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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

**MERCHANT INTERCHANGE FEE UMBRELLA
PROCEEDINGS**

TRIAL 1

A P P E A R A N C E S

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

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

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

Thursday, 14 March 2024

DR GUNNAR NIELS (continued)

Cross-examination by MR BEAL (continued)

(10.00 am)

THE PRESIDENT: Good morning, Dr Niels, good morning,
Mr Beal. Over to you.

MR BEAL: Good morning, sir. Thank you.

Dr Niels, please could we look at the report that we
finished with yesterday, that is {RC-J3/79/84}. This is
the table that we were considering before we broke.

A. Yes.

Q. Can we see that in scenario 2, which is a response to
a 1% increase, in terms of the number of people who
would use an alternative card or apply for
an alternative card, it is between 20% and 35%, is it
not, for the three different cohorts?

A. So you are referring to the second and the third row in
the table?

Q. Yes.

A. Adding them together, yes.

Q. No, I have not added them together. I am just saying
that the range for each -- presumably you would not do
both at the same time, would you?

A. No. But therefore then I misunderstood the question.

Q. Okay. You would not do both at the same time, but of

1 these people presumably the maximum that would apply for
2 an alternative card on these statistics would be roughly
3 in the region of 20% and the maximum number that would
4 apply for an alternative card -- sorry, that would use
5 an alternative card they already own is 32%; is that
6 right?

7 A. Yes.

8 Q. 34%, sorry.

9 Just using those figures obviously not everyone --
10 we know the acceptance rate for Amex was about 50% for
11 the US and Australia and the figure was much lower for
12 Russia?

13 A. Yes.

14 Q. So if we use those statistics to think about what
15 proportion would either apply for an Amex or use an
16 Amex, the reality is it is going to be a low fraction,
17 is it not? You are stripping out the number of people
18 who already own an Amex and then you are looking at
19 would they apply for an Amex and the reality is that the
20 figures do not get very high?

21 A. Correct. The figures are what they are. Yes.

22 Q. The survey does not provide any information on the costs
23 of alternative payment methods to cardholders, does it?

24 A. The survey does not, no.

25 Q. It is right, is it not, that conjoint analysis for

1 customer preference would have been a more robust method
2 of dealing with this switching preference; correct?

3 A. There are various methods of doing consumer analysis of
4 this kind. There are the straightforward surveys and
5 there is conjoint analysis.

6 Conjoint analysis can be a robust method. It has
7 its own downsides, one of which is time and costs.

8 I would not say that categorically the conjoint analysis
9 is always preferred over this type of straightforward
10 survey analysis. But, yes, conjoint has its benefits as
11 well.

12 Q. You would not walk into an article 101(3) hearing, would
13 you, with just this in your pocket?

14 A. If it is 101(3), then the evidence that you would look
15 at I am just thinking about whether this cardholder
16 reference where this comes into 101(3). I mean, I have
17 been in 101(3) hearings, I have walked into them with
18 a lot of evidence. I am just trying to think -- it is
19 a bit hypothetical to say just this survey. Obviously
20 no, not just the survey, I would come to 101(3) with
21 a lot of additional evidence as I have done in the past.

22 Q. Now, the lower levels of acceptance for Amex and its
23 less than universal coverage mean that it would be
24 a brave tourist that travelled to a foreign country with
25 just an Amex in their wallet; correct?

1 A. I think, and we have seen from the factual evidence that
2 Amex is pretty well accepted in -- in the UK, in
3 particular in those sectors where most inter-regional
4 spending takes place.

5 Q. We have seen, have we not, that the Amex regime has both
6 higher cardholder fees and higher interest payments than
7 Mastercard and Visa cards?

8 A. It has on the whole, yes.

9 Q. So you would still need a demand, would you not, for
10 a card that could be used internationally and that
11 demand would still subsist?

12 A. Sorry, I do not understand the question.

13 Q. If Amex is not filling the gap and Amex is an expensive
14 -- relatively -- is more expensive relatively compared
15 to Mastercard and Visa cards then there would be
16 significant consumer demand for a payment system that
17 was either cheaper or more universally acceptable?

18 A. There would be -- so there are various alternatives,
19 there are other cards and there is PayPal and travellers
20 cheques and those sort of things.

21 Q. You see, what I am suggesting to you is that therefore
22 the risk of issuers switching to Amex is remote because
23 the revenue that would be lost from doing so by -- by
24 getting rid of international functionality for the UK
25 and Ireland would be small, there would still be high

1 consumer demand for the universal solution and therefore
2 the risk of issuers shutting down international
3 functionality because of a threat to Amex would be
4 remote?

5 A. So this is about cardholder switching, so if the
6 question is about the risk of issuer switching, I think
7 it can be attractive for issuers to switch to Amex in
8 a scenario like this. But that bit I have not assessed.

9 Q. No, if issuers do not switch but they simply do not turn
10 off the functionality, then issuers remain where they
11 are. The question then is: do cardholders stick with
12 what they have got or do they switch?

13 A. Well, the survey indicates that cardholders switch, yes.

14 Q. The survey is predicated on the functionality being
15 removed, is it not, so if that predicate does not hold
16 good --

17 A. The survey covers four scenarios and in one scenario the
18 functionality is being removed but in the other
19 scenarios the offering to the cardholder is being
20 modified.

21 Q. When for Mastercard it was required to reduce its
22 intra-EEA MIF to 0% from June 2008 to July 2009, there
23 was no evidence of cardholder switching to Amex, was
24 there?

25 A. I have not analysed that.

1 Q. Secondly, following the caps that were put in place by
2 the Commitments decision, which has now lasted from 2019
3 to 2024, you are not able to point to any evidence of
4 any significant improvement in Amex's market position
5 correct?

6 A. Correct.

7 Q. In relation to the position in Australia when
8 interchange fees were capped, whilst Amex's market share
9 improved by a little bit, the Merchant Service Charges
10 that Amex charged fell, did they not?

11 A. Apologies, what was the last bit of your question?

12 Q. Amex's charges to merchants fell?

13 A. I believe that is correct. I have discussed the
14 Australian example and we have also seen that in the
15 factual evidence; that the Australian situation was one
16 where after the regulation you saw a proliferation of
17 MIF rates indicating that Mastercard and Visa were able
18 to compete with Amex's sweet spot in the premium card so
19 there remained significant competition between --
20 between Visa, Mastercard and Amex which in my mind makes
21 it a less -- makes it not a good comparator for the
22 current counterfactual.

23 Q. Fourthly, in terms of perhaps natural examples we might
24 have to give us some indication of what might happen, we
25 have the position in New Zealand following the 2022 Act,

1 have we not, which capped MIFs and indeed reduced the
2 debit MIF to zero?

3 A. I think I have considered New Zealand in the context of
4 the UIFM where it was raised as a comparator. I do not
5 think I have looked at New Zealand more broadly than
6 that.

7 Q. Could we look, please, at transcript Day 7, page 95
8 lines 1-4 {Day 7/95:1-4}, this is a point I put to the
9 witness from Visa who was dealing with New Zealand
10 matters.

11 That is page 95, please. If we go back to the top
12 of -- bottom of page 94, please. At the bottom there
13 you see I asked a question:

14 "Question: Now, given that we have been operating
15 in this world of zero MIFs for contacted in-person debit
16 charges in New Zealand, have you, with overall
17 responsibility for New Zealand, seen a sudden stampede
18 of custom to American Express or another scheme rather
19 than Visa?"

20 The answer came back no, so that was the evidence
21 the witness gave for Visa in relation to this?

22 A. Yes, I see that.

23 Q. It is right, is it not, that if on your version of
24 events reducing MIFs to zero would cause switching one
25 would have expected to see more of it in any of the four

1 examples that I have been discussing?

2 A. I -- I have rejected some of those four that I have
3 considered as relevant or as comparable situations.

4 There are important differences in each of them.

5 I cannot comment on this last one in New Zealand.

6 Q. In your second report, please, at paragraph 4.62, which
7 is page 52 of {RC-H3/3/52}, if we look, please, at the
8 end of paragraph 4.62, you say:

9 "There would have been no such restriction on Amex's
10 fees and its bargaining power in the counterfactual in
11 the present case."

12 You are aware, are you not, that Amex exited the GNS
13 market as a result of the imposition of the IFR and more
14 generally the regulatory position?

15 A. Yes.

16 Q. Can I then come on to the third stage of the three-stage
17 analysis, so we had: how realistic are the scenarios;
18 how realistic is the switching; and then the third stage
19 is to look at the costs of the alternative methods
20 because you say in your counterfactual costs would be
21 the same or even higher on a market-wide basis than they
22 would be otherwise; correct?

23 A. Yes.

24 Q. So you would have to show, would you not, that the most
25 likely outcome would be that the overall MSCs paid by

1 merchants would be higher or the same as what they are
2 currently paying in the factual world?

3 A. Apologies, I -- I do not really get the question.

4 Q. So your task, as I understand it, with this
5 counterfactual analysis is to show, having made the
6 assumptions about the scenarios and having made the
7 assumptions about switching, that your costs analysis
8 then drives a conclusion that MSCs paid by merchants
9 market-wide would be higher in the counterfactual?

10 A. Yes, that is the -- that is what I seek to show or
11 analyse in my report, yes.

12 Q. In your first report you gave estimates of the costs of
13 alternative payment methods; is that right?

14 A. Yes.

15 Q. You then reformulated that in your second report?

16 A. I am not sure I reformulated it in my second report.
17 I did make an addendum in my -- well, my addendum
18 report, my third report.

19 Q. Yes.

20 A. Where I showed some further sensitivities to the
21 analysis, yes.

22 Q. You made substantial corrections in that third report,
23 did you not?

24 A. I would not call them corrections, they were
25 sensitivities in response primarily to the reply reports

1 by in particular Mr Holt and Mr Dryden.

2 Q. Do you feel that this process of trying to analyse this
3 issue has been done in haste?

4 A. This process has been done in a short timetable
5 necessarily as Trial 1 had a very short timetable.
6 I think "haste" is not a description I would use.

7 Certainly an enormous amount of work has gone into
8 this and I have tried, and with my team, to do this
9 analysis as robustly and comprehensively as possible in
10 the given time.

11 Q. Why was not this front and centre of your first report
12 if it was so important?

13 A. But this was first -- front and centre of my first
14 report. This is the essence of what I did in my first
15 report in sections 4 and 5.

16 Q. The 2016 Oxera report was not put into the "Materials
17 relied upon by experts" shared folder, was it?

18 A. The 2016 report?

19 Q. Oxera report. It was put into the Mastercard documents
20 but you did not put it forward to be shared with the
21 experts in a dedicated folder you had with the experts
22 for relevant material?

23 A. It was disclosed to me at the same time as to the other
24 experts and that was in late October/early November, so,
25 yes, a very limited time available for all the experts.

1 But I did not have access to this report before the
2 other experts.

3 Q. Could we look please in your first report,
4 {RC-H3/2/344}, we see here some confidential estimates
5 for credit and debit figures, can you see that?

6 A. Yes.

7 Q. Those have turned out to be lower than the ones you
8 subsequently relied upon because Mr Dryden pointed out
9 that you got the figures wrong; is that right?

10 A. That is a very simplistic characterisation and not --
11 not true. I still stand by these because what I have
12 tried to do is have a consistent estimate and use
13 a consistent source for these cost figures. So maybe to
14 give the Tribunal some background, these cost figures in
15 the Oxera 2016 report ultimately derive from
16 confidential data obtained by the Commission itself in
17 its extensive merchant cost survey. It had a data room
18 to which my colleagues at Oxera had access, I did not.

19 But that data room or the data that the Commission
20 had collected is very detailed data on -- across Europe
21 on merchants' costs of cards including Amex, and cash
22 and the Oxera report that has been disclosed reports on
23 what it found at -- in the data room and thus these
24 calculations.

25 That is the basis on which I have done my analysis

1 in my first report for this trial and that is the table
2 that you see here. Subsequently, Mr Holt and Mr Dryden
3 made some comments on these and pointed to some figures
4 that were different, for example acquirer margins, and
5 therefore as a sensitivity I have also shown the results
6 in my addendum, the third report, for the alternative
7 calculations, if you did it in an alternative way.

8 My conclusions --

9 Q. Sorry to interrupt --

10 A. -- between --

11 Q. Can we just look at that, I am asking you to look at
12 your third report so we can see the figures.

13 A. Yes, but I am not talking about figures, I am --

14 THE PRESIDENT: I think counsel is trying to help.

15 MR BEAL: I was trying to help, because I thought if he
16 mentioned figures, if we show it in context, we can see
17 what--

18 THE PRESIDENT: If we give you the information it might be
19 helpful to see the materials that you are referring --

20 A. Okay, but I was explaining the background because the
21 question put to me, "You corrected it because the other
22 experts said it was wrong" and I am just explaining that
23 was not the situation.

24 Also my final point, apologies, but I just wanted to
25 make this also to be clear, the sequence of this was

1 first report by all the experts, so simultaneous
2 exchange. The comments from the other experts that
3 I referred to, Mr Holt and Mr Dryden, came in their
4 reply reports and therefore in my reply report I do not
5 yet address those and therefore I put in the addendum.

6 THE PRESIDENT: Right, what does the addendum do?

7 A. So the addendum takes some of these comments, for
8 example in particular on -- for example, this particular
9 table and -- and maybe this then it is right for Mr Beal
10 to say, "Let us look at it" but at a high level one of
11 the things, for example, Mr Holt and Mr Dryden made
12 comments about the line that you see here is "acquirer
13 margin", they said, well, acquirer margins were in
14 reality a lot higher or in the relevant period and so --
15 so I have beside this acquirer margin data on the
16 European Commission data.

17 So what I have done then -- one of the things I did
18 in the addendum was to say, okay, if I take the acquirer
19 margin according to Mr Holt and Mr Dryden, then what is
20 the resulting change in the figures, so that the
21 Tribunal sees not just my original estimations but also
22 if I take into account various comments by Mr Holt and
23 Mr Dryden.

24 THE PRESIDENT: I see. If we go back to page 11 of the
25 [draft] transcript today, and look at your question at

1 line 21, where counsel is saying that:

2 "Question: [The figures] have turned out to be
3 lower than the ones you subsequently relied upon because
4 Mr Dryden pointed out that you got the figures wrong; is
5 that right?"

6 Now, I can see why an expert might bridle at that,
7 but would you accept that your figures have changed as
8 a result of a dialogue between the experts?

9 A. So my figures have changed in the sense of I would show
10 a wider range now.

11 THE PRESIDENT: Right.

12 A. So I still think these original figures, I still stand
13 by them. I do say that in the addendum report as well,
14 because they are based on a consistent source on the
15 Commission data. There is always some uncertainty
16 around this, I accept that.

17 THE PRESIDENT: That is where I am coming from, that one of
18 the --

19 A. Yes.

20 THE PRESIDENT: -- many great assistances we derive from the
21 expert process is the dialogue. But what I am getting
22 a sense of is that -- and we will go to the addendum in
23 a moment -- you prefer your old figures but you have as
24 it were taken account of points made by the other
25 experts but you prefer your original approach? Would

1 that be --

2 A. On this particular one, sir, I am saying I still stand
3 by the original numbers but I am happy to show precisely
4 because of the helpful dialogue with the other experts
5 that, yes, there is some uncertainty so you can change
6 some of the assumptions and sources and then you get
7 a slightly wider range.

8 THE PRESIDENT: Sure.

9 A. To be helpful to the Tribunal, I have shown the full
10 range. My original figures, the new figures; it is the
11 full range. So my new position, if you like, after the
12 addendum is it is relevant to look at the full range in
13 the round because there is necessarily some uncertainty.

14 THE PRESIDENT: Well, that is helpful. Let me just
15 articulate the tribunal's problem on this sort of thing.
16 You have got two sets of figures, at some point it may
17 be necessary that we work out which ones we prefer and
18 at the moment I am getting a sense from you that if we
19 were to look at figures, you would rather we went back
20 to your original figures rather than looked at the
21 revised figures, but that is what I think counsel is
22 exploring with you.

23 MR BEAL: This would be a lot easier if we went to the table
24 that I asked to go to --

25 THE PRESIDENT: Let us go --

- 1 A. But on the last --
- 2 MR BEAL: I am not trying to trap the witness in any way, it
3 explains exactly what has happened.
- 4 THE PRESIDENT: Dr Niels, we are not cutting you off but let
5 us look at the addendum because I think --
- 6 MR BEAL: {RC-H3/4/6} please. We can see exactly what has
7 been added. First off, can I clarify this, this was
8 an increase in a figure which is to your client's
9 advantage from Mr Dryden, is it not?
- 10 A. On this particular one, yes, this was the pro Dr Niels
11 point that was discussed in Mr Dryden's evidence.
- 12 Q. So when the learned President was putting to you: do you
13 want to go back to your original figures, I am guessing
14 your answer would be no because this amended figure that
15 Mr Dryden has offered to you is preferential to your
16 client and detrimental to his, in principle?
- 17 A. That is not the way I judge whether figures are right or
18 wrong.
- 19 Q. No, of course, and therefore we simply need to get the
20 right figures. Can we look at table 2.2, you can see
21 that you have got an entry there for the original
22 acquirer margin and then you have got the -- can
23 I mention this, the acquirer net revenue? I am not
24 mentioning the figures. Nobody is telling me off.
- 25 I am not asking you to look at the figures but you

1 can see that there have been increases, can you see
2 that?

3 A. Yes.

4 Q. Then that drives in part an increase to the final
5 calculus which is an alternative acquirer margin;
6 correct?

7 A. Yes, can we just scroll down to the rest of the table?

8 Q. Of course. Sorry, I did not know where you were. There
9 is also something has gone in at G, has it not, that is
10 a new addition? I do not see that in the original.

11 A. So could I just --

12 Q. Of course.

13 A. -- comment on -- so the top rows, this is where I say
14 I show both the, I try to be as clear as possible,
15 I show both the original cost of cards, which is what
16 I was after, and the alternative and -- and here are the
17 figures. To the point of if the Tribunal has to decide
18 one or the other, I think I am saying in this report as
19 well, there is some uncertainty about which are the
20 right assumptions. I do not actually have a basis for
21 saying the top row is better than the bottom row,
22 therefore Tribunal look at it in the round.

23 But what I am saying to help the Tribunal is: under
24 either of these rows, the conclusions that I draw on the
25 total costs of merchants does not change and that is the

1 bit perhaps where it can help the Tribunal. I am saying
2 you do not need to choose necessarily between these
3 rows, they are both done based on different assumptions
4 based on different but consistent sources.

5 THE PRESIDENT: So they are both reasonable attempts to
6 articulate cost of cards?

7 A. That is exactly how I would perhaps articulate it.

8 THE PRESIDENT: Very grateful.

9 MR BEAL: We see at the top of the next page, do we not,
10 that there is a comparison of the two end results for
11 both debit and credit. It is fair to say that
12 regardless of what caused the change of the figures,
13 there has been a roughly five fold factorial increase in
14 the value, give or take; between four and five times?

15 A. When you refer to the cost of cards bit of the
16 calculations, that is correct. You can see that here in
17 the --

18 Q. That is just a mathematical exercise.

19 Now, your calculations did not consider the costs
20 impact for those cardholders who already used
21 alternative payment means, did they? For example, those
22 people who already use PayPal and do not switch but who
23 would benefit from having lower MIFs in the
24 counterfactual?

25 A. Sorry, are you referring to cardholders or are you

1 referring to merchants?

2 Q. So cardholders include, do they not, people who use
3 PayPal?

4 A. Yes.

5 Q. PayPal to an undetermined extent, but one would assume
6 a significant extent, runs on the rails of Visa and
7 Mastercard cards?

8 A. Yes.

9 Q. What you have not taken into account in your analysis
10 here is the impact for those people of lower MIF rates
11 because they do not switch?

12 A. But -- but I am a bit confused here. So on the merchant
13 costs side I have taken into account of course that Visa
14 and Mastercard interchange levels are also what PayPal
15 pays to Visa and Mastercard so I have certainly taken
16 those out.

17 On the consumer side I am a bit confused because my
18 understanding is that actually PayPal does not charge to
19 consumers so therefore the question of: do you take into
20 account costs to cardholders of using PayPal, I do not
21 -- I do not see any relevant costs that I should take
22 into account there.

23 Q. You have not assumed, for example, that PayPal would
24 reduce its prices to cardholders if itself it faces
25 lower MIFs?

1 A. Again you are talking prices to cardholders but I do not
2 think -- my understanding is that PayPal does not have
3 prices to cardholders.

4 Q. Now, you recognise, do you not, that PayPal would lower
5 its fees in the counterfactual, the fees to merchants?

6 A. The fees to merchant, it goes down to the extent that
7 you also take out the bit that is interchange in the
8 PayPal costs, yes.

9 Q. But you then do not consider the possible impact for
10 those cardholders who would have stayed with PayPal at
11 both the higher MIF level and the lower MIF level, so
12 they stay exactly where they are?

13 A. I -- I think that is right. I have not looked at that
14 effect.

15 Q. In your reply report you presented various scenarios in
16 which Amex would react to lower MIFs by reducing its own
17 MSCs, but in this addendum, you have stripped out that
18 analysis; correct?

19 A. I am not quite sure what you refer to but in the reply
20 report, I did address the point made by the other
21 experts, that in the counterfactual there is
22 a possibility that Amex would reduce its MSCs and I have
23 addressed that both in terms of why I think that is
24 actually not necessarily the case and in terms of what
25 would happen if Amex dropped its MSCs. In the addendum,

1 I have focused purely on the cost of Amex and indeed
2 using existing levels so there I have not addressed the
3 point of Amex dropping its MSCs.

4 Q. In calculating the cost of cash, the Oxera report from
5 2016 on MIT MIFs, it is adjusted to take into account
6 smaller merchants; is that right?

7 A. Yes.

8 Q. If we could look, please, at {RC-J5/22.1.1/103}, we see
9 that:

10 "... the Commission addressed the possibility to
11 extrapolate from the previous estimation results [based
12 on] MIT MIF benchmarks ... Such extrapolations require
13 strong assumptions on cost functions ... They would also
14 require the estimation of a reliable benchmark ... This
15 element is essential since, from the Commission's
16 experience, the acquiring margin may be much higher for
17 small merchants than for large ones. Given these
18 limitations, the Commission considers that the study
19 cannot deliver any reasonably reliable indifference
20 benchmark for the whole merchant population without any
21 complementary information."

22 Did you get that complementary information?

23 A. No.

24 Q. The European Commission Report on Cash, as I understand
25 it, presented six different estimates of the cost of

1 cash; is that right?

2 A. It -- it presented a number of its own estimations of
3 the cost of cash and it certainly had differences in
4 cost of cash by size of merchants, merchant categories.
5 I cannot now recall if there were six categories.

6 Q. Oxera 2016 took a selection of those three out of six,
7 but in doing so, it removed the lowest six figures --
8 lowest three out of six figures; correct?

9 A. I cannot recall the detail right now top of my head.
10 But what the Oxera report did, and certainly what I did
11 for Trial 1, was to try to get despite the limitations
12 that the Commission itself flagged and itself had to
13 find a way to get over, but I tried to adjust the cost
14 of cash for the fact that there are many, many small
15 merchants as well, so the figures and the sum -- the
16 survey that the Commission had done and the main results
17 it had were for the larger merchants and included the
18 very largest merchants and it is the case that these
19 very largest merchants have lower costs of cash than
20 smaller merchants and therefore I think it is a very
21 reasonable assumptions, the ones that I made and that
22 was also made before, I based my costs of cash on the
23 categories -- they are called categories 5 to 7, so sort
24 of the mid-sized merchants as the best estimate for what
25 is the cost of cash for the merchant population as

1 a whole.

2 Because for the context of the MIT but also for this
3 context, what you are interested in is the cost of cash
4 for merchants as a whole, not just the very largest
5 merchant.

6 So yes, it requires certain assumptions. I think
7 for the cost of cash they are reasonable assumptions.

8 Q. Now, the Oxera report 2016 also added in a third
9 estimate, did it not, based on data from the
10 Commission's data room, but which did not feature in the
11 formal survey findings?

12 A. It had carried out an additional analysis on the basis
13 of the data in the data room. Just to give some
14 background to the Tribunal, in the cost of cash in this
15 calculation there is also a lot of debate about the
16 fixed cost of cash and the variable per transaction cost
17 of cash, there is of course the cash handling in the
18 immediate term, there is the sort of variable costs that
19 vary by transactions but there are also the fixed cost,
20 so the investment in cash handling machines, etc.

21 So there are two scenarios that I present here and
22 that also the Commission itself had looked at is -- and
23 they revolve around how do you take into account the
24 fixed costs. So the Commission itself had an
25 econometric analysis which I describe here, the Oxera

1 2016 report had an alternative analysis, where fixed
2 costs -- because this is a long-term analysis, where
3 fixed costs were treated as variable, so you get another
4 cost estimate.

5 So in the whole you get a lot of ranges in the cost
6 of cash and I tried to be transparent that yes there are
7 some ranges and uncertainties here depending on how you
8 treat fixed costs, but overall the range is what I would
9 say the Tribunal should look at.

10 Q. Your range ended up substantially higher, has it not,
11 than the ranges used in the Commission survey?

12 A. I do not -- I do not agree with that.

13 Q. I am going to turn now to the costs used for Amex. In
14 your first report, can we look at that, please,
15 {RC-H3/2/348}, you gave some ranges for Amex; is that
16 right?

17 A. Yes.

18 Q. We can see those in table A.9; correct?

19 A. Yes.

20 Q. As I understand it, you took those estimates directly
21 from the Oxera 2016 study, did you?

22 A. Correct, maybe just also to clarify. This is something
23 that can be quite complicated when you look at a table
24 like this. When -- when I say cost of Amex, I refer to
25 the -- indeed the actual cost of Amex but why do I have

1 two lines that say "credit" and "debit"? That does not
2 refer to Amex credit cards and Amex debit cards. What
3 that refers to is that for the -- again for -- this was
4 done in the context of the merchant indifference test
5 originally, you have -- if Amex were to replace credit
6 cards you get a different cost than if Amex were to
7 replace debit cards because of the change in -- the
8 difference in average transaction value between credit
9 and debit.

10 So it can be a bit confusing perhaps if you look at
11 the table and you think what is credit and what is
12 debit, that is what it refers to.

13 Q. You need to strip out from those figures, do you not,
14 some figures for processing costs, processing card
15 payments?

16 A. Well, processing card payments are part of the
17 merchant's cost. In addition to the fees that they pay
18 to Visa and Mastercard, or Amex, they have processing
19 costs as well and they were picked up by the Commission
20 survey and I have included them in the -- also in the
21 cost -- yes, in the cost of cards.

22 Q. Have you included those processing costs in the costs
23 for Mastercard and Visa?

24 A. I think in the analysis that we just looked at cost of
25 card processing costs are part of that, yes.

1 Q. Mr Dryden helped you with these Amex figures, did he
2 not, and said that according to the evidence they were
3 probably on the low side?

4 A. So the -- they came from the European Commission survey
5 again for merchant costs. I accept that actually, yes,
6 you could also take another source for Amex costs and
7 you get higher figures, that is right. Mr Holt also
8 pointed that out so of all the experts after the main
9 reports I was the one that had used the lowest cost of
10 Amex.

11 Q. That changed in the addendum, did it not, if we look at
12 page 7 of {RC-H3/4/7}, top of that page. You will see
13 that having had arguably the lowest figures, you then
14 switched to the highest figure of 3.95; is that right?

15 A. Well, I do not know if they are the highest but yes,
16 this is again showing a sensitivity that if you take
17 those higher figures for Amex, then this is what -- what
18 results. So the alternative Amex costs. Again, I am
19 not saying one line should be preferred over another.
20 I am just showing here the full range of possible
21 figures that you can get for Amex costs and again I am
22 saying my conclusions do not change regardless of which
23 of the rows you consider.

24 Q. It is right, is it not, that we have got a variety of
25 different witness evidence where the figure for Amex is

- 1 substantially lower than 3.95?
- 2 A. The factual evidence is what it is. I think what I have
3 seen from the various factual evidence here, there was
4 nothing to suggest that the ranges for Amex's costs that
5 I have produced in this -- in these last two rows are
6 out of line with the factual evidence.
- 7 Q. Could we look, please at {RC-F1/1/15-16}. This is
8 a confidential figure, so I am not going to read it out.
9 But if at the bottom of page 15, you will see that there
10 is a communication it went on to tell dealerships
11 certain things had been reduced and then it refers to
12 Amex charges having remained -- in fact I do not think
13 that is marked as confidential, they had remained at
14 1.9% plus VAT. Can you see that?
- 15 A. Yes.
- 16 Q. If we look, please, at the communication in question,
17 {RC-J1/13/1}, you can see there is a table there with
18 the fee ascribed to American Express, this is
19 a confidential document, so I shall not read it out, but
20 you can see what it says; correct?
- 21 A. Yes.
- 22 Q. Are you aware, for example, that Elavon is advertising
23 rates as low as that figure for Amex?
- 24 A. No, I am not aware.
- 25 Q. You did not consider using this figure in the range that

- 1 you adopted, did you?
- 2 A. No, I have not.
- 3 Q. In the addendum, you went for the highest figure you
4 could find for the Amex MSC?
- 5 A. In the addendum, I showed what happens if you take the
6 assumptions put -- suggested by the other experts.
7 Again, there may also be -- so my analysis of the costs
8 of Amex is trying to be based on objective sources and
9 sources -- also consistent sources for the other costs.
10 Of course, in reality -- and they also refer to a
11 certain time period. In reality there is anecdotal
12 figures like this where it says a particular percentage.
13 But for me that is not a sufficiently scientific basis
14 to adjust my -- my -- my ranges on.
- 15 Q. Can we come on to look at PayPal. In your first report
16 you did not use the cost of PayPal from the Oxera 2016
17 study, did you?
- 18 A. The 2016 study did not have PayPal in there.
- 19 Q. So you used instead 2023 PayPal costs from the PayPal
20 website; is that right?
- 21 A. That was what I tried to look at, yes.
- 22 Q. If we go to {RC-H3/2/348-349}, so your first report, we
23 can see a table. A5.10, the cost of PayPal and there is
24 some figures given at the bottom of that page. Can you
25 see? Although if they have derived from a publicly

1 available website I am not sure entirely why it is
2 confidential but let us maintain the confidentiality for
3 now?

4 A. Yes.

5 Q. Those are the figures you are relying on. Now, in your
6 addendum, you have amended that, that is {RC-H3/4/3}, we
7 now see that those figures have increased to the figures
8 given at the bottom of that table; correct?

9 A. Yes, so again in response or in reaction to the comments
10 made by Mr Holt and Mr Dryden, there were two main
11 corrections that I have made and I tried to be as
12 transparent as possible and as clear as possible in this
13 table.

14 So there was the revised percentage fee, which was
15 indeed a correction because I had taken -- I had taken
16 the wrong percentage fee, the [redacted], which should
17 be the 2.9 and then there was the point about the
18 currency conversion fee that I should have taken out.

19 Yes.

20 Q. So you should have taken out?

21 A. No, no, apologies, that is for commercial. We are still
22 talking here inter-regional so -- but I have -- but
23 there are two --

24 Q. You have kept the currency conversion in, have you not?

25 A. Yes, apologies. But for -- so this is for

1 inter-regional, I have kept them in, but for commercial,
2 that is later on in the addendum report, I have taken it
3 out because it was correct to take it out.

4 Q. You are treating therefore the currency conversion fee
5 for inter-regionals as being a cost that is imposed on
6 the merchant; correct?

7 A. Yes.

8 Q. Could we look, please, at {RC-J4/90/27}. This is the
9 website you refer to in your footnote 10 on your report.
10 If you see at the bottom, there is a section dealing
11 with currency conversions; do you have that?

12 A. Yes.

13 Q. Then it says at the final sentence:

14 "Converting balance for a business account and
15 transactions for which a receiver has agreed to bear the
16 currency conversion."

17 Then there is a rate that is given of 3% above the
18 base rate, so that is what you are attributing as a cost
19 to the merchant; correct?

20 A. Yes.

21 Q. That is only borne by the merchant if the merchant
22 agrees, is it not? That is what the terms and
23 conditions say?

24 A. Yes.

25 Q. So obviously if a merchant does not want to pay that

1 currency conversion, it is the cardholder -- the PayPal
2 user -- that has to pay that currency conversion?

3 A. That is a possibility, but I do not know enough, I have
4 not seen any other evidence on this whether that is
5 a situation that can arise.

6 Q. Well, rationally, other things being equal, the merchant
7 is not going to agree to pay a 3% fee on the price that
8 it has just sold something to?

9 A. But I do not know if -- if really the merchant has
10 a choice transaction by transaction or always. I just
11 do not know enough about how it works. I had taken this
12 to be a charge that merchants incur.

13 Q. You have not taken into account, have you, the
14 additional quality benefits that the PayPal offering
15 might produce such as fraud protection, commercial
16 opportunities through joint marketing endeavours and so
17 on that some of the witnesses have referred to,
18 including Mr Steeley?

19 A. I have looked at PayPal costs to merchants. I have not
20 looked indeed at the benefits of PayPal to merchants,
21 nor in the comparison of all the payment methods have
22 I looked at the benefits that the other payment methods
23 offer to merchants. I have focused on costs.

24 Q. So let us just drill down into what you have done. You
25 have focused only on costs, not benefit; correct?

- 1 A. Yes.
- 2 Q. You have then -- from the statistics that we have looked
3 at, you have, through a process of iteration, partly
4 justified, we say, partly not, revised the estimates up;
5 correct?
- 6 A. That was the result of my -- my addendum, that the
7 estimates have gone up, yes.
- 8 Q. You have consistently, out of ranges of figures,
9 selected the highest one to make your point?
- 10 A. I disagree with that accusation.
- 11 Q. I am going to come on to deal now with commercial cards.
12 In your first report, please, page 131, paragraph 5.2,
13 you say that these are potentially different markets.
14 {RC-H3/2/131}
- 15 A. Yes.
- 16 Q. But in fact there is common agreement, is there not,
17 that the relevant market that we are considering is
18 simply the market for acquiring card services?
- 19 A. Well, I have said before it is helpful in this case to
20 look at the -- in to sister market, the acquiring market
21 and the issuing market. For commercial cards, I have
22 also said that, yes, there are different competitive
23 dynamics in commercial cards. But it is not necessarily
24 to get hung up on the precise delineation of the market.
- 25 Q. Indeed at page 144, paragraph 5.31, {RC-H3/2/144} you

1 recognise that the PSR has analysed consumer and
2 commercial card transactions jointly rather than just
3 focusing on consumer transactions because it wanted to
4 understand how the acquiring market was working;
5 correct?

6 A. Yes, I think that is correct. The PSR looked at the
7 acquiring market. It therefore, also when it did its
8 econometric analysis lumped consumer and commercial
9 cards together and that is exactly what I and the other
10 experts then tried to untangle from the PSR data.

11 Q. If we go back, please, to page 134, {RC-H3/2/134}
12 paragraph 5.7 of your first report, you say at the end
13 of 2019 there were over 1.1 million virtual cards issued
14 in the UK. We had some evidence on this from I think
15 Mr Buxton of Jet2 and others who work in the
16 holiday/hotel business. Their evidence was that virtual
17 cards were a means for, for example Booking.com, to
18 secure a credit card transaction and it would be an
19 individualised digital account for that particular
20 transaction; correct?

21 A. Yes.

22 Q. So if we then, please, turn to {RC-J5/40/195}, which is
23 where I think you get this figure from, top right-hand
24 side:

25 "At the end of 2019 there were over 1.1 million

1 virtual cards."

2 Obviously if you look then down the fifth bullet
3 point:

4 "Single use accounts are considered to be one of the
5 fastest growing commercial card products in the UK."

6 I think some of the evidence we have had is that
7 during Covid, with the emphasis being on customers being
8 able to get their money back from online travel
9 agencies, the tendency towards using these single use
10 digital cards massively increased. So it is right, is
11 it not, this is a growing sector of the commercial
12 market?

13 A. I think that is right, yes.

14 Q. Could we then look, please, at some figures for
15 American Express starting at page -- your evidence at
16 page 135, paragraph 5.9 {RC-H3/2/135}. You used some
17 figures there from 2014 for a market share of Amex for
18 the UK corporate card market; is that right?

19 A. Yes.

20 Q. It is right, is it not, that commercial cards are
21 a small share of the market?

22 A. Commercial cards are a small share of what market?

23 Q. Of the payment market. Well, let us put this in
24 context. Could we turn, please, to {RC-J3/73/21}. If
25 we look please at recital (67). For Mastercard, this is

1 the part of the statement of objections for
2 *Mastercard II*. It says:

3 "In 2012, the number of MasterCard cards issued in
4 the EEA was a little more than 380 million. Consumer
5 debit cards represented 67% of all these cards and
6 consumer credit cards 31%. The vast majority (97.7%) of
7 MasterCard cards were consumer cards, whereas commercial
8 cards represented 2.3%."

9 Then there is a table that justifies that conclusion
10 beneath that.

11 Then if we turn, please, to recital (73), you see
12 that by value, given that 96% of Mastercard card
13 transactions were with consumer cards, 4% were going to
14 be commercial cards; correct?

15 A. Yes. The consumer card market is clearly much larger
16 than the commercial card market.

17 Q. That may have changed with the growth that we have been
18 looking at with virtual cards and so on, but it has not
19 changed substantially, has it?

20 A. Correct.

21 Q. If we then, please, look at recital (77) here. Turning
22 over the page to page 27, I think it is {RC-J3/73/27}.
23 There should be a paragraph before a long space on the
24 page. I think that is page 26 {RC-J3/73/26}. The last
25 sentence on that page says:

1 "The other international payment card schemes are
2 far behind the two market leaders; the market share of
3 the third largest international payment scheme, Amex is
4 rarely higher than 2-3%".

5 Can you see that?

6 A. Yes, again I think this refers to all cards as a whole.

7 Q. We know, do we not, that the -- I think I mentioned it
8 yesterday -- PSR has formed the view that Amex does not
9 pose a competitive constraint to Visa or Mastercard in
10 the market for card acquiring services?

11 A. That was the PSR's conclusion, yes.

12 Q. Could we then turn, please, to {RC-J5/35.01/20}. This
13 is some more recent data from RBR from 2020. We see in
14 the second paragraph on that page:

15 "14% of payment cards were premium cards in 2018.
16 Income requirements for premium card issuance in the UK
17 are less strict than in many other countries.
18 Commercial credit cards accounted for just 8% of cards
19 in 2018 including 16% of credit cards and 4% of debit
20 cards.

21 So that gives us a flavour of the evolving nature of
22 the market; is that right?

23 A. Yes, it is a flavour. So 8%, that gives a flavour and
24 I think this is then also the UK, whereas the previous
25 figures were Europe-wide.

1 Q. Yes, that is a fair point.

2 If we then please look at page 26, {RC-J5/35.01/26}
3 we see here that the RBR is reporting in the first
4 paragraph that:

5 "The Number of American Express cards decreased at
6 a rate of 12% between 2014 and 2016 as customers turned
7 away from the higher fees charged for these cards in
8 comparison to bank cards."

9 So it is right, is it not, that Amex has been
10 holding its own in certain sectors but it has also been
11 faring badly over certain periods during the claim
12 period?

13 A. Yes, that is right. I think just in terms of the
14 overall picture that is emerging or my understanding of
15 it is after the IFR, Amex did decrease in
16 competitiveness because its GNS model was no longer
17 a good model to compete with Visa and Mastercard because
18 it was also regulated.

19 But this is all for consumer cards, so I can see
20 that this may be a reflection of Amex being slightly
21 weakened in the card market as a whole. I think we are
22 talking here about commercial cards where I do not
23 believe or I have not seen evidence that Amex's position
24 was weakened, necessarily, during the period.

25 Q. Could we go to {RC-J5/27/5}.

1 PROFESSOR WATERSON: Could I check something before that?

2 MR BEAL: Of course.

3 PROFESSOR WATERSON: So the Amex GNS model, was it dropped

4 in all countries?

5 A. I do not know factually if it was.

6 PROFESSOR WATERSON: Right. But was it dropped in the UK?

7 A. That is my understanding, yes. Sometimes it is causally

8 linked -- I think even Mr Beal causally linked it.

9 Again I do not know if it was causally linked by the IFR

10 Amex dropping its GNS but certainly it has dropped its

11 GNS model.

12 MR BEAL: Professor, if you give me a moment there is

13 a press release from American Express in January 2018

14 which I can pull up once I have the reference in my

15 head, which at the moment I do not. It is in RC-J5 --

16 I have got it written down somewhere but not at this

17 stage of my notes.

18 PROFESSOR WATERSON: Well, I am happy for you to --

19 MR BEAL: It confirms the evidence and I do not want to put

20 something to the witness on an incorrect premise. It is

21 {RC-J5/26.3/1}. It is an investor relations press

22 release. You will see there in the middle of the page:

23 "The combined impact of the EU payments package --

24 including price cap, separation of payment scheme,

25 processing operations, pan-European licensing and

1 network access requirement -- impose a regulatory burden
2 on the American Express licensing business that renders
3 it no longer viable. American Express has therefore
4 taken the decision to exit all of its licensing
5 arrangements in the EU."

6 Pulling out of its partnerships with issuing banks.

7 PROFESSOR WATERSON: Right, and this was in 2018?

8 MR BEAL: It took effect from January 2018, yes.

9 Could we then go, please, to {RC-J5/27/129}. This
10 is dealing with commercial cards, so to respond to your
11 point that commercial cards were not being disaggregated
12 in the previous figures.

13 What we see here, do we not, is on commercial value
14 for the UK the share of value of card payments as at
15 2016 for Amex was 5%; is that right?

16 A. Yes.

17 Q. The piechart on the right-hand side.

18 Then if we turn, please, to {RC-J5/40/23}, so that
19 is 2016, if we then look at page 23, commercial cards in
20 Europe, RBR from 2021 these are figures for 2019 and we
21 see in terms of share of total purchase volume, bottom
22 left-hand corner of the table, the green component is
23 American Express and it moves from 11% commercial card
24 market share to 10% between 2018 and 2019.

25 A. Yes.

1 Q. For Ireland, the figures are given at page 92
2 {RC-J5/40/92}.

3 We see on the right-hand side commercial cards
4 accounted for 20% of the total volume of card payments
5 in 2019 so in Ireland the figures are higher by about
6 double; correct?

7 A. Yes.

8 Q. If we then look at page 95 {RC-J5/40/95} this is the
9 share of Amex in Ireland, share of total purchase
10 volume, left-hand side, for commercial card volume in
11 Ireland, we do not find Amex recorded at all, do we?

12 A. Correct.

13 Q. Could we then, please, go to {RC-J5/40/191}. On the
14 right-hand side we find some updated UK commercial card
15 volume figures, second bullet down on the right-hand
16 side:

17 "In 2019 approximately 4% of total UK card payments
18 and 11% of volume were spent on commercial products."

19 Can you see that?

20 A. Yes.

21 Q. So let us take the volume figure for accuracy of that
22 11% share. 45% was on business cards, and 28% was on
23 corporate cards; can you see that?

24 A. Yes.

25 Q. Large business T&E is defined as including both

1 corporate and Lodge cards?

2 A. Yes.

3 Q. Lodge cards we have not been dealing with, have we?

4 A. No. They have sort of been mentioned by everyone.

5 I have mentioned them for completeness but I have not
6 looked into detail in Lodge cards.

7 Q. Could we then, please, go to page 194 {RC-J5/40/194}.

8 In the top right-hand side, this is dealing with
9 accounts for the vast majority -- sorry, commercial
10 debit volume. Top right-hand side, 2019, Visa held 42%
11 of UK commercial card expenditure, Mastercard had 40%,
12 American Express had 15.

13 Can you see that figure?

14 A. Yes.

15 Q. Could you then, please, go to {RC-J3/113/3}. This is
16 a confidential document so I shall not refer to the
17 specific contents. It is part of the Mastercard
18 strategy paper. You will see that it is dealing with on
19 the right-hand side some market share figures which
20 I will not refer to because this is a confidential
21 document. It is fair to say though that -- well, I will
22 let that figure speak for itself.

23 Could we then, please, go to {RC-J3/125/30}. This
24 is I think again a restricted confidential document so
25 I shall not refer to it but we see some network share

1 figures on the left-hand side, can you see that, for
2 Europe? So we have been looking at UK, this is now the
3 European level. Can you see that?

4 A. Yes, I see it, yes.

5 I -- sometimes with these figures one needs to be
6 clear which bit of the commercial market one is actually
7 looking at. SMB, I do not know exactly what -- I assume
8 it means small/medium businesses?

9 Q. That is what it means, yes.

10 A. Yes. So I do not know if that is the whole commercial
11 market or not in this context but I see the figures on
12 the bottom left, yes.

13 Q. So in RBR terminology, as I understand it, these are all
14 commercial cards but they split between business cards
15 which are typically for the small and medium business
16 market and then corporate, effectively, which are the
17 larger corporate cards?

18 A. Yes.

19 Q. Page 50, please, {RC-J3/125/50} can we just look at the
20 position specifically for Ireland. Again confirming
21 what we already know, I think; is that right?

22 A. Yes.

23 Q. We do not see any -- well, cannot see any of the
24 relevant dark blue there. Then page 55, {RC-J3/125/55}
25 the sector that American Express does best in is T&E,

1 can you see that, because it is the slightly lighter
2 blue; it is mid-blue rather than navy. It may not be
3 very easy to see on your screen, but ...

4 A. Yes, if -- if the third --

5 Q. It is the second column, but then it is --

6 A. Yes -- no, I see but in each of these columns the third
7 vertical blob is the colour of American Express and
8 I see indeed --

9 Q. No, it is the second one that is American Express, it is
10 the --

11 A. Well, the second from the top but the third -- I think
12 the third stacked --

13 Q. Yes.

14 A. -- on top, but that blue colour I see that that is
15 highest in T&E and --

16 Q. Then not so -- does not do so well in the others, does
17 it?

18 A. Well, the numbers are what they are. But the B2B figure
19 is there and the SMB figure is there.

20 Q. There is no figure for the OTA?

21 A. I cannot now remember what OTA stands for.

22 Q. Online travel agencies?

23 A. I see. Yes.

24 Q. In your first report, page 136, {RC-H3/2/136}
25 paragraph 5.10, you rely on certain factual differences

1 between commercial cards. Can I suggest to you that all
2 of those differences arise in the issuing side of the
3 market and not on the acquiring side?

4 A. Well, if -- that may be the case. I think they would
5 also have implications on the acquiring side. But, but
6 as a -- yes, as a general premise I think overall that
7 is right, on the acquiring side we have seen that for
8 a merchant it may not matter too much whether
9 a particular card is a consumer or commercial card, so
10 from that perspective these differences refer indeed to
11 the -- to the issuing side.

12 Q. You have looked at typical merchant service agreements
13 we know that and they list out, do they not, in many
14 cases the product categories and they will have a list
15 of consumer debit consumer credit, commercial and then
16 they will break down the commercial categories where
17 necessary, you have seen agreements to that effect?

18 A. Are you referring to the -- yes, the MSAs?

19 Q. Yes.

20 A. They do not always explicitly have all these detailed
21 breakdowns but yes, by and large they do.

22 Q. Ms Suttle accepted in her evidence before this Tribunal
23 that business cards, for example, for an electrician,
24 which was Professor Waterson's example, or for
25 a hairdresser, which I think was mine, are very similar

1 to consumer cards for individual businesses?

2 A. If you refer to the offering or the benefits that the
3 hairdresser as a business gets -- apologies, are you now
4 referring to the hairdresser as a cardholder?

5 Q. Yes --

6 A. Or as a merchant?

7 Q. It is a business and it is operating as a cardholder, so
8 it is in the issuing side of the market which I am
9 saying these differences relate to and I am saying how,
10 what I am putting to you is that there is no significant
11 difference between a small business that holds
12 a business debit card and a consumer that holds
13 a consumer credit card?

14 A. I have not --

15 Q. Or a consumer debit card, sorry?

16 A. I think overall that is probably correct because in the
17 commercial segment you have a range of offerings from
18 the very simple to the much more sophisticated. I am
19 describing here that commercial cards generally have
20 much more sophisticated features in general. But
21 I accept that there may well be a significant segment in
22 the commercial market where the offering to the
23 cardholders to the business cardholders is very simple.
24 I do not know if there are still differences, though,
25 between what the hairdresser gets offered and what I, as

1 an individual, get offered with my card there well still
2 be differences, but I agree, I accept those are much
3 less marked than for some of the other more
4 sophisticated offerings.

5 Q. Now, every business will need a business debit card,
6 will it not, if it is to make purchases in this day and
7 age?

8 A. Well, it -- it may need a card, it could be a charge
9 card, which is very common in the commercial segment.

10 Q. We know, do we not, that in the commercial segment debit
11 cards account for a significant proportion of the
12 transaction value?

13 A. They do, yes.

14 Q. We know, do we not, that in a shop environment when they
15 are being used to buy goods it is pretty difficult to
16 distinguish between a consumer debit card and a business
17 debit card?

18 A. For a merchant at point of sale it is difficult, yes.

19 Q. Especially for contactless payments?

20 A. I do not know if especially or not. But I accept the
21 premise that it is difficult.

22 Q. If you are being presented a card at a till in WH Smith
23 and somebody uses the contactless, you are not going to
24 peer over their shoulder and see whether it says
25 "business" on the front of it, are you?

1 A. No, but equally if it is PIN, for example, you may also
2 not peer over their hands or shoulder, but I accept the
3 premise.

4 Q. If we were to move to a zero MIF world for commercial
5 cards, businesses would still need a payment card of
6 some sort for their transactions, would they not?

7 A. Yes.

8 Q. If businesses have a demand for something and it is
9 a high demand, it is reasonable to expect them to pay
10 for it, is it not?

11 A. As a matter of principle, yes.

12 Q. There is no evidence that issuers here would simply stop
13 meeting that demand for a business debit credit card for
14 a business account?

15 A. I think there is factual evidence or the factual
16 witnesses have commented on this scenario, where their
17 entire debit and credit interchange fee falls away and
18 they have indicated that they as a scheme and the
19 issuers would take certain measures. So the -- the
20 offering may well be -- may well be altered. I do not
21 know if it will be completely terminated but there will
22 be measures taken on the commercial card side.

23 Q. In your role as an independent and impartial expert, did
24 you probe that evidence and consider how realistic it
25 was?

1 A. Yes. I have -- well, what I have done is mapped that
2 evidence on to my own understanding of the economic
3 characteristics of two-sided platforms and the
4 competitive dynamics that you get. One of those
5 competitive dynamics also in commercial cards is that
6 these commercial cards compete with other payment
7 methods. For overall context, it is also important to
8 note the vast majority of commercial transactions
9 actually take place still with bank transfers. So
10 card -- card payments are still relatively small fry in
11 the overall scheme of things.

12 So there is competition with the other payment
13 methods and therefore my understanding of the
14 competitive dynamics is that you still need that
15 interchange revenue to make to allow the issuers to
16 offer a competitive and attractive product in the
17 commercial segment.

18 So in that sense, I have interpreted the factual
19 witness evidence as consistent with my understanding of
20 the competitive dynamics.

21 Q. Can I just put some propositions to you and we will see
22 if we can get a yes or no agreement.

23 One: businesses need a bank account these days to be
24 able to conduct their businesses properly?

25 A. Yes.

1 Q. Two: if a business has a bank account it is extremely
2 likely to want to have a debit card at the very least?

3 A. Probably. I am just struggling with the notion because
4 for example, my own business, my partnership, I have of
5 course a business card but it is a credit or probably
6 a charge card, actually, it is not a debit card so
7 I struggle with the notion that you need a debit card.
8 You can also have charge cards.

9 Q. But the market shares attributable to debit commercial
10 cards indicate that there is demand for it.

11 A. Yes, absolutely, we saw the figures the other day.
12 There is -- of the whole commercial market, if you like,
13 there is a very large segment by volume which represent
14 over 50% which was called small debit cards, so in that
15 segment absolutely, that is debit cards, so there is
16 demand for it.

17 Q. Banks offer business accounts to businesses because they
18 make money from deposits advancing loans, generally
19 having a customer relationship with a business, do they
20 not?

21 A. Correct.

22 Q. So if there is business demand from a business for
23 a card, call it a charge card, debit card or even credit
24 card, then the position is that the banks are going to
25 want to offer that business a payment card if it can

1 profitably do so; correct?

2 A. Yes.

3 Q. You have not conducted any analysis, have you, of the
4 other sources of revenue available to an issuing bank
5 from which they derive money from this customer
6 relationship with a business?

7 A. Correct.

8 Q. Now, we have already discussed whether the
9 counterfactual should consider the removal of the MIF on
10 just Mastercard and Visa transactions or a wider market
11 and I put to you that the Supreme Court had not looked
12 at this concept of switching behaviour in the
13 counterfactual. The same applies, does it not, to your
14 switching concepts in the counterfactual for commercial
15 cards?

16 A. Yes, correct. So I accept for commercial cards as well
17 that the counterfactual is one where there is a zero
18 MIF. What I then have said to have issues with is the
19 notion that everything else stays the same. So what
20 I have assessed based on the factual evidence that there
21 would be reactions to -- in such a counterfactual and
22 what I have then done is try to quantify what those
23 reactions -- what the implications of those reactions
24 would be for the total cost that the merchants
25 ultimately pay.

1 But I do accept, as we discussed yesterday as well,
2 that the counterfactual that we are looking at, all of
3 us, is the zero MIF counterfactual.

4 Q. So this is in truth just a variation of the death spiral
5 analysis, is it not?

6 A. The death spiral analysis has been used in different
7 contexts. The last context where I have seen it was in
8 when we had the lower court -- the High Court and
9 the Tribunal retailer litigations where it was still
10 very much in issue whether if you reduce the MIF for one
11 scheme, Mastercard, it would also have to reduce for
12 Visa. In that context I have seen the death spiral
13 argument because if one scheme still has MIFs the other
14 one does not. You get a death spiral.

15 I -- I cannot say whether this or rather I would not
16 characterise my analysis of commercial cards as a death
17 spiral argument.

18 Q. You are aware, are you not, that the Court of Appeal in
19 Sainsbury's said that the death spiral only came in
20 either at the objective necessity stage or at the
21 article 101(3) stage?

22 A. I cannot recall the detail, but indeed where the death
23 spiral argument comes in, if it comes in is in -- that
24 is -- that is a legal matter.

25 Q. Would you like me to take you to the Court of Appeal in

1 Sainsbury's -- let us go to it just so there is no
2 suggestion of funny business on my part, {RC-J5/28/40}.
3 We should have there paragraphs 161 and 162. Scrolling
4 down, would you please just have a look, cast an eye
5 over those two paragraphs. (Pause)

6 A. Yes.

7 Q. Then could we move on, please, to page 48 {RC-J5/28/48}
8 and cast an eye over the conclusions, the objective
9 necessary stage at paragraphs 198-200. You will see
10 there essentially that the Court of Appeal rejected the
11 suggestion that even if it came in at the objective
12 necessity stage that the test was in any event met on
13 the facts of that case.

14 A. Sorry, can you just point me to the paragraph?

15 Q. Yes, I will let you scan 198-200. (Pause)

16 A. Yes, I have seen that, yes.

17 Q. That logic applies equally, does it not, to the
18 commercial MIFs in this case and so in short your theory
19 of the competitive threat posed by Amex is premature?

20 A. That, that is a legal matter. I can see -- I find this
21 interesting, this is an interesting discussion, of
22 course, where -- where exactly the sort of the
23 competitive pressure and threats to a scheme come into
24 the analysis. If the criterion of objective necessity
25 under 101(1) is survival of the scheme, then yes,

1 I accept it as the legal test.

2 What I have shown in my analysis is the consequences
3 of this counterfactual of -- so the zero MIF in
4 commercial in this case. I have shown consequences to
5 what the scheme would do. I have not opined or I have
6 not commented or shown that whether the scheme would
7 survive or not, if that is the -- if that is the legal
8 test.

9 MR TIDSWELL: Dr Niels, I think Mr Beal is also asking you
10 in effect why you have put it into the 101(1) analysis
11 in relation to effects and I think it is being said here
12 that that is as a matter of law that is not the right
13 approach, that is what Mr Beal has put to you.

14 I just wondered, from your point of view, why have
15 you done that from a non-legal perspective; it need not
16 be economical, it is also a question of logic? Why is
17 it -- you said I think that you have issues with the
18 concept that everything else remains the same in the
19 counterfactual when one is assessing competition on the
20 acquiring market, which is the exercise that the
21 Court of Appeal describes. You obviously take
22 a different view. Why do you take that view?

23 A. Well, as an economist I would like to understand what
24 happens in such a situation of zero MIF and -- and
25 therefore I did consider it relevant. But, well, as

1 an economist but I was -- I think it was also put as
2 an issue for the economists to explore in this trial,
3 what would happen in this counterfactual. Therefore as
4 an economist I find it relevant to look at, you know,
5 yes you can take out the MIF completely, survival or not
6 is one test, but actually look at what happens, so what
7 are the sort of measures and reactions that the scheme
8 would take in the competitive dynamics, what are the
9 consequences for -- for that market in terms of
10 cardholder switching and therefore what would be the
11 costs to merchants as a result because it cannot be the
12 case that in that counterfactual, everything else stays
13 the same, just the price to merchants goes down and the
14 transaction volume stays exactly the same. That is just
15 not economically what is likely to happen.

16 But indeed -- so I think that is an economically
17 sensible way of doing it, of looking at it, but I fully
18 accept that legally, the line is drawn somewhere between
19 101(1) and 101(3) and that is a matter for the Tribunal.
20 If the -- if the legal analysis is that my analysis fits
21 more into 101(3), then -- then I accept that.

22 MR TIDSWELL: Well, I mean, I think you would say, would you
23 not, that it does fit into 101(3) if this was Trial 3,
24 you would be articulating these points, you would say
25 they naturally fit into that analysis as well though,

1 would you not?

2 A. That is an interesting point because 101(3) in my mind
3 is about efficiency and justification for a restriction
4 and -- and Mr Dryden -- I think we share the same view
5 and understanding of the mechanisms. Mr Dryden called
6 the higher merchant costs -- the higher costs that
7 merchants would incur. Let us assume my analysis is
8 correct and merchants do pay a higher cost, Mr Dryden
9 called that: well, that is a justification point that
10 you discuss in 101(3). If indeed in 101(3) you discuss
11 the MIT so the -- which looks at costs of comparator
12 payment methods, as I have done in the previous
13 litigations, then my analysis also fits into 101(3) and
14 it is part of the justification argument. But in my
15 mind -- at least in my mind as an economist -- this
16 dynamic that merchants are actually paying and will end
17 up in this counterfactual, will end up paying a higher
18 cost overall, in my mind that is also a core part of
19 just counterfactual analysis.

20 MR TIDSWELL: But I have just a little difficulty with the
21 logic of that, though, because if you are saying it is
22 going to fit into 101(3) where presumably one does not
23 just look at the cost, but one looks at the benefits as
24 we discussed yesterday, so you look in the round to
25 where the merchant is left and you are looking at the

1 merchant pool as a whole as to whether or not they are
2 actually competitively better off with the restriction
3 in place and therefore be justified. So you know that
4 exercise is coming and you also know that in order to
5 get through objective necessity you need to hit the
6 hurdle of viability.

7 A. Yes.

8 MR TIDSWELL: So bringing it in there requires quite a high
9 hurdle. It just seems logically quite odd to me in the
10 way that the Court of Appeal put in paragraph 199 here
11 that you would introduce this question of just looking
12 at the costs, so a partial -- if you like, a partial
13 view of the benefit and then you put that into the
14 question of whether or not there is a restriction, that
15 seems to be quite an odd thing to do for the reasons
16 that the Court of Appeal articulate here, that you are
17 never getting past 101(1) because you are playing into
18 it, into that analysis, a partial merchant benefit
19 analysis.

20 Does that not strike you as being slightly
21 illogical?

22 A. I can see that logic and I can see that one can take
23 that perspective, absolutely.

24 Just to, maybe one last sort of --

25 MR TIDSWELL: Please do.

1 A. To justify my own thinking.

2 MR TIDSWELL: Please do, that is why I am asking you?

3 A. I really think about this in terms of counterfactual
4 analysis and counterfactual analysis in 101(1) can be
5 really useful because you want to compare the factual
6 with the counterfactual and you want to see in the
7 counterfactual is the situation actually worse or not
8 and the competitive condition or the competitive
9 outcome, is it worse or not than in the factual? That
10 is the same way as I looked in the bilaterals and
11 traditionally I have always said in bilaterals you end
12 up with a higher cost, higher interchange fee and
13 therefore it is not a restriction in my mind.

14 Likewise here, in this counterfactual to me it is
15 naturally to explore the whole train of -- go through
16 the whole circle and say: well, if it is true that
17 merchants in this counterfactual end up paying a higher
18 price, then I would say what is being alleged is
19 actually not a restriction because the allegation at the
20 end of the day is about merchants paying a higher cost
21 at the end of the day, that is the accusation against
22 MIFs. So in my mind at least, if but in the
23 counterfactual merchants actually pay an even higher
24 cost without the MIF, then to me that is relevant for
25 counterfactual analysis.

1 But I fully accept the logic that you have just
2 articulated and in the Court of Appeal as well; that
3 that is also a matter or may be actually only a matter
4 for 101(3) but that is not for me then to decide. But
5 hopefully I have explained at least my logic as to why
6 I see it as an intrinsic part of what an economist would
7 do in counterfactual analysis.

8 MR TIDSWELL: If -- that all makes sense if the question we
9 were looking at under 101(1) was the whole question but
10 it is not, though, is it, we are just looking at whether
11 there is restriction or not, are we not?

12 A. Correct, yes, yes, that is correct.

13 MR TIDSWELL: Okay, that is helpful, thank you.

14 MR BEAL: Could I just pick up a couple of points up there,
15 Dr Niels, please. You have said a couple of times "the
16 experts agree that". Can I just put down a marker. For
17 example you said that the experts had agreed, I think,
18 the higher figure for Amex that was derived from
19 Mr Holt's report. That clearly was not agreed by
20 Mr Dryden was it, the 3.95 figure?

21 A. I was not -- I was not implying or referring to that in
22 particular.

23 Q. When you said that the experts had agreed that this
24 particular way of analysing the issues was in the list
25 of issues, we cannot find in the list of issues the way

1 you have put that point because it certainly was not, as
2 we understood it, agreed by the Claimants' experts that
3 this was a relevant consideration?

4 A. Yes. So maybe two points on that. What I refer to in
5 terms of where the experts agree I was just referring to
6 Mr Dryden and I and Mr Holt. We -- we all agree on this
7 logic of how interchange works in terms of a pot of
8 money being shifted from the merchant side to the -- to
9 the issuing side. So in that sense, the mechanics of
10 interchange and two-sided platforms are -- are agreed.

11 I have always put forward -- and I am not saying
12 that the other experts have, but I have always put
13 forward in the -- all the way back from the
14 Redfern Schedule and the issues in trial, I have always
15 put forward that the costs to merchants of other payment
16 methods was a relevant consideration, so that that
17 actually went into the agreed list for sampling, also,
18 for example, the sample C; one of the criterion and
19 actually the experts agreed for sample C whilst
20 merchants who had internally analysed their own costs of
21 other payment methods.

22 So in that sense I am not saying -- clearly not
23 saying that the other experts agreed that this is
24 a relevant thing to look at but -- but we worked
25 together on -- on the sampling and I have always

1 consistently put forward this as a relevant
2 consideration, at least in my mind.

3 MR TIDSWELL: So I think you are saying that you -- that the
4 experts agreed that you needed to look at the
5 counterfactual, but your particular way of looking at
6 the counterfactual is not agreed by the other experts?

7 A. Correct. Certainly Mr Dryden.

8 MR TIDSWELL: Mr Dryden -- yes, yes, I think that is
9 helpful.

10 MR BEAL: Sample C was about steering, was it not, it was
11 not anything to do with issues 4 and 5.

12 A. But the information request had -- had that criterion as
13 well. Merchants who had considered and have done
14 an internal analysis on their costs of payment methods.

15 Q. It is something of a Trojan horse, if it was expressly
16 agreed that that was a relevant consideration. It
17 certainly was not seen from our side that that was what
18 it was going to be used for.

19 Anyway, that is a comment rather than a question.

20 Let me please get back properly to the questions.

21 Page 153, paragraph 5.54 of your first report,
22 {RC-H3/2/153} you point to evidence from Ms Suttle of
23 Mastercard about issuers' costs and revenues. But she
24 had no access to any detailed data sources for her
25 information, did she?

- 1 A. I think we have seen the evidence of Ms Suttle.
- 2 Q. She was not able to provide any details for any of these
3 revenue streams, was she?
- 4 A. I do not recollect exactly, but that is probably
5 correct.
- 6 Q. I can take you to the transcript if you would like me
7 to. Would you like me to take you to the transcript?
- 8 A. No.
- 9 Q. You have relied on that evidence even though it is pure
10 speculation?
- 11 A. Well, this is a business person commenting from their
12 own commercial and business perspective what they think
13 they would likely do. This goes again to the question
14 of the role of factual experts -- factual witnesses and
15 economic experts. I do rely on these factual witnesses
16 because they bring to the -- to the evidence their
17 commercial perspective on things.
- 18 Q. Which you are reviewing to make sure that it passes the
19 sniff test of credibility?
- 20 A. Yes, this passes the sniff test of credibility in my
21 mind because it is consistent with my economic framework
22 for the competitive dynamics in two-sided platforms and
23 payment systems.
- 24 Q. If we look, please, at paragraph 5.56 of your report.
25 You say Ms Suttle explains that it would not have been

1 commercially viable for issuers to try to make up these
2 revenues by imposing additional or different fees on
3 their corporate clients, such as cardholder fees or
4 interest charges, and then it says: for the following
5 reasons.

6 It says essentially SMEs are often incentivised to
7 switch providers on the basis of reduced fees.

8 Well, we have established, have we not, that other
9 revenue sources come from the more, the broader
10 business/bank relationship; correct?

11 A. Yes.

12 Q. We have established that there will be demand by
13 businesses for a payment card of some sort?

14 A. Yes.

15 Q. It is therefore not credible, is it, to suggest that no
16 issuing bank will provide any business payment card in
17 the event that MIF revenue streams are not available?

18 A. I do not necessarily agree because when they offer that
19 card, it has to also be an attractive financial
20 proposition at an attractive price. So again earlier
21 the comparison was made or the notion was raised that
22 there is demand by the SME small businesses, and
23 therefore there is willingness to pay and that does not
24 always follow. Even if there is demand, or even if
25 there is willingness to pay, it does not mean they would

1 be willing to pay any price or even a price if currently
2 the offering is for free or other products -- other
3 providers offer it for free.

4 Q. Could we go, please, to {Day9/154:20} starting at
5 line 20. You will see there I asked a question to
6 Ms Suttle, I said:

7 "Question: You say there that MIF revenue is
8 important for issuers. Have you looked at an issue
9 bank's revenue streams in detail?"

10 Her answer was?

11 "Answer: No, I have not worked at a bank to look at
12 their revenue streams implicitly.

13 I then said:

14 "Question: I assume from that answer you do not
15 know what proportion of overall revenue is attributable
16 to MIF revenue?

17 "Answer: No."

18 That is not a very promising basis, is it, to
19 vouchsafe her evidence that this revenue is business
20 critical for maintaining a business payment card
21 offering?

22 A. I have no reason to question Ms Suttle's evidence.

23 Q. Have you reviewed your position in the light of her
24 cross-examination?

25 A. No.

1 Q. Could we then please look at page 154 of your report
2 {RC-H3/2/154} and the second bullet there -- sorry,
3 third bullet, it is the third paragraph, second bullet,
4 technically, it says:

5 "Issuers face strong competition from Amex which is
6 able to offer commercial card products without needing
7 cardholder fees or any other additional fees."

8 That is simply not right factually, is it, we looked
9 at the figures yesterday in the document I was finally
10 able to find, do you remember, the APR rates for Amex?

11 A. Yes, correct. Can I just have a look at footnote 203?

12 Q. Of course.

13 A. What I refer to here?

14 Correct, yes, that was based on Ms Suttle but
15 I accept the premise that Amex does have some fees.

16 Q. We know, do we not, that commercial MIFs account for
17 a relatively low percentage of the overall value of card
18 payment transactions?

19 A. Yes.

20 Q. So, relatively speaking, the value of revenue derived
21 from commercial cards will be lower than the revenue
22 derived from consumer cards; correct?

23 A. Yes.

24 Q. Other things being equal, therefore, the loss of
25 a smaller sum of revenue is less life-threatening than

- 1 the loss of a larger sum of revenue?
- 2 A. It is less life-threatening but it is -- but here we are
3 focusing on the commercial card market, so it could be
4 life-threatening in that sense in the commercial card
5 space.
- 6 Q. When the issuing banks lost a larger sum of revenue with
7 the IF price cap, that did not stop Visa and Mastercard
8 from offering competitive consumer cards to issuing
9 banks?
- 10 A. Sorry, are you referring now to consumer cards and
11 the --
- 12 Q. Consumer cards, I am using an afterthought experiment of
13 look at the IFR, look at what happened when the MIF
14 rates for consumer debit and consumer credit were
15 significantly reduced, leading to a significant loss of
16 revenue, correct?
- 17 A. Yes.
- 18 Q. Visa and Mastercard managed to struggle on continuing to
19 be extremely profitable businesses?
- 20 A. They still exist, yes, in the -- in the consumer space.
21 I am just a bit confused because we are talking about
22 commercial and that was not affected by the IFR, but
23 I accept the premise.
- 24 Q. Could we look, please transcript day 9, page 157
25 starting at line 9 {Day9/157:9}.

1 I have two short points to make by reference to the
2 transcript and then I am conscious of the time.

3 But 157, line 9:

4 "The point I am trying to make is a slightly more
5 basic one ..."

6 This is from Ms Suttle:

7 "... which is you are not in a position to know what
8 proportion of revenues are used to cover which cost?"

9 She said:

10 "Not specific proportion, no."

11 Then, please, could we go to page 163, line 20.

12 There I asked: {Day9/163:20}

13 "So that is all presentation to the market based on
14 interchange rates rather than any underlying cost
15 analysis, is it not?"

16 The answer was "Yes".

17 So if you recall, her evidence was essentially she
18 was indicating that different costs would be
19 attributable to different products, solely based on the
20 MIF rate that was being applied by Mastercard to those
21 products, correct?

22 A. Sorry, I am a bit lost in terms of what exactly is being
23 discussed here and what is being proposed. But the
24 evidence is what it is, so I am happy to accept that it
25 says what it says.

1 Q. If we then go, please, to page 168, line 20, and scan
2 through to the next page, to line 9 -- line 20 is at the
3 bottom of page 168 and then scan over, {Day9/168:20} to
4 {Day9/169:9} -- she recognises that a small business
5 would not have a relationship with an issuing bank, they
6 would ring Amex direct, and the risk that was posed by
7 Amex was the small business preferring the Amex product,
8 rather than joining up forces with an issuing bank that
9 was issuing Amex.

10 A. Again, I am a bit lost what is being discussed here, but
11 I am willing to accept the logic that is being --

12 Q. She is accepting that Amex does not co-brand with
13 issuers for commercial cards.

14 A. Yes.

15 Q. You are not aware of any suggestion that that is wrong,
16 are you?

17 A. No.

18 Q. It is right, is it not, that Amex does not offer a debit
19 card, as Ms Suttle confirms at line 8 and 9?

20 A. I think that is my understanding as well. Yes.

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

22 In terms of progress, I am making good progress and
23 I am hoping that I will be -- I am aiming for shortly --
24 well, 15 minutes before lunch, if possible.

25 THE PRESIDENT: That is helpful, Mr Beal. We will rise for

1 10 minutes.

2 (11.36 am)

3 (A short break)

4 (11.49 am)

5 THE PRESIDENT: Mr Beal.

6 MR BEAL: Dr Niels, please may we look at page 156,

7 paragraph 5.61. {RC-H3/2/156} You say at the bottom of
8 the page there that your view is Mastercard's witness
9 evidence supports the view that its commercial card MIFs
10 can be considered essential for the operation of
11 a four-party card scheme.

12 Just pausing there. Are you really suggesting that
13 no four-party system could be operated without a
14 commercial card network and the MIF revenue it produces?

15 A. Yes, maybe essential, I do not know if it is the right
16 term. It puts a certain qualification on it. I am not
17 suggesting what has been proposed that it could not
18 operate at all. I am coming at it here from an economic
19 perspective and saying that it is essential, certainly
20 very, very important and inherent to the operation of
21 the scheme.

22 Q. Could we then, please, look at page 157, paragraph 5.65.
23 {RC-H3/2/157} You recognise there that you have got no
24 information on switching behaviour for commercial card
25 transactions, is that right?

1 A. Correct, there is no equivalent of the survey for
2 inter-regional that we have seen.

3 Q. If we then look in your second report, please, at
4 paragraph 5.31, page 73, {RC-H3/3/73}, you say at the
5 bottom of that paragraph:

6 "... I would expect substantial switching to Amex
7 for commercial credit card transactions but not for
8 debit card transactions."

9 Can you see that?

10 A. Yes.

11 Q. You have accepted, have you not, that debit card
12 transactions in the commercial card payment sphere
13 account for a significant proportion of the revenue
14 attributable to commercial cards?

15 A. Yes. This segment of small debits, as it was called,
16 small business debit is a large segment of the market,
17 yes.

18 Q. If we look, please, at {RC-J5/40/192}, on the right-hand
19 side -- well, in fact just take it from the headline at
20 the top:

21 "UK commercial debit card volume is set to grow the
22 most between 2019 and 2025, owing to the impact of Covid
23 and the increasing use of debit by small businesses."

24 A. Yes.

25 Q. On the right-hand side, you see that 65% of commercial

1 card volume and 61% of payments spent on charge cards
2 but then, third bullet down:

3 "Commercial debit, credit and prepaid cards
4 accounted for 31%, 6% and 2% ..."

5 So that is giving a figure for commercial debit of
6 over 30%, correct?

7 A. Yes. Apologies, I am just looking at the first bullet.

8 Q. Dealing with charge cards.

9 A. Because it also flags the importance of charge cards,
10 yes.

11 Q. Yes. But charge cards in this context would be both
12 corporate charge cards and business charge cards,
13 correct? Or is corporate separated out? It says:

14 "... UK charge cards are issued as Business,
15 Corporate, Lodge, Purchasing, Fleet ..."

16 So it seems to be a broader category. You cannot
17 simply read across charge equals corporate, can you?

18 A. Correct. Yes, I am not exactly on top of all the
19 precise categorisations here, but charge cards are
20 an important part of the commercial market, or the other
21 way round, a lot of the commercial cards are charge
22 cards. That is my understanding.

23 Q. Now, in your assessment of the market-wide MSC for
24 commercial cards, as I understand it, you compare the
25 cost of each alternative payment method in the

1 counterfactual to the cost of Visa and Mastercard in the
2 factual, is that right?

3 A. Correct. Although also to the cost of Visa and
4 Mastercard in the counterfactual with the MIF stripped
5 away, stripped out of it.

6 Q. What you do not do is estimate the market-wide MSC for
7 commercial cards in the factual and the market-wide MSC
8 for commercial cards in the counterfactual?

9 A. I do not follow the premise of the question.

10 Q. You do not estimate the market-wide MSC for commercial
11 cards in both the factual and the counterfactual, you
12 are comparing the market-wide MSC for commercial cards
13 with, in the counterfactual, the cost of -- sorry. You
14 come up with a market-wide MSC in the counterfactual and
15 then compare it solely with the cost of Visa and
16 Mastercard in the factual?

17 A. Well, I mean, I am clear what I have done, and I hope it
18 is clear what I have done is I have -- I have calculated
19 the costs of the alternative payment methods, I have
20 calculated the costs of Visa and Mastercard, both in the
21 actual and in the counterfactual without a MIF, and then
22 I have -- I have compared all of those. So that is what
23 I have done. I am a bit confused by the question in
24 terms of what I -- what I have done and have not done
25 and factual and counterfactual.

1 Q. Let us come at this from another way to make it easier,
2 I hope. First, the premise of your analysis is
3 essentially that Visa and Mastercard ceased to offer
4 commercial cards in the counterfactual; correct?

5 A. That could be one possible scenario, yes, but equally --

6 Q. That is what your analysis on switching and associated
7 costs is premised on, is it not?

8 A. Well, I have been clear that there is no evidence here
9 on switching, so in commercial cards, I have limited
10 myself to the analysis of the costs of other payment
11 methods. There is no implicit or explicit assumption
12 on -- on switching, nor of there being a scenario where
13 there is no Visa or Mastercard any more versus scenarios
14 where other sorts of changes are made.

15 Q. Well, if we look at page 157 of your first report, there
16 is a heading at the top of that page: {RC-H3/2/157}

17 "Counterfactual switching to alternative payment
18 methods and the associated merchants' costs."

19 Can you see that?

20 A. Yes.

21 Q. Now, you have accepted that you do not have any evidence
22 of switching, and that is true. So you have simply
23 assumed, have you not, in the counterfactual, that there
24 are no Mastercard and Visa transactions, there are
25 simply transactions with the alternative payment methods

1 that you then analyse at page 158?

2 A. I -- I do not think I have assumed that. But what
3 I have set out is the different costs and then I have
4 compared them to how they -- what those costs were in
5 the factual.

6 Q. So if we were to build into this, for example, Visa and
7 Mastercard retaining 60, 70% of the commercial card
8 market but with zero MIFs in place and assume for the
9 sake of argument at the moment that, therefore, there
10 were drastically reduced MSCs in place for those
11 transactions, you do not know what the comparator would
12 be in terms of weighted average MSC cost for all card
13 payments in the commercial card markets in the
14 counterfactual and the factual?

15 A. Yes. So one way of approaching this would be -- so
16 knowing all the costs and assuming they are correct, is
17 to try to work out some sort of critical loss or
18 critical switching rate above which it would flip the
19 total costs, which is what Mr Dryden did in his reply
20 report. I can comment on that. But clearly, that
21 requires some assumptions as well, and I have been
22 clear, I do not have much information to go on on what
23 exactly is the likely switching rate going to be, the
24 factual evidence indicates that there will be some
25 switching, there will be some reactions, but I do not

1 know the quantum of that.

2 Q. In table 5.1, you use a figure for Amex that is
3 different from the figure that you used in
4 inter-regionals, is there a reason for that?

5 A. Correct. Yes.

6 Q. It is a lower figure, a substantially lower figure, is
7 it not?

8 A. Correct, and that is my best estimate for Amex for
9 commercial cards.

10 Q. Can we move on, please, to cross-border acquiring, the
11 Central Acquiring Rule.

12 In relation to the Central Acquiring Rule for
13 Mastercard, at paragraph 6.2, page 163 of your report,
14 you say you are only dealing with the periods before and
15 after the period covered by the *Mastercard II* CAR
16 decision. Is that right? {RC-H3/2/163}

17 A. Yes.

18 Q. You are not seeking to go behind that decision here, are
19 you?

20 A. What do you mean by "behind that decision"?

21 Q. You say:

22 "I am instructed that no economic analysis is
23 required ..."

24 For the period covered by the infraction decision,
25 because the *Mastercard II* decision is binding.

- 1 A. Yes.
- 2 Q. I am assuming you are not trying to suggest that that
3 reasoning is wrong?
- 4 A. I am not commenting on that reasoning.
- 5 Q. Can we then explore the extent to which that reasoning
6 can be applied to the period prior to February 2014.
7 Could we look please at {RC-J5/30/1}. That is the
8 beginning of the decision, and if we could turn then,
9 please, to page 9, {RC-J5/30/9}, at paragraph 25,
10 recital (25) of the decision, we have a broad overview
11 of the CAR as it stood at the time. Can you see that?
- 12 A. Yes.
- 13 Q. In essence, last line on that paragraph:
14 "In particular, until 9 December 2015, unless the
15 acquirer had agreed bilaterally with the issuer on the
16 interchange fee, a cross-border acquirer was obliged to
17 apply the applicable domestic MIFs of the country of the
18 merchant."
19 Can you see that?
- 20 A. Yes.
- 21 Q. There is no suggestion, is there, that there was
22 a different rule applicable before, say, 2005 for
23 present purposes?
- 24 A. My understanding is that Mastercard had the same rule in
25 place during the *Mastercard II* period and before, yes.

1 Q. Page 13, please, {RC-J5/30/13}, paragraph 45-46, we see
2 that the economic assessment from the EU Commission is
3 that cross-border acquiring rules were an additional
4 barrier to cross-border trade, and we then see in 46:

5 "The restriction of cross-border acquiring locked in
6 merchants and forced them to accept the domestic MIFs
7 applicable in their 'home' Member State. Even very
8 large merchants were unable to negotiate a MSC below the
9 MIFs. Merchants' lack of bargaining power was largely
10 due to the two-sided nature of [the market and] 'must
11 take' nature of Mastercard cards combined with the
12 Honour All Cards Rule ..."

13 Can you see that?

14 A. Yes.

15 Q. Next page, recital (47), {RC-J5/30/14}:

16 "... because merchants did not know if the consumer
17 would carry a Visa or a Mastercard card, and because of
18 the 'must take' nature of both cards, almost all
19 merchants accepted both Visa and Mastercard cards."

20 That obviously gives rise to what Mr Dryden
21 described as the merchant predicament, does it not?

22 A. Yes.

23 Q. At recital (48), we see that what has changed with
24 effect from February 2014 is that the
25 European Commission accepted commitments that had been

1 offered by Visa, which led to a dedicated cross-border
2 MIF rate for 0.2% for consumer debit and 0.3% for
3 consumer credit?

4 A. Yes.

5 Q. That decision was not implemented, was it, until
6 1 January 2015?

7 A. I cannot recall the date when it was implemented.

8 Q. It says:

9 "Visa's commitments as regards cross-border
10 acquired --

11 A. Yes, (Overspeaking) yes.

12 Q. -- transactions entered into force on 1 January ..."

13 So this commitments decision did not actually
14 produce any effect on the market, did it, until
15 1 January 2015?

16 A. That is probably correct. Yes.

17 Q. At this stage, Mastercard chose not to offer comparable
18 commitments?

19 A. I believe that is the correct timeline, yes.

20 Q. Please could we then look at page 16, {RC-J5/30/16},
21 recitals 57-58. We see the principles defining
22 restrictions of competition by object are set out, and
23 in recital (58), the EU Commission said:

24 "One of the objectives of the Union and the EEA is
25 to achieve an internal market. By their very nature,

1 decisions by associations of undertakings that partition
2 the internal market along national borders or make the
3 interpenetration of national markets more difficult ...
4 reveal a sufficient degree of harm ..."

5 To constitute restriction of competition by object.

6 Can you see that?

7 A. Yes.

8 Q. That is not, of course, necessarily the way that
9 an economist would view it, is it?

10 A. Correct.

11 Q. So an economist would tend to views things as can you
12 get access to a market and compete on the basis of
13 a market, and if you can, then you let the market take
14 over, correct?

15 A. I think that that is a very general statement. But it
16 is probably broadly correct. But just to be clear, what
17 was the last bit of your statement?

18 Q. Well, an economist -- let us make it concrete. Imagine
19 you have a national market?

20 A. Yes.

21 Q. You have entrants to the market who are not established
22 in that national market?

23 A. Yes.

24 Q. Those entrants are established in another member state
25 of the EU?

- 1 A. Yes.
- 2 Q. From an economist's perspective, if a new entrant from
3 another member state of the EU can get into the domestic
4 market and compete on level terms, everything else is
5 irrelevant, from an economics perspective, for you?
- 6 A. Again, that is a bit of a broad statement, but
7 economists generally would see it as a good thing if
8 a foreign or an overseas provider is allowed to come
9 into the market, I -- I agree with that proposition.
- 10 Q. The difference I am putting to you is that,
11 institutionally, and indeed as a matter of EU law, what
12 the single market was intended to achieve was what it
13 says, which is a single market of no national markets
14 within the EU?
- 15 A. Yes, that is an important objective of the EU.
- 16 Q. So what the EU has set its stall against is a patchwork
17 quilt of national markets that are incapable of what is
18 described as interpenetration by merchants?
- 19 A. That is what the Commission is saying here. Just as
20 a general observation, one thing that I have always
21 found slightly bemusing when thinking about central
22 acquiring is that actually the fact, the mere fact of
23 allowing central acquiring or cross-border acquiring,
24 that is in fact highly pro-competitive. I do not know
25 how the schemes at some point started to allow that or

1 the reasons why. But that, that is what economists
2 would think is that is opening the market to
3 competition.

4 Then the specific rule that is being discussed here,
5 the card for Mastercard, is to say well you can enter
6 other markets, so it is open, that is in line with the
7 single market, but when you do so, you have to compete
8 on the level playing field with the other domestic
9 acquirers and charge the MIF that is applicable in that
10 country. So that is the bit that is being restricted.
11 But overall, central acquiring is -- is in line with
12 open markets and with the internal market.

13 Q. Can we turn, please, to page 17, {RC-J5/30/17}, recital
14 (62) to (63), and see why the EU Commission
15 fundamentally disagreed with what you have just said.
16 What it says is:

17 "Mastercard's cross-border acquiring rules meant
18 that acquirers offering card payment transaction
19 acquiring services in Member States where the domestic
20 MIFs were lower were prevented from seeking to offer
21 cheaper services based on the MIFs in their 'home'
22 countries in Member States where the domestic MIFs were
23 higher. The merchants were also prevented from taking
24 advantage of the internal market and benefiting from
25 less expensive services from card acquirers established

1 in low-MIF Member States.

2 "Therefore, the Commission concludes that
3 Mastercard's cross-border acquiring rules created an
4 obstacle to cross-border trade in the market for
5 acquiring card payment transactions in the EEA. The
6 rules shielded national markets from cross-border
7 competition from acquirers established in other Member
8 States. The rules reveal in themselves, and by their
9 very nature, a sufficient degree of harm to competition
10 to be considered a restriction ... 'by object'."

11 So clearly, the Commission did not think that these
12 rules were inherently pro-competitive and something to
13 be congratulated, they thought, on the contrary, they
14 were compartmentalising the single market into a series
15 of national territories?

16 A. Yes, so I can see all the concerns that you have just
17 read out that the Commission has mentioned. But they
18 are indeed sort of outlining what effects this rule
19 would have and that is precisely what we, the experts,
20 set out to analyse for the current case, the effects of
21 these rules --

22 Q. They are finding a restriction by object, are they not?

23 A. But the bit -- the bit about the "by object" bit, that
24 is -- that is indeed different and that is the bit that,
25 at least in my analysis, I would not agree with.

- 1 Q. Well, you may not agree with it --
- 2 A. For the period that I looked at.
- 3 Q. -- but your client, Mastercard, chose not to apply for
4 the annulment of this decision before the General Court.
- 5 A. That is a correct statement, yes.
- 6 Q. We then see in recital (64) that:
- 7 "The two-sided nature of Mastercard's scheme does
8 not change the Commission's conclusion that ..."
- 9 This was a restriction by object. They:
- 10 "... adopted the cross-border acquiring rules in
11 order to restrict cross-border competition, thereby
12 preferring to coordinate their conduct rather than
13 competing. Such co-ordination was, by its very nature,
14 incompatible with the proper functioning of competition
15 ..."
- 16 So again, you could not find a more diametrically
17 opposed statement from the one you have just given this
18 Tribunal, could you?
- 19 A. In terms of my assessment of the CAR -- and I have said
20 this in my report, I focused on the period but there may
21 be some overlaps with this period as well. But I do not
22 see this as a by object infringement, and my criterion,
23 as an economist, to say that is that my understanding
24 is, if a particular agreement has a clear economic
25 rationale and therefore is not inherently by nature sort

1 of damaging, etc, like a hard core cartel, then -- then
2 you would not class it as by object, and I have
3 identified in my report what I see as the inherent
4 economic rationales behind a -- behind the CAR.

5 Q. In fact, the Commission dealt with that submission. As
6 we see, that is at the top of page 18, recitals 67 to
7 68, {RC-J5/30/18}, the Commission said that:

8 "The fact that the cross-border acquiring rules may
9 have pursued other, possibly legitimate, objectives does
10 not preclude them being regarded as a restriction 'by
11 object'.

12 "Moreover, Mastercard acknowledges that there were
13 no objective justifications for the cross-border
14 acquiring rules during the relevant period."

15 There is then a reference to footnote 59 to a series
16 of cases which support that proposition. I am not going
17 to take you to those because that is a legal matter.
18 But the Commission then says, back at recital (68),
19 second line down:

20 "In particular, the Commission considers that the
21 interests pursued by the cross-border acquiring rules
22 were not those of the public, but the private,
23 commercial interests of Mastercard and its members."

24 So it rejected the suggestion that a pro-competitive
25 legitimate objective could be found within the rules

1 themselves and it maintained -- see recitals 69 and
2 70 -- that there was a restriction by object and that
3 was an infringement of article 101(1). It then went on
4 to consider the 101(3) analysis.

5 It found it was an appreciable -- sorry, it did not
6 consider -- it considered objective necessity at recital
7 (75), concluded at recital (76) the cross-border
8 acquiring rules were not objectively necessary for the
9 operation of the scheme. Then at recital (85), at
10 page 21, {RC-J5/30/21}, we see a rejection of the
11 suggestion that it would benefit from an exemption under
12 101(3).

13 In particular recital (85):

14 "The Commission concludes that Mastercard's
15 cross-border acquiring rules did not meet the conditions
16 for exemption ..."

17 Set out in 101(3).

18 So that was a categorical rejection, was it not, of
19 everything that you have just said?

20 A. I see what the Commission has done and said. I have
21 given my economic observations about the "by object"
22 question in the CAR, and I have given my economic
23 analysis of effects of the CAR, in a counterfactual
24 sense, of 101(1), that is what I have done. I do not
25 have any other comment on this.

1 Q. Could we look, please, at {RC-J4/31/154}. This was
2 a statement of supplemental objections that was sent to
3 Visa for Visa's cross-border acquiring rule. This was
4 a document, I think, that was sent in 2012. We see at
5 recital (493), a finding that Visa's cross-border
6 acquiring rule was a restriction of competition by
7 object. It sets out the reasons why, which are
8 substantially the same as the reasons given to
9 Mastercard in the final decision that Mastercard
10 reached. Can you see that?

11 A. Yes. I can see that.

12 Q. At the bottom of that page, it says:

13 "It is a territorial and price restriction which
14 hinders acquirers in low MIF countries from offering
15 their services in other Member States at lower prices.
16 This is a very serious restriction also against the
17 background of the declared aim of an internal market in
18 payments and it appears to be unjustified. Even without
19 further demonstration it is obvious that such artificial
20 partitioning of acquiring markets is a restriction of
21 competition by object which harms consumers, as
22 merchants are obliged to pay higher prices for acquiring
23 services."

24 Now, that assessment was made on the basis simply,
25 was it not, of a construction of the scheme rules?

- 1 A. Yes.
- 2 Q. To the extent that the scheme rules have been unchanged,
3 as you confirmed, the same analysis would surely apply,
4 would it not?
- 5 A. Probably if the Commission wanted to or did apply the
6 same analysis, then, yes, the factual basis is the same
7 in that sense. I am not clear myself why, for
8 example -- why the Commission has not applied it to the
9 Mastercard rules, if they were the same before the 2014
10 period, but that is not for me to opine on.
- 11 Q. One can think of a ready reason why the Commission did
12 not take the finding back before February 2014, can one
13 not, because Visa has offered commitments, those
14 commitments were accepted in February 2014, and it would
15 be treating two schemes with virtually identical rules
16 differently, if the Mastercard infraction period were to
17 go back prior to February 2014?
- 18 A. I am not sure if that logic holds or not, but I do not
19 have any opinion on that.
- 20 Q. I mean, if we extract the analysis -- abstract the
21 analysis out to something like a pharmaceutical product,
22 you would accept, would you not, that it is competitive
23 to allow parallel importation of generics drugs,
24 notwithstanding any national market that might exist for
25 a particular pharmaceutical product?

1 A. This is precisely where the economics comes in, in terms
2 of parallel trade and cross-border price differences.
3 From an economic perspective, one cannot say a priori
4 whether a uniform price across all countries is good or
5 whether it is good to have some price differentiation.
6 There are -- there can be many good justifications,
7 including in pharmaceuticals, to have price
8 differentials. Equally, opening markets for parallel
9 trade can also be a good thing.

10 There is a big economic debate about this, and
11 actually also a legal debate, because the rules on
12 parallel trade within the EU are again different from
13 between the EU and outside trade. So -- but what
14 I would comment here is that, from an economic
15 perspective, this is a -- always a complex but very
16 interesting debate, but also again therefore there is no
17 way of saying per se or by object: this -- this
18 particular outcome is bad and this particular outcome is
19 good.

20 Q. If I buy a property in London, and I approach an Irish
21 building society for a mortgage, and they offer me
22 a prevailing interest rate in the Irish market, why can
23 I not secure a loan for my property using that Irish
24 service that is provided cross-border?

25 A. I do not know. You tell me why. There may be all kinds

1 of rules. But are you asking me from an economic --

2 Q. From an economic perspective?

3 A. But again, the "why can I not" has some factual

4 objective element to it or a normative question. I do

5 not understand the question.

6 Q. Should Oxera be precluded, for example, from providing

7 economic advice in Ireland on a prevailing rate for

8 economic advice provided in Ireland -- sorry, on

9 a prevailing rate offered in London for services in

10 Dublin, in some way?

11 A. No.

12 Q. So your consultancy should be free to provide services

13 cross-border and price it as it sees fit?

14 A. Yes, that would be a good thing.

15 Q. The same should hold true for merchant acquiring

16 services, should it not?

17 A. But there are -- there is the consideration that this is

18 done in the context of a -- again, a scheme that sets

19 MIFs in different countries differentially, taking into

20 account local market conditions. So, yes, a scheme

21 could do that, it could -- so first of all, again, the

22 scheme has liberated cross-border acquiring as such, but

23 then it sets the restriction that if you go from the UK

24 to Spain or from Spain to the UK, you have to take the

25 domestic UK MIF. The reason why the scheme does that,

1 that is -- that is where we comment on economically,
2 there are rationales for domestic MIFs to differ, and
3 they do differ across Europe because the competitive
4 conditions on the issuing and acquiring markets are
5 different in each of these geographies.

6 So yes, Mastercard or Visa could allow it. What
7 then would happen is you would get the undermining of
8 this differential pricing structure and you would flip
9 back to a uniform price, and that is exactly what I have
10 addressed in my report, what would happen if that were
11 the case.

12 Q. Let us look at --

13 A. So that -- that is my approach to this question of
14 should the acquirer not be allowed. I am saying yes,
15 Mastercard could -- could allow that in principle, but
16 then look at what happened in the counterfactual.

17 Q. Let us look at how you deal with it in your
18 first report, please, paragraph 640, page 179.

19 {RC-H3/2/179} You rely on the fact that the interchange
20 fee is said to be a balancing mechanism that addresses
21 the imbalancing costs, and Mastercard has historically
22 applied that on the basis of national conditions, is
23 what you are telling us, is that right?

24 A. Yes.

25 Q. So Mastercard is setting different MIF rates, in

1 different national territories, within a single market,
2 based on what it perceives to be the optimal pricing?

3 A. Yes.

4 Q. So it is like a benign dictator, telling everyone what
5 the market should bear?

6 A. Yes, and in economic theory, monopolists who price
7 discriminate are actually seen as a good thing generally
8 because the price differentials have some welfare
9 benefits. But that's -- we will come to that, because
10 that is actually at the core also of my economic
11 analysis of this.

12 Q. So in essence, you are postulating a monopoly position
13 for somebody who is setting rates in different national
14 markets in the EU?

15 A. I am not postulating it, but let us stick to Mastercard,
16 factually it is the case that interchange fees that
17 Mastercard has set differ significantly between
18 geographies, and I have a chart that is very near this
19 point in my report, which clearly sets that out.

20 Q. At paragraph 6.45 to 6.46 in your report -- that is
21 page 181, {RC-H3/2/181} -- you seem to suggest that
22 domestic rates were tied to domestic costs, but you are
23 aware, are you not -- I think I took you to it
24 yesterday, recital (174) of the Commission's
25 *Mastercard I* decision -- that the cost studies which

1 Mastercard had conducted were aimed at finding out how
2 much merchants would pay?

3 A. This, this just -- I am starting from the general
4 premise that Mastercard sets its rates in each country
5 based on domestic market condition. That may include
6 costs, that may include competition from other payment
7 schemes, it may include other factors, such as
8 incentivising, growing the scheme etc.

9 Q. Mastercard applied the same intra-EEA MIF rate to all
10 cross-border transactions within the EEA, did it not?

11 A. The intra-EEA MIF is the same, yes.

12 Q. Even though, on your case, there were separate local
13 market conditions for where the acquirer and the issuer
14 were based?

15 A. Yes. But also to be clear, I am just setting out
16 factually here that there are these price differentials.
17 I am not judging or analysing whether that is a good
18 thing or a bad thing.

19 Q. At 6.27 of your first report, page 174, {RC-H3/2/174},
20 you say the one assumption we make in the counterfactual
21 is that Mastercard would not have otherwise changed its
22 pricing structure, can you see that? Sorry, you are
23 saying:

24 "I consider that Mastercard would have had an
25 economic incentive to make further changes."

1 Can you see that? 6.27?

2 A. Yes.

3 Q. As I understand it, that is based on Mr Willaert's
4 evidence, is it? That he would have reacted?
5 Mastercard would have reacted. It seems to have
6 a footnote reference at the bottom. Let us go to his
7 evidence in the daily transcript. It is day 9, please,
8 tab 105, page 2 {Day9/105:2}. I say at the top of that
9 page:

10 "At paragraph 43 of your statement, can I just make
11 sure I have got this properly understood, you seem to
12 suggest ... that if the card had not existed ..."

13 CAR, that should be. Sorry, that is a typo. If the
14 CAR:

15 "... had not existed back in the day prior to 2014,
16 you would have directed all domestic MIFs to be
17 harmonised to a given level; is that right?"

18 He said:

19 "Yes, we wanted to ensure we would not lose our
20 issuing business, yes."

21 I said:

22 "Everywhere in Europe everyone would have been
23 paying the same price for the transactions on a MIF
24 basis?"

25 He said:

1 "Yes, it would have lowered -- it would have raised
2 the rates in low countries to make sure that, for
3 instance, in an important market like the UK that we
4 would be competitive from an issuing perspective ..."

5 So I then said:

6 "So you will have had a coordinated price increase
7 in any market where there was a lower MIF available?"

8 The answer that was given was: yes.

9 Do you think that is something that would be
10 acceptable to you as an economist?

11 A. So I am not -- I am not sort of particularly interested
12 in -- in -- in this, in -- in this particular dialogue
13 because what I have done is -- is quite simply, actually
14 worked on the premise of what the claim is about,
15 because factually there are these price differentials --
16 and again, I am not judging whether they are right or
17 wrong; they are just factually there. The claim is
18 about, well, if you did not have the CAR, then merchants
19 in the UK and Ireland would have access to cheaper rates
20 so, in a way, that is already assuming that there would
21 be an adjustment in the rates or there would be this
22 arbitrage between countries.

23 What I do take from Mr Willaert's factual
24 evidence -- and I also think it is a useful thought
25 experiment -- is to say well, then, okay, let us see

1 what happens if arbitrage was fully operational and
2 schemes would undermine -- or acquirers would in each
3 country get the lowest MIF. So you would -- I think it
4 is then economic logic, and in line with what
5 Mr Willaert says, that the scheme would then drop the
6 notion of having all these differentials, it would go to
7 a uniform MIF across Europe, or at least harmonise the
8 MIFs more closely across Europe.

9 That is the thought experiment that I then focused
10 on. The question then is, well, what would happen in
11 that case? The claim says we would get the very lowest
12 in that whole distribution. I say economically that is
13 unlikely because you would more likely end up, if MIFs
14 were uniform across Europe, closer to the average, and
15 then you can see from my chart -- I was trying to look
16 for them -- that the UK is below -- and Ireland are
17 currently below average MIFs.

18 So if you flip from differentials to uniform MIFs,
19 then certainly merchants in the UK and Ireland would not
20 benefit, in that counterfactual, from lower MIFs; if
21 anything, they might increase a bit.

22 That is the basis for my analysis, or that is one of
23 the analyses that I carried out in terms of the effects
24 and the counterfactual in relation to the CAR.

25 Q. In your second report, paragraph 6.14, page 77,

1 {RC-H3/3/77}, last line, you said:

2 "It would not have been economically rational for
3 Mastercard to set significantly different domestic MIFs
4 in different countries."

5 From your last answer, as I understand it, you say
6 it would be economically rational for Mr Willaert to
7 have insisted that all low MIF rate countries had MIFs
8 that were brought up to the UK level?

9 A. So without the CAR -- so what I am saying is not
10 sustainable is just -- while you have these MIF
11 differentials, it is not sustainable to just say, okay,
12 now we scrap the CAR and everyone can arbitrage across
13 Europe, because then indeed it would go all the way down
14 to the lowest but, at that point, you get again the
15 competitive dynamic that, at that point, Mastercard
16 would not be able to compete with Visa because Visa has,
17 presumably, higher MIFs in those countries that are
18 relevant here.

19 So therefore, the economically rational thing to do
20 would be for Mastercard to drop this notion of
21 differential rates and go to more uniform rates, as
22 I said before. There is maybe another factor here
23 that -- that we can also bring in -- and just to
24 clarify, in the expert evidence there are some different
25 premises that we have been asked to look at. There is

1 the question of when I do my analysis before the
2 *Mastercard II* period, so for Mastercard, the Mastercard
3 CAR, do I assume that Visa had in place a legal CAR or
4 cross-border acquiring rule, as it calls it.

5 My analysis is -- indeed does assume that, in that
6 situation, Visa does have a CAR so Visa is able to
7 maintain these price differentials across geographies,
8 but Mastercard is not. So that is why it is rational in
9 that situation for Mastercard also to drop the notion of
10 having the differentials, it would have to adjust to
11 uniform CARs.

12 MR TIDSWELL: Why would you make that assumption, because if
13 the whole point of this exercise is that it is not right
14 to be price discriminating in that way, in other words
15 that the acquirer should be entitled to choose the
16 lowest cost location and then apply that elsewhere, why,
17 in your thought experiment, would you assume that Visa
18 would not be put in the same position?

19 A. Well, that was a particular -- yes, a particular
20 consideration -- again, this is -- this is a legal
21 premise for what is the relevant counterfactual, is it
22 asymmetry or not, and I was instructed to assume Visa,
23 legally, factually had in place its own CAR so it was
24 able to do this price discrimination across geography,
25 what happens to Mastercard, and that is what I have

1 assessed.

2 MR TIDSWELL: So they were your instructions?

3 A. Yes, on this point, on this particular point of what is
4 the -- what does Visa do in the counterfactual, those
5 were my instructions.

6 MR TIDSWELL: Do you think that that represents a logical
7 position, forget about the law, but if you are looking
8 at a price discrimination issue, where you are
9 considering what might happen if Mastercard cannot do
10 that, would it be logical to assume that Visa could do
11 something which is -- or you are proceeding on the
12 premise is unlawful.

13 A. I think generally -- I think generally there is some
14 logic in treating Mastercard and Visa the same. But
15 I should also clarify, a lot of the economic analysis
16 that I have carried out or the economic logic of price
17 discrimination versus uniform prices, that holds both
18 for Visa and Mastercard almost, you know, regardless of
19 what the other does. So that bit of my analysis is not
20 actually critically dependent on the counterfactual what
21 does Visa do. The bit about issuer switching and the
22 arbitrage, yes, the arbitrage leading to issuer
23 switching, ultimately that does rely on the assumption
24 of the -- of Visa being treated differently.

25 MR BEAL: Could we look, please, at paragraph 6.59 of your

1 first report, that is page 187. {RC-H3/2/187} You are
2 citing here some evidence from Mr Willaert, who suggests
3 that there were significant legal and economic barriers
4 to entry for cross-border acquirers. He is only dealing
5 there, is he not, with the very historic position?

6 A. Correct. I do not know how historic or not, but that is
7 what he is dealing with there.

8 Q. We had a single European payments area, did we not, for
9 cash transfers from 2008?

10 A. Yes.

11 Q. The EU Commission clearly thought that a counterfactual
12 in which acquiring cross-border was permitted, on the
13 terms that it has endorsed, was plausible in the
14 counterfactual?

15 A. Yes.

16 Q. At paragraph 6.60, you imply that, if these barriers
17 existed, then that would stop cross-border acquiring
18 anyway. If cross-border acquiring was not going to
19 happen for technical reasons, why did Mastercard need
20 a rule to prevent it?

21 A. Well, that is indeed one of the other parts of my
22 overall assessment, to put it in context. What would
23 happen in the absence of the rules, and there, there is
24 the evidence by Mr Willaert on technical barriers, there
25 is also the evidence in more recent years from claimant

1 disclosure, what would -- what would merchants do, you
2 know, what has actually happened since the market was
3 more liberalised, is there actually a lot of
4 cross-border acquiring. So I think that is all relevant
5 evidence to look at in this context.

6 Q. Paragraph 6.61 at page 188, {RC-H3/2/188}, you mention
7 regulatory barriers. Are you familiar with the Markets
8 in Financial Instruments Directive from 2004, so-called
9 MiFID I?

10 A. I am broadly familiar, yes. Apologies, just to finish
11 the answer to my last question. You could then ask the
12 question if -- if without the CAR indeed nothing
13 actually happens a lot -- nothing much would happen
14 because merchants are not interested in cross-border
15 acquiring etc, for whatever reason, then one could ask
16 the question, well, why do you need a CAR? But in my
17 mind, well, both answers lead you to the question of,
18 well, there is no -- from an economic perspective, there
19 is no restriction of competition here. The CAR, in my
20 mind, has an economic justification. If without the CAR
21 there would not actually be any effect, then -- then in
22 my view on the counterfactual, the CAR does not produce
23 any -- anti-competitive effects.

24 Q. So I think prior to that exposition, you indicated that
25 you were familiar with the MiFID directive. Are you

1 aware that it was introduced in 2004?

2 A. Yes.

3 Q. It introduced passporting arrangements for financial
4 institutions within the EU, correct?

5 A. Yes.

6 Q. In paragraph 6.63, at the top of page 189,
7 {RC-H3/2/189}, you suggest that it is only in more
8 recent years, particularly since 2015, that central
9 acquiring has become a more realistic possibility. That
10 is simply wrong, is it not?

11 A. That is my understanding of the factual evidence and --
12 yes.

13 Q. If we look at footnote 265, you say:

14 "As mentioned, from the evidence that I have
15 reviewed, it is unclear exactly when the situation
16 changed. This is ultimately a factual issue."

17 So why are you selecting particularly since 2015 if
18 you have no underlying factual basis for it?

19 A. Sorry, can you just go back to --

20 Q. Yes, the top of page 189, the point I am drilling in on
21 is your selection of a date particularly since 2015,
22 I have put to you that financial institution passporting
23 has made cross-border acquiring perfectly acceptable,
24 from a regulatory perspective, since 2004, and you have
25 singled out the date of 2015, which happens, of course,

1 to coincide with the Visa commitments decision. What
2 I am trying to understand is why you chose that date?
3 A. Well, again, it is correct, it is unknown, so in the
4 early years there were these technical barriers,
5 assuming they were right, despite the passporting
6 arrangements etc, there were technical barriers. It is
7 correct that one -- there is no information on when
8 exactly that early period stops. But this is also not
9 crucial for my analysis. So when I am saying
10 particularly since 2015, I am not, anywhere in my
11 analysis, drawing a line between before 2015 and not.
12 I am just flagging factually that there were these
13 barriers.

14 THE PRESIDENT: But why have the date at all then?

15 A. I think that is purely for context to give -- give
16 a particular context. Let me -- if I can just look at
17 the full sentence what I have said just before that.

18 THE PRESIDENT: Do you want both pages up so that you can
19 see the whole of the paragraph? I do not know if we can
20 do that. (Pause)

21 It looks like we are doing one page at a time.

22 A. Yes. So this is -- I am just trying to sketch out the
23 context here. So -- so what I observe or what I note
24 here in the 6.63, if you go back, so I am just sketching
25 out the context here. So there were barriers in the

1 early 2000s that is what I am saying potentially during
2 the initial years of the claim.

3 There is no particular reason why I chose then 2015
4 other than -- so on the next page, I give, I give the
5 figure of 2015 and when you observe the data on the --
6 on cross-border acquiring it did take off significantly
7 from around that period, 2014, 2015. So it is to do
8 with the commitment decision having facilitated more
9 cross-border acquiring potentially. That is the reason
10 why I raise here particularly since 2015 because the
11 data -- there is data also in my report somewhere which
12 shows that --

13 MR BEAL: It is the next page --

14 A. -- cross-border acquiring has --

15 Q. -- at page 190, I think you are referring to figure 6.5
16 and, again, I only interrupted you because I think it
17 will help you to explain what you are trying to explain.
18 Is that what you are thinking of? There is a huge spike
19 in 2014 to 2015?

20 A. Yes.

21 Q. -- in cross-border acquired transactions?

22 A. Correct.

23 Q. Of course that is precisely because at the beginning of
24 2015 the Visa commitments decision removed the Visa
25 barrier on cross-border acquiring from 1 January 2015?

1 A. Yes, there is a -- there is a likely causal link.

2 Q. Well, it is not just a likely causal link. It is also
3 vouchsafe in the evidence. Let us have a look at it.
4 It is {RC-J2/36/1}. I think it is tab 2, page 1.

5 This is a confidential document. I am not going to
6 refer to it in detail, but essentially an email is being
7 sent by a merchant acquirer to a merchant offering
8 a service in which -- well, let us just read under
9 "Interchange". Can you read those two paragraphs
10 please?

11 MS TOLANEY: Sir, may I just interrupt because there has
12 been a bit of this this morning. I am just a bit
13 confused because at the page before, Mr Beal said that
14 there was no factual basis for the suggestion that
15 central acquiring had become more realistic and then he
16 has now said by looking at the figure that there is
17 a huge spike. So can he just put the question properly?

18 MR BEAL: I have.

19 Dr Niels, you have accepted that there is a huge
20 spike, correct?

21 A. Yes.

22 Q. You have accepted that the Visa commitments decision
23 entered into force on 1 January 2015?

24 A. Yes.

25 Q. What I am putting to you -- and I think this is maybe

1 what Ms Tolaney would like me to do -- I am putting to
2 you that the two events are connected?

3 A. Yes.

4 Q. You accept that?

5 A. Yes.

6 Q. Thank you.

7 MS TOLANEY: There was no basis.

8 MR BEAL: Can we then please look back --

9 THE PRESIDENT: Ms Tolaney, I am sorry, the question seems
10 very clear but if you have got a problem let us hear it.

11 MS TOLANEY: Sir, why I was just clarifying it was that it
12 was suggested in the questions earlier that there was no
13 basis to suggest it was more realistic and I was just
14 wondering why that question was put in light of the
15 question that is now being put. Because it seemed to be
16 an attempt to trip the witness up without showing him
17 why he had given the information --

18 THE PRESIDENT: I do not think there is any tripping up,
19 Ms Tolaney, and if there was then it is a matter for
20 re-examination.

21 MS TOLANEY: Well, I can do. I just wanted the witness to
22 be given a fair question.

23 THE PRESIDENT: I do not think there is any question of
24 unfairness here.

25 MR BEAL: Thank you. Please could we look at {RC-J2/36/1}.

1 I was asking you to look, please, under "Interchange"
2 and there is two paragraphs there.

3 A. Yes.

4 Q. At the final paragraph on the page it is suggesting
5 a programme will be available from 1 January and you
6 have to opt in to take advantage, can you see that?

7 A. Yes.

8 Q. There are some steps that have to be taken and new rates
9 are going to be available and so on. Can you see that?

10 A. Yes.

11 Q. If we then please look at {RC-J2} -- I have got
12 page 475, but I have missed off the tab. I assume you
13 need the tab. Sorry, just give me a moment. Tab ...
14 39. Is it 39? I am going to move on. {RC-J2/39/1}.
15 I will move on. It is the difficulty with having
16 prepared cross-examination some time ago, aspects of it,
17 and I was using pre-bundle references.

18 Go to your first report, please, paragraph 6.52,
19 page 184. You suggest that there is no way of knowing
20 whether a given MIF would be higher or lower. Can you
21 see that?

22 A. Yes.

23 Q. But of course we do know, do we not, with a concrete
24 factual example, that the MIFs presently in Ireland for
25 debit card transactions are 0.1%?

- 1 A. Yes.
- 2 Q. Indeed if we look at page 199 in your first report,
3 figure 6.7, we see that you have highlighted in green
4 United Kingdom and Ireland back in the day, 2012, and we
5 see to the right-hand side for example that France had
6 MIF rates of approaching well under 0.6%, is that right?
- 7 A. Yes.
- 8 Q. There is no figure given for Liechtenstein on there or
9 indeed for Malta on figure 6.8, but is that simply
10 because you did not have any data available?
- 11 A. Probably. I cannot now recall.
- 12 Q. So let us just assume for the moment that looking at
13 figure 6.8 a MIF rate in 2012 was available from the
14 Netherlands, which was under 0.2%, and going back to
15 figure 6.7, that for consumer credit transactions,
16 a rate was available in France at around 0.6%. Both
17 those rates were obviously lower, were they not, than
18 the UK figures prevailing at the time?
- 19 A. Yes.
- 20 Q. If indeed there was a drive towards a harmonised
21 approach, one would expect, would one not, in a position
22 of free competition, that it would be the lower rates
23 that would drive the harmonised price?
- 24 A. Yes. But equally, the competitive dynamic that
25 I earlier sketched out was that the most likely

1 alternative, if one were forced to uniform pricing,
2 starting from this as a starting point, so if Mastercard
3 were forced by market forces, arbitrage to go to uniform
4 prices, then it would -- you would get an equalisation
5 effect, you would not go down to the lowest common
6 denominator, that is not how price setting or even how
7 the theory of price discrimination works. You would --
8 what you compare is differential prices, which are --
9 which are considered optimal by the provider in this
10 case.

11 If -- if the alternative is you have to go back to
12 uniform prices, you would also adjust the prices in the
13 lower countries. Mastercard, Visa, would do that, a
14 pharmaceutical company would do that as well.

15 Q. At various points in your report, you suggest that
16 relatively few merchants took advantage of cross-border
17 acquiring. The figure 6.5 that we looked at at page 190
18 shows that the share of centrally acquired domestic
19 consumer card transactions in the UK has risen to about
20 40%, I assume that is of the entire market, is it not?

21 A. Yes. This is -- this is the factual information that
22 all the experts have commented on, and I think have
23 formed a consistent view on, which is that these -- this
24 cross-border central acquiring increase was primarily in
25 the form of offers made to large merchants, first of

1 all, and secondly, offers largely made by the existing
2 acquirers of those merchants, just offering them, well,
3 do you want -- we have this relationship, do you want my
4 acquiring relationship now to be run from Ireland or
5 from France, where the MIF is lower?

6 So it is, it is a factual -- this is the facts that
7 happened, and I -- and I have not given my economic
8 views on it.

9 Q. So when you say, for example, that smaller merchants
10 were not able to benefit to the same extent as large
11 merchants, economically that does not matter a jot, does
12 it, because it is the larger merchants that make up the
13 lion's share of transaction value by volume?

14 A. But it is an interesting factual observation that this
15 was offered to small merchants -- that this was
16 primarily offered to large merchants.

17 Q. In paragraph 6.95 of your first report, page 204,
18 {RC-H3/2/204}, you refer to the interchange fee
19 regulation. What has that got to do with any of this?

20 A. Well, this is the interesting observation that, as far
21 as I understand, the Mastercard rules, as they were
22 reformed after the IFR, were actually more generous to
23 acquirers and merchants than strictly what the IFR would
24 have applied. That is a technical point. I am not --
25 I can explain it or it is explained here. That is the

1 answer to the question, the IFR is relevant --

2 Q. It just sets a cap, does it not. It does not tell you
3 what the price should be beneath that cap?

4 A. Yes, but the qualification in the IFR -- the
5 categorisation under the IFR was -- was different
6 from --

7 Q. I see.

8 A. -- what Mastercard then called intra-EEA.

9 Q. Yes, so it is a technical point about the classification
10 of what constitutes a cross-border transaction?

11 A. So it is a -- yes.

12 Q. You make a suggestion at page 207 of your first report,
13 paragraph 6.102, {RC-H3/2/207}, that somehow Mastercard
14 would have introduced a bilateral arrangement in the
15 event that the central acquiring rule was lifted. No
16 Mastercard witnesses suggested that would be done, have
17 they?

18 A. Sorry, I cannot now remember what the exact context is
19 for this.

20 Q. You say:

21 "Therefore, absent CARs, Mastercard would not be
22 required to set any default rate for centrally acquired
23 transactions, and could leave issuers to agree with
24 acquirers or unilaterally set the applicable IF, as
25 discussed in section 3."

1 Nobody has suggested that Mastercard would do this
2 in the event that the card rule is liberated so as to
3 allow a merchant acquirer to charge the rate that is
4 prevailing in its home market? Let me put it in
5 concrete terms.

6 A. No, I agree with the premise, I do not -- I was just
7 checking for myself what I said in the preceding
8 paragraph. But -- but I do not think it is very
9 material, and I accept the premise that no one has
10 commented on that in -- on this particular aspect in the
11 factual evidence.

12 Q. Can I come on to deal with the Honour All Cards Rule.

13 At page 71 of your first report, paragraph 3.11,
14 {RC-H3/2/71}, you recognise that in the absence of any
15 default settlement rule, each acquirer has to accept
16 transactions on cards issued by each issuer. That is
17 right, is it not?

18 A. Yes.

19 Q. You attribute that, at least in part, to the HACR, see
20 footnote 53?

21 A. Yes.

22 Q. Now, the HACR forces acquirers to take new or expensive
23 cards as well as the very popular ones, does it not?

24 A. That depends on whether you are talking about the honour
25 all issuer aspect or the honour all product aspect. It

1 also depends on how exactly the rule is defined.

2 I have done a lot of -- I had to do a lot of
3 homework on how the rules exactly apply, the HACR in
4 this case, and I have described that extensively. My
5 understanding is that the HACR has always been a rule
6 that is limited to within certain product categories, so
7 this notion of -- that it led to, in a way, bundling or
8 tying between product categories, I do not think -- that
9 is not my understanding of the HACR.

10 Q. Now, the rule has obvious application, does it not, to
11 premium credit cards and card transactions bearing
12 inter-regional fees where the MIFs are substantially
13 higher?

14 A. If they are included in the category, yes.

15 Q. Indeed, you appear to accept that at page 236, paragraph
16 7.64 of your first report, {RC-H3/2/236}, you say:

17 "Figure 7.2 suggests that the most relevant
18 categories of higher-cost cards are commercial cards and
19 inter-regional cards. To a lesser extent, domestic
20 consumer ... cards prior to the IFR ... may also be
21 classified as higher-cost cards."

22 If we then turn, please, to paragraph 7.66,
23 page 238, {RC-H3/2/238}:

24 "... my understanding of the Mastercard Rules ..."

25 Was that the merchant that felt it had to accept

1 Mastercard on account of alleged must-take status, but
2 wanted to refuse higher-cost Mastercard cards, had the
3 option to choose to accept only Debit Mastercards issued
4 in Europe.

5 Just pausing there, if we are dealing with the
6 higher cost MIFs of credit cards, then the position
7 would be, would it not, that if a merchant accepted
8 a common or garden domestic credit card, it would also
9 have to accept premium credit cards and foreign-issued
10 credit cards?

11 A. I think that is a correct statement. But equally,
12 I think what I say here is also just a factual
13 understanding of the rules, that there was this option
14 to choose to accept debit cards issued in Europe only.
15 This is just me factually describing my understanding of
16 the rules.

17 Q. You will probably remember Mr Bailey from Pendragon, who
18 was selling expensive £100,000 cars to customers. He
19 was facing a scenario where, if somebody presented a
20 premium card, he would be passing over £1,500 or so to
21 the bank for the privilege of receiving a payment by
22 a card. He is not in a position, is he, because of the
23 Honour All Cards Rule, to say, "I am not going to take
24 that card."

25 A. Again, I do not know if at that point it is because of

1 the Honour All Cards Rule or because of the arrangement
2 that he has with the acquirer, but I accept it as
3 a premise that he has to accept that payment, yes.

4 Q. The Honour All Cards Rule is essentially a form of
5 tie-in provision, is it not, in economic terms?

6 A. Again, there are many definitions of tie-in, but you
7 could in principle call it a form of tie-in, yes.

8 Q. At page 260, paragraph 7.124, {RC-H3/2/260}, you cite,
9 in the second bullet point there, a negative clearance
10 decision from 2001. Are you aware that the Commission's
11 consideration of this issue has moved on substantially
12 since 2001?

13 A. It has moved on, yes.

14 Q. But you did not draw attention to those developments in
15 your report?

16 A. Well, I -- the -- well, it has moved on, because we have
17 seen that and heard that, but I am here just setting out
18 reasoning in a Commission decision. I actually do not,
19 I do not know -- yes --

20 Q. Could we look, please --

21 A. Sorry, I am just trying to answer the question.

22 Correct, what I have noted here, but just for
23 background, is what the Commission's reasoning was at
24 the time for the HACR. I am just giving a historical
25 perspective on why the HACR has been considered a -- or

1 why there has been -- why there were some economic
2 reasons. So here the Commission is in line with my
3 thinking. If that has changed later, that is the case,
4 that may well be the case, yes.

5 Q. Could we look, please, at {RC-J4/8/5}. I think this is
6 the statement of objections from 2005 or 6 that was sent
7 to Mastercard. Could you read, please, paragraph 11 on
8 that page. (Pause)

9 A. Yes.

10 Q. That was a pretty contemporaneous readjustment of the
11 Commission's position, was it not?

12 A. What I have never seen is a Commission decision which
13 says these things about the HACR.

14 Q. Could we look at {RC-J5/11/43}, please. This is the
15 2007 decision. Please could we concentrate on recital
16 (118).

17 A. Yes.

18 Q. We see there, do we not, that the Commission is finding
19 that the HACR reinforced the anti-competitive aspects of
20 the MIF?

21 A. Yes.

22 Q. Can we then, please, look at page 144, {RC-J5/11/144},
23 recitals 508-509. The Commission, does it not, gives
24 a detailed description of why the HACR reinforced the
25 anti-competitive aspects of the MIF?

1 A. Yes.

2 Q. Could we then, please, look at {RC-J5/31/11}, the
3 *Mastercard II* decision, and in particular recital (37),
4 you will see that it operates as a restraint on
5 competition.

6 A. Yes.

7 Q. Then as far as Visa is concerned, if we turn for
8 simplicity to {RC-/J4/31/188}, recitals (602) to (605),
9 we see the European Commission identifying the impact of
10 the HACR on competition.

11 A. Yes.

12 Q. {RC-J5/51/39}, please. We are now moving on to the
13 payment services regulator. At paragraph 4.32 to 4.33,
14 identifying the competitive constraint that arose as
15 a result of having the Honour All Cards Rule in place.
16 In particular, 4.33, the rule means:

17 "... that a UK merchant cannot accept domestic
18 transactions with domestic IFs but refuse those from
19 EEA-issued cards of the same brand with the higher
20 cross-border IFs. With regard to issuer location, the
21 HAC rule makes accepting a card brand an all-or-nothing
22 decision, at least at a product level."

23 Can you see that?

24 A. Yes.

25 Q. We see at 4.38, over the page, please, {RC-J5/51/40},

1 the Honour All Cards Rule:

2 "... also prevents merchants from refusing cards on
3 the basis of an issuer's location, but refusing to
4 accept the card brand as a whole would mean losing
5 significant volumes of sales ..."

6 That, in a nutshell, is the merchant predicament, is
7 it not?

8 A. Yes, I agree with all the logic and the effects of the
9 HACR that are being set out here, yes.

10 Q. I think in your first report, at paragraph 7.42,
11 page 224, {RC-H3/2/224}, you effectively recognise, do
12 you not, that the HACR allows Mastercard to price
13 discriminate between different types of card without any
14 adverse risk of a merchant reaction to it?

15 A. Sorry, where, can you just point me to ...?

16 Q. Yes. What you say is:

17 "... from an economic perspective, it would not be
18 economically rational for Mastercard to competitively
19 constrain itself ... Therefore, if merchants were very
20 successful at steering ... Mastercard could respond by
21 simply raising the fees of the latter, at least where
22 such fees are not subject to regulation ..."

23 A. Yes.

24 Q. At page 232, paragraph 7.54 of your first report, as
25 I understand it, you suggest that this rule is

1 an important part of the brand promise. What is wrong
2 with merchants simply sticking in their shop window
3 which cards they are prepared to accept and which they
4 are not and thereby indicating which part of the brand
5 promise they are prepared to meet?

6 A. Sorry, I do not understand the premise of the question.

7 Q. So at 7.54 you say it is important for the HACR to be in
8 place. See the last sentence:

9 "The HACR is a mechanism to ensure that this brand
10 promise is delivered."

11 Do you see that?

12 A. Yes.

13 Q. So a merchant could presumably put up a sign in the shop
14 window saying: We accept Mastercard debit and credit
15 cards but not the Mastercard Premium World Elite card?

16 A. I do not know if it could or not, but possibly it could.

17 Q. There would not be any breach of the brand promise if
18 a merchant made it clear what they were prepared to
19 take, would there?

20 A. That I cannot comment on.

21 Maybe it is also just worth highlighting in this
22 regard; what I have in mind in terms of the
23 justification with the HACR and I have linked it to the
24 brand promise which is perhaps to do with the merchant
25 side, but I have very much also linked it in my mind,

1 and I have expanded on it in my second report, to the
2 issuing side. Because without the Honour All Issuer
3 aspect of the HACR Mastercard would have to negotiate
4 with individual issuers attracting them to the scheme
5 without being able to promise to them: Look, if you
6 join my scheme you have access to all these merchants.

7 Without the Honour All Cards Rule or the Honour All
8 Issuers aspect of it Mastercard would not be able to
9 promise that, it would not be able to offer that
10 attractive network. It would effectively be saying to
11 issuers: You can join my scheme, but you have to sign
12 up all these merchants yourself or all these acquirers
13 yourself. That is, in my mind, an economic rationale
14 for the HACR which is linked to the brand promise.

15 Q. At page 235 of your first report, {RC-H3/2/235} top of
16 the page, you say:

17 "In addition to situations in which a customer is
18 expecting to pay by card and is refused the HACR helps
19 to ensure the acceptance of new cards which might
20 otherwise face the chicken and egg network externality
21 problem."

22 So you are recognising there, are you not, that the
23 HACR enables Mastercard to leverage its position to
24 launch new products into the market?

25 A. Yes and the HACR also allows more effectively for new

1 issuers to come into the market, so it promotes
2 competition in the issuing market.

3 Q. So new issuers are essentially being lured to Mastercard
4 with a promise of a ready-made acceptance network?

5 A. Exactly, that is a core proposition of Mastercard to its
6 issuers.

7 MR BEAL: Sir, I think that I have made less good progress
8 in the second half of today, of this morning's
9 proceedings. But I am hoping I will only need -- I have
10 three pages left, so I am hoping I will only need
11 15 minutes with a fair wind, 20 with an ill one.

12 THE PRESIDENT: Would it assist again, subject to
13 consideration of other people's need for a rest, if we
14 try to start at say a quarter to 2?

15 MR BEAL: Yes, if everyone is happy with that.

16 THE PRESIDENT: We will do that in that case. Dr Niels, we
17 will see you back in the witness box at a quarter to 2.
18 Thank you.

19 (1.03 pm)

20 (The short adjournment)

21 (1.45 pm)

22 THE PRESIDENT: Mr Beal, good afternoon.

23 MR BEAL: Good afternoon, sir. Good afternoon, Dr Niels.

24 A. Good afternoon.

25 Q. I am simply going to put something to you then I hope we

1 can move on. On objective necessity I am going to
2 suggest to you that you have applied the wrong legal
3 test for each of the anti-steering rules where you
4 consider they are objective necessity?

5 A. I do not know whether I applied the right or wrong legal
6 test.

7 Q. Turning to the non-discrimination rule. As I understand
8 it, you proceed on the basis that Mr Willaert is right
9 that the scope of the rule is limited to ensuring that
10 there is no discrimination between co-badged domestic
11 and international scheme; correct?

12 A. I was partly guided by the factual evidence from
13 Mr Willaert. I tried to do a lot of homework myself on
14 the rules in terms of understanding how and what and --
15 and whether they exactly applied. So, yes, partly on
16 the NDR I relied on the factual evidence, yes.

17 Q. I understand that you have not considered the position
18 if that evidence is not correct; is that right?

19 A. Correct.

20 Q. No surcharging rule. Again, I understand from page 216,
21 paragraph 7.18 of your report {RC-H3/2/216}, you have
22 been told that merchants were free to surcharge at all
23 times until surcharging was made unlawful in 2018; is
24 that right?

25 A. Can we have a look?

- 1 Q. Yes, it is paragraph 7.18, page 216.
- 2 A. Yes, correct. I have also on surcharging in particular
3 done a lot of digging and homework myself in terms of
4 understanding the rules, which is ultimately a factual
5 matter, so I have therefore also described in quite
6 a bit of detail what the rules were in my report and
7 this statement here in 7.18 is correct as well.
- 8 Q. Did you look at a typical Merchant Service Agreement to
9 see what their terms contain?
- 10 A. I did look at some merchant service agreements, but not
11 in detail in this context, I believe.
- 12 Q. Could we look, please, at {RC-J2/45/20}. This is
13 confidential so I am not proposing to read it out but
14 I would just ask you to look, please, at clause 3 and in
15 particular clause 3.1(c) and (d).
- 16 PROFESSOR WATERSON: What was the date?
- 17 MR BEAL: This is 2013.
- 18 PROFESSOR WATERSON: Thank you.
- 19 A. Yes.
- 20 Q. It is possible, is it not, that by virtue of the scheme
21 rules being as they are, acquirers thought that they
22 were bound to ensure that the scheme rules were observed
23 and put in clauses such as the ones we have just seen?
- 24 A. I cannot comment on what acquirers might have thought.
- 25 Q. You have said that on the evidence it does not seem as

1 though many merchants would have wanted to surcharge
2 even if they could because of customer friction?

3 A. Correct, that is my reading overall of the evidence from
4 the merchants.

5 Q. Could we look, please, at {RC-J4/22/1} -- sorry that is
6 the beginning, that is statement of objections. Then if
7 we go, please, to page 104, recital (303), that is
8 page 104 and focus in on recital (303) {RC-J4/22/104}.
9 It is there making a finding, the Commission is there
10 making a finding that the non-discrimination rule, which
11 is the way that the Commission treats the no surcharging
12 rule:

13 "... further reduces merchant's capacity to
14 constrain the collective exercise of market power. In
15 the absence of the NDR merchants might arguably threaten
16 Visa Europe with surcharging or the use of other forms
17 of discouragement and thereby exercise some degree of
18 competitive constraint.

19 If you then please look at page 105, {RC-J4/22/105}
20 recital (309); sorry, recital (305) first, en passant?

21 A. Yes, I have seen that.

22 Q. Recital (305) refers to a merchant survey that showed
23 that 92% of merchants who replied do not surcharge. So
24 the Commission was cognisant, was it not, of the fact
25 that in practice many merchants did not exercise the

1 right that they had, if they had the right, to
2 surcharge?

3 A. Correct.

4 Q. It nonetheless concluded, see, recital (309), that
5 Visa Europe's non-surcharging rule prevented merchants
6 from refusing acceptance of specific types of payment
7 card and reinforced the restrictive effects of the Visa
8 MIFs. Can you see that?

9 A. I see that and it is probably worth here being clear
10 about NDR and no surcharging. I understand that the
11 original phrasing here of NDR included the no
12 surcharging rule but it may also have included other
13 forms of discouragement etc which is therefore slightly
14 different from the surcharging rule that we are talking
15 about here in this context. But subject to that factual
16 caveat, I -- I see what is being said here and I do not
17 have any reason to disagree with it.

18 Q. So if the price of the MIF in the MSC is never
19 surcharged, then the cardholder never receives any price
20 signal, does it, that his or her use of the card has
21 additional costs associated with it from the merchant's
22 perspective?

23 A. Correct.

24 Q. Would you agree that that is hardly consistent with
25 prices incentivising optimal behaviour in a freely

1 competitive market?

2 A. One could take a very theoretical view that every single
3 product that one consumes needs to have the right price
4 signals but that is not -- first of all not necessary
5 even in economic theory and it is certainly not
6 practical or realistic in the real world.

7 So when I go to the supermarket I get potentially
8 free car parking, that also has costs, and if I had to
9 charge the costs for that, then that would be a price
10 signal to me of using the carpark or not.

11 So this is very common that not everything that one
12 consumes has a specific price tag to it.

13 Q. If you are providing your consultancy services to
14 a customer and you receive an input for your
15 consultancy, I do not know, perhaps another form of
16 consultancy that is joining with you, if that other
17 consultancy said to you: you cannot pass on the prices
18 I am charging you to your own customer, how would you
19 feel about that?

20 A. Let us say, yes, we have academic associates in Oxera so
21 let us say we have an academic associate whom we work
22 with and -- sorry, what was then the question?

23 Q. So they charge you for their services with VAT, so let
24 us assume that they are VAT registered, you then charge
25 your customer, you claim their VAT back, but there is

1 a clause in the contract from the associate saying: you
2 cannot charge the end customer for my services. So you
3 have suffered a cost but you cannot pass it on.

4 A. Yes, well, I -- I would say there are two considerations
5 there. First of all, we may have other ways of paying
6 for that associate rather than through the charges by
7 clients. We do have retainers, for example, etc.

8 Secondly, though, if it was really the case that we
9 can have the services of the academic but cannot get any
10 benefit or revenue from it, then we may not enter into
11 a commercial relationship.

12 Q. In relation to your supermarket example of course the
13 supermarket is free to choose, is it not, whether it
14 charges for parking or not?

15 A. Indeed.

16 Q. Can we look, please, at paragraph 7.92, page 247 of your
17 first report {RC-H3/2/247} and you are referring here to
18 the Visa statements of supplemental objections in 2012;
19 is that right?

20 A. Yes.

21 Q. You did not refer there, did you, to recitals (613) to
22 (619), they are at {RC-J4/31/190}, let us have a look at
23 those.

24 If you just cast an eye, please, at recitals (613)
25 to (619) where the no surcharging rule is dealt with

1 starting at (613) you note, do you not, that:

2 "Since the Visa I decision in 2001, payment card
3 markets have evolved and the Commissioner has further
4 examined the market conditions".

5 So things have moved on?

6 A. Yes.

7 Q. Then going through to (617), there is a reference to
8 Australia and the abolition of the no surcharging rule
9 in Australia and the Commission considers the evidence
10 from there and the conclusion that is then reached
11 at (619), is that:

12 "The Commission was of the preliminary view that
13 a prohibition on surcharging in combination with
14 practice of blending and with the HACR prevents
15 merchants from refusing to accept specific types of
16 payment. Such a prohibition further decreases
17 merchant's power of sanctioning high MSCs and MIFs and
18 takes away merchants' power to place a credible threat
19 against increases of MSCs and MIFs".

20 So it is finding, is it not, that that is -- the
21 market is not working properly to exercise a competitive
22 constraint against the imposition of high MSCs?

23 A. Yes, I see the Commission's conclusion there. What
24 I was interested in in the relevant bit of my report
25 that we just looked at is actually the evidence from

1 merchants on whether -- on whether they would or would
2 not surcharge or did or did not surcharge and that was
3 the basis for my analysis and, therefore, I quoted the
4 same 92% from the Commission in that context. It is
5 correct that I did not go on to assess the Commission's
6 reasoning on and conclusions on surcharging, I drew my
7 own conclusion in light of the current case.

8 Q. It is worse than that, is it not, because if we look at
9 paragraph 7.93, page 248 {RC-H3/2/248} you then pray in
10 aid the negative clearance decision from 2001 without
11 making any mention of the fact that the
12 European Commission had said in terms its thinking had
13 moved on and market conditions had moved on?

14 A. I pray in aid and I mention it because it is a -- it is
15 relevant background but it is not the basis for my
16 conclusion.

17 Q. Were you giving a fair and impartial view of the spread
18 of decision-making from the European Commission over the
19 entire claim period?

20 A. I think I have reflected -- it is not my -- it is not my
21 role to set out European Commission precedent but
22 I think I have shown where relevant, where it is --
23 where it adds to the -- to the background for my -- for
24 my own analysis.

25 Q. Can we look, please, at page 255. {RC-H3/2/255} We are

1 now on co-badging, so this is the final furlong.

2 Paragraph 7.111, you mention the absence of any
3 co-branded domestic scheme in the UK. But Mastercard
4 has never set out in rules, has it, the basis on which
5 it would be prepared to give permission for co-badging
6 to operate?

7 A. That may well be factually correct, yes.

8 Q. That creates a cause and effect issue, does it not?

9 A. In what sense?

10 Q. If you are saying: well, nobody has ever asked, it could
11 well be because people have been deterred from asking?

12 A. Yes, I think in this case there is also an element of
13 there is actually there is nobody because there are no
14 domestic schemes in the UK in the relevant periods to my
15 knowledge.

16 Q. Could we look in Mr Willaert's third witness statement
17 for the Asda proceedings; that is {RC-M1/10/9},
18 paragraph 25.2. He gives an example there --

19 A. Yes.

20 Q. -- of Mastercard having introduced lower interchange
21 rate than the domestic scheme Cartes Bancaires for low
22 value transactions. So it chose to badge the Mastercard
23 scheme with the Cartes Bancaires scheme and there was
24 a differential in price and customers and merchants were
25 able to choose which of those rates was going to be

1 applicable at the till; can you see that?

2 A. Yes, I see that.

3 Q. So clearly there were not any technical difficulties in
4 implementing that as a solution, were there?

5 A. Well, I cannot fully judge that. I have -- there is
6 also reference to other technical issues around
7 co-badging that I have commented on but this is purely
8 factual evidence.

9 Q. Could we look, please, in the Visa scheme rules at
10 RC-J3/89.2/221 -- sorry. J4, I beg your pardon.
11 {RC-J4/89.2/221}, I apologise.

12 A. Yes.

13 Q. So this is chip issuance requirements you can see that
14 in the first clause and then at the bottom of the page,
15 "Chip card account requirements", it says:
16 "An issuer of a chip card must do all of the
17 following ..."
18 Then overleaf we see a series of bullet points, can
19 you see that?
20 The second bullet is:
21 "Allow a cardholder to select the service and
22 account to be used for a transaction."
23 Then:
24 "Designate a payment credential for each
25 account ..."

- 1 Then:
- 2 "In the Europe region in addition notify Visa of any
3 payment applications contained in the chip. Visa
4 reserves the right to review and approve or prohibit the
5 use of those payment applications ..."
- 6 A. Yes.
- 7 Q. So clearly the Visa rules are envisaging, are they not,
8 the use of two or more applications on a given chip?
- 9 A. I think they leave open the possibility here, yes.
- 10 Q. If we were talking about co-badging of international
11 schemes, why should that prove difficult if you have
12 a digital wallet?
- 13 A. I am not saying one way or another whether that is
14 difficult or not.
- 15 Q. Do you know for a fact whether or not Mastercard has
16 ever been -- never been asked because in fact it simply
17 had a policy of not realistically granting permission?
- 18 A. That I cannot say for a fact.
- 19 Q. Well, if you would speculate just for a moment, do you
20 think it is likely that Mastercard would have granted
21 permission to an issuer to badge with Visa -- co-badge
22 with Visa?
- 23 A. Mastercard would have?
- 24 Q. Would Mastercard have given permission to an issuer to
25 issue a card that was co-badged with Visa?

1 A. Mastercard?

2 Q. Sorry, would Mastercard have given permission for
3 an issuer to issue a card that had both the Mastercard
4 scheme and the Visa scheme on it?

5 A. Well, I can imagine for a number of reasons that
6 Mastercard would say no to that.

7 Q. Finally, you mentioned yesterday the CMA report, could
8 we look, please, at RC-R, tab 45, page 7. {RC-R/45/7}.
9 This is a section table 5.7 of the CMA report that you
10 referred to and could we please magnify to the extent we
11 can the table.

12 The fourth line down, there is a reference to
13 interchange fees debit card; can you see that?

14 A. Yes.

15 Q. The 2014 figure for the percentage for that is 10%; is
16 that right?

17 A. Yes.

18 MR BEAL: Right. I am in the tribunal's hands, I can put my
19 overall case to you or one can assume that you know what
20 my case is and to the extent you disagree with it, you
21 disagree with it. It always seems a bit
22 unnecessary/showboating to put a series of propositions
23 to you which you disagree with but I am happy to do so
24 if my learned friends would like me to put my case?

25 THE PRESIDENT: I think the former course is probably better

1 than the latter.

2 MS TOLANEY: I am -- I did not hear that. I am not putting
3 it -- oh, putting it?

4 THE PRESIDENT: Putting it.

5 MR BEAL: I am happy to formally put my case.

6 So can I put a series of points to you and see what
7 you say.

8 Firstly, your reports either ignore or fail to
9 respond to the regulatory and court decisions that have
10 disagreed with Mastercard's case?

11 A. I do not address those reports or those decisions.

12 I think to the extent that they are relevant I actually
13 mention them, for example I have mentioned that the
14 debate has been had and the Supreme Court has decided on
15 what the counterfactual is in -- in terms of the ex-post
16 pricing prohibition and settlement at par. I have
17 mentioned those.

18 Q. On issue 3 your selection of the appropriate
19 counterfactual is invalid both because it is wholly
20 unrealistic and because it would not produce a lawful
21 outcome?

22 A. Sorry, can you repeat that?

23 Q. Yes. Your selection of the appropriate counterfactual
24 for issue 3 is wholly unrealistic and would also produce
25 an unlawful outcome?

1 A. I would say it is realistic. Whether it would produce
2 lawful or unlawful outcomes, I do not see how it
3 produces unlawful outcomes.

4 Q. On issues 4 and 5, the proper counterfactual is simply
5 to remove the MIFs in question from the consideration
6 and that would produce an outcome in which Merchant
7 Service Charges were lower in the counterfactual?

8 A. I think we have been clear that yes, I agree that that
9 is the counterfactual one would look at but when it
10 comes to what is the result of that overall for what
11 merchants' costs are, I have been clear that I have
12 assessed that more in the round than just focusing on
13 the interchange -- on the credit and debit card of Visa
14 and Mastercard.

15 Q. That knock-on impact or consequential analysis is not an
16 appropriate one for this stage of the trial?

17 A. I -- I hear that that is a consideration and
18 a proposition. It is a legal matter.

19 Q. In any event, your conclusions on the analysis are
20 unreliable, contain errors of analysis or approach and
21 rely on what are ultimately skewed calculations?

22 A. That I disagree with. I think my calculations are
23 reliable. They have a degree of uncertainty, there are
24 sensitivities around assumptions but they are reliable.

25 Q. All of the anti-steering rules either reinforce the

1 anti-competitive effect of the MIF or are on their own
2 terms objectionable as a matter of Competition Law?

3 A. I have assessed those rules and I do not see any reason
4 why those rules would be considered restrictive by
5 object from an economic perspective nor by effect.

6 MR BEAL: Thank you.

7 A. May I just very quickly?

8 THE PRESIDENT: Of course yes, of course.

9 A. The CMA page that we are seeing in front of us.

10 THE PRESIDENT: Yes.

11 A. I think it is helpful. As I said yesterday it is
12 relevant material for the Tribunal also to consider when
13 thinking about current accounts and how debit cards come
14 in there. I think, having looked at what has been
15 disclosed, I would also add or recommend you look at
16 paragraph 6.215 which I do not think has been included
17 in the documents shared last night because that makes
18 the point that I made yesterday about the CMA's finding
19 regarding the various customer groups covering the
20 incremental cost. So that is other relevant context to
21 look at.

22 THE PRESIDENT: Thank you, Dr Niels, we will certainly look
23 at that. That concludes your --

24 MR BEAL: Thank you very much, Dr Niels.

25 THE PRESIDENT: We have some questions. Mr Tidswell I think

1 will go first.

2 Questions by THE TRIBUNAL

3 MR TIDSWELL: Dr Niels, can we go back to the Honour All
4 Cards Rule.

5 A. Yes.

6 MR TIDSWELL: You had an exchange with Mr Beal where you
7 talked about the economic justification for that and
8 I just wanted to walk through that with you and some of
9 the implications.

10 A. Sure.

11 MR TIDSWELL: As a starting point I think as I understand it
12 the point of the rule -- and I appreciate it is
13 effectively two rules, but if we just talk about it in a
14 composite way unless you think it is important to
15 distinguish. The point of the rule originally was to
16 encourage and achieve acceptance of schemes' cards of
17 the cards issued by the schemes?

18 A. Yes.

19 MR TIDSWELL: Then over time of course to try and convert
20 that into universal acceptance?

21 A. Yes.

22 MR TIDSWELL: Is it right to think about it this way, that
23 the consequence of that is actually over time to create
24 the "must take" situation, what is being referred to as
25 the merchant predicament, because of universal

1 acceptance there is a decrease in the merchants' market
2 power and an increase in the issuers' market power in
3 relation to their respective positions?

4 A. Yes, I agree with that proposition and with the -- that
5 dynamic that has occurred. Again "must take" or "should
6 take" or "very nice to take", that is sort of a matter
7 of labelling and degree. But it is -- I accept that the
8 HACR as a rule contributes to this issue of there being
9 less bargaining power for the acquirers and more for the
10 issuers, so the issuer hold-up problem is reinforced by
11 the HACR.

12 MR TIDSWELL: Yes, and you talked a little bit about
13 Mastercard having to negotiate with issuers. You talked
14 this morning about that situation that would arise if
15 there was no HACR and it would be more difficult for
16 Mastercard to persuade issuers that their cards would be
17 accepted so therefore there would be some negotiation on
18 that side of the platform.

19 A. Yes.

20 MR TIDSWELL: Am I right in thinking that is really
21 effectively the reflection of the point you have just
22 made, which is that there is less ability for merchants
23 to negotiate in relation to or acquirers to negotiate on
24 behalf of merchants in relation to refusing cards, they
25 are really two sides of the same coin?

1 A. Yes, they are, it reverses the bargaining positions.

2 MR TIDSWELL: Yes.

3 A. Although that is between issuers and acquirers and what
4 I was referring to this morning is also the bit in
5 the -- in the notes between the scheme and the issuers,
6 so when the scheme tries to attract the issuers, it also
7 would like to promise the issuers you have access to my
8 entire network.

9 MR TIDSWELL: Yes -- no, I understand, that is helpful thank
10 you.

11 Then is it fair to say that both of those elements,
12 the one you have just referred to, the competition, if
13 you like, for the issuers and the persuasion of the
14 issuers and also the possibility of competition arising
15 from merchants being able to refuse cards, those are
16 both elements of competition which are dampened as
17 a result of the situation. Forget about whether it is
18 for Honour All Cards Rule or just the factual situation
19 that has transpired. But both those elements which
20 might be seen as elements of competition have been
21 dampened down in the schemes.

22 A. Yes, in this context of the two-sided market, these
23 particular rules, the HACR, that it does mean inevitably
24 and it is actually it has the aim to do so, to dampen
25 that bit of competition that would otherwise arise.

1 MR TIDSWELL: The justification for that, as I understand
2 it, is that it is necessary to have that element of
3 dampening because it reflects the need for the success
4 of the scheme in terms of driving greater acceptance and
5 card usage and so on.

6 A. Yes, indeed. So therefore I do think that it is
7 inherently pro-competitive in that sense in that it is
8 inherently driven by the need to grow the schemes and
9 make the scheme more successful, yes.

10 MR TIDSWELL: Can I ask you about the temporal aspect of
11 that because obviously when you start a scheme, there
12 may be a very pressing need to create acceptance and
13 then of course to move on to universal acceptance. In
14 your views, does there come a point in time at which the
15 justification for that position, which we just talked
16 about, ceases to be so strong; in other words when you
17 achieve universal acceptance, is it a necessary
18 condition of success for the schemes that -- and does
19 that pro-competitive rationale still point to having
20 that dampening of competition?

21 A. Yes, I think that is a very good question and I think
22 indeed one of the dynamics you observe in the factual
23 evidence is that merchants or the reasoning follows that
24 merchants do want to accept Mastercard and Visa to
25 a very large extent. Therefore in the thought

1 experiments that I and some of the other experts have
2 engaged in, there is -- part of the finding or the
3 factual evidence would actually indicate that even
4 without the HACR it would still be very attractive for
5 a merchant to accept Visa and Mastercard, so in that
6 sense the HACR as such is from that perspective less --
7 in itself is less necessary. It still then begs the
8 question but then it is not a restriction either because
9 it does not have the effect any more, but there is that
10 temporal dynamic, it leads to the -- it is linked to the
11 debate we had in the hot tub about mature networks
12 and -- and new networks.

13 One point that I would make and I made on Wednesday
14 is that even mature networks, they can implode, so yes
15 you may -- you may have now achieved universal
16 acceptance such that you are basically "must have" or
17 "should have", but that status can also be reversed and
18 that is a general proposition in two-sided platforms.
19 If you compete on two sides, if you are suddenly less
20 attractive on the other side, then maybe you lose at
21 some point again your "must have", "must take" or
22 "should take" status.

23 MR TIDSWELL: I think it is probably my fault for the way
24 I put it but I was asking you a slightly different
25 question which you have partially answered, I was not

1 asking you so much about whether it was the HACR that
2 now caused the dampening of competition we have
3 identified or just the market, because I think the point
4 we have got to was that the market conditions have
5 become conditioned to that because of universal
6 acceptance. So in some ways as I understand it you are
7 saying it does not really matter whether you have the
8 HACR or not because you have ended up with "must take"
9 and so you have effectively the same dynamic.

10 A. Yes.

11 MR TIDSWELL: So the question I was asking you was on the
12 assumption that there were originally pro-competitive
13 reasons to be going down a path that created that sort
14 of market power, or one could see it as an imbalance in
15 market power, does there come a point in time where the
16 pro-competitive reasons cease to apply or cease to apply
17 so much so that actually it is no longer justified to
18 have that concentration of market power?

19 A. Yes. I can see this is a very interesting question. It
20 does -- it does go into sort of the -- almost the
21 normative with social welfare questions. From a --
22 I have always taken the view, just from a competition
23 perspective, even in this mature status where they are
24 universally accepted etc the schemes still want to grow,
25 they still have competitive desire to grow and to me

1 there is nothing inherently wrong with it.

2 Now, you may take the view and Mr Dryden,
3 I understand his view, and I can see that others have
4 that view as well, but I just think it is not
5 a Competition Law question.

6 One may take the view that this dynamic universal
7 acceptance, no choice for merchants, you can just load
8 more and more costs on to merchants and you shift that
9 to the acquirer side, one can take the view that that is
10 not socially optimal or desirable. My position is if
11 one takes that view, then the solution would be to
12 regulate this and put a cap on it and that is exactly
13 what the IFR did. I am not necessarily agreeing with
14 that view because I do think there are competitive
15 dynamics that sort of make this at some point stabilise
16 or the market remains sufficiently dynamic but one could
17 take the view that yes, this is now so established,
18 there is now so much market power I have a concern with
19 it. I would say regulated under the IFR it is very
20 difficult or not even intuitive or obvious how one then
21 treats it under 101(1).

22 MR TIDSWELL: That is helpful. I think that starts to get
23 into a little bit into that debate as to how one looks
24 at this through the lens of a case built around 101(1)
25 And collusion as opposed to looking at through a 102

1 lens or, as you say, looking at it through a regulatory
2 social welfare lens. I am not so much trying to stray
3 into that; it is just getting a sense from you about
4 whether you think the pro-competitive justifications
5 might change over time, so that at least some degree of,
6 if you like, of the market power or the factors causing
7 it might be relaxed. That was really the question.

8 A. Yes, no, I understand and I think that is a very valid
9 question to ask about this, this market.

10 MR TIDSWELL: That is helpful. Thank you.

11 Can I change subjects and ask you about something
12 else. Could we pull up please paragraph 4.69 of your
13 first report which is page 127 {RC-H3/2/127}. This is
14 where you are talking about -- we are talking about
15 inter-regional MIFs and this is the "by object"
16 restriction and just in here you explain some -- as
17 a background general point you have talked about this in
18 sections 2 and 3C, which we will come to in a minute.
19 Then you say there are some particular considerations
20 with default MIFs for inter-regional card transactions.
21 Then if we go over the page, please, {RC-H3/2/128} you
22 talk about inter-regional MIFs cannot be characterised
23 as a restriction of competition, as you say, from an
24 economic perspective and I just want to explore with you
25 a little bit to make sure I understand the economic

1 reasoning.

2 So could we go back to section 3C, paragraph 3.50

3 I think it is. That is page 86 {RC-H3/2/86}.

4 A. Yes.

5 MR TIDSWELL: I think what you are doing here is you talk --
6 maybe if we go over to page 87, please, {RC-H3/2/87} in
7 3.51 and 3.52. You talk first -- in 3.51 you talk,
8 well, I think in here you are talking generally about
9 the need to increase card usage and then you go on and
10 say -- I think you introduce the balancing point; is
11 that right?

12 A. Yes. Yes, my -- my reasoning generally and thank you
13 indeed for pointing out the links also between section 4
14 and 3 and then in 2 I discussed it as well. My overall
15 approach to this has been to set out the economic
16 rationale for interchange which I consider to to be
17 pro-competitive and integral to the scheme etc for all
18 the reasons that we have discussed.

19 My approach therefore to the "by object" question
20 has been based on my understanding of the legal test
21 being that if there is an economic rationale such that
22 it is not obviously anti-competitive such as a cartel,
23 then you cannot call it by object. So I have -- I have
24 reached my conclusions by object on that basis.

25 Of course, if I am wrong legally, then so be it,

1 then what I say is not correct. But this is my economic
2 perspective on the "by object" infringement. The other
3 way I have put this is this is so inherently different
4 from a cartel as a classic hardcore price fixing cartel.
5 The objective of a cartel is to restrict output and
6 raise prices. The objective here is the opposite, it is
7 to grow output, to grow the scheme. Yes, you raise
8 prices on one side but you keep them low on the other
9 and I think that is inherently pro-competitive.

10 MR TIDSWELL: Am I right in thinking that in order to get to
11 that pro-competitive point, that is where the balancing
12 argument comes in because that is the way that you
13 adjust the pricing on the platform to increase the
14 output, that is the --

15 A. Yes, the balancing comes in there because it is the
16 combination of the two-sidedness and wanting to achieve
17 that skewed pricing structure but then facing the
18 reality, that in your platform because you are
19 a four-party platform, the costs are not in balance if
20 you just keep the revenues that way and therefore that
21 is where the balancing comes in.

22 MR TIDSWELL: That requires you, as you say, to look at the
23 costs on the issuer side.

24 A. If -- if one were sort of conceptually I think, because
25 my factual understanding is that these costs are

1 incurred more on the issuing side than not, that is --
2 but therefore my approach here is more conceptual on the
3 conceptual understanding that this is the imbalance. If
4 you say you are required to have the cost, that is if
5 you were to actually try to implement the interchange
6 fee in this sort of very purist approach of actually
7 precisely rebalancing. I think that is my understanding
8 of how Mastercard has done this, at least there has been
9 some reference, they try to identify those costs a proxy
10 for the imbalance.

11 MR TIDSWELL: Yes, that is helpful because I think what you
12 are saying is that you have not -- and really this is
13 the point of my question, I think you are saying you
14 have not conducted any exercise yourself of looking at
15 those costs and working out whether they might justify
16 the principle you have just advanced, so you have given
17 us a principle but you have not actually given us the
18 detailed justification for that.

19 A. Correct, certainly not in this case, I have given you
20 the principle and I think it is a sound economic
21 principle. We did in the OFT case, Oxera and EDC, we
22 did together carry out this mini Baxter and maxi Baxter
23 study to actually try to do that whole exercise of
24 looking at all the acquirer revenues and costs and all
25 the issuer revenue and costs and work out is that

1 roughly then the imbalance where the interchange is and
2 those studies indicated roughly that was sort of the
3 right ballpark, but that was more -- that was not to
4 implement MIF and work out the optimal; it was more sort
5 of a sense check at the time to say whether the
6 conceptual approach to MIF is broadly the right one.

7 MR TIDSWELL: If we are, as we are here, looking at
8 inter-regional MIFs surely you would need to conduct --
9 one would need to conduct that exercise in relation to
10 the costs associated with inter-regional MIFs, would you
11 not?

12 A. Certainly possibly if it comes to the 101(3) assessment
13 of what is the exemptable level of MIF if we accept that
14 the cost-based approach might work, then you would look
15 at the costs.

16 MR TIDSWELL: I think -- absolutely, I understand that. But
17 here the difficulty I think is that you are saying to us
18 from an economic perspective we should not go down the
19 path of looking at inter-regional MIFs as a restriction
20 of competition by object, I think inviting us to do so
21 because there is the need for a balancing payment which
22 reflects the costs on the issuer side. But I think the
23 problem we have with that is that as far as -- unless
24 you tell me otherwise, we do not have any information
25 about that at all really. We have no detailed

1 information about what those costs are and how they
2 relate particularly to the level of the inter-regional
3 MIFs, do we, or am I missing something?

4 A. No, I think you are right. You are correct. Other than
5 indeed the factual evidence which is perhaps more
6 qualitative in nature that there are these costs but you
7 are right, there is no detailed information of costs.

8 MR TIDSWELL: Okay, I think unless I have got that wrong
9 I think the same position applies more or less to
10 commercial cards as well.

11 A. Yes.

12 MR TIDSWELL: We have the principle but not the underlying
13 analysis.

14 A. Yes.

15 MR TIDSWELL: Thank you. That is very helpful.

16 PROFESSOR WATERSON: Thank you. So I am an economist like
17 you and so I am going to ask you an economic question.

18 A. Yes.

19 PROFESSOR WATERSON: It relates to the counterfactual. So
20 if we go to your first report {RC-H3/1/294}, at the top
21 of the page you have a chart, figure A3.1, and obviously
22 this is confidential.

23 A. Yes.

24 PROFESSOR WATERSON: But what we see here a big change in
25 terms of credit card MIFs, I am talking about domestic

1 essentially and we also know for example from the
2 Merricks report, which you say you have read, that the
3 level appears to be at the start of your period, appears
4 to be somewhat for credit cards, seems to be somewhat
5 similar to the position in 2007 regarding the credit
6 card level MIF? That was certainly my reading but that
7 is not essential to accept that.

8 A. Yes, so the top line or the green line in this.

9 PROFESSOR WATERSON: The green line, yes.

10 A. If one can see the colour that is credit, indeed, so
11 credit -- this is no secret credit dropped significantly
12 after the IFR.

13 PROFESSOR WATERSON: Yes.

14 A. But you are saying, Professor Waterson --

15 PROFESSOR WATERSON: I am not sure what happened to debit
16 because I cannot see it in your figure, but I am talking
17 about a few years before that. But certainly it is just
18 interesting for my purposes that there has been this big
19 drop in credit.

20 A. Yes, for sure.

21 PROFESSOR WATERSON: Okay. Then with that sort of
22 background in mind, and that was a big drop, I am not
23 going to mention it in terms of percentages but it is
24 a big drop. With that in mind, let us go to the
25 hot tub, this is the transcript on Day 10, page 112.

1 Let us go up a little bit, maybe to the previous
2 page. {Day10/111:1} so I am asking you a question,
3 I say:

4 "... {RC-J4/22/104} this has led me to think about
5 whether we have seen firms exiting the issuing side in
6 response to this rebalancing created by the IFR, or not?
7 Have we seen -- you know, if he says he we want to keep
8 the acquire issues and merchants happy [that is
9 Mr Knupp, I think] suddenly there has been a big change
10 to the merchants there, they have had to receive [sorry,
11 I should have said the issuers there] they have had to
12 receive less and the acquirers have had to pay less."

13 Then we come to this bit:

14 "So have we seen an exit of issuers in the market?
15 Have we seen a growth in acquirers as a result of the
16 IFR?"

17 Then going over the page now to your answer
18 {Day10/112:1} and you say essentially this was not
19 really the focus of expert reports in Trial 1.

20 A. Yes.

21 PROFESSOR WATERSON: Looking at that issue.

22 It is just I am curious. It is a bit like -- I am
23 also keen on Sherlock Holmes stories, it is a bit like
24 the story of Silver Blaze and. This is like -- Sherlock
25 Holmes says, "Then there is the curious incident of the

1 dog in the night-time" and Watson said "The dog did
2 nothing in the night-time" and Sherlock Holmes said,
3 "That was the curious incident".

4 So as an economist, what I would want to do in
5 looking at a counterfactual is to look at a previous
6 position, a previous situation where there has been
7 a big change in MIFs and see what happened.

8 So I am a bit puzzled rather than having sort of
9 completely hypothetical counterfactuals which I think
10 there has been a lot of confusion about quite what is
11 included and what is not included on the part of all
12 parties -- I am not saying you particularly -- it is
13 a bit puzzling that no one chose to look at what
14 actually happened in response to this and whether we saw
15 a big exit of issuers of credit cards, or whether there
16 were other things that they did. I do not know whether
17 you have looked at all into evidence on this?

18 A. Yes, I see what you mean and I think I agree. It is
19 a very relevant question and a very relevant topic to
20 consider and my answer was not that it is irrelevant at
21 all. There was clearly an element in Trial 1 because of
22 the timetable we needed to focus, there was clearly
23 a focus on the acquiring market and therefore all the
24 topics we have discussed already over the past days.

25 PROFESSOR WATERSON: Yes, although the issuing market has

1 often come up.

2 A. Yes, no, certainly it has. But the issuing market,
3 including issuer competition and indeed cardholder
4 willingness to pay, those sort of questions, which have
5 been quite central in the oral evidence now, but they
6 were not really the focus originally in Trial 1,
7 I think -- I think one reason perhaps why it was not
8 immediately a focus is that one can always say well the
9 IFR was a specific -- there was consumer MIFs and yes,
10 we should look at what happened there as a relevant
11 example. But whether that would then really be relevant
12 or directly comparable to other counterfactuals, for
13 example inter-regional or commercial, again there would
14 be imperfections in the comparability, just like the
15 New Zealand and Australia examples are not fully
16 comparable.

17 PROFESSOR WATERSON: Yes, no.

18 A. But I absolutely agree with you; I would actually also
19 quite like to see what happened to the number of issuers
20 in the UK and after the IFR. We did see of course bits
21 and pieces here and there, we saw that the GNS -- Amex
22 gave up on its GNS model.

23 PROFESSOR WATERSON: But that was not until 2018.

24 A. Yes, interestingly it took them a few years but the
25 causal link was made with regulation and price.

1 PROFESSOR WATERSON: In part, yes.

2 A. We saw the SSNIP -- well, this was -- as I mentioned
3 here again this was not fully in evidence, I agree,
4 but -- but the -- so generally the level of cardholder
5 benefits, rewards etc that were offered also did
6 decrease in the -- in the actual post IFR.

7 PROFESSOR WATERSON: Sorry, is there evidence on that?

8 A. Again, it is not in evidence in this case. I think it
9 has been mentioned, for example in the -- the FCA credit
10 card study etc, that that would be a response to the
11 IFR. But, no, because of the focus of the Trial 1 it is
12 not in evidence.

13 PROFESSOR WATERSON: Right. So although it seems to me, and
14 to you indeed, that it is a relevant counterfactual to
15 look at from the purpose of domestic -- the domestic
16 situation, you did not look at it but I fully accept
17 that no one else looked at it either?

18 A. Yes, that is correct.

19 PROFESSOR WATERSON: Thank you.

20 THE PRESIDENT: Lastly, since I am going to look at it at
21 some point, let us bring up the diagram that I am so
22 inordinately proud of {RC-R/41/1}, just so that I can
23 locate my questions and we are all talking about the
24 same thing.

25 Can we assume an ecosystem that involves, in order

1 for it to work efficiently, costs in the issuer class
2 that they have to incur in order to both make the system
3 work for themselves but which involves benefits for
4 everyone else in the system as well, hypothetically I am
5 going to pick fraud as a good example, but we could have
6 fraud as a good example?

7 A. Fraud, yes.

8 THE PRESIDENT: So let us assume we have a situation where
9 the issuers as a class of person are incurring very
10 significant costs, let us pick a figure out of the air,
11 100 million a year, in order to eliminate and prevent
12 fraud. That is good for everyone but as it happens
13 no one else is incurring any costs in this regard,
14 neither the scheme nor the acquirers nor the merchants;
15 they are all just benefiting from a prevention of fraud
16 or compensation in regard to fraud.

17 Let us also assume, though, that although the
18 aggregate cost of fraud prevention is 100 million, those
19 costs are separately incurred; in other words
20 differentially incurred by different issuing banks in
21 the class; in other words, are of more efficient than
22 others in suppressing fraud which is probably quite
23 likely?

24 A. Possibly, yes.

25 THE PRESIDENT: Let us assume it anyway. Now it is trite

1 that and Dr Frankel I think accepted this that the
2 issuing banks, the issuers will try to recover those
3 costs from some sources or other.

4 A. Correct.

5 THE PRESIDENT: That makes obvious commercial sense. Now,
6 let us assume that the point of the interchange fee in
7 this case, the purple arrow in the diagram is to
8 transfer from the acquirer class of people to the
9 issuers precisely 100 million. Now, is that one of the
10 justifications that you are advancing for the
11 interchange fee that it is effectively ensuring that
12 a benefit that is derived by the entirety of the
13 ecosystem, but at the cost of one particular group is
14 held harmless?

15 A. Yes, indeed. Yes. So the way I look at it is from the
16 scheme perspective as a whole, let us say the scheme
17 knows that it can make, let us say 200 million in
18 revenue from the merchants and let us say zero from the
19 cardholders, let us -- in a stylised way and that is
20 what market forces lead it to conclude, other
21 three-party systems have the same thing.

22 Then the scheme needs to have a mechanism to be able
23 to say: well, acquirers, you had better charge, you
24 know -- it is up to you acquirers, to get the 200 into
25 the -- into the system by setting your prices at the

1 merchant level at 200, okay. So now there is
2 100 million profit, but let us ignore that.

3 But for the scheme to function, the scheme has
4 actually allocated in its current rules the fact that on
5 the -- that there is an optimal level of fraud
6 prevention in for the scheme as a whole and that costs
7 100 million and the scheme rules are such or are
8 reflecting that those costs are most effectively
9 incurred by the issuers in our example because, as it
10 happens, they are the ones who have control over
11 processing.

12 THE PRESIDENT: Assume that, let us assume that.

13 A. So therefore the scheme as a whole, sitting at the apex
14 will want to have a balance between the issuers and
15 acquirers, it will want to ensure that the issuers take
16 part in the scheme and carry out their function and
17 fraud prevention so incur the 100. But equally it wants
18 to make sure that acquirers then get indeed the revenue
19 from the merchants. So that is my justification for
20 interchange as a mechanism and I think that is
21 pro-competitive in the sense that it is driven by
22 competition by competitive forces with other payment
23 methods and the intent and the aim of all of this is to
24 grow the scheme, to make the whole scheme more
25 successful.

1 THE PRESIDENT: Thank you, that was a very helpful answer.

2 I want to ask you a little bit more about that. So
3 you have explained not that we needed it but it was very
4 helpful that this is, as it were, a payment that is
5 initiated on the actual case by the scheme causing value
6 to move from the acquirers in the hypothetical out of
7 100 million a year to the issuers.

8 Now, can I ask you to make two further suppositions.

9 First of all, that it is not known with absolute
10 precision by the scheme what the issuer costs in regard
11 to fraud is, so there may be an inaccuracy between the
12 aggregate costs of the issuer class in preventing fraud
13 and the amount that the scheme causes to transfer in
14 value from the acquirer to the issuer?

15 A. Yes, I am with you.

16 THE PRESIDENT: You are with me. Excellent. Also let us
17 assume, as we discussed earlier, that in fact the costs
18 incurred by issuers are patchy in that some are less
19 efficient at eliminating or preventing fraud than
20 others.

21 A. Yes.

22 THE PRESIDENT: Banking those two assumptions, is the point
23 of markets not to ensure that costs like this are most
24 efficiently recovered and does not the imposed
25 interchange fee cut across a market created solution?

1 That is going to be my question.

2 Let me unpack it before you tell me how wrong I am.
3 By reference, since I gave it to you yesterday I might
4 as well refer to the "I, Pencil" article. It is
5 obviously a Chicago School of Economics article that
6 does not really focus on the Neo-Brandeisian thinking
7 that goes on.

8 But the point that is being made in the paragraph
9 I referred you to is that government intervention by
10 imposing outcomes is less efficient than a market
11 created solution and what I am going to put to you, and
12 the reason I referenced the article, is that in this
13 case, could it not be said that the scheme imposed
14 interchange fee is actually creating a distortion or
15 moving away from the efficient outcome that the market
16 might produce because it is both not precisely
17 a reflection of the costs incurred by the issuing class
18 in the aggregate and because it treats both the
19 acquirers and the issuers, but particularly the issuers,
20 as homogenous, whereas in fact their costs may be
21 variable and lumpy. So what is your answer to that
22 proposition?

23 A. Yes, I understand the question. I would like to get
24 back to you on -- on the logic of Leonard Read and how
25 it applies indeed to this picture in a broader sense.

1 But first of all I wanted to address you on the two
2 suppositions. Those two suppositions indeed both inject
3 a degree of reality to our hypothetical example because
4 both are quite realistic suppositions. The scheme at
5 the top will not know exactly what the issuer costs are
6 and indeed the fraud costs may differ between issuers so
7 in that sense the interchange fee is a very crude
8 mechanism and -- but I would say that are forces in
9 there that make the fact that this crude mechanism not
10 so problematic. So if the scheme is very far out -- so
11 let us take the first supposition, the scheme does not
12 know exactly what the issuer costs are, that it is
13 100 million or 80 or 120, it sets an interchange. If
14 that interchange fee is wildly out of balance there are
15 mechanisms; they talk to each other, there are meetings
16 etc the issuers.

17 THE PRESIDENT: Issuers and scheme.

18 A. Issuers and scheme will talk to each other.

19 THE PRESIDENT: Okay.

20 A. They will flag -- probably quite rapidly -- to say:
21 well, hang on, there is no way that this is or this is
22 not covering our costs. Equally if the costs, if the
23 interchange fee is way above the 100 million it will be
24 the acquirers who are saying to the scheme: are you sure
25 that this is the right level of cost.

1 So there are force -- the uncertainty will always
2 exist, that is just the reality but there are forces
3 that sort of bring the interchange fee sort of closer to
4 the balance, I would say.

5 The other supposition, so the differential costs,
6 again, it is a crude mechanism but this is -- this is
7 actually a mechanism that you often see in price cap
8 regulation. The price cap is set at a certain level, in
9 this case the interchange fee and therefore the allowed
10 revenue is set at a certain level. Those who incur
11 actually higher fraud costs than is being efficient are
12 then forced down to make themselves efficient so there
13 is an element of -- you cannot get it right exactly at
14 each issuer's exact level of costs but the -- setting
15 the interchange fee as a cap actually to issuers has
16 some incentive properties as well, to efficiencies, to
17 generate efficiencies.

18 THE PRESIDENT: Well, can that be right because what is
19 happening is that every issuer is receiving the same
20 interchange fee because it is determined according to
21 the transaction, not according to the issuers' costs, so
22 is it not the case that if you are receiving, as it
23 were, a flow of money that is unrelated to your costs,
24 you have got less incentive to push them down than if
25 you have got a genuine bilateral negotiation where you

1 are saying: I must achieve revenue of X in order to
2 cover my own costs?

3 A. I can -- I can see that. The incentive property, it
4 also depends a bit whether you are talking about
5 inefficiently incurred costs, is that because the costs
6 are too high or are you actually inefficient because you
7 do not spend enough and in both situations you can spend
8 more or less than the 100 million and both situations
9 are undesirable.

10 So again, yes, I agree one should not overstate the
11 incentive property of the MIF and I also agree with the
12 proposition that if you were to do these negotiations
13 individually issuer by issuer, you would get a closer
14 approximation to what issuer spends on costs.

15 Again, actually in reality I do not know if the
16 costs between issuing banks is really so different,
17 there is just no factual evidence. I do assume that
18 there is such a thing as best practice in the industry
19 and again the scheme can facilitate that and can
20 indicate, look, this is the way.

21 THE PRESIDENT: Dr Niels, we are going to the facts there
22 so --

23 A. Yes.

24 THE PRESIDENT: -- I do not want to trespass there. I am --
25 to be clear, oblige you to make an assumption of

1 a mismatch in costs.

2 A. Yes.

3 THE PRESIDENT: If that is wrong then that is wrong.

4 Moving on, though, can I ask you this arising out of
5 those earlier questions: why is the interchange fee
6 better or more efficient than a pure market negotiated
7 outcome between individual participants in the market
8 and let me unpack that. Let us in this diagram remove
9 the purple arrow labelled "Interchange fee" and try and
10 see how it might work without the interchange fee at
11 all.

12 Now, the issuer, they have got the class, they have
13 got 100 million costs, they want to discharge them,
14 somehow. There are various ways in which they can
15 recover those. They might charge cardholders a fee,
16 they might rely upon the revolvers rather than the
17 transactors of their users to charge high interest
18 rates, there are ways of doing it which would enable
19 them to cover those costs, that is fairly trite?

20 A. In principle, yes, in practice of course there is the
21 question of cardholder willingness to pay etc.

22 THE PRESIDENT: Absolutely. The whole questions of whether
23 it actually works.

24 A. Yes.

25 THE PRESIDENT: I understand that. So having acknowledged

1 that as a theoretical point, let us move on. Why can
2 the issuers not individually negotiate with the scheme
3 and say, look, we are incurring our share of this
4 100 million annual cost, we are paying you fees of
5 whatever it is, we need to do a renegotiation because,
6 frankly, we are paying you rather more than we are
7 getting in terms of benefits and these costs need to be
8 sorted out.

9 So why could not the issuer -- an individual issuer,
10 negotiate with the scheme and why could not, if that was
11 persuasive, the scheme negotiate with the acquirer
12 saying: I am terribly sorry but you are going to have to
13 pay a little bit more because this thing will not work
14 without everyone ensuring that the monies are routed,
15 not cutting across the pyramid in this diagram but going
16 up to the apex and down to the issuers.

17 Now, that would be a series of bilateral
18 negotiations of the existing contract between issuer and
19 scheme and scheme and acquirer which would -- I am
20 suggesting to you but do please push back -- reflect the
21 market outcome of negotiation between persons who could
22 at the end of the day choose to walk from the
23 transaction if they wanted to?

24 A. Yes. So I think that is a really good question and
25 I think this is a really relevant way of looking at it.

1 At the hot tub you indeed had raised the question, this
2 counterfactual analysis, is it right: can we remove the
3 purple arrow here? My answer at that point in the
4 hot tub was: my approach to counterfactual is to strike
5 out the multilateral bit in the arrow and go to
6 bilateral. But I agree that if you strike out the
7 purple arrow completely, it is an interesting thought
8 experiment what would happen then because each of the
9 actors on the different notes makes their own decisions
10 and have their own bilateral negotiations.

11 By the way, just a quick comment to help the
12 transcriber, yesterday when I talked about "nodes" in
13 this context I meant "node" with a D, it ended up with
14 T.

15 THE PRESIDENT: Very good, thank you.

16 A. So nodes, but it is an interesting thought experiment
17 what would happen. But going back to pencils, even --
18 I like the article obviously as an economist, I have
19 a good deal of sympathy for the thinking behind the
20 invisible hand and individual decisions leading to
21 aggregate good outcomes up to a point. But let us start
22 with the market for pencils.

23 Even in the market for pencils, you have someone at
24 the apex of the diagram who does some thinking, planning
25 and organisation, so let us take Faber Castell, which is

1 the largest pencil manufacturer in the world, it was
2 a German company founded in the 18th century
3 Faber Castell does the thinking and planning around
4 manufacturing, relationships with suppliers, with
5 distributors, commercial proposition, growing the
6 success of the pencil business, marketing, pricing,
7 branding etc. In a payment scheme likewise you have
8 someone sitting at the apex of the scheme who does
9 consider all these competitive considerations in the
10 round.

11 So you have a scheme that thinks about these
12 competitive dynamics. So in this counterfactual the
13 scheme will think, and I think it is actually also in
14 the actual but the scheme will think about factors such
15 as I do need to get these issuers on board, I do need to
16 get these acquirers on board, I do need to make sure
17 that the issuers incur their efficient 100 million in
18 fraud and I do need to ensure that therefore I get some
19 of the revenue from the acquirers to help pay for that
20 in the scheme as a whole. So I agree this is a relevant
21 counterfactual, the scheme will play that role and comes
22 from it that way.

23 Then of course the next interesting question is,
24 yes, what sort of fee levels do you get, because the
25 fact that the scheme will try to apply a fee or

1 a revenue transfer of some sort. I think that to me is
2 obvious, maybe we can call it a scheme fee or whatever.
3 But the question then when -- is then what happens to
4 the level of that fee? The scheme negotiates that
5 individually with the issuer indeed, but it will very
6 much have in mind the overall competitive consideration.

7 So in my mind the conclusion will very much be
8 similar to the actual situation, for example post IFR,
9 the scheme will want to set, to say to the issuers:
10 well, do not worry, I will guarantee you that you get
11 0.3/0.2 in line with the cap in that negotiation even
12 with the individual issuers.

13 THE PRESIDENT: Well, is that right? Because what we would
14 be getting on this hypothesis is not an interchange fee
15 by proxy simply travelling further up to the apex and
16 down. One would be getting something quite different
17 because what one would get, let us take the individual
18 efficient issuer, who is preventing fraud at a cost that
19 is less than the market average, so they are saying: we
20 are incurring out of 100 million a mere 5 million a year
21 to clearly eliminate for all our cards, a stretch I know
22 but let us assume that, and we are not being reimbursed
23 for this. So they could say: we are a really efficient
24 anti-fraud outfit, the whole scheme is benefiting, we
25 would like a 5 million deduction in the overall fees

1 that we are paying to the scheme. If you do not do
2 that, let us say Visa, we, the single issuer, will
3 migrate over to Mastercard and we will just stop issuing
4 Visa cards, we will just issue Mastercard, so give us
5 our 5 million or we will walk.

6 Now, that is a negotiation which would take into
7 account the costs of the individual issuer, not the
8 aggregate and the response would not be: yes, you are
9 going to get a certain number of basis points on the
10 transaction. The point would be you would get
11 a commercial market-based deduction to the fees that
12 were paid by the issuer to the scheme and my question
13 really is this: accepting for the sake of argument that
14 the scheme is the controlling mind of this and is seeing
15 all of the efficiencies and inefficiencies in the
16 scheme, why is this not a better outcome than a rather
17 broadbrush interchange fee transfer value that may or
18 may not be accurate and that is certainly, on the
19 assumptions we have had, inaccurate as regards which
20 particular issuer benefits when they are potentially
21 more inefficient than others?

22 A. Yes, I see the sort of thoughts and arguments that go in
23 there. There is -- there are some sort of nuances to
24 this, in particular when it comes to issuers and fraud
25 cost, because again as I said earlier whether you incur

1 more fraud costs -- you can be more or less efficient
2 whether you incur more or less. So this issuer in your
3 example would say: well, I -- I spent a lot less on
4 fraud. But -- but how does the scheme know, well, that
5 is right level because actually I want you to spend more
6 so that you prevent more fraud.

7 So there is that slight nuance in it.

8 THE PRESIDENT: Yes, but my point holds good whether it is
9 fraud or whether it is the additional cost of
10 transnational transactions. I mean, the point is
11 a general one, I am picking fraud as a hypothetical
12 example.

13 A. Yes.

14 THE PRESIDENT: But the point is as good if you take
15 an issuer whose additional costs of doing a cross-border
16 transaction are lower than others; they will say well,
17 you the scheme are generally benefiting, customers are
18 benefiting from the ability to transact over borders,
19 I am paying this because I am incurring the costs.
20 I need to recover that in some way and the way I want to
21 recover it is from you, the scheme.

22 A. Yes, and so the other nuance is that obviously issuers,
23 they get revenue through that mechanism so they ask for
24 more. So if they are more efficient and incur less they
25 will still want all of that, they will still want more

1 revenue and as much revenue as the other issuers are
2 getting. Do you see what I mean? The issuer incurs
3 costs, whether fraud or another category, but it is
4 efficient so therefore it spends less. It is not going
5 to say therefore you, scheme, pay me less.

6 THE PRESIDENT: I quite understand that. My point is you
7 are achieving a market-based outcome because you are
8 bilaterally negotiating between the issuer and the
9 scheme. I am not going to presume as to what the
10 outcome might be. I quite see that the issuer would
11 say: we should get a payment per transaction that is
12 going on, that may be the answer; my point is that you
13 are allowing the market to deal with it, whereas what
14 one has got in the interchange fee is the imposition of
15 effectively a tax on an acquirer class, which involves
16 the transfer value from that entire class to a separate
17 entire class subsisting in a different market where the
18 monies just move over at the behest of the scheme with
19 the inaccuracies that we have discussed and my question
20 is: why is this the best way of doing it?

21 A. Yes, so I would still say the scheme sits there in the
22 centre, it has a degree of -- well, there is a monopoly
23 power in that negotiation with the issuer. So yes, it
24 could -- it could take the view of forget about relative
25 efficiency, but let us say each issuer individually goes

1 to it and says; I have these costs and the scheme says:
2 Okay, I pay you therefore this through this mechanism.
3 Other issuer goes: I have this amount of costs so okay,
4 I get this.

5 The scheme in the centre will still, because of
6 market forces, want to ensure that the issuers -- first
7 of all that the playing field between the issuers is not
8 distorted so there will be some market driven tendency
9 towards a uniform MIF that is equal for all issuers
10 because otherwise you get the dynamic that this issuer
11 who gets more yes, that is closer to its costs but it
12 can then not compete effectively in the issuing market.

13 So -- so even in the pencil example, it is a very
14 sound and good way of thinking about it, about
15 individual decisions but even in the pencil market,
16 there are some central planners, organisations who have
17 to play some central role for the greater good and the
18 scheme does that in -- in this example.

19 I still think it is a valid counterfactual and it is
20 really worth thinking through what happens and also to
21 the levels of MIF, whether individual or on average.

22 THE PRESIDENT: Thank you very much.

23 Mr Beal, do you have anything out of that?

24 MR BEAL: Absolutely nothing.

25 THE PRESIDENT: Ms Tolaney?

1 MS TOLANEY: I think Mr Kennelly had something.

2 Re-examination by MR KENNELLY

3 MR KENNELLY: One question on the transcript.

4

5 Could we have, please, for Dr Niels, page -- it is
6 from yesterday, (Day14/157:21}).

7 Dr Niels, you were asked about the UIFM by Mr Beal
8 yesterday?

9 A. Yes.

10 Q. The question is at line 21, do you see that?

11 A. Yes.

12 Q. So you were being asked about the UIFM, the idea of
13 a UIFM. Could you be shown now, please, page 158,
14 line 7 (Day15/158:7} the question you were asked was
15 about the issuers, that the issuers under the UIFM are
16 free to establish their own IFs -- it is "MIFs" but it
17 should be interchange fees -- up to the extent of any
18 cap, do you see that?

19 A. Yes.

20 Q. At line 13, you were asked the assumption the
21 expectation is that all issuers would set their own
22 interchange fee at the cap; do you see that?

23 A. Yes.

24 Q. Then between that question and the next, my learned
25 friend Mr Beal switched from discussing issuers to

1 discussing the scheme. Do you see that at line 17, he
2 is asking you a question about the scheme. Do you see
3 that?

4 A. Yes.

5 Q. About price floor and at line 18 -- sorry, at line 19
6 you gave your answer, you say:

7 "Subject to the debate around the exact meaning of
8 price floor, yes ... that MIF would be the level that
9 the acquirers would treat as an input for setting the
10 MSC".

11 Do you see that?

12 A. Yes.

13 Q. So when you say "that MIF", do you see?

14 A. Yes.

15 Q. Who is setting "that MIF" in the UIFM?

16 A. In the UIFM it is the IFs indeed not MIFs set by the
17 issuers, that is my understanding.

18 Q. So to the extent that the interchange fee sets a floor
19 in the MSC, under the UIFM, who is setting that price
20 floor?

21 A. It is the issuers.

22 MR KENNELLY: Thank you, Dr Niels. That was all I had.

23 THE PRESIDENT: Thank you, Mr Kennelly. Ms Tolaney.

24 Re-examination by MS TOLANEY

25 MS TOLANEY: Thank you. Dr Niels, questions were put to you

1 yesterday on the basis that Mr Justice Popplewell's
2 analysis of Maestro switching was overturned by the
3 Court of Appeal and that was the reference {Day15/28:20}
4 onwards.

5 Just for the sake of clarification, are you aware
6 that there was in fact no challenge to
7 Mr Justice Popplewell's analysis of Maestro switching?

8 A. Sorry, there was in fact ...

9 Q. No challenge to Mr Justice Popplewell's analysis of
10 Maestro switching?

11 A. I am not aware of that.

12 Q. Can we bring up {Day15/211:5-9}, please.

13 So the question was put to you and that is -- is
14 that the right reference? No, I have the right one,
15 sorry, thank you. There is no way, is there, that
16 Mastercard and Visa would shut down their inter-regional
17 system functionality; do you see that?

18 A. Yes.

19 Q. In order to protect their revenues etc and the question
20 was put you would be cutting off your nose to spite your
21 face. Can I just show what the witnesses say, if we
22 could go to {RC-F3/5/13}, please. This is
23 Ms Sarmiento's statement, if we go up, please, to
24 paragraph 44 --

25 A. Yes.

- 1 Q. -- you see what she says.
- 2 A. Yes.
- 3 Q. Then could we go down, please -- sorry, I am just trying
4 to find the right paragraph. Go down a bit more,
5 please. Paragraph 48:
6 "As a result, without interchange fees ..."
7 Can you read that:
8 "... Mastercard's foreign issuers would most likely,
9 first, have declined to allow their cardholders to make
10 loss-making inter-regional transactions into the UK and
11 Ireland and more widely"?
12 A. Yes.
- 13 Q. So that would be an issuer declining to allow their
14 cardholders to make loss-making transactions, I think
15 she is saying?
16 A. Yes, correct.
- 17 Q. So putting the question on the correct premise, is
18 Ms Sarmiento saying here that Mastercard would have shut
19 off their entire inter-regional system functionality?
20 A. No. She is not.
- 21 Q. Can we go the Oxera 2016 report and the survey results,
22 please. That is -- first of all, let us see what was
23 put to you, that is {Day16/3:4-10}. So it was suggested
24 to you -- and it is lines 4-10. Thank you.
25 It was put to you, can you see that a proportion of

1 customers who would switch to Amex was a low fraction?

2 A. Yes.

3 Q. Meant to be a low fraction.

4 Then at line 3, if we use those statistics to think
5 about etc, can you read that passage?

6 A. Yes.

7 Q. So can we then go to {RC-J3/79/84}. Can we look
8 together at the data. So you see USA online and I am
9 just looking, 19 apply for an alternative card and 32
10 use a card they already own?

11 A. Yes.

12 Q. So that is 51% of survey respondents in the US who may
13 use Amex instead?

14 A. Yes.

15 Q. You see that and then we see for PayPal 6%, alternative
16 payment method, 10%.

17 A. Yes.

18 Q. So if we do not include cash for now, 66% would switch
19 to an alternative payment method?

20 A. Yes.

21 Q. Then USA face-to-face, 18% is alternative card?

22 A. Yes.

23 Q. 34% might use an alternative card, so -- sorry, 18 was
24 to apply for and 34 might use an alternative?

25 A. Yes.

- 1 Q. 52 might switch to Amex?
- 2 A. Yes, if you add them together, yes.
- 3 Q. Yes. So is the term "low fraction" appropriate?
- 4 A. In this case on this basis for inter-regional
5 transactions, no.
- 6 Q. Then you can see going on 21% cash, 1% PayPal, 7%
7 alternative payment method, with 81% switching to
8 alternative payment method and again is the term "low
9 fraction" appropriate?
- 10 A. In that case no, it is not.
- 11 Q. I do not want to go through all the data, but when you
12 look at switching to alternative payment methods, is the
13 term "low fraction" appropriate for any of the entries?
- 14 A. No, in my analysis -- or the numbers are what they are,
15 but I would not describe it as low fractions switching.
- 16 Q. It was also suggested to you today -- that is [draft]
17 Day16, page 4, lines 20-22 -- that Amex had much higher
18 APRs, and if we go to {RC-J5/35.01/31}, can we look at
19 the APR, the standard APR for Amex, and do you see that?
20 That is 22.9.
- 21 A. Yes.
- 22 Q. Then can you look at the APR for the standard Mastercard
23 and Visa card, which must be, I think, over the page --
24 sorry, above, I beg your pardon. Sorry, it is the same
25 page. Thank you.

- 1 A. Yes, the APRs, yes.
- 2 Q. For the standard cards, not the premium cards?
- 3 A. Yes.
- 4 Q. Can you see, are they similar or higher?
- 5 A. They are of similar order of magnitude. Just to
6 clarify, Amex has Amex Gold in here and Amex Premium BA
7 and then the other two, the Amex Platinum is probably
8 what you describe as a standard Amex card, yes.
- 9 Q. Thank you. It was also suggested to you as a premise
10 that the Amex regime has higher cardholder fees, that
11 was at [draft] Day16, page 4, lines 20-22, and if we
12 look in the same document at page 30, {RC-J5/35.01/30},
13 can you see Amex Rewards, Amex BA and Amex Business?
- 14 A. Yes.
- 15 Q. Are they charging fees?
- 16 A. No, they are not.
- 17 Q. Then if we look at Mastercard and Visa, can you describe
18 what we see for the premium cards?
- 19 A. So, yes, some Mastercard and Visa premium cards also
20 have an annual fee, many of these are zero.
- 21 Q. So does Amex have higher cardholder fees across the
22 board?
- 23 A. I think overall probably Amex has somewhat higher
24 cardholder fees. It depends on what are the most
25 commonly accepted of these cards. I do think that Amex

1 does have, across the board, somewhat higher cardholder
2 fees.

3 Q. But not for every single card?

4 A. No.

5 Q. You were asked about the cost of accepting Amex, and you
6 were shown the example of a merchant who paid a lower
7 fee to accept Amex than your figures?

8 A. Yes.

9 Q. With your Amex figures, are you trying to calculate the
10 cost for each individual merchant or a market average
11 figure?

12 A. No, this is very much trying to capture the market
13 average.

14 Q. Then you were asked at [draft] Day 16, line 16, what
15 evidence there was of switching to Amex following the
16 inter-regional commitments. Could you go to Mr Dryden's
17 first report that is at {RC-H2/1/229}. It is paragraph
18 D.110(d). If you could just read that, please.
19 Obviously, some of it is confidential.

20 A. Yes.

21 Q. Mr Dryden makes the point that the impact of the 2019
22 commitments may have been limited. How do you expect
23 Amex's position to have been affected in light of the
24 commitments in 2019?

25 A. So for the category where there was not a major

1 adjustment in -- in MIFs, the impact on Amex's
2 competitive position would have been limited.

3 Q. You were asked at [draft] Day 16, page 20, line 1, about
4 what would happen to PayPal's prices to merchants if
5 MIFs were lower, and can I show you {RC-H4/4/105}. This
6 is Mr Holt's analysis, and if you look at paragraph 392.

7 A. Yes.

8 Q. Do you need to go over, please, {RC-H4/4/106}, could you
9 just explain, when you have looked at it, what it shows.

10 A. I think this shows that PayPal did not adjust its fees,
11 even after the IFR.

12 Q. Then you were asked at page 126 of today's transcript
13 lines 18-20, [draft] Day 16, page 126, lines 18 to 20:

14 "... would Mastercard have given permission for
15 an issuer to issue a card that had both the Mastercard
16 scheme and the Visa scheme on it?"

17 Were you aware that under the IFR, Mastercard is not
18 permitted to prevent co-badging?

19 A. I think that is my understanding of what the IFR says
20 about co-badging, yes.

21 Q. Thank you. Then the President asked you some questions
22 about the diagram, {RC-R/41/1}, and you were asked, as
23 you recall, about a counterfactual in which there are no
24 interchange fees at all but instead each issuer and
25 acquirer negotiates bilaterally with Mastercard the

- 1 financial terms of its participation in the scheme.
- 2 A. Yes.
- 3 Q. Focusing on that counterfactual, and thinking
4 specifically on the post-IFR world, what financial
5 outcomes would you expect for acquirers and for issuers
6 in the counterfactual?
- 7 A. I would expect, I think as I have also covered in that
8 discussion that we had, that ultimately, the scheme
9 would decide to set the rates at the cap and uniformly
10 so. So you would get rates at the cap.
- 11 Q. On the same counterfactual, but thinking this time in
12 relation to inter-regional and commercial card MIFs,
13 what financial outcomes would you expect for acquirers
14 and for issuers?
- 15 A. I would expect that the scheme at the apex will take
16 into account the same competitive dynamics in this
17 counterfactual as it does in the factual, so therefore
18 I would expect the interchange fee rate for commercial
19 and inter-regional to be roughly ending up in the same
20 place where they are today.
- 21 MS TOLANEY: That is all I had for Dr Niels.
- 22 THE PRESIDENT: Thank you very much.
- 23 MS TOLANEY: May I just, in case Professor Waterson wants to
24 see it while Dr Niels is in the box, just mention that
25 Professor Waterson asked a question about whether there

1 is evidence on whether benefits or rewards decreased
2 after the caps came in, and this is addressed, I accept,
3 in a limited fashion, in Ms Devine's witness statement
4 at paragraph 16 and the reference to that is
5 {RC-F3/3/5}, and Mr Dryden also accepted that reduction
6 in MIFs would result in cardholder benefits and that was
7 at {Day13/15:1}. I do not know if you wanted to look at
8 that with the witness, I just wanted to mention it.

9 PROFESSOR WATERSON: Thank you.

10 THE PRESIDENT: Thank you very much, Ms Tolaney. Dr Niels,
11 we are very much obliged to you for your time. Thank
12 you for your evidence. You are released from the
13 witness box with our thanks, thank you very much.

14 A. Thank you.

15 THE PRESIDENT: Probably time for a shorthand writer break
16 and then we will resume with Mr Holt. So we will rise
17 for 10 minutes.

18 (3.18 pm)

19 (A short break)

20 (3.30 pm)

21 MR DEREK HOLT (called)

22 THE PRESIDENT: Mr Holt, good afternoon. You have already
23 been affirmed, so we will not go through that again.
24 You have some water, I hope. You have a screen.
25 I assume you have heard my usual spiel about if you want

1 to see other pages.

2 I shall hand you over to Mr Kennelly, who has some
3 questions for you.

4 Examination-in-chief by MR KENNELLY

5 MR KENNELLY: Thank you, sir.

6 Mr Holt, you have your eighth and ninth reports in
7 front of you.

8 A. Yes.

9 Q. I will ask you to go to {RC-H4/3/1}, should be the first
10 page of your eighth expert report. Do you see that?

11 A. Yes.

12 Q. Could you go, please, to page {RC-H4/3/227}. Do you see
13 your expert declaration and statement of truth?

14 A. I do.

15 Q. Your signature over the page at 228?

16 A. It is taking a little bit of time to switch to the next
17 page.

18 Q. Page 228?

19 A. Yes, now it is there, thank you.

20 Q. You are content to stand by your declaration?

21 A. Yes.

22 Q. Very good. Now your ninth report, {RC-H4/4/1}, is
23 that --

24 A. Yes.

25 MR KENNELLY: Is that your ninth report?

1 A. That is, yes.

2 Q. Could you go, please, to page {RC-H4/4/161}, do you see
3 your expert declaration?

4 A. I do.

5 Q. Over the page, please, your signature at 162?
6 {RC-H4/4/162}

7 A. Yes.

8 Q. You are content to stand by this declaration of
9 statement of truth also?

10 A. I am, yes.

11 MR KENNELLY: Thank you. Mr Beal will have some questions
12 for you.

13 Cross-examination by MR BEAL

14 MR BEAL: Good afternoon. Can I give the usual warning.
15 First, I am not going to be addressing those passages in
16 your reports where you may have inadvertently slipped
17 into legal submissions, so I am just taking that off the
18 table. Secondly, where you have relied on witness
19 evidence and that evidence is either not correct or is
20 otherwise rejected, then presumably, your opinion could
21 change.

22 A. Yes, it could change, if the evidence changes.

23 Q. Third, given time constraints, I am not going to put
24 every point in issue to you because we would be here
25 until Christmas, but I will put the core and salient

- 1 points of my case to you so you can respond.
- 2 A. Thank you.
- 3 Q. Your eighth report, please, page 15, paragraph 11,
4 {RC-H4/3/15}
- 5 A. Yes.
- 6 Q. You recognise there, do you not, that a four-party
7 payment scheme cannot directly set prices on each side
8 of the market?
- 9 A. That is right.
- 10 Q. Would you accept that it would be pretty unusual, would
11 it not, from a competition perspective, for a third
12 party to set the prices for an unrelated party's
13 contract with an unrelated counterparty?
- 14 A. Well, I think there might be situations where that could
15 hold, but you would have to look at the particular
16 context.
- 17 Q. If you have a standard contract negotiation between
18 party A and party B, unless they specifically direct
19 that party C will set a price for them, it is quite
20 unusual, is it not, for party A and party B to have
21 a negotiated settlement of price where party C is
22 involved?
- 23 A. Well, I think if you are talking about an end-user
24 price, then that would be the case. I think if you are
25 talking about a priced transfer, then it might be

1 different.

2 Q. But, of course, that is precisely what the MIF does
3 here, is it not? It sets a floor for the price of the
4 MSC, which is otherwise to be negotiated between the
5 acquirer and the merchant?

6 A. Well, it certainly has an impact in terms of affecting
7 the relative pricing across the two sides of a two-sided
8 market, so I certainly agree with that.

9 Q. It means, does it not, that the MSC is not freely
10 negotiated between the acquirer and the merchant because
11 such a significant component of that price has already
12 been dictated by the scheme?

13 A. Well, I think in that context there are some specific
14 issues that need to be taken into account. It may be
15 a legal issue, as I described in my report, but when
16 thinking about the impact of the MIF on the MSC, there
17 is an issue as to what factors you take into account
18 and, therefore, it is not so simple to say that there is
19 a -- either a price floor, for example, or at least
20 a pass on of the MSC as a result of the MIF; it depends
21 on the context, as I found in the inter-regional and
22 commercial cases.

23 Q. I thought it was common ground that for IC plus plus
24 pricing, the MIF very much did set a core component of
25 the price payable for the MSC?

- 1 A. That is -- that is agreed, I think, amongst all the
2 experts and myself, yes.
- 3 Q. That, at the very least, is sufficient, is it not, to
4 make it appreciable, and prevalent indeed, in the
5 market, that the MIF is therefore a significant
6 determinant of the MSC price?
- 7 A. Well, that was not the view I reached. I noted that
8 whether appreciability and prevalence was sufficient was
9 a matter for the Tribunal. I did then go on to look at
10 other evidence that would be relevant to the price floor
11 effect and indeed found that it was likely that the
12 price floor would be met in relation to each of
13 inter-regional and commercial.
- 14 Q. So we have heard time and after number, with Visa
15 witnesses and Mastercard witnesses alike, that the
16 entire point of having the MIF is to transfer revenue
17 from merchants via acquirers to the issuing banks?
- 18 A. Well, yes, I mean that -- that is a way to describe it.
19 I think I would describe it more generally as
20 a mechanism in order to enable the four-party scheme to
21 compete in a payment scheme market, again in competition
22 with other schemes, including both four-party and
23 three-party, and given that the underlying conditions in
24 the competitive dynamics, both from the cardholder
25 perspective and the merchant perspective, which I could

1 go into in a bit more detail, but I propose not to at
2 this stage, essentially dictate that you have a merchant
3 pays model and that is what the MIF is doing here, it is
4 enabling the four-party scheme to compete with the
5 others as well as solving some externalities within the
6 scheme.

7 Q. On your version of the world, the scheme is the benign
8 dictator that we have heard Dr Niels describe, but how
9 on earth are they meant to be approaching this on an
10 efficiency maximising basis?

11 A. Well, I think what they are aiming to do, in my view, is
12 to compete in the market as the market conditions
13 present themselves.

14 Q. Yes, so they are profit maximising businesses in their
15 own right, are they not, the schemes?

16 A. Yes, I think that is fair.

17 Q. Indeed, we know, do we not, that Professor Tirole said
18 that the schemes would not themselves be setting an
19 efficiency maximising approach to pricing because that
20 was, in a sense, none of their business, that was not
21 what they were aiming to do.

22 A. Well, I agree that the -- that the objective of the
23 scheme may not be to maximise social welfare but that is
24 the case for essentially any company in the -- in the
25 economy. No company is attempting to maximise social

1 welfare. What they are trying to do is to compete
2 within a market and to -- to optimise their own
3 competitive position.

4 Q. I agree. That is usually why businesses are only
5 interested in the price they are receiving from their
6 direct counterparty, is it not, because they are simply
7 negotiating a deal between the two of them -- each of
8 them are hoping to make as good a deal as possible?

9 A. Well, I think -- so I am not sure I understand the
10 premise of the question. I think, if the point is that
11 any participant in the economy or any company would be
12 seeking to maximise its position when -- when achieving
13 negotiations or setting prices, I think that is
14 generally what I would say a profit-maximising entity
15 can do, and indeed should be doing, if it is properly
16 competing.

17 Q. Yes. At an aggregated level, that leads to the supply
18 and demand curves that are the bedrock of
19 microeconomics?

20 A. Yes, I think it is fair to say that the -- the aggregate
21 economy is the sum of all the individual participants
22 within the economy.

23 Q. Now, in terms of the mechanism for setting the MIFs, let
24 us see if we can agree some propositions. Firstly,
25 Visa's scheme rules require a MIF to be paid by the

- 1 acquirer to the issuer, correct?
- 2 A. Yes, that is right.
- 3 Q. That sum of money is deducted by the issuer from funds
4 which the issuer transfers to the acquirer?
- 5 A. Yes, although I understand in the concurrent session
6 there was some debate as to the precise transfer
7 mechanism of the funds, as to whether it would be
8 transferred up the scheme and then onwards to the
9 acquirer or directly. But in the end, I said that that
10 economically did not really impact the net outcome.
- 11 Q. If funds were going specifically into Visa on a daily
12 basis, it would be clearing and settling vast sums of
13 money, would it not, in its own bank accounts, which
14 would create serious systemic risk?
- 15 A. I think there are two premises there. First, is Visa
16 clearing and settling funds in its own account? That --
17 that is actually a somewhat more complex question than
18 it at first appears. Clearly, the Visa scheme is
19 a large scheme and, therefore, a large amount of
20 transactions --
- 21 Q. I am sorry (Overspeaking) something factual to you
22 because I am still waiting for clarification from Visa.
- 23 A. Yes.
- 24 Q. I asked for that before I started cross-examining you.
25 It has not arrived.

- 1 A. Yes.
- 2 Q. So I just have to assume that, for the sake of argument,
3 it does not matter for present purposes whether or not
4 funds go into Visa or not or whether it is done by
5 authorisation codes.
- 6 A. I think one important point that came up in the
7 concurrent session is the competition in processing
8 functionality. So it is not necessarily the case that,
9 even if the Visa scheme is used for processing for
10 a transaction, that Visa would be the entity carrying
11 out the clearing settlement mechanism.
- 12 Q. That is a fair point, because the IFR certainly
13 encouraged, did it not, the separation of physical
14 processing --
- 15 A. Yes, that is my understanding.
- 16 Q. (Overspeaking) settlement of the scheme itself?
- 17 A. Yes.
- 18 Q. Now, the acquirer has no option but to take the money it
19 is sent, has it?
- 20 A. Well, obviously, the scheme determines a rule that is
21 essentially in the interests of the overall scheme in
22 terms of encouraging participation on both sides. So if
23 there is a rule that determines what is the settlement
24 basis, then I agree, that is essentially the mechanism
25 that would apply both to issuers and to acquirers.

1 Q. The acquirer has got no option of going back to the
2 issuer and saying, "You have taken off too much. Please
3 can I have some more."

4 A. I think the -- that is not quite correct. The -- as
5 I think as has been well aired by now, the MIF is
6 a default settlement rule. It does allow for the
7 potential for bilateral negotiations, so in other words,
8 it is possible for issuers and acquirers to agree
9 bilateral variations relative to the MIF but, based on
10 the economic principles essentially of free riding,
11 there is no incentive for either issuers or acquirers,
12 in my view, to deviate from it. So in practice, yes,
13 that would be the likely outcome.

14 Q. You are not aware of any examples of bilateral
15 negotiation in the UK, are you?

16 A. No.

17 Q. The merchants got no realistic option to pay a lower
18 sum, therefore, because, on an IC plus plus contract,
19 the MIF fee is being washed straight through to the sum
20 that the merchant has to pay?

21 A. Yes, I think that is the mechanism of an IC plus plus
22 contract. Obviously, these questions are within scheme
23 questions and one of the key issues -- I am sure we will
24 come on to it -- is the broader competitive implications
25 of all this.

1 Q. The rate of the MIF is set by Visa itself, is it not?

2 A. Yes.

3 Q. Now, post IFR, the rate of the domestic MIF is still set
4 by Visa, is that right?

5 A. Post IFR at the moment.

6 Q. Yes.

7 A. In the factual, yes, my understanding is it is still
8 setting MIFs, but subject to the IFR cap.

9 Q. The inter-regional MIF, from December 2015 until
10 1 January 2021, was still set by Visa.

11 A. I am afraid I do not have the transcript coming up and
12 some of these questions have quite specific details as
13 to --

14 Q. Dates.

15 A. Dates and things like that, so I can now see it, so let
16 me just -- sorry.

17 Q. The magic of the date, if it helps, Mr Holt,
18 is December 2015 is when the IFR came into effect.

19 A. Yes.

20 Q. 1 January 2021 is Brexit.

21 A. Okay. So what you are talking about is that the IFR
22 applies at least for intra-EEA.

23 Q. Yes.

24 A. Obviously, domestic transactions still continue to
25 apply --

- 1 Q. Yes.
- 2 A. -- at the IFR cap level, yes.
- 3 Q. The point I was actually asking was, dealing
4 specifically with the intra-EEA MIF, if you want to
5 characterise it that way, that was still set by Visa
6 over that time period?
- 7 A. Well, it was, but it was subject to the IFR.
- 8 Q. Now, with Brexit in the UK, the EEA MIF has become an
9 inter-regional MIF, if not by name, then de facto;
10 correct?
- 11 A. Yes, I understand that those types of transactions have
12 been recategorised and, therefore, an inter-regional --
13 or, sorry, I think it is called an EEA or, sorry,
14 a non-EEA intra-regional MIF now applies.
- 15 Q. The inter-regional MIF is set by Visa for all foreign
16 transactions?
- 17 A. The inter-regional MIF is indeed set by Visa for foreign
18 transactions where there is a cross-border across Visa
19 regions, so it is not quite accurate, I think, to say it
20 applies to all foreign transactions, it applies to
21 transactions which take place across different regions.
- 22 Q. The intra-EEA MIF is still applicable in Ireland, is
23 that right?
- 24 A. I would --
- 25 Q. Intra-EEA MIF?

1 A. (Overspeaking) I would expect is the case for -- for
2 those type -- obviously, there is a particular set of
3 transactions to which that applies. But, yes, I would
4 expect that is correct.

5 Q. That too is set by Visa; correct?

6 A. Yes, I think so.

7 Q. The commercial card MIF is set by Visa; correct?

8 A. Yes.

9 Q. The essential mechanics of the MIF are the same in each
10 case, are they not, in terms of a sum of money being
11 paid by the acquirer to the issuer?

12 A. I mean, I think that is fair, the essential mechanics in
13 terms of how the -- the MIF is applied seems likely to
14 be similar, subject to the point about processing,
15 because different degrees of processing competition
16 might affect different transactions differently.

17 I would say, however, that a number of further factors
18 need to be taken into account when comparing these
19 different MIFs, both in terms of the competitive
20 dynamics of those types of transactions and the cost.

21 Q. Just trying to deal with the basic mechanics of price
22 setting at the moment.

23 A. I understand.

24 Q. On an IC plus plus contract, you would accept that each
25 of these MIFs, regardless of product type or category,

- 1 has to be paid by the merchant?
- 2 A. Yes. I think -- certainly for an IC plus plus contract,
3 then all -- yes, that would be correct.
- 4 Q. The merchant has no option but to pay those MIFs because
5 the MIF, from its perspective, is non-negotiable?
- 6 A. Yes, I think the -- essentially what the MIF is is
7 a default. I mentioned earlier that there is scope for,
8 at least in principle, bilateral negotiations but that
9 tends not to apply.
- 10 Q. Let us assume every time I say it is non-negotiable, we
11 are accepting there is this theoretical possibility of
12 a bilateral negotiation that overrides it but nobody is
13 aware of any in the UK.
- 14 A. Sure. Sure. Sure.
- 15 Q. Of course, you would accept, would you not, that for the
16 pre-IFR domestic and intra-EEA MIF, there have been
17 findings that they constitute an infringement of
18 Competition Law, by the EU Commission, firstly?
- 19 A. Yes, I understand that is correct.
- 20 Q. The EU courts?
- 21 A. Yes.
- 22 Q. This Tribunal?
- 23 A. Yes.
- 24 Q. The Court of Appeal?
- 25 A. Yes.

- 1 Q. The Supreme Court?
- 2 A. Yes.
- 3 Q. Indeed, even if we look at the Visa exemption decision,
4 which I think your report is quite fond of, if we look
5 at that at recital (71), that is {RC-J5/5/13}.
- 6 A. Yes, I can see the page. Yes.
- 7 Q. Recital (71). It says:
- 8 "As concerns the acquiring market, even though the
9 MIF may be not the only component of the MSC, it is by
10 far the main cost component, representing according to
11 Euro Commerce about 80% of the MSC. The MIF therefore
12 effectively imposes a floor ... Moreover, the economic
13 impact ... is very substantial."
- 14 So that was recognising then, also at recital (73),
15 that, on that reasoning, the MIF in the Visa system
16 amounts to an appreciable restriction of competition
17 within the meaning of what was then Article 81.1 of the
18 EC Treaty?
- 19 A. Yes, I can see that is what the Commission says there.
- 20 Q. So they were recognising that this floor-producing
21 effect and the non-negotiable aspect of the MIF feeding
22 into the MSC gave rise to an appreciable restriction of
23 competition for EU law purposes?
- 24 A. Yes -- sorry, this is intra-regional.
- 25 Q. Yes, I accept that.

- 1 A. Yes.
- 2 Q. The market we should be focusing on here, for the
3 restriction of competition analysis, is the market for
4 acquiring services for payments by card, correct?
- 5 A. Yes, but I think it is also important to take into
6 account the interaction of that market with other
7 relevant markets.
- 8 Q. Of course, the point of having a focal point in the
9 market is you can work out what the restriction of
10 competition is, and here the restriction of competition
11 that we are analysing is the one that produces an effect
12 on price in the relevant market, is that right?
- 13 A. Yes, I think that is fair. Obviously often you would
14 look at a range of potential outcomes in a market, but
15 that price would be one.
- 16 Q. We are focusing on price, are we not, because it is the
17 impact of the MIF on the MSC --
- 18 A. Yes.
- 19 Q. -- that is perceived or, we say, actual restriction of
20 competition?
- 21 A. Yes. These are essentially the second and the sixth
22 tests of the Supreme Court, which --
- 23 Q. The MSC is the price which merchants pay, which indeed
24 is the whole subject of this Competition Law claim.
- 25 A. Yes, I understand that.

- 1 Q. While, for example, at page 76 of your eighth report,
2 paragraph 213, you identify what may be a distinct
3 issuing market for commercial cards, you would accept
4 that that has no direct impact on the market for
5 offering acquiring services? {RC-H4/3/76}
- 6 A. I am sorry, did you say page 76?
- 7 Q. No -- page 76, paragraph 213.
- 8 A. Okay, yes, I have got it.
- 9 Q. You are defining there, on the issuing side of the
10 market, a potential different sector for commercial
11 cards; is that right?
- 12 A. Yes, I -- I was examining whether it would be helpful to
13 essentially go beyond the -- the market definitions that
14 the Commission had identified in its 2007 decision.
15 Overall, I agreed with the other experts, ultimately
16 that that framework was appropriate and essentially all
17 of the relevant analysis that needs to be carried out
18 for the purpose of these proceedings can be adopted
19 within that framework. But I did identify some
20 potential nuances as to, you know, where competitive
21 dynamics might be somewhat different.
- 22 Q. Paragraph 221, page 77, {RC-H4/3/77}, you say almost all
23 merchants take services from a single acquirer. We have
24 seen some examples in our case, have we not, of large
25 companies having multiple acquirers?

- 1 A. I think we have seen --
- 2 Q. Jet2, for example?
- 3 A. -- some examples of that. I did not get a sense that
4 that was prevalent or common.
- 5 Q. But what all of the acquirers have in common is that
6 they do not break out, from the acquiring side, separate
7 offerings for commercial cards versus consumer debit and
8 credit cards. They offer the spread of both commercial
9 cards and consumer cards when they are offering
10 acquiring services to a merchant?
- 11 A. Well, I think that reflects that acquirers, as a general
12 economic proposition, want to be able to offer the best
13 services that they can to their merchants, they are
14 obviously competing with other acquirers, and I think,
15 yes, so that would include --
- 16 Q. I am not asking about the motivation for it. I am just
17 trying to get the sense of when you say potentially
18 there is a different side of the issuing market that is
19 either a sub sector or a sector in its own right, that
20 does not actually directly impact on the acquiring side
21 because the acquiring side treats all of these cards as
22 a bundle and offers services across the bundle.
- 23 A. Well, I think there is a number of nuances there. It
24 may well be that the contract might specify the ability
25 to process both consumer and commercial cards, I would

1 agree with that. There is very few merchants who decide
2 to accept one but not the other and, therefore, the
3 contract would be separated out in that way, but that is
4 a very small number.

5 The rates might differ, so within the contract there
6 might be differentiation in terms of what the MSCs are.

7 Q. I mean, there is, is there not, because (Overspeaking)
8 different, the underlying MIF is different, the
9 underlying costs therefore change and therefore the
10 price of the MSC changes?

11 A. They may do, they may do, in some cases, not all. But
12 I think, if your suggestion is that, as a result of
13 that, there is no important distinction between consumer
14 and commercial acquiring services, then I would
15 disagree.

16 Q. Could we look, please, in {RC-J5/36/30}, paragraph 103
17 of the Supreme Court decision. So when the
18 Supreme Court comes to look at restriction on
19 competition, they compare the real world in which the
20 MIF sets a minimum or reservation price for the MSC and
21 the counterfactual world in which there is no MIF but
22 settlement at par. It says:

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

1 In the latter the whole of the MSC is open to
2 competitive bargaining."

3 So there what we see is the Supreme Court's focus
4 was on the extent to which the price in the acquiring
5 market was open to competitive bargaining?

6 A. Yes, and again this sort of applies to domestic
7 intra-EEA in the pre-IFR period --

8 Q. Obviously, the thrust of my cross-examination, as you
9 can anticipate, will be to what extent can that
10 reasoning be read across to the situations we are now
11 looking at or to what extent can it not be.

12 A. Sure.

13 Q. Our case, obviously, is that it can be read across and
14 your case is that it cannot.

15 A. Yes.

16 Q. At page 17, please, paragraph 17 of your eighth
17 report --

18 A. Sorry, just to clarify. Obviously, it is not my case.
19 But also I have recognised where some of the economic
20 analysis does depend on a legal threshold, and I have
21 tried to be clear where that applies.

22 Q. Go back to my first caveat, I am going to try and avoid
23 putting legal propositions to you.

24 A. Sure.

25 Q. There is a fine line (Overspeaking).

1 A. I just wanted to clarify that I have looked at the
2 economic analysis under different scenarios.

3 Q. Page 17, paragraph 17, {RC-H4/3/17}, you address the
4 question of market power, is that right?

5 A. Yes.

6 Q. You have now seen the witness evidence from the SH
7 Claimants. Many of them stated that, as a general
8 proposition, Visa and Mastercard payment cards are
9 must-take cards for merchants in the UK and Ireland;
10 would you accept that?

11 A. Yes, I think it depends essentially on which payment
12 cards we are talking about. I think that case has
13 greater merit in relation to consumer cards than perhaps
14 it does to commercial. A further point that I have
15 noted in the reports is that, at least in respect of
16 commercial, for example, you need to think about not
17 only whether they are actually accepting the cards but
18 the relative costs of those cards compared to
19 alternatives and, furthermore, you need to consider
20 market power, in my view, in the proper context of this
21 market being a two-sided market, rather than simply
22 focusing on the acquiring side.

23 An illustration of why that is important is that
24 failing to do that would lead to what I would consider
25 to be an odd outcome, whereby you are, for example,

1 defining Visa's having market power in commercial cards,
2 for example, in part due to the fact that it is able to
3 set a positive MIF, when, if my analysis is correct, the
4 removal of that MIF in the counterfactual would actually
5 lead to merchants overall paying a higher MSC. So
6 I would suggest that characterising Visa as having the
7 position of market power in that context, due to the
8 MIFs, would lead to a very inconsistent outcome, once
9 you take into account the two sides of the market.

10 Q. Just on the facts, a large number -- well, the larger
11 merchants that we have evidence from took the same view
12 on the must take nature of a card for commercial cards,
13 did they not?

14 A. Sorry, can we get back to the transcript, if possible?
15 But, yes, I am sure, if the point is that merchants are
16 saying that they want to accept and do accept Visa and
17 Mastercard, then, obviously, I accept that, that is
18 clear.

19 Q. Not dealing specifically with commercial cards but with
20 Visa and Mastercard cards more generally, it has been
21 the consistent approach of the regulators that these are
22 indeed must-take cards and that gives rise to the
23 merchant predicament that we have heard Mr Dryden
24 explain.

25 A. Well, I am sorry but that sentence seems to say not

1 dealing with commercial cards but then says these cards
2 are must-take cards, so --

3 Q. I am trying to avoid the point you take, which obviously
4 we do not agree with, that commercial cards are not
5 must-take cards. I do not know whether that is your
6 point or whether you are recognising it might not be
7 a must-take card for certain merchants. Perhaps we
8 should clarify the position.

9 A. Well, no, I think I have not sort of commented in the
10 sense of individual merchants, I have looked at it as
11 a property of the commercial payment card as a whole.

12 Q. How does that have meaning if it is an abstract
13 proposition? I mean, obviously, a corporate card is not
14 going to be a must-take card for a corner shop
15 newsagent, is it?

16 A. Perhaps not, perhaps not.

17 Q. But for large merchants, who want to have a throughput
18 of customers in a large store like Marks and Spencer,
19 you have a very different scenario?

20 A. I agree that large corporates who expect to have a lot
21 of commercial customers would -- would be very likely to
22 accept commercial cards, and indeed that is what the
23 evidence suggests, that even post the IFR, when the HACR
24 ceased to apply to commercial cards, that acceptance
25 remained high. So I am certainly not disputing that.

1 What I am saying is that, in a context whereby the costs
2 of alternatives are high and the consequences, in my
3 view, of removing the MIFs would be to lead them to pay
4 higher costs associated with those alternatives, it is
5 odd to me to say that is a situation of strong market
6 power.

7 Q. When you say the cost of alternatives are high, what are
8 you talking about? Which cards?

9 A. Amex is an example.

10 Q. No, no, which MIFs and which cards?

11 A. I am talking about commercial cards at this point.

12 Q. Right, so as a general proposition, you are not talking
13 about, for example, comparing consumer debit and credit
14 with the cost of cash?

15 A. No, I was not talking about those. Obviously, the focus
16 of these proceedings is on (Overspeaking).

17 Q. My questions to you at this stage are not focused
18 specifically on commercial cards or commercial MIFs, if
19 that helps. I am trying to frame the more general
20 background questions which we have raised, so if I ask
21 you a question, the immediate answer is not going to be
22 commercial card-specific, if that makes sense.

23 A. Okay.

24 Q. You recognise, do you not, that Visa and Mastercard have
25 sustained very high shares in the payment card market

- 1 for a prolonged period of time?
- 2 A. Yes.
- 3 Q. Are you aware, for example, of the argument that the
4 schemes have run, that the MIF is to be equated with an
5 excise tax and, therefore, competition takes place on
6 the remainder of the price charged by acquirers?
- 7 A. Yes, I am aware of that argument.
- 8 Q. You are aware, of course, it has been rejected? We went
9 through that with Dr Niels yesterday.
- 10 A. Sure, I think -- I think I actually have some sympathy
11 with the -- with the nature of that argument being that
12 what a four-party scheme is aiming to do is to optimise
13 itself but also to encourage competition on each of the
14 sides, so having good competition within acquiring can
15 be a positive for the scheme --
- 16 Q. So you are happy --
- 17 A. The same can be for issuing side.
- 18 Q. Sorry. You are happy to equate the imposition of a MIF
19 with the imposition of an excise duty; correct?
- 20 A. I have not said that, no. That has not been part of my
21 reports in these proceedings. I think I can recognise,
22 of course, that acquiring competition can very well take
23 place on a number of dimensions, that's the thing --
- 24 Q. The nub of this excise duty/excise tax argument is that
25 it is a common cost that all acquirers must bear and,

1 therefore, it does not have any competitive effect
2 because everyone bears it on a level basis, correct? If
3 I understand the argument.

4 A. Yes. Just to sort of reiterate the position, I am not
5 relying on this particular argument for my findings in
6 any of my analysis.

7 Q. But it shows, does it not, that the MIF is
8 a paradigmatic exercise of power, because nobody has the
9 power to impose a tax other than the state?

10 A. Well, I agree that only the state can impose a tax.
11 I do not think anyone was suggesting that Visa is the
12 state and is imposing a tax. I think the nature of the
13 argument, so far as it runs, is that the economic
14 effects can be described in a similar way to a tax, that
15 is all.

16 Q. But the economic effects you are describing is that,
17 just like a taxpayer, the MIF has to be paid come what
18 may, regardless of whether or not the merchant would
19 wish to pay it?

20 A. Well, again, I -- I accept that that is the principle of
21 a default MIF which is applying. Obviously, that is
22 subject to acceptance, so obviously -- different
23 merchants can obviously choose to participate in the
24 scheme or not.

25 Q. Yes, I mean (Overspeaking).

1 A. If they are, then they are signing up to be members of
2 the scheme across a whole series of rules and
3 contractual obligations. But the default MIFs are one
4 part of that matrix.

5 Q. Even a natural monopolist can set a price so high that
6 the consumer says no, can they not?

7 A. Yes, I think that is a matter of -- that is obviously
8 true as a matter of principle.

9 Q. Page 27, please, paragraph 109. Sorry, this is your
10 second report, I beg your pardon. {RC-H4/4/27}

11 A. Okay.

12 Q. I am going to call them first and second, rather than
13 eight and nine --

14 A. Please do.

15 Q. This is nine.

16 A. I sort of wish I had started renumbering it.

17 Q. Ninth report. It shows your longevity, which is great.
18 Page 27, paragraph 109, of your ninth report.

19 A. Sorry which paragraph, please?

20 Q. 109, at the bottom of the page.

21 A. Yes.

22 Q. You are looking at general developments in the market
23 and you say:

24 "For example, the fact that card transactions are
25 increasingly shifting to a CNP environment and that

1 there exist a broad range of alternative payment ...
2 show that the payments market is dynamic and evolving."

3 A. Yes, so, in my first report, I set out quite
4 a significant analysis of developments in the payment
5 card schemes within the UK and Ireland, how the MIFs had
6 evolved, how transaction shares evolved and so on. One
7 of the fact points that struck me was the relative
8 increase in the CNP part of the market, yes.

9 Q. Could we look at {RC-J5/51/50}. This is the
10 December 2023 interim report of the PSR. We see, do we
11 not, at paragraph 4.104, that:

12 "The UK acquirers and one merchant representative
13 body, the BRC, that responded said that UK merchants
14 must be able to accept Mastercard- and Visa-branded
15 cards for remote transactions, including with EEA
16 consumers. They said there are no merchants that accept
17 only one of the two."

18 We then see at 4.105:

19 "Some respondents said they also accept other
20 payment methods, but Mastercard and Visa are the payment
21 methods that consumers most commonly use and must be
22 accepted to avoid 'conversion losses'. Other payment
23 methods are much less commonly used and in some cases
24 are offered mainly to expand consumer choice, but
25 consumers are less aware of them or less likely to use

1 them."

2 The conclusion that is then reached at 4.106 is that
3 there are few viable alternatives to Mastercard and Visa
4 for retail e-commerce with EEA and EEA consumers who
5 want to make purchases at UK merchants. Can you see
6 that?

7 A. Yes, I think what this is saying is that merchants who
8 want to accept e-commerce transactions essentially
9 accept both Mastercard and Visa. Of course, that does
10 not mean that they do not accept a number of other
11 schemes. So I agree that there is a high acceptance
12 rate, of course, for Visa and Mastercard.

13 Q. Let us be clear, your ninth report is trying to suggest
14 that there is an evolving feature of the market, where
15 card not present transactions are increasingly capable
16 of being dealt with through alternative payment schemes.
17 What I am putting to you is that the PSR has looked at
18 this very recently and has concluded we are not yet at
19 a stage where anything other than Visa or Mastercard
20 would be a sensible way of running a retail e-commerce
21 business.

22 A. That is not what it is saying at all. It is not saying
23 that no other payment method would be a sensible way of
24 running the retail business. It is saying that
25 Mastercard and Visa are important to accept but there is

1 an increasing number of other options as well. One of
2 the points I made in my -- I think it was the
3 first report was that, at least for e-commerce -- and
4 this is the part of the market that we are talking
5 about -- the share of payment cards is actually on the
6 decline. Both digital wallets and buy now/pay later
7 methods have grown very extensively in recent years and
8 now account, in many countries in Europe, for 20% plus
9 market share. So I think that is an illustration of an
10 evolving dynamic payment market in e-commerce, and that
11 is despite the fact that those payment methods are more
12 costly to merchants than Visa and Mastercard.

13 I also noted at the same point that one of the
14 reasons they are able to grow so quickly is that they
15 have been very adept at using the two-sided market
16 pricing structure principles to develop very attractive
17 propositions for consumers, Klarna being a very good
18 example, where it provides interest free credit, the
19 ability to spread payments over time. Of course, the
20 reason it is able to do that is that it is adopting the
21 same principles of essentially a merchant-based model
22 that the four-party schemes are also using.

23 Q. If we look over the next page, page 51, {RC-J5/51/51},
24 the PSR is, at 4.108 and 4.109, reaching an entirely
25 different conclusion from the one that you have just

1 implied should be reached. So for PayPal, what the PSR
2 says, in terms, last sentence of 4.108:

3 "... PayPal represents a weak alternative to
4 Mastercard and Visa."

5 Next paragraph, 4.109:

6 "Klarna does not currently represent an alternative
7 to Mastercard and Visa because, for cross-border
8 transactions, it only facilitates card-based
9 transactions."

10 So whilst you may be, in the future, proven to be
11 correct about the competitive constraint that is posed
12 by alternative payments, like Saint Augustine's
13 chastity, we are not there yet; correct?

14 A. Well, no, I think I disagree with that. What the PSR is
15 looking at here is the case for non-acceptance of Visa
16 and Mastercard on the basis that other payment methods
17 are now so prevalent that you can accept those instead
18 of Visa and Mastercard, and I think it is, quite
19 rightly, finding that that is not the case yet. My --
20 my point that I just described a minute ago, which was
21 in my report, is not that these payment methods can take
22 the sole place, from an acceptance perspective, for
23 e-commerce. My point is that those are increasingly
24 important competitors and they are taking increasing
25 shares of transactions.

- 1 Q. Is it your position that neither Visa nor Mastercard
2 have considerable market power?
- 3 A. Well, they may do in certain segments. I think my focus
4 here has been on the commercial and inter-regional
5 segments, where I think that there are alternatives
6 which are prevalent and which, in the case of the
7 counterfactual that we are talking about, significant
8 switching would occur.
- 9 Q. In terms of the market for card acquiring services,
10 please could we look at {RC-J6/3/82}. This is an
11 earlier PSR report from November 2021.
- 12 A. Yes.
- 13 Q. It looks specifically at alternatives to Mastercard and
14 Visa.
- 15 A. I see that.
- 16 Q. Then if we go through to the conclusion, 1.352,
17 {RC-J6/3/83}:
18 "In summary, we have not seen evidence that
19 currently there are effective substitutes to Mastercard
20 and Visa cards for merchants, which would exert
21 a competitive constraint on the supply of card-acquiring
22 services for these cards."
- 23 A. Well, again, I think my point previously applies here;
24 that these other payment methods are not substituting
25 for Visa and Mastercard from an acceptance perspective.

1 What they are clearly doing, however, is substituting
2 from a transaction perspective, which I think from
3 a switching perspective is the more important
4 consideration.

5 Q. At page 27 of your eighth report, paragraph 77 onwards,
6 you give an introduction to two-sided markets. There
7 are obviously different aspects of two-sided markets,
8 are there not? There is a market which is an
9 intermediary between a purchaser and a seller, a buyer
10 and a seller?

11 A. Yes.

12 Q. Then we have a payment system which does not actually
13 act as an intermediary between the buyer and the seller,
14 does it?

15 A. Well, if you mean it is not sort of a commerce platform,
16 such as Amazon, which is creating a -- a place for
17 buyers and sellers to interact, perhaps I agree,
18 although I am not sure I agree with that actually
19 because, obviously, a payment network is creating
20 a platform for interaction between buyers and sellers
21 and the interaction is at the point of consumption and
22 payment. So I am not -- I might be misunderstanding
23 your point.

24 Q. I think you are, because you would not say, for example,
25 a paper voucher system of gift vouchers brings

1 a specific buyer to a specific seller, would you? It
2 facilitates a payment but it does not have any
3 introductory or intermediary capacity in the actual
4 underlying purchase of goods or services.

5 A. No, but I think that understates the role of the
6 building out of the acceptance network and the
7 importance for cardholders who are taking cards by
8 issuers to --

9 Q. You say cash is a crucial way of introducing a buyer to
10 a seller?

11 A. Well, certainly -- well, it -- it -- perhaps not, but it
12 is obviously facilitating the interaction; in other
13 words, absent other payment methods, if cash were
14 hypothetically the only payment method, then its
15 existence obviously does create the basis for the -- the
16 transaction.

17 Q. So your proposition is that a buyer would not sell goods
18 to a customer unless the buyer was paid, which I think
19 we can all accept; correct?

20 A. I think a buyer would probably -- well, sorry, a buyer
21 is buying goods.

22 Q. Sorry, the seller would not sell goods to a buyer unless
23 the seller was being paid.

24 A. I think that is probably a reasonable statement.

25 Q. Yes.

- 1 A. It would not last very long as a seller if it did
2 otherwise.
- 3 Q. No, and the method of payment, I mean subject to costs
4 and avoided costs, which we will come on to -- the
5 seller is going to be agnostic as to the form of
6 payment?
- 7 A. Well, that obviously is a proposition which
8 misunderstands, if that is your view, a lot of the basis
9 of payment methods and the payment schemes and this
10 case. Clearly, merchants will not be agnostic as to the
11 basis of payments. They may have transaction cost
12 savings associated with different payment methods. They
13 may also have perspectives on the sales implication of
14 acceptance.
- 15 Q. Well, I was trying to make it clear, other things being
16 equal in terms of avoided costs and the differential
17 costs of accepting a differential payment method, the
18 fact that the seller is being paid by the buyer is what
19 counts, correct? So the idea that the payment method is
20 determining the features of the underlying transaction
21 is nonsense, is it not?
- 22 A. Well, I think I disagree with that. I mean the payment
23 methods, of which there are plural, have a whole range
24 of different competitive features in terms of price,
25 quality, service, range, and those have direct

1 implications for card or consumer interests, cardholder
2 interests, as well as for merchants.

3 So I think, if your proposition is that, if you
4 assume all of that away, then, at the end of the day,
5 you just have a transaction, then, sure, but I think you
6 have assumed away all of the important aspects of what
7 makes competition and payment methods interesting.

8 Q. At various places in your expert reports, you suggest
9 that the scheme will need to balance two sides of the
10 platform, correct?

11 A. Sorry, can I get back to the transcript again, please?
12 Sorry, I do not mean to be pedantic.

13 Yes, I think I do say that one of the objectives of
14 the scheme is to achieve that sort of balance, yes.

15 Q. Are you aware that that argument has consistently been
16 rejected as a reason for concluding that the setting of
17 MIFs has no anti-competitive effect?

18 A. Well, I think it has -- to the extent that infringement
19 findings have been found for domestic and intra-EEA,
20 then clearly that particular argument has not been
21 sufficient to overcome a restriction effect. I would,
22 however, add that the IFR, the Commission's analysis
23 which underpins the application of the IFR very much
24 does recognise that there are externalities in the
25 payment system across the two sides and that a positive

1 MIF can indeed achieve that sort of effect.

2 Q. That is always considered, is it not, at the article
3 101(3) stage of the analysis?

4 A. I think the full analysis of the efficiencies is, in
5 a sense, by definition, what a 101(3) exercise would be.
6 That would take into account essentially all manner of
7 potential efficiencies, and indeed those are beyond the
8 remit of this trial and -- and potential efficiencies
9 that, you know, will -- could be taken into account are
10 not issues that I have addressed in this trial for my
11 expert reports.

12 Q. In your ninth report, page 26, paragraph 103, at the
13 bottom of that paragraph, you say Dr Frankel:
14 {RC-H4/4/26}

15 "... makes no reference to the fact that the 'Scheme
16 member banks' which receive MIFs (ie issuers) may pass
17 on such 'additional revenue' to cardholders as they
18 compete, both with each other and with other payment
19 instruments ..."

20 You have not conducted any detailed analysis, have
21 you, as to the extent to which the banks do in fact pass
22 those MIF revenues on to cardholders?

23 A. No, but I have -- well, there was some evidence, that
24 was actually just described by Ms Tolaney earlier, which
25 demonstrates that, where changes in MIFs have happened,

1 that has had consequence for issuers, so that, by
2 definition, suggests that a change in the MIF has had
3 a change in what issuers are setting in terms of prices
4 and terms and conditions for their payment cards.

5 Q. As an independent and impartial economist, who brings
6 rigour to the process, you would have detailed data to
7 back up that proposition, would you not?

8 A. Well, I think I have looked at all the evidence that
9 I could in the timeframe of these proceedings, in order
10 to look at the question, which, of course, is
11 a restriction question, and the way I have approached
12 that is to say is the evidence consistent with an
13 appreciable restriction in the form of MSCs being higher
14 as a result of the MIF than they would have been
15 otherwise. So I have looked at all the evidence
16 available, available to me in order to address that
17 question.

18 Q. But the scheme rules do not require the MIF funds that
19 transfer to the issuing banks to be used for any
20 particular purpose, do they?

21 A. Well, I think that proposition has been put many times
22 to many witnesses and the answer is always the same.
23 The answer, of course, is no, it does not require any
24 particular way in which issuers ought to use that source
25 of funds, but that is the whole basis of the four-party

1 model, which essentially outsources the product
2 development and competitive framework for payment cards
3 to -- to be issued to cardholders, to the issuer, so it
4 is not for the scheme to define the particular prices
5 and services that issuers want to offer. Obviously,
6 what they do need take into account is the balance of
7 contractual obligations that they face as a result of
8 being scheme participants --

9 Q. If you --

10 A. -- and revenue sources.

11 Q. If you wanted to price in such a way as to account for
12 a positive externality, you would need to focus on the
13 avoided costs of the merchant, would you not, that are
14 attributable to accepting payment cards?

15 A. Well, that is one way of looking at it.

16 Q. That is the way that Professor Tirole recommended.

17 A. It is, it is. It is the way that he has looked at it,
18 but there are a number of aspects to that. One is what
19 are the transaction cost savings in relation to
20 different payment methods, but at the same time, I think
21 what has been recognised -- first, I have not done
22 a 101(3) exercise, as you will appreciate, so I am sort
23 of speaking a little bit ahead now but --

24 Q. There is no detailed analysis for that purpose at all,
25 is there?

1 A. Well, it did not require it, is my view. The -- the
2 nature of the exercise I have conducted is to address --

3 Q. You are not suggesting here, are you, that you are
4 trying to do some sort of surrogate article 101(3)
5 analysis on the cheap? That would not be appropriate.

6 A. No, and in my view, determining the socially optimal
7 level of MIF which might be exemptable is not (a) what
8 I have tried to do, nor would it be appropriate to try
9 and do that at the restriction stage. That to me is not
10 the test that should be adopted for assessing the
11 appreciability of a potential restriction.

12 Q. In terms of two-sided platforms, you have given the
13 classic example of a free newspaper -- paragraph 82, for
14 your notes, of your eighth report -- but, of course,
15 a newspaper does not require advertisers to transfer
16 a substantial revenue stream to newsagents, does it?

17 A. Well, what -- what it does, though, is -- and this was
18 an illustration of some of the general principles of
19 two-sided markets, whereby the pricing structure may be
20 tilted across the two sides, so the illustration I was
21 giving was a very simple one, in -- in many newspaper
22 markets we have seen the emergence of free newspapers;
23 in other words, zero costs are being raised -- zero
24 revenues are being raised on the reader side. What that
25 obviously means is that the need to cover costs is

1 tilted towards the recovery from the advertiser side.

2 I have not -- I have not suggested that all aspects
3 of the newspaper example apply to payment cards, the
4 nature of the network externalities differ somewhat, but
5 it is a good illustration, I think, amongst many others
6 that I have cited, of how pricing structure can matter
7 in a two-sided market.

8 Q. Advertisers, in that example, can choose where to
9 advertise, can they not? It is not a choice made by
10 their customers.

11 A. Yes, but I think -- I cannot remember who made the
12 point, but advertisers might be under similar matters of
13 thinking in terms of how to access the consumers that
14 they need to reach, depending on the nature of
15 competition within the newspaper market on the other
16 side. So, for instance, if everybody systematically
17 got, you know, both papers that happen to exist in
18 a regional market every day on their doorstep, then they
19 might think about which of those two is more likely to
20 get readership and I might advertise in one. Whereas,
21 if half the population looked at one paper and half the
22 population looked at the other, they might be inclined
23 to advertise in both. So while I appreciate that those
24 are voluntary commercial decisions as to participating
25 in -- in advertising activity, it is a clear indication

1 that the competitive dynamics, about how the whole
2 market is operating, influences their decisions.

3 Q. Page 31, please.

4 THE PRESIDENT: Mr Holt, are you not in that example
5 identifying an instance where there is significant
6 market power?

7 A. Well, in -- in my view, no, because what you would be
8 focusing on then is a single-sided perspective on --
9 with respect of market power applied with respect to
10 advertisers, on the basis that advertisers wanted to
11 reach as many customers as they could. My point is that
12 if you are to -- if one of those newspapers were to
13 adopt a sub optimal pricing structure, let us say, you
14 know, they are going to start charging a pound
15 circulation drops off the floor, then that would have
16 major implications for that newspaper. So the fact that
17 they are able to attract advertising revenue depends on
18 them acting competitively across both sides of the
19 market including having lower in this case, even zero
20 prices on one side.

21 THE PRESIDENT: Yes, I see that if you are aiming for
22 readership that insufficiently values the content that
23 they do not want to pay a marginal amount, that is the
24 market you are in, but of course you do have a market
25 where you can charge for your product and you may have

1 a different advertiser profile or no advertising at all.
2 I just confess I thought the example you gave -- maybe
3 I was wrong -- at 214, 215 was making certain
4 assumptions about not merely charging at zero but going
5 further than that, but maybe I misunderstood.

6 A. When you say 214, 215, do you mean of my report?

7 THE PRESIDENT: Just now, the transcript now.

8 A. Oh, oh sorry. Well, what I was just describing there is
9 a way in which in a different two-sided market price
10 structure matters and the point being that just as
11 a single newspaper is trying to optimise its offering
12 across the two sides in this illustrative example by
13 setting a very low price on one side and gaining the
14 revenues on the other side, that if it were to for
15 whatever reason, regulatory reasons, or any other
16 reason, adopt a sub optimal approach, even then that
17 would have systematic implications for its success in
18 the market.

19 So it could try and reduce advertising costs and
20 raise readership costs, and you might say actually it
21 has achieved -- you know, there has been no exercise of
22 market power in the sense that it has not increased
23 prices overall, it just rebalanced them somewhat.

24 My point is that actually despite not having
25 increased its overall price, it may well have

1 essentially priced itself out of the market, just
2 because of competitive dynamics mean all those readers
3 might shift over to the free newspaper.

4 THE PRESIDENT: I see, thank you.

5 MR BEAL: Is there anything wrong with a newspaper getting
6 its parameters wrong and going out of business, is that
7 not just what competition involves necessarily in
8 certain circumstances?

9 A. Well, I would certainly expect that newspapers would
10 recognise the competitive pressures that they face and
11 would seek to optimise their pricing structuring; if
12 they get it wrong, they might go out of business.

13 Q. If they get it right, they will do very well?

14 A. I agree.

15 Q. At page 31, paragraph 92 of your eighth report,
16 {RC-H4/3/31} you mention some differences between
17 three-party and four-party schemes and I am not going to
18 go through that directly with you. But I want to put to
19 you there is another difference, is there not, which is
20 that Amex for example will receive the cardholder fees
21 and the interest charges that it levies? Let us just
22 break this down.

23 A. Okay.

24 Q. It is not in your report, I am asking you to think about
25 it?

- 1 A. You directed me to paragraph 92 --
- 2 Q. I have located the question for you so, this is the
3 difference between three-party and four-party?
- 4 A. Thank you.
- 5 Q. I now want you to, if you may, please engage with my
6 question --
- 7 A. I will.
- 8 Q. -- which is another difference between, for example, the
9 American Express three-party system and the four-party
10 system is that Amex directly sets the cardholder fees
11 and the interest charges that it receives from its
12 cardholders?
- 13 A. That is correct.
- 14 Q. Amex also receives directly the Merchant Service Charges
15 that merchants pay for Amex cards being used as a sort
16 of payment for the merchant?
- 17 A. Yes.
- 18 Q. It receives that money centrally into American Express
19 as revenue from two sides of the market?
- 20 A. Yes, and in determining the relative prices it is
21 obviously taking into account the same price structure
22 principles I have been describing in general.
- 23 Q. Well, this is where I want to challenge what you say on
24 that because Amex is setting its prices for its
25 cardholders and for its merchants in order to cover its

- 1 own costs; correct?
- 2 A. Well, yes, in a general sense it is obviously trying to
3 optimise its position, so that will be covering its
4 costs, it will be hoping to make a profit. I do not
5 think there is anything too important in that
6 distinction. But yes, I agree.
- 7 Q. It is not trying to set a socially optimal price for the
8 service it provides?
- 9 A. No, I agree but as I said before Amex, Visa,
10 Sainsbury's, nobody is trying to set an optimal social
11 position, they are trying to compete in a market and set
12 the profit maximising price generally.
- 13 Q. If Amex gets it wrong, it will lose market share and
14 eventually exit the market and if it gets it right it
15 will do very well?
- 16 A. Yes, I think that that is fair. Obviously it will be
17 under pressure to do a number of things as best as it
18 can in terms of efficiency and cardholder proposition.
19 But obviously if it gets any of those things wrong, that
20 is going to be detrimental to the scheme. One of the
21 things it could get wrong of course is getting the price
22 structure wrong across the two sides.
- 23 Q. Yes, like any business if it gets the price too high so
24 it does not have any custom it will not do well and if
25 it sets the price too low so it does not cover its

- 1 costs, it will have to exit the market.
- 2 A. Yes, and in one of the interesting aspects of Amex or
3 indeed the payment cards method is -- sorry, the payment
4 methods more generally is that when making those
5 decisions they do not uniquely think about what is the
6 impact of the price on each side independently but they
7 have to take into account the interrelationships.
- 8 Q. With respect, that must be right because all Amex cares
9 about is covering its costs and making a suitable profit
10 for return on capital that it needs; correct?
- 11 A. Yes, I do not think that is any different to what I am
12 saying. I am just providing some context as to the
13 nature of the competitive dynamics that it will be
14 confronting when reaching those decisions to optimise
15 into profit maximise.
- 16 Q. Of course the significant difference with Amex is it
17 knows what its own costs and revenues are, does it not?
- 18 A. Yes, I think that is fair.
- 19 Q. Whereas as has been eloquently established in this trial
20 Visa does not know about the costs and revenues of
21 issuing banks?
- 22 A. It does not directly oversee them, it might get such
23 information from time to time from the parties but
24 I think a general proposition here is that there are
25 disciplines between three and four-party models, that is

1 clear, no one is suggesting otherwise. In my view, that
2 is actually a benefit of competition because you get
3 competition in terms of different business models
4 competing in the market.

5 One possible disadvantage from a four-party scheme
6 operator perspective is that they have somewhat less
7 information in terms of some of those costs at the -- at
8 the level of the, you know, cardholder and merchant with
9 whom they do not have a direct contractual relationship
10 with. On the other hand there is also advantages of
11 that model from a competition perspective because unlike
12 Amex who is, you know, solely doing that acquiring and
13 cardholder attraction rule of its own volition, within
14 a four-party scheme you obviously have competition on
15 each of the acquiring and issuing sides. So essentially
16 I think what you are describing is one of the
17 differences between three-party and four-party models
18 but I think it is important to understand there are many
19 such differences and out of all of those differences,
20 different sort of competitive dynamics can emerge.

21 Q. But we have established, have we not, that Visa does not
22 know the detail of the revenues and costs of the issuing
23 side and nor does it know the detail of the revenue and
24 costs on the merchant side; correct? It is no good
25 having chatty conversations with --

1 A. Well, you sort of talked about two different sort of
2 layers there; you talked about on the one side issuers
3 and on the other side merchants as opposed to acquirers.

4 Q. Let us just break it down. If that is your objection --

5 A. Sure.

6 Q. -- are you saying there is a wealth of data available on
7 one side that is absent from the other; that is the
8 first proposition?

9 A. Sorry, I was not objecting vehemently to your point,
10 I was just describing that --

11 Q. Let us break it down the other way. Are you saying --

12 A. -- normally you sort of talk about the different layers
13 within a four-party system --

14 Q. -- there is any detailed data at the Visa level for
15 either side of the market?

16 A. I mean, I am not within Visa so I do not know the full
17 extent of what information they have. I mean, they
18 might have surveys, they might have membership forms
19 that need to be provided. They obviously get of lot of
20 data in terms of transaction data and otherwise in terms
21 of how -- how many transactions of different types are
22 arising.

23 Q. Visa cannot conceivably, can it, set an optimal price
24 for somebody else's transaction when it does not have
25 any of the pricing or revenue data, the costs or revenue

1 data that conceivably dictate what the price should be.

2 A. I agree with you that no scheme can be an all-knowing
3 entity whereby it suddenly has full perfect information
4 in the market. But that is rarely the case. I think
5 what it is doing is in a dynamic context doing the best
6 it can to set the parameters of the scheme, the
7 contractual obligations on those sides, the rules and of
8 course one aspect of that being the MIFs in order to
9 optimise the regime.

10 If the regime -- sorry, if the sum of those
11 contractual obligations are not correct, are sort of not
12 optimal, then the scheme will suffer and it will have
13 a good close look, I would presume, as to what is going
14 wrong and it would reassess and amend those.

15 So I would expect that even if it does not have
16 perfect information, that through experience over time
17 it would gain an understanding of where the broad
18 parameters lie and do its best to to set the obligations
19 and including settlement accordingly.

20 Q. Paragraph 99 of your eighth report, please, {RC-H4-3/34}
21 page 34, last three sentences, you say:

22 "Consequently a profit maximising scheme operator
23 must set rules, including interchange fees that take
24 this interrelationship into account."

25 Now, you are aware, are you not, because you

1 produced a responding report to Dr Frankel's addendum,
2 that there are of course four-party schemes that have
3 historically existed for a period of time with zero MIFs
4 being paid by way of interchange?

5 A. Yes, I am aware of that. That was obviously a subject
6 of some further reports, was it earlier in the week?

7 Q. If I could -- it seemed to me that your response to
8 Dr Frankel was, well, yes these schemes may have existed
9 historically, some of them may have existed for a long
10 time but where are they now? Is that a fair summary?

11 A. No, I would not say that is a fair summary. I made
12 a number of points, what -- that that might be one of
13 them. One of the points indeed was that some of the
14 zero MIF schemes that did exist no longer exist and
15 I was interested in why that might be and it seems that
16 there is a number of potential factors that led to that
17 outcome, but one which was the need to invest to meet
18 new technology requirements in SEPA, so that was one,
19 one sort of category of zero MIF schemes. There are
20 other categories there as well -- (overspeaking) --

21 Q. Let us just pause there. I am sorry to interrupt but
22 you giving quite long answers --

23 A. Well --

24 Q. -- and I would like to break that down.

25 A. Okay.

1 Q. People obviously compete on PQRS, correct?

2 A. Yes.

3 Q. Innovation with go to Q, quality, correct?

4 A. Yes. I mean it could also affect service, you know,

5 range. I would not say innovation is limited to one

6 aspect.

7 Q. Somebody may choose a cheaper payment service provision

8 over a innovative payment service provision, there are

9 two parameters to competition --

10 A. It is obviously possible, yes. I can agree it is

11 obviously possible that if the balance of improvement of

12 service relative to price was insufficient then that

13 would not be a sufficiently viable operation. I think

14 again because you have suggested that all I was saying

15 in that reply report was: where are they now? My point

16 was that was not what I was saying.

17 What I was saying is that to the extent that

18 Dr Frankel was suggesting that interchange fees serve no

19 purpose because zero MIF schemes exist and are doing

20 perfectly well, then the factual basis of which -- on

21 which he makes that statement is in severe doubt because

22 some of those schemes failed. Some of them realised

23 that to innovate properly they needed to set

24 an interchange fee and others who have done neither, ie

25 they still exist but have not set an interchange fee

1 have demonstrably lower levels of quality including
2 failure to do contactless transactions and indeed
3 I think the other key point which is perhaps most
4 relevant to these proceedings because I did not really
5 get into the whole debate about zero MIF schemes, I can
6 see why that might be relevant in a debate about
7 domestic four-party schemes and the objective necessity
8 of MIFs in that context. But we are talking about
9 commercial and inter-regional MIFs here and none of the
10 zero MIF schemes provide those types of functionality.

11 Q. So --

12 A. I just thought it was a off-base set of observations --

13 Q. So --

14 A. -- from Dr Frankel.

15 Q. Let us drill into inter-regionals just for moment.

16 Please can we look at {RC-J4/80/123}. Hopefully that
17 will bring up recital (420) of the most recent Visa
18 statement of supplemental objections. Can you see that,
19 2017?

20 A. Yes.

21 Q. Recent analysis. It is dealing with inter-regionals
22 because it is the most recent decision and you will see
23 that --

24 A. I am sorry, what is shown here is paragraph 420. Do
25 I need to look at something or... ?

- 1 Q. I am inviting you to read recital (420).
- 2 A. Okay.
- 3 THE PRESIDENT: Do you have it on screen?
- 4 A. I do, thank you. Yes, so this is referring to the
5 existence of four-party schemes. Obviously some of
6 these were indeed the very ones that Dr Frankel looked
7 at and I -- and I carried out, in very short order, some
8 basic level research finding that things are not perhaps
9 as they should be with some of these schemes. But
10 again, which -- which type of MIFs does this --
- 11 Q. Inter-regionals.
- 12 A. Okay. So, well, then I -- I do not really understand
13 the basis of making a comparison as to the rationale or
14 any benefits associated with inter-regional MIFs by
15 comparison to a series of zero MIF schemes that offer
16 only domestic functionality. I just do not see the
17 relevance.
- 18 Q. If we look at the footnotes you will see that the
19 Commission is also noting some of the points that you
20 have made, namely that certain of the schemes have been
21 phased out in 2011 to 2012 and if we go please --
- 22 A. Yes.
- 23 Q. -- to page 154, you will see that there is a detailed
24 annex where each of those schemes is considered in
25 turn --

- 1 A. Yes.
- 2 Q. -- over three or four pages.
- 3 A. Okay.
- 4 Q. And an exploration is given as to whether or not the
5 schemes achieve success and were capable of discharging
6 a four-party payment scheme which was viable. Have you
7 read this before?
- 8 A. I have sort of skimmed it briefly. I am aware of, you
9 know, this debate.
- 10 Q. Right. Now, the --
- 11 A. Would you like me to comment on -- on this?
- 12 Q. The Commission was doing a detailed analysis for the
13 purposes of working out whether or not inter-regional
14 MIFs were objectively necessary for a four-party scheme,
15 were they not?
- 16 A. Well, if it was, and I am not disputing that that was
17 what it was trying to do, then I simply see no relevance
18 to looking at schemes that do not operate a similar
19 functionality. What possible inference can you make
20 from a scheme that does not offer inter-regional
21 functionality to look at whether they set a MIF? I just
22 do not see the relevance.
- 23 Q. In response to this statement of supplementary
24 objections by the Commission, Visa offered commitments,
25 did it not, so it did not challenge these findings?

- 1 A. Yes. I mean, as a matter of fact, it offered
2 commitments. I cannot speak to, you know, what were the
3 reasons for that or the extent of challenge it felt it
4 had and so on. But yes obviously as a matter of fact I
5 accept the commitments.
- 6 Q. In your second report, please, at page 33,
7 paragraph 135, that is at Holt 9, page 33,
8 paragraph 135, you refer to payment facilitators
9 operating with Amex for Amex transactions?
- 10 A. Sorry, just let me --
- 11 Q. Paragraph 135.
- 12 A. Yes. Okay, yes.
- 13 Q. Now, in terms of who the acquirer is for those
14 transactions the acquirer is Amex, is it not?
- 15 A. Yes, I think I am sort of noting that. Also noting that
16 some of the large acquirers also allow merchants to
17 accept Amex cards indirectly as well. So that is just
18 an observation I am making.
- 19 Q. In order to discharge that facilitatory function, the
20 merchant and acquirer will have to have a separate
21 agreement with Amex to do so, correct?
- 22 A. Yes, I -- I suppose that must be right; that it could
23 not process Amex transactions for a merchant without
24 Amex being contractually linked into that. Sure.
- 25 Q. In your eighth report, page 41, paragraph 115, you say:

1 "To my knowledge no payment provider in the world
2 has been able to attract a customer base while relying
3 predominantly on transaction-related charges."

4 A. Yes, that is what I say there in paragraph 115.

5 Q. Examples you then go on to give, surely, are all
6 examples of other payment methods that involve the
7 merchant being charged for using the particular scheme;
8 no, ie scheme fees are being charged?

9 A. So I think what I have done here -- and sorry, I am just
10 going to my own report so I can actually see the context
11 of what immediately preceded this -- is setting out in
12 the -- I think this is the inter-regional context, is
13 it? I mean I cannot -- no, this is the general
14 description.

15 Q. I am still on general unfortunately, yes.

16 A. Yes, sorry. I mean, obviously it is a long report,
17 I have to skip back to see what section I am in. I am
18 just identifying a range of payment methodologies
19 describing some basic facts and figures around them and
20 then making an observation that pricing structure
21 matters for them as well and that essentially in general
22 a user pay model seems to be quite systematic.

23 Q. A last question on general section. In this report,
24 page 60, please, paragraph 160, a question you have
25 heard before; I do not think it is going to come as

1 a surprise but you are referring there to the Maestro
2 example, is that right?

3 A. So, yes. So this is -- this is explaining Mastercard's
4 relatively low share in the debit card segment that can
5 be explained by uncompetitive interchange fees. I was
6 in session when it was put that there may be other or at
7 least another explanation and if that is factually
8 correct, I would obviously accept that it may be that
9 there are components to both of those reasons.

10 MR BEAL: You have predicted the question and you have given
11 an answer.

12 Sir, before going on to section 3, it is quite a big
13 section, I am wondering if I try and trim some fat for
14 Monday to take stock of where things are and hopefully
15 be more efficient with some of the questions in the
16 light of how I have seen Mr Holt give his evidence, in
17 those circumstances, whilst I am sacrificing 15 minutes,
18 I am hoping that it will not have a knock-on effect for
19 Monday's duration.

20 THE PRESIDENT: Well, you know that we will do our best to
21 accommodate any mishaps that might happen if your
22 expectations --

23 MR BEAL: I would be using every ounce of time if I thought
24 I was under undue strain.

25 THE PRESIDENT: I understand. That is very helpful,

1 Mr Beal.

2 In that case we will be resuming on Monday, 18 March
3 at 10 o'clock. We will be having a Silk ceremony on the
4 evening of Monday but quite late, so it will not stop
5 a late sitting.

6 MR BEAL: I am reliably informed at 5 pm.

7 THE PRESIDENT: You are reliably informed by Mr Woolfe, soon
8 to be KC --

9 MR BEAL: Yes.

10 THE PRESIDENT: -- that that is the case.

11 We will adjourn until then. Before we rise though,
12 Mr Kennelly, the Visa settlement process.

13 MR KENNELLY: Yes, absolutely, sir. That is a very good
14 question. We have sent it. I apologise for the delay,
15 I apologise to the Tribunal and to my learned friends.

16 THE PRESIDENT: No --

17 MR KENNELLY: That has gone to them. Hopefully it will make
18 no difference to, as Mr Beal suggested, to the questions
19 he has been asking. We will see what he says when he
20 reviews it. I am not asking for him to respond now
21 obviously.

22 MR BEAL: No, no. I was rising for a different point, which
23 is I have been asked by my instructing solicitors to
24 enquire, with respect, whether or not the Merricks
25 application is still being heard on Monday or if that

1 hearing has been pushed back.

2 THE PRESIDENT: Now, remind me. The Merricks application,
3 yes --

4 MR BEAL: Sorry, have I got the wrong one? I see. No, I am
5 sorry I have misunderstood the message.

6 Let me read it properly: Is the deadline for
7 responsive evidence in the Merricks application still on
8 Monday or is that deadline also being pushed back?

9 I misread the question.

10 THE PRESIDENT: We will revert when I have managed to speak
11 to someone who knows what they are talking about on
12 this.

13 MR BEAL: It is apparent I do not know what I am talking
14 about.

15 THE PRESIDENT: There are so many balls in the air, I think
16 I had better say nothing.

17 MR BEAL: You will let us know, sir, of course.

18 THE PRESIDENT: Mr Holt, you remain in purdah.

19 A. Yes. Oh, sorry. I was not offering an opinion.

20 THE PRESIDENT: Well, that is an enthusiastic response.

21 A. I understand that is the normal course, so it is fine if
22 that is the case.

23 MR KENNELLY: If there was ever proof that we are not
24 co-ordinating!

25 For my part, I am happy for Mr Holt to be in purdah

1 and for him not to discuss the case with anyone.

2 Because of the state of the proceedings we are in
3 I will not need to deal with him but I would like
4 Mr Holt to have his access to Opus but that -- on the
5 basis that that would involve no communication; he will
6 not have access or be able to communicate with anyone on
7 the team but he will be able to access the papers. It is
8 much easier for him to access papers through that.

9 MR BEAL: Sir, if it is the transcript of course we have no
10 objection but if it is linking into Post-It note
11 comments that people flash up on the Opus system that is
12 more problematic.

13 MR KENNELLY: That is precisely what he will not be able to
14 do and it is on that basis --

15 MR BEAL: Fine.

16 THE PRESIDENT: So it is transcripts and documents.

17 MR KENNELLY: Precisely, sir, yes. It is just much easier
18 to do it online.

19 MR BEAL: Sir, I just wanted to make --

20 THE PRESIDENT: No, no, it is quite right to raise it
21 because electronic systems are rather different to paper
22 bundles.

23 MR KENNELLY: We have checked that very point to make sure
24 that that is not going to be possible. Mr Holt will not
25 have access to Post-It comments from anyone.

1 THE PRESIDENT: I am very grateful to you, Mr Kennelly.

2 Well, Mr Holt, you get your wish. You are
3 in purdah. I quite sympathise as to why, but knock
4 yourself dead on the papers and the transcripts if that
5 is what you want to look at between now and Monday.
6 I mean I quite understand why you need the access.

7 A. Yes.

8 THE PRESIDENT: You have it. Mr Kennelly, if things should
9 change, do get in touch.

10 MR KENNELLY: Of course.

11 THE PRESIDENT: With that, we will resume 10 clock on
12 Monday. Thank you all very much.

13 (4.50 pm)

14 (The hearing was adjourned until 10 o'clock,
15 Monday, 18 March 2024)

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