substantial consumer demand for it?

23 A. They would want to but they have to consider it again in  
24 the context of significant lost interchange revenue.

25 Q. A given issuer might request that Mastercard switch off

1            functionality but surely you would need a majority of  
2            issuers to lobby Mastercard for that outcome to be  
3            obtained via the scheme, correct?

4            A. That is an interesting question in terms of in these  
5            counterfactual dynamics what happens to the decisions by  
6            the scheme and what happens to decisions by issuers. We  
7            heard the evidence from the scheme -- from the schemes  
8            in particular that they would certainly take into  
9            consideration this lost revenues to their issuers which  
10           means they -- they struggle more in attracting those  
11           issuers in competing with the other payment methods.  
12           I think issuers are in that sense in the same boat so  
13           probably in that context the incentives -- the positions  
14           of the scheme and the issuers are aligned.

15           Q. Well, we have just looked at the rule that says you  
16           cannot make selective authorisation decisions based on  
17           geographical location of the terminal. The consequence  
18           of that must be surely that it would only be with the  
19           schemes' express authorisation that you would be  
20           permitted selectively to decline authorisations for an  
21           Irish or UK transaction?

22           A. I think that is correct and therefore I do think the  
23           evidence indicates that the scheme is also certainly  
24           considering alternative options and actions -- and this  
25           could potentially be one -- changing the rules so that

1           such a measure is possible, because certainly the  
2           factual witnesses talk about this kind of measure  
3           that -- measures that can be taken.

4       Q.   Globally, it is highly unlikely, is it not, that  
5           a majority of issuing banks would all petition the  
6           scheme to turn off this functionality on a sort of  
7           scheme-wide basis?

8       A.   Well, I am thinking aloud here but I am not sure if  
9           there is such a co-ordination problem or co-ordination  
10          failure between issuers. All the issuers have an  
11          aligned incentive, they are all in the same boat at that  
12          very point in time in the counterfactual that they  
13          collectively cannot compete with other payment methods  
14          in the inter-regional market, consumers turn to other  
15          types -- their cardholders will say: if I go to the UK  
16          I am going to use other payment methods.

17                So whether one issuer raises that or all of them,  
18                they are aligned in that sense in terms of the  
19                incentives, they have to want to have alternative  
20                measures.

21       Q.   Let us just assume that all of them decided that they  
22           were going to take the same decision which is to turn  
23           off functionality for the UK and Ireland, assuming it  
24           can be done. The result of that surely would be that  
25           there would be certain issuers whose cardholders would



1 say: this is jolly unfair, I want to carry on using my  
2 card in the UK and we can think only of Irish and French  
3 neighbours to think that is a realistic prospect?

4 A. Yes, and that is why you, you get these customer  
5 reactions that I have observed in the cardholder survey.  
6 Some cardholders clearly do not like the measures and  
7 therefore switch to other payment methods.

8 Q. So therefore the first issuer to switch -- to fall out  
9 of rank in Dublin would pick up a substantial cardholder  
10 demand for offering UK functionality?

11 A. But that issuer would not be in a sustainable position  
12 because that issuer equally loses the interchange  
13 revenue which was the rationale for dropping that  
14 functionality in the first place. It is not other  
15 issuers that benefit, it is the other payment methods  
16 that benefit, it is the other payment methods that  
17 cardholders switch to if there is this lack of  
18 functionality.

19 Q. Dealing more prosaically, perhaps, with the Oxera report  
20 in 2016 that was prepared for the purposes of an  
21 Article 101(3) submission to the Commission, was it not?

22 A. Correct.

23 Q. It was looking at switching issues, it was not a proper  
24 costs analysis of the relevant costs to merchants of  
25 using different payment types?

1       A. Well, it did a number of things. It did seek to apply  
2       the merchant indifference test as well, so analysis of  
3       the costs of other payment methods to merchants was very  
4       much part of it, that was one component.

5               The other component -- and this may have been in  
6       different reports, but they all were part of the same  
7       investigation -- is indeed the cardholder survey.

8       Q. You did not look, did you, at the countervailing  
9       benefits for a merchant of the acceptance of different  
10      payment products. So the advantages, say, of  
11      a particular payment product like Klarna or PayPal as  
12      opposed to a debit card or a credit card issued by Visa  
13      and Mastercard?

14      A. I did not in that analysis and I did not in general,  
15      what I observe is that Klarna from the factual evidence  
16      is that Klarna, PayPal, Amex have much higher costs to  
17      merchants than Visa and Mastercard.

18      Q. Could we look, please, at {RC-J2/98/5}. This is  
19      a confidential document so I will not read it out.

20              But can you see there we had evidence from Mr Steely  
21      from Marks & Spencer, recognising that he had done some  
22      careful calibrations to work out halo effects and  
23      benefits from certain payment methods and can you see  
24      there what that analysis shows? Clearpay, PayPal --  
25      I had better not read out too much more.

1 A. Yes. Yes.

2 Q. So they have a certain outcome and other credit cards  
3 not so much. Can you see that?

4 A. Yes.

5 Q. Now, you have relied on the cardholder survey that was  
6 commissioned by Clifford Chance?

7 A. Can I just make one more comment on this?

8 Q. Of course.

9 A. Looking at this chart in my mind, so the most relevant  
10 part of this chart to look at are the dark green bars  
11 below the zero, the negative bars, because they indicate  
12 what are to Marks & Spencer the direct costs of each  
13 payment method and there you can clearly see, I will not  
14 mention numbers, but a system like Clearpay has much  
15 higher direct costs than the others.

16 Q. Well, Mr Steeley was very clear, was he not, that he  
17 looked at the costs and benefits --

18 A. He also analysed the benefits and -- and certainly in  
19 this analysis it shows that the other payment methods  
20 also have high benefits.

21 MR TIDSWELL: Why would you not look at the net outcome,  
22 rather, why would you only just look at the costs?  
23 Surely the net outcome is what matters, if we are  
24 looking at the merchant preference in relation to  
25 payment?

1       A. That is an interesting question. Ultimately we are  
2       looking at price so the -- the claim here is about MSCs  
3       being increased by the MIF, so they are looking at  
4       a price, a monetary figure and are merchants paying  
5       a higher price. My analysis shows that still looking at  
6       just prices and costs but now also the other payment  
7       methods, they pay higher costs, so I think there is some  
8       merit in also -- in just -- in keeping the analysis to  
9       costs.

10       Now, one could say, well, let us also look at the  
11       benefits but I would say that is then you enter into  
12       territory that is highly subjective, hard to measure and  
13       you would have to analyse all the benefits that all  
14       these merchant payment methods bring.

15       Maybe that is perhaps something more for, for  
16       Article 101(3), but it is certainly something that is  
17       much harder to do. I have focused on cost effects here.

18       MR TIDSWELL: I think Mr Beal is putting to you that you  
19       might need to look at benefits if you were going to look  
20       at costs; in other words, if you are looking at whether  
21       the counterfactual produces a less competitive situation  
22       then taking the benefits into account is necessary and  
23       actually obviously we see here one merchant who has done  
24       that analysis, so it is capable of being done.

25       A. I think it is an interesting proposition. I had not

1 really thought about it in those terms. But I still  
2 would say the first -- sort of the first order analysis  
3 that one does is on costs and prices because ultimately  
4 that is what this case is about. Benefits can be  
5 relevant, I would still say they are subjective and  
6 would need to be measured carefully also for -- for  
7 credit cards and other and all the other payment methods  
8 so I do not know, for example, what methods  
9 Marks & Spencer applied here and are they really  
10 objective measures.

11 It is an interesting exercise that could also shed  
12 light on this case, I accept that. But I would also say  
13 just looking at costs is a first order analysis that one  
14 does.

15 MR BEAL: I am going to now look at the survey. It was  
16 conducted by the Artemis Strategy Group; is that right?

17 A. Yes.

18 Q. We have not had it disclosed, the underlying  
19 questionnaire or the results; correct?

20 A. Correct.

21 Q. It was based on consequences flowing from the use of  
22 Mastercard or Visa for the entirety of the EU; is that  
23 right?

24 A. Yes, it focused on the EU as a whole.

25 Q. Could we look please at {RC-J3/79/83}. If we look,

1 please at paragraph A4.22, it says the first three  
2 scenarios are considered realistic changes in the  
3 payment card service.

4 That implies, does it not, that the last one of  
5 Mastercard or Visa not being available at all for  
6 inter-regional payments was not considered to be  
7 a realistic one?

8 A. Yes, so just to be clear. The order is slightly  
9 different from the ordering that I had the four  
10 scenarios. So here what I called scenario 1 was here  
11 the fourth scenario, indeed. It has to be said this was  
12 done in 2016, so at that time I think it is fair to say  
13 realistic or theoretical constructs. Since then, we  
14 have had the specific factual evidence in this case from  
15 the scheme witnesses and therefore I would say on that  
16 basis that the last option or my scenario 1 in my report  
17 is not -- is not just a theoretical construct but  
18 a realistic option that was considered.

19 Q. It did not explore what would happen if there was zero  
20 MIFs only for the UK but not for the rest of the EU, did  
21 it?

22 A. That is right.

23 Q. If we look at page 84, {RC-J3/79/84}. Some of the  
24 questions, they do not permit, do they, the possibility  
25 of someone thinking they could pay by a different debit

- 1 card run by the schemes because it is looking only at  
2 credit cards?
- 3 A. Yes. What this survey proposes is that all Mastercard  
4 and Visa interchange basically is gone, so there are no  
5 other alternatives that these cardholders could turn to.
- 6 Q. It does not deal either, does it, with the suggestion  
7 that you could switch between a Mastercard card and  
8 a Visa card?
- 9 A. Because it assumes that Mastercard and Visa are in the  
10 same position of no longer having a MIF.
- 11 Q. If we look then, please, at paragraph A4.17 on page 81,  
12 {RC-J3/79/81}. The assumption behind card ownership  
13 seems to have been that 65 to 72% of the respondents  
14 owned at least one Mastercard credit card and 78 to 90  
15 owned at least one Visa credit card. That did not deal  
16 at all, did it, with debit card holdings?
- 17 A. This is a description of the -- of the respondents so  
18 this is just factual describing. It does not -- it does  
19 not describe here indeed how -- how many of the  
20 respondents had debit cards for Mastercard and Visa.  
21 The selection criterion was that the respondents needed  
22 to have at least a Mastercard or a Visa card, whether it  
23 is debit or credit.
- 24 Q. Then in terms of Amex penetration, it is 50% for  
25 Australia and US but only 11% for Russia; correct?

1 A. Correct.

2 Q. Now, different issuers, do they not, charge different  
3 transactions fees for international payments?

4 A. That is possible.

5 Q. So some might charge 0%, others might charge 3%.

6 A. Yes.

7 Q. So for example Amex for international transactions at  
8 the moment is currently 3% from their website, do you  
9 know that?

10 A. That sounds right, yes.

11 Q. The respondents to the survey were not given the details  
12 of the costs, benefits or decline rates of using Amex  
13 for an international transaction, were they?

14 A. Correct.

15 Q. If we had postulated 1% increase in the transaction fee,  
16 it is entirely possible that some cardholders would  
17 switch to another card with a lower fee which would  
18 increase from, say, 0% to 1% rather than switch to an  
19 Amex card which would have gone from 3% to 4%?

20 A. Sorry, can we just go back to the table where the --

21 Q. Answers are given?

22 A. Where the wording of the question was given.

23 Q. Yes, that was page 84, was it? {RC-J3/79/84}.

24 A. Yes. So the question says you can see that below the  
25 table. It was posited as imagine this time you found



1 out that using either Mastercard or Visa cards, plural,  
2 for payment in the EU would mean that you would pay this  
3 1% increase.

4 So it was postulated that all Mastercard and Visa  
5 cards would have this increase, and therefore, you know,  
6 what would you do as the cardholder?

7 Q. So we are postulating that a Visa or Mastercard which  
8 may have had a transaction rate from zero to, say, 3%  
9 would increase by 1%, within that cohort, some of them  
10 would still be cheaper than the 3% for Amex, would they  
11 not?

12 A. Yes. Would still be cheaper than Amex, yes.

13 Q. Where did the survey questions tell the respondent what  
14 the costs for Amex would be?

15 A. Well, it does not say anything about the costs of Amex  
16 leaving it implied that that does not change relative to  
17 the current situation.

18 Q. In terms of the fourth question down, one substitutable  
19 option was to pay in cash. How would 14% of respondents  
20 from the United States think that they could pay cash  
21 for an online transaction?

22 A. Yes, that is a slightly curious result. Part of the  
23 explanation for that may be that, you know, you have pay  
24 on delivery or the example that we heard the other week  
25 of someone booking a hotel online and then paying on

- 1 arrival.
- 2 Q. Is a UK merchant likely to ship goods to the  
3 United States for cash on delivery?
- 4 A. So not for e-commerce but for other types of  
5 transactions like the hotel example, that may be  
6 a possibility.
- 7 Q. If you --
- 8 A. Again I accept this is a slightly odd result but --
- 9 Q. If you are paying in cash at the hotel it is the  
10 equivalent of a card present transaction, is it not,  
11 because you are there, you are handing over the cash,  
12 you are present. If you are paying by a payment card,  
13 that is a card present transaction?
- 14 A. Well, that, that -- that depends on the exact definition  
15 and the situation that is being compared.
- 16 Q. Could we look, please, last question, I think for today,  
17 page 78. {RC-J3/79/78}.
- 18 PROFESSOR WATERSON: Can I just ask a question on the table?
- 19 MR BEAL: Please, sir.
- 20 PROFESSOR WATERSON: These are percentages, all these --
- 21 A. Yes.
- 22 PROFESSOR WATERSON: -- of that group. So that, for  
23 example, would not make a purchase if we consider  
24 Russia, online there are 160 people in this sample, 2 is  
25 a rounded figure, presumably?

1 A. Yes.

2 PROFESSOR WATERSON: 2%, so that represents three people or  
3 four people?

4 A. In this survey, yes.

5 PROFESSOR WATERSON: Right.

6 A. In this table. For example, just also to be clear, in  
7 my analysis of the switching what it means for merchant  
8 costs, I have actually excluded the "would not make  
9 a purchase", it is a small proportion. But in the  
10 normal SSNIP logic, SSNIP test logic, some consumers  
11 switch to alternatives, others would not make the  
12 payment at all.

13 So for simplicity and actually also to be slightly  
14 conservative, I have excluded the "would not make  
15 a purchase at all" from my results.

16 PROFESSOR WATERSON: Similarly, if we look at the Russia  
17 online percentage figure for "choose to make those types  
18 of purchases with an alternative credit card", again,  
19 that number is, well, presumably 2?

20 A. I presume that is a rounded number, indeed.

21 PROFESSOR WATERSON: Thank you.

22 MR BEAL: Could we look finally please at page 78, paragraph  
23 A3.7. {RC-J3/79/78}. It says:

24 "Postal payment by cash is limited to medium and  
25 small transactions ... and is very expensive: fees

1 amount to at least 10% of the transaction value in the  
2 UK. Customers are therefore unlikely to opt for this.  
3 Cash on delivery might not be available for cross-border  
4 deliveries."

5 So that was what Oxera was itself recognising, that  
6 cash is impractical for long distance transactions,  
7 which is what it says?

8 A. Yes.

9 MR BEAL: I am more than two-thirds of the way through, but  
10 not by much, but I anticipate that I will not need this  
11 witness past -- if we start at 10 tomorrow, I would hope  
12 to be done by 12.30 to allow time for obviously  
13 questions in re-examination and everything else. We are  
14 then on track with Mr Holt.

15 THE PRESIDENT: Three-day cross-examination in total?

16 MR BEAL: Yes.

17 THE PRESIDENT: I am very grateful, Mr Beal, do keep us  
18 posted, but that is very helpful.

19 MR BEAL: Of course.

20 THE PRESIDENT: Dr Niels in anticipation of some questions  
21 that at least I have tomorrow, I wonder if you might be  
22 given sort of amuse bouche in the form of a very short  
23 article by Leonard Read called "I, Pencil", you have  
24 probably read it already but we have a copy here for  
25 you. Do not take too long about -- the bit you really

1           only need to read, just to give you a sense of my  
2           questions, is actually the paragraph just above the  
3           title "The Law" on page 9. But it is not a long  
4           article.

5           The reason I am giving it to you is because I want  
6           to ask you about the effect that an interchange fee that  
7           is imposed might have on the ability to negotiate costs  
8           and prices independently in, as it were, a free market  
9           and this has something to say about that so you have  
10          an idea of where I am coming from? (Handed)

11         A. Okay, thank you, can you just repeat the paragraph that  
12          you referred to, or the page?

13         THE PRESIDENT: Yes, page 9, and it is the paragraph above  
14          the title "Testimony Galore" on page 9 beginning "Once  
15          government has had a monopoly". So that is the bit I am  
16          coming from but by all means look at the rest of it, but  
17          it does not matter if you do not.

18          Ms Tolaney, do we put Dr Niels in purdah or do we  
19          release him?

20         MS TOLANEY: I do not feel strongly about that.

21         THE PRESIDENT: Well, in that case, I think for the  
22          protection of the witness, if nothing else, Dr Niels do  
23          not talk about your evidence with anyone but Ms Tolaney  
24          should that change, let us know. We will be as flexible  
25          as we were with Mr Beal.

## 1 Discussion re timetable

2 MS TOLANEY: Thank you. I think we may need to discuss  
3 timetable, which is why I really stood up.

4 THE PRESIDENT: Of course, who wants to go first?

5 MR KENNELLY: Sir, I ought to have pointed out when you  
6 raised the possibility of sitting in this trial on the  
7 18th that currently on 18 March -- well, I should say  
8 first of all we wrote to the tribunal today, the letter  
9 was sent to you at lunchtime. I would not be at all  
10 surprised if you have not had a chance to see it. Has  
11 the tribunal received the letter we wrote?

12 THE PRESIDENT: Do you want to give us a one-line sentence.  
13 We probably have.

14 MR KENNELLY: The hearing in -- the strike-out hearing is  
15 an important hearing.

16 THE PRESIDENT: It is an important hearing.

17 MR KENNELLY: The tribunal wanted it to be a hearing, not  
18 determined on the papers.

19 THE PRESIDENT: That is correct.

20 MR KENNELLY: A separate legal team for Visa has been  
21 instructed and is ready to argue that case.

22 THE PRESIDENT: Indeed.

23 MR KENNELLY: There are other parties who will attend who  
24 are not part of this trial.

25 THE PRESIDENT: Mr Kennelly, we got the letter. I was

1           actually going to raise it with you because it seemed to  
2           us somewhat -- a difficult letter to have written given  
3           the fact that it is the schemes that have put the  
4           Claimants in some difficulty regarding timing and we  
5           have been adjusting that.

6           It means that we have had to re-arrange two  
7           hearings. We are flagging to the parties in both of  
8           those hearings that the dates cannot stand but we are  
9           absolutely going to ensure that there is a minimal  
10          delay. We have three days where we are not sitting in  
11          this case when you are doing your closing. We have  
12          already reached out to the parties in the strike-out  
13          application to see whether they can make any of those  
14          three days, we have a preference for Wednesday  
15          afternoon, so we are alive to the importance of the  
16          point and we are dealing with it.

17          But I will be quite frank, a letter saying that we  
18          are outraged at the adjournment of a hearing when it is  
19          the same party who has caused that adjournment did not  
20          go down very well. What we really want is  
21          a constructive engagement with the parties to ensure  
22          that we get it listed within a day or two or 48 hours of  
23          the time it was set. So we are very conscious of the  
24          difficulties that everyone is working under, including  
25          the tribunal, we are determined to ensure that any

1 difficulty is overcome.

2 We accept that there are going to be difficulties  
3 but it does seem to us that the critical importance of  
4 ensuring that Mr Beal had an appropriate amount of time  
5 to cross-examine the witnesses, given that the  
6 difficulties of the loss of a day were not of his  
7 making, had to trump the other difficulties of other  
8 related hearings here.

9 So that is what we are doing. I do not know if you  
10 can assist us on whether the Wednesday afternoon, which  
11 is our preferred date, works for a shadow team but it is  
12 probably best if we take that offline and discuss it  
13 with them and of course the other parties who are  
14 genuinely discombobulated by this because they are not  
15 involved in Trial 1. Primark and Ocado obviously are  
16 deeply involved in the strike-out in Trial 2 and we very  
17 much regret the inconvenience that we are causing to  
18 them, we know that, but we have got to prioritise our  
19 time.

20 MR KENNELLY: First of all, sir, we hear you loud and clear  
21 and no offence was intended by the letter.

22 Mr Rabinowitz I understand is not available on Wednesday  
23 but we will take it offline and see obviously the extent  
24 to which we can accommodate the tribunal and bear well  
25 in mind the points you have made to me.



1 THE PRESIDENT: We have three days. I think one of them is  
2 very difficult for the tribunal. The Tuesday is very  
3 difficult. The Wednesday afternoon is better, the  
4 Thursday is doable as well. So there are essentially  
5 three half-day slots for everyone agrees is a half day  
6 hearing and we are prepared to consider listing it for  
7 out of court hours if that needs to be done because we  
8 do know that if the application goes one way, not the  
9 other but if it goes one way, then there are significant  
10 issues for Trial 2. We are alive to that.

11 MR KENNELLY: Of course I understand Mr Rabinowitz is  
12 available on Thursday.

13 THE PRESIDENT: It may be then that Thursday will be the day  
14 but we are already sounding out the other parties  
15 because we do not like adjourning matters; we only do it  
16 under the most extreme of pressure and unfortunately  
17 that was such a case here.

18 For those interested in the MIF 2 catch-up, that is  
19 likely to be listed for a somewhat ungodly hour on the  
20 same day that we were to hear it during ordinary court  
21 hours, but I will again be, through the Registry, in  
22 touch with the relevant parties to give them that no  
23 doubt very unwelcome news.

24 We are living somewhat hand to mouth on timeframe.  
25 Do we need to discuss further whether it is three days

1 writing or three days -- or less than that to have  
2 a full aliquot of oral submissions?

3 I am more inclined to park that for the parties to  
4 discuss --

5 MR BEAL: We will see what we can agree.

6 THE PRESIDENT: -- offline.

7 MR BEAL: It may be that practically we have to start on  
8 Friday and that may dictate the outcome because we run  
9 out of time because Monday is not available.

10 THE PRESIDENT: Yes.

11 MR BEAL: For my part can I be absolutely clear what I am  
12 proposing to do.

13 I have told my team not to be treekillers on final  
14 submissions because I think it is counterproductive.  
15 Then I am proposing to produce an aide memoire where  
16 I drill in to the issues that this tribunal has been  
17 asked to decide and give my answer. That is the easiest  
18 way I can think of doing it.

19 I will dip in and out perhaps to some of the detail  
20 but I am proposing to do a separate aide memoire which  
21 is a much more focused script as a companion piece,  
22 partly because I think as an advocate that is the best  
23 way of me presenting my answer to the case, which is  
24 what I want to deal with in closing. I understand there  
25 is commonality between my learned friends on this basic

1 approach. What it does mean is that we are not  
2 enamoured, if we can put it that way, of a very large  
3 written large closing process after the trial is  
4 finished because that not only trespasses on everyone's  
5 patience but the memories fade because everything is not  
6 as fresh as it is otherwise. I am simply being candid  
7 as to what my own position is.

8 THE PRESIDENT: That seems, Mr Beal, very sensible and the  
9 fact is you are going to get, like it or not, requests  
10 for references, particularly in a case as diffuse as  
11 this where the facts are there but elusive and those  
12 will come after closings, when we are writing the  
13 judgment, when we want to be assured that we are  
14 covering the evidential terrain that all of the parties  
15 would expect us to cover. That is why I gave the  
16 indication this morning that very detailed footnotes and  
17 references are unlikely to assist. Of course, it is  
18 useful for you to nail those references while it is  
19 still fresh in your mind and we certainly do not  
20 discourage you from doing that, that seems very  
21 sensible.

22 But for our purposes what you have outlined seems  
23 a very sensible compromise. We get what we need to  
24 understand your oral submissions, something that is  
25 focused and manageable. We also get, but we probably

1 will not read, the detailed AMR references, which we  
2 will have to look at in due course. After the event you  
3 will get information requests to the extent we need to  
4 do so when we are writing the judgment.

5 MR BEAL: Of course I am sure we are all very happy to help  
6 on that basis. There is one outstanding matter which  
7 has been the subject of correspondence which was the  
8 Visa were going to tell me why I had got settlement and  
9 clearing wrong and I have not yet been illuminated on  
10 that, but no doubt the letter will come. If it was to  
11 come before I started cross-examining Mr Holt, that  
12 might save some time. That is all I will say on that.

13 THE PRESIDENT: The marker has been put down. That is  
14 helpful. Ms Tolaney?

15 MS TOLANEY: The first thing we should say is from the  
16 schemes' perspective we are very sorry that we have gone  
17 over on time and we are very grateful.

18 THE PRESIDENT: That is fine. Look, Ms Tolaney there is no  
19 question but that you have appropriately cross-examined  
20 and there is absolutely no criticism, implied or  
21 otherwise, of the manner in which anyone has conducted  
22 this case.

23 MS TOLANEY: Thank you.

24 THE PRESIDENT: Overruns happen. If it had been  
25 unjustifiable we would have stopped it; the fact is it

1           was not and we wanted to hear the evidence. But of  
2           course the same goes for Mr Beal.

3           MS TOLANEY: Of course.

4           THE PRESIDENT: It is coping with the fall-out --

5           MS TOLANEY: Yes.

6           THE PRESIDENT: -- that we have to do that and it does mean  
7           that certain choices have had to be made which we regret  
8           but which are inevitable.

9           MS TOLANEY: On that point I think from Mastercard's  
10          perspective we will entirely fall in with what needs to  
11          be accommodated in relation to the Monday hearing. What  
12          I would say is that subject to that, experience has  
13          shown that maybe just being a bit more generous on the  
14          oral submissions side may be wise given we have got that  
15          hard finish. So maybe once the tribunal has been able  
16          to relist that hearing, we can then look at whether it  
17          is two and a half days or three days for that period.

18          THE PRESIDENT: Ms Tolaney, again, from our point of view  
19          you are pushing at an open door in terms of the value  
20          that we get from oral submissions.

21          MS TOLANEY: Precisely.

22          THE PRESIDENT: So we would like to maximise that but we are  
23          very conscious that maximising that when one has got  
24          a hardened date creates problems in preparing for those  
25          matters and I have tried to signal that we are very

1 happy for the parties to do a less full job on the  
2 detail, if that saves them time to maximise the oral  
3 submissions. The price you pay for that of course is  
4 the after the event notes which I understand nobody  
5 wants, but it is like a waterbed: you push down  
6 somewhere and the problem pops up somewhere else.

7 So we will leave it to the parties to work out how  
8 they want things to work. We have given a signal that  
9 we agree with you that as long as possible for oral  
10 submissions is desirable, but one must be realistic on  
11 the demands of the people in front of us and that is  
12 really why we are discussing this.

13 MS TOLANEY: Thank you very much.

14 THE PRESIDENT: Anything else by way of housekeeping?

15 MR KENNELLY: Only to say that, as Mr Beal said, we had  
16 spoken and we intend to give you the written submissions  
17 by the deadline that the tribunal imposes, which may  
18 move; it will contain a detailed summary which will  
19 serve as the aide memoire and hopefully that will be all  
20 you need before you engage with the oral closing and  
21 then the cross-references will be in the longer document  
22 and obviously will be available to give you such further  
23 references you need after the trial finishes.

24 THE PRESIDENT: That is helpful. References -- given we are  
25 going to have to trawl through an awful lot of

1 regulatory history, if nothing else, that is in itself  
2 a massive terrain to cover and the parties will be  
3 relying on different bits of that massive terrain and we  
4 will obviously want to ensure that we get everybody's  
5 points arising out of those documents, we can take you  
6 to various Commission decisions. Well, when we come to  
7 a point which seems to us significant, we will, I think,  
8 be saying: what other paragraphs do the parties want to  
9 draw to our attention so that we see a full picture.  
10 Because understandably in the course of these 15 days,  
11 we have really been seeing the tip of the iceberg; sure,  
12 the most important tip, but context is everything.

13 MR KENNELLY: Of course.

14 THE PRESIDENT: Thank you all very much. We will resume  
15 then at 10 o'clock tomorrow morning.

16 (5.05 pm)

17 (The hearing was adjourned until  
18 10.00 am on Thursday, 14 March 2024)

19  
20  
21  
22  
23  
24  
25