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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

Monday, 18 March 2024

(10.03 am)

MR DEREK HOLT (continued)

Cross-examination by MR BEAL (continued)

THE PRESIDENT: Good morning, everybody, Mr Beal. Over to you.

MR BEAL: Good morning, good morning, Mr Holt.

A. Good morning.

Q. Please could you look in your second report --

A. Yes.

Q. -- at page 36, paragraph 155 {RC-H4/4/36}. You there suggest that people may hold, ie cardholders may hold a Visa and a Mastercard product. Can you see that?

A. Yes.

Q. But the footnote makes clear this would be a credit card, would it? Footnote 71 says {RC-H4/4/36}:

"As I noted in my first report, most debit cards in the UK are Visa cards, and most credit cards are Mastercard cards."

A. Yes.

Q. I am assuming you are talking predominantly about credit cards?

A. Yes, well, I am simply noting that there are different types of cards, and customers could have both.

Q. Well, somebody is not likely, are they, to have a debit

- 1 card that is both Mastercard and Visa from the single
2 bank account?
- 3 A. That seems unlikely.
- 4 Q. The evidence from the Claimants was that they needed to
5 cover payment from both schemes, because of the risk
6 that a customer would not hold one or the other card?
- 7 A. Yes, I agree that most merchants accept both Visa and
8 Mastercard essentially for that reason.
- 9 Q. So merchants have to multi-home card acceptance, do they
10 not?
- 11 A. In general, I think, merchants do tend to multi-home,
12 yes.
- 13 Q. That means that both Visa and Mastercard have market
14 power, do they not, in the acquiring market?
- 15 A. Well, again, I think one needs to consider the -- the
16 broader context in the two-sided market, and also think
17 about which segment we are looking at. So I appreciate
18 here we are not yet on commercial or inter-regional, and
19 I think different --
- 20 Q. We are dealing at this stage --
- 21 A. -- considerations.
- 22 Q. Let us just keep it consumer.
- 23 A. Sure.
- 24 Q. Consumer debit and credit. Are you saying that there is
25 no market power attributable to Visa and Mastercard in

- 1 the acquiring market?
- 2 A. I am not saying that, no. I am saying that there are
3 a number of considerations that would need to be
4 recognised and investigated in order to reach that view.
- 5 Q. You have mentioned the role of Amex in the acquiring
6 market. You are aware, are you not, that Amex acquires
7 its own transactions?
- 8 A. Yes. That is the -- the virtue of it as a three-party
9 model; it acquires its own transactions, although I am
10 aware that some acquirers also facilitate the payment of
11 Amex transactions through their machines.
- 12 Q. Amex does not acquire Visa and Mastercard cards, does
13 it?
- 14 A. Amex does not acquire Visa and Mastercard cards, no.
- 15 Q. So it would not be right to think of Amex as competing,
16 for example, with Worldpay for acquiring services for
17 Visa and Mastercard cards?
- 18 A. Well, I would agree that Amex is not competing to offer
19 that particular service, but what it is doing is
20 competing in the -- in the market for transactions. It
21 is competing in the sense that additional usage of Amex
22 cards will substitute for usage of Visa and Mastercards.
- 23 Q. Moving on to restriction by object. It is right, is it
24 not, that you accept that this issue is primarily
25 a legal one?

1 A. Yes, I think I say that. I make a number of
2 observations from an economic perspective, but I think
3 overall, it may be a -- primarily a legal issue.

4 Q. Price is a key parameter of competition, is it not?

5 A. Yes, I think that is fair.

6 Q. Co-ordinating the setting of a key parameter of
7 competition, such as price, by for example a group of
8 strangers, would not ordinarily be treated as price
9 fixing?

10 A. Well, I think that is exactly what a cartel would be
11 described as, essentially: a group of competitors
12 substituting co-ordination instead of competition, and
13 that indeed is widely recognised as a by object
14 restriction, for -- I think for very good reason. I do
15 not think that framework applies well in the context of
16 a two-sided market, where we are talking about
17 a transfer rather than an overall increase in price.

18 Q. Do you remember my learned friend Mr Kennelly put to
19 Mr Dryden that if the buyers on the acquiring side of
20 the market, say merchants, grouped together and tried to
21 exert some countervailing buyer power against an issuer
22 bank, it was suggested by Mr Kennelly that that would be
23 cartel conduct; do you remember that?

24 A. I -- I was here for the session. I do not require --
25 sorry, I do not recall the particular question being

- 1 put, but I can sort of understand the concept, yes.
- 2 Q. Do you agree that that would be price fixing behaviour
3 by the buyers?
- 4 A. Well, I mean, it -- it may be. I think -- I have not
5 really investigated that particular issue. It was not
6 one of the issues here for the economists, but I think
7 in -- it is at least possible, I think you need to look
8 into a number of aspects there. It is at least
9 possible.
- 10 Q. So it is possible or conceivable to approach it in that
11 way when it is the buyers who are co-ordinating their
12 response to price, but not plausible or conceivable to
13 view it that way when it is the sellers, the issuing
14 banks, that are co-ordinating their response?
- 15 A. Yes, I think -- what I meant in the sense of possibility
16 is that you would need to look at the effects of that
17 and also think about how that affects the overall impact
18 of the scheme in terms of its competition overall --
- 19 Q. Sorry to interrupt. The whole point of restriction by
20 object is that certain conduct, such as price fixing by
21 horizontal competitors, is intrinsically harmful;
22 correct?
- 23 A. Yes, as I mentioned a moment ago, I am aware of that and
24 agree with it in the sense that substituting
25 co-ordination for competition in -- in many contexts

1 clearly has a negative impact on competition. What I am
2 distinguishing here is that in this context, it has very
3 different effects, because essentially what -- to the
4 extent that you are -- you are inferring that that
5 applies in the context of the MIFs, I do not think that
6 that is the case, because of the fact that the MIFs
7 enable the scheme to compete, given the price structure
8 issues that we have discussed at length, regarding
9 two-sided markets.

10 Q. If the object of the MIF is to set a floor below which
11 another price will not fall, and that is done on
12 a coordinated basis, why cannot that be treated as
13 something that is intrinsically harmful to competition
14 that would need to be justified under article 101(3)?

15 A. Well, again, I go back to my previous answer on this.
16 This is a situation where, in order for the scheme to
17 optimise its ability to compete in the market, it needs
18 to recognise the underlying competitive dynamic. So the
19 way in which cardholders engage in the market, the way
20 in which merchants engage in the market, if it is not
21 able to adopt some sort of mechanism to enable that
22 two-sided pricing structure mechanism to be achieved,
23 then it is simply not going to be able to compete
24 effectively in the market, and I think that is what the
25 evidence from a wide range of payment methods clearly

1 demonstrates.

2 So I think that is really the -- the distinguishing
3 characteristic here, relative to the proposition that
4 co-ordinating on price is generally a bad thing for
5 competition, and quite obviously -- sorry, quite
6 obviously so.

7 Q. Now, two follow-up points to that. Firstly, it is
8 right, is it not, that the balancing exercise you are
9 talking about has, at least historically, always been
10 conducted under the parameters of article 101(3)?

11 A. I think the identification of the exemptible level, or
12 the -- yes, I think that is fair, that the extent to
13 which efficiencies are derived from the scheme can be
14 done at the 101(3) level.

15 Q. Secondly, both the English courts and the European
16 courts have recognised that conduct that restricts the
17 ability of a third and fourth party freely to negotiate
18 the price between them would be an infringement of
19 competition?

20 A. I mean, that seems to be a legal proposition which I am
21 happy to take. I do not have a comment on economically.

22 Q. Now, you are an independent and impartial expert,
23 correct?

24 A. Correct.

25 Q. Your report should give a fair reflection of the

1 regulatory decisions in this area, correct?

2 A. Yes, I mean, I think I referred to a number of
3 regulatory decisions, but essentially what I have tried
4 to do is to look at the issues that were posed to the
5 experts, and to engage on the evidence as best as
6 I could.

7 Q. In terms of findings that have been made of object
8 restriction, can we just turn to those, please. I am
9 going to try and deal with them solely for Visa and
10 largely in date order. The first is at {RC-J4/22/87},
11 and hopefully we can look at paragraphs -- recitals 247
12 through to 253. At 248, for example, it says:

13 "... the Commission is of the view that the Visa
14 MIFs constitute a restriction by object within the
15 meaning of Article ..."

16 What is now 101(1).

17 A. Yes, so this is -- sorry, the SSO against Visa in the
18 inter-regional context, is that right, or ...

19 Q. No, this was an earlier one.

20 A. It is an earlier one, sorry.

21 Q. This is the 2009 statement of objection that ultimately
22 led to the first commitments decision?

23 A. I see. Yes.

24 Q. They then go on to say:

25 "However, given that it can be clearly established

1 that [they] have the effect of appreciably restricting
2 ... competition ... the Commission goes [on] ... to
3 identify the effects ..."

4 Then if we look, please, at the first Visa
5 commitments decision, {RC-J5/14.8/6}. Hopefully
6 recital (21) sets out that:

7 "The Statement of Objections expressed a concern
8 that the MIFs have as their object and they also have as
9 their effect an appreciable restriction of competition
10 ... The MIFs appeared to inflate the base on which
11 acquirers set the MSCs by creating an important cost
12 element common to all acquirers."

13 So that was the view taken there, can you see that?

14 A. Yes, I can see that.

15 Q. Then, please, {RC-J4/31/146}, this is part of the 2012
16 statement of supplemental objections that went to Visa,
17 leading to the second commitments decision. We see that
18 the Commission has a long section beginning at recital
19 456 dealing with object. If we turn, please, to
20 page 152 {RC-J4/31/152}, paragraph 481, it says there:

21 "In the Commission's view it is obvious from the
22 above analysis that the Visa MIFs do have the object to
23 restrict competition as they are capable of directly and
24 substantially influencing the prices paid by consumers
25 and remove important uncertainties related to the

1 operation of that market..."

2 You see that?

3 A. Yes.

4 Q. Therefore the MIFs {RC-J4/31/152}:

5 "... can be regarded, by their very nature, as being
6 injurious to the proper functioning of the market."

7 A. Yes.

8 Q. Could we then please look at the second commitments
9 decision. That is {RC-J5/20/7}. At recital (23), the
10 decision refers back to the preliminary assessment, and
11 expressing the concern that there was an object
12 restriction. So that is then -- that then finds echo,
13 does it not, in the actual decision itself; you will see
14 that?

15 A. Yes. It is referring back to the preliminary
16 assessment, yes.

17 Q. Can we then please look at the 2017 supplemental
18 statement of objections. It is {RC-J4/80/71}. There is
19 a very long section dealing with restriction by object
20 that starts at recital (247) and you will see the
21 heading there. If we could cut to the chase and look at
22 the conclusion, that is at page 89 {RC-J4/80/89},
23 please, recital (308):

24 "The Commission provisionally finds that Visa's
25 rules on inter-regional MIFs amount to horizontal

1 price-fixing. The inter-regional MIFs fix a significant
2 component of the price charged to merchants for
3 acquiring services through the MSCs."

4 It then goes on to find that, recital (310):

5 "Price fixing between competitors is by its very
6 nature harmful to competition ..."

7 At (312), over the page {RC-J4/80/90}:

8 "The Commission therefore considers that Visa's
9 rules on inter-regional MIF are a set of decisions by an
10 association of undertakings that restricts competition
11 by object ..."

12 Can you see that?

13 A. Sorry, which paragraph?

14 Q. Recital (312).

15 A. Yes.

16 Q. Top of page 90 {RC-J4/80/90}?

17 A. (312), yes.

18 Q. That then is also recorded in the final Visa
19 inter-regional decision, which is {RC-J5/32/11},
20 paragraphs (34)-(35). We see recital (35) in particular
21 says -- it deals with effect; recital (34) deals with
22 object; can you see that?

23 A. Yes.

24 Q. So that is a pretty consistent line of reasoning from
25 the Commission over those years, finding that MIFs as

1 a proposition, because of the way they operate, are
2 a restriction by object, correct?

3 A. Yes, I think that is correct. I think just two -- two
4 brief observations. Having agreed that that was the
5 Commission's view as expressed in each of these
6 documents, obviously the legal basis of those is not
7 something for me, they are preliminary in some cases and
8 commitments decisions in others.

9 That is obviously a legal issue. What I have
10 focused on is some limited commentary from an economic
11 perspective as to what the role of the MIFs is. In my
12 view, that is a relevant factor to take into account,
13 but I appreciate it is really for the tribunal to make
14 that assessment.

15 I think, finally, with the exception of the
16 inter-regional MIFs context here, the other decisions --
17 or not decisions but preliminary assessments, focus on
18 different MIFs, and obviously I have focused primarily
19 here on inter-regional and commercial MIFs, where
20 I think different competitive conditions apply.

21 Q. Well, we have established, I thought, from the
22 witnesses, that the mechanism by which the MIF is set is
23 the same for each variety of MIF that we are dealing
24 with?

25 A. Yes. The mechanism may well be very similar. What I am

1 talking about is what is the -- the economic context
2 within which that mechanism is applied, and I think that
3 that is different as you look at the different important
4 segments of the types of cards and transactions.

5 Q. Well, we will come on to deal with this, but just as
6 a general proposition, a number of things hold good, do
7 they not? Firstly, the MIF, when it is set by default
8 by the scheme, represents a coordinated approach to
9 a key parameter of competition, namely price, correct?

10 A. Well, that seems to be focusing on the first limb as to
11 whether the setting of the MIF is a coordinated
12 agreement. I have said fairly consistently, I think, in
13 my reports, that that aspect of the analysis is a legal
14 issue. So I have not really commented on that
15 specifically.

16 Q. The second proposition is that the MIF operates to
17 establish a significant component of a different price,
18 which is the price that acquirers are charging merchants
19 in the acquiring services market?

20 A. Yes. I think that goes to the sixth essential fact, as
21 to what would be the counterfactual impact on costs
22 to -- essentially on -- ultimately on costs to
23 merchants, and that is exactly the type of analysis
24 I have carried out.

25 Q. The object of the exercise is to -- gives rise to

1 a position where the merchants have no realistic
2 opportunity to negotiate the price that they are paying
3 for a significant component of the acquiring services
4 that they pay for?

5 A. Well, I think we -- we previously discussed that there
6 is the potential for negotiations, and I think it is
7 agreed that there tends not to be deviations from the
8 default. That -- that goes both in respect of issuers
9 and acquirers, actually.

10 So, yes, I think whether -- whether there would be
11 different -- sorry, the ability to -- to negotiate,
12 I think probably it is fair to say that there is limited
13 evidence of negotiation below a default rate, as
14 I mentioned in both directions. So I think that that is
15 a fair point.

16 My analysis is focused on essentially whether --
17 well, firstly, from a by object discussion, what is the
18 role in terms of the ability to resolve externalities
19 and to compete with other schemes. So I think that is
20 really what the economic analysis focuses on.

21 Q. Well, that analysis is the very analysis that is
22 traditionally conducted, is it not, under the article
23 101(3) side of the fence?

24 A. Well, I do not think that is necessarily correct in the
25 context here, particularly with the MIFs that are the

1 subject of these proceedings. There are direct
2 implications, in my view. It is a legal matter, as
3 I have explained, but I think there are direct
4 consequences in terms of what -- what merchants are
5 paying for payment card services that need to be
6 captured.

7 Q. I did not detect in your report any analysis of the very
8 consistent line of reasoning that I have been through
9 with you this morning, dealing with restriction by
10 object?

11 A. Well, the reason for that is that I acknowledged
12 essentially right at the beginning of that discussion
13 that it is primarily a legal issue, and that the limited
14 economic context that I was able to bring to bear
15 focused on what was the rationale of the MIFs, and how
16 does it enable the schemes to compete, so that was
17 really the basis on which I examined that.

18 Q. Could we look, please, at page 89 of your first witness
19 statement -- sorry, your eighth witness statement,
20 paragraph 267. That is {RC-H4/3/89}. You there
21 summarise the key six factors.

22 A. Yes, 267, that is the six factors of the Supreme Court
23 judgment, yes.

24 Q. Yes. We see from (iv) that the counterfactual was no
25 default MIF with settlement at par; do you see?

- 1 A. Yes.
- 2 Q. You would accept, would you not, that settlement at par
3 is both realistic and viable?
- 4 A. Yes, it is. It is -- well, sorry, it is -- it is viable
5 in the sense that it is a counterfactual that could be
6 adopted to avoid concerns regarding the hold-up problem,
7 which was -- was one of the reasons why pre-IFR
8 bilaterals structure was perceived not to be viable. So
9 a settlement at par does resolve that in the sense
10 that -- and therefore it is viable in that sense.
- 11 Q. Are you saying it is impractical or unrealistic?
- 12 A. I am saying it is -- well, impractical, no, I have not
13 suggested it is impractical. Sorry, we are now on
14 whether ...
- 15 Q. Settlement at par?
- 16 A. The settlement at par is the appropriate or --
- 17 Q. I am not asking appropriate?
- 18 A. Sorry.
- 19 Q. I am saying is it realistic?
- 20 A. Well, it is -- realistic to me requires a number of
21 factors: (1), would it be viable, and I think it does
22 meet that test; but (2), would it likely be selected ie
23 is it realistic that that would be the selected scheme
24 rule in the post-IFR world, and on that basis I do not
25 think it is realistic.

1 Q. So you are saying essentially that some options are more
2 realistic than others, because they would be more likely
3 to be selected by the scheme?

4 A. Yes.

5 Q. Can I ask you, please, to look at {RC-J5/11/154}. This
6 is part of the *Mastercard I* decision. At recital 551,
7 just cast an eye down that, please, you will see that
8 the Commission is contemplating the absence of a MIF and
9 a payment card scheme, and what that would mean for the
10 way prices were set. Can you see that?

11 A. Yes. Yes.

12 Q. There is nothing unrealistic about that being the way
13 that a scheme operates, is there?

14 A. Well, that -- in the sense that schemes have operated
15 like that. We have discussed whether there are zero MIF
16 schemes in other contexts, albeit with some of the
17 concerns I aired. That -- my view is not that this
18 would be an impossible counterfactual to contemplate.
19 My view is that in the post-IFR world, which is,
20 I think, the now -- the context that we are now speaking
21 of, it would not be realistic that the schemes would
22 adopt this.

23 Q. You would accept, would you not, that it would not be
24 appropriate to have a counterfactual which was itself
25 a restriction of competition by object or effect?

- 1 A. Yes.
- 2 Q. Please could we look in your eighth report at
3 paragraph 271, which is page 90 (RC-H4/3/90}. At
4 paragraph 271, you say that the counterfactual must
5 remove the conduct that is alleged to be restrictive of
6 competition; correct?
- 7 A. Yes.
- 8 Q. Now, at paragraph 270 {RC-H4/3/89} in support of that
9 proposition, you cite the *Société Technique Minière*
10 case, a Court of Justice case dating back to 1966, can
11 you see that?
- 12 A. I do. Yes.
- 13 Q. That requires, does it not, that the competition in
14 question must be considered in the absence of the
15 agreement in dispute, can you see that?
- 16 A. Yes. That is -- that is right.
- 17 Q. So what you have to do is you have to strip out those
18 aspects of the scheme rules which are under challenge,
19 do you not, in order to understand what the impact on
20 competition would be?
- 21 A. Yes. But then there is obviously a question as to what
22 the scheme would do in that environment.
- 23 Q. Well, let us go back, if we may, please, to the
24 Supreme Court summary you have given at page 89
25 {RC-H4/3/89}, paragraph 267. You will see that the

1 first Roman point there, (i), is that:

2 "The MIF is determined by a collective agreement
3 between undertakings' ..."

4 Can you see that?

5 A. Yes.

6 Q. So that is what determines the relevant agreement that
7 has to be stripped out, is it not?

8 A. Yes, I think so. I think possibly (iii) might also be
9 relevant there, but ...

10 Q. Well, (iii) is consequence of (i), is it not?

11 A. Yes, yes.

12 Q. Then (i), what the court is essentially saying is that
13 the MIF is determined by collective agreement. It is
14 not saying, is it, that the actual level of the MIF is
15 agreed multilaterally, because that is not what the
16 default scheme was doing, was it?

17 A. Well, I mean obviously, the multilateral nature is -- is
18 embedded within the definition of the MIF, or the
19 acronym of the MIF.

20 Q. Well, the Supreme Court is not looking at who has
21 actually set the MIF. It is looking at the process by
22 which the MIF is implemented through the scheme?

23 A. Well, perhaps, I mean, as I -- I think was quite clear
24 in this report, and indeed in other reports, this -- the
25 precise definition as to what, what constitutes

1 a collective agreement, I have consistently considered
2 to be a legal point. So, yes, I am not sure what else
3 I can add.

4 THE PRESIDENT: Mr Kennelly.

5 MR KENNELLY: The tribunal can anticipate my intervention.
6 My learned friend is cross-examining an expert witness
7 on the precise meaning of the Supreme Court judgment,
8 and asking him to interpret these passages, which seem
9 to me at least to be requests of law for submission.
10 There is a limit to what the expert can do of use for
11 the tribunal in construing a Supreme Court judgment.

12 THE PRESIDENT: Well, that is true. But it is quite a good
13 prism for articulating the expert's understanding as to
14 what is going on here.

15 A. Sure.

16 THE PRESIDENT: Mr Holt, to be quite clear, we are not
17 expecting you to articulate any form of construction as
18 to what the Supreme Court is doing or saying. But, of
19 course, your take on what is going on here is important
20 in terms of understanding the nature of such collective
21 agreement as exists, and the findings of fact that in
22 due course we must make, and it is in that spirit that
23 the questions are being asked.

24 A. Yes, and just to be clear, I think as I set out, my
25 understanding of the alleged concern that needed to be

1 removed was that there was a collective agreement to
2 establish the MIF, a multilateral default, and positive
3 default interchange fee. Therefore, in my assessment,
4 while recognising it is a legal issue, I was just
5 checking that that component had been removed in the
6 alternative counterfactual.

7 THE PRESIDENT: Yes, so what you are saying is that in the
8 real world, there is a collective agreement as to
9 a unilaterally imposed MIF?

10 A. In the real world, there is a unilateral --

11 THE PRESIDENT: Collective agreement.

12 A. Collective agreement as to --

13 THE PRESIDENT: That the scheme says the floor should be.

14 A. Yes, sorry, the scheme is determining the MIF.

15 THE PRESIDENT: Yes, exactly, but there is a collective
16 agreement to that effect, so it is --

17 A. Yes.

18 THE PRESIDENT: -- as it were, a collective agreement to
19 give power to an individual entity so far as that
20 particular charge is concerned?

21 A. Yes. So, again, we are perhaps straying into legal
22 points, but the scheme, as I understand it, is
23 determining the rule, but also identifying the level of
24 the default interchange fee to be applied; and then
25 obviously the other participants within the scheme take

1 that rule and then proceed in terms of settlement of
2 transactions at that level.

3 So, in my view, that is the -- my understanding of
4 what needs to be removed is the scheme determining what
5 is the parameter or the level of the default interchange
6 fee to be set multilaterally.

7 THE PRESIDENT: Thank you.

8 A. Yes.

9 MR BEAL: The learned President has anticipated my next
10 question. I was going to take you to paragraph 272,
11 which addresses the objection wrongly raised by my
12 learned friend as well. So paragraph 272, please, at
13 page 90 {RC-H4/3/90}. One sees that your understanding
14 is there set out. You say:

15 "My understanding is that in the present case the
16 alleged anti-competitive conduct is the setting of
17 default interchange fees that are multilaterally
18 agreed..."

19 A. Yes.

20 Q. The point the learned President put to you is that is
21 not actually the factual scenario, is it, because in the
22 default world, in the factual world, it is Mastercard
23 that sets the level of the MIF, or Visa that sets the
24 level of the MIF, and that does not amount to
25 multilateral agreement. The multilateral agreement

1 comes by the scheme being an organisation of an
2 association of undertakings that agrees the parameters
3 on which the MIF will be set?

4 A. I do not have any basis to -- to suggest otherwise.
5 I think the -- the question is, as I am setting out
6 here, is perhaps a legal one, but the -- the scheme is
7 setting the level of MIF by allegedly anti-competitive
8 collective agreement. So that was really the mechanism
9 that I was examining as to whether that had been removed
10 in the alternative counterfactuals.

11 Q. The agreement that needs to be stripped out from the
12 counterfactual must be -- necessarily to be found in the
13 scheme rules, must not it?

14 A. Well, yes, I think the scheme rules are the --
15 essentially the place where the -- the MIF was
16 established.

17 Q. Could we look, please, at {RC-J4/89.2/124}. This is
18 a scheme rule that deals with settlement.

19 A. Yes, sorry, which paragraph, please?

20 Q. It is 1.7.6.11, two-thirds of the way down the page?

21 A. Okay.

22 Q. It says {RC-J4/89.2/124}:

23 "An Issuer must pay the Acquirer the amount due for
24 a Transaction occurring with the use of a valid Card.
25 This includes Transactions resulting from geographically

1 restricted Card use outside the country of issuance."

2 So that is effectively a settlement rule, is it not;
3 the issuer has got to pay for the payment transaction,
4 otherwise the scheme is not going to work very well?

5 A. Yes. Yes.

6 Q. That settlement rule does not make any mention of
7 a specific MIF, does it?

8 A. It does not make any explicit reference to it. I do not
9 know whether that is implied within the amount due
10 aspect, so for example the amount due might be defined
11 as the -- the value of the purchase less any, for
12 example, interchange fee.

13 Q. I am going to come on to deal with the specific
14 interchange fee provisions in a moment. But you
15 understand, do you not, that the Claimants have not
16 challenged this particular rule as being
17 anti-competitive, in any way?

18 A. Well, it -- well, I am happy to take that if that is
19 what the Claimants say, they do not challenge this
20 particular rule, fine.

21 Q. Therefore it would not be appropriate, would it, to
22 strip that rule out from the counterfactual, because of
23 course this rule exists in the factual and is not
24 challenged?

25 A. That is fine. I understand that. But when a challenged

1 rule needs to be removed, then one needs to enable the
2 scheme essentially to identify the -- how it will react.
3 Now, it may be that that particular rule would stay, or
4 maybe it would be amended in some way. Obviously I do
5 agree that such amendments would need to be avoiding
6 anti-competitive concerns in their own right.

7 Q. It is not the role of the counterfactual, is it, to
8 sanction a complete rewrite of the rules so that no
9 anti-competitive behaviour is ever considered at all
10 conceivable?

11 A. No, I think the role of the counterfactual is to
12 identify, if you take out the identified concern, what
13 would be the most realistic counterfactual then to
14 assess the factual versus the counterfactual on that
15 basis.

16 Q. Just looking at this rule, what that is saying,
17 essentially, is if you have a card payment transaction
18 that an acquirer has acquired, then the issuer has to
19 pay the acquirer the amount due. So in the absence of
20 any other rule, that would require settlement of the
21 transaction at the transaction value, as agreed between
22 the merchant and the cardholder; correct?

23 A. Yes, if there is no -- no rule which specifies
24 a framework for an adjustment to the -- the level, then
25 I think I would agree. But my concern with that

- 1 proposition is that that does not seem to be the
2 realistic counterfactual that we are looking at.
- 3 Q. Could we look, please, at {RC-J7.1/6/4}. Hopefully that
4 brings up a rule that is confidential. I will not read
5 it out, but it should be rule 1.9.1.1; can you see that?
- 6 A. Yes.
- 7 Q. This deals with fees, can you see that?
- 8 A. Yes.
- 9 Q. So this would be the rule that would be a candidate for
10 the blue pencil test, if one were trying to remove the
11 objectionable elements, correct?
- 12 A. Yes.
- 13 Q. If you remove, for example, this entire rule, just for
14 the sake of argument, that does not produce a situation
15 where you have the UIFM, does it?
- 16 A. I agree with that, I think. I think the UIFM would
17 essentially require the scheme to implement something
18 further than simply removing the -- this particular
19 clause.
- 20 Q. So you would necessarily have to go further than the
21 *Société Technique Minière* case suggested, by not simply
22 removing the objectionable rule, but then also
23 substituting it for something else that has been drafted
24 in order to meet the competition concern?
- 25 A. Yes, I think --

- 1 Q. On your case --
- 2 A. So whether -- whether that is a relevant approach to
3 consider in the counterfactual is a matter for
4 the tribunal. All I have done is to say if you take out
5 the alleged anti-competitive element as I have
6 understood it, what would the scheme do, and what would
7 then be the outcome in terms of that counterfactual
8 relative to the factual.
- 9 Q. For the pre-IFR period, the Supreme Court did not engage
10 in this process, did it? It did not say: how could we
11 conceivably rewrite Visa's rules so that it does not
12 infringe competition any more.
- 13 A. No. But I think it recognised that potential
14 alternatives could be investigated, and that was,
15 I think, the basis on which the bilaterals
16 counterfactual was -- was explored in some detail in --
- 17 Q. No, because the bilateral negotiations that the
18 Supreme Court was considering were already part of the
19 factual. It has always been part of the factual, you
20 can have a bilateral negotiation that substitutes for
21 the default rule set by the scheme itself?
- 22 A. Yes, but -- but I think the -- the question then was: if
23 you -- if you did not have some mechanism to address the
24 likely consequences of that bilateral, then -- then
25 there would be significant disadvantages to the scheme,

1 and therefore that was why --

2 Q. Why did the Visa team not put forward the UIFM model as
3 a counterfactual in the *Sainsbury's* case before the
4 Court of Appeal or the Supreme Court?

5 A. Well, I think that is exactly what I have just
6 described. In the -- in the pre-IFR world, that may not
7 have been a realistic counterfactual for that particular
8 case because the -- the concern might have been that
9 there was no -- there would be no basis on which you
10 would avoid the hold-up problem, which was extensively
11 debated in the *Sainsbury's* case.

12 So I think that is really why the -- the application
13 of the counterfactual in the post-IFR world is so
14 interesting as -- as a distinction between what happens
15 before the IFR and what happens after the IFR.

16 The role of the IFR is essentially, by placing caps
17 on the levels of the domestic and intra-EEA MIFs, to
18 avoid a situation whereby the unilateral bargaining
19 power of issuers would lead to potentially too high MIFs
20 to the disadvantage of the scheme. So in that pre-IFR
21 world, that would not have been in my view an
22 appropriate counterfactual, but in the post-IFR world,
23 that significant problem is resolved by the IFR, and
24 therefore it does become a realistic and relevant
25 counterfactual.

1 Q. Can we look, please, in your ninth report at
2 paragraph 165, which is at {RC-H4/4/40}. You say in
3 165(a) that the counterfactual:
4 "... should remove the conduct that is alleged to be
5 restrictive of competition. For the avoidance of doubt,
6 I should make clear that I understand that the relevant
7 anti-competitive conduct is the collective setting of
8 positive default MIFs..."

9 Can you see that?

10 A. Yes.

11 Q. Under the UIFM, the scheme would determine, would it
12 not, that the appropriate MIF was that selected by the
13 issuer, and that would be payable unless there was
14 a specific overriding bilateral agreement?

15 A. Yes, the UIFM framework would enable the individual
16 issuers to essentially nominate the interchange fee to
17 apply, yes.

18 Q. So therefore it is collectively agreed by all scheme
19 participants that the interchange fee payable can be set
20 by the issuer in that way?

21 A. Well, if that is the case, then it is a legal issue as
22 to on what basis there is a collective agreement being
23 set. Again, the first and third aspects of the
24 Supreme Court test which -- which relate to how one must
25 define an agreement, I have considered to be legal

1 issues.

2 Q. In practice, the UIFM is being set up in the expectation
3 that all issuers will set at maximum permitted rates
4 under the IFR, correct?

5 A. Well, I cannot comment to the precise expectation
6 that -- that Visa would have. I think it is fair to say
7 that it is plausible that unilaterally or individually,
8 issuers would think about the -- the bargaining position
9 and adopt an interchange fee that works well for them in
10 a competitive environment vis-à-vis other issuers.
11 Ultimately I have gone further and said, in my view, it
12 is likely that the levels of those unilaterally
13 nominated interchange fees would in general be at the
14 IFR caps.

15 Q. The whole purpose of the UIFM, is it not, is to ensure
16 that significant MIF revenues continued to be paid to
17 the issuing banks; all of the witnesses accepted that.

18 A. So, firstly, they are not MIFs in that context; they are
19 unilaterally determined, but I agree --

20 Q. I am sorry, IFs rather than MIFs, apologies.

21 A. Yes, so they are IFs, and I think that as I have
22 recognised in my report, one of the reasons I have
23 identified this as being realistic is that it would
24 enable the Visa scheme to compete more effectively,
25 given the two-sided pricing structure issues that we

1 have debated. So --

2 Q. You are not going to get those revenues, are you, unless
3 you have positive interchange fee rates set?

4 A. I agree with that. The -- the only mechanism for
5 achieving the -- the transfer or the cost revenue
6 rebalancing, to internalise the externalities, however
7 you want to describe it, in a four-party model, is to
8 have the interchange fee.

9 I mean, there is -- there is potentially
10 an alternative via scheme fees, but basically the
11 interchange fee is the mechanism by which you would do
12 that in a four-party model, in contrast to how
13 a three-party model would do it.

14 Q. In essence, what this suggested counterfactual involves
15 is a particular MIF rate then being plugged into the
16 scheme, which then forms the basis upon which clearing
17 and settlement of payment transactions takes place,
18 correct?

19 A. Yes, I think that is -- I think that is right, so my
20 understanding is the issuer would nominate the level of
21 the interchange fee, and then that would be incorporated
22 into the system for settlement, yes.

23 Q. The scheme then instructs the issuing bank to transfer
24 a specific sum to the merchant acquirer's bank, less
25 that interchange fee?

1 A. I believe that is the case. Obviously that is getting
2 into the precise rules as to settlement. But basically
3 that seems reasonable, yes.

4 Q. For international transactions, having now received
5 Visa's note, it appears that there is a dedicated bank
6 account which Visa maintains, where it receives funds in
7 and then remits funds out to the merchant acquirer, and
8 that second leg of the transfer -- sorry, both legs of
9 the transfer would see a deduction for the MIF -- the
10 interchange fee rate set. Let me try that again --

11 A. Yes, sure.

12 Q. -- because I did slightly make a mess of delivering
13 that. For international transactions, Visa has
14 a settlement fund, which I understand it receives money
15 into, and then remits money out to the merchant
16 acquirer. So it receives from the issuing bank and
17 remits to the merchant acquirer.

18 A. Yes.

19 Q. That is the premise because it is in Visa's note.

20 A. Fair enough.

21 Q. The scheme would therefore be saying, would it not: this
22 is the amount of money I need to receive and this is the
23 amount of money I will pay to the merchant acquirer.

24 A. That, I think, does stand to reason. Obviously the
25 basis on which, or the levels at least on which those

1 payments are made will have been defined by the
2 framework, and the individually nominated interchange
3 fees would then feature, I guess, in the amount of the
4 settlement funds.

5 Q. So the scheme determines the amount of money that will
6 end up in the merchant acquirer's hands.

7 A. Well, I am not sure I would put it that way, because the
8 scheme is merely at that point implementing what the
9 issuer has decided.

10 Q. Well, the scheme as a whole is doing a lot more than
11 that, is it not; it is arranging for clearing and
12 settlement of the payment funds in order to give effect
13 to a payment transaction on a payment card operated by
14 Visa?

15 A. Yes, I think it is fair to say that the scheme is doing
16 a lot of things. Yes.

17 Q. Now, you prayed in aid the New Zealand model in support
18 of your suggestion that the UIFM is viable and
19 realistic; that is right, is it not?

20 A. Yes, I have referred to it as essentially an example
21 which in my view demonstrates its feasibility. I have
22 also looked at it as a guide in terms of the evidence as
23 to what the likely outcome would be.

24 Q. Did you read the reports from the New Zealand Ministry
25 of Business that were critical of the operation of the

1 UIFM model in New Zealand?

2 A. Well, I am -- I have -- I have seen some of those
3 reports. I have quoted the -- the New Zealand
4 authorities in my report, but I do not -- I do not think
5 it is a fair suggestion to say that there is a criticism
6 of the UIFM as such. My understanding is that there was
7 regulatory intervention which led to issuers having to
8 agree commitments to reduce interchange fees, and that
9 the authorities had expressed a number of concerns.

10 But that is not in my view germane to the question
11 as to whether the UIFM was either (a) feasible or what
12 (b) what the likely outcome would be.

13 Q. Can we look at {RC-J3/85/41}, and we see there
14 paragraph 150 through to 152, the Ministry of
15 Business --

16 A. Yes.

17 Q. -- is making a series of -- expressing a series of
18 concerns about the competitive landscape that has
19 evolved as a result of the settlement agreed with the
20 Commerce Commission; can you see that?

21 A. Yes, I can see, so they are commenting on the, you know,
22 competition between acquirers.

23 Q. There had been a differential introduced, so that larger
24 merchants have been able to secure strategic merchant
25 rates, and smaller merchants were on average paying

1 more. Can you see that?

2 A. Yes, I was aware of that and I commented on this in my
3 reports, and found that the -- it would be incorrect to
4 attribute this to the mechanism of the UIFM, but rather
5 that that was the outcome of the regulatory commitments
6 that the issuers had negotiated with the government in
7 terms of reducing interchange fees on average, and the
8 mechanism, I understand, by which they did that was
9 essentially through rebates to -- to some mostly,
10 I understand, large merchants.

11 Q. We see at the bottom of that page, paragraph 156, the
12 process of substantial rebates being negotiated with
13 individual issuers, and it refers back to table 5?

14 A. Sorry, that says {RC-J3/85/41} "between schemes and a
15 handful of large merchants", not between issuers and
16 large merchants, so that is exactly the point I was just
17 making. Under the UIFM, issuers would nominate the
18 level of the interchange fee. In New Zealand, my
19 understanding is from the factual witness evidence that
20 the issuers did nominate levels up to the cap with
21 a very minor exception of one issuer adopting a somewhat
22 lower rate for charities, but essentially they did adopt
23 the cap.

24 The fact that the scheme had some negotiations with
25 large merchants is something that was able to happen

1 with or without the UIFM. That is something that can
2 happen in the factual, and that just recognises that as
3 the schemes are seeking to optimise the overall balance
4 of acceptance and the issuer side, in some cases, there
5 might be rebates to be provided to certain segments on
6 the acceptance side to approve it. So that in my view,
7 this in no way suggests that under the UIFM, you would
8 not get the results I identified.

9 Q. Could we look, please, at page 42 {RC-J3/85/42} and
10 recital 157. Certain merchants had been able to respond
11 to the situation by surcharging and steering; can you
12 see that?

13 A. Well, that says -- makes a sort of a broad statement
14 that says they are able to influence it under those --

15 Q. Well, the prevalence -- at paragraph 158?

16 A. Yes.

17 Q. You can see at the bottom of that paragraph
18 {RC-J3/85/42}:

19 "... there are some sectors in which surcharging for
20 credit and ... debit is more prevalent. These include
21 hotels, airlines, and central and local government."

22 A. Yes, I can see that.

23 Q. Then it explains the barriers to surcharging at 159.
24 Can you see that?

25 A. 159, so -- sorry, yes. Let me just have a quick look.

1 So this relates to a number of challenges to
2 surcharging. In some cases, it could be associated with
3 a rule, and in some cases it could be technical
4 distinctions or insufficient information. Then -- then
5 at the bottom, customer reactions is identified.

6 Q. Page 43 {RC-J3/85/43} please, paragraph 162:

7 "Because schemes still impose honour-all-cards rules
8 ... merchants who accept a scheme's credit cards are not
9 allowed to steer customers away from high-cost cards,
10 towards low-cost credit cards."

11 Can you see that?

12 A. Well, that -- that does not -- that -- that does not
13 seem accurate to me. The Honour All Cards Rule means
14 that a merchant cannot selectively accept, let us say,
15 debit cards and not accept credit cards. Oh, sorry,
16 this is high-cost cards towards low-cost credit cards.
17 Sorry, my mistake, I thought this was in relation to
18 credit and debit.

19 But basically, again, that does not seem to be the
20 outcome of an Honour All Cards Rule, because if the
21 merchant wished to implement surcharging, as between the
22 different cards, then that would be a mechanism by which
23 in principle they could steer. I am not sure the Honour
24 All Cards Rule prevents that.

25 Q. But the Honour All Cards Rule says within a category of

1 credit cards, you have to accept both high-cost credit
2 cards and low-cost credit cards, correct?

3 A. Yes, but it does not say that you cannot --

4 Q. That is the point that is being made?

5 A. Yes, but this is saying, not allowed to steer away,
6 which is a broader statement.

7 Q. You have seen the barriers to surcharging that are
8 mentioned above it, so it is saying that the Honour All
9 Cards Rule has an impact on the market?

10 A. In this case, I think it is saying that if you assume no
11 surcharging, then it -- then -- then it would stand to
12 reason that if the merchant would only select to accept
13 the low-cost credit cards and not the high-cost credit
14 cards, then that would be a way of steering. But as --
15 as the previous statements clearly indicated, it is not
16 clear at all that that is what merchants would actually
17 do, absent the Honour All Cards Rule. They may have
18 a view as to: why not accept both because we are worried
19 about losing sales.

20 Q. Mr Holt, just as a general point, I have got quite a lot
21 to get through today --

22 A. I understand.

23 Q. -- and I appreciate you want to put your case as best
24 you can.

25 A. I was just commenting on that statement about Honour All

1 Cards Rule, that there is more to it than --

2 Q. I am going to come on to the Honour All Cards Rule
3 later. I was simply inviting you to note that the
4 Ministry of Business was looking at this issue?

5 A. Okay.

6 Q. Page 53 {RC-J3/85/53}, please, paragraphs 204-205, we
7 see their conclusions.

8 A. 205, did you say?

9 Q. 204 to 205?

10 A. Yes.

11 Q. If you would, please, just cast an eye over 204 and 205,
12 and then I will put a point to you.

13 A. Okay.

14 Q. So that is recognising, is it not, that the way that the
15 payment system had evolved for retail payments in
16 New Zealand had led to economic distortions which would
17 need to be addressed; correct?

18 A. I think it is recognising that they had some concerns
19 about the overall level of efficiency which had arisen.
20 I note that in the very same document, they recognised
21 that the outcome of that was not due to any irrational
22 or anti-competitive actions, but merely the reflection
23 of the underlying competitive dynamics of what -- you
24 know, how competition works on the cardholder side and
25 merchant side.

1 Q. That is not something, is it, that an independent
2 economist would sanction, the idea that a payment system
3 development had given rise to economic distortions of
4 the type mentioned there by the Ministry?

5 A. Well, I think this raises a question as to whether under
6 competition, the possibility that MIFs could be too high
7 in -- and if that were demonstrated to be the case, you
8 might want to address that, and in my view, the best way
9 to address that would be to identify a regulatory
10 solution.

11 Q. If we could then, please, look at {RC-J3/111/30}, this
12 is part of the December 2020 issues paper, issued by the
13 Ministry.

14 A. Yes.

15 Q. You see at paragraphs 102 and 103 --

16 A. Yes.

17 Q. -- that there was an overall objective for the retail
18 payment system to deliver long-term benefits for end
19 users, and what the system would require; can you see
20 that?

21 A. I can see that.

22 Q. This was part and parcel, was it not, of what led to the
23 legislation, the 2022 legislation that was put in place?

24 A. Yes.

25 Q. So the legislative solution was necessary in order to

1 address the requirements, which included healthy
2 competition, incentivising innovation, efficient
3 allocation of resources and so on?

4 A. Yes.

5 Q. It follows from that that the existing system had not
6 produced those outcomes, correct?

7 A. Yes, I understand that the -- the authorities there felt
8 that some further intervention as to the level of the
9 interchange fees might be relevant. But in my view
10 that -- that is a context in New Zealand that is not
11 relevant to the adoption of the UIFM in the
12 counterfactual that we are looking at.

13 In that case, you had already had the EC intervening
14 to set interchange fees at 0.2%, 0.3%, reflecting the
15 outcome of its extensive analysis of -- you know, the
16 benefits and what would achieve an efficient allocation
17 of resources.

18 Q. Can I just explore the differences between the
19 New Zealand model and the model that you are proposing.
20 Firstly, in the New Zealand model, it is the schemes
21 that set the caps, but you are suggesting that the
22 interchange fee regulation would set the cap, is that
23 right?

24 A. Yes, I think that is fair. The cap was in -- in the
25 context of the post-IFR world is determined by the

- 1 regulation itself, yes.
- 2 Q. But in each system, Visa would not set default MIFs by
3 itself, would it?
- 4 A. That is -- well, that is correct. That -- yes, that is
5 correct.
- 6 Q. Issuers and acquirers would be free to reach bilateral
7 agreements on interchange fees, correct?
- 8 A. Correct.
- 9 Q. But in the absence of bilateral agreements, issuers
10 would be allowed unilaterally to choose the level of
11 interchange fee they wished to receive?
- 12 A. Correct.
- 13 Q. So the result of that would be that an issuer would very
14 likely notify a positive interchange fee for all
15 transactions, correct?
- 16 A. Correct.
- 17 Q. If they did not, then the settlement would be at par ie
18 no interchange fee payable. So given that issuers can
19 unilaterally choose what rate to set, you only get to
20 a situation where you have settlement at par if the
21 issuer wanted to do so, correct?
- 22 A. Well, close. I think technically it is in the absence
23 of them having nominated a positive interchange fee.
24 I suppose you can infer that what reason might it have
25 adopted for not nominating a fee; perhaps because it

1 wanted a settlement at par, but there might be some
2 other reason, I do not know.

3 Q. Let us just explore to what extent that system would be
4 displaced by bilateral negotiation. So for bilateral
5 negotiation, it would be appropriate, would it not, to
6 look at the best alternative to negotiated agreement for
7 each side to the negotiation ie what happens if you
8 cannot reach agreement?

9 A. Yes.

10 Q. If you have a situation where the default settlement is
11 at par, then, in reality, the acquirer's best
12 alternative to it is a zero interchange fee, is it not?

13 A. I agree that if an acquirer can simply access the
14 settlement at par option, it would have no incentive
15 to -- to do anything otherwise --

16 Q. Whereas --

17 A. -- and, sorry, the reason, I should add, is that that is
18 not because a positive interchange fee would necessarily
19 be counterproductive at the scheme level or even for
20 acquirers as a whole, but rather because of the free
21 riding problem on the acquiring side ie there would be
22 no basis for them to accept a positive interchange fee
23 if rival acquirers could then just default to
24 a settlement at par.

25 Q. Whereas if the default is that the issuer can set

1 a positive interchange fee up to the level of the cap,
2 then the best alternative to a negotiated outcome is
3 going to be settlement -- an interchange fee at the
4 level of the cap, is it not?

5 A. I think I agree with that. If -- if by that you meant
6 if the issuer is identifying any -- any reason to
7 deviate from the cap, and identifies no such reason,
8 then I agree they would likely set it at the cap.

9 Q. So where essentially all of the contractual power is
10 given to the issuing side, the reality is that the
11 interchange fee will not be negotiated but will have
12 a general tendency to be set at the cap?

13 A. I think it would have a general tendency to be set at
14 the cap, and that is because the outcome of any
15 negotiations would lead it to be thus.

16 Q. Of course, we know, do we not, that the Honour All
17 Issuers Rule leads to a situation where the acquirer
18 has -- or the Honour All Cards Rule more generally has
19 the -- the acquirer has no choice but to take those
20 cards, all of the cards issued by every issuer?

21 A. Yes, that is right. If they want to participate in the
22 scheme, but yes.

23 Q. The Honour All Issuers Rule necessarily removes, does it
24 not, a parameter of competition between issuers?

25 A. I think it is fair to say that the Honour All Issuers

1 Rule provides some additional bargaining position in
2 favour of issuers relative to the counterfactual. As
3 I explained in my report, there is a number of inherent
4 reasons why the -- the Honour All Issuers Rule may be
5 imposed nonetheless.

6 Q. Issuers would ordinarily compete, would they not, on how
7 acceptable their cards are, in terms of are they widely
8 accepted by merchants?

9 A. Well, do you mean absent that rule, because the reason
10 I am sort of disagreeing is that one mechanism by
11 which -- there is a whole range of mechanisms by which
12 issuers compete in terms of developing the product.

13 Q. I am --

14 A. But acceptance -- sorry, acceptance is not one of them
15 in a four-party scheme. Acceptance in a four-party
16 scheme is something that is common across issuers,
17 not -- not individually selected.

18 Q. Only because of the Honour All Issuers Rule, the Honour
19 All Cards Rule?

20 A. Yes, but that is part of what a four-party scheme is
21 doing. It is sort of saying the scheme works on these
22 issues, the issuers work on those issues, and one of the
23 important parameters for cardholders and for issuers is
24 to have the confidence that their scheme -- their cards
25 will be used.

- 1 Q. Absent that rule --
- 2 A. Okay.
- 3 Q. -- the issuers would be saying to cardholders: use me
4 because I have got a broader acceptance network of shops
5 than that bank.
- 6 A. Okay, okay, so absent the Honour All Issuers Rule, then
7 I agree that at least in principle that could be
8 a mechanism of competition. However, the -- the
9 underlying competitive dynamics goes the other way.
10 Each issuer in my view, absent the Honour All Issuer
11 Rule, would be competing to ensure that they are
12 offering the best cardholder proposition, and would not,
13 in my view, be particularly concerned about acceptance,
14 because they would recognise that merchants and
15 acquirers would want to accept them to avoid lost sales.
- 16 Q. Surely it would be something that they would advertise:
17 use my card because we are accepted at more shops than
18 the bank down the road.
- 19 A. Well, I think the -- the likely outcome would be that
20 there would be no real variation in that. So what they
21 would be mainly focusing on is ensuring that they are
22 offering the best competitive offering in terms of
23 price, quality and service to their cardholders. There
24 is no -- I sort of went through this in quite some
25 detail in my two reports as to why that is the case, and

1 it essentially relates to the absence of any credible
2 threat of non-acceptance to issuers, even absent the
3 Honour All Issuers Rule. I can expand on that if
4 helpful.

5 Q. Can we see how you put it in your ninth report,
6 {RC-H4/4/45}, paragraph 190.

7 A. Yes.

8 Q. You say halfway down that paragraph {RC-H4/4/45}:

9 "While the HACR may strengthen the bargaining
10 position of issuers, the negotiations are already tilted
11 in favour of the issuer because of the underlying market
12 dynamics."

13 A. Yes. So essentially, without having used the jargon,
14 what I am saying there is that the HACR is a sufficient
15 condition to get to the caps, but in my view it is not
16 a necessary one.

17 Q. But you would accept in principle, therefore, that the
18 HACR does strengthen the bargaining position of issuers?

19 A. Yes, that is why it is a sufficient condition, but not
20 a necessary one.

21 Q. It leads to a strong incentive for the acquirer to agree
22 with each issuer, because otherwise the acquirer is not
23 able to provide the full service to merchants, correct?

24 A. Yes, so I have already agreed with counsel that the
25 Honour All Issuers Rule further reinforces the reasons

1 why acquirers will want to accept a given issuer,
2 because they have to do so in order to accept all the
3 other issuers. That is why I say that is a sufficient
4 condition for the outcome I identify, but in my view, it
5 is not a necessary one because even absent that, the
6 bargaining power would lead to that same outcome.

7 Q. The incentive for an acquirer to reach an agreement with
8 a smaller issuer is not as strong, is it?

9 A. Well, I have recognised that -- that it is not
10 impossible that a smaller issuer would approach that
11 negotiation in a different way. I would add, however,
12 that the actual economics from the acquirer's side are
13 not so distinct, really, between a large and a small
14 issuer, and the reason for that is that the balance of
15 risk of lost sales versus gain from negotiating down the
16 interchange fee is exactly the same balance, whether it
17 is a large issuer or a small issuer. You are only
18 scaling it up or down.

19 So the lost sales point which is, you know, let us
20 say the gross margin is 30%, if there is a risk of lost
21 sale, that dominates sort of two orders of magnitude
22 greater than the 0.3% over which they would be sort of
23 trying to achieve a gain. That same mechanism, or that
24 same negotiating position factor, applies whether it is
25 a large issuer or a small one.

1 Q. Let us just think about it from the perspective of
2 a cardholder for a moment. Now, the cardholder cannot
3 switch debit cards without changing bank, can they?
4 A. I think -- well, yes, I think that is -- that is fair.
5 Q. If the cardholder was to change bank, then the issuer
6 would lose all the money-making opportunities associated
7 with the cardholder, would they not?
8 A. If the -- if the cardholder would switch, that is fair.
9 Q. For example, the use of credit balance and overdraft
10 charges and the other myriad charges that banks impose,
11 correct?
12 A. Yes, yes.
13 Q. So if the issuer and the acquirer fail to reach a deal,
14 the issuer is also at risk of losing out for those other
15 services, correct?
16 A. I think so. I have identified that there could be, you
17 know, factors to consider on the issuer side as well.
18 What I have identified is that (1) at the margin, risk
19 to the issuers is modest or indeed negative, if actually
20 in post-IFR world the profitability of this transaction
21 is actually somewhat negative; then, secondly, I address
22 the cardholder perspective on this. Essentially, the
23 degree of inconvenience imposed by not having the card
24 accepted at a merchant in my view does not compare to
25 the risk of the lost sales for the merchant.

- 1 Q. If a cardholder is unhappy that the card cannot be used
2 in all the shops, that cardholder may switch?
- 3 A. I -- it may do. But in my view, it would be more likely
4 to either use an alternative form of payment or to
5 switch -- to switch merchants and then, again, because
6 of the lack of credibility --
- 7 Q. We are dealing with debit at the moment. You accepted
8 right at the beginning of this morning that cardholders
9 are unlikely to have a different debit card for
10 a particular bank account; they will have one debit card
11 for a particular bank account?
- 12 A. That is fair, but they might have an alternative means
13 of payment; it could be a credit card or it could be
14 some other form of payment.
- 15 Q. If you take the position of a big acquirer, like
16 Worldpay, negotiating with a small issuer, then in the
17 absence of the HACR, Worldpay has substantial bargaining
18 power, does it not?
- 19 A. Well, I -- I do not consider that the size of the
20 acquirer lends them great bargaining power, because for
21 the very reason I explained before, the more risk of
22 lost sales that they are essentially at risk of -- of
23 losing on behalf of their merchants, the less likely
24 that they would win the merchant contracts.
- 25 Q. Assume you have got a new banking outfit that operates

1 exclusively electronic banking accounts; it is breaking
2 into the market, it is a challenger bank?

3 A. Yes, sure.

4 Q. They go to Worldpay and they say to Worldpay: I insist
5 that you pay this interchange fee; and Worldpay says: we
6 are not going to do that, and you cannot -- if your
7 cards are not accepted at Worldpay outlets that we
8 service, your cardholders are going to leave you. That
9 would be a realistic negotiating scenario, would it not?

10 A. Well, I do not think so, because the issuer will
11 anticipate what is the credibility of the threat to
12 non-accept, and merely because an issuer has
13 a relatively small number of cards is, in my mind, not
14 a good reason to change the competitive focus.

15 I could see that if this new entrant, essentially
16 all the cardholders had alternatives, ie there was
17 almost perfect multi-homing, then it would not be in as
18 good a bargaining position, but that is a very limited
19 scenario that I do not think exists in the real world,
20 and furthermore does not account for the fact that it is
21 not just about multi-homing; it is also about the degree
22 of preference to use a card.

23 Q. We have seen, have we not, in the evidence that Amazon,
24 for example, has been able to leverage its bargaining
25 power; HMRC has been able to leverage its bargaining

- 1 power in securing better rates?
- 2 A. So I do not know anything about the Amazon arrangement
3 as to whether that is -- you know, how that has come to
4 be. My understanding is that those are bargaining
5 outcomes which may happen at the scheme level, in which
6 case that is a different issue than what we are talking
7 about here. Then, as for HMRC, it is not surprising to
8 me that it is able to achieve a reduction, because by
9 definition, it does not face any risk of lost sales.
10 I mean, obviously, taxes paid cannot really be stolen by
11 somebody else, sadly.
- 12 Q. You have seen, have you not, that we were able to
13 identify large merchants who had pushed for rebates in
14 New Zealand?
- 15 A. Yes, as I mentioned before, the rebates in New Zealand
16 related to the commitments that the issuers had given to
17 the government to reduce average interchange fees, and
18 that was the way in which I understand that that played
19 out. That is very different to them nominating a level
20 of interchange fee at the cap, which they did under the
21 UIFM, as I understand it.
- 22 Q. Obviously if you have got an integrated issuer acquirer,
23 such as Lloyds or Barclays, there is room for them to
24 negotiate around the margin on interchange fees, because
25 they are both present in the acquiring and the issuing

1 markets?

2 A. Yes, so there are on-us transactions, I think is what
3 you are getting at.

4 Q. Yes.

5 A. It is not clear to me that that -- that is potentially
6 a quite complex sort of scenario, as to what would be
7 the incentives for on-us. I am not aware -- I am aware
8 that that was raised in the Ministry of Economics note,
9 but it did not seem to give any clear guidance as to
10 what the actual outcome of those on-us transactions were
11 either way.

12 Nor -- nor did it seem to suggest that that was
13 specific to the UIFM-nominated levels, as opposed to the
14 way in which they were implementing the commitments that
15 they had agreed with government.

16 Q. Indeed, if we look at page 98 {RC-H4/4/98} of your ninth
17 report, paragraph 368, you will see that you identify
18 the role of the HACR in the context of commercial cards?

19 A. Yes.

20 Q. You say:

21 "Commercial cards could still be 'must take' if
22 merchants considered consumer cards to be 'must take'
23 and they were not permitted to selectively decline
24 commercial cards due to the presence of the HACR."

25 A. Yes.

1 Q. So you are identifying the HACR as being a basis upon
2 which the odds are stacked substantially in the favour
3 of the issuers, are you not?

4 A. I think all I am doing is describing the -- exactly what
5 the economics of the HACR could be, and identifying that
6 it could lead to a situation whereby the commercial
7 cards were accepted only because they were -- because
8 they had to be in order to accept the consumer cards.
9 I later go on to look at the evidence in that respect
10 and find that that clearly is not the case, because when
11 the HACR was removed in relation to the commercial
12 cards, there was no real impact on either acceptance of
13 those cards, nor indeed on the interchange fees that
14 were set.

15 So I am identifying a hypothetical issue here which
16 I then go on to say does not exist in fact.

17 Q. You are aware, are you not, that some of the witnesses
18 in this hearing have given evidence to the tribunal that
19 the effect of the HACR would be to -- sorry, without the
20 HACR, that the scope for real negotiation, especially
21 with smaller issuers, would be -- would be there?

22 A. Yes, I -- I recognise that -- I think a couple of the
23 Mastercard witnesses identified that possibly smaller
24 issuers would be in a different bargaining position. As
25 I mentioned, I had already acknowledged that in my

1 report that maybe it could be the case that smaller
2 issuers would nominate something somewhat lower than the
3 caps.

4 I have now expanded on the reasons in -- in, you
5 know, just earlier today as to why I do not feel that
6 that necessarily would -- would be in fact how the
7 negotiations would carry out, but in any event, even if
8 that were the case, I identify that that would be
9 unlikely to lead to an appreciable reduction in the
10 level of interchange fees, if nothing else, because
11 those issuers would then be disadvantaged by reference
12 to the other issuers who are bigger and able to give
13 a better deal to cardholders.

14 Q. You said earlier that the risk to the issuer of not
15 getting an agreement would be negative, but that cannot
16 be right, can it, because if essentially cards were
17 a cost-inducing item with no countervailing benefit,
18 they would not be offered?

19 A. That comment is essentially just looking at the direct
20 financial impact of not having the transaction made, so
21 I agree with you that that is one aspect to look at it,
22 and whereas if they were making at the margin a negative
23 profit as a result of the transaction, which is possible
24 if the cost of the transaction exceeded the -- the MIF,
25 then you can contrast that to the very large amount of

1 potential lost sale margin effect on the acquiring side.

2 Q. Now, in terms of the position with the HACR, the options
3 for an acquirer, and therefore merchants, are
4 essentially either to accept the unilaterally notified
5 level or to decline all scheme cards of the relevant
6 category and from every issuer?

7 A. Yes.

8 Q. So the effect of the HACR is to penalise the acquirer
9 for a failed negotiation, by not only depriving it of
10 the value of the deal for the individual issuer, but
11 also the values of every deal from every other issuer in
12 the market?

13 A. I think all I would say to that is that there is no
14 incentive for the acquirer to -- to threaten to not
15 accept, in which case they have no basis to make
16 a credible offer of a reduced interchange fee.

17 Q. That, as Mr Dryden says, is essentially a unionised
18 approach to price setting, is it not?

19 A. I am not sure I would use the word "unionised", but
20 I have acknowledged that all else equal, the HACR does
21 increase the bargaining power of the issuers, because of
22 the -- the need to accept that issuer relative -- to
23 continue to participate in the scheme.

24 My -- my point, however, is that while I can see
25 that effect and I describe it and acknowledge it, and

1 I say that it is a sufficient condition if that applies
2 to get to the IFR caps, it is not a necessary one
3 because of the -- essentially because of the lack of
4 a credible -- a credible threat, even against individual
5 issuers.

6 So I am not discounting the hypothetical possibility
7 of what you say; I am saying that in the context of the
8 post-IFR world, it is, in my view, very unlikely that
9 the HACR would have any impact.

10 Q. Now, at -- in your ninth report, please, page 43
11 {RC-H4/4/43}, paragraph 180, you imply that the HACR has
12 been somehow given a clean bill of health by what you
13 call the EC, which is the European Commission, is that
14 right?

15 A. Sorry, paragraph 180 --

16 Q. Yes.

17 A. -- did you say?

18 Q. You say {RC-H4/4/43}:

19 "As I set out in my prior report and in further
20 detail below ..."

21 Generates what you say to be competitive effects,
22 benefits.

23 "I note that when regulators such as the EC assessed
24 the competitive effects ... they took a broader approach
25 than Mr Dryden appears to be advocating for."

1 A. Yes.

2 Q. Are you suggesting -- then there is a footnote where you
3 set out some reasoning from the *Visa 1* decision?

4 A. Yes.

5 Q. Can you see that?

6 A. Yes.

7 Q. Do you think that that provides a full and fair
8 reflection of all of the European Commission's
9 decision-making on the HACR?

10 A. Well, my -- my understanding of the
11 European Commission's perspective on the HACR in a sense
12 deviated as between the Honour All Issuers Rule and the
13 Honour All Products Rule. I think this is fair in
14 relation to the Honour All Issuers Rule. I am not aware
15 of having ever challenged the --

16 Q. You cited *Visa 1*. Where in your report do you go
17 through all of the other regulatory decisions that deal
18 with the HACR from the EU Commission? We will come
19 on --

20 A. In my first report in the HACR section, this is
21 obviously a statement within the UIFM section, but I did
22 describe a broader range of -- of regulatory history in
23 relation to the HACR in my first report on the relevant
24 issue regarding the HACR, and I did identify that the
25 Commission began with a general support in recognition

1 of the benefits of the HACR without distinguishing
2 really between the two types, and then later it seemed
3 to form a view that there could be some reinforcing
4 concern and effects regarding the impact of the HACR,
5 the Honour All Products Rule, but did not, in my view,
6 as I understand it, express that concern in relation to
7 the HAIR, the Honour All Issuers Rule, which -- which it
8 continued to allow for in the IFR on the basis of the
9 benefits that it brought.

10 Q. But the -- you say the benefits that the IFR brought.
11 The IFR was not a competition decision, was it; it was
12 expressly not dealing with a competition position?

13 A. Well, I understand it was a regulatory intervention,
14 yes.

15 Q. Recital 14 of the IFR -- I do not think we need to turn
16 it up -- says this is without prejudice to the position
17 under competition law?

18 A. That may be, yes.

19 Q. It was not an exemption decision identifying an
20 exemptible level for a MIF, was it?

21 A. I understand that might not be what the status of it is,
22 but it did make some comments about the role of the
23 Honour All Issuers Rule, that -- my interpretation was
24 that it saw that there were benefits.

25 Q. They identified the Honour All Cards Rule -- I will come

1 on to this when we are dealing with the HACR. It
2 identified the Honour All Cards Rule as being
3 effectively a tying obligation, did it not?

4 A. Yes, but that was in relation to the Honour All Products
5 Rule, not the Honour All Issuers Rule.

6 Q. You say that the IFR solved the hold-up problem. In
7 fact, it has not, has it? It has simply constrained the
8 effects of the hold-up problem?

9 A. No, I -- I disagree with that. The hold-up problem is
10 that -- is explicitly that absent some basis to -- to
11 constrain the risk of free riding by issuers, that you
12 would let -- sorry, lead to a level of interchange fees
13 that was so high that it would be detrimental to the
14 scheme. In my view that is not the case here.

15 Q. But issuers can still hold up acquirers but only to the
16 level of the cap?

17 A. Well, the hold-up problem, as I am describing it,
18 relates to the impact of the incentives on issuers in
19 relation to achieving an overall outcome that is
20 detrimental to the scheme; that is -- that is the bit
21 which is present pre IFR but not present post IFR.

22 Q. In terms of the viability, plausibility of the UIFM, can
23 we look, please, in your ninth report at paragraph 173,
24 page 41 {RC-H4/4/41}.

25 A. Yes.

1 Q. As I understand it, the essential reason you give for
2 the UIFM being more likely than settlement at par is
3 because it would allow the Visa scheme to operate with
4 positive interchange fees, which you consider to be
5 desirable from Visa's perspective?

6 A. Yes.

7 Q. So you have not considered whether or not issuers and
8 acquirers would want this change, have you?

9 A. No. But I -- I have made a comment in my first report
10 as regards the question as to whether there were any
11 obstacles to the adoption of the scheme, if the scheme
12 preferred to adopt it, but if -- there might be
13 obstacles in theory, and my understanding was that there
14 were none, certainly nothing that was -- that could not
15 be surmounted.

16 Q. This model would also have to be operated in Ireland,
17 would it not, in your counterfactual world?

18 A. Yes, I think that is fair, given that we are -- the
19 post-IFR MIFs would apply in Ireland, yes.

20 Q. The EU Commission would therefore still have something
21 to say about it, because it has competence in relation
22 to the Irish economy?

23 A. I have no view on that.

24 Q. Well, the reality is that the EU Commission has already
25 expressed concern, has it not, about alternative

1 proposals that Mastercard put forward, where they were
2 concerned that the hybrid model that Mastercard had been
3 mooting would not eliminate the possibility that the
4 formulas were being used to replicate the MIF; do you
5 remember that expression?

6 A. I do not remember that. But I would find it surprising
7 if the Commission were to intervene to -- if either Visa
8 or Mastercard were to implement the UIFM at the level of
9 the caps in Ireland, because they are obviously
10 currently permitting the schemes to operate the actual
11 MIFs in Ireland at those levels, so I do not see why it
12 would have a different view.

13 Q. Can we look, please, at {RC-M1/5/8}. This was dealing
14 with a different model, the hybrid model.

15 We see at paragraph 25.3 of Mr Perez's statement
16 that the third option, replacing the intra-EEA default
17 fees with a fee-based incentive scheme, the hybrid new
18 business model --

19 A. Yes.

20 Q. "... MasterCard had not provided the Commission with
21 sufficient details and therefore 'cannot eliminate the
22 possibility that the formulas would be used to replicate
23 the MIF'."

24 That allegation could be cast, could it not, at the
25 UIFM, which is simply seeking to put a positive MIF in

1 place to continue generating the positive revenue that
2 you have identified as being, on your case, necessary
3 for the scheme?

4 A. Well, firstly, I think a lot of detail has been given in
5 the context of the UIFM, none of which would have been
6 available perhaps at April 2008, because the model has
7 been devised since then in great detail and has in fact
8 been implemented.

9 As to whether one could say that the formulas are
10 used to replicate the MIF, well, that is, if anything,
11 a legal issue. I go back to what I said before. In my
12 view, you have taken away the positive default
13 multilateral setting point, and everything from that
14 point is unilateral. So if there is a concern there, it
15 is a legal one.

16 Q. It is right, is it not, that the settlement and clearing
17 regime would still be required for the UIFM?

18 A. Yes.

19 Q. It is right, is it not, that if the UIFM were put in
20 place, substantial changes would be needed from the
21 acquiring perspective, which would be costly?

22 A. It may be. I have not investigated the precise cost to
23 implement it. All I have referred to is the factual
24 witness evidence, saying it can be done, essentially,
25 and has been done in New Zealand.

1 Q. It would be convoluted and technically complex?

2 A. That is not something that I have examined.

3 Q. Some of the material dealing with this has been
4 addressed in closed session. Have you had access to
5 that material and considered it?

6 A. I -- I have considered what the witnesses had to say
7 about the issue. I have not sort of formed views as
8 an economist as to the precise degree of any technical
9 challenges. But I have relied on the fact that (a) it
10 has been implemented elsewhere and (b) I do not
11 understand there to be any insurmountable obstacles.

12 Q. But that would be a factual matter on which you have not
13 particularly delved?

14 A. That is correct.

15 MR BEAL: Sir, I think in those circumstances I can avoid
16 the need to go into private session.

17 But perhaps if I could ask for the shorthand
18 writer's break now, I can take stock with my team as to
19 what the collective view is, but it will save me a good
20 five, ten minutes of questioning which will aid my cause
21 elsewhere.

22 THE PRESIDENT: Well, that is very helpful, Mr Beal.

23 It is a good time for a break in any event, and we
24 will rise for ten minutes.

25 MR BEAL: Thank you.

1 (11.27 am)

2 (A short break)

3 (11.38 am)

4 MR BEAL: Mr Holt, you have not dealt with the bilaterals
5 counterfactual, correct?

6 A. Only to a very, very limited extent.

7 Q. Can we then turn, please, to objective necessity. Could
8 I ask you, please, to look at {RC-J5/5/11}, and in
9 recital (59), it should be at the top right-hand corner
10 of that page, you will see that the Commission records
11 an admission from Visa that the Visa scheme would exist
12 without the MIF; can you see that?

13 A. Yes, I can.

14 Q. Then there is a submission that is made that
15 {RC-J5/5/11}:

16 "Visa only says that without the MIF 'the scale of
17 Visa's operations would be greatly reduced and so would
18 its competitive impact. The "product" offered ... could
19 be different and inferior, cardholders would get access
20 to a smaller network ...' ..."

21 The Commission's response, was it not, was that such
22 arguments were to be considered under what is now
23 article 101(3), where the question is -- whether the --
24 and not under article 101(1), where the question was
25 whether the clause was technically necessary for the

1 operation of the Visa payment system. Can you see that?

2 A. Yes, I can see that.

3 Q. If we then, please, look in bundle {RC-J3/73/114}, in
4 recital (391), the Commission provisionally found that
5 inter-regional MIFs were not objectively necessary as
6 a default mechanism, since Mastercard's payment system
7 could function on the basis of a rule prohibiting
8 ex-post pricing?

9 A. Yes.

10 Q. It goes on to explain what that means.

11 A. I see that.

12 Q. At page 117 {RC-J3/73/117}, please, recitals
13 (402)-(403), the Commission concluded that there are
14 past examples where Mastercard's debit card brand
15 Maestro does not have a MIF, and it mentions
16 Switzerland, and it mentions the fact that from
17 21 June 2008 to 8 July 2009, Mastercard had operated
18 with a zero intra-EEA MIF, correct?

19 A. Yes.

20 Q. Then turning over the page to the top of page 118
21 {RC-J3/73/118}, recital (403), the Commission then
22 refers to a number of instances of card schemes being
23 operated with a default settlement at par rule; can you
24 see that?

25 A. I can see that, yes.

1 Q. I am going to move on now to inter-regional MIFs. Here
2 it is common ground, is it not, that the counterfactual
3 would be default settlement at par?

4 A. Yes.

5 Q. It is right, therefore, is it not, that in that
6 counterfactual world, the MIFs payable for Mastercard
7 and Visa cards on inter-regional transactions would be
8 zero?

9 A. Yes.

10 Q. It would follow from that, would it not, that certainly
11 for IC plus plus pricing contracts, the MSC payable
12 would be lower?

13 A. Yes, within those contracts. There is a question as to
14 what transactions those would apply to, but yes, I agree
15 with that point.

16 Q. As I understand it, your argument, based on your most
17 recent report, is that there is a case for recognising
18 that the analysis should stop there, that you simply
19 look at what the impact is on Mastercard and Visa's
20 transactions, correct?

21 A. Yes, so this is essentially the discussion of whether
22 the -- and this is in relation to pass on as opposed to
23 price floor, by the way.

24 Q. Well, this is in relation to what is the exercise in the
25 counterfactual?

- 1 A. Yes.
- 2 Q. Which is to consider, strip out the MIFs, make them
3 zero, what impact does that have on the MSCs?
- 4 A. That is correct, so I was simply clarifying that I am
5 applying this in the context of the sixth test of the
6 Supreme Court, and that there are two ways of looking at
7 that. One would be what I describe as a narrow one, so
8 just looking at the cost of the transactions -- the
9 inter-regional transactions that would continue to apply
10 over the Visa network, and the other being what I call
11 the wider test, which looks at the implication of that
12 for cost of accepting payment cards for merchants, if
13 there is some switching to other schemes.
- 14 Q. You are aware, are you not, that the Supreme Court did
15 not consider the issue of switching at all?
- 16 A. That may be the case. I am not sure -- I am not sure
17 how -- how clear it was as to whether there was a case
18 for doing that, and whether -- because it was looking
19 obviously at other MIFs where perhaps the issue would
20 have been less relevant.
- 21 Q. But the Supreme Court was formulating its test by
22 examining the factual basis for the Mastercard decision
23 that was upheld by the Court of Justice, correct?
- 24 A. I presume that must be what it was doing.
- 25 Q. Can we just look at the language in *Mastercard*

1 I decision, and as I understand it, you found upon
2 recital 448, which is at {RC-J5/11/130}. You will see
3 that that paragraph says:

4 "... the purpose of the second quantitative analysis
5 was to assess the differential between merchant fees
6 paid by larger and small merchants to assess the extent
7 to which larger ones are in a position to negotiate an
8 MSC below the MIF."

9 Just pausing there, that quantitative analysis had
10 been conducted in relation to Mastercard's transactions,
11 had it not?

12 A. It may well be the case, yes. I have not sort of seen
13 the detail of that analysis, but, yes, I think that is
14 probably correct.

15 Q. We are going to come on to look at the relevant recitals
16 in a moment, but I am just trying to frame the analysis.
17 The next sentence then says {RC-J5/11/130}:

18 "The decisive question is whether in the absence of
19 the MIF the prices acquirers charge to merchants at
20 large would be lower".

21 Just pausing there. That is clearly referring back
22 to the concept of price in the -- that is being
23 considered in the first sentence, correct?

24 A. It -- it could be that that is the case. Obviously
25 my -- my point on this is that if there is an impact on

1 essentially the costs that merchants are paying for
2 payment schemes, of which obviously Amex is a rival,
3 then that -- from an economic standpoint, is -- is
4 a relevant consideration because you would not exclude
5 the Amex point, just because it -- it is a three-party
6 model and does acquiring itself rather than through
7 third-party acquirers. Whether -- whether that is
8 a relevant legal analysis, I have acknowledged is
9 something for the tribunal, and I have just pointed out
10 the economic implications of the two approaches.

11 Q. If we look at what the reason is that is given in
12 recital 448 for this particular focus, it is because the
13 price each individual bank could charge to merchants
14 would be fully determined by competition rather than to
15 a large extent by collective decision among or on behalf
16 of the banks?

17 A. Yes.

18 Q. So again, what they are focusing on, surely, is the
19 collective determination of the MIF for Mastercard
20 transactions, because that is what is going to be
21 stripped out from the counterfactual?

22 A. Yes, yes, and I think my point is that in the context of
23 inter-regional MIFs, where the competitive dynamics are
24 in my view quite distinct from consumer domestic ones,
25 that it is important to consider what -- what are

1 merchants actually paying for these transactions in the
2 counterfactual.

3 Q. Well, that is not what the Commission did. If we start,
4 and look, please, at page 117 {RC-J5/11/117} of this
5 document, recital 408, this is the start of the analysis
6 by the Commission of the effects of the MIF. It
7 identifies that:

8 "In the absence of a bilateral agreement, the
9 multilateral rule fixes the level of the interchange fee
10 rate for all acquiring banks ... Prices set by acquiring
11 banks would be lower in the absence of the multilateral
12 rule and in the presence of a rule that prohibits ex
13 post pricing."

14 So the Commission is coming at this very much from
15 that is the appropriate counterfactual, correct?

16 A. Yes, I can see what the Commission is doing. I think
17 the question I am being asked is what would be the
18 consequences in the UK and Irish markets and -- and that
19 is the basis on which I have answered it.

20 Q. But it is right, is it not, that the Commission is only
21 considering the impact of the cost of accepting
22 Mastercard rather than anything else?

23 A. That -- that may be the case. In my view, if -- if that
24 is the case in a situation whereby merchants would be
25 paying more in the payment scheme cost of MSCs as

1 a result of the implication of removal of the MIF, then
2 it would be erroneous to not account for that.

3 Q. So the Commission got it wrong by not conducting the
4 switching analysis that you urge upon the tribunal?

5 A. Well, it is not clear to me to what extent that would
6 have been relevant in -- in their analysis. They -- it
7 is not clear here whether they took that into account or
8 not, and, for example, you know -- sorry, I think it is
9 fair to say that it -- it appears from this discussion
10 that they did not take that into account. In my view,
11 at least in the UK where you can see, you know, a strong
12 Amex acceptance network, then you get to a different
13 answer.

14 Q. If we look, please, at recital 412 at page 118
15 {RC-J5/11/118}. The Commission's focus is on:

16 "The collective decision by the MasterCard
17 organisation to set a MIF inflates prices charged by
18 acquirers to merchants for acquiring cross-border credit
19 and debit card transactions with MasterCard's payment
20 cards."

21 A. Yes.

22 Q. What the Commission does not go on to do, does it, is to
23 conduct a broad switching analysis to say what would be
24 the consequence of a market-wide Merchant Service
25 Charge?

1 A. Yes, sorry, this is the -- sorry, we are talking -- this
2 is the commitments decision, is it, or...

3 Q. No, this is the *Mastercard I* decision?

4 A. This is the *Mastercard I* decision, so not -- so it is
5 not looking at inter-regional in that case.

6 Q. No. The reason I am taking you to this is to understand
7 the framework of analysis that has been set by the
8 Supreme Court, which you are purporting to apply, are
9 you not, for inter-regional cards?

10 A. Yes.

11 Q. I have established with you that the Supreme Court was
12 deriving its analysis from analysis of the appropriate
13 way of doing things that had been sanctioned by the
14 Court of Justice in Luxembourg, correct, in the
15 Mastercard case?

16 A. Yes, I think that is -- that is fair.

17 Q. The Court of Justice in the Mastercard case upheld the
18 Commission's way of doing things. I am taking you back
19 to the start of all this to look at the framework?

20 A. Yes, understood.

21 Q. If we look, please, at page 120 {RC-J5/11/120}, recital
22 419, the Commission looks at the role of the intra-EEA
23 MIF as a fall-back fee, does it not, for domestic
24 transactions?

25 A. Yes.

1 Q. Those domestic transactions are domestic transactions on
2 the Mastercard network, correct?

3 A. Yes, I think that is right.

4 Q. It is only looking at the Mastercard fees?

5 A. Yes.

6 Q. Page 122 {RC-J5/11/122}, recital 428, we see that the
7 Commission on the first quantitative analysis is showing
8 the average merchant fee for Mastercard branded credit
9 and charge cards of all acquirers in a particular ... do
10 not know what, and the fact that it dropped. So the
11 focus is very much, is it not, on the impact on
12 Mastercard branded credit and charge cards for
13 acquirers?

14 A. Yes, I think that is fair.

15 Q. If we then, please, look at page 124 {RC-J5/11/124},
16 recital 430.

17 It says, taking into account that the weighted
18 average of all cross-border interchange fee rates of the
19 Mastercard brand was X in 2002, and X -- or Y, sorry, in
20 2003, this means that Mastercard's MIF has accounted for
21 approximately 57% and 60% of the average merchant fee
22 for Mastercard-branded payment cards.

23 Again, it is a Mastercard-specific focus?

24 A. Yes.

25 Q. At page 130 {RC-J5/11/130}, then, going back to recital

1 448, it is in this context, and -- well, let us just
2 stop in passing, please, at 432 {RC-J5/11/125}, which is
3 the second quantitative analysis:

4 "... the Commission assessed to what extent
5 MasterCard's MIF determines the merchant fee of small as
6 opposed to large merchants. This was done by comparing
7 the weighted average of MasterCard's Intra-EEA fallback
8 ... fees to the weighted average merchant fee which each
9 of the 17 acquirers..."

10 So, again, coming to the second quantitative
11 analysis, yes, it changes the ambit of the enquiry, but
12 it is still very much a Mastercard focus, is it not?

13 A. Yes.

14 Q. So when we see at recital 448, the reference to -- which
15 is back at page 130 {RC-J5/11/130}, we see the reference
16 to:

17 "The decisive question is whether in the absence of
18 the MIF the prices acquirers charge to merchants at
19 large would be lower."

20 That is in the context, is it not, of an exclusively
21 Mastercard focus all the way through?

22 A. I think it seems to be. I think my point is that in an
23 inter-regional context, there is likely to be
24 an important further consideration that directly affects
25 competition in -- as between the schemes and directly

1 affects the costs that the merchants would be paying.

2 In my view, that is a relevant economic consideration
3 that should be taken into account, but I have recognised
4 from the outset that there are -- you know, that the
5 precise test is a matter for the tribunal.

6 Q. It is clear, is it not, from the various regulatory
7 decisions we have looked at this morning that the
8 Commission regards switching to alternative payment
9 methods as an article 101(3) issue?

10 A. Yes, I think my previous answer applies. I think in the
11 context of inter-regional, where there is a very
12 important question as to what actually merchants are
13 going to be paying for their card acceptance, if that is
14 going up, it seems very odd to say that there is
15 a restriction that is attributable to the MIF when that
16 is actually bringing the -- you know, in -- if I am
17 correct, obviously on the analysis, when that would be
18 having a beneficial impact.

19 Now, the general efficiencies debate is a much
20 broader debate that -- I have not carried out that.
21 That is obviously not a matter for this trial, and there
22 would be a whole range of further things that you need
23 to take into account, some of which would be similar and
24 some of which would be additional.

25 Q. In relation to inter-regional transactions themselves,

1 I think you note in your first report at paragraph 334,
2 which is page 104 {RC-H4/3/104} -- I say first, I mean
3 eighth, sorry. You note that they are low in volume?

4 A. Yes.

5 Q. But it is correct, is it not, that they generate
6 a reasonably substantial amount of revenue?

7 A. Yes. So they are lower in volume, higher in -- in
8 value, I think in terms of a share transaction, and
9 higher again in terms of the contribution of the MIF,
10 and that reflects that the inter-regional MIFs are above
11 the domestic ones.

12 Q. Inter-regional MIFs are typically paid by UK merchants
13 for tourist purchases or online e-commerce transactions,
14 correct?

15 A. Yes, I think that is fair. It would be a range of
16 people based in other regions making purchases in the
17 UK.

18 Q. Now, in your ninth report, page 61 {RC-H4/4/61},
19 paragraph 236(b), you say that intra-EEA transactions
20 have a fundamentally different character. Let us just
21 locate that.

22 A. Sorry, which paragraph?

23 Q. The ninth report, page 61 {RC-H4/4/61}.

24 A. Yes.

25 Q. Paragraph 236(b).

1 A. Yes.

2 Q. You say {RC-H4/4/61}:

3 "Inter-regional transactions take place in
4 a substantially different competitive landscape to..."
5 Intra-EEA ones.

6 You know, do you not, that post Brexit, intra-EEA
7 transactions for UK purposes are indeed inter-regional?

8 A. I -- I believe it is the case that the inter-regional
9 rate applies; I think it is called a non-EEA
10 intra-regional or something like that, I forget the
11 precise term, but, yes, there is a change in the
12 transaction characterisation as a result of Brexit.

13 Q. Presumably you do not suggest, do you, that there is
14 a substantially different competitive landscape on
15 1 January 2021, when Brexit took effect, compared to
16 31 December 2020, before Brexit had been completed?

17 A. Well, I -- I stand by my comment that there is
18 a difference in competitive conditions overall, as
19 between domestic and intra transactions and
20 inter-regional ones. Obviously the regulation applied
21 to domestic and intra as a broader group, so you have
22 got an averaging-out effect going on. It is an
23 aggregation effect. So obviously some of the -- some of
24 the -- the transactions will, will differ to others, but
25 essentially overall, I think it is quite clear that

1 there are differences between the overall average of
2 inter-regional transactions, compared to the overall
3 average of domestic and intra-EEA ones.

4 Q. It is also your case, as I understand it, that the
5 competition from Amex is stronger in an inter-regional
6 context, is that right?

7 A. Yes, the reason for that being that there is higher
8 degrees of acceptance by merchants in the segments of
9 the economy, where inter-regional transactions are most
10 prevalent. Just as an example, for travel, retail
11 goods.

12 Q. Can we look, please, at {RC-J3/129/6}. This is
13 a May 2023 Nilson report.

14 A. Yes.

15 Q. In terms of total volume, third paragraph down on the
16 left, purchases of goods and services combined with cash
17 advances and withdrawals was US\$40-odd trillion; can you
18 see that?

19 A. Yes.

20 Q. Top right-hand corner {RC-J3/129/6}:

21 "Visa and Mastercard cards combined accounted for
22 54.83% of total volume ... UnionPay cards generated
23 39.93% ... American Express, JCB and Diners ...
24 [combined] accounted for 5.24%..."

25 Can you see that?

- 1 A. Yes, I can.
- 2 Q. Now I invite you to keep the 41 trillion figure in your
3 head. Could we then, please, look at {RC-J3/129/7}.
- 4 This is to do with global network cards in
5 circulation. It is providing figures in billions.
- 6 A. Yes.
- 7 Q. You can see American Express admittedly has 0.13 billion
8 cards in circulation, but that is only 0.8% of the
9 overall share of the number of cards worldwide, correct?
- 10 A. Yes.
- 11 Q. Visa and Mastercard have substantially higher figures,
12 do they not?
- 13 A. Yes, they do.
- 14 Q. Can we then please go to {RC-J5/41.04/16}, and this is
15 providing analysis of European market shares, and it is
16 right, is it not, that Mastercard has a very significant
17 position, so does Visa; American Express not so much?
- 18 We see --
- 19 A. Yes.
- 20 Q. -- third bullet up from the bottom of page 16
21 {RC-J5/41.04/16}:
- 22 "American Express held 1.6% of purchase volume ...
23 down from 2.4% in 2019".
- 24 Correct?
- 25 A. Yes, yes. Essentially -- sorry, are you -- I will wait

1 if you are presenting more figures, but I can comment at
2 some point.

3 Q. There is more, yes.

4 A. I will hold off on any comments --

5 Q. Page 141 {RC-J5/41.04/141}, please. This is Ireland.

6 We see that American Express does not have any share in
7 Ireland, does it?

8 A. Yes, I think that is fair, yes. Yes, okay, I accept
9 that.

10 Q. In terms of acceptance, because we are dealing with
11 inter-regionals, page 144 {RC-J5/41.04/144}, please, in
12 terms of Ireland, second to last bullet on the
13 right-hand side:

14 "Three-party schemes like Amex and Diners Club have
15 high levels of acceptance and have particularly high
16 acceptance in areas with a large number of tourists".

17 So that suggests that their acceptance is better
18 than their issuing in Ireland, is that right?

19 A. Yes, yes, three-party schemes have higher levels of
20 acceptance with large tourist numbers, yes, that is
21 right.

22 Q. Can we then please look at page 289 {RC-J5/41.04/289}.
23 The figures for the UK are broadly similar in terms of
24 share of purchase volume, and we see on the right-hand
25 side of that page:

1 "American Express accounted for 3% of UK card volume
2 in 2020 ..."

3 A. Yes.

4 Q. {RC-J5/41.04/289}.

5 "... down by one percentage point, as [travel and
6 entertainment] spending on such cards was significantly
7 affected by pandemic-related travel restrictions".

8 Then again in terms of acceptance levels, page 292
9 {RC-J5/41.04/292}, please, bottom right-hand side:

10 "American Express acceptance tends to be
11 concentrated in large multinational chains and urban
12 areas, as well as traditional T&E outlets".

13 A. Yes.

14 Q. We can see from the table on the left-hand side,
15 American Express's acceptance levels are below those for
16 Visa and Mastercard; can you see that, in terms of
17 outlets?

18 A. Its acceptance is lower than Visa and Mastercard, is
19 that the point? Yes. I can see the figures.

20 Q. If the MIFs were reduced to zero for inter-regional
21 transactions in the UK and Ireland, schemes would still
22 continue to offer inter-regional functionality across
23 the network, would they not?

24 A. Well, firstly, can I make a brief comment about the Amex
25 points that have been put over the last series. So

1 I accepted in my report that Amex's share of total
2 transactions is low. It is 3%, as I explicitly state.
3 It is higher in the inter-regional and commercial
4 segments. Amongst the reasons why I think it is higher
5 in those segments is that the sort of customers who
6 carry out those types of transactions are more
7 predisposed to have an Amex than on average across the
8 consumer domestic part of the market, and that reflects
9 the higher level of acceptance in the relevant parts of
10 the economy which are the subject of a high proportion
11 portion of the inter-regional and commercial -- I know
12 we are not on commercial right now, but those types of
13 transactions, and I set out in the data what the mix of
14 transactions for inter-regional and commercial is by
15 type of -- by type of transaction.

16 Moreover, I noted that Amex does have high and
17 increasing acceptance in the UK of 80% plus, and that
18 the claimant evidence makes it very clear that for those
19 Claimants who have a particular focus on accepting
20 inter-regional transactions, for example, in the travel
21 sector, it is in the high -- mid-90s, I think 94% is the
22 number that sticks to mind.

23 So my view is that even if Amex's overall share of
24 transactions, of course those being dominated by
25 domestic transactions where it does not have

1 a particularly strong position, it does not detract from
2 its ability to win transactions in the inter-regional
3 and indeed commercial markets.

4 Q. Can I go back to the question I actually asked you,
5 which was if MIFs are reduced to zero for inter-regional
6 transactions in the UK and Ireland, Visa and Mastercard
7 would still continue to offer inter-regional
8 functionality across their networks, would they not?

9 A. I mean, I think that is fair, subject to some caveats.
10 So I -- I have looked at the witness evidence, and they
11 identify a number of potential reactions, some of --
12 most of which, I think it is fair to say, include the
13 continued availability of such functionality. Some of
14 that evidence suggests that it would not include the
15 availability of that functionality, at least in the
16 context of cases where the inter-regional MIF would be
17 reduced. So there might be some reaction of that type.
18 I think that was the Mastercard witness.

19 Q. If we look, please at {RC-J5/56.3/3}, we have a figure
20 for card activity in the UK for the month
21 of November 2023 in the top right-hand corner, which is
22 73.3 billion?

23 A. Yes.

24 Q. That comes out, as you heard from my cross-examination
25 of Dr Niels, at about US\$94 billion, correct?

- 1 A. Yes.
- 2 Q. You times that by 12 and you get an annual purchase
3 spend of US\$1,128 billion.
- 4 A. Yes.
- 5 Q. We know that the total size of the purchase market for
6 globally is 41 trillion, or 41,000 billion; correct?
- 7 A. Yes.
- 8 Q. So if you divide 1,128 billion by 41,000 billion, you
9 get a figure of 2.75%?
- 10 A. I am prepared to accept that as a calculation.
- 11 Q. So the global purchase market up for grabs for the UK,
12 and of course that includes domestic and inter-regional
13 transactions, so this is a conservative estimate, is
14 2.75% of the world market?
- 15 A. Yes. I think -- this raises an important point about
16 the counterfactual in my view which I addressed in my
17 first report, in the context mostly actually of
18 objective justification, which is -- is the
19 counterfactual the removal of inter-regional MIFs only
20 acquired in the UK and Ireland, or is it the removal of
21 inter-regional MIFs which the -- the issue for the
22 experts simply refers to, are the inter-regional MIFs
23 anti-competitive, and in my view, it may well be a legal
24 issue as to the distinction between those different
25 options.

1 But in my view, from an economic perspective, and I
2 said this in my first report, it seems arbitrary and
3 inconsistent, and indeed subject to important free rider
4 problems if you were to go for the narrower application.

5 Q. Well, why is that so, because let us just explore this.
6 You have accepted, have you not, that inter-regional
7 transactions make up only a low proportion of sales
8 transactions generally?

9 A. Yes.

10 Q. Suggesting in the UK the value is about 2%?

11 A. I think the value is higher; the share of transactions
12 I think was something like that, but value might be
13 higher.

14 Q. So if we are talking about 2% of a 2.75% global purchase
15 market, that is relatively insignificant, is it not, in
16 the grand scheme of things?

17 A. I would agree that is low in terms of a share of the
18 total card transactions on -- in the globe. But I have
19 two points: one, the question I put just now as to what
20 is the right counterfactual in this regard. From an
21 economic standpoint, it seems inconsistent to say you
22 should remove the Visa inter-regional transactions
23 acquired in the UK. You should also remove, of course,
24 the Mastercard inter-regional transactions in the UK for
25 symmetry reasons, of course, even though it does not

1 control those, but then you have to keep the other
2 inter-regional transactions that Visa sets, and I think
3 that seems inconsistent.

4 I mentioned that it seems arbitrary, because you get
5 a different answer, at least on objective necessity, if
6 you recognise that there is a single rule, and then you
7 analyse it piecemeal by piecemeal or country by country
8 as opposed to the globe.

9 Q. Why on earth would the schemes choose to get rid of
10 inter-regional functionality for the sake of such
11 a small share of the overall pot suddenly not being
12 available?

13 A. So my comment is what is -- what are we saying has to be
14 removed, so it is a comment not on whether if -- I will
15 come on to that. I think we are in two different
16 branches.

17 Q. This tribunal is not going to be ruling, is it, on the
18 legality of interchange fees as applied between the
19 United States and Mexico?

20 A. But then in that case, you have got the proposition that
21 the Claimants proactively want to include and retain
22 Visa from including the inter-regional MIFs, in order to
23 promote issuers to provide good functionality in all the
24 other regions, so as to avoid them paying too much for
25 Amex. So in other words there is a free rider problem

- 1 in my view because --
- 2 Q. The counterfactual has to be plausible and realistic,
3 does it not, Mr Holt?
- 4 A. Yes. What I am describing is a concern about the
5 counterfactual whereby you retain --
- 6 Q. Who is going to remove international functionality, who
7 can do that?
- 8 A. Well, I think what we are talking about is what is the
9 right counterfactual for this analysis. I agree that it
10 would be --
- 11 Q. The only people that can do that are the schemes,
12 correct?
- 13 A. Well, or -- or by sort of regulatory or competition --
- 14 Q. So your counterfactual is assuming that for the sake of
15 a very small share of the global market, Mastercard and
16 Visa turn off the ability --
- 17 A. No.
- 18 Q. -- to use a card anywhere in the world?
- 19 A. No, that is not what I have said. What I have said is
20 from the perspective of understanding the implications
21 of turning off the transactions, it seems very odd and
22 arbitrary to me to say, "You have to turn these ones
23 off, but we would like you to keep all the other ones
24 where merchants all around the world are contributing to
25 the inter-regional functionality, because that then

1 means that there is more people using Visa and
2 Mastercard, which are cheaper for us. We just do not
3 want to pay for it ourselves because we think it is
4 anti-competitive."

5 I just find that a very odd economic outcome, and it
6 sort of, in my view, (inaudible) with a free riding
7 problem that these merchants want the benefits of the
8 inter-regional functionality but not to contribute to
9 the costs.

10 Q. You are only meant to consider in the counterfactual,
11 are you not, the -- you strip away the bit that is
12 contested for the competition analysis?

13 A. In my view, what was being contested was the
14 inter-regional MIFs.

15 Q. In the United Kingdom and Ireland?

16 A. Well, then it is a legal question as to which bit of the
17 MIFs you should remove. All I am saying is that if you
18 remove those ones, but assume -- I mean, it is one thing
19 for it to be not relevant as to whether the
20 inter-regional MIFs are existing in other parts of the
21 world. What I am commenting on is that is directly
22 relevant and indeed the merchants, at least on my case
23 for objective necessity, would proactively want all of
24 those MIFs, the very same inter-regional MIFs that they
25 say are anti-competitive, to be preserved in the rest of

1 the world, which I think is just odd.

2 Q. But if you do not restrict the counterfactual simply to
3 the removal of the aspects that are contested, you are
4 not comparing like with like, are you? You are assuming
5 that there has been a finding that inter-regional
6 transactions across the globe are not lawful, if they
7 have a MIF.

8 A. I am not making any sort of assumptions. I am just
9 commenting on what I consider to be concerns about
10 economic logic and arbitrariness. So I have not gone
11 beyond that and I have accepted that this is a legal
12 point, after all, for the tribunal to determine.

13 Q. You have not taken into account either, have you, that
14 for the EEA more generally, Visa and Mastercard have
15 agreed to cap the relevant MIFs that can be charged
16 under the commitments decisions?

17 A. Well, I did recognise that. I considered it as to
18 whether that was a useful case study as to the likely
19 effects of the removal of the inter-regional MIFs, but
20 I found that that was not the case simply mainly because
21 the commitment was modest in overall magnitude,
22 particularly because it distinguished between card
23 present and CNP transactions. Most of the
24 inter-regional transactions are CNP and the commitments
25 led to a pretty small reduction in the inter-regional

- 1 MIF for CNP transactions.
- 2 Q. Could we look, please, at {RC-J5/30.3/1}.
- 3 A. Yes.
- 4 Q. This is a press release from the European Commission in
5 the light of the commitments decisions and about five or
6 six paragraphs down, there is a paragraph that begins:
7 "Both Mastercard and Visa have now committed to
8 reduce their respective inter-regional MIFs. These
9 commitments, which will cut the inter-regional MIFs by
10 on average 40%, will significantly reduce the costs for
11 retailers in the EEA when they accept payments made with
12 cards issued outside the EEA."
13 A. Yes.
- 14 Q. We have not, have we, following this commitments
15 decision seen American Express suddenly taking over the
16 world of retail payments?
17 A. No, I think that is fair. I think what I am looking at
18 is a counterfactual, which is a much more significant
19 reduction.
- 20 Q. Your counterfactual necessarily premises the removal of
21 any MIF income from inter-regional transactions anywhere
22 in the globe for any issuer.
23 A. No, that is not what I was saying at all. What I was
24 saying is that I find it odd if the outcome on the
25 objective necessity depends on that, despite the

1 concerns I have expressed as an economist about the
2 arbitrary nature --

3 Q. We are not dealing --

4 A. -- of that and the free rider problem --

5 Q. -- (overspeaking) at this stage.

6 A. I -- yes.

7 Q. We are dealing with the impact in the counterfactual --

8 A. Yes.

9 Q. -- of the removal of the restriction of competition that
10 is challenged.

11 A. Yes, I agree, but that is the only context in which
12 I was identifying that the outcome would be likely
13 different. So in relation to the switching analysis,
14 I do not think that distinction arises.

15 Q. Even if we were to assume that somehow all the worldwide
16 inter-regional MIFs were in jeopardy, do you accept that
17 international functionality is something that is valued
18 by a cardholder?

19 A. Yes.

20 Q. Visa and Mastercard's value proposition is a global
21 network with universal acceptance, is it not?

22 A. That is indeed one of the parts of it, yes.

23 Q. So it would be a fundamental step for Visa and
24 Mastercard to abandon that global acceptance of its
25 cards, would it not?

1 A. I am not suggesting that it would necessarily abandon
2 the possibility of inter-regional functionality. What
3 I am saying is that there are likely to be a series of
4 reactions either by the schemes, which is about
5 unbundling and rebalancing some of the contractual
6 commitments between issuers and acquirers to try to
7 address the impact of the intervention, or by issuers,
8 who would, in my view, have the incentive to take
9 account of what would be a very significant change in
10 the economics of the profitability of the inter-regional
11 transactions.

12 Q. Please could we look at {RC-J4/89.2/178}. Here we have
13 a scheme rule, 4.1.1.5.

14 A. Yes.

15 Q. "Issuance of Domestic Use-Only Cards"

16 "An Issuer must not issue a consumer Credit Card or
17 a consumer Debit Card that is restricted to use only in
18 the country of issuance."

19 A. Yes.

20 Q. So that is a scheme rule that is not under challenge
21 which precludes the concept of purely domestic Visa
22 cards; correct?

23 A. Yes, but I am not suggesting that Visa and Mastercard
24 would then adopt purely domestic cards.

25 Q. Well, how would it work? How would you --

- 1 A. What --
- 2 Q. How would you suggest that all of the inter-regional MIF
3 transaction monies suddenly are no longer available for
4 consideration, which is what I understand is the premise
5 for your argument here?
- 6 A. Well, again, the premise of my argument is not that the
7 switching relies on the entire global network of
8 inter-regional MIFs disappearing. That -- there is
9 a relationship between the amount of the inter-regional
10 MIFs that disappear on the objective necessity side.
11 I can see that. But I think the switching analysis
12 focuses on the change in the economics where the change
13 in the rule applies.
- 14 Q. Let us just deal with my hypothetical South African
15 bank --
- 16 A. Yes.
- 17 Q. -- that I posited to Dr Niels the other day. That
18 issuing bank is issuing, for 95% of its customers for
19 domestic transactions, cards for those; correct?
- 20 A. Yes.
- 21 Q. Give or take, that is a conservative assumption.
- 22 A. Sure.
- 23 Q. The number of transactions which are generating MIF
24 revenue for that bank from South African cardholders
25 visiting Ireland and the UK is going to be comparatively

1 very small, is it not?

2 A. I think that is fair.

3 Q. Are you saying that the issuing bank would stop issuing
4 cards with international functionality because of the
5 putative loss of UK and Irish MIF revenue?

6 A. No, I am not saying that at all. Clearly it would want
7 to continue to offer those sorts of cards with that
8 functionality as applicable in all of the other
9 countries.

10 I think one way to look at this is just by
11 hypothetical example. If Poland, for example, just for
12 whatever reason -- I am not saying it is realistic --
13 were to impose a tax on inter-regional transactions
14 acquired in Poland of, let us say, 10%, then what would
15 schemes and issuers do in relation to that? The
16 question -- and I think this is a very similar question
17 to what you are asking here.

18 In my view, they would not cut inter-regional
19 functionality around the globe. They would target the
20 limitation to the inter-regional functionality to the
21 source of the problem, ie the fact that suddenly a very
22 large tax has been imposed in that context. So they
23 would, in my view, either seize themselves or enable
24 issuers to seize processing of transactions in Poland
25 where the economics would be fundamentally problematic.

- 1 Now, that is obviously one particular example of
2 one country.
- 3 Q. That would cause a significant amount of friction
4 between an issuing bank and its cardholder --
- 5 A. Well --
- 6 Q. -- for really something that was not very significant in
7 commercial terms.
- 8 A. No, it would -- well, it would be very significant in
9 commercial terms. There would be a very significant
10 loss on all of those transactions. So I do not think
11 that the suggestion that they would just not react would
12 be realistic at all. Yes, there would be some friction,
13 I agree, but --
- 14 Q. You are assuming -- sorry, you are assuming for these
15 purposes that it is open to an issuing bank to restrict
16 the ability of a card to be used in the UK and Ireland;
17 correct?
- 18 A. Well, that is only one of the alternatives. I think
19 what I have looked at is the range of potential
20 reactions that issuers might adopt. Those include
21 price, quality, service and so on, authorisation rate
22 changes; things of that nature. Functionality being
23 turned off is one of several potential options.
- 24 Q. Could we look, please, at {RC-J3/76/4}. You will see on
25 the left-hand side here there is a series of mitigation

1 business strategies considered in the course of this
2 presentation.

3 A. Yes.

4 Q. You have not considered any of those mitigation
5 strategies in your report, have you?

6 A. No, I have not considered all of these, but obviously
7 some of them are implicitly things that I have taken
8 into account by -- through my review of what the factual
9 witnesses have said about the potential reactions, some
10 of which seem to overlap here. [Redacted].

11 Q. Cash machine.

12 A. Yes, so that is a different issue. So what I have
13 looked at is the set of reactions that might be carried
14 out by the schemes and/or the issuers, as the witnesses
15 have identified it.

16 Q. In terms of dealing specifically with the
17 Supreme Court's analysis and plugging it into the
18 inter-regional context, as I understand it, you have got
19 two main points in your first report at paragraph 380,
20 which is page 126. I keep on calling it first; I am
21 sorry, it is your eighth.

22 A. Yes.

23 Q. The first one is the minimum price floor point; is that
24 right?

25 A. Yes, yes.

1 Q. As I understand it from Visa's opening submissions, that
2 is no longer pursued.

3 A. Perhaps, yes. Yes, I think so.

4 Q. Can we put that to one side?

5 A. Sure.

6 Q. The second point is the counterfactual where switching
7 would lead to the MSC being at or higher than the
8 current factual level; correct?

9 A. Yes.

10 Q. I would like to concentrate on that then, please.

11 A. Okay.

12 Q. In your eighth report, page 136, paragraph 428, you
13 accepted that there was limited evidence of the cost of
14 alternative payment cards and the magnitude of any
15 counterfactual diversion; correct?

16 A. Yes. Yes, I have looked at the evidence as best
17 I could. There was fairly limited evidence on cost of
18 alternatives from the Claimants, but there was some
19 evidence and I used that and then I supplemented that
20 with public domain research.

21 Q. If we then please look at page 139 {RC-H4/3/139}, at
22 paragraph 449, you had insufficient evidence to model
23 counterfactual outcomes; is that right?

24 A. Yes, insufficient analysis to look at all the
25 counterfactual outcomes, so I focused on a review of the

1 factual witnesses' evidence, the cost of alternatives,
2 other evidence that I thought would be relevant,
3 including my analysis of the two-sided economic features
4 of the markets and also, there was quite a broad range
5 of evidence relating to the competitive dynamics of
6 inter-regional MIFs that I thought was directly
7 relevant.

8 Q. You did not say in any of the mini CMCs, did you, that
9 there would be a need to get hold of this evidence to be
10 able to conduct the analysis properly?

11 A. No, I do not think it is necessary to go beyond the
12 evidence that I had. I think I was able to reach views
13 based on the evidence I had access to. I did, in the
14 evidence gathering process, identify the need for
15 certain types of evidence, including, for example, the
16 cost of Amex, and that did feature in the
17 evidence-gathering process.

18 [Redacted]

19 Q. Well, we have faced the factual world in which the
20 chargeable MIF rates for inter-regional transactions
21 have been capped by the commitments decisions; correct?

22 A. Yes. Yes, we discussed that earlier.

23 Q. We have not seen any of these so-called changes to the
24 schemes being put in place.

25 A. No, I think the comment made earlier about the extent to

1 which that is a good guide to the counterfactual is very
2 limited. It has had limited effect on CNP transactions.

3 Q. If we look then please at paragraph 444 at the bottom of
4 that page, you say it would not follow from
5 inter-regional MIFs being low in the counterfactual that
6 the unregulated schemes, by which I assume you mean
7 principally Amex, would face competitive pressure to
8 reduce their Merchant Service Charges. But it is right,
9 is it not, that in Australia, that is precisely what
10 happened?

11 A. Well -- so in Australia, there was a whole series of
12 regulatory measures that were adopted over the course of
13 time, some of which directly affected Amex and I agree
14 that Amex's MSCs reduced over time. It is not so clear
15 to me, however, that there was a very direct
16 relationship between Visa and Amex -- sorry, Visa's MSCs
17 changes and Amex's MSCs changes.

18 Q. Can we have a look at what Amex itself has said in
19 a regulatory finding with the SEC in the United States.
20 It is {RC-J5/44.03/20}.

21 A. Yes.

22 Q. There is a paragraph -- the second to last paragraph on
23 the page, there is a section that begins:

24 "The EU ..."

25 Do you have that?

1 A. Yes.

2 Q. We see that, second sentence:

3 "Regulation and other governmental actions relating
4 to pricing or practices could affect all networks
5 directly or indirectly ... Among other things,
6 regulation of bankcard fees has negatively impacted and
7 may continue to negatively impact the discount revenue
8 we earn, including as a result of downward pressure on
9 our discount rate from decreases in competitor pricing
10 in connection with caps on interchange fees."

11 A. Yes.

12 Q. So that is Amex in its own words telling an important
13 regulator in the United States that its response to
14 interchange fees has been to reduce its Merchant Service
15 Charges.

16 A. Yes, I think that is a fair statement. They clearly
17 have attributed some aspect of their own reductions to
18 the reductions that have applied to Visa and Mastercard,
19 while also identifying that there are broader set of
20 factors that apply both in terms of changes of rules,
21 and obviously Amex did face increasing prevalence of
22 surcharging.

23 I think the key point that I have identified here is
24 that in the data, you cannot see a very clear
25 relationship. I have modelled it for the full period of

1 time that I have data and I do not see a very strong
2 relationship. I appreciate what Amex is saying here,
3 but fundamentally, even if it is the case -- and this is
4 my main point -- that Amex did react in the Australian
5 context, that was in a -- highly domestic interchange
6 fee regulation focused, and there were a number of other
7 differences between the Australian context and the
8 counterfactual relevant to these proceedings, which
9 means I do not put much weight on the Australian guide.

10 In particular, as I mentioned, some of the
11 regulatory pressures were directly imposed on Amex
12 itself, culminating in the removal of Amex's own --

13 Q. What do you mean, regulatory pressures? Do you mean
14 that they were basically tipped off this was happening
15 so they could jump the gun ahead of the regulation
16 coming --

17 A. No. What I mean is that the question of how the
18 regulations would be adopted potentially applied to
19 Amex. Some of the other changes that the RBR adopted
20 included increased prevalence -- led to increased
21 prevalence of surcharging on Amex, and then they finally
22 removed the ability of Amex to adopt the GNS model in
23 Australia.

24 So all of those, I think, are contextual points
25 which say that Amex itself was under quite a significant

1 regulatory pressure in Australia, which, in my view, is
2 not relevant to the counterfactual we are discussing
3 here. That is aside from perhaps the more obvious point
4 that the Australian condition context was a cap and not
5 a removal of MIFs and it was obviously focused mainly on
6 domestic.

7 I think Dr Niels made a further valid point that
8 Visa and Mastercard had flexibility in terms of how they
9 actually adopted -- adapted, rather, to the strategy in
10 terms of, you know, maintaining differential card
11 products with higher MIFs, which the Australian
12 regulation permitted.

13 Q. Can we look at {RC-J5/10.11.1/24}. Now, simply, very
14 straightforwardly, this graph shows, does it not, Amex
15 fees coming down in Australia from 2003 through to 2007?

16 A. Yes, it does. I have looked at a much longer period of
17 time and found broadly sort of similar findings to here;
18 in other words, that Amex had a long-term reduction,
19 a trend downward impact on its MSCs, that did not seem
20 to be directly related to the sort of quite sharp
21 reduction that Mastercard and Visa experienced, but
22 rather was something that happened over many years and
23 may well reflect the broader regulatory pressures and
24 the surcharging issues that it was facing.

25 Q. Now, in terms of your analysis of -- once you get past

1 the switching issue, the analysis of what the costs
2 would be, as I understand it, to some extent for both
3 switching and costs, you rely, do you not, on the work
4 that Dr Niels conducted in your ninth report?

5 A. Well, I reached my own view in my first report based on
6 the evidence I had reviewed. I then noted that Dr Niels
7 had carried out some analysis based on the Oxera study
8 in 2016 and I thought that was a useful further
9 contribution to the debate and I carried out essentially
10 some sensitivity analysis on it.

11 Q. You ran some variations on his analysis.

12 A. Yes.

13 Q. Could we look, please, at your ninth report, page 185
14 {RC-H4/4/185}.

15 A. Yes.

16 Q. So here you are dealing with the scenarios that we
17 looked at in some detail with Dr Niels; is that right?

18 A. That is right.

19 Q. They were the scenarios that were put to consumers in
20 the Oxera study, were they not?

21 A. Yes.

22 Q. You have included, however, a scenario where no
23 inter-regional payments were available at all: see
24 scenario 1.

25 A. Yes.

1 Q. There is nothing to suggest, is there, that cardholders
2 would realistically face one of those scenarios in the
3 event that the inter-regional MIFs were set to zero in
4 the UK and Ireland?

5 A. I disagree with that. I think that is highly likely
6 that cardholders would face one or other or some mix of
7 those scenarios because of the significance on the
8 transaction profitability of those types of transactions
9 and the nature. It is a direct variable revenue loss.

10 I think the suggestion that there would be no
11 reaction by issuers is highly unlikely. I think
12 actually Mr Dryden, when discussing it in his evidence,
13 seemed to me to accept that issuers would re-optimize.
14 That seems to me a reaction of a -- sorry, a recognition
15 of a likely reaction.

16 Q. But I thought your paramount suggestion, your primary
17 suggestion, was that issuers would be likely to try and
18 push certain costs, like the costs of fraud, on to
19 merchants rather than retaining them as issuers' costs.

20 A. These are two alternative scenarios. In fact, it may be
21 some combination of them. So I think one set of
22 reactions is from the scheme and the scheme, I think,
23 would have incentive to try and ensure as best as it
24 could that it was able to compete effectively with other
25 schemes. If that included some amendments to payment

1 guarantee or free funding rules, then that would be part
2 of the scenario. Those would obviously directly
3 increase costs to acquirers.

4 These scenarios are essentially in a situation where
5 the schemes are unable to wholly neutralise the effect
6 of the loss of the inter-regional MIFs. So these
7 reactions may not be necessary if the schemes are able
8 to essentially react sufficiently to conserve the
9 underlying competitive dynamics as existed in the MIF.

10 Q. Could we look, please, at page 187 {RC-H4/4/186},
11 paragraphs A101 and A102. Some of the variations you
12 are make are to exclude cardholders who had switched to
13 cash; is that right?

14 A. Yes. Yes, I carried out a scenario where that
15 particular aspect of the analysis was not accounted for
16 in order to understand whether the overall analysis
17 relied significantly on the switch to cost of cash.

18 Q. You stripped out those who had switched to PayPal;
19 correct?

20 A. I did that in one scenario, but noted that there was
21 a case for including it and so I did both.

22 Q. At the top of page 188 {RC-H4/4/188}, we have the
23 results of this amended analysis; is that right?

24 A. Yes.

25 Q. As I understand it, where you use the expression

1 "above", you are suggesting that the MSC would be above
2 in the counterfactual.

3 A. Yes.

4 Q. "Uncertain" means you do not know and then "below" is
5 obviously it would not be above the MSC in the
6 counterfactual.

7 A. Yes, yes.

8 Q. Now, if we just look at the scenarios for scenario 3,
9 that scenario relates, does it not -- this is back at
10 page 186 {RC-H4/4/186} -- to cardholders not getting any
11 benefits or rewards; is that right?

12 A. Sorry, which scenario?

13 Q. Scenario 3. Cardholders not receiving any reward --

14 A. 3, not getting reward programme points.

15 Q. Or any other benefits.

16 A. Yes, yes.

17 [Redacted]

18 Q. Now, scenario 1 is a situation in which Mastercard and
19 Visa is not available at all for inter-regional
20 transactions, is it not?

21 A. Yes, for the transactions in relation to the country in
22 question, that is right.

23 Q. Well, it was the EU as a whole.

24 A. Yes, yes.

25 Q. That is simply not realistic, is it?

1 A. Well, again, I think that depends on the perspective of
2 the issuers as to how concerned they about the
3 economics. If the change in the economics is dramatic,
4 then it calls for a more dramatic reaction.

5 Q. Scenario 4 is the higher decline rates option, but, of
6 course, that was not a very well defined option in the
7 survey, was it?

8 A. Yes, I was here while that point was put to Dr Niels.
9 I think as I understand he was describing it, the
10 recognition was that there would be a material increase
11 in the risk of transactions being not authorised, and
12 I can very well see that in that situation, which is
13 realistic, that there would be a significant cardholder
14 response.

15 Q. In terms of switching analysis, this was looked at by
16 the European Commission in the 2017 statement of
17 supplemental objections when dealing with inter-regional
18 transactions and it was dealt with in an article 101(3)
19 context. I am going to turn to that now, please,
20 {RC-J4/80/137}, picking up, please, on recital (479).

21 You see the subheading at the top of that page:

22 "MIFs as a tool to lead to an efficient choice of
23 payment means (output 'optimisation')."

24 Can you see that?

25 A. Yes.

- 1 Q. At (478), it says:
- 2 "... MIFs can contribute to an efficient choice of
- 3 payment means by the consumer only if they give
- 4 appropriate price signals to the consumers."
- 5 Can you see that?
- 6 A. Yes.
- 7 Q. That means, does it not, that for positive MIFs to be
- 8 appropriate, cards have to be cheaper than alternatives
- 9 for merchants aside from the MIF?
- 10 A. Yes, that is under the particular merchant indifference
- 11 test framework, yes.
- 12 Q. That is then what is considered at (480), correct, the
- 13 merchant indifference test?
- 14 A. Yes.
- 15 Q. Of course, that has always been dealt with as part of
- 16 the 101(3) analysis, has it not?
- 17 A. Yes, but that is not the analysis I am doing. I am not
- 18 doing a merchant indifference test. I am not doing
- 19 a 101(3) efficiencies test at all. What I am doing is
- 20 saying: in the counterfactual, what are the competitive
- 21 implications of the change in the competitive
- 22 environment? One of those is that there be a direct
- 23 impact on the relative economics of Visa versus Amex,
- 24 rather, and that that seems to me economically to be
- 25 a directly relevant economic issue to think about when

1 talking about the change in the MIFs.

2 Q. But you have not, therefore, looked at any of the
3 countervailing benefits that exist with other payment
4 methods and other payment means in the overall equation,
5 have you?

6 A. No, I have -- I do not think that would be relevant at
7 this stage of the analysis. That would be something to
8 do, perhaps, at the 101(3) analysis. All I am doing is
9 saying that if you change the competitive dynamics by
10 removing the inter-regional MIFs, it has a very
11 significant, in my view, at least in inter-regional and
12 commercial context, impact on how the market will
13 operate and that, in my view, is directly relevant to
14 the question of restrictiveness.

15 Q. You see in recital (482) on page 138 {RC-J4/80/138}:

16 "A second condition to meet is that MIFs do have
17 a real impact on prices charged to cardholders or on the
18 services provided ... In other words, that MIF revenues
19 get passed on to cardholders by the issuers."

20 A. Yes.

21 Q. That is not something you have looked at either, is it?

22 A. Well -- excuse me -- I mean, I have recognised the
23 importance of that in terms of looking at cardholder
24 sensitivity. I referred to this in the concurrent
25 session, which is that it is not actually particularly

1 contentious or at least it is pretty commonly accepted
2 that cardholder sensitivity is high by reference to
3 merchant sensitivity.

4 Several articles, including those identified in the,
5 I think it was, 2011 -- sorry, no, more recent -- ECB
6 article referred to that analysis, so I think it is
7 commonly understood that there is a significant
8 cardholder sensitivity issue underpinning payment card
9 dynamics.

10 Q. You have essentially been doing a variant of the 101(3)
11 analysis which does not take into account a whole series
12 of countervailing factors that are taken into account
13 properly at the article 101(3) stage.

14 A. Well, I think I reiterate the answer I gave on, I guess
15 it was, Thursday, which is the answer I was seeking to
16 address here, which I understand to be the correct
17 answer, is: in the absence -- or assuming that the MIFs
18 would have been zero, would there have been
19 an appreciable impact on what merchants were paying? In
20 my view, there would not have been because of the
21 effects that I have described.

22 Q. Would you agree that an issuer must take into account
23 when considering if an inter-regional MIF is removed the
24 effect of the inter-regional PQRS on the overall demand
25 for the card?

1 A. I think any sort of supplier in a market will need to
2 consider the impact of price change, but -- price
3 changes, rather, or of changes in other dimensions.
4 That is indeed what I have considered. I considered it
5 in sort of three sort of components.

6 One, is it likely that there will be a reaction? In
7 my view, the size of the inter-regional MIFs and the
8 nature of the inter-regional MIFs suggests the answer is
9 yes. I recognise that the precise reaction could be
10 a number of things, PQRS essentially covering a range of
11 possible reactions.

12 Then the final question is, importantly: is it
13 likely that the reaction would be relevant to
14 inter-regional transactions or not? I have formed the
15 view that it is more likely that the reaction would be
16 on something affecting inter-regional transactions.

17 Q. But you have not looked, have you, at the overall demand
18 for the card by reference to a multitude of factors that
19 are not simply based on, for example, something as blunt
20 as Mastercard and Visa not being available full stop?

21 A. No, but what I have considered is whether it is more
22 likely that they would react by changing PQRS on non --
23 on other aspects of the product offering. In my view,
24 that is not the case because if they did so, they would
25 be -- let us say they increased prices for aspects of

1 the card that did not relate to inter-regional
2 transactions in response to the loss of the
3 inter-regional MIF, well, in that world, they become
4 less competitive on the parts of the offering that were
5 more profitable prior to the change and they become more
6 competitive on the bit which was -- which has now become
7 less profitable.

8 So the commercial reality for an issuer of reacting
9 in that way would, in my view, not make any economic
10 sense. It would be far more likely to react to the
11 change in the economics of the inter-regional
12 transactions by focusing its adjustments in that regard.

13 Q. Could I move on, please, to objective necessity. Could
14 we look in your eighth report, page 146, paragraph 475
15 {RC-H4/3/146}.

16 A. Yes, yes.

17 Q. What you are looking at there, is it not, is for
18 objective necessity purposes, you are looking at the
19 potential impact on Visa's ability to compete in this
20 segment of the market; is that right?

21 A. Yes, I am.

22 Q. Could we go back please to --

23 A. Sorry, with the slight variation: ability to compete
24 and/or have the incentive to make the functionality
25 available in the relevant market.

- 1 Q. Could we go back, please, to page 141, paragraph 456
2 {RC-H4/3/141}.
- 3 A. Yes.
- 4 Q. Here you are setting out EC guidelines on objective
5 necessity.
- 6 A. Yes.
- 7 Q. It says at the last three sentences -- last three lines
8 on that page:
9 "The fact that the cooperation is simply more
10 difficult to implement, or less profitable without the
11 restriction concerned, does not make that restriction
12 'objectively necessary' and thus ancillary."
13 Can you see that?
- 14 A. Yes.
- 15 Q. So you have not even applied the test that you think is
16 relevant to objective necessity, have you?
- 17 A. Well, firstly, it is not clear to me whether the context
18 of -- there is obviously a degree, I think, that needs
19 to be taken into account. If you do not have the
20 inter-regional MIF from a Visa or Mastercard
21 perspective, if it potentially fundamentally changes the
22 nature of that offering, albeit through the impact of
23 competition, then I think that is a relevant factor to
24 take into account.
25 If the context here is that you should not take into

1 account competition with a similar scheme, ie the
2 symmetry debate, then that is not what I am doing. If
3 it is saying beyond that, no competitive dynamics can be
4 taken into account, well, then I appreciate that would
5 potentially be the legal test. It would be sort of odd
6 to say that even if you could not provide the
7 functionality to an appropriate standard, that would not
8 be relevant, because the reason for it would be that you
9 would, you know, suffer from diversion to Amex. I just
10 do not --

11 Q. Could we look, please, at {RC-J4/80/78}. This is the
12 way that the European Commission approached the issue in
13 its 2017 SSO for inter-regionals.

14 A. Yes.

15 Q. Can you cast an eye, please, over recitals (272) and
16 (273) on this page --

17 A. Okay.

18 Q. -- in particular, the Commission saying:

19 "... the two-sided nature of a market does not
20 preclude the finding of a restriction of competition 'by
21 object'."

22 A. Yes.

23 Q. It says halfway down:

24 "In addition the restrictive nature of MIFs is also
25 well established."

1 Dealing with the two-sided scheme.

2 (273), it says:

3 "Potential economic advantages ... are not relevant
4 for the assessment whether the MIFs restrict
5 competition."

6 That comes in at the 101(3) stage.

7 Then if we look at recital (274) {RC-J4/80/79},
8 having looked at Meca-Medina and Wouters case law, the
9 last five lines or so at (274) says:

10 "In both cases, the legitimate objectives were
11 manifestly in the public interest and the restrictions
12 were secondary by-products of those objectives. The
13 present case does not bear any resemblance to that case
14 law. In particular, the objectives pursued with the
15 rules on inter-regional MIFs are not in the public
16 interest, but in the private commercial interest of Visa
17 and its members/licensees. The Commission therefore
18 provisionally finds that there are no objective
19 justifications with respect to the rules on
20 inter-regional MIFs."

21 Are you saying that was, therefore, to use your
22 words, an odd conclusion for the Commission to reach?

23 A. Well, I think what, in my view, at least given the
24 evidence that I have looked at, seems to be the case is
25 that if you take away the inter-regional MIFs, then

1 there will be significant effects on the market and Visa
2 and Mastercard's ability to compete in that market.

3 Firstly, I am not saying that the schemes would
4 cease to be operating. Clearly, you know, I have not
5 said that. I have noted, of course, that for
6 inter-regional functionality to exist, I am not aware of
7 any schemes that have done that without inter-regional
8 MIFs. So it seems to me that that is also a relevant
9 consideration, which, you know, should be taken into
10 account.

11 I appreciate it is a matter for the tribunal just
12 how degraded does the schemes' inter-regional
13 functionality and ability to compete with Amex have to
14 be in order to reach a view of those MIFs being
15 objectively justified? I am just commenting on what
16 I think the economic aspects of that decision are.

17 Q. Now, Amex has a negotiable MSC, does it not? A merchant
18 can approach Amex and seek to negotiate the price that
19 is paid for Amex services.

20 A. Yes, I think that is probably right. I mean, I do not
21 know how it does its negotiations, but I am aware of
22 some variation in the Amex rate across some merchants,
23 so yes.

24 Q. Could we look then, in relation to PayPal, please, at
25 {RC-H4/3/37}.

- 1 A. Yes.
- 2 Q. You are describing PayPal there and you are saying fees
3 range from 1.2 to 2.9% plus fixed fees. So they are
4 negotiable as well, are they not?
- 5 A. There seems to be a range there, but that -- yes, I am
6 not sure to the extent to which it has postings that
7 apply in different circumstances which are not
8 negotiable. So negotiation can imply that on each and
9 every case, PayPal gets involved with a merchant and
10 they work out an approach. I am not sure that is the
11 case. I think actually this range that I identified
12 here is simply a tiering system that PayPal has adopted,
13 ie merchants of different size pay different rates.
14 That does not mean there is a negotiation. It just
15 means that --
- 16 Q. Do you remember Mr Hirst giving evidence about how he
17 could reach negotiated deals with Klarna and PayPal and
18 ClearPay and so on?
- 19 A. I do not recall the detail of how he did that, no.
- 20 Q. In relation to Amazon Pay, your footnote 48 here
21 suggests that large merchants can apply for discounts.
- 22 A. Yes, that is right, yes.
- 23 Q. Do you recall Mr Steeley's evidence that ClearPay was
24 a payment solution that he was capable of doing a deal
25 with and bringing new customers with it and innovating

1 round the margins of the product? Do you remember that
2 evidence?

3 A. I do not recall the precise nature of that evidence, no.

4 Q. So before comparing the pros and cons of these products,
5 you would need to work out, would you not, what the
6 benefits were to the merchants from them because they
7 may bring with them an additional benefit that Amex
8 and -- Mastercard and Visa does not confer?

9 A. Well, I agree that the merchant in making an acceptance
10 decision will weigh up the costs and benefits and would
11 only accept all these other payment methods if it -- if
12 it is in their interests to do so, but -- but that is
13 not, in my view, relevant to the analysis of the cost
14 impact of a switching of an existing transaction from
15 Visa to PayPal.

16 So the reason they might be saying there is more --
17 we are willing to pay a higher rate in general, all of
18 these other payment schemes have higher rates than Visa
19 and Mastercard, is that they hope to get higher amounts
20 of sales essentially as a result. Now, that may be
21 a good rationale from a merchant to take into account
22 when accepting that, but I am not talking about the
23 broad rationale.

24 I am talking about assuming that you have
25 an interest in accepting those payment methods, if the

1 transaction switches as a result of a deterioration in
2 the Visa and Mastercard economics, then you will be
3 paying more. The benefit part of that goes away, you
4 have already had -- the sale is the same one in either
5 event. There is no increment in terms of lost sales or
6 gained sales to take into account. We are talking about
7 the very same Visa transactions which are assumed to be
8 happening in either event. It is just in one case it is
9 a lower cost option and in the other case it is a higher
10 cost option.

11 MR TIDSWELL: I am afraid I do not really understand that,
12 Mr Holt, because are you saying that -- so we are
13 talking about the effect here, are we not, we are
14 talking about the effect on competition --

15 A. Yes.

16 MR TIDSWELL: -- that is the first stage of the analysis.

17 A. Yes.

18 MR TIDSWELL: I think you are saying it is the wrong thing
19 to do to limit your consideration of that effect just to
20 the change in cost to the merchant that comes from
21 decreasing, removing the interchange fee?

22 A. Yes, from an economic standpoint, that is correct.

23 MR TIDSWELL: From an economic point of view, because you
24 are saying you would want take into account the wider
25 economic implications of the market more generally when

1 you come to look at effect.

2 A. Yes.

3 MR TIDSWELL: So you say you should take into account the
4 additional costs that a merchant might bear from having
5 to trade -- from having to pay fees to Amex or PayPal
6 and so on.

7 A. Yes.

8 MR TIDSWELL: So why would you not go the extra step and
9 work out what the net benefit to the merchant was? I do
10 not understand why, if you are seeking clarity on the
11 actual effect on the merchant, you would not go from
12 cost to look at benefit?

13 A. Well, the reason is because we are talking about
14 a comparison of a factual. Just to simplify things, let
15 us say there is 100 million worth of Visa transactions
16 that are inter-regional transactions we are talking
17 about and 50 million of them might switch as a result --
18 I am just making up numbers now -- a certain amount of
19 them might switch to an alternative higher costs
20 approach.

21 There is no gain in sales as a result. It is the
22 same 50 million that is either going through a Visa
23 network or going through an alternative cost network.
24 So the only, in my view, difference from the merchant
25 perspective that is material is the differential and the

1 costs. I appreciate the distinction would be greater in
2 the cost of cash analysis because there would be greater
3 internal cost changes that would also need to be taken
4 into account in that regard, but that is not an analysis
5 that I have conducted in my article 101(1) analysis.

6 MR TIDSWELL: I am sorry, I am afraid I do not understand
7 what you have just said. I am sure it is my fault.

8 A. Okay. It is probably my explanation.

9 MR TIDSWELL: Why does the volume of the transactions
10 matter? I can see you absolutely have to come to
11 an averaging of the cost --

12 A. Yes.

13 MR TIDSWELL: -- because that is part of the point, is it
14 not; that you are saying on average, the cost to
15 merchant is going to go up? So why does it matter that
16 there are 50 million out of 100 switching beyond that?

17 A. Well, the reason that is important is because we are
18 looking at essentially a trade-off from the merchant
19 perspective. On the one hand, they gain from the loss
20 of the reduction of the MIF for the reasons that I think
21 it is now agreed; that the MSCs for the Visa
22 transactions would come down. Whether they would come
23 down by the full amount or some proportion is yet to be
24 fully determined. It would be somewhat less than 100%,
25 in my view. But that would be sort of on the positive

1 side for the merchant. They would save costs.

2 But if some of those transactions switched to a more
3 costly alternative, then that would be on the negative
4 side of the balance. It is the same transactions. The
5 same -- I am assuming the same level of sales to the
6 merchant would occur, but in one case, it would go with
7 one set of weightings across the different payment
8 methods and in the other context, it would go through
9 a different set of weightings across the payment method.
10 So there is no lost or gained sales benefit to take into
11 account in that context.

12 MR TIDSWELL: Yes, I see, but we are not really talking
13 about that, are we? When we are talking about the
14 effect on the merchant, we are talking about the effect
15 on the cost base, not the number of transactions they
16 enter into.

17 A. Yes.

18 MR TIDSWELL: I think you are saying that you think it is
19 an economically reasonable thing to do to look at the
20 additional costs that would come from the other payment
21 sources --

22 A. Yes.

23 MR TIDSWELL: -- but not to look at what the actual net
24 benefit or cost for that merchant would be. So, for
25 example, by using a particular buy now, pay later

1 solution, they might end up with significant benefits as
2 a result of that. Why is that not something you would
3 take into account?

4 A. I am already assuming that if there are benefits to that
5 and that people are already making purchases using that,
6 that is part of the factual. The thing that is changing
7 in the counterfactual is that a certain proportion of
8 Visa transactions would go to, for example, Klarna.

9 MR TIDSWELL: I see. I think I understand you now. Sorry
10 to interrupt you.

11 A. Yes.

12 MR TIDSWELL: I think I am getting there slowly.

13 A. Okay.

14 MR TIDSWELL: Forgive me. So what you are saying is that if
15 you just assume between factual and counterfactual the
16 same transactions --

17 A. Yes.

18 MR TIDSWELL: -- then when you are talking about the benefit
19 to the merchant, you are saying that is baked in because
20 you are not getting any additional sales as a result of
21 the buy now, pay later incentive. Is that the point you
22 are making?

23 A. Exactly. The sale has happened in the factual with Visa
24 and now it is happening in the counterfactual with buy
25 now, pay later. It is not that the buy now, pay later

1 offering has created some additional sales. I am not
2 disputing that that is possible. Buy now, pay later
3 could create some additional sales, but those would be
4 compared to a sale that would not be happening. My
5 analysis is saying this is about the costs of the
6 transactions which have happened being diverted to more
7 expensive options.

8 MR TIDSWELL: Sorry, Mr Beal, I am just about finished.

9 Are you not still -- you are still shifting the
10 goalposts, but only shifting them halfway, are you not,
11 because you do not like the narrowness of the
12 counterfactual Mr Beal is putting to you, which is --
13 because you say it does not take into account the
14 economic consequences. But you are shifting halfway by
15 maintaining some assumptions like, for example, the
16 volume assumption you have just explained to me, but you
17 are not actually taking into account the full economic
18 benefits that might accrue to the merchant.

19 A. Well, I disagree that I am only sort of -- well, first,
20 I disagree that I am moving the goalposts. I think what
21 I am doing is looking at the cost implications for
22 merchants in the counterfactual compared to the actual.
23 I do not think that there would necessarily be any other
24 differences that are relevant beyond the cost change,
25 because these are transactions -- the effect that I am

1 analysing is what happens if the Visa transactions
2 become less attractive for either Visa issuers to offer
3 or cardholders to use? The assumption I am making is
4 that the factual sales will still be made.

5 I think it is possible to say that there could be
6 some overall sales development role, I have looked at
7 that in the 101(3) context in the previous proceedings,
8 but those would apply to Visa and the others and perhaps
9 you need to take into account the relative assessment of
10 that. But that really is getting into quite a lot of
11 detailed evidence of a 101(3) nature. I am looking at:
12 what are the costs of the transactions being made and
13 are merchants better or worse off as a result?

14 MR TIDSWELL: Thank you.

15 MR BEAL: I think the last question on inter-regionals
16 before the short adjournment, probably. Obviously,
17 where some of these payment solutions that we have been
18 looking at run on the rails of Mastercard and Visa,
19 there would still be a benefit to the schemes from the
20 MIF that would be payable, would not there?

21 A. There may be and so if that were the case, and I think
22 the -- and the costs would go down in terms of the use
23 of that other payment method, then that would be
24 an appropriate factor to take into account in the
25 analysis, but --

1 Q. You have --

2 A. -- the evidence -- well, I have looked at the evidence
3 on that, which -- the best evidence that was available,
4 in my view, which is the PayPal reaction to the IFR,
5 which suggested that there was no reduction in its fees
6 as a result of the IFR.

7 Q. You have not taken into account the fact the schemes
8 therefore benefit from the necessary MIF that is part of
9 the PayPal service for cards that are running on the
10 PayPal, because the MIF is still payable. It is just
11 there is an additional bit for using either Apple Pay or
12 PayPal on top.

13 A. Yes, perhaps, perhaps, yes. I am not sure of the
14 implication on that for my analysis because, again, if
15 there is a switch from a Visa MSC, which is lower, to
16 an Apple or PayPal transaction, which is more expensive,
17 then that would be, in my view, an increase in costs for
18 the merchant irrespective of whether that other
19 transaction embodies some part of the MIF. If the MIF
20 were to go down and the alternative payment method would
21 take that into account, that would be a fair adjustment
22 to make, but the PayPal situation suggests otherwise.

23 MR BEAL: That is, I think, probably, sir, a convenient
24 moment. I have commercial cards and scheme rules left
25 to do. I am hoping to be sat down metaphorically to

1 give the tribunal and my learned friends time to ask
2 further questions. So I would aim for 4 o'clock.

3 THE PRESIDENT: That is very helpful. Ought we just, for
4 safety's sake, start a little bit earlier?

5 MR BEAL: If you would not mind, sir, that would be helpful
6 from my perspective, because I am aware we have a hard
7 stop for Mr Woolfe at 5.00.

8 THE PRESIDENT: Indeed. Mr Woolfe now KC.

9 MR BEAL: Yes.

10 THE PRESIDENT: We will resume at a quarter to 2.00 because
11 I do not want -- this has been a very helpful exchange
12 and I do not want either of you to feel that your style
13 has been cramped by the clock. So we will start then at
14 a quarter to.

15 (1.03 pm)

16 (The short adjournment)

17 (1.45 pm)

18 THE PRESIDENT: Mr Beal.

19 MR BEAL: I am going to come on to commercial cards. My
20 understanding is that it is no longer in dispute that
21 the commercial card MIFs set a floor for Merchant
22 Service Charges?

23 A. Yes, I think that is right.

24 Q. There is therefore appreciable/substantial pass-on by
25 acquirers into commercial MSCs for Visa and Mastercard

1 transactions?

2 A. In my case I found that is likely in the long-run.

3 Q. It is accepted here, is it not, that the counterfactual
4 has to be default settlement at par?

5 A. Yes.

6 Q. So the issues I think that are raised by your reports
7 are, first, whether or not the counterfactual should
8 include the wider impact on MSCs in the wider market?

9 A. That is right.

10 Q. We have already been through that for inter-regionals,
11 and I am not proposing to cover that again.

12 A. Okay.

13 Q. Secondly, whether on your case, that market-wide MSC
14 would be at least as high as in the factual, correct?

15 A. Yes.

16 Q. Then, thirdly, the question of objective justification?

17 A. Yes.

18 Q. So turning to a couple of background matters. You have
19 given some market figures for Amex in your eighth
20 report, page 165 {RC-H4/3/165}, paragraph 511.

21 A. Yes, I see.

22 Q. What I would like to do is just to have a look at the
23 actual other available data we have for Amex market
24 shares. Could we look, please, in {RC-J5/40/23}, and we
25 can see here under share of total purchase volume for

1 commercial cards, for the international overview of RBR,
2 the figures are falling from 11% to 10%, 2018, 2019, is
3 that right?

4 A. Yes, Amex being --

5 Q. The green, sorry?

6 A. Got it, 11 to 10.

7 Q. If we could look then for Ireland, please, at page 92
8 {RC-J5/40/92}. You will see that there is a total
9 purchase volume given, and on the top right-hand corner:

10 "Commercial cards accounted for 20% of the total
11 volume of card payments in 2019 ..."

12 Can you see that in the second bullet?

13 A. I see that, yes.

14 Q. Then if we go to page 95 {RC-J5/40/95} please. The Amex
15 share does not appear to be listed out there?

16 A. In Ireland, yes.

17 Q. Then in the UK if we go, please, to page 194
18 {RC-J5/40/194}, so again, looking at the bar chart
19 rather than the pie charts, one sees share of total
20 purchase volume falling from 16% to 15% between 2018 and
21 2019. Can you see that?

22 A. I see that.

23 Q. Then at page 197 {RC-J5/40/197}.

24 A. Yes.

25 Q. Under interchange fees, we see there is quite a wide

1 discrepancy, is there not, between consumer interchange
2 fees and commercial interchange fees?

3 A. Agreed, yes. Since the -- since the IFR came into
4 effect, that is; yes.

5 Q. Could we then please look at bundle {RC-J5/30.1/6}.
6 This is a submission that was made by American Express
7 to the PSR?

8 A. Yes.

9 Q. You will see in the last paragraph on that page, the one
10 that begins {RC-J5/30.1/6}:

11 "American Express does not compete ..."

12 A. Yes.

13 Q. {RC-J5/30.1/6} "... and could not compete -- on the
14 basis of ubiquity."

15 A. Yes.

16 Q. It says {RC-J5/30.1/6}:

17 "American Express focuses on providing superior
18 customer service as well as differentiated value ... It
19 is notable that merchants will not accept the payment
20 products of a discretionary network like American
21 Express unless they find value in doing so."

22 So it does not read from that as if American Express
23 is seeing itself as providing a "must carry" commodity,
24 that is the wording it uses, nor indeed therefore is
25 challenging the dominance of Visa and Mastercard in the

1 relevant sectors?

2 A. Well, firstly, I think this response does not seem to
3 focus on any particular market segments, but seems to be
4 a general statement. I would agree Amex is not
5 competing on the basis of ubiquity, and I have not
6 suggested that is what it would be doing in the
7 counterfactual. I think what I am saying is that within
8 the commercial sector, I know we have already talked
9 about inter-regional, in the commercial sector, that it
10 has a stronger position; the market shares that you
11 showed me are higher than they are in relation to its
12 overall offering; and as I mentioned before, but it
13 applies equally to the commercial segment. For those
14 commercial transactions, they tend to be more
15 concentrated in a small subset of sectors of the
16 economy, and they seem to be in sectors of the economy
17 within which Amex has a stronger acceptance profile, and
18 that is what I identified in my reports, based on the
19 witness evidence.

20 Q. Could we then, please, look in your eighth report,
21 page 168 {RC-H4/3/168}, paragraph 522. You are dealing
22 here with the additional costs that are said to arise
23 with issuing commercial cards?

24 A. Yes.

25 Q. You refer to some witness evidence that has been given,

1 and I think for these purposes, you rely exclusively on
2 the evidence of Ms Jones of Visa; is that right?

3 A. Yes. At various points I refer to Ms Suttle as well.

4 Q. That is for the previous paragraph?

5 A. It might be in a different sort of segment of the
6 report. I would have to go back and check, yes.

7 Q. Yes. Could we look at Ms Jones' evidence, please. It
8 is Day 8, page 149, starting at line 7 {Day8/149:7}.
9 What she said is:

10 "Because there is still a differentiator between
11 consumer and business debit from an FI perspective."

12 Financial institution, I think she meant.

13 A. Yes.

14 Q. {Day8/149:7} "I do not set interchange, that is not my
15 job at Visa, that is not what I do. I manage our
16 commercial card programme. So all of this is just
17 opinion and based on experience of being in the
18 industry..."

19 This was in response to a question as to whether or
20 not she was able to point to any data and so on.

21 If we then look, please, at {Day8/153:12}, she was
22 asked:

23 "We do not have any evidence from you, do we, of the
24 specific costs that issuing banks incur when dealing
25 with fraud screening?"

1 "Answer: No.

2 "Question: So how are we able to assess ... that
3 the costs per card of running fraud screening systems is
4 much higher ..."

5 She then reads her paragraph and then at 154,
6 line 16 {Day8/154:16}, I asked:

7 "Did you actually secure data which gave you a cost
8 for fraud per consumer card?

9 "Answer: I did not.

10 "Question: Did you look at the average spend per
11 card ..."

12 She said she did. I said {Day8/154:23}:

13 "Have you determined the percentage of revenue that
14 issuers derive from commercial cards for their overall
15 card issuing process?

16 "Answer: I did not."

17 So it is fair to say, is it not, that she lacked
18 data to back up her assertions of fact?

19 A. Yes. I think she says that some of that is based on her
20 time at -- is it Bank of America.

21 Q. Did you check her evidence and audit it for underlying
22 data sources when you saw it before you relied upon it
23 in your report?

24 A. No, I -- I reviewed the evidence as I saw it. I --
25 I have not got access, perhaps, to all of the, you know,

1 material under which she formed those views.

2 Q. You did not ask her if she could produce data to back up
3 what she was saying?

4 A. No, I think what -- what she was saying overall is that
5 there are a range of differences between commercial and
6 consumer product segments that -- that seems to stand to
7 reason. Why else would you have a different set of card
8 products? The cost is just one aspect, I think.

9 Overall, what I am saying is that the features of the
10 cards, the nature of the customers and the competitive
11 dynamics are really the overarching sort of body of
12 evidence on which I relied in order to form my views.

13 Q. Could we look, please, in your eighth report at
14 paragraph 559, which is page 175 {RC-H4/3/175}. You are
15 here, are you not, putting forward two alternative
16 routes by which switching might take place, issuer
17 switching, and then business switching over the page.

18 A. Yes, that is right.

19 Q. At 560, on page 176 {RC-H4/3/176}, you say:

20 "At the extreme, this process can lead to
21 a 'downward spiral' in which the network effects start
22 unfolding and the market 'tips' in favour of the
23 unregulated scheme."

24 By which I assume you mean principally Amex, is that
25 right?

- 1 A. That is right, yes.
- 2 Q. What is a downward spiral? Is it like a death spiral
3 that does not end up being terminal?
- 4 A. I think all I am referring to here is that in
5 a two-sided market, there are network externalities, and
6 that increasing use of a card on one side can have
7 an important impact on the other side in terms of the
8 acceptance, and that can reinforce the original
9 mechanism that I was referring to, and so create
10 a stronger effect than you would see in typical markets,
11 such as single-sided markets.
- 12 Q. You then in 561(b) go on to give an example of some
13 changes that took place in Hungary. Are you aware that
14 the Court of Appeal rejected the Hungary analysis
15 previously in the *Sainsbury's* case?
- 16 A. No, I think -- well, sorry, I think -- I am not aware of
17 what the Court of Appeal has said about that. If you
18 are saying that they did not consider that any of the
19 switching occurred as a result of a differential in
20 interchange fees, then I would find that potentially
21 surprising. It seems not a very contentious observation
22 that issuers will react to substantial deviations in
23 interchange fees. I was not even aware that was
24 contentious.
- 25 Q. Can we look at {RC-J5/28/48}, and in particular

1 paragraph 197 at the top of the page there. Some
2 evidence is given in relation to -- rather, sorry,
3 a recital is contained as to what Mr Justice Phillips
4 had found. He had found that this is what occurred in
5 Hungary in 2010:

6 "... when Visa had significantly cut its debit MIFs
7 pursuant to a commitment given to the Commission, but
8 MasterCard had not ..."

9 It was said {RC-J5/28/48}:

10 "... Visa had lost half its market share in that
11 country."

12 Then at paragraph 203 on the next page, page 49
13 {RC-J5/28/49}, dealing with whether or not it was
14 a realistic counterfactual to assume that if one of the
15 schemes was unable to set default MIFs, the other scheme
16 would be similarly constrained. The Court of Appeal
17 said:

18 "The correctness of that conclusion was not
19 undermined by the points made by Ms Rose about what had
20 happened historically in Hungary or even in the United
21 Kingdom. The critical point is that the hypothesis of
22 the asymmetrical counterfactual is that one of the
23 schemes would be prevented from setting any default MIF
24 but the Commission and the UK competition authorities
25 ... would allow the other scheme to carry on setting its

1 default MIFs, without any constraints being imposed.
2 That seems to us to be [both] completely unrealistic and
3 improbable."

4 A. Yes.

5 Q. They were rejecting the relevance, were they not, of the
6 Hungary example, for the purposes of the counterfactual
7 analysis?

8 A. Sorry, I think I misunderstood you when you asked: did
9 I understand the nature of the rejection of that
10 evidence. So I am aware, of course, about the role of
11 the symmetric versus the asymmetric counterfactuals in
12 the context of these cases, and that the asymmetric one
13 was rejected by the Court of Appeal.

14 I was not making this point with a view to
15 suggesting that the symmetric argument should be
16 reinserted at this particular point. All I was doing
17 was saying that as the first paragraph that counsel took
18 me to, there are two ways of identifying switching in
19 the commercial market. One is through issuer switching;
20 the other is through cardholder switching.

21 Is -- sorry, as regard to the potential for issuer
22 switching, I am merely making the observations that
23 issuers will respond to incentives ie changes in the
24 economics of the card issuance programme. I think the
25 Hungary evidence, and indeed, albeit to a somewhat

1 lesser extent, because there is more than one factor
2 that created it, the Maestro evidence, indicate to me
3 that issuers are likely to react to changes in the
4 economics when those arise. I was not suggesting that
5 they were directly relevant from an asymmetric versus
6 symmetric counterfactual.

7 Q. Now, in terms of the critical loss analysis let me just
8 see if I have this right. You are relying on the
9 critical loss analysis to produce a figure for market
10 share that Amex would need to acquire, in order to lead
11 to a result in which the MSCs would be at or higher than
12 the level in the factual, is that right?

13 A. That is right, yes.

14 Q. In relation to issuer switching, you deal with this in
15 your eighth report at paragraph 559, page 175
16 {RC-H4/3/175}.

17 A. Yes.

18 Q. As I understand it, you say that {RC-H4/3/175}:

19 "With the lower MIF of Visa's and Mastercard's
20 schemes, issuers would have no incentives to continue to
21 offer the additional functionality of commercial cards
22 and incur the associated cost themselves with no
23 corresponding revenue stream."

24 A. Yes.

25 Q. Now, you do not present any analysis in this report, do

1 you, of the extent to which issuers of commercial cards
2 would have alternative revenue streams or could seek out
3 alternative revenue streams, do you?

4 A. No. In this regard, I was looking at the factual
5 witness evidence, and also relying on essentially an
6 economic analysis of the underlying dynamics of the
7 market.

8 Q. If we look, please, at page 35 {RC-H4/3/35} of this
9 report, paragraph 102, as I understand it what you are
10 saying there is:

11 "... three-party payment card schemes such as Amex
12 that can directly determine the price structure tend to
13 charge relatively high [merchant discount rates] and
14 zero ... usage fees for consumers."

15 Can you see that?

16 A. Yes. It -- that is right. It can be zero, it can be
17 negative, it could be positive, but generally the point
18 is that the pricing is tilted towards the merchant side.

19 Q. Could we look, please, at {RC-J5/35.01/30}. This shows
20 a list of fees payable by various different banks --

21 A. Yes.

22 Q. -- for having accounts with them, and you will see that
23 American Express charges £60 a year for the Amex green
24 card, and --

25 A. Yes.

- 1 Q. -- up to £595 for the business platinum card?
- 2 A. Yes, I see that.
- 3 Q. With certain cards, Amex business, Amex BA and Amex
4 rewards, having zero cardholder fees.
- 5 A. Yes, so this is an example of product differentiation.
6 So each of Visa issuers and Amex create multiple
7 products designed to be attractive to different
8 merchants, some of which might have higher annual fees
9 but going along with that, higher benefits. Others
10 might have lower annual fees and going along with that,
11 likely lower benefits.
- 12 So it does not surprise me in the least that there
13 were a range of alternatives that each issuer is
14 offering.
- 15 Q. At the bottom of page 31 {RC-J5/35.01/31}, the next
16 page, we see typical APR rates available for four of the
17 American Express products, and they vary at the bottom
18 of the page. Sorry, page 31?
- 19 A. I have not seen that. Yes.
- 20 Q. This is not of the expert report. This is
21 {RC-J5/35.01/31}.
- 22 A. Yes, I see it now. So there are various interest rates
23 quoted for different issuers, as well as for Amex. As
24 I mentioned just a moment ago, there was variation
25 within each of the issuers, that reflects that different

1 products might be more and less appropriate for
2 different types of issuers, depending on their spending
3 profile and other needs.

4 Q. So cardholder fees and cardholder charges provide
5 a revenue stream, do they not, for issuers?

6 A. Yes.

7 Q. In terms of the commercial debit card, for example, that
8 is part of a wider banking relationship, is it not?

9 A. Yes.

10 Q. You would expect a bank to earn money from a wider
11 banking relationship with a business?

12 A. Yes.

13 Q. So your statement that there is no revenue stream
14 corresponding to the additional functionality simply is
15 not correct, is it?

16 A. Yes, I think -- I think it is fair to say that I should
17 have clarified that -- that there are other funding
18 sources available. I think that is a fair point. It
19 does not actually change my conclusion, because as
20 I explained earlier in the context of inter-regional,
21 where you have a significant change in relation to the
22 commercial MIFs, and that has a direct impact on the
23 level of the incentive associated with encouraging
24 transactions, then I think that would be the most
25 important indicator for the issuers to how to react to

1 the change in the -- change in the counterfactual
2 environment when you do not have those MIFs.

3 I understand that the costs associated with
4 facilitating those transactions are on average higher,
5 due to the extra costs of customer service and/or fraud
6 and so forth, the additional functionality. If you lose
7 that revenue source, then you are going to have to
8 reoptimise. In my view it is most likely that you
9 reoptimise by changing the thing that has changed ie
10 where the change in the economics has occurred is on the
11 transaction incentive.

12 Q. If we go back, please, to your eighth report, page 176
13 {RC-H4/3/176}, top of the page, you refer to the Amex
14 GNS programme?

15 A. Yes.

16 Q. Essentially saying that could be a useful outlet by
17 which Amex would secure the switching customers, as you
18 envisage it?

19 A. Yes.

20 Q. But it is right, of course, is it not, that Amex stopped
21 its GNS programme in January 2018?

22 A. Yes, I am aware of that. In my view, the reason it
23 stopped its GNS programme in 2018 was due to the fact
24 that the IFR captured the effects of that in relation to
25 the consumer product, and there -- they did not have

1 a strong case for it at that time.

2 Q. But it stopped also issuing, did it not, in the
3 commercial card market, jointly with other banks?

4 A. Yes. But what I am saying is that the change in the
5 competitive environment would be very much different in
6 the counterfactual, because in that situation, it would
7 have a very strong incentive in my view to redevelop the
8 programme, because it would be able to offer things to
9 issuers that Visa and Mastercard would no longer be able
10 to offer, whereas in the current factual world, it does
11 not have that particular advantage.

12 PROFESSOR WATERSON: Can I just check on this. Do we have
13 any evidence either way as to why Amex made this
14 decision?

15 A. Well, I think it has -- well, my understanding, I would
16 have to sort of go through the reports to try and
17 pinpoint the specific source of the evidence, but my
18 understanding is that when the IFR applied caps of 0.2,
19 0.3 to domestic and intra consumer products, that
20 captured also Amex's GNS programme, and therefore it was
21 no longer able to offer a viable consumer domestic and
22 intra-EEA focused product.

23 I realise that it stopped in 2018, whereas the IFR
24 came in a year, two years or so before that. But I also
25 understand that Amex tried to overturn the Commission's

1 inclusion of the GNS programme within the IFR, and it
2 seems obvious to me that the reason it was fighting that
3 was because it realised it would have a very detrimental
4 impact on its market --

5 PROFESSOR WATERSON: So just -- I am wanting to check, does
6 this come from Amex documents, or does it come from your
7 understanding, which seems quite natural, based on what
8 Amex did?

9 A. Yes, yes, I -- I cannot recall just now whether Amex has
10 already stated this. I am quite sure that Amex has
11 identified -- well, it certainly has, it is in my
12 report, that Amex has identified that the IFR applies to
13 the GNS programme and that obviously has a negative
14 consequence on its ability to compete. I am not sure
15 whether it has explicitly said we are stopping it as
16 a result. But it stands to me to be quite clear, why
17 else would it have stopped the programme.

18 MR BEAL: If it helps, please could we go to {RC-J5/26.1/1}.
19 This is an Amex press release. It explains -- it is
20 clearly not an Amex press release.

21 MR TIDSWELL: I wrote it down the other day as
22 {RC-J5/26.3/1}.

23 MR BEAL: I am sorry, thank you. That is it. Thank you
24 very much, sir.

25 What you will see there is Amex attributes the

1 combined impact of the EU payments package, including
2 price cap, separation of payment scheme and processing
3 operations, pan-European licensing and network access
4 requirement, imposing a regulatory burden such that
5 Amex's licensing business is no longer viable. Taken
6 the decision to bring it to an end.

7 So it was a multi-factorial decision, was it not?

8 A. Yes. Obviously, it is not commenting on the relative
9 drivers amongst those.

10 Q. When we look then, please, at business switching, you
11 have said yourself that the products available in the
12 market show that there is differentiation in the market,
13 correct, between Amex products and Visa products and
14 Mastercard products?

15 A. Yes.

16 Q. Given that there is a degree of differentiation in the
17 market, it is pretty unlikely, is it not, that the
18 entire market would tip to Amex, purely on the basis of
19 some degree of rebalancing?

20 A. Well, what I am saying is that if there is a change in
21 the environment due to the commercial MIFs for
22 Mastercard and Visa being removed, then there is an
23 economic rebalancing in favour of Amex. So,
24 essentially, while there is product differentiation
25 across a range of Visa products, and also Mastercard

1 products and also Amex products, there would in my view
2 be no relative change within the Visa set of offerings.
3 So if a given merchant chooses one of those, it is not
4 likely to switch to another one of those, because it has
5 already shown by revealed preference that the one it is
6 selecting was the best for it, and there is no reason
7 why, in the counterfactual, there would be a change in
8 the ranking of the Visa offerings.

9 The only change in my view would be the relative
10 position of the Amex ones by comparison to the
11 respective --

12 Q. Visa and Mastercard could respond with a more
13 differentiated offering, could they not?

14 A. Well, what I am saying is that the trigger for all this
15 would be the change in the MIF, so why would -- you
16 know, in my view it is not realistic to say that Visa is
17 going to offer better differentiated, improved products
18 with lower prices and so on, when the change in the
19 economics -- sorry, I meant issuers rather than Visa
20 itself, of course, when the change in the economics is
21 actually moving them away from having a profitable
22 product. They are going to have to react to the
23 increase in effective costs or loss of revenue with a --
24 with a reaction.

25 Q. You have not looked at the merchant competitive

- 1 response, have you, in your report?
- 2 A. By which you mean Amex acceptance?
- 3 Q. Yes. I mean, if for example there are merchants for
4 whom in the factual world, Amex is already setting its
5 MSC too high, and therefore it is not acceptable, if
6 Amex does not change its MSC in the counterfactual, it
7 is not going to be any more acceptable to those
8 merchants, is it?
- 9 A. Well, I have addressed that and I have -- I have reached
10 the opposite conclusion, and I think the sort of failing
11 in that logic, respectfully, is that it sort of assumes
12 that the only important issue is: what is the price?
13 That is not the only important issue. The important
14 issue from the merchant perspective is: what is the
15 price but also what am I getting for that? If more
16 commercial card customers want to use Amex, which
17 I expect would be the case because its relative offering
18 would improve, then that is a factor that I say
19 merchants would certainly take into account.
- 20 Q. How would its relative offering improve where on your
21 analysis assume that the Amex price stays the same, but
22 the Visa and Mastercard price reduces because the MIFs
23 are no longer charged; that would mean the differential
24 between Visa and Mastercard on the one hand and Amex on
25 the other was even higher, would it not?

1 A. Yes, no, you are absolutely right about that, and
2 I agree with that point, that the differential MSC would
3 be higher if Amex did not react by reducing its MSCs in
4 this environment. What I am saying is that when you
5 take into account the two-sided aspect ie the increased
6 demand on part of the customer base to use Amex, that
7 the merchants will capture that in their thinking and
8 say: why am I not going to accept Amex if it is going to
9 cause me to lose sales to my rivals who will be in my
10 view likely to accept Amex.

11 So that is why I say it is not simply about what is
12 the level of the MSC, or even the gap between Visa and
13 Amex, but what is the risk of lost sales if you do not
14 accept Amex. That will go up if more people are using
15 Amex.

16 Q. You have not assessed the likelihood of Amex achieving
17 a particular market share, have you?

18 A. I have not done so in terms of -- sort of given specific
19 probabilities for any given market share number you
20 might wish to quote. The way I have approached this,
21 given the evidence I had available to me, was to reflect
22 on what was the degree of increase in market share that
23 Amex would need to obtain in the commercial market
24 segment in order to offset the impact of the lower MSCs
25 for Visa and Mastercard.

1 I found that broadly, and in my ninth report, I sort
2 of updated this a little bit, it would need to go from
3 something like 12% to around low to mid-30s, about
4 30%-35%, something like that. I found that that is
5 plausible given the economic conditions, as I describe
6 it, and the change in the relative economics of the two
7 types of schemes.

8 Q. Page 111 {RC-H4/4/111}, please, in your ninth report.
9 Table 6.2 is the table I think you have just been
10 referring to, is that right?

11 A. Yes. That is indeed the one I was referring to, yes,
12 thank you.

13 [Redacted]

14 Q. So you have not factored in any other market share from
15 any other scheme provider?

16 A. No, not on this particular analysis. I -- I accept that
17 that could have been perhaps a way to look at it, and
18 then you would also need to think about any diversion to
19 that further scheme.

20 [Redacted]

21 Q. In the counterfactual, you would assume, would you, like
22 I do, that a business -- a bank is not going to stop
23 providing debit cards to its business customers?

24 A. So I guess a couple of points on this. Firstly, this
25 table that is still on the screen here is an overall

1 commercial perspective; in other words, that is the
2 market share it would need to achieve overall. Now,
3 obviously you could break that out into sub segments and
4 form a view as to the relative likelihood of Amex
5 winning market share in each of the sub segments. It
6 may be that it needs to -- it would need to get to
7 a higher market share in some segments if it was not
8 going to achieve those same market shares in other
9 segments.

10 But, firstly, I think this is a reasonable way to
11 look at it because the issue said, you know, what is the
12 extent to which commercial MIFs would lead to an
13 appreciable change in MSCs? Secondly, there is a number
14 of factors that I think are relevant to think about,
15 even in the context of the debit, small debit market,
16 because I do not think it is right to say that
17 necessarily Amex would not win any transactions in that
18 market for a number of reasons which I can expand on.

19 Q. Well, let us just concentrate on one pretty obvious one.

20 Amex is not a bank, is it?

21 A. Well, I understand that if Amex needed to provide
22 various services, it would need to operate some sort of
23 a bank account. I understand that it does so in some
24 other markets such as the US.

25 Q. It does not offer a business bank account to business

1 customers?

2 A. Well, I think that is what we have just agreed. It is
3 not in that market at the moment. I think there are two
4 implications of that: one, in the counterfactual, would
5 some of the small debit business commercial card
6 transactions move to Amex nonetheless even if Amex does
7 not enter; and I think that is plausible because the
8 relative economics of debit versus Amex credit will have
9 changed. In other words, what might currently be the
10 best option being a debit card transaction might switch
11 to an Amex credit transaction, because of the change in
12 the commercial MIFs.

13 So Amex would not necessarily have to enter the
14 small debit commercial market in order to win some
15 transaction share of that market.

16 Q. If we look at paragraph 407(a) in your ninth report?

17 A. Yes.

18 Q. You give a figure there for the total addressable market
19 of Amex?

20 A. Yes.

21 Q. So of the entire commercial card market, I understand
22 that you are saying that the bit they could tilt for is
23 that percentage figure; is that right?

24 A. Yes, so that is the percentage figure of the segments
25 where they currently operate.

1 Q. If we then please look in your eighth report, page 178
2 {RC-H4/3/178}, paragraph 567.

3 A. Yes.

4 Q. We see you are there looking at percentages that would
5 need to be obtained?

6 A. Yes. I am describing the scenarios at 567.

7 Q. In fact those percentages have now increased, have they
8 not?

9 A. Yes. So.

10 Q. You have only assumed switching to Amex. You have not
11 assumed, for example, that there might be switching to
12 bank transfers, a faster payment system and so on?

13 A. No. Looking at a much sort of broader sort of series of
14 implications, could be done. I think that is right.
15 I have -- I have focused on what I thought was most
16 relevant to the question of what is the impact on the --
17 essentially, the payment card MSCs or the costs of
18 payment card acceptance.

19 [Redacted]

20 A. Yes. That just flows from the nature of the analysis.

21 If you update an assumption, then the required level of
22 market share gain will be amended accordingly. What
23 I have done is in my ninth report, taken into account of
24 what others have said and updated my scenarios
25 accordingly.

- 1 Q. Can we look, please, at {RC-R/48/1}. This is Elavon
2 pricing and you will see at the bottom of that page,
3 there is a quote for Amex giving prevailing rates of
4 1.9%, so --
- 5 A. I see that.
- 6 Q. -- that is a whole percentage below, is it not, the
7 figure that you were alighting upon for your critical
8 loss analysis?
- 9 A. Yes, I mean, what I have looked at is the range of
10 evidence from -- from the sample A. I have not looked
11 at -- I am not sure I have accounted for this particular
12 value. But overall, I think --
- 13 Q. Were you familiar -- I have to be careful what I say
14 because it is a confidential figure, but did you look at
15 the Pendragon evidence which also had a figure for
16 Amex's MSC?
- 17 A. Yes, but I think Pendragon, without going into too much
18 detail, obviously the -- the general use of cards for
19 acceptance from Pendragon is, I would suggest,
20 relatively modest, given the very high ATVs of vehicles,
21 so I am not sure that is a representative merchant to
22 focus this analysis on.
- 23 Q. It is not plausible, is it, that Amex would, in the face
24 of increased price competition from Visa and Mastercard,
25 because of the stripping away of the commercial MIFs,

- 1 respond by maintaining or increasing its own pricing?
- 2 A. Respond by -- sorry, would --
- 3 Q. Maintaining or even increasing its own merchant service
- 4 charges?
- 5 A. Well, in my view, it would be -- it would not -- I have
- 6 not suggested it would necessarily increase its pricing.
- 7 I have said that the economic principles suggest that
- 8 that is a possibility, and the reason why that is
- 9 a possibility is that if the two-sided network effects
- 10 are really strong, then if you have the intervention for
- 11 the four-party schemes, then Amex might very well decide
- 12 to -- I have called it double down ie really take
- 13 advantage of the cardholder improvement that it can --
- 14 that it can access, and that increase in the cardholder
- 15 demand would be encapsulated in the merchant willingness
- 16 to pay. So it can go up. I have not assumed that it
- 17 would go up. My best estimate is that it would probably
- 18 be about the same.
- 19 Q. The reality is, as Mr Dryden described, that Amex on
- 20 your analysis would need to capture not only the lion's
- 21 share of every sub market, but also make headway in the
- 22 much more difficult to contest sub market of commercial
- 23 debit?
- 24 A. Well, that is inaccurate. I think -- I was listening to
- 25 his evidence. I think he -- he made one statement and

1 then I think he later corrected himself as to the degree
2 to which his first statement held. My -- and
3 furthermore, on my analysis, it does not need to win all
4 of the market share in the segments within which it is
5 operating. There would be some reasonable headroom,
6 even within those segments.

7 I think one of the reasons why Mr Dryden and I come
8 up with somewhat different figures is that in my view,
9 I have used more appropriate evidence for the Visa MSC
10 and MIF analysis for commercial transactions, because
11 I have used the PSR data which related specifically to
12 commercial transactions, whereas I understand he has
13 used a mix of different sources which did not focus on
14 commercial.

15 So if the commercial transaction scheme fee and/or
16 acquiring fee margin is higher for commercial than for
17 consumer, then that is a really important data input
18 into this type of analysis.

19 So I think that is one of the reasons why in my
20 view, he is underestimating the likelihood of the MSC
21 going up, because he is in my view overstating the gain
22 in terms of cost reductions, if there is retention by
23 the Visa scheme transactions.

24 Q. Can we now, please, come on to look at objective
25 necessity in the context of commercial cards. Please

1 can I invite you to have a quick look at page 185
2 {RC-H4/3/185} of your eighth report, paragraph 593. As
3 I understand it, the mainstay of your argument here is
4 that the elimination of commercial card MIFs would have
5 a downward spiral for the regulated schemes in favour of
6 Amex. That does not apply the right test, does it?

7 A. I mean, I think it is fair to say that the precise legal
8 test to apply is a matter for the tribunal. I am aware
9 of some of the references to which counsel referred me
10 to earlier, indicating that perhaps competition is not
11 directly relevant. I am not sure whether what was
12 intended in some of these payment card references was
13 the debate about symmetry versus asymmetry. That may or
14 may not be something that they had in mind when making
15 that statement.

16 Therefore, in my view, all I am saying is that if
17 you take away the commercial MIFs, that changes the
18 dynamics as between a four and a three-party scheme
19 extensively. The extent to which that creates a loss of
20 the functionality, or at least the ability to offer
21 a reasonably competitive product, might vary across the
22 segments. I think I said that it is more likely in the
23 corporate market than it is in the small business market
24 that these would be objectively justified.

25 Q. Please could we then see what you say at paragraph 596

1 by reference to some evidence from Ms Suttle of
2 Mastercard.

3 A. Yes.

4 Q. Can we then look and compare and contrast, {Day9/154:20}
5 tipping over to the top of {Day9/155:1}. If we try and
6 get that section up in one page, that would be very
7 helpful. So the question I put to Ms Suttle at line 20
8 was:

9 "You say there that MIF revenue is important for
10 issuers. Have you looked at an issuing bank's revenue
11 streams in detail?

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

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 "Question: Nothing in Mastercard's rules requires
19 issuing banks to use MIF revenue for a particular
20 purpose, does it?

21 "Answer: No, it does not.

22 "Question: So when you say transactions costs are
23 higher, what is the basis for that proposition...

24 "Answer: I think the transaction costs are higher
25 because the rates that are applied on a commercial card

1 are larger than a standard card."

2 So she is looking at the BPS that are offered on
3 a commercial card and a consumer card, is she not, and
4 saying that must necessarily imply that the transaction
5 costs are higher?

6 A. Yes. Well --

7 Q. That is circular, is it not?

8 A. I think -- I think that might be the case that she is
9 referring to an understanding of what are the charges
10 for those cards, and inferring that costs are similar.
11 I think it is not an unreasonable assumption that there
12 is a link between the costs of making -- facilitating
13 transactions and the fees that are -- are applied. The
14 higher the costs, generally, the -- the issuers will
15 tend to need to recoup that with higher fees, so I do
16 not think it is an unreasonable assumption.

17 I think more generally the evidence I saw does seem
18 to indicate that the costs of facilitating commercial
19 payment card transactions overall is higher than on
20 consumer for a variety of reasons relating to the -- you
21 know, the nature of the functionality that has to be
22 offered, which I understand is significantly greater for
23 commercial than it is for consumer, and reflecting what
24 the -- the commercial customers really want from that
25 product.

1 Q. There is nothing that makes it impossible, is there, for
2 commercial card payment schemes to be run with no MIF in
3 place?

4 A. Well, I think if there was no competition, then -- then
5 one might argue that is possible, although I would not
6 be able to say for sure because I am not aware of any
7 evidence to suggest that any payment schemes that offer
8 commercial functionality do so on a --

9 Q. No, I am just --

10 A. -- zero MIF basis.

11 Q. As an operational matter, there is nothing inherent in
12 a MIF that requires the MIF to be there for
13 the operation of a commercial card payment scheme?

14 A. No, I do not think -- I would agree with you that it is
15 not required from a technical perspective for it to
16 operate.

17 What I am saying is that it is required from
18 a commercial and competitive dimension, because if you
19 do not have that, then your scheme might work
20 technically, but if no one wants to use it then it is
21 not really worth very much.

22 Q. We know, do we not, that issuers can obtain revenue for
23 corporate card programmes from other sources other than
24 MIF?

25 A. Yes, I agree that there are some -- as I agreed earlier,

1 that there are some additional revenue sources but then
2 I come back to the -- the analysis I have described in
3 the inter-regional scenario, which is that if there is
4 a significant change in an important revenue source, and
5 it is on a per transaction basis, that is something that
6 banks will have to reoptimise in relation to. They can
7 do so with a variety of mechanisms. I certainly agree
8 with that.

9 I am not saying that they are only going to apply
10 fees on the commercial transactions. They could also
11 change levels of service, they could reduce the value of
12 rewards and so on. There is a lot of things they could
13 do, but what I am saying is that it is more likely they
14 will do that in relation to the commercial transactions
15 than some of these other dimensions, the reason being if
16 they put fees on to those other dimensions, then they
17 will make their offering worse for people who are
18 otherwise profitable, and they will make their offering
19 better for people whose profitability is now reduced
20 and --

21 Q. There is no competitive constraint present from Amex in
22 the commercial debit card market, is there?

23 A. I missed the beginning of that question.

24 Q. There is no competitive constraint from Amex in the
25 commercial debit card market?

1 A. I think that is fair, with one caveat, which is that
2 there is a competitive tension as between transactions
3 which are currently carried out by debit which could go
4 via credit. So it is quite right to say that Amex is
5 not currently offering a debit product -- market. It
6 has done in the US. It might do so if the competitive
7 conditions improve enough in its favour, but at the
8 moment it is not, but it can still compete by winning
9 credit transactions, which were formerly debit ones.

10 I think that was the point put to Mr Dryden in his
11 evidence, which is that when you look at the market
12 shares of all the segments, you cannot -- well, you
13 should not assume that those will necessarily stay fixed
14 in the counterfactual.

15 In the counterfactual, I would expect the total size
16 of the debit market to fall relative to the credit
17 market.

18 Q. Can we please move on to the cross-border acquiring
19 rule. In your ninth report at page 122 {RC-H4/4/122},
20 paragraph 450, the only regulatory decision that you
21 cite in support of your submission is that in the *Visa 1*
22 decision; that is right, is it not?

23 A. I think so, yes. I describe that the EC found that the
24 old CBA rules were not anti-competitive at that stage.

25 Q. Do you think that gives a fair and balanced view of the

1 overall conclusions that the Commission has reached?

2 A. I mean, I -- I obviously recognise and I describe that
3 the Commission then required, through commitments, Visa
4 to amend those rules, and what the reasons for that
5 were, so I do not think I have been unfair in describing
6 only one side of it. I think what I am describing is
7 that there were two rules; they have different effects
8 in the market. The Commission, I think, has changed its
9 view as to what its priority was, and in my view the
10 common sense economics were quite clear from the outset.

11 Q. Could we look at {RC-J4/14/4}, please. This is a note
12 of a meeting. It is confidential so I am not going to
13 refer to it. Can you look at paragraph 2.21.

14 A. 2.21. Okay. So -- yes, sorry, this is confidential.
15 I will not read it out.

16 Q. Yes.

17 A. Yes.

18 Q. Then could we look, please, at {RC-J4/31/186}. That was
19 a meeting in May 2008. This is a supplemental statement
20 of objections subsequently sent to Visa. If we go to
21 recital 598, you will see that Visa had been contending
22 that the *Visa 1* decision negatively clearing certain
23 aspects of the cross-border acquiring programme meant
24 that somehow the Commission's hands were tied. It is
25 fair to say that the Commission did not see it that way,

1 did it?

2 A. Well, that -- that I agree with. I have not suggested
3 otherwise. The fact that it required Visa to accept the
4 new CBA rules clearly demonstrates that it thought that
5 that would be better. What I am saying is that I do not
6 understand there to be any improvement in cross-border
7 acquiring as a result, and if anything, it has actually
8 lead to a deterioration in the ability of cross-border
9 acquirers to compete on a level playing field, and the
10 ability equally for domestic acquirers to compete on
11 a level playing field because you cannot really -- in my
12 view, it is not reasonable to say that something that
13 tilts the playing field in favour of cross-border
14 acquiring against domestic acquirers has led to an
15 improvement in competitive outcomes.

16 Q. Could we look, please, at {RC-J4/22/107}. This is part
17 of the 2009 statement of objections that went to Visa.
18 You will see at recital 316, the Commission concluded
19 that:

20 "... by forcing merchants to be subjected to high
21 MIFs through preventing that they benefit from
22 cross-border acquiring from countries with lower
23 domestic MIFs the Visa Europe's network rules also
24 reinforce the restrictive effect of the Visa MIFs."

25 Can you see that?

1 A. Yes, I mean, obviously, this is one of the interesting
2 points I have made in relation to the cross-border
3 acquiring rules, which is I cannot see how this could be
4 a restriction in its own right, if you have not already
5 somehow formed a view that the Visa MIFs are
6 restrictive, and that seems to be consistent with the --
7 the Commission's view here.

8 In my view, if you do not get to that conclusion, ie
9 that the Visa MIFs are not necessarily anti-competitive
10 and furthermore that given that there are national
11 markets with different conditions, different MIFs might
12 be appropriate from one to the other, then I cannot see
13 how you could then in that world find that the cross
14 border -- the old, rather, cross-border acquiring rules
15 were -- were doing anything that is anti-competitive.

16 All they were doing is ensuring that if there was
17 cross-border acquiring, they were all competing with
18 domestic acquirers on the same playing field with the
19 same MIF.

20 Q. Please could we then look at {RC-J4/31/146}, focusing on
21 recital 457. The Commission is here indicating that it
22 considers the cross-border acquiring rule as it stood to
23 be a restriction by object, and further reasoning for
24 that is given at recital 493, which is at page 154
25 {RC-J4/31/154}.

1 A. Yes.

2 Q. It is quite a detailed section at recital 493. It says,
3 {RC-J4/31/154}:

4 "... cross-border acquirers are subject to rule
5 which mandates the application of the MIFs applicable in
6 the country of transaction [applies as a default] ...
7 Visa members in the country of transaction and
8 cross-border acquirers may deviate ... by concluding
9 bilateral ... For cross-border acquirers this means in
10 practice that they often have to apply the (higher)
11 Country-specific [MIF] ... or registered domestic MIFs.
12 This may put cross-border acquirers at a
13 disadvantage..."

14 They say, bottom of the page {RC-J4/31/154}:

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

24 Do you see that?

25 A. Yes, I see that. I --

1 Q. You do not --

2 A. I have a different view on the economics than the
3 Commission took in that regard. I think there is no --
4 I mean, the fact that cross-border acquiring was
5 happening during the old CBA rules clearly shows that
6 there was not a partitioning that prevented it from
7 happening -- I show it into my report that it was indeed
8 happening. Was it the case that once you change to the
9 new rule, whereby you get -- can adopt essentially the
10 MIF in any sort of EEA country that you routed the
11 transaction for, well, yes, there was some arbitrage
12 and, in my view, quite artificial changes in routing in
13 order to take advantage of the lower MIFs in some
14 countries.

15 I think -- although I did not analyse it in this
16 way, Mr Dryden and Dr Niels both made valid points,
17 which said if you could not have the cross-border
18 acquiring rules, then it stands to reason that the
19 schemes would have to re-examine the geographic
20 differentiation of the MIFs. If you applied a uniform
21 one, it is not necessarily the case that the uniform one
22 would be lower than what applied in the UK, and I think
23 only Dr Niels provided any detailed assessment, and he
24 found that the UK ones were lower than elsewhere, and
25 therefore it was very unlikely that the counterfactual

1 would be lower.

2 Q. When you say arbitrage, you are referring, essentially,
3 are you not, to Worldpay's move to the Netherlands and
4 Barclaycard move to Dublin? That led to --

5 A. It is not limited to acquirers moving. It is a whole
6 series of things. It is sort of selecting which
7 transactions to route, based on being able to access the
8 distinction between an ad valorem cap in some cases, and
9 a fixed cap in other cases, which I describe in my
10 report.

11 Q. You have suggested that is not genuine competition, have
12 you not?

13 A. I suggest it is not genuine competition because it is
14 not related to anything inherent to the competitiveness
15 of the acquirer itself. So in other words, it is not
16 that the acquirer is competing -- out-competing a rival
17 because it is better in any sense in quality/price terms
18 and so on, with the exception of being able to access
19 a lower MIF due to routing the transaction in
20 a different --

21 Q. You are not suggesting it is a sham transaction?

22 A. I have not said it is a sham transaction. I can very
23 well see -- I am not suggesting there is anything
24 untoward about it. I can very much see why, if you had
25 the opportunity to do it, you might well wish to take

1 advantage of it. What I am saying is that it is not
2 competition on a level playing field as between
3 cross-border and domestic acquirers.

4 Q. You would accept, though, that the parallel importation
5 of generic drugs into the UK would be genuine
6 competition, would you not?

7 A. That is a completely different scenario. That is
8 a situation where, if there is a concern about
9 competition on price being prevented, then -- then that,
10 I could see a concern.

11 This is about whether the same acquirers can compete
12 for the same transactions on the same basis. That was
13 the case in the old CBA rules and it no longer held
14 afterwards. So I think sort of the opposite scenario to
15 the parallel import trade one; that one was designed to
16 help create a neutral playing field for foreign-based
17 providers to compete with domestic ones, and that was
18 essentially what was already happening in the old
19 CBA rules.

20 Q. An acquirer that can benefit from a lower MIF rate in
21 the Netherlands is taking advantage of establishment in
22 the Netherlands, and access to a different rate of MIF
23 that can then be used for cross-border acquiring. Why
24 is that not genuine competition?

25 A. Well, it is not genuine in the sense that it means that

1 the very same transaction is -- that is being acquired,
2 is being done on a different basis as between
3 a prospective domestic acquirer, and one that happens to
4 have --

5 Q. Because the costs available to the acquirer in the
6 Netherlands are lower than the costs available to the
7 acquirer in the UK?

8 A. Again, this is not a cost that the acquirer is
9 essentially, sort of, you know, inherent to its
10 operation.

11 Q. That is because Visa set the rate?

12 A. It is -- it is due to the fact that there were different
13 geographic considerations as to what the appropriate
14 rate --

15 Q. It is because Visa has set the rate differently in two
16 different markets, has it not?

17 A. Well, I agree, the MIFs were different in different
18 geographic markets, and therefore, if you were not able
19 to set different rates in different markets, then you
20 probably set a uniform one at a rate that made sense
21 overall. So even in that world, you would not
22 necessarily have had any reduction in the MIFs -- sorry,
23 in the costs.

24 Q. Can we look at {RC-J2/39/13}.

25 A. Sure.

1 Q. The effect of this decision was to enable substantial
2 savings to be obtained by merchants. This is
3 confidential, but can you see on the right-hand side an
4 indicia of the sorts of savings available for a given
5 year for, in this case, a merchant?

6 A. Yes. So I am not disputing that if a merchant took
7 advantage of what I call the arbitrage opportunities, it
8 would not achieve any reduction. What is, I think,
9 somewhat concerning is that (a) that has not been the
10 result of any true competitive tension between acquirers
11 competing on the same playing field. That is one point.
12 But the other point is also that generally, there was
13 only the larger merchants that were able to access this,
14 so you caused a bit of a distortion between the retail
15 markets as between who could compete by getting
16 an acquirer who was able to use this strategy and who
17 was not.

18 So that, I think, is a problematic distortion.

19 Q. Could we look at bundle {RC-J4/70/1}. This is
20 a document that has been prepared by Visa.

21 A. Okay.

22 Q. You will see that at table 1, there are some then
23 prevailing UK domestic consumer debit MIFs. Can you see
24 that?

25 A. Yes, I can.

1 Q. Then essentially what is then being dealt with in the
2 next paragraph under that is that based on the calendar
3 year 2015 data, using the PSR definitions, only one
4 quarter of UK consumer debt transactions are UK
5 domestic. So in essence what is being posited is that
6 a substantial number of transactions are now going to be
7 acquired by using cross-border acquiring, correct?

8 A. Yes, I think that is what that is saying, yes.

9 Q. The result of that, as you can see from table 2, is that
10 approximately 75% of UK domestic consumer debit
11 transactions were now likely to be acquired by
12 a cross-border acquirer, correct?

13 A. Yes.

14 Q. Or had been acquired by a cross-border acquirer. That
15 is the figure given in the middle table, middle section
16 of the table?

17 A. Yes, so there has been -- compared to the figures that
18 I showed which already showed the cross-border acquiring
19 was happening at a -- well, you know, at something like
20 10% of transactions prior to these changes, clearly that
21 went up a very large amount, and I think that reflects
22 the ability to adopt these sort of arbitrage and sort of
23 virtual moving strategies.

24 Q. So the aim of the former CBA rules was to prevent
25 exactly that sort of cross-border opportunity, was it

1 not?

2 A. I think the aim of it was to essentially enable -- if
3 you are acquiring a transaction in one market, to enable
4 all the acquirers to compete on a level playing field.
5 That is what was happening. Now you can very well see
6 that one of the implications of tilting the playing
7 field heavily in favour of cross-border is that a whole
8 series of transactions have moved that way, I would
9 suggest far more than you would normally expect in terms
10 of the actual competitiveness of the UK acquiring
11 market. Generally the UK acquiring market is perceived
12 to be strongly competitive, so I do not see why they
13 would suddenly lose, you know, 70% of the whole market,
14 other than through a distortion that has suddenly
15 appeared in favour of cross-border acquirers.

16 Q. Can we look, please, at {RC-R/47/1}. This is a
17 European Commission document dealing with the
18 single euro payments area, or SEPA. Are you familiar
19 with that area?

20 A. Yes.

21 Q. You will see that the overview provides {RC-R/47/1}:
22 "The ... (SEPA) harmonises the way cashless euro
23 payments are made across Europe. It allows European
24 consumers, businesses and public administrations to make
25 and receive the following ... transactions ...

1 "Credit transfers

2 "Direct debit payments

3 "Card payments

4 "This makes all cross-border electronic payments in
5 euro as easy as domestic payments."

6 Do you see that?

7 A. Yes.

8 Q. It applies in the United Kingdom and continues to apply
9 in the United Kingdom, correct?

10 A. Yes.

11 Q. We see that the advantages are:

12 "a single system for both domestic and cross-border
13 bank transfers

14 "allowing cross-border transactions by direct
15 debit..."

16 Etc etc. So it is clearly a mechanism which, since
17 its introduction in 2008 or so, has greatly facilitated
18 cross-border payment transactions in the euro area,
19 correct?

20 A. Yes, I am sure that is right. I mean, obviously, you
21 could do cross-border transactions in the euro area
22 either with the old CBA rules or with the new ones.
23 There is nothing to distinguish them in that regard.
24 I agree that more of them happened with the new rules
25 because it tilted the playing field in favour of

- 1 cross-border but you can do it --
- 2 Q. An acquirer acquires transactions, do they not, by
3 receiving batched files of sales transactions from
4 a merchant on a daily basis?
- 5 A. Yes.
- 6 Q. That process takes place electronically?
- 7 A. Yes.
- 8 Q. The acquirer then interacts with the scheme, and it
9 clears and settles those transactions through the
10 scheme?
- 11 A. I am happy to sort of accept that for now, noting that,
12 as I mentioned earlier, payment processing can be
13 a competitive activity, so it would not necessarily be
14 going via the scheme.
- 15 Q. Putting aside for the moment the idea that you can have
16 individual processes acting for either issuing banks or
17 acquirers within the scheme, since -- certainly since
18 the introduction of the SEPA, that process has taken
19 place electronically and through secure Internet
20 connections?
- 21 A. I have no view on that. It seems right.
- 22 Q. We know from Visa's note that no doubt you have read,
23 that the transfer of funds for international banking
24 settlement takes place through Visa itself?
- 25 A. I have to admit I have not read it, but I am happy to

1 accept that is the case.

2 Q. The single electronic payment system relies on secure
3 messaging and secure bank transfers?

4 A. Yes.

5 Q. Now, all of that makes cross-border electronic payments
6 pretty straightforward, does it not?

7 A. I am not sure I am capable of answering whether
8 electronic payments are straightforward. If you mean,
9 has it made it relatively, you know, easy from a user
10 perspective, maybe that is the case --

11 Q. The process --

12 A. It does not suggest there is a huge amount of detail
13 that is highly complex that underpins all of that to
14 make it happen. I would be surprised if that was not
15 the case.

16 Q. The process is going to be largely homogenised,
17 regardless of which member states of the EU you are in,
18 is it not?

19 A. Well, I think, yes, I can see your point that the EU or
20 the SEPA framework was trying to sort of have greater
21 degree of commonality across countries to have, you
22 know, a set of standards and so forth.

23 Q. There is no reason, is there, why an acquirer based in
24 Dublin should not be able to offer a merchant based in
25 Belfast the benefit of a lower MSC if it has reasonably

1 got access to a lower MSC?

2 A. I think that is really at the heart of whether this is
3 a restriction or not. There are two -- two ways of
4 thinking about it. One is what I adhere to, which is
5 that what you should be doing in terms of facilitating
6 cross-border acquiring is enabling those cross-border
7 acquirers to compete without any limitation and without
8 any bias against them relative to domestic acquirers, so
9 they have equal access to the customer base. In my view
10 that is what the old rule did.

11 The alternative view, which I appreciate is one that
12 some others adhere to, is that you should let acquirers
13 access the MIF that they happen to have in a domestic
14 context and use that to their advantage when competing
15 against other acquirers, even though the low MIF is
16 something that was, as is agreed by counsel, set by the
17 scheme to take into account different domestic
18 considerations on, you know, costs and -- and
19 competitive situations.

20 But now you are using that in order to out-compete
21 domestic acquirers in a different country, and I do not
22 really see why you would say that is a level playing
23 field. What you are doing is using, in my view, an
24 artificial advantage associated with the basis for the
25 schemes setting different conditions in different

1 countries to reflect those conditions, and then using
2 that to out-compete rivals on a, in my view, non-level
3 playing field basis.

4 Q. One of the people that have disagreed with you yet again
5 is the EU Commission, have they not? So let us have
6 a look at what they say. {RC-J5/30/1} is where it
7 starts, and if we could go, please, to {RC-J5/30/13},
8 this is looking at the impact of the old Mastercard
9 Central Acquiring Rule --

10 A. Yes.

11 Q. -- on respective domestic markets, and we see at
12 recitals (45)-(46), (46) in particular, the Commission
13 is noting that the cross-border acquiring rule locked in
14 merchants and forced them to accept domestic MIFs in
15 their home state, even very large merchants who were
16 unable to negotiate a MSC below the MIF.

17 Then if we look, please, at recital 47 on the next
18 page, page 14 {RC-J5/30/14}, merchants could not
19 threaten to move to another card scheme.

20 Page 16 {RC-J5/30/16}, recitals (57)-(58), the
21 Commission looked at the principles that lie behind
22 restriction by object, which is familiar to us all.

23 Then the conclusion that was reached, page 17
24 {RC-J5/30/17} recital (62)-(63), was that the Central
25 Acquiring Rule did constitute a restriction by object.

1 The reason it did that was because it prevented
2 cross-border acquirers offering lower MSCs, based on
3 lower domestic MIFs. Can you see that?

4 A. Yes. Yes, I mean, I have not really looked at the
5 Mastercard situation. It was not in my instructions to
6 do so. I was looking at the Visa cross-border acquiring
7 rules, and there obviously was a commitments decision as
8 opposed to this -- I think it is an infringement
9 decision for Mastercard.

10 I think I have already explained my view on the
11 economic implications at some length.

12 Q. Then at paragraph (64), they say {RC-J5/30/17}:

13 "The two-sided nature of Mastercard's card scheme
14 ... does not change the Commission's conclusion that the
15 cross-border acquiring rules restricted competition 'by
16 object'."

17 A. Yes. I mean in this case, my argument actually does not
18 rely on the two-sided nature so much. It is actually
19 relying more on the acquiring market alone in terms of
20 whether you have got a neutral playing field or not
21 within the acquiring market alone, irrespective of what
22 is happening on the two-sided consideration.

23 Q. Recital (66) at the bottom of page 17 {RC-J5/30/17}, one
24 sees the Commission noting that:

25 "... the actual purpose of the cross-border

1 acquiring rule was to shield the domestic MIF levels in
2 individual Member States from cross-border competition,
3 so that they remained at the same uniform level."

4 Can you see that?

5 A. Well, firstly, I thought that they were not at a uniform
6 level. If they were at a uniform level, then you would
7 not need to shield them, so I do not quite understand
8 that statement at all.

9 Q. Then at (67) and (68) {RC-J5/30/18}, the suggestion that
10 somehow the cross-border acquiring rules may have
11 pursued other possibly legitimate objectives did not
12 preclude them from being regarded as a restriction by
13 object.

14 A. Yes, but there -- but if the purpose of them is to
15 ensure a level playing field, then that seems to me to
16 be a relevant economic consideration.

17 Q. Could we then please look at page 19 {RC-J5/30/19},
18 recital (76). The Commission found that the
19 cross-border acquiring rules were not objectively
20 necessary. Finally at page 21 {RC-J5/30/21},
21 paragraph 85, the Commission declined to give an
22 exemption?

23 A. In terms of whether they are objectively necessary, I do
24 not think I have actually found that specifically in my
25 own report. Obviously they would -- they might well be

1 necessary in order to preserve variation across
2 geographies in terms of setting the MIF to reflect the
3 local conditions.

4 Now, if you did not have the rule, you would have
5 the sort of arbitrage that later appeared to be the
6 case, and of course with the IFR, you removed the
7 domestic variation in any event, so it then becomes sort
8 of redundant. I think the relevant point here is that
9 if you could have uniform MIFs, and if that were
10 appropriate, then you would not need this -- you know,
11 there would be no basis to have this rule, because there
12 would be no arbitrage to take advantage of.

13 Q. You have suggested in your reports that this -- the
14 amended ie the new CBAR does not have any impact. Is
15 that right?

16 A. It does have lots of impacts. Not very good ones.

17 Q. Can I put to you a situation and see if you agree with
18 me. Let us take Ireland again. At the moment the
19 position in Ireland is that the domestic debit cap is
20 0.1%?

21 A. Yes.

22 Q. A merchant in Northern Ireland therefore would be
23 offered 0.2% as opposed to 0.1%, by virtue of being
24 based in Northern Ireland, because both the cross-border
25 acquiring rate and the local domestic rate are capped at

- 1 0.2%, correct?
- 2 A. Yes. I think that is right.
- 3 Q. If that merchant went to an Irish acquirer, it would
- 4 have been offered 0.2% as an intra-EEA MIF, is that
- 5 right?
- 6 A. Yes, I think so. It would apply the same rate based on
- 7 the location of the merchant, which in this case was in
- 8 Belfast.
- 9 Q. Following Brexit, it would be offered 0.2% for debit and
- 10 1.5 -- 1.5 for debit from a card not present
- 11 transaction?
- 12 A. Yes, given the --
- 13 Q. So card present 0.2, card not present 0.15?
- 14 A. Yes.
- 15 Q. That is because it is charged at the inter-regional
- 16 rate?
- 17 A. Right.
- 18 Q. Under the rules as they stand, what the acquirer cannot
- 19 do is offer the local debit MIF rate of 0.1% to the
- 20 Belfast merchant?
- 21 A. When you say the rules as they stand, I think you mean
- 22 the old CBA rules?
- 23 Q. No, that is the new rules.
- 24 A. The new rules ... that might be the case. I have to
- 25 admit I am not sure about that, but that seems

1 plausible.

2 Q. The cross-border commitment rates are the ones we have
3 just identified.

4 A. Yes.

5 Q. There is no facility in the Visa rules for the Dublin
6 acquirer to offer the Belfast merchant the local MIF
7 rate payable in the Irish market?

8 A. Yes, okay. I --

9 Q. So exactly the same problem with differential MIF rates
10 applies under the new CBAR as well, does it not?

11 A. I think in -- to the extent that with the new CBA rules
12 post Brexit in relation to non-UK EEA acquirers, it may
13 be that it is as if the old CBA rules apply. I do not
14 know that for a fact. It sounds like that is -- that
15 might well be the case from what counsel is suggesting.

16 Q. I am going to move on to the Honour All Cards Rule.
17 I am just wondering actually if this might be
18 a convenient moment to take the break. It is slightly
19 earlier than I was hoping, but I can then finish off the
20 rest of the rules in one go. I am in really
21 the tribunal's hands as to --

22 THE PRESIDENT: Mr Beal, I --

23 MR BEAL: I would need to take it in about 15 minutes anyway
24 in order to give the transcriber a break.

25 THE PRESIDENT: We will follow your suggestion, Mr Beal, and

1 members'."

2 Then if we look, please, further down --

3 A. Can I just make a brief observation which is this is not
4 the case in the UK, as I understand it. So in the UK
5 throughout the whole period that we are examining that
6 that statement would not have held, because you could
7 selectively decline credit cards even if you wanted to
8 accept debit cards. So this general description of the
9 rule was not actually in effect in the UK, as
10 I understand it.

11 Q. Then if we look, please, over the page {RC-J4/22/65},
12 about a third of the way down, it says:

13 "In practice, the HACR prevents merchants from
14 refusing acceptance of those VISA cards that typically
15 bear higher interchange fees, such as commercial cards
16 ... or credit and deferred debit cards (as compared to
17 debit cards). Merchants might wish to refuse acceptance
18 of payment cards bearing higher interchange fees if the
19 interchange fees excessively contribute to the increase
20 of MSCs."

21 Can you see that?

22 A. Yes, I see that.

23 Q. We see that the HACR was a category of global rules
24 under recital (169), which Visa Europe was obliged to
25 implement. Now, if we turn, please, to page 103

1 {RC-J4/22/103}, there is a detailed critique of the HACR
2 at recitals 298-300, and in particular the headline
3 point at 300 is:

4 "The 'honour all products' functionality reinforces
5 the restrictive effects of the Visa MIFs on price
6 competition between acquirers."

7 A. Yes, that is the one I quoted at paragraph 671.

8 Q. At recital 299, the HACR was identified as producing two
9 effects. First, it prevented merchants and their
10 acquirers from refusing cards issued by some banks,
11 while accepting other cards issued by other banks. So
12 that is the issuers' rule, is it not?

13 A. Yes.

14 Q. Secondly, it prevented merchants and their acquirers
15 from refusing certain products while accepting other
16 products, and that is the products rule.

17 A. Yes.

18 Q. If we then please look at --

19 A. Just to point out that we have gone in reverse order,
20 that it generally described the two different aspects of
21 the HACR, and then it goes on to reach a finding as to
22 whether anything reinforces the restrictive effects.
23 But in that case, it focuses on the Honour All Products
24 Rule, which is what I said in my report.

25 Q. Then if we could look, please, at page 104

1 {RC-J4/22/104}, recital 303, there are some findings
2 made, are there not, about the non-discrimination rule?

3 A. Yes.

4 Q. It was found that that too contributed to reinforce the
5 negative effects of the MIF?

6 A. I have not really dealt with the non-discrimination
7 rule, because it was a Mastercard-only issue in these
8 proceedings, as I understand it.

9 Q. But the way that the Commission has described the
10 non-discrimination rule, it includes the no surcharge
11 rule. See recital 301 {RC-J4/22/104}.

12 A. Yes, and I have addressed Visa's no surcharges rule in
13 my report, yes.

14 Q. So if we then come on to look at recital 305 at the top
15 of page 105 {RC-J4/22/105}, we see that the Commission
16 is recognising that even though a majority of merchants
17 did not surcharge, that did not mean it did not have
18 an impact; can you see that?

19 A. In which?

20 Q. Recital 305?

21 A. Yes, yes.

22 Q. It is looking at the incidents of actual surcharging --

23 A. Yes, I can see that.

24 Q. -- and recognising that it takes place. It is not
25 prevalent?

- 1 A. Yes.
- 2 Q. But notwithstanding that, if we then look at recital 309
3 on page 105 {RC-J4/22/105}?
- 4 A. Sorry, in 306, it is saying that is not an unexpected
5 result, given surcharging is still forbidden in many
6 payment card schemes, including that of Visa Europe.
7 But that is not my understanding of the factual
8 situation in the UK during the claim period.
- 9 Q. It also then says {RC-J4/22/105}:
10 "... surcharging does not take place on a wide
11 scale. Merchants clearly do not want to inconvenience
12 their customers, in particular since their competitors
13 do not do so either."
- 14 A. I agree with that, and that is one of the reasons why
15 I think the actual effect of the rule has been so
16 limited.
- 17 Q. Then if we --
- 18 A. When it was taken away, they did not still want to
19 surcharge.
- 20 Q. If we look at recital 309 at the bottom of that page
21 {RC-J4/22/105}:
22 "The Commission ... finds that Visa Europe's NDR
23 [which included the no surcharge rule] applied in
24 combination with the practice of blending and with the
25 HACR, which prevents merchants from refusing acceptance

1 of specific types of payment cards, reinforces the
2 restrictive effects of the Visa MIFs on price
3 competition ... The NDR further decreases merchants'
4 power of sanctioning high MIF levels and takes away ...
5 power to place a credible threat against increases of
6 the MIF."

7 All of that is recognising, is it not, that the
8 combination of these rules cumulatively is to reinforce
9 the restrictive effect of the MIF?

10 A. Yes, I think that is a fair statement, that the
11 Commission's view is that where all of those rules
12 apply, they can reinforce the -- the potential
13 restrictive effect of the MIFs. I note it is not
14 necessarily saying that they are restrictive in their
15 own right absent the MIF. More generally, I think
16 I have tended to focus on the situation as it applies in
17 the UK and Ireland, and I have reached my conclusions on
18 that basis, and actually many of these rules had
19 limited, if any, effect in the UK, because they did not
20 actually apply for -- at least in some regards, some of
21 these rules did not apply during the claim period.

22 Q. Could we then look at {RC-J4/31/188}. If you cast an
23 eye, please, over recitals 602 through to 604, you will
24 see again that the Commission in 2012 is launching
25 a sustained challenge to the HACR, is it not?

1 A. Well, 602 is talking about the two types of aspects of
2 the HACR, so the Honour All Issuers Rule and the Honour
3 All Products Rule. So that -- that is what -- I think
4 this seems to be essentially -- is this the same set of
5 paragraphs that we were looking at earlier, or is this
6 just sort of largely reproduced? Because essentially,
7 first, the Commission is describing that there are two
8 aspects to the rule, and then it is homing in on one of
9 them for expressing its concerns.

10 The one it has expressed its concerns on in my view
11 has very limited application in the context of these
12 proceedings. The one it is not expressing a concern on
13 has in fact applied during the proceedings, but has very
14 good reasons as to why it applies, and why the
15 Commission did not express any concerns with it.

16 Q. Can we explore your proposition that it has got limited
17 impact in these proceedings?

18 A. Yes.

19 Q. The rule obviously has application, does it not, to
20 premium credit cards, to inter-regional fees where the
21 MIF rates are substantially higher?

22 A. Okay, so in relation to premium cards, my understanding
23 is that Visa did not have any cards with premium MIF
24 rates for at least domestic and -- transactions. It may
25 have done so in relation to inter-regional, I believe,

1 but my view is that the evidence does not suggest that
2 there would have been surcharging or non-acceptance of
3 those transactions, because merchants already were able
4 to not accept or to surcharge similar types of
5 transactions, and did not take that option up.

6 Q. So if Pendragon, for example, was selling a £100,000 car
7 to a customer, and the customer produced either
8 a foreign credit card or a high MIF domestic card, that
9 customer could end up costing Pendragon £1,500 for the
10 privilege of using that payment method?

11 A. Well, I am not sure how many --

12 Q. 1.5%?

13 A. -- foreign non-UK people would be buying cars in the UK
14 for fairly obvious reasons as to the driving on the
15 other side of the road in most of Europe, but I think
16 the general point is that there was capability of
17 acceptance or non-acceptance of credit versus debit, and
18 later on of commercial, also within the credit option,
19 and that was very rarely taken up.

20 So the idea that there would have likely in the
21 counterfactual been much more non-acceptance of some
22 types of transactions seems unlikely to me.

23 Q. If your case, as I understand it to be, is that it is
24 appropriate for that MIF money to be used to fund
25 a rewards programme for the cardholder, then the effect

1 of this rule is essentially to force the seller to give
2 the customer the benefit of that aspect of the rewards
3 programme, which is essentially a discount on his or her
4 purchase price, is it not?

5 A. Well, I have not made a comment as to exactly how the
6 issuers should best use the MIF income. I think that is
7 sort of commonly understood that there is no specific
8 way in which issuers can and should do so. Different
9 issuers may have different business models. Some might
10 focus on lower fees or higher rewards or better service,
11 and so on.

12 But leaving that sort of variety aside, I think the
13 question then is, well, if a customer has a strong
14 preference for using a card, then I think it is likely
15 that the merchant will want to accept it.

16 Q. I put it to you earlier, and I think you agreed, that
17 the HACR has been recognised to be a form of a tie-in
18 provision in the IFR. Recital 37?

19 A. Again, when -- when referring to the HACR, it is
20 generally helpful to distinguish between the honour all
21 issuers aspect and the honour all products aspect. In
22 the IFR, the Commission's view, as I understand it, was
23 that there should be greater limits on the application
24 of the Honour All Products Rule. As an example, the
25 commercial cards had to be delinked from the consumer

1 cards.

2 Q. But in terms of the --

3 A. But on the Honour All Issuers Rule, the Commission in
4 the IFR had some text explicitly recognising the benefit
5 of the Honour All Issuers Rule, and the fact that it
6 should be preserved effectively, it has not taken any
7 steps to reduce that.

8 Q. But the Honour All Issuers Rule gives a new issuer
9 a ready-made network of acceptance that it can benefit
10 from, does it not?

11 A. Well, that is one of the benefits, as I see it. It
12 allows a four-party payment scheme to essentially
13 outsource competition on the issuing side to get the
14 best card products and functionality out to consumers.
15 Obviously, if new issuers faced large barriers to entry
16 or expansion because they had to reconstruct
17 an acceptance network, then the whole benefit of
18 a four-party scheme in terms of competition amongst
19 issuers would be lost.

20 Q. But, of course, that means that it does not have to
21 worry about taking steps to build its acceptance
22 network, and therefore it gives acquirers less leverage
23 over those smaller issuers, and precludes them from
24 demanding lower interchange fees in return for
25 broadening acceptance levels?

1 A. I think I partially agree with that. So I have
2 previously already, when you put the proposition to me,
3 agreed that the Honour All Issuers Rule does in a sense
4 increase the cost to the acquirer of not accepting the
5 new issuer, because if it did not, then it would not be
6 able to accept all the other cards, so I agree with
7 that.

8 As to whether that puts the acquirer in
9 a particularly detrimental position compared to not
10 having the rule, I think there is two things that need
11 to be said. One, it is not in my view obvious that that
12 would be the case in the range of interchange fees that
13 we are actually talking about. The reason for that is
14 the point I made earlier in the UIFM context: the size
15 of the loss of gross margin associated with any lost
16 sales in my view would significantly outweigh the
17 potential gain for bargaining down a couple of basis
18 points, even a few, you know -- 0.3% or 0.4%.

19 Q. We saw the example from Mr Steeley, did we not, of Marks
20 & Spencer, that he would have been willing to consider
21 an innovative new payment system for use in his shops if
22 a new issuer came to him with a proposition, and he
23 could do some bargaining with the new issuer to try and
24 work out a solution which benefited both of them?

25 A. Yes.

- 1 Q. So that would be a practical example?
- 2 A. I recall that example. But my understanding was that on
3 further discussion in that same session, he accepted it
4 was not a case whereby they would be bargaining for
5 a reduction in the interchange fee from an issuer, but
6 actually would be bargaining for a collaborative
7 increase in interchange fees which would be linked to
8 some rewards that could be spent in Marks & Spencer. So
9 it is sort of the opposite type of negotiation, and that
10 type of thing can already happen in the current model
11 with co-branded cards.
- 12 Q. In your eighth report, paragraph 679, page 211
13 {RC-H4/3/211}, you suggest that removing the HACR would
14 generate inefficiencies. Surely that is a matter for
15 the article 101(3) stage, is it not?
- 16 A. I sort of understand where you are coming from. The use
17 of the word "inefficiencies" naturally seems to indicate
18 a 101(3) component. That is a fair point. What I am
19 saying here is that the inherent role of the Honour All
20 Issuers Rule is to enable the four-party scheme to
21 operate by distinction to a three-party scheme, with
22 this universal acceptance network, the ready-made
23 acceptance network as you put it, and therefore it is
24 inherent to the operation of the scheme. So therefore
25 in my view to say: well, because that is a -- you know,

1 you could use the word efficiency in that discussion,
2 therefore you should shunt it off to 101(3) seems to,
3 you know, fail to recognise the rather inherent nature
4 of it in the four-party context. I think that is
5 something that is important right upfront in the
6 restriction analysis.

7 Q. Could I ask you, please, to look in your ninth report,
8 page 143 {RC-H4/4/143} at paragraph 523. You are
9 dealing there with the prospect of differential
10 surcharging of different issuers, is that correct?

11 A. Sorry, just give me a second here. Thank you.

12 Q. 523?

13 A. Yes, yes. So this is the rule that -- the Uniform
14 Services Rule, so I understand that there was a limit --
15 I guess a variation on the general point about
16 surcharging being available for different types of cards
17 and different types of transactions. There was a limit
18 to the extent to which that --

19 Q. Can I just focus you in for a moment?

20 A. Sure.

21 Q. This is dealing with differential treatment of different
22 issuers -- can you see that --

23 A. Yes.

24 Q. -- and surcharging terms. Different issuers do not pay
25 different MIFs, do they, under the Visa scheme, per

1 product category?

2 A. No, that is correct.

3 Q. So there is no prospect, is there, of having to
4 surcharge on a different basis?

5 A. Yes.

6 Q. Now, at paragraph --

7 A. I think what this is -- yes. No, I think that is fair,
8 that there would not necessarily be an obvious reason
9 why you would want to -- well, sorry, I think I take
10 that back.

11 In theory, as I already mentioned, you can have
12 bilateral negotiations between issuers and acquirers
13 around the default MIF. Now, generally, as we already
14 described, there is not much of that. There could have
15 been a suggestion that if an acquirer had said: I am
16 going to only accept you, or I am going to surcharge
17 everybody else except you, people want to use your cards
18 in my store so is that not great, do you not want to
19 give me a discount.

20 I have already expressed that I have reservations
21 about the credibility of that offer, because as soon as
22 the merchant would be pressed with the decision to
23 actually reject the other cards, I think it would relent
24 and accept those cards anyway. But I think -- in that
25 context, I think this Uniform Services Rule is

1 potentially important because it sort of avoids that --
2 that -- you know, that lack of consistency in the
3 treatment of the different issuers' cards.

4 Q. Please may we then look at page 145 {RC-H4/4/145} of
5 this report, paragraph 531. You suggest here that
6 without the HACR, a four-party business model would be
7 technically unviable. That is simply not right, is it?
8 What you mean is it would be commercially unviable on
9 your case?

10 A. Sorry, which paragraph?

11 Q. 531?

12 A. Yes, technically unviable ... I think, yes, maybe the
13 word "technically" is perhaps ... I mean, if it meant
14 that the result was that issuers could not rely on
15 an acceptance network and had to then recreate
16 an acceptance network themselves, then that almost in my
17 view goes to a technical distinction, because you are
18 then turning the four-party model into a whole series of
19 little three-party models. So is it a commercial point
20 or a technical point? I think you could call it almost
21 either really.

22 Q. Then at paragraph 532 on that page, you mention the
23 badge and the brand promise argument. The reality is
24 that a shop could indicate by appropriate signs, could
25 it not, which cards were prepared to be accepted and

- 1 which were not?
- 2 A. Well, I mean obviously card -- shops do that at the
3 moment with the scheme. I think if you then had a huge
4 amount of variation, that would sort of become untenable
5 as to whether that type of information could be
6 conveniently conveyed to the customer, and avoid the
7 sort of inconvenience that this rule is designed to try
8 and prevent.
- 9 Q. Moving on to the no surcharging rule. In your eighth
10 report, please, page 162 {RC-H4/3/162}, paragraph 501.
- 11 A. Okay, yes.
- 12 Q. You recognise there, do you not, that if a merchant
13 negotiates the price in the knowledge of how a customer
14 is going to pay, it can pass on the costs of that method
15 of payment to the customer through charging a higher
16 price?
- 17 A. Yes, I think I am just saying that there is a world in
18 which MIFs have limited impact in either direction,
19 neither benefit nor disbenefit, if they are effectively
20 internalised or neutralised by the merchant, who then
21 just takes whatever the mechanism of the MIF is
22 suggesting and sort of passes that on to the customer.
23 So this is an example.
- 24 Q. That effect is neutralised, is it not, by a no
25 surcharging rule, because it precludes a merchant from

1 being able to respond to the cost of the payment method
2 in that way?

3 A. I think that is fair. I think my comments on the no
4 surcharging rule are more about the actual effect in the
5 market, given the evidence that I have seen it, in other
6 words, my neutrality point here presumes that there
7 would be essentially full effective surcharging. So my
8 comment here is on a very narrow type of transaction.
9 If you had full surcharging throughout the economy, then
10 I agree, MIFs would have limited impact.

11 But I think the commercial reality from the merchant
12 side, as the claimant witnesses have, I think quite
13 clearly indicated, is that that is not a world that they
14 understand and sort of can adopt, because of the
15 concerns about the impression they give to their
16 customers. They need to give the frictionless
17 opportunities.

18 PROFESSOR WATERSON: Can I just check here. Are we talking
19 all the time about a posted price world or are we
20 talking about a potentially negotiated priced world in
21 which you are buying something where there is not
22 a price?

23 A. Yes. Yes. So I think that this paragraph that counsel
24 took me to is a good example of the negotiated price
25 world, whereby if you are negotiating a price very

1 individually, with full information as to what your
2 costs are, then any of those costs can be accounted for,
3 and then there is -- and the fact that the MIF is
4 somewhat higher or lower would, in my view, likely be
5 neutralised. There would be no diversion-type effect
6 of -- of -- sorry. Effectively you would have perfect
7 steering on that very small set of transactions.

8 In a posted price world, I do not think that does
9 hold any more, and that is, you know, the large majority
10 of retail transactions.

11 MR BEAL: Of course, if no surcharging is permitted, then
12 consumers will not be responding to the correct price
13 signal if the correct price signal is not being passed
14 on, correct?

15 A. Well, I think there is a caveat to that, which is that
16 the price signal is accounting for a number of things
17 including the -- the resolution of externalities. So
18 I think it is not quite the case to say --

19 Q. Why is the price -- sorry, can I just drill down into
20 that. Why is the price relating to externalities in
21 a different market?

22 A. Well, externalities in the retail market, for instance,
23 so this is one of the reasons I think why the Commission
24 has essentially banned surcharging on the IFR
25 transactions, because there is no reasonable basis to do

1 so in a world where it has identified what are the --
2 you know, it has obviously carried out the IFR -- it has
3 analysed the caps, it has analysed the efficiencies. It
4 has formed a view as to what --

5 Q. When you say the Commission, do you mean the EU
6 legislature, which is --

7 A. What I mean is in the application of the IFR rules, it
8 has removed the scope for surcharging on the --

9 Q. That is a piece of legislation; that is not a Commission
10 decision?

11 A. Sure.

12 Q. But it also -- that is not the piece of legislation that
13 prohibits surcharging, is it?

14 A. No. No. But -- but in my view the -- well, what is the
15 purpose of that legislation if not to --

16 Q. That is why I am asking.

17 A. -- recognise the benefits that -- the Commission's work
18 in identifying what the cap should be.

19 Q. The legislation that you are talking about was
20 a consumer measure, aimed at precluding surcharging
21 arriving as a surprise at the end of a consumer
22 transaction, correct?

23 A. That might be one of the reasons why you want to prevent
24 surcharging. I am not sure whether that was the only
25 reason given in the context --

1 Q. It had nothing to do with an assessment of efficiencies
2 of an externality in a different market, correct, the
3 measure in question?

4 A. The IFR caps --

5 Q. IFR Services Directive 2?

6 A. Yes, sure.

7 Q. The IFR did not actually look at efficiencies either,
8 did it, because it was simply a regulatory measure
9 designed to produce a cap on the MIFs. It was not an
10 exemption decision that was looking at the exemptible
11 level for the MIF?

12 A. No, I agree with that, but obviously there was
13 a detailed investigation into what would be the merchant
14 difference cost level, so again, this is sort of going
15 beyond territory I have traversed in these reports,
16 because some of that goes into 101(3) territory.

17 Q. The nature of the no surcharging rule, surely, in its
18 context, is to restrict the pricing behaviour that
19 merchants can adopt in response to a given price, is it
20 not?

21 A. Well, I think there is a couple of things that it does.
22 One, it prevents the risk to consumers that you
23 identify, because there are several situations whereby
24 they might no longer have a choice and then -- then they
25 could be taken advantage of.

1 I agree with you that it also removes the ability to
2 apply a higher cost at the till price for a card
3 transaction. That is also fair.

4 Then the next question is: well, what would be the
5 implication of the rule. That is essentially what
6 I have done in terms of the counterfactual analysis.
7 Would merchants have likely operated very differently?
8 In my view, no. That is what the evidence seems to
9 suggest.

10 Q. At page 224 {RC-H4/3/224} of your eighth report,
11 paragraph 730, you deal with co-badging.

12 A. Yes.

13 Q. You suggest that from 2015, co-badging is permissible in
14 accordance with conditions set by Visa and subject to
15 prior approval by Visa. Where are the conditions for
16 the grant of permission to be found?

17 A. I cannot recall where the -- where the co-badging rule
18 is modified to make co-badging permissible.

19 Q. No, that is not the question. I am asking where the
20 conditions that you refer to can be found.

21 A. Well, I footnoted the Visa Europe operating regulations,
22 but you might be suggesting that that is inaccurate.
23 I do not know.

24 Q. Well, I am just asking you where in those regulations
25 the matter is to be found?

1 A. I cannot recall exactly where within the regulations the
2 matter is to be found.

3 Q. At paragraph 732, you note that co-badging remains in
4 effect for cards which are not issued in the EEA. Can
5 you see that?

6 [Redacted]

7 A. That may be the case factually. I do not know. Well, I
8 mean, I know that UK is outside the EEA, so I presume --
9 I do not know whether any further adjustments to rules
10 have been adopted in relation to that issue.

11 Q. You refer to technical challenges with co-badging. Can
12 I ask you, please, to look at {RC-M1/4/21}, which is
13 a witness statement from Mr Douglas in the earlier Asda
14 proceedings. Paragraph 79, Mr Douglas refers to the
15 co-badging of Laser with the Mastercard scheme -- the
16 Maestro scheme in Ireland, can you see that?

17 A. Yes.

18 Q. So there was no technical difficulty there, was there,
19 with a co-badge scheme having both Maestro functionality
20 and a domestic payment scheme functionality?

21 A. Yes, but I explained in my ninth report that there is
22 some important distinctions between the nature of these
23 technical restrictions being addressed, and the domestic
24 plus international scheme context, as opposed to the two
25 international scheme contexts.

1 In my view they are entirely different situations.
2 I have referred to what the factual witnesses say about
3 the nature of the technical limitations, which has to do
4 with bin numbers and so on. I am not, you know,
5 an expert on exactly what those technical concerns are.

6 But the economic issue here is that where you have
7 a complementarity between a domestic scheme and
8 an international scheme, that can lead to (a) the
9 incentives for co-badging, and (b), obvious rules to
10 overcome some of the technical limitations.

11 So, for example, routing all the transactions that
12 are domestic transactions over the domestic scheme, and
13 all the international ones over the international
14 scheme, is my understanding of how those arrangements
15 tend to work. In a -- in a -- and that can sort of help
16 you overcome the technical limitations, as I understand
17 it. That situation, I think, is entirely different in
18 an international context of two branded -- two
19 co-branded international schemes.

20 Q. I took Dr Niels to the Visa scheme rules that enable
21 a chip to be used for two or more payment applications
22 from the same card. You were here for that evidence.
23 I am not proposing to take you back to it, but it is
24 clearly possible, is it not, from a technical
25 perspective, for a single chip card to have two or more

1 different applications across it, because otherwise it
2 would not be in the Visa scheme rules?

3 A. Yes, it must be possible. But the -- the technical
4 limitations require solutions which -- my understanding
5 of the factual evidence suggests that those do apply ie
6 there are mechanisms that can work to overcome those
7 solutions more easily in the domestic context than in
8 the international context.

9 So that is not saying that it would not technically
10 be possible, but there would be, I think a lot of
11 preconditions, that would raise concerns commercially
12 for the different schemes, for example, and/or the
13 issuers actually, who obviously have to be the ones who
14 have the incentive to do a co-badge international
15 scheme, and I do not see why they would when that would
16 expose them to a revenue loss.

17 Q. Of course, there is no technical restriction, is there,
18 on co-badging different payment products in a digital
19 wallet?

20 A. No, I -- I am not aware of the details of that, but I --
21 I am aware that digital wallets can have different
22 inputs to them. I do not know whether that is
23 technically equivalent to co-badging. That is
24 a technical issue.

25 Q. Now, you have implied, I think, that co-badged cards

1 would not have emerged in the counterfactual; is that
2 a fair summary?

3 A. What I have done is observe that since co-badging was
4 permitted, at least in the EEA as we just described for
5 international schemes, I referred to what the factual
6 witnesses say about that, and what they say is that they
7 have had no requests, and there have been no such
8 schemes that have led to any co-badging.

9 Q. Could you look, please, at {RC-M1/2/15}, the first
10 statement of Mr Willaert from Mastercard --

11 A. Yes.

12 Q. -- who is dealing with a companion card arrangement that
13 Lloyds TSB Duo had with American Express?

14 A. Yes.

15 Q. That involved two different cards being held, tied to
16 the same account, correct?

17 A. Yes. I think there is a difference there, though.

18 A companion card is a situation where on the same
19 account, the issuer decides to issue both a Mastercard
20 in this case and an Amex. Now, that is an entirely
21 different situation than having a single card which is
22 branded both with Amex and Mastercard, whereby if that
23 one card is presented, the merchant can then route the
24 transaction according to what they prefer. If there are
25 two cards --

1 Q. Or indeed the cardholder could choose. If that
2 companion card, instead of being a separate card which
3 is a bit of a pain, was simply co-badged on a single
4 card, then the cardholder could choose to use the Amex
5 portion where Amex was accepted by a merchant and get
6 the Amex rewards, and when it was not accepted, it could
7 use the Visa portion?

8 A. Well, I agree with you that if that was how it would
9 work, then there would be relatively little difference
10 between a companion situation with two separate cards,
11 where the cardholder clearly makes the choice and
12 presents the card they want, and the co-badged cards
13 where they are both badged on the same card and then the
14 cardholder determines the outcome.

15 What -- what I am not sure of is whether those are
16 actually in fact comparable situations, because if the
17 merchant is the one setting the default, because, you
18 know, the card is presented at the till, the machine has
19 to have a starting point and it might take the starting
20 point because perhaps the acquirer wants it to, to adopt
21 the lower cost card, even though the cardholder might
22 have a preference for the other.

23 Now, maybe the rules would suggest that the
24 cardholder would have the right to, you know, bypass
25 that and switch it around, but I am sure -- I am not

1 sure that many of the cardholders would -- would know
2 about that.

3 So I think that the two situations are quite
4 distinct.

5 Q. The IFR makes it a requirement, does it not, that anyone
6 offering settlement at the till with a co-badged card,
7 the cardholder has to be given the opportunity to have
8 the final say?

9 A. Yes, but why would -- I have two questions here:
10 firstly, the opportunity to have the final say may not
11 work if the default is given to the merchant, and the
12 merchant chooses the one that the cardholder does not
13 want, and the cardholder is not noticing that. That is
14 one point.

15 The second point is I cannot see why the issuer
16 would -- would want to do a co-badging with two
17 international schemes, unless they wanted to do it with
18 a companion card, where they could then be sure that
19 they are giving the right price signals to the
20 cardholder, and they are adopting those.

21 If they are worried about the default setting being
22 set against their interests and the interests of their
23 cardholder, then that would be a disincentive to do
24 a co-badge.

25 Q. Can I, in conclusion, put a series of points to you.

1 This is simply me putting my case.

2 A. Yes.

3 Q. I would be frankly surprised if you turn around and
4 suddenly agreed with them.

5 It is economically meaningful, is it not, to
6 determine whether schemes that dominate the market have
7 market power over merchants?

8 A. Well, as I explained, it is very important in
9 a two-sided market context, particularly in the context
10 of inter-regional and commercial, to recognise the
11 impact of what is happening on the cardholder side.

12 Q. Your reports have either ignored or failed to respond to
13 the full panoply of regulatory and court decisions that
14 have disagreed with Visa's case?

15 A. I disagree with that. It is probably fair to say that
16 I have not referred to every single Commission statement
17 in every context, but I have given wide reference to
18 Commission statements, and where I have reached
19 different views, I think it is mainly because I am
20 looking at this from an economist's perspective on
21 certain issues, where the Commission was often taking
22 preliminary estimates on things like by object, which is
23 largely a legal issue.

24 Q. Your selection of the appropriate counterfactual for the
25 UIFM ignores the legitimacy of that counterfactual,

1 which you have said is a legal issue for others, not for
2 you?

3 A. I think I would agree with that. I have not addressed
4 the legitimacy in great detail, at least. I think the
5 only caveat I would put is that I have identified what
6 I saw as the concern about the MIF, which is the default
7 positive multilateral bit, and ensured that was removed,
8 as far as I could tell, from the counterfactual.

9 But I agree with you, I have not done an economic
10 assessment of the legitimacy. I have focused on the
11 economics of the -- the competitive dynamics as to what
12 would likely be chosen and what the likely effects would
13 be.

14 Q. More generally, the selection of the UIFM as
15 a counterfactual is unrealistic, not least because its
16 legality would be very much in debate with the
17 European Commission?

18 A. I am not sure I have too much to add to the last answer,
19 because it goes straight to the legal point that I just
20 described. I think on the economic considerations, it
21 is pretty clear it would be adopted and that it would
22 lead to very similar levels of interchange fee as the
23 MIFs.

24 Q. Your approach to the risk of switching for both
25 inter-regional and commercial card MIFs is not

1 consistent with the correct legal approach?

2 A. Well, I am not best placed to comment on the correct
3 legal approach. I have identified what I think are the
4 relevant economic considerations to take into account in
5 the counterfactual. It seems to me very odd to treat
6 Amex differently, just because it does its own acquiring
7 and is a three-party system rather than a four-party
8 scheme.

9 Q. Your appraisal of the risks of switching and therefore
10 of the calculation of what would be the MSC in the
11 counterfactual in those scenarios has relied on
12 incorrect or flawed calculations and analysis?

13 A. That I disagree with. Even where the other experts have
14 identified different approaches, I have engaged with
15 those, sometimes updating my scenarios to reflect that,
16 quite often pointing out that the database that I was
17 using was much more relevant and consistent.

18 Q. You failed to apply the correct test for objective
19 necessity?

20 A. Again, I think that largely points towards a legal
21 threshold issue. For objective necessity, I have, it is
22 fair to say, at least in relation to inter-regional and
23 commercial functionality, relied on the implications of
24 competition with Amex. So if that is something that
25 should not be done for the purpose of objective

1 {RC-H4/3/87} --

2 A. Yes.

3 MR TIDSWELL: -- where you summarise this in your
4 subparagraph 264(d). It is this point -- I think you
5 have just referred again to this in your answer to
6 Mr Beal in the second sentence about --

7 A. Yes.

8 MR TIDSWELL: -- two-sided markets, and I just wanted to
9 understand that a bit better, because I think as
10 I understand the logic of the argument, that there is,
11 if you like, market power and maybe we need to analyse
12 exactly what we mean by that, but you start with the
13 idea you have a four-party scheme. I think you said
14 earlier today that the whole point of those is to
15 achieve acceptance, so that issuers have confidence
16 about card use. So that is the sort of starting point
17 to assess the framework for the way the whole system
18 works. Is that fair?

19 A. There is a slight nuance there. You made a valid point
20 that the Honour All Issuers Rule is about ensuring that
21 issuers can have confidence in the acceptance network
22 and their cardholders can have confidence in the
23 acceptance network. That is a distinct point to
24 achieving, for example, universal acceptance.

25 So the -- the issuer rule is not specifically about

1 the size of the acceptance network. It is about the
2 relative access to the acceptance network for that
3 issuer, by reference to everyone else. So you would not
4 want, sort of, discriminatory access to the acceptance
5 network, because then that would make issuers
6 essentially think twice about participating and probably
7 not want to be members of the scheme.

8 MR TIDSWELL: Yes, and I had not actually put the point to
9 you on the basis of the Honour All Cards Rule.

10 A. Okay.

11 MR TIDSWELL: I was just talking more generally.

12 A. More generally.

13 MR TIDSWELL: I think it seemed to me it followed that if
14 you were setting up a four-party scheme, the idea was to
15 get acceptance, so issuers had confidence, and the more
16 acceptance you had, the better, presumably.

17 A. Well, absolutely. For a screening to be successful,
18 acceptance is one of the key things it is trying to
19 achieve. The whole point about balance is that you are
20 balancing that against the cardholder side as well, so
21 they are both important, sure.

22 MR TIDSWELL: Yes, of course. So as a consequence, is it
23 the higher you get with acceptance, the more you get
24 into what has been called the merchant predicament,
25 which is this question of the fear of lost transactions,

1 and the idea that that fear overcomes a certain amount
2 of resistance to the price that is imposed by the
3 interchange fee.

4 A. Yes, I think that is fair, that -- that -- although I am
5 not sure it is necessarily about universal acceptance
6 being a driver of merchant resistance. I think it is
7 actually more about the popularity of the card on the
8 issuer side, on the cardholder side, and the degree to
9 which the cardholder will want or have to use that card.

10 MR TIDSWELL: Yes, so the success of the scheme more
11 generally, rather than necessarily just a feature of
12 universal acceptance?

13 A. Yes, so issuers will want -- will want to accept the
14 card to a greater extent if there are more people on the
15 cardholder side using it, and they will want to accept
16 it and be willing to pay for it to a greater extent if
17 there are more cardholders who either only have that
18 card, or have a strong preference to use that card.

19 MR TIDSWELL: Yes, thank you. Then I think where you go
20 next, I think, is that that leads to the ability of
21 issuers to continue to seek higher interchange fees, and
22 this is the dynamic that before the IFR led to the
23 concern that hold up was not unlimited, but certainly
24 unchecked to a very significant degree.

25 A. Yes.

1 Q. So you do get this -- this dynamic where the issuing
2 side of the market is able to effectively transfer value
3 to themselves from the acquirer side?

4 A. Yes. I think that that -- I think there is a little bit
5 of nuance there as well. So the issuer hold-up problem
6 is essentially a free rider type problem which
7 essentially means that issuers care quite naturally
8 about their own profitability themselves, not overall
9 about everyone else in the scheme.

10 So if the question put to an issuer is: can you, if
11 everyone else is charging, let us say, you know, 1% as
12 a MIF, can you charge 2% and get advantages from that,
13 would you be likely to do so? My answer is: yes, they
14 would, because even if it was agreed that at 2%, if 2%
15 was widespread, then that would have significant
16 acceptance issues in the network.

17 The individual issuer would not put much weight on
18 that, because that is a very diluted effect. It is the
19 overall impact of all the issuers that has the impact on
20 the average cost of acceptance, whereas the individual
21 issuer is focusing more about competing about its rivals
22 and offering a better deal to cardholders than its
23 rivals. So in that case, it would not be constrained by
24 worries about acceptance side issues, because its
25 contribution to the acceptance costs would be so modest.

1 This all assumes that there is not separate
2 issuer-based surcharging, of course.

3 MR TIDSWELL: Yes.

4 A. If there was, then it would potentially think about
5 that, but the evidence to me in this case does not
6 suggest that that is a prevalent issue.

7 MR TIDSWELL: So once you have got to that point, it would
8 seem that you do have certainly an imbalance of -- maybe
9 market power is the wrong word, but the merchant -- the
10 acquirer and the merchant are subject to these forces
11 that push the interchange fee up.

12 A. Yes.

13 MR TIDSWELL: Why do you then say -- can you explain to me
14 why you then say that does not imply market power? What
15 is the next step in your logic.

16 A. Yes. So there is two factors in the logic: (1), if the
17 costs of the alternatives to the merchant are generally
18 lower, then that seems to me a relevant consideration,
19 but I accept that, you know -- well, I think, yes, that
20 is one factor essentially.

21 MR TIDSWELL: When you say alternatives, you mean --

22 A. Other payment methods, yes, exactly, the cost of
23 everything else is higher, and then you are saying this
24 one, which is offering essentially the best price in the
25 market, the lowest acceptance cost, to say that that is

1 one with market power without reference to relative
2 prices relative to the alternatives, seems to be missing
3 part of the question.

4 But that is not really the main point I am making.
5 The main point I am making, which is relevant at least
6 for, in my view, inter-regional and commercial, it may
7 be less so for domestic consumer, is that it seems odd
8 to say -- to me, anyway, to say the setting of a MIF
9 represents the exercise of substantial market power. If
10 you were to not have that MIF, the scheme would lose
11 sufficient transactions to more high cost rivals,
12 leading to a potential negative outcome on merchants.

13 I cannot see how that pair of observations ie that
14 you are setting a MIF that is a positive value on the
15 one hand, and that absent the MIF, the merchants would
16 potentially be facing higher alternative costs on the --
17 at the same time, leads to a situation where you are
18 defining the party setting that first set of MIFs as
19 having substantial market power, because of the
20 two-sided market phenomenon.

21 The single-sided perspective is, well, leaving aside
22 what is happening on the cardholder side, the acquirer
23 might pass on a reduction, and you will have some
24 savings and I account for that. I agree in my reports
25 that that is a likely impact within the set of Visa and

1 Mastercard transactions. But it seems to me failing to
2 recognise the underlying economics, to not also
3 recognise that the impact of the MIF also affects what
4 the cardholders and the issuers are doing.

5 MR TIDSWELL: Is that really equivalent to saying that the
6 dynamic we have been talking about is inherent in
7 a payment system of any sort, because there tends to
8 be -- I think you said somewhere else in your report,
9 there tends to be a flow of value from merchant to
10 issuer to create a so-called balance?

11 A. Yes.

12 MR TIDSWELL: So are you saying that there is nothing
13 particular about this because all the rest are the same;
14 is that the point you are making effectively?

15 A. Well, in part I am making a point similar to that, in
16 other words that the price structure that the four-party
17 schemes are -- is adopting or are adopting is very
18 similar, it seems to me, to what other non four-party
19 schemes are doing, both three-party and other payment
20 methods. In other words, this is the "merchant pays"
21 model as opposed to the "let the costs fall where they
22 lie" version of the model, which has, you know, not
23 really held much support in the academic literature

24 But I think you are raising a good underlying point
25 which is: why is that? I mean, so far I have just made

1 an observation that they are doing this, so is everyone
2 else, that is competition. You can get underneath that,
3 and the literature has done, to understand why is that
4 the case?

5 The reason is that cardholders have choices, they
6 choose where to shop, they choose what payment method
7 within a set of accepted payment methods to use, and
8 that does give them a degree of bargaining power. That
9 is how competition is working in this market. Merchants
10 want to attract cardholders.

11 MR TIDSWELL: So is that an observation about
12 inter-scheme -- effectively about inter-scheme
13 competition and about cardholder preferences regarding
14 those outcomes? That is the point.

15 A. Yes, it is a little bit beyond that, because I think the
16 same forces apply outside of payment card schemes, so
17 I would not limit that observation to just Amex. It is
18 very clear that some other of the payment methods also
19 have that type of structure.

20 MR TIDSWELL: Yes, but you could -- I mean, there may be all
21 sorts of reasons why we have got to that position, might
22 not there? One of them may be that you have got -- in
23 relation to cards anyway, you have got two schemes which
24 have a very, very substantial part of the market to
25 operate that way, and therefore it is relatively easy,

1 if you are going to set up a competing scheme, to
2 replicate that dynamic. So I am not saying that is
3 necessarily the reason why that is -- what has happened
4 but just advancing it as do you not need to understand
5 what the reasons are for the other schemes, and
6 therefore the state of inter-scheme competition, before
7 you can use that as an inference that there is no market
8 power here?

9 A. Yes, so I think that is what I was saying. It is
10 interesting historically to note that three-party models
11 evolved before four-party models, and they did adopt
12 a merchant pays model before there even was four-party,
13 as I understand it.

14 So I do not think it is sort of something that has
15 been specifically driven by the four-party scheme.
16 I think it is something that reflects the parameters
17 that I described earlier, the fact that merchants are
18 competing against each other, and one of the aspects of
19 competition is to attract cardholders who want some
20 convenience, and therefore have the choice to visit
21 whichever shops offer the most effective and convenient
22 set of options.

23 But as I explained earlier, it is possible that in
24 a world of extreme prevalent surcharging, that you would
25 have some different outcomes. I have acknowledged that.

1 But in that case, you would generally say the MIFs
2 do not have much impact, neither beneficial or
3 detrimental. They do not restrict competition because
4 they are basically neutralised by wide prevalent
5 surcharging, but again, I think the evidence suggests
6 that -- the underlying dynamics as to what merchants
7 want and what cardholders want does not lead to that
8 outcome. It leads to one where cardholders tend to have
9 some choice.

10 MR TIDSWELL: Okay, thank you. Very helpful.

11 A. Thank you.

12 PROFESSOR WATERSON: Thank you. So just following

13 Mr Tidswell's thought experiment, which he has done, so
14 you answered that one of the firms could think I am
15 going to charge 2%, and the scheme will still go ahead
16 I suppose.

17 A. Yes.

18 PROFESSOR WATERSON: But then presumably all the issuers
19 could think like that.

20 A. Yes.

21 PROFESSOR WATERSON: So they could all charge 2%.

22 A. Yes.

23 PROFESSOR WATERSON: But then one of them might think: well,
24 I could charge 3%.

25 A. Yes.

1 PROFESSOR WATERSON: So then all of them could think --
2 A. Might do that.
3 PROFESSOR WATERSON: Yes. But then at some stage,
4 presumably, acquirers start -- or, sorry, merchants
5 start dropping out of the market.
6 A. Yes, I agree with that.
7 PROFESSOR WATERSON: So there is some natural limit to that,
8 if you like.
9 A. Yes.
10 PROFESSOR WATERSON: Because -- not necessarily from the
11 individual issuer's point of view, but from the scheme's
12 point of view.
13 A. Yes.
14 PROFESSOR WATERSON: Because the scheme wants merchants to
15 be signed up.
16 A. Yes.
17 PROFESSOR WATERSON: But it is not a direct influence on the
18 issuer.
19 A. Yes. Well -- yes, so my -- my illustration was in the
20 world of pre IFR and no MIF but bilateral negotiations.
21 So in that world, I think you are absolutely right,
22 Professor Waterson, that issuers would start to outbid
23 each other by nominating higher and higher interchange
24 fees. The reason they would do that is because then
25 they could attract more cardholders, and secondly, as

1 I mentioned, even if that did have some costs into the
2 overall success of the scheme from an acceptance side,
3 those would be so neutralised and so limited and dilute
4 from their perspective that they would not put any
5 weight on them, so they would be focusing more on
6 getting more.

7 But that -- and the outcome would be -- goes from 2
8 to 3 and so on. Yes, eventually, the acceptance starts
9 to fall, but where you end up in equilibrium is a far
10 less attractive situation, potentially a non-viable
11 scheme, which is one of the reasons why I think this
12 hypothetical scenario was not accepted as a reasonable
13 counterfactual over settlement at par in the pre-IFR
14 proceedings.

15 The IFR, of course, changes that because this whole
16 bidding up to a situation where the acceptance of the
17 whole scheme suffers simply does not happen. It is
18 capped at 0.2, 0.3.

19 PROFESSOR WATERSON: Okay, so coming on to the IFR.

20 A. Yes.

21 PROFESSOR WATERSON: I want to understand, there has been
22 a lot of talk about switching today. Does that relate
23 to intra-Europe as well or does it just relate to
24 inter-regional commercial, etc etc?

25 A. The latter, so the switching discussions I was

1 commenting on are uniquely for the inter-regional set of
2 transactions and the commercial set of transactions.

3 I do not see any basis to describe the intra-regional
4 transaction switching, because there is no
5 counterfactual, at least in these proceedings, where
6 there is a relative price change, or a relative change
7 in terms and conditions for either issuers or
8 cardholders. That is sort of locked in.

9 PROFESSOR WATERSON: Right, but issuers still seem happy
10 with the IFR, presumably.

11 A. Well, yes, so there is a number of points to make about
12 the IFR. I do not think it came up earlier. The
13 Australian case did come up, and I explained my views on
14 that. The IFR, my views are quite similar to the
15 Australian case. Essentially, it has limited relevance
16 to the consumer inter-regional or the commercial
17 context, because it was applied for mostly domestic.
18 Yes, intra-EEA but intra-EEA was 2% or 3% of the total
19 transactions, and domestic was 95 plus. So it was
20 essentially a domestic regulation. It was obviously
21 a cap, not a full reduction, and it applied to Amex's
22 GNS programme, as we did discuss earlier.

23 So for all those reasons, the competitive dynamics
24 in my view are different in inter-regional where Amex
25 has a stronger position, and would not be hamstrung with

1 its GNS programme. Obviously you would have to
2 reinstate it, but it would have the capability of doing
3 that in my view.

4 PROFESSOR WATERSON: Yes. This is a sort of technical
5 economist question now.

6 A. Okay.

7 PROFESSOR WATERSON: This -- if I can, I will bring up your
8 ninth report, {RC-H4/4/193}.

9 A. Yes.

10 PROFESSOR WATERSON: We see the picture here.

11 A. Yes.

12 PROFESSOR WATERSON: Would you agree with me that
13 a significant limitation of your analysis here is that
14 we hardly have any observations before the change?

15 A. Yes, that is a significant limitation. It is one
16 I noted.

17 PROFESSOR WATERSON: Yes.

18 A. I agree that it is a limitation. It is all we have, so
19 I have used the full available data. I think the
20 implication of that is that it does raise more
21 uncertainty about what the diagram might be showing. It
22 was hypothesised that maybe Amex had sort of pre, you
23 know, pre sort of cut its rates in anticipation. I am
24 not aware of any suggestion that that is the case.

25 But I think overall, my views are that firstly, from

1 the economic principles perspective, it could go in any
2 direction ie the Amex reaction could go in any
3 direction, up, neutral or down, depending on what the
4 four-party scheme does.

5 What it will do will depend on the competitive
6 conditions it faces. Here in the -- primarily focused
7 on domestic Australian scheme, even there it -- the
8 degree of reaction is not clear cut in my view. There
9 is no statistical basis to that, but I do appreciate
10 your point about some limitations to it. But that is in
11 a situation where for a domestic consumer, universal
12 acceptance is probably a much more important
13 consideration than it would be for either inter-regional
14 or commercial.

15 The reason for that is that we know that from the
16 evidence I have put in my report that the inter-regional
17 and commercial transaction mix is heavily concentrated
18 in segments of the economy where Amex is prevalent in
19 terms of its acceptance rate, so Amex has a very
20 different position in my view in those --

21 PROFESSOR WATERSON: No, my point was merely that you are
22 not able to maintain the parallel trends assumption
23 prior to --

24 A. Yes, there is not enough data prior to be sure --

25 PROFESSOR WATERSON: Well, there is barely any.

1 A. There is not enough data to be sure. There is some
2 limited evidence that Amex was coming down prior. There
3 is obviously also evidence that its reaction was over
4 a much, much longer period of time where its rate of
5 fall was very -- more or less constant over the entire
6 20-year period that this is looking at, whereas for Visa
7 and Mastercard, there was a small reduction later on,
8 but most of the fall was sort of quite -- quite sharp.

9 PROFESSOR WATERSON: Right. Thank you.

10 THE PRESIDENT: I have no further questions. Mr Beal, does
11 anything arise out of that?

12 MR BEAL: No, thank you, sir.

13 Re-examination by MR KENNELLY

14 MR KENNELLY: I have three questions in re-examination.

15 THE PRESIDENT: Of course.

16 MR KENNELLY: The first, Mr Dryden -- sorry, Mr Holt,
17 forgive me, is -- because I am obviously reading my
18 notes about Mr Dryden, relates to the question you were
19 asked by Professor Waterson about why Amex closed its
20 GNS programme.

21 A. Yes.

22 Q. You mentioned Amex documents, and you also mentioned
23 a court case in which Amex tested the scope of the
24 application of the IFR to its partnerships with --
25 between banks and others?

1 A. Yes.

2 Q. Could I show you those documents please?

3 A. Sure.

4 Q. First, could you be shown, please, {RC-J5/44.03/1}, just
5 so you can see first of all what this document is.

6 A. Okay.

7 Q. It is a Form 10-K, my learned friend Mr Beal took you to
8 this document earlier today?

9 A. Yes.

10 Q. It is the Form 10-K filed by Amex with the US Securities
11 and Exchange Commission?

12 A. Right.

13 Q. Could you be shown, please, page 20. Again I think the
14 page you were shown by my learned friend and go to the
15 bottom of the page, please.

16 A. Yes.

17 Q. Yes, you see that. So the second paragraph from the
18 bottom.

19 A. Yes, so, "The EU..."

20 Q. Indeed and if you could read please, I think it is from:
21 "In some cases..."
22 About halfway down that paragraph, do you see that?

23 A. Yes, I see that.

24 Q. Yes. In fact, if you could read that, please, and then
25 speak to it if you can to the tribunal.

1 A. Yes. I mean I think that one sentence beginning, "In
2 some cases ..."

3 Sorry, this is not confidential?

4 Q. No, no. This was filed at the SEC.

5 A. I mean, it will take five seconds to read it, really.

6 It says:

7 "The regulations extended to certain aspects of the
8 business including network and co-brand arrangements in
9 terms of card acceptance for merchants who have exited
10 our network businesses in the EU and Australia as
11 a result of regulation in those jurisdictions."

12 That seems to me a very clear statement that the
13 fact that the regulations were not uniquely applying to
14 four-party schemes, but also to Amex's own network which
15 is effectively the GNS programme, was a direct factor in
16 its decision to exit from those arrangements both in the
17 EU and in Australia. I am aware that, as it happens,
18 that it still runs that, that operation in some other
19 jurisdictions where it has not been regulated.

20 Q. Could you now be shown please, Mr Holt, {RC-Q3/54/1}.

21 A. Yes, okay.

22 Q. Is this the case you were referring to earlier
23 concerning Amex?

24 A. Yes, yes. So my understanding of this case is that Amex
25 was challenging the application of the IFR including the

1 caps to its network services model. Yes, and I think it
2 lost. So that was the -- an important factor, I would
3 suggest, in why it did not want to continue with it.

4 Q. Next, Mr Holt, you were asked -- at one point you
5 mentioned a correction. Now we are moving on to
6 switching to Amex and you mentioned that Mr Dryden in
7 his evidence had corrected himself. Just to give you
8 those references to just check if I properly understood
9 what you said, could you be shown first please from
10 today's transcript page 153, line 13.

11 A. Yes. Yes, so this is where I was suggesting -- sorry,
12 this is the question where Mr Dryden was suggesting that
13 on the Amex analysis you not only need to capture the
14 lion's share of all the sub markets but also make
15 headway into other areas where it is not currently
16 operating such as commercial debit and my answer was
17 that is inaccurate as this shows.

18 Q. Just to see what Mr Dryden said could you be shown
19 please from the transcript {Day13/51:11}, the full page,
20 please. It is day 13, page 51, beginning at line 11.

21 A. Okay, I can see it now. Yes, so this is Mr Dryden
22 acknowledging that he had said something incorrect so he
23 wanted to correct that. I think he was incorrect to say
24 that in the no reaction scenario Amex would need to
25 monopolise every segment and get a share of the SMEs.

1 It -- and I think he is saying there that if it did
2 to that, that would be sufficient, that would be
3 sufficient; in other words, it would not need to enter
4 any -- the further segments it was not already present
5 in and then he is going on to say that if Amex reacts,
6 which is essentially saying that if Amex did have to
7 reduce its MSC, then it may -- or he says, it is going
8 to need to get a share of the SME debit segment.

9 So the correction I was referring to Mr Dryden
10 fairly acknowledged that in the no reaction scenario,
11 Amex can win enough market share in the segment it is
12 already operating without winning any of the debit
13 segments.

14 I went on to further note that actually there is
15 fair bit of headroom there and, furthermore, it is very
16 conservative to say that Amex, even if it did not enter
17 that market, would not win any debit transactions
18 because of the relative change of the economics of debit
19 card transactions relative to Amex's credit card ones.

20 Q. Thank you, Mr Holt. Finally, you were asked about
21 surcharging and the ban on surcharging in 2018 and there
22 was some confusion as to the basis for that.

23 May I show you the Payment Services Directive, PSD2
24 {RC-J5/22.3.1/1}. Do you recognise this piece of
25 legislation?

1 A. Yes, it has been quite a while since I have seen it so
2 I would need to remind myself of the relevant recital.

3 Q. You spoke to the rationale for the ban on surcharging.
4 Could I show you page 11, please, and recital 66 at the
5 bottom of the page.

6 A. Yes.

7 Q. Do you want to read that, please, and speak to it if you
8 can?

9 A. I will just read that.

10 Q. Mr Holt, if you have trouble reading that screen because
11 of the light --

12 A. No, it is fine. I have moved it to avoid the sunlight
13 reflecting, thank you. (Pause)

14 So essentially I think a number of points are being
15 made, 1) there was a variation in surcharging practices
16 in different markets and we have seen in these
17 proceedings in the UK even where it was allowed, it has
18 not generally been prevalent at all.

19 There is a concern that the -- that this document is
20 highlighting as regards merchant surcharging at levels
21 much higher than the costs borne by the merchant and
22 that is obviously a consumer protection concern that
23 I think they were addressing within this legislation and
24 then, finally, they are also noting that in the context
25 of the other provisions of the regulation, which

1 establishes caps on domestic and intra-EEA interchange
2 fees, the basis -- the need for, as they say,
3 surcharging falls away; that the limits that those caps
4 apply sort of make redundant sort of the case for
5 surcharging.

6 I think my interpretation of that is that where the
7 interchange fee -- and I appreciate it was not set
8 precisely to be an exemptible level, it was
9 a regulation, but where it was based on analysis looking
10 at the cost of other payment methods, then the rationale
11 for the surcharging of those capped transactions is
12 reduced if not removed.

13 MR KENNELLY: Thank you, Mr Holt. I have no further
14 re-examination.

15 THE PRESIDENT: Mr Holt, thank you very much for your
16 evidence, we are really very grateful. You are released
17 from the witness box with our thanks, so thank you very
18 much.

19 A. Thank you.

20 Housekeeping

21 THE PRESIDENT: A few housekeeping matters before we
22 conclude for the day.

23 First of all, we mentioned a couple of days ago the
24 requests that the tribunal might make for further
25 information. I think it would be inappropriate to

1 trouble the parties with those requests now. You have
2 got quite enough to do in terms of preparing your
3 submissions in writing. It is just to say we have not
4 forgotten the need and we will articulate more precisely
5 what we want after the closing submissions have been
6 delivered, possibly during the course of oral closing or
7 thereafter. But we have well on board the points made
8 by Mr Cook that the way we framed our original requests
9 might be asking too much and we have that message loud
10 and clear. We will think of another way to articulate
11 what it is we have in mind.

12 Secondly, and related to that, if we bring up the
13 transcript of today, page 205, where Mr Beal was very
14 recently questioning Mr Holt about the IFR requirement
15 regarding the offering of settlement, it is quite
16 possible that we will ask some questions about the
17 potential mismatch between what the law requires and
18 what in practice happens when one is engaging in
19 a transaction because I think we will want, again in
20 a non-controversial way, to understand not just what the
21 law requires but how it actually does work in the
22 transactions that are actually taking place in the
23 market because when one is talking about counterfactuals
24 it is very important, I think, to understand the factual
25 and not just the theory as to how things are supposed to

1 operate but how they actually do operate so you can
2 expect queries in that regard.

3 The final point is just timetabling. I raise it now
4 because the chances of my getting it wrong are
5 spectacularly high and I think we ought to have a common
6 understanding as to when we are resuming. My
7 understanding is that we are resuming Thursday
8 afternoon, 21 March at 2 o'clock. Is everyone happy
9 with that understanding or do they want to tell me that
10 I have got it completely wrong?

11 MR BEAL: I think we had rather hoped it was Friday morning
12 just because it gives us a clear run for a day and
13 a half on each side and we then maintain the full period
14 between close of evidence, which is now, and
15 presentation of written submissions because I have
16 obviously not been able to work flat out on closing
17 submissions at the moment because I have been busy.

18 THE PRESIDENT: You have been very busy on other things,
19 Mr Beal.

20 MR BEAL: Yes.

21 THE PRESIDENT: That is entirely appreciated.

22 I think the price of that Friday morning start is
23 that on the timetable as was, which is long ago, I had
24 calculated that we had nine half days and the only way
25 in which we achieve nine half days is by starting that

1 afternoon. Now, I am very happy to shift to eight half
2 days and we can certainly stretch the days by having
3 10 o'clock starts it make sure all is going on but
4 I wanted that --

5 MR BEAL: I had assumed that I would be coming down from
6 a two day oral closing to a day and a half and I will
7 cut my cloth accordingly. I am content to do that.

8 THE PRESIDENT: If that is -- very good. Well, that is
9 fine. Is everyone happy with that?

10 MR KENNELLY: That was indeed my understanding as well, that
11 we were starting Friday morning and we would both be cut
12 back to a day and a half each.

13 THE PRESIDENT: Very good. Well, on that basis that is what
14 we will do. Do we want to start at 10 or 10.30 on the
15 Friday?

16 MR BEAL: I think we have all now got into the habit of
17 10 o'clock, it is a painful one but perhaps salutary.

18 THE PRESIDENT: Very good. That is what we will do so 10 on
19 Friday, 22 March and that is understood when we will
20 resume.

21 There is one other thing which I -- sorry, before
22 I move on to my one other thing, is there anything else
23 that you want to raise with the tribunal?

24 MR KENNELLY: The time for written closings.

25 THE PRESIDENT: Yes.

1 MR KENNELLY: I assumed would be on Friday morning.

2 THE PRESIDENT: Do you mean when you hand them over?

3 MR KENNELLY: When we hand them over to you. We are not
4 expecting the tribunal to have read them. You have made
5 clear that it is impossible for you to have read them
6 even if they were shorter than they will be, but at
7 least you will have them and you will have the shorter
8 summary which, in the course of days, you will be able
9 to read.

10 THE PRESIDENT: That is understood. We are quite clear we
11 are not going to make any direction as to when these
12 things are produced because we know that the parties
13 will work flat out to produce them as and when. It
14 seems to us pointless to make any direction.

15 MR BEAL: All we have done is we have transposed the
16 deadline of Wednesday morning to Friday morning. I was
17 hoping to get them to the tribunal for 9.30 if we can,
18 but I would not expect the tribunal to have --

19 THE PRESIDENT: A leisurely read.

20 MR BEAL: Well, I am hoping to produce an aide memoire,
21 which following the President's suggestion ditches quite
22 a lot of the referencing and the detail and just drills
23 down on what I say the answers are to the issues. That
24 might be a more leisurely read for one's coffee on
25 a Friday morning.

1 THE PRESIDENT: That sounds like a something we will very
2 much look forward to, Mr Beal, so thank you for that,
3 but we will not make any directions in regard to this.
4 You are all very skillful advocates, you know what is
5 best to persuade and we will leave it to you to do that.

6 MR BEAL: Thank you.

7 THE PRESIDENT: Thank you for that.

8 There is one other thing. I think we can stop the
9 transcription now.

10 Thank you very much. We will resume at 10 o'clock
11 on Friday morning.

12 (4.38 pm)

13 (The hearing was adjourned until 10.00 am,
14 Friday, 22 March 2024)

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