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

Tuesday, 26 March 2024

Closing submissions by MR BEAL (continued)

THE PRESIDENT: Good morning, Mr Beal.

MR BEAL: Good morning, sir. I am sorry you did not have a restful day yesterday according to press reports that you were dealing with yet another matter in this Tribunal.

THE PRESIDENT: Yes, but interesting and enjoyable.

MR BEAL: Good.

THE PRESIDENT: Not that this is not interesting and enjoyable!

MR BEAL: Back to the frying pan, if we may.

Can I please just make a handful of points as to some thoughts that have occurred to me over the weekend having read, but not necessarily entirely digested, the voluminous material that we were served with on Friday.

First it has been said that my restraint of competition case by object is hopeless and lacks any foundation in law or fact, and that overall this case is legally and factually absurd.

Stripping away the hyperbole, the difficulty of course with that proposition is that we are faced here with five or six statements that have been repeatedly made by the EU Commission to the effect that this is -- the setting of a MIF is a restriction by object so the

allegation of absurdity would have to necessarily be levelled at that as well.

Of course, the most recent of those was the 2017 statement of supplemental objections for inter-regionals which I went through at length but which did use the term "horizontal price fixing".

So with the greatest of respect, it seems unlikely that the conclusions in a supplemental statement of objections, if they were indeed hopeless, absurd, lacking any foundation in law or fact, would have been accepted by, for example, a very large well-resourced organisation that cannot be described as litigation averse.

If indeed that objection was accepted and led to commitments, one would have expected -- sorry, if indeed it were, as suggested, absurd it is highly unlikely to have led to commitments being given.

So we simply say that is a strange outcome.

Even stranger, we say with respect, is the willingness seemingly of Visa and Mastercard to rely upon a 2001 negative clearance decision despite the substantial quantity of regulatory water that has flowed under the bridge since then. It would seem that in the schemes' version of the world, that decision somehow continues to carry weight, even though I took

the Tribunal through chronologically the various meetings between the EU Commission and Visa where they had said in terms we have changed our thinking, we are not relying on that decision any more and here are our concerns. Quite a lot of that material was, for better or worse, in confidential format but it is undoubtedly true Visa were left under no illusions but that the piece was open for reinvestigation by the Commission at the end of 2008/2009.

So Visa was told in turn essentially that things had moved on and we are of course in a position where there is still six months left to run on the duration of the Commitments Decisions that were taken in April 2019 so we are still within the period of application of those Commitments Decisions.

That therefore brings me on to the second point I wish to make briefly before I get back to my aide memoire and it relates to those Commitments Decisions. Somewhat surprisingly, with respect, Visa have now suggested that they are no longer binding, given Brexit. With respect, that is simply wrong. If we could look please at {RC-Q1/19.1/49}, we will find, I hope, article 95 of the EU UK (Withdrawal) Act. That says in terms that:

"Decisions adopted by institutions [of whom the

Commission is one] before the end of the transition period [which the 2019 decisions would be] and addressed to the United Kingdom or to natural and legal persons residing or established in the United Kingdom, shall be binding on and in the United Kingdom.

"Unless otherwise agreed between the European Commission and the designated national competition authority of the United Kingdom, the European Commission shall continue to be competent to monitor and enforce commitments given or remedies imposed in, or in relation to, the United Kingdom ..."

Two points there. Insofar as the Commitments Decisions relate necessarily to UK established entities then it is still binding; if they do not relate to UK established entities then Brexit does not bite and the decisions still remain binding on the relevant entities and of course these decisions are still binding as a matter of EU law in Ireland.

There is also an enforcement mechanism under 95.4 that we see further down that page where article 299 of the Treaty which deals with the Commission's enforcement powers and ability to use national competition agencies to enforce Commission obligations, shall apply in the United Kingdom in respect of the enforcement of decisions referred to in paragraph 1.

So there is a mechanism by which the Commission can still enforce the Commitments Decisions it has secured in relation to UK- based entities post Brexit.

That particular article 5 is given effect to by section 7A of the 2018 EU (Withdrawal) Act, that is {RC-Q1/18.1/14}. Scanning down that page to the very bottom, we see section 7A deals with "General implementation of the remainder of the withdrawal agreement". Then we have provisions that are substantially similar to the former wording of the ECA 1972, so it confirms that all obligations -- subsection (2) says in terms:

"The rights, powers, liabilities, obligations ... concerned are to be:

"(a) recognised and available in domestic law, and

"(b) enforced, allowed and followed accordingly."

Every enactment, see subsection (3), then has to be read and has effect subject to subsection (2).

Now, my learned friends have also relied upon the Retained EU Law Act 2023, could we please look at {RC-Q1/23.1/25}. Here is section 22(5) about a third of the way down the page which confirms that sections 2, 3 and 4, which are the operative provisions dispensing with general principles of EU Law going forward in the UK, "do not apply in relation to anything occurring

before the end of 2023".

So there is a temporal carve-out to ensure non-retrospection of the Retained EU Law Act in relation to matters that have already taken place prior to what is now 1 January 2024.

So we do say that the Commitments Decisions are currently binding. I have not heard it said, but no doubt my learned friends Mr Kennelly will confirm, whether or not it is Visa's case that they can now simply ignore the Commitments Decisions in relation to the UK. I suspect the EU Commission might have something to say about that but I will see what he says before dealing with that in reply, if I need to.

Now, the third point is something I have dealt with in opening but I just want to make it clear what our position is and it relates to the schemes' reliance on *Dune* in the Court of Appeal and the Competition Appeal Tribunal and essentially the allegation is made is one I have already addressed in opening but they repeat in their closing submissions that the *Dune* Court of Appeal decision has already found their counterfactuals to be lawful.

Could we start off please with the Competition Appeal Tribunal's decision in *Dune* {RC-J5/44/20}. If we pick it up please at paragraph 44. The CAT was

emphasising it is:

"... not on the present applications [which was an application by the HK claimants for summary judgment] deciding whether either of these counterfactuals are correct, or whether in those counterfactual situations the interchange fees would indeed have risen to the levels capped under the IFR. The question at this stage is whether those counterfactuals are arguable in terms of the summary judgment test."

We then please look at paragraph 46, we see there is a citation of the Supreme Court and the Court of Appeal's decision as to what the appropriate counterfactual was and then reverting if we may, please, to paragraph 50, {RC-J5/44/23}, at the bottom of the page -- sorry, halfway down page 23 there is a section that begins:

"Whether that is in reality a meaningful distinction ..."

That was dealing with bilaterals and whether they would emerge and what the position would be with no default settlement at all, the tribunal said this:

"Whether that is, in reality, a meaningful distinction, or whether in circumstances under the IFR the same analysis elaborated by Phillips J in the *Sainsbury's Visa* ... would apply, is in our view a

matter for trial.

"As Phillips J noted at [paragraph] 129 there was no evidence before the court to support such a counterfactual in those proceedings. Having regard to the witness statement of Ms de Crozals from Mastercard and the expert report of Dr Niels, we cannot, at this interim stage, feel satisfied that Mastercard could not adduce such evidence in the present case."

So certainly from the perspective of the bilaterals counterfactual, what was being envisaged is that there would need to be a trial to address those very matters.

The Court of Appeal is to similar effect.

In essence obviously the way we have dealt with the counterfactuals as a matter of law is to respectfully suggest that they lead to a coordinated MIF being established collectively by the scheme rules in a manner which necessarily sets a floor to the MSC charged by acquirers to merchants and we have submitted that that amounts to unlawful price setting as found by the Commission, the EU courts and the Court of Appeal and Supreme Court in *Sainsbury's*.

So it is that argument which is really the focus of the point and if we look, please, in the *Dune* Court of Appeal at {RC-J5/46/20}, there are three paragraphs -- four paragraphs from 46 through to 49

where Lord Justice Newey made it clear what this very issue was going to have to be determined at trial in due course.

If we could start, please, at the bottom of paragraph 46 where a summary is given of the way that the case is put in a re-reamended defence in relation to the UIFM, it is said:

"... 'Issuers would have been likely to choose to stipulate the maximum interchange fee permitted by the IFR or other applicable regulation because it would have been in each of their economic interests, evaluated on an independent and individual basis (i.e. without any collective decision-making or collusion), to do so'."

Now, clearly our submission is that these counterfactuals do amount to, in substance, collective decision-making and that the collective decision-making is such as to set a MIF rate that is then plugged into the MSC and necessarily sets a floor for the MSC in the actual world which would not -- sorry, and in the counterfactual world, so that element is the same in each.

We then see paragraph 47, Ms Smith for the KH claimants at that stage -- HK, sorry, claimants at that stage had not suggested that the Honour All Cards Rule aspect of the interaction with the UIFM was subject to

capable of being determined on summary basis.

At 48 and 49, Lord Justice Newey therefore concluded that he did:

"... not accept that the CAT ought to have found that the counterfactuals proposed by Visa and Mastercard would involve collusive/collective arrangements. I would not myself exclude the possibility of the claimants succeeding in establishing at trial that one or both of the suggested counterfactuals would involve such arrangements. It is impossible, however, to arrive at such a conclusion now, on a summary basis."

At such a conclusion now on the summary basis.

Then overleaf, {RC-J5/46/21} top of paragraph 49:

"Overall, I have not been persuaded that the CAT's decision to refuse judgment ... can be faulted. Of course, it may in the end transpire that the arrival of the IFR did not change the appropriate counterfactual or that, even if it did, it can be seen using the alternative counterfactual(s) that the rules providing for those MIFs remained restrictive of competition."

So the very argument we are running necessarily followed from the way in which the defence had been cast by the schemes and it was recognised that it would be a matter for trial at this stage as to whether or not -- or who was right on that key point.

So the suggestion that somehow the last six weeks have been a pointless waste of time because the Court of Appeal and the CAT have already accepted the legality of the counterfactuals I am afraid needs to be rejected.

My fourth of six points -- and I am getting through these with some pace -- so it will not derail my time estimate for this morning, is to note that you will recall that I dealt last Friday with the suggestion that my learned friend Ms Tolaney had made, that the *Wouters* counterfactual -- sorry, analysis for objective necessity was different as a concept from ancillary restraint and I took you to *Wouters* at some speed without having had the relevant paragraphs marked in my version electronically and I would like to do so now this morning, slightly more effectively than I perhaps did last Friday.

Could we look, please, at {RC-Q3/25.1/32} starting at page 32. So as an entry into this point, as I noted on Friday, it is correct that the learned authors of Whish & Bailey have, as an aid to exposition, sought to identify two different strands of the case law, namely what they call regulatory ancillarity and commercial ancillarity, but they are two twigs from the same branch.

Both of those approaches crucially depend on a finding that there are restrictions or restraints of competition that are capable of falling outside 101(1) altogether and the way that has been traditionally approached is to view it as quasi rule of reason.

Looking at Advocate General Léger's opinion in the *Wouters* case picking it up please at paragraph A90, and taking it through to A92, the Advocate General there explains how this particular argument has come about. Please can I invite the Tribunal to read those paragraphs of the opinion. (Pause)

THE PRESIDENT: Yes.

MR BEAL: Then if we could go through, please, to page 35, paragraph 99. {RC-Q3/25.1/35} It is the learned Advocate General said:

"In essence, the arguments put forward by the parties invite the Court to adopt a form of 'rule of reason'. That 'rule of reason' would enable all professional rules which are intended to ensure observance of the ethical rules particular to the legal profession to evade the prohibition laid down by Article 85(1) ...

"Before I examine that idea, it should be observed that the Treaty provisions on competition are set out according to a precise structure. [He identified that

you have] Article 85(1) ... the principle that agreements restrictive of competition are prohibited ..."

But then Article 85(3) derogating from that principle.

He then identifies in paragraph A101 that the rule of reason theory had developed in the United States in response to the strictness otherwise of the Sherman Act which prohibited all obstacles to competition without distinction as to degree or motive and the rule of reason and the concept of ancillary restrictions had been developed in response to give a greater degree of latitude towards courts and regulatory bodies in the United States.

Paragraph 102 he said:

"In Community competition law, the 'rule of reason may carry several meanings'. However, it is not in the circumstances of this case necessary to recall the learned disputes concerning the definition ...

"For the needs of this case I shall simply say that the Court has made limited application of the 'rule of reason' in some judgments. Confronted with certain classes of agreement, decision or concerted practice, it has drawn up a competition balance-sheet and, where the balance is positive, has held that the clauses necessary

to perform the agreement fell outside the prohibition ..."

Of The Treaty in 101(1) altogether.

He then cites a series of subparagraphs in which he conducts a tour d'horizon of the case law if we look at the footnotes at the bottom of page 36, {RC-Q3/25.1/36} it is the usual suspects, so it is *Metro Großmärkte*, it is Nungesser, it is Remia, it is *Pronuptia* it is the franchise cases, the plant seed case Nungesser, it is the vertical distribution arrangements in *Metro* and so on.

Those are all -- the classic thing would be restriction of competition when you sell a business.

So when we look through, going back up to the top of page 36, the series of hyphenated subparagraphs, it is a selective distribution system. It is a new agricultural product leading to an open exclusive licence for cultivation of, in that case I think it was seeds rights. It is then the classic non-competition clause once you sell a business.

"Clauses essential to the performance of a franchise agreement ..."

Then, and I do say this is an important point:

"A provision in the statutes of a co-operative purchasing association, forbidding its members to

participate in other forms of organised co-operation which are in direct competition with it ..."

So there was a -- that is the *DLG* case cited at footnote 90. That countervailing purchasing power in collective form was being erected as against some particularly powerful producers in an agricultural market.

The Advocate General then concludes in A104:

"It follows from those judgments that, irrespective of any terminological dispute, the 'rule of reason in Community competition law is strictly confined to a purely competitive balance-sheet of the effects of the agreement'. Where, taken as a whole, the agreement is capable of encouraging competition on the market, the clauses essential to its performance may escape the prohibition laid down in Article [101] ...

"In this case ..."

He concludes, see 105, that it would not be appropriate to follow the rule of reason approach based on the public interest objective of seeking to regulate the legal profession in the Netherlands, which was what the *Wouters* case was about. He said that essentially, the parties believed that prohibition of multi-disciplinary partnerships between lawyers and accountants are necessary in order to protect aspects of

the profession, but he said that reasoning introduces provisions into article now 101(1) relating to considerations which are linked to the pursuit of a public interest objective.

In 106, the Advocate General concludes that is appropriately dealt with under Article 101(3) and not trying to shoehorn that into the ancillary restraints case law that he has referred to at 101(1) stage.

That was the Advocate General's opinion and he frames the debate nicely in terms of where does this particular concept fall. The conclusion, however, that the court reaches is diametrically opposed to that.

I should add at page 43 {RC-Q3/25.1/43}, paragraph 134, the Advocate General concludes that the regulation in question would have infringed Article 101(1) and he then has to move on to consider whether or not it would have been justified.

Could we then please look at what the court did, which is at page 90 of this report, paragraph 97 {RC-Q3/25.1/90}. The court takes a different view. Please could the Tribunal read paragraph 97. (Pause)

THE PRESIDENT: Yes.

MR BEAL: At page 91, paragraph 105 {RC-Q3/25.1/91}, we find the central justification for the Dutch regulation is identified, and it is this justification that the court

then takes into account in finding that the restriction does not fall within the scope of Article 101(1) at all. So it is looking at the regulatory issue.

Then at 109 -- this is a key point -- the court says, page 92 {RC-Q3/25.1/92}:

"In light of those considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession ..."

Then they cite in support the *DLG* case.

So they are bringing the case law on ancillary restraint to bear when dealing with a public policy justification for what would otherwise be a restriction of competition. So they are bringing the ancillary restraint case law within the fold of an overarching public interest objective, which can also achieve the same result of requiring the test for objective necessity to enable 101(1) to be avoided in its entirety.

It is that case law, *Wouters*, and then a subsequent sports case called *Meca-Medina* that is then cited in the *ISU* case which I took the Tribunal to on Friday. That is at {RC-Q3/62/20}, paragraph 111 on that page. It

refers to the case law derived in particular from, amongst other cases, *Wouters*, *Meca-Medina* and the *OTOC* case, *Ordem dos Técnicos Oficiais de Contas*.

That case law, as we have seen, necessarily builds on the case law dealing with ancillary restraint, the common theme being you are applying a quasi rule of reason at the Article 101(1) stage in order to avoid the need to even get into the 101(3) stage. Specifically then it follows that the case law that the court is identifying in the *ISU* is all part of a piece with the ancillary restraint case law.

Therefore, reliance on the CJEU's judgment in the trilogy of cases delivered in December 2023 is perfectly apposite and they do deal specifically with the test of objective necessity and say in terms you do not get into that test if you have an infringement by object.

My fifth point concerns the cross-border acquiring rule. I took the Tribunal on Friday to the 2014 Commitments Decision and I indicated that my submissions was that the 2014 Commitments Decision did not say definitively that what Visa and Mastercard were doing was exempt. It was not an exemption decision. It was simply accepting a commitment. As we know from the case law in *Gasorba* and *Canal +*, that is not determinative of whether or not there is in fact an infringement of

competition. That is still left open to the national courts and tribunals.

A different point has been raised in the written closings, which is that the 2010 Commitments Decision somehow compelled Visa to have the old cross-border acquiring rule in its old form.

Could we look, please, at {RC-J5/14.7.1/2}. Under a paragraph at the bottom of that page with heading "Registration", we find this is part of the commitment that was given to the Commission that was accepted in the Commitments Decision. It says:

"Visa Europe will maintain in force an Operating Regulation requiring all MIF rates applicable to transactions with VISA ... cards in the EEA countries to be registered with Visa Europe and to be publicised on [its] website. Where the Intra-Regional MIF rate applies by default to domestic transactions this will be made clear on the relevant website."

So the publication relates to both intra-EEA MIFs and domestic MIFs and the EEA MIF, where it applies by default, that will also be made clear. The registered MIFs, so that includes intra-EEA simpliciter, intra-EEA where it is the default domestic MIF, plus any domestic set MIFs, all of those are going to be registered rates. They apply in the absence of bilateral agreements and

they apply also to transactions involving cross-border acquirers.

That does not tell you what the MIF rate will be for a given cross-border transaction and it could be an intra-EEA MIF or it could be a domestic MIF. That simply is not part of the commitments. All that is made -- all that the commitment achieves is the registration of rates in a public forum. Of course, that is what -- the mischief that was aimed at by the Commission initially in this Commitments Decision.

The Commission left open the question that subsequently arose, which was: is it appropriate to require every domestic transaction to be subject to the domestic rate rather than intra-EEA MIF rate? This commitment does not answer that question, and that is for good reason that that issue was left open.

We can see that at {RC-J5/14.8/18} at Recital (72), where the Commission say -- this is the 2014 -- sorry, this is the 2010 Commitments Decision. It says:

"The Revised Commitments do not cover Visa Europe's MIFs for consumer credit and deferred debit card transactions, which will continue to be investigated ..."

So the commitments simply set a cap. We see that on the previous page, I think. They set a cap of 0.2 for

debit transactions and 0.2 for intra-EEA debit transactions. Maybe not previous page, but that is what the commitments were.

Going back, please, to paragraph (72), page 18:

"Bringing proceedings to an end on the basis of the Revised Commitments is also without prejudice to the right of the Commission to initiate or continue proceedings against other Visa network rules, such as the HACR, the rules governing cross-border acquiring, Visa Europe's MIFs for commercial card transactions, or the Inter-Regional MIFs."

So it is specifically saying the rules governing cross-border acquiring are going to be subject to ongoing review, as they were, and indeed they led then to the 2014 commitments, which again Visa provided rather than facing an infringement decision.

The sixth and final point in this sweep-up is to deal with what has been caused called in the written closings the scheme fees counterfactual. The scheme fees counterfactual is not, as I have made clear, a counterfactual I advance. It is not a counterfactual that I think the schemes have advanced.

However, it does seem that their written closing now wants to have an element of having one's cake and eating it too. What they say is that the schemes'

counterfactual essentially cannot be the subject of any findings because they say it would be procedurally unfair because nobody has pleaded it and therefore none of the evidence has gone to it. They then say that if findings are to be made, more evidence will be needed. But they then say if no further evidence is needed and the CAT feels that it can conclude that scheme fees would have been -- sorry, then this Tribunal should say, well, the scheme fees would have been as high in the counterfactual leading to Merchant Service Charges being as high in the counterfactual as they are in the factual.

Obviously that is a pretty unattractive proposition having said that there is no evidence behind it and it has not been pleaded, but that does seem to be what the schemes invite this Tribunal to do. Can I therefore simply make my position clear with a series of seven short points.

First, we have not pleaded a counterfactual based on scheme fees. It is our counterfactual that settlement at par would be the viable and appropriate counterfactual.

A necessary corollary of the scheme fees counterfactual would in fact be that there would be no default MIF. So the MIF would be stripped out and that

would necessitate settlement at par with separate scheme fee charges being raised on a different basis, because the scheme fee is nothing to do with the MIF. So the MIF would, on this counterfactual, be settlement at par, i.e. there would be no MIF.

Thirdly, once you have settlement at par and no MIFs, then in our counterfactual, the MSCs paid by the Claimants would be lower for the obvious reason that on IC plus pricing, you no longer have the MIF being fed into the MSC. We would say that is sufficient at this stage to establish a restriction of competition by effect because once you strip out a significant component of the MSC, the MSC is lower. Therefore, effect on competition established.

The scheme fees analysis does not in truth touch upon that analysis. This is my fourth point. Instead, what they seek to do is they rely on consequential steps that would be taken in other markets, namely the inter-scheme market, because it posits a situation in which the Schemes respond to the absence of the MIFs in order to set ex hypothesi higher scheme fees.

So that is akin, we say, to the switching case, so it does not actually deal with the mischief that is aimed at this Article 101(1) stage, which is the coordinated approach to MIF setting which leads to

a significant component of the MSC being non-negotiable between acquirers and merchants. That switching analysis does not touch on that mechanism. It is simply looking at: what is the knock-on effect?

My fifth point is the obvious one that there is no evidence whatsoever of the likelihood of any consequential increases in scheme fees. That is not something that any of the witnesses have engaged with. Nor do we have any evidence of the extent of the scheme fees which Mastercard in particular now says, in unsubstantiated fashion, would simply rise to the level of whatever the MIFs were previously. There is simply no evidence to support that assertion.

The sixth point is that the legality of the imposition of the scheme fees in that way would obviously have to be considered in any counterfactual analysis. Our primary position would be that if you simply replace MIFs with scheme fees, then that amounts to circumvention which may well engage Article 5 of the Interchange Fee Regulation. But other legal challenges also would have to be thought of and considered, including perhaps an allegation of excessively high scheme fees being imposed by the schemes with a view to replacing unlawful MIFs and that might well involve recourse to Article 102 or chapter 2 prohibition

considerations.

Finally, my seventh point is that the availability of alternative sources of revenue for the schemes in the form of scheme fees is self-evidently an issue that is before the Tribunal and it goes to the evidential assertion that the Schemes have made that the Schemes would not be commercially viable if the MIFs were removed.

So that is something that is properly before the Tribunal and which the Tribunal can consider, because there is evidence that scheme fees form part of a package of revenue which goes to Visa and Mastercard and which helps it to maintain the Schemes that they run. But that evidential proposition does not, as a matter of law, trigger the objective necessity test because, of course, the commercial success or viability of the schemes is irrelevant for finding out whether or not something is objectively necessary for the operation to take place; the main operation that is benign, such as it might be identified to be.

So it might conceivably come in at the Article 101(3) stage, but we confess at this stage we have not thought significantly about that and we do not propose to commit to a final position on whether or not it would be relevant at the Article 101(3) stage.

So those were the handful of points I wanted to run through having been through at least, if not fully digested, the closing submissions from my learned friends over the weekend.

Could I then please come back to the aide memoire and I left you on the edge of your seats with the HACR in prospect. That is at page 35 of my aide memoire {RC-S/3/35}.

Issue 9.1 is how did the schemes' respective Honour All Cards Rules operate? We have set that out in our opening. There was an annex of the scheme rules which set it out, which, having looked at a footnote in Visa's submissions, they accept our annex was correctly identifying the provisions for them on this. I have not detected an equivalent footnote in the Mastercard submissions, but we have sought to accurately and neutrally portray the wording of the rules that are applied.

The short answer is that there were provisions in place imposing an Honour All Cards Rule, to some extent by categories rather than fully, for both Visa and Mastercard, but it is dealt with in detail in our written evidence.

Come the IFR, the Schemes amended their rules to allow -- sorry, to prohibit the Honour All Cards Rule

operating in relation to commercial cards, but to permit -- once you accept a category of given cards, you have to accept all cards in that category.

In terms of question 9.2, issue 9.2:

"Did ... the Challenged Rules have and/or continue to have the effect of restricting merchants' ability to steer transactions towards ... lower cost cards or lower categories of cards ..." and so on.

Our submission is yes. That is the consistent view of Dr Frankel and Mr Dryden. It is supported by a wealth of material and the regulatory decisions to like effect and observations of the General Court and Court of Justice in Mastercard.

So when you have an Honour All Products aspect of the rule, you obviously have to accept cards that are within a given category regardless of whether or not those cards are treated differently in terms of the MSC that they necessarily give rise to.

A classic example would be premium cards. A premium credit card versus a standard credit card gives rise to different interchange fees and those interchange fees then feed into the MSC that is payable. So that would be a classic example of two categories -- two cards within the same category where the Honour All Products Rule requires you to take both.

Dealing with the Honour All Issuers Rule, as a basic proposition, that requires you to take -- once you accept cards in a given category, you have to accept all cards in that category from every issuer in the country. The problem with that, as I have endeavoured to explain previously, is that it amounts to a unionised selling position.

Now, a new issuer gets a ready-made acceptance network. One of the parameters of competition from an issuer's perspective is how widely accepted their cards are and ordinarily, you would expect issuers to be able to compete on that.

So an issuer with a well-established network would use that as a virtue that it used to advertise its card services to cardholders. A new entrant would not have ex hypothesi an established network and so it would have to work harder to get one. One of the ways it might work harder to get one would be by lowering its MIF rates to either merchant acquirers generally or specific merchants with a view to generating a higher level of acceptance so that it builds the scale.

That is a perfectly acceptable way of competition working. It is that way of competition working that is shut off by the Honour All Issuers Rule because it is not open to an acquirer to say, "Well, I will take the

large issuers' cards because my clients have no choice. It's a must-take card and that particular issuer is significant in the market", but then secure a better deal with a new entrant with a view to driving down the MIFs, which over time might well establish a more competitive position.

This is not abstract or hypothetical or unreal because it is exactly what Mr Steeley envisaged. If he could do a deal, he would do a deal with a new entrant either in collaboration with Marks & Spencer's promoting a new type of payment method in the M&S stores and so on. So this has real bite.

Moving on to the regulatory decisions. Could we look, please, at the supplemental statement of objections from Mastercard at {RC-J4/8/5}, Recital (11). This is said to be confidential, so I shall not read it out, but please can I invite the Tribunal to read it. (Pause)

That was then reflected in the formal decision, {RC-J5/11/43}, paragraph 118. It is not flashing up on my laptop, but we see at the bottom of the page:

"The present decision moreover deals with certain aspects of MasterCard's 'Honour All Cards' Rule which enhances the restrictive effects of the MasterCard MIF."

That is then developed in more detail at page 144,

recitals 508 to 509 {RC-J5/11/144}. If I could invite, please, the Tribunal to cast an eye over those two paragraphs. (Pause)

Next up, if we could go, please, to {RC-J4/22/103}. This is the Statement of Objections sent to Visa in 2009. Recitals 298 to 300, again, a detailed critique there of aspects of the HACR. Again, if I could invite, please, the Tribunal to cast an eye over those paragraphs. (Pause)

Next, please, {RC-J4/31/188}. To similar effect, recitals 602 to 605. (Pause)

Those conclusions then are formally reflected in a Commitments Decision. {RC-J5/20/1} is where the second Commitments Decision starts, but if we could pick it up, please, at page 7, Recital (23) {RC-J5/20/7}. It refers back to the preliminary assessment having:

"... expressed a concern that the MIFs have as their object and ... also ... their effect an appreciable restriction of competition ... The MIFs appear to inflate the base on which the acquirers set the MSCs ... According to the Commission's Preliminary Assessment, [the] MIFs are not objectively necessary. The restrictive effect in the acquiring markets is further reinforced by the effects of the MIFs on network and issuing markets as well as by other network rules and

practices, namely ... (the 'HACR'), the No Discrimination Rule ... blending and the segmentation of acquiring markets due to rules restricting cross-border acquiring."

Next is the *Mastercard II* decision, {RC-J5/31/11}. At (36) and (37) the Commission look at the Honour All Cards Rule in the context of diminished countervailing bargaining power from merchants, the risk of business stealing if merchants do not accept cards. Then in Recital (37):

"Mastercard's Honour All Cards Rule obliges merchants who accept Mastercard branded cards to accept all Mastercard branded cards, irrespective of which bank issued the card (honour-all-issuers element) and irrespective of the card product ... The same applies to Maestro branded cards. The Honour All Cards Rule therefore means that a merchant, which accepts 'ordinary' Mastercard cards for fear of business stealing, cannot refuse payments that carry a higher interchange fee, for example because the card is a premium card or the transaction is inter-regional ..."

That, in a nutshell, is where the competition vice is in this case. It is not open to the likes of Mr Bailey of Pendragon to charge -- well, (a) to surcharge, but (b) to decline to accept a premium credit

card if he has accepted a standard credit card for the payment of high value vehicles, for example.

So that is a very clear statement of the competitive constraint which the HACR produces and the benefits to issuers that it does produce.

Now, that is also matched by the sectoral regulator for payments in the UK, the interim report from December 2023. Please could we look at {RC-J5/51/39}. This is in the context of the changes that the schemes brought about post-Brexit to increase inter-regional fees -- sorry, intra-EEA transactions were now reclassified as inter-regional and therefore the MIF rates for CP and CNP transactions went up.

If I could invite, please, the Tribunal to read 4.32 to 4.36, you will see what the PSR said about those issues. (Pause)

Overleaf, please, at paragraph 4.38 {RC-J5/51/40}:

"The [Honour All Cards Rule] also prevents merchants from refusing cards on the basis of an issuer's location, but refusing to accept the card brand as a whole would mean losing significant volumes of sales for domestic transactions of all types and not just for [card not present] transactions using EEA-issued cards. This makes it highly unlikely that UK merchants would stop accepting either Mastercard or Visa branded cards

in response to an increase in UK-EEA outbound [MIFs] even if alternatives to these cards were readily available ..."

So it is clearly positioning the Honour All Cards as compelling merchants to accept the higher MIFs that are being introduced post-Brexit by the schemes and there is nothing that the merchants can do about it.

Issue 9.3 then, please, page 37 of my note {RC-S/3/37}. We say that the HACR is a tying obligation in both its permutations and is straight-forwardly anti-competitive. Indeed, the Honour All Products aspect of that was recognised as such in Recital (37) of the IFR. What the Honour All Issuers aspect enables is a unionised approach to pricing, as Mr Dryden said, and the products rule requires merchants to accept all cards within certain product categories even if they impose substantial cost, and I give there the Pendragon example.

The HAIR gives a ready-made acceptance network. That was considered by Mr Holt to be a good thing and I have given some references in paragraph 132. But, of course, as I have indicated, that necessarily means that a parameter of competition is determined by the rule, namely the extent to which issuers compete on acceptance and, therefore, a countervailing bargaining chip in the

hands of acquirers and merchants is removed.

Each of those effects we say modifies the non-operation of a free flow of negotiated prices and they are restrictions by object: see the top of page 38 {RC-S/3/38}.

We nonetheless recognise -- and this is a point that is taken against Mr Dryden. Mr Dryden's point was, "Well, I am not able to say, if you did not have any MIFs, what the consequence would be of these rules". But the reality is if we did not have any MIFs, then we would not have any claim. So, in a sense, that is not going to be a meaningful distinction. The reality is it is the effect of all of these rules reinforcing and enabling removing countervailing bargaining power in the negotiation with issuing banks that is the vice. That is the consistent vice throughout each of these rules.

Issue 9.4, does it have the object of restricting competition? Our answer is yes. The second question, is:

"In particular, for each of Visa and Mastercard, in the absence of the Challenged Rules, would the credible threat of steering ... have constrained the Visa and Mastercard Fees ..."

Well, we say the answer to that question is yes. It has been suggested, I think, in Mastercard's closing

submissions, perhaps in Visa's as well, that, well, there is no evidence that anyone would have done anything about trying to steer away from these cards if the option were available to them. However, with the greatest of respect, that is not right.

We know, for example, that a large number of merchants simply do not accept certain cards. Amex, JCB, Diners are cards that are not routinely accepted by a large number of merchants, so you could steer away by simply not accepting those cards. If it were the case that a trader, a merchant, could steer away from particularly expensive premium cards, then it would make sense for that merchant to do so in certain circumstances. Whether or not it chose to do so would be a matter for the merchant, but the reality is that this rule precludes merchant choice on that important issue, and that is its vice.

We have seen and there is evidence of Mr Bailey from Pendragon trying to impose surcharging to deal with this and there is evidence of British Airways surcharging for corporate cards. We know from the evidence that other merchants have chosen to surcharge at certain key moments. I think Mr Buxton gave evidence for Jet2 and I think even Mr Kennelly recognised that Ryanair as an airline was surcharging historically as well.

So merchants, when given the choice, are able to choose how to steer away from expensive products to less expensive products. If they are deprived of that choice, then it sits ill in the mouth of the schemes to say, well, they would not have wanted to exercise that choice in favour of steering in any event.

Issue 9.5 is then whether the Honour All Cards Rule, alone or in conjunction with other rules, is objectively necessary. The answer to that is no. The evidence was given in the report and it is dealt with in our closing submissions.

The evidence was it was relaxed in Australia, but Visa and Mastercard maintained a very healthy market presence in that jurisdiction. Slightly foreshadowing a point on surcharging, Australia was obviously a jurisdiction where surcharging rules were relaxed as well as part of the regulatory intervention in the 2003/2004 period and what we have seen develop in Australia is a culture of surcharging; a culture of steering away from the expensive cards so that merchants can exercise some form of countervailing bargaining power or control over the process, which they presently lack.

Right. Issue 10 is the bespoke iteration of essentially a no surcharging rule by Mastercard, but it

is a more extreme version of the no surcharging rule because it simply says you cannot discriminate against Mastercard's products.

In our submission, the non-discrimination rule, as articulated in the scheme rules and which again are set out in our written closing and in our written opening, is unqualified. It simply says you cannot discriminate against Mastercard's products.

Mastercard's answer to this is a slightly odd one. They say, well, that is only intended to deal with co-badging, which, simply as a matter of construction, I am afraid I cannot see how that works because there is absolutely no qualification to suggest that it is only on co-badging. It was something I cross-examined Mr Willaert about and Mr Willaert accepted that it was not simply restricted to that situation.

So I am not quite sure where this argument on construction comes from, but it does not work on the face of the rules.

I have shown the Tribunal obviously those Merchant Service Agreements where the Merchant Service Agreement, in order to give effect to the scheme rules, itself then imposes an obligation on a merchant not to discriminate against Mastercard cards or to accept all of Mastercard's cards and so on. That is effectively the

mechanism by which the merchant will be constrained, but it follows precisely because the rules are drafted the way they are.

So we say that that is a basic and obvious restriction of competition because it is forcing the hand of merchants, constraining what they can do in response to differential pricing being given on Mastercard cards and restricting the ability to react by placing a surcharge on that particular card.

The third issue for issue 10.3 was: was it objectively necessary and proportionate? We say no. Indeed, that type of clause has been prohibited by Article 11, subparagraph 1 of the IFR with effect from 9 June 2015.

So this is one of those rules that was immediately removed. There was a deferred entry into force of quite a lot of the anti-steering rule provisions in the IFR, so most of them were June 2016. Interestingly, this was June 2015, so it did not get the additional time.

Now, to the extent that Mastercard has maintained the rule in force, which it has, then it has simply been in breach of both the EU IFR until Brexit and then latterly of the UK IFR.

That brings me on to the no surcharging rule. Quite a lot of the detail of this has been gone through in

opening and is set out in detail in our written closing submissions. Our opening submissions had a detailed box of which provision applied when over time. The reality is that there are defined time periods where this rule would have bitten in terms of it precluding something taking place, and that could be precluding either the ability to surcharge full stop or the ability to surcharge to the extent of the costs. So one needs to track through the detail of the -- I do not propose to do so now because it is not a useful use of anyone's time or energy, but it is clearly set out in our opening.

So within the parameters that we accept, at given points and indeed from January 2018 for consumer credit and debit cards, it has not been possible to lawfully surcharge at all. So the point is, in that sense, dead for that sector from that point on. Nonetheless, there have been points at time in which it has had effect and it has bitten.

There is a more fundamental point, which is if it is right that this rule either has no practical effect, which is one of the schemes' arguments, or has no legal effect, why do they bother to maintain it in the scheme rules at all? Why simply not remove any restraint and that way there is not the risk of merchants

inadvertently thinking that they cannot surcharge when they can up to a certain level of cost or merchants thinking that they are bound by the terms of their Merchant Service Agreement not to surcharge even when lawfully they can?

That lack of clarity on -- for example, the Visa rules simply say, well, you can surcharge if it is lawful to do so, but if the Merchant Service Agreement says the merchant -- taking a view of the legality of surcharging that you should not surcharge, then, of course, that will be the contractual obligation that the merchant most visibly faces in the market and is most likely to respond to.

We do say that as a matter of simple analysis, precluding somebody from responding to a higher price by passing that price on is evidentially restrictive of the competitive response that a merchant can make to that price.

Indeed, Mr Holt, in the paragraph of his report that I cite at the top of page 40, recognised that if a merchant negotiates the price in the knowledge of how a customer is going to pay, it can pass on the benefit of that cost through charging a higher price. In other words, the signal gets passed on to the end consumer. This payment method has costs for the merchant and the

consumer is going to have to bear those costs. So you get the full circle going round the diagram.

If you are precluded from closing that circle by not passing on the cost through a surcharge to the customer, then you are not sending the right price signals to the consumer. So the consumer thinks, "Great, I have got a platinum card here. It is getting me flight reward points for a well-known airline. I am going to use that to pay for a laptop computer that costs £1,000. It is a great contribution towards my holiday. Thank you very much." The merchant is thinking, "Well, hold on. I have got to pay -- let us take the capped rate -- £30 for the use of that payment card, whereas if it was paid by way of electronic bank transfer, the payment costs would be zero."

So the effect of this rule is to prevent a merchant taking steps to show a customer what the consequences of the customer's choice are. When I say "customer", I mean the cardholder customer rather than customers generally.

Now, that approach to the restrictive effect of no surcharging rule is also borne out by the regulatory history. Could we look, please, at {RC-J4/22/104}, Recital (303), where the Commission recognised that the no surcharging rule -- they call it the NDR, the

non-discrimination rule, but as I went through with one of the witnesses, the definition of that was at all times the no surcharge rule. It said it reinforced:

"... the negative effects of the Visa MIFs ... [reduced] merchants' capacity to constrain the collective exercise of market power of Visa Europe's member financial institutions through the MIFs. In the absence of [that], [they] might arguably threaten Visa Europe with surcharging or the use of other forms of discouragement and thereby exercise some degree of competitive constraint ..."

You will recall the evidence from New Zealand was the abolition of the no surcharging rule allowed some people credibly to threaten to surcharge and that led to better deals being negotiated on a bilateral basis. Also, we have the evidence, of course, from Amazon and HMRC that when they simply declined or threatened to decline to take certain cards, they were able to secure better outcomes.

Moving forward, please, to Recital (305) on the next page {RC-J4/22/105}, the Commission recognised that quite a lot of merchants would not want to surcharge, and that is a point that is taken against me. I recognise that many merchants are not going to want to surcharge because they do not want the customer

friction.

That was the some of the evidence that you received. Some of the evidence was, "We would like to surcharge, but we cannot". Some of the evidence was, "We have surcharged, but we do not any more". Some of the evidence was, "We would not surcharge come what may because we do not want to put a barrier between our customer and us and getting paid, and that will be the position come what may unless MIF rates get very high". That was, for example, some of the evidence that was given.

The Commission was alive to this point, but it nonetheless found at Recital (309) -- having looked at Australian example and so on, at 309, the Commission nonetheless found that the NDR, i.e. the no surcharge rule:

"... in combination with the practice of blending and with the HACR ... prevents merchants from refusing acceptance of specific types of payment cards, reinforces the restrictive effects of the ... MIFs ... decreases merchants' power of sanctioning high MIF levels and takes away ... a credible threat ..."

That might otherwise have been put in place.

Next, please, {RC-J4/31/190}. Recitals -- quite a long section, recitals 613 through to 619. I do not

propose to dwell on them, but we see that the Commission goes through the times at which it has looked at the NDR and criticised it. The overall conclusion is then reached having looked at Australia. For example, at Recital (617), page 192 {RC-J4/31/192}, that is the Australian example being considered. Then at 619:

"The Commission is ... of a preliminary view that a prohibition on surcharging in combination with ... blending and ... the HACR ... prevents merchants from refusing specific types of payment cards ..."

So, again, it is maintaining the same position.

Finally in terms of the evidential framework, the OECD has, since 2012, been encouraging regulators to take steps to remove anti-surcharging rules. That is {RC-J3/86/10}.

So it is the recital in a BERL report of the OECD position. We see halfway down the page:

"The OECD (2012) [noted] that:

"It is generally accepted that competition authorities and regulators should try to minimise barriers to entry or exit into a payments system and to abolish restrictions on market participants' behaviour, like the 'no surcharge' rule, the 'no steering' rule, or the 'honour all cards' rule ..."

"Imposition of the three rules (above) prevents

merchants from steering customers towards certain bank Issuers. With the ability to surcharge, steer or not honour cards, different merchants can prefer the card products of different issuers. Consequently, this would put a constraint on issuers and the terms they can impose ..."

That straightforwardly summarises the mischief, we say, of the steering rules, the anti-steering rules, and why they represent a restriction of competition by object. We also say they reflect a restriction of competition by effect because they serve to reinforce the MIF and stop the ability of merchants to negotiate credibly for a better deal or threaten to negotiate credibly for a better deal.

Issue 11.3, is the surcharging rule objectively necessary? We say the answer is no. You could have a scheme rule without it and they do have a scheme rule without it in Australia, where it is prohibited.

Finally, issue 12, co-badging. Again, the actual operation of the co-badging rule is set out in our written opening and in our written closing.

In our written opening, in the annex, we landed upon the co-branding rule. There is a separate rule which we have referred to and detailed in our written closing, where there is essentially a restriction on the use of

two separate marks in Visa's rules for a certain period of time until the abolition of the co-badging rule in 2016 by the IFR.

In a nutshell, this tracks the cross-examination that you have heard from me of the witnesses, factual witnesses, and also of Mr Holt and Dr Niels, so no surprises.

We say that the co-badging rule, very straightforwardly, prevents an issuer being able to join, for example, a Visa card to an Amex card on one card. We saw the evidence that I was putting to the witnesses that the Lloyds card duo had previously been a companion card, Amex and Lloyds going to one account. Imagine that scenario on one single card where the technology, because I took the witnesses to it, is capable of allowing the chip to be used and to direct to a given thing, depending on the selection, because the Visa rules, for example, require the chip to have that capacity to run two different applications off it.

You then have a co-branded card -- co-badged card, sorry, which when you present to a merchant that accepts Amex, you can use to get your reward points. When you are caught in a position where a merchant will not accept Amex cards, you can switch back to the Visa scheme.

That is a perfectly sensible product. It mirrors the companion card paradigm, but the scheme rules prevented it happening until 2016.

Rather curiously, Visa's closing submissions say, ah, but that only -- it only curtails competition between international issuers. Well, that is the point. Competition between international schemes is the whole point of this. It is that you are able to drive -- as we saw with the *Cartes Bancaires* example, you are able to drive lower cost routing at the merchant's request whilst recognising that the cardholder can ultimately insist on a more expensive option between the two. There is a conversation that the merchant can then have, with inducements being given, if necessary, to the customer to use a cheaper version of the badge.

Examples are that in practice, firstly, I think it was Mastercard co-badged with *Cartes Bancaires* in France to drive its international entry. It was offering cheaper rates than *Cartes Bancaires* with a view to promoting the international use of the cards. Then also in New Zealand, we have had the evidence about the same card being used either to dip or swipe, i.e. you would get a different rate if you chose to use the EFTPOS system than if you used the scheme system that was also run on the same card.

Co-badging rules prohibited by Article 81 of the IFR with effect from 9 June and, nonetheless, if one looks at the scheme rules and the wording used, the carve-out is solely for the EEA. The UK is no longer in the EEA and, therefore, co-badging rules now infringe the UK IFR.

That brings me to an end of the particular issues -- sorry, issue 12.3, is it objectively necessary? No.

That brings me to the end of the aide memoire. I had wished to, but I am not sure how meaningful it is going to be -- if I could just draw to your attention, please, a section of our written closing starting at page 123, so this is going to be {RC-S/1/123}.

There is a section then that begins "Findings of fact the tribunal is invited to make". It reminds me slightly of the Treaty of Versailles when Woodrow Wilson developed his 14 points and the President of France, Georges Clemenceau said, "The good Lord only had 10". We have 31, which seems excessive, but we wanted to be thorough.

There is no point me wasting the tribunal's time by going through all of those. You will, of course, read them and digest them in due course. They cover a wide range of areas. What we have sought to do, we hope helpfully and not in a dirigiste way, but we have

encouraged the Tribunal to think about areas where it will need to make findings of fact. We have identified the evidence that supports certain propositions and the cross-examination, for example, that underlies certain points, and they are set out in an effort to be helpful. It covers a wide range of issues all the way through, but we would respectfully commend that to you.

That leaves me -- I am proposing, if I may, to finish and then give the transcriber her break and then over to whoever is taking on the baton for the schemes, but if I could just make some concluding remarks.

THE PRESIDENT: Of course.

MR BEAL: They will be very short.

Firstly, you are about to hear from the schemes for a day and a half -- more than a day and a half because I have given them more time. You will no doubt, as I will, be intrigued to hear how many of my submissions are hopeless, unfounded, do not even come close to meeting their target and so on; the usual submissions that one always sees. No doubt my team will be playing a form of word bingo every time that happens and telling me at the end what the tally is.

But I do respectfully invite the Tribunal to consider the core point of this case, this part of the trial, which is to what extent do the six essential

facts found in the Supreme Court's judgment at paragraph 93 extend to different types of MIF?

Those different types of MIF are, in truth, simply different product cards or different types of transaction where the underlying setting of the MIF is exactly the same. The underlying mechanism by which a rate is determined that leads to a positive transfer of significant funds from a merchant through an acquirer to the issuing bank remains undiminished in all of its forms. That, indeed, is the point of the positive MIFs. That is what it is intended to do. That is what the Schemes hope it will do because they are relying on that to then compete with each other in a way that drives this upward only approach to MIFs that we have seen in the commercial card market, for example, since 2016.

The key issue, therefore, is to what extent can those six facts be read across? We say very clearly that the mechanism is the same on all of them and what the schemes have essentially done is try to pick apart aspects of the findings that are made by the Supreme Court and say that does not apply.

That involves principally two attempts: firstly, the counterfactual attempt and, secondly, the wider MSC point.

So the counterfactual attempt simply says, "Well,

whilst we accepted previously that the default settlement at par was an appropriate and viable counterfactual, we do not accept that any more". So they have set about coming up with a devised set of hypothetical scheme rules which they say that it would put in place, which, to all intents and purposes, simply produces the same result.

With greatest of respect, that is not really the point of a counterfactual analysis. It is meant to be credible. It is meant to be realistic. It is meant to be lawful. Anyone who is accused of committing an infringement of competition law could credibly say, "Well, if I had known it was unlawful, I would not have done it and I would now change my mind and I would not do it that way again." You would never end up with a competition law infringement.

That is not what this exercise should be about. This exercise should be about stripping out the restriction in the agreement in question, which is the setting collectively of a positive MIF in a way that contributes to the MSC and if that is removed in the counterfactual, seeing what the consequences are. The obvious consequence of stripping that out is that you do not have a significant component of the MSC that is set in a non-negotiated way. You have free negotiation for

the entirety of the MSC.

The counterfactual that each of the schemes propose does not lead to that outcome. It still leads to a coordinated approach by the scheme to ensuring that a positive rate is set and that positive rate then leads to the fund transfer and the non-negotiated element of the MSC that was the target of the Supreme Court's concern and, indeed, finding.

Now, Visa and Mastercard rely extensively in their written closings on expert evidence to make what are essentially legal submissions. I think -- well, it certainly dawned on me over the course of the trial how little of the expert evidence is actually directed at genuinely economic issues.

We have not had, as Professor Waterson said, the crunching through the data, the analysis, the regression analysis. All the things that actually were threatened have gone because the acquirer pass on issue, which was a genuine economic issue that required genuine economic evidence, was always going to be very difficult to get home on for the simple reason that once you have IC plus plus pricing in the market, that answers the question for you to a material and, therefore, appreciable extent.

I note that, for example, looking back at the 2014

Visa Commitments Decisions over the weekend, it was a commitment that Visa undertook on the understanding that the cross-border acquiring rate would be set on an IC plus plus basis, so they baked it into their commitment. Of course, that means that the world has moved on from 2014/2015 because of the prevalence of IC plus plus pricing and that does change the game.

It does mean, however, conversely, that quite a lot of the expert evidence is actually answering legal issues or is a targeted form of advocacy. That is most evident, with respect, in relation to the treatment of the scheme rules, whereas experts are not actually saying, "In my view, what an economic problem is and what the economic answer is as a matter of expert opinion". What they are saying is whether or not, in their view, it is restrictive of competition or not, which is quintessentially a legal matter.

The cross-border acquiring rule, for example, is a classic example of that. There is a very clear set of rules from the CJEU and its case law on segmentation of the national market. The fact that the experts seemingly, or three of them, have treated it as an access to the market issue rather than a segmentation issue shows that there is a gap between the practice of the CJEU and the European Commission and the experts'

view of what amounts to a restriction of competition.

They have also -- certainly the schemes' experts have also ventured opinions on how the market might have developed or what might have happened if MIFs were removed. That whole MSC analysis, i.e. market-wide MSC, what we have done in this situation, would the MSC have been just as high, would people have switched, none of that, we say, is legally relevant to the Article 101(1) issue. That all comes in, if at all, at the 101(3) stage.

Therefore, we have been engaged, as I said we unfortunately would be at the start, in something that is not for now. It may or may not be for Trial 3, but which, if done ad hoc and without sufficient evidence, will produce real problems for the final determination of those issues at Trial 3 stage.

What do we have in our favour? Well, we have two formally binding decisions, *Mastercard I* and *Mastercard II*. We have got the GC -- General Court decision and the Court of Justice decision in Mastercard, supporting *Mastercard I*. We have got the decision of this Tribunal, for the most part, the Court of Appeal and the Supreme Court in previous domestic litigation against the schemes.

Then we have got the further enforcement decisions

taken by the EU Commission where the schemes do not want you to look at those because they led to commitments rather than informal infringement decisions and they try to distinguish it on that basis and take you back to 2001 and the Negative Clearance decision, which is what they ultimately seek to rely upon for a significant period of the claim.

With the greatest of respect, what we have seen, therefore, is obfuscation and groundless distinctions being drawn to try and avoid the consequences of that wealth of precedent in our favour, and that wealth of precedent supports the suggestion that the mechanism of the MIF, the way it is set, is sufficient by itself to establish a restriction of competition by object and effect. That is because it produces the non-negotiated MSC in the acquiring services market.

Switching analysis is, to all intents and purposes, a smoke and mirrors game that the schemes' experts have chosen to play, but we would encourage the Tribunal to see it for what it is. At the very least, it is a distraction and, at worst, it is attempt to shoehorn issues that are properly to be considered under Article 101(3) into the 101(1) analysis.

The anti-steering rules, as we have seen this morning, simply serve to immunise the imposition of high

MIFs against the practical exercise of any countervailing market power.

Sir, that has run on slightly longer -- I apologise to the transcriber -- than I was hoping, but those are my submissions in closing.

THE PRESIDENT: Mr Beal, thank you very much. We are very grateful, Mr Beal.

Is it Mr Kennelly next after the break?

MR KENNELLY: Yes, sir.

THE PRESIDENT: Very good. We look forward to hearing from you, but we will rise for 10 minutes. Thank you very much.

(11.54 am)

(A short break)

Closing submissions by MR KENNELLY

THE PRESIDENT: Mr Kennelly, good morning.

MR KENNELLY: May it please the Tribunal, Ms Tolaney and I have divided up our oral closing in the same way as we divided our oral opening. So I will begin, if I may, with issue 3 and infringement by object because that is the claimants' primary case in respect of domestic and intra-EEA MIFs set consistently with the IFR. As I said in opening, MIFs have been under scrutiny by the European Commission and European courts and national authorities and national courts almost continually since

1977 and in almost 50 years of regulatory scrutiny and litigation, Visa's domestic and intra-EEA MIFs have never been found by the Commission or the EU courts or the domestic courts to be an infringement by object. That finding is even more inconceivable in respect of MIFs set consistently with the IFR caps which the EU assessed were efficient so the Tribunal needs to look with particular care at what the Claimants argue could justify such a novel and unprecedented finding.

The test for a restriction by object is not disputed, the Court of Justice held in *Cartes Bancaires* that it was an agreement or practice which is by its very nature harmful to competition, such that an effects analysis would be redundant. The Court of Justice has examined allegations of infringement by object in the context of two-sided payment card platforms and in doing so, the Court of Justice expressly addressed the balancing rationale advanced by the schemes. The Court of Justice held consistently with the thesis of Professor Tirole that a transfer of value from one side of the platform to the other was not inherently harmful to competition. That balancing objective made the comparison with a cartel inapt. That is not the same, contrary to what is suggested by the Claimants in their closing, as actually weighing the pro and

anti-competitive features of an interchange fee. That weighing exercise is for Article 101(3).

We are concerned here with identifying the objectives of the interchange fee and for that purpose it is relevant to ask if its object is to balance the incentives on both sides of the platform and solve the externalities.

Of course, the interchange fee could still be a restriction by effect and in applying Article 101(3) the Tribunal may find that the balancing is not in fact such as to satisfy the requirements of Article 101(3), but where that balancing objective exists, that is a powerful indication, we say, that any restriction is not an infringement by object and that is what the Court of Justice found in *Cartes Bancaires* and Budapest Bank.

The claimants' case is that positive MIFs by their essential features are inherently harmful and the Claimants still refuse to acknowledge where those features were present in the fees examined in *Cartes Bancaires* and *Budapest Bank* and so for that reason I will need to go back to those judgments and show the Tribunal briefly where those features arise.

So for *Cartes Bancaires* we need to go to {RC-J5/21.2/2}. The Tribunal remembers this is

a domestic four-party scheme and we see the measure in question at paragraph 4 and it is useful to see the measure because it has features which arise also in the case of our MIFs and which the Claimants say are inherently harmful to competition.

So at paragraph 4 in the first indented subparagraph, we see how the purpose of the device which involved the transfer of funds. It was designed three lines down to encourage members that are issuers more than acquirers to expand their acquisition activity. It was to encourage more acquiring activity.

Its aim, in the next line, was to take account financially of the efforts of members whose acquisition activity is considerable in relation to their issuing activity and the formula, the formula for this transfer involved comparing the share of the members' activities in the total acquisition activities with the members' share in the total issuing activities.

So the formula for calculating the fee, which is to be paid from one side of the platform to the other, was not based on the costs of acquiring, it just compared share of activities on both sides of the market. The fee was distributed by the scheme multilaterally and if one looks down to the bottom of that first indented paragraph, we see the court recording that the

recipients of the fee could freely use the sums thus levied. There was no need to apply the sums to the costs of acquiring activities or anything like it. Issuers were forced to pay, there was no ability to negotiate down the fee set under this device.

We know *Cartes Bancaires* was a different market that was said to be distorted, it was the issuing market. At page 11 {RC-J5/21.2/11} we see the legal test in the context of an allegation of infringement by object, page 11, paragraph 49. The court first records that certain types of co-ordination between undertakings reveal a sufficient degree of harm to competition, it may be found there is no need to examine their effects.

Skipping down to paragraph 51, put a different way certain collusive behaviour such as that leading to horizontal price fixing by cartels may be considered so likely to have negative effects, in particular on the price quantity or quality of the goods and services that it may be considered redundant for the purposes of applying 101(1) to prove that they have actual effects on the market. Pausing there, it is interesting to see that in the context of by object allegations it is still relevant to examine the potential for effects to that extent.

But moving on to the application of the by object

test in this *Cartes Bancaires* case, if we go please to page 14, paragraph 72, {RC-J5/21.2/14} this is where the balancing rationale was addressed by the court. Of course the General Court had rejected that balancing rationale in *Cartes Bancaires*. 72, the General Court rejected the appellants' claim that it was apparent from the formulas prescribed that the measures sought to develop the acquisition activities in order to achieve an optimal rate of balance between both sides of the market, I paraphrase, there was too much issuing and that was an externality, I submit, that this fee sought to address and the formulas encouraged the members to have a certain volume of card issuing to achieve a given ratio between the issuing acquisition activities in the group as a whole.

Then at 73:

"The General Court found ... that, in the present case, in a card payment system that is by nature two-sided, such as that of the grouping, the issuing and acquisition activities are 'essential' to one another ..."

I emphasise this because of the parallels with our case--

"... and to the operation of that system: first, traders would not agree to join the CB card payment

system if the number of cardholders was insufficient and, secondly, consumers would not wish to hold a card if it could not be used with a sufficient number of traders."

74:

"... that there were 'interactions' between the issuing and acquisition activities of a payment system and that those activities produced 'indirect network effects', since the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other ..."

The very same externality which is sought to be addressed in relation to MIFs. Because of that:

"... the General Court could not, without erring in law, conclude that the measures at issue had as their object the restriction of competition within the meaning of [101(1)]."

75:

"Having acknowledged that the formulas ... sought to establish a certain ratio between the issuing and acquisition activities [the balance, as mentioned earlier] the General Court was entitled at the most to infer ... that those measures had as their object the imposition of a financial contribution on the members of the Grouping which benefit from the efforts of other

members for the purposes of developing the acquisition activities ... Such an object cannot be regarded as being, by its very nature, harmful to the proper functioning of normal competition ..."

At paragraph 78, there is a reference to the importance of considering the real conditions of the function and the structure of markets.

Skipping down to 79, that must be the case in particular when that aspect is the taking into account of interactions between the relevant market and a different related market and all the more so when as, in the present case, there are interactions between the two facets of a two-sided system.

Then page 16, {RC-J5/21.2/16} interesting here how the Court of Justice addressed what on the face of it was a clear anti-competitive feature of the *Cartes Bancaires* device.

They said at 86:

"Although the General Court found ... that the measures at issue encouraged the members of the Grouping not to exceed a certain volume of CB card issuing..."

So that was a volume limit, the idea was to limit by these -- by the use of these devices the degree of card issuing, so a limit on production which, as we know, is normally a by object infringement issue, the objective

of such encouragement was not to reduce possible over capacity for the issue of cards but what was the objective? To achieve a given ratio between the issuing and acquisition activities of the members of the grouping.

Why? Why do they seek to strike this balance between two sides of the market and address the externality? The court records: in order to develop the CB system further.

Now, as the Claimants say, the fee, the fee in *Cartes Bancaires* was not the same as the MIFs, that was the point made by the Advocate General in *Cartes Bancaires* in the same case in footnote 5 that my friend showed you but the features -- key features which the claimants impugn were present here, the fees were paid from one side of the platform to the other. There was -- as my learned friend said a few minutes ago, there was a positive transfer of significant funds from one side to the other. These were multilateral, they were set by the scheme, they were imposed on the issuers, they were not capable of individual negotiation and they appeared to constrain competition on the issuing side of the platform by encouraging a restriction of card issuing.

Now, that might ultimately have been an infringement

by effect but it was not -- not an infringement by object.

MR TIDSWELL: I do not think you are suggesting, are you, that the court here has decided that -- has not decided the point about the MIF in this case, the analogy you are using --

MR KENNELLY: Absolutely no, no.

MR TIDSWELL: -- rather than any direct decision.

Am I right in thinking that we are really talking here about -- we are talking about what the objective of the MIF is in this case and that is an assessment of what we understand to be, as you put it, the balancing exercise in this case and obviously there is a balancing exercise in that case as well but it is a different one, is it not?

MR KENNELLY: It is different, it is different because the fee is different and the particular device is different from the MIF at issue in our case. But my submission is that the core objective behind the balancing issue in *Cartes Bancaires* was similar to ours, which is that they sought to balance the activities on the issuing and acquiring sides in order to achieve the optimal growth of the scheme as a whole.

MR TIDSWELL: Is that telling you anything more than needs -- and I appreciate the point about the two-sided

market, but is it telling you anything more than you have to make an assessment, we have to make an assessment as to whether the MIF in this case and the balancing exercise can be justified by finding an objective of that sort. We still have to undergo the factual analysis and the decision about what we think is really happening here, all this tells us is there is a template for this analysis but it does not tell us what the answer is, does it?

MR KENNELLY: No, indeed. The reason I am taking you to *Cartes Bancaires* is because the claimants have said you have no business looking at whether -- whether -- the MIF has as its purpose the balancing of both sides of the two-sided market and the curing of externalities. The closing submissions, the claimants say balancing is entirely for 101(3) and you should not even ask the question: is the objective of the post IFR MIF the balancing of the acquiring and issuing sides, the balancing of the incentives and the curing of the externality? My answer -- just to be clear, my answer is that for a by object infringement allegation, it is necessary to ask if that is the object and purpose and then you have to ask, well, does the evidence show that? That is entirely a matter for the Tribunal.

MR TIDSWELL: Thank you.

MR KENNELLY: But if the Tribunal is concerned with a case that is closer to our facts, *Budapest Bank* is such a case and I would ask you to go to that, that is in {RC-J5/35.1/8} I will go straight into it at paragraph 45. In *Budapest Bank* the banks had agreed the interchange fee not just for one scheme but for both schemes, so if the claimants were right again based on what they say are the features that demonstrate a by object infringement, this case *Budapest Bank* was a fortiori an infringement by object.

If you go to page 9, {RC-J5/35.1/9} you see the three markets concerned, which are the markets in these proceedings, the focus in *Budapest Bank* was also on the acquiring market and distortions of competition on the acquiring market and you see that in paragraph 57, three lines from the bottom:

"... the banks themselves gave it the role of restricting competition on the acquiring market ..."

That is what the referring court said.

Also that the MIF agreement necessarily affected competition on the acquiring market.

At paragraph 58, the European Commission argued that the agreement between the banks to fix the MIF was a restriction of competition by object. Why do the Commission say that? Because it entailed indirect

determination of the service charge of the MSC which served as prices on the acquiring market, so the very same feature which the claimants say means it is an infringement by object in this case.

Paragraph 60: It was not in dispute that the agreement established a uniform amount for the interchange fees paid by the acquiring banks to the issuing banks.

Paragraph 61, what was the effect of that?

Two lines from the bottom of that page:

"... the MIF Agreement [did] not directly set sale or purchase prices, but standardises an aspect of the cost met by the acquiring banks to the benefit of the issuing banks in return for the services triggered by the use of the cards issued by the [issuing] banks as a means of payment."

Next paragraph: that indirectly fixed a purchase or selling price which may also be regarded as having the object of the prevention restriction or distortion of competition.

So the essential elements of a MIF were present here and well understood.

Mr Beal said, well, whether it was an object infringement depended on facts which were left to be determined by the referring court. This was a reference

case. But as the Tribunal knows, if the facts are available to the Court of Justice, it is open to it to make a finding that an infringement is by object and all the facts that my learned friend says are sufficient for an object infringement are here. The MIF determined a substantial component of the MSC. It set a reserve price or floor below which the MSC could not go. It was set by the banks -- sorry, it was set by the banks collectively in the manner of what the claimants would say was a benign dictator role, it was set as a single price by a single group, it was not the product of bilateral agreements, it was imposed on the acquirers. Why did the Court of Justice not say: this is an infringement by object?

We see why at paragraph 65:

"Although it is clear from the documents before the Court that ... percentages and amounts were used ... for the purposes of fixing the interchange fees, the content of that agreement does not, however, necessarily point to a restriction 'by object', [why?] in the absence of proven harmfulness of the provisions of that agreement to competition.

" ... as regards the objectives pursued by the ... agreement [to fix the MIF] the court has already held that, in the case of two-sided card payment systems such

as those offered by Visa and MasterCard ...

This is referring to the *Cartes Bancaires* case so the Court of Justice itself in looking at a MIF agreement recalls what it said in *Cartes Bancaires* and said:

"... it falls to the competent authority or to the court having jurisdiction to analyse the requirements of balance between [the] issuing and acquisition activities within the payment system concerned ..."

The payment system concerned, so within each of Mastercard and Visa:

" ... in order to ascertain whether the content of an agreement or a decision ... reveals the existence of a restriction of competition 'by object' ..."

"In order to assess whether coordination between undertakings is by [its] nature harmful [you have to take into account] all relevant aspects ..."

Having regard to the real condition of the markets.

68:

"That must be the case, in particular, when that aspect is the taking into account of interactions between the relevant market and a different related market and, all the more so, when there are interactions between the two facets of a two-sided system."

Then 70: what was the objective?

"... the referring court states that the pursuit of the objectives ... in the MSC Agreement ..."

The agreement to not sign but to fix the MSC:

"... played a role in the conclusion of the MIF Agreement ... the specific purpose of the MSC Agreement was to determine, per category of merchants, the minimum level of the uniform service charge ..."

Then moving on to the MIF agreement:

That said, certain information contained in the documents before the Court tends to indicate that one objective of the MIF Agreement was to ensure a degree of balance between the issuing and acquisition activities within the card payment system at issue in the main proceedings."

So there were obvious indications of other objectives which could be infringements by object but the court zeroed in on this objective; which was not a by object infringement if the object was to ensure a degree of balance between the issuing and acquisition activities within the card -- the card payment system that is each of Visa and Mastercard.

At 72, at the end of that paragraph, the banks -- there is a reference to banks being informed by Visa and Mastercard that cost studies conducted by each of them reveal that the levels of the costs fixed in the MIF

agreement were not sufficient to cover all the costs borne by the issuing banks. It was a relevant factor that the interchange fee agreed in the MIF agreement was designed to cover costs borne by the issuing banks, not determinative, but a factor showing that the agreement was not an infringement by object.

In 73:

"It cannot be ruled out that such information points to the fact that the MIF Agreement was pursuing an objective consisting not in guaranteeing a minimum threshold for service charges but in establishing a degree of balance between the 'issuing' and 'acquisition' activities within each of the card payment systems at issue in the main proceedings in order to ensure that certain costs resulting from the use of cards in payment transactions are covered, whilst protecting those systems from the undesirable effects that would arise from an excessively high level of interchange fees and thus, as the case may be, of service charges."

The court is saying if that is the objective, and it is for the national court to ascertain if it is, then it should not be an infringement by object.

Now, to come back to Mr Tidswell's point, the reason why I am taking you to this again is because in the

claimants' written closing they say this whole question of balance is protean, it is a euphemism but what these judgments show is that it is a very real and recognised objective in payment systems in two-sided markets and as to the question of whether balancing the issuing and acquisition activities is -- is a purpose or is the key purpose for the MIFs at issue in this case, the post IFR domestic and intra-EEA MIFs, the evidence before you is clear.

Before I go to that, though, I show you very briefly this tribunal's judgment in the *Sainsbury's* case and my learned friends did not take you to this, but since it is directly on point and much more on point that many of the judgments which you were taken to, I will take you to it briefly.

MR TIDSWELL: Sorry, just before you do that, your point about balance again. I mean, if you look at paragraph 73, is the objective that is said to be one that might -- the objective that is one that does not engage by object analysis one can put it that way, it is not necessarily just the striking of the balance, is it, it is actually the -- it is the second bit of that where:

"... in order to ensure that certain costs resulting from the use of [the] cards in payment transactions are

covered, whilst protecting those systems from the undesirable effects [from] excessively high ... interchange fees ..."

Because the point here is that the -- it was said that the arrangement was going to stop interchange fees rising unreasonably, was it not?

MR KENNELLY: That was one of the objectives and results of the MIF agreement, yes.

MR TIDSWELL: So I think my question is, are we correct in talking about the objective being that specific point. I mean I think you are putting forward a -- you are making objective a broader use to encompass the balancing exercise and it seems to me the balancing exercise is the -- is actually just shorthand for the process you are going through in order to achieve what is there some measure of control of the MIF, is that a fair distinction, do you think?

MR KENNELLY: I am afraid, sir, that it is not, in my respectful submission, a fair distinction. Here two different points are identified in paragraph 73.

MR TIDSWELL: Yes.

MR KENNELLY: The first is establishing a degree of balance between the issuing and acquisition activities within each of the card payment systems in order to ensure that certain costs resulting from the use of cards are

covered.

Now pausing there -- pausing there. That echoes two things. It echoes first of all the point in paragraph 72 that part of the role of interchange fees is to ensure that issuers' costs are covered and it recalls the broader point about balancing issuing and acquisition activities on two sides of a payment platform in *Cartes Bancaires*. That is expressly invoked at paragraph 66.

So there is a broader balancing point being made by the court which they say tends to show that the infringement, if one exists, is not by object. There is a further objective that protecting the systems from the undesirable effects that would result from excessively high levels of interchange and that is indeed a further objective which they say does not suggest infringement by object but it would be wrong, in my respectful submission, to say that all of this discussion of balancing is background or somehow supporting the main objective, which is to prevent the interchange fees being excessively high.

MR TIDSWELL: You are saying that is not from -- perhaps that is my reading of it, but the objective here which is said to be one that does not engage a by object restriction is controlling the interchange fees rather

than the exercise of making sure the costs are covered, that is obviously part of the exercise but the reason why there is a potentially pro-competitive or not anti-competitive objective is because there is an attempt to control interchange fees, that is how I read the case.

MR KENNELLY: That is definitely an objective here and it is stated -- I suppose there are two ways of looking at this, sir. The first is that the idea of balancing, issuing and acquiring activities and when I say "balancing" it is a shorthand for dealing with the externalities which we will come to when the experts' evidence is examined and that is well understood those externalities exist and the MIF is used to address those externalities by balancing the incentives on both sides of the market. In my respectful submission, that is definitely what the court is talking about in these paragraphs.

When they talk about ensuring that the MIFs are not excessively high, it might also be said that one of the purposes of a MIF is to ensure that the MIFs are not simply driven to the highest level that the issuers would seek, but they are constrained. The MIF again, as part of its fundamental purpose in balancing both sides, does among other things seek to constrain the market

power of the issuers and ensure that the interchange fees are not as high as the issuers would have them in their unconstrained world.

So we may be agreeing with one another.

MR TIDSWELL: I think we are, I think.

MR KENNELLY: Because if that is part of it what I did not want to accept is what the claimants are submitting which is that this whole concept of balance is all for 101(3) and is irrelevant in considering whether the infringement is by object or effect.

MR TIDSWELL: I think probably we are agreeing in a sense that I think the balancing is probably an instrument for achieving whatever the objective is and you are saying the objective actually is two-fold here, the covering of the costs and containment of the MIF, it is obviously for interpretation of the case. But I think it is -- I think we are in agreement that the balancing is really shorthand for getting to whatever that objective is.

MR KENNELLY: To be clear, I am not saying that covering the costs was the main objective, it was one of the features that were cited here as a feature which suggested that it was not an infringement by object. I am not saying that the issuer cost methodology was somehow endorsed by this or that was the main pro-competitive objective, that was not my submission at all. I was simply going

to this balancing point to refute the suggestion made by the claimants that you should not be looking at this at all, and that is all for 101(3).

MR TIDSWELL: Thank you.

PROFESSOR WATERSON: Can I just ask Mr Kennelly to help me here on this balancing point. So, I mean, the argument seems to be made in general terms, if you like, that there is this function, but then the question must surely arise at what level is that balance achieved?

MR KENNELLY: Indeed and that question, what is the right level to achieve the balance, is a 101(3) question. The question for the purposes of asking is the infringement by object, it is sufficient to identify that the object of the schemes is to secure this balance. Whether they do succeed or not lawfully is a question for 101(3). But if this is the objective this is what we see in *Budapest Bank* in particular, if that is their objective, it may still be an infringement by effect, but it is very unlikely to be an infringement by object, if that is their object.

Now, they may fail in achieving the correct balance, the level they strike at may be wrong and that is something for the 101(3) trial. But for the purposes of asking, is this agreement so inherently harmful to competition you do not even need to look at the effects,

the law is clear, and the economics. You do need to look at the effects and ask: is the balance properly struck? It is not enough simply to stop and say: this is cartel behaviour we need look no further.

PROFESSOR WATERSON: Thank you.

MR KENNELLY: Going then to *Sainsbury's* in the Tribunal. That is in {RC-J5/24.01/75}. It is paragraph 101, please.

The Tribunal here turns to whether the setting of the UK MIF is an agreement with the object of restricting competition and the Tribunal finds that it is not, and the reasons are given from page 76 {RC-J5/24.01/76} and if you go to the bottom of page 76, subparagraph (3), the tribunal does say:

"... we do consider that it is important to examine why MasterCard was setting a MIF."

You ask -- you asked what was the purpose in the setting of the MIF and that was material in determining if it had the object of restricting competition and the evidence is recorded on page 77 {RC-J5/24.01/77} and Mr Willaert's evidence is set out there in detail.

If I could just skip ahead -- I know the Tribunal has read this before -- to the bottom of page, indented paragraph 24, there is a reference to multiple factors being considered when setting interchange fees, skipping

down three lines:

"In particular, Mastercard must balance the competing interests and desires of cardholders, issuers, acquirers and merchants."

There is a reference to the incentives on each side of the two-sided platform.

If you skip ahead, please, to page 80, {RC-J5/24.01/80} in the bottom of that page, the tribunal recorded that:

"It is ... clear that in terms of the level at which it was set, the MIF was no ordinary price-fixing agreement. MasterCard sought to set a considered default interchange fee [over the page] reflecting multiple factors and diverse interests. ... it was Mr Willaert's evidence, which we accept, that MasterCard sought ..."

Professor Waterson's point, maybe they did not succeed, that is a different question, but:

"... sought to balance the competing interests of Issuing Banks ... and Acquiring Banks ... as well as taking account of the competitiveness of MasterCard cards with its rivals ..."

For that reason, it was not by its very nature demonstrating sufficient harm to competition so as to amount to restriction by object and as the tribunal has seen, the very same evidence has been given in this

trial by Mastercard and Visa.

You have the references, Mr Willaert {RC-F3/1/4}, paragraph 15, Mr Knupp -- I am not asking the document production to go to this -- {RC-F4/8/9}, paragraph 33 and it was supported in oral evidence by Mr Steel, Mr Livingston and Mr Peterson, all the references are in our written closing.

I am not going to take you to all of the documents I refer to in the course of my oral closing. All of the references that you need are in our written closing.

Skewed pricing in a two-sided platform is precisely what we saw in the Amex model and the claimants have not argued that it involves an infringement, still less by object.

The answer to this from the claimants is that their economic case is so overwhelming that the Tribunal should have the confidence to strike out and be the first court to find that MIFs are restriction of competition by object, even when set at the IFR caps which the EU considered was the efficient level for interchange fees.

As to the economic evidence, Mr Dryden of course said very fairly that he could not conclude that the domestic and intra-EEA MIFs post IFR were restrictions so harmful to competition that the effects could be

assumed, that leaves the claimants with Dr Frankel and even Dr Frankel's position in the end was unclear on this issue because he accepted in cross-examination, and I was going to read you what he said the references are in our written closing, he said as a theoretical matter it is possible that the UK and Irish MIFs create efficiencies. He said if the idea is to create the right incentive for people to choose the right payment instrument on average and merchants cannot do it themselves, that is not a crazy idea.

He said MIFs can be used as a solution theoretically to an externality problem and in principle a certain level of MIF might create the right economic incentive to use the efficient payment method.

But ultimately, Dr Frankel's complaint was really that we should never have started out MIFs in the first place and he disagreed with the EU's conclusions in the IFR. He expressly disagreed with the economic analysis summarised in Recital (20) of the IFR. Dr Frankel said in terms that the concept of balancing each side of the platform with interchange to resolve externalities was -- and I quote -- was just a talking point and did not have a lot of economic content to it.

Now, when I put to him that that was Professor Tirole's thesis, Dr Frankel said quite clearly

that Professor Tirole had got that wrong. {Day13/181:11-15}

That was a striking statement and my learned friends have not addressed it. In the 350 pages of closing, I did not see it cited at all.

The Claimants say that their case represents the economic consensus on this issue. That, that is not a sustainable claim. Professor Tirole is by far and away the leading economist in this field. His Nobel Prize was awarded for his work on market power and regulation, his work is cited and relied on by all the economists in this case and in all of the academic material before you since Professor Baxter's article and the 1998 work from Dr Frankel.

Now, Professor Tirole has written in terms that MIFs can operate to address the externalities in these two-sided platforms. Professor Tirole has said repeatedly that calling MIFs horizontal price fixing is incorrect. Professor Tirole cited with approval the statement by the European Commission that noted how the MIF can operate as a balancing fee which ensures that the merchant payment reflects the benefits that the merchant receives from the card payment and the Tribunal will recall from the 2011 article Professor Tirole's conclusion was that a MIF set at the level of the

merchant indifference test was a conservative estimate of the socially desirable interchange fee meaning that the socially desirable MIF was probably higher and all of that was in {RC-J5/14.8.01} and of course the caps in the IFR are set by reference to the merchant indifference test with a view to promoting economic efficiency.

In view of the position that Dr Frankel has taken, it is useful in my submission just to recall what Recital (20) of the IFR says and to recall that the MIFs which are said to be infringements by object are set according to this approach. The European legislature said that MIFs pursuant to the MIT stimulate the use of efficient payment instruments through the promotion of those cards that provide higher transactional benefits while at the same time preventing disproportionate merchant fees which would impose hidden costs on other consumers, that may be what Mr Tidswell was putting to me earlier and perhaps that was the shortcut to the conclusion I eventually reached.

Experience has shown that those MIT MIF levels are proportionate as they do not call into question the operation of international card scheme and payment service providers, they also provide benefits for merchants and consumers and provide legal certainty.

That does not mean that post IFR MIFs are immune from competition law challenge. But it does mean that it is very hard as a matter of economics at least to say there are restrictions of competition so obviously and inherently harmful that any analysis of effects would be redundant and unnecessary.

That harm cannot simply be assumed. As to what Dr Frankel said was the alternative to MIFs, which supported his argument on by object, it simply could not have worked and certainly not in the post IFR period.

Can we just see what Dr Frankel proposed what the Claimants now advance as the alternative. It is summarised at paragraph 500 of the claimants' submissions, that is {RC-S/1/299}. If we go down, please, to subparagraph 2(b), the Claimants adopting Dr Frankel say: a far more obvious, simpler more direct and less restrictive solution than a MIF would be for payment system operators to give the merchant the freedom to choose how to internalise the externality and quoting Dr Frankel: do you want to pay a MIF to let the merchant decide if the merchant wanted to pay a MIF or not.

The problem with that is obvious as every economist apart from Dr Frankel realised. The problem with it is the free rider problem. If you leave it to individual

merchants to decide to pay interchange fees bilaterally or not, the merchant who does not pay will get the same benefit from increased card usage as the merchant who does pay and this point, this very point, arose in the *Sainsbury's* case before Mr Justice Phillips in 2017 where the experts' joint view was recorded.

I wish to show that to you, if I may, because Mr Dryden was of course an expert in that case and you will find that please in {RC-J5/25/37}. It is page 37. Paragraph 117:

"The five expert economists agreed a Joint Expert Statement, [asking] 'Would bilateral agreements for positive interchange fees be agreed ...'"

It is useful, in my submission, to examine what they said about how merchants would react.

We see Mr Dryden for the claimants in that case saying: no, even if contrary to my analysis interchange fees benefit merchants collectively, free-riding means that no individual merchant would agree to them.

So what do the Claimants have left to argue that MIFs are restrictions by object even if they comply with the requirements of the IFR? What they are left with are the provisional views of the European Commission expressed in statements of objection and Commitment decisions and even then, not one of those statements of

objection or Commitment decisions addressed the domestic and intra-EEA MIFs post IFR.

Now, as I said in opening and it is an obvious point, an SO or SSO is a provisional view in an investigation. It is necessarily a provisional view because the European Commission has not yet heard the submissions of the investigated party on the matters contained in it.

The European Commission's mind is necessarily still open as to whether there was an infringement at all. It is no more than an allegation, the SO is a charge sheet and no more than that. In the Commitment decision, the Commission refers to its views on the conduct investigated as they are set out again in an SO or SSO. That is as far as the analysis has gone before the Commitments Decision is made.

Now, I have heard many strange things in competition cases but this was the strangest. Asking the Tribunal to treat a view by the Commission expressed in terms as provisional as a final determination by the Commission.

There is no magic to a Commission statement of objections, it carries no more weight than a CMA statement of objections or provisional findings and although the Claimants cannot quite bring themselves to say it, and again, my learned friend tried to fudge it

again today, their argument on the *Gasorba* and *Group Canal +* cases, their argument is that this Tribunal is bound to find that the conduct described in the 2010 and 2014 Commitment decisions is an infringement contrary to Article 101(1) and we get that from the claimants' own written closing. Could you go to that, please, {RC-S/1/212}, paragraph 357.

At subparagraph (1), the claimants tell the tribunal:

"A finding that the MIF constitutes a restriction of competition by object and/or effect will not run counter to any part of the Commission's analysis ..."

In its Commitments Decision.

Then at subparagraph (2), conversely for the Tribunal to find that there is no restriction of competition would run counter to the relevant Commission decision and is not permissible. So there is only one option open to you, say the Claimants: you must find a restriction by virtue of the Commission's Commitments Decision despite the fact that the Commitments Decision on its own face expresses no more than a provisional view on the very issue of restriction and the claimants' argument is obviously wrong. It goes directly contrary to what the Regulation 1/2003 says on the subject and because the point has been emphasised again by my

learned friend today, I will need to go back to Regulation 1/2003 to show you that. If I could do that just before we break for lunch, I would be grateful.

THE PRESIDENT: Of course.

MR KENNELLY: That is {RC-Q1/5/3}. Recital (13), and this is basically the recital that deals with Commitments Decisions. Skipping about halfway down:

"Commitment decisions should find that there are no longer grounds for action by the Commission ..."

Then this:

"... without concluding whether or not there has been or still is an infringement."

Without concluding whether there is an infringement or whether there is no infringement.

"Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding ..."

"Such a finding" is whether there has been an infringement or whether there has not been an infringement.

Article 16 is different. Article 16 is on page 13 {RC-Q1/5/13} and this provides that where a decision has been taken by the Commission, national courts must not make decisions running counter to the decision taken by the Commission.

That is the outcome of the Commission decision which is of relevance in particular for cross-border acquiring.

Finally, to recall at page 17 {RC-Q1/5/17} the penalties that are imposed on undertakings, which breach their commitments, 10% of their total turnover in the previous business year is the cap, that is in article 23(2)(c).

So looking at these provisions together, there is an important distinction and I made it in opening and my friend has not come back on this analysis, I will make it again: there is an important distinction between the agreement or practice investigated and what the Commission ultimately requires the undertaking to do. The Commission is not in the Commitments Decision making any final decision about the agreement or conduct investigated but it is making a final and binding decision about what the undertaking has to do in the future and once the Commitments Decision is made, the undertaking is bound by it and continues to be bound by it. We never suggested, as my learned friend said today, that we were no longer bound by the Commitments Decisions. We have said repeatedly in our written closing: we are bound by the Commitments Decisions, we must do what we are ordered to on pain of heavy

financial sanctions.

But if the claimants' submission were correct, the submission you saw in their written closing, it would never be possible for a national court to reach its own decision on the agreement or practice investigated while a Commitment decision remained in force. You would always be bound, bound to find an infringement of competition. That we say is directly contrary to the language of the modernisation regulation and it was put beyond doubt in *Gasorba*.

I am happy to stop there if that suits the Tribunal and I will come back to *Gasorba* after the break.

THE PRESIDENT: Yes, that is a good point to stop and we will resume at 2 o'clock.

MR KENNELLY: Yes, please.

(1.02 pm)

(The short adjournment)

(2.02 pm)

THE PRESIDENT: Mr Kennelly, good afternoon.

MR KENNELLY: Thank you.

I was going to the *Gasorba* judgment of the Court of Justice, {RC-Q3/53/18} and paragraph 30 which states that by reference to Article 16 of Regulation 1/2003, which we have seen, a Commitment decision concerning certain agreements between

undertakings adopted by the Commission under Article 9(1) does not preclude national courts from examining whether I say whether or not, those agreements comply with the competition rules and if necessary, if necessary declaring those agreements void pursuant to Article 101(2).

Now, the Claimants rely on the *Group Canal +* judgment but the court in that case did not conclude that a Commitment decision necessarily entailed a finding of competition law infringement. *Group Canal* is directed at avoiding a situation where a national court gives a decision which may subsequently conflict with a decision made by the Commission. For that we need to go back to the *Group Canal +* judgment, that is {RC-Q3/58/18}, paragraph 108.

Again the facts we have been through already with the Tribunal, I will not go over them again, but about halfway down paragraph 108, we see *Gasorba* repeated a Commitment decision concerning certain agreements between undertakings does not preclude national courts from examining whether those agreements comply with the competition rules and if necessary declaring them void.

Then at paragraph 112, we see a focus on *Masterfoods* and Article 16 of the regulation avoiding a situation where a national court's decision conflicts with

a finding by the Commission, a finding by the Commission, halfway down Article 16, and *Masterfoods*:

"... require national courts, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission to avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Article 101 [and following]."

It is in that context that the Court of Justice finds in the next paragraph, 113, about halfway down that:

"... national courts cannot issue, in relation to the conduct concerned, 'negative' decisions finding that there has been no infringement of Articles 101 and 102 ... if the Commission may still reopen the proceedings, pursuant to Article 9(2) of that regulation, and, as the case may be, adopt a decision containing a formal finding of an infringement."

Which must necessarily include the possibility of no infringement.

Our short point here is this is a case where there is no such risk. There is no basis at all for believing that the Commission may re-open proceedings and make a formal finding of infringement in the future, and the Claimants do not point to any and the effect of

Group Canal cannot be that national courts must continue to view concluded Commitment decisions as potential impending infringement decisions indefinitely, even years after the relevant investigation has concluded and even of course if I am wrong about that the Tribunal immediately sees by reference to the *Masterfoods* case that it is not a one-way street for claimants, if the claimants are right that article (2) may apply, the consequence is not that you must make a positive finding of infringement. It follows that you cannot make any finding at all because your finding might conflict with a dispute finding by the Commission as to whether or not there was an infringement by reference to the conduct under investigation.

But there is no suggestion by the Claimants that what they want is a stay by reference to these authorities and our answer is ultimately the need to avoid taking a conflicting decision should not trouble you in this case because it is common ground that the duty of sincere co-operation no longer applies in the United Kingdom. So you do not need to be worried about taking a decision that might conflict with a future decision of the European Commission. If the Commission were to re-open the investigation and reach a subsequent formal finding, it would not -- that future decision

would not now be binding in the United Kingdom; and if you are not going to be bound by a future Commission decision, it is hard to see why the prospect of it should prevent you from ruling now on the question of whether the underlying conduct was or was not an infringement of competition.

So we are not saying that the Commitment decision is retrospectively annulled. We were bound by it and we are bound by it until it terminates but your hands are not tied and it would be bizarre if they were in circumstances where this future contemplated decision would not bind you at all.

The claimants' argument ultimately leads to absurdity and unfairness because what they are saying is not that you must stay your decision, it is that you must find an infringement where that was the Commission's provisional view in the Commitments Decision and as you have seen all the Commitments Decision is based on is a Statement of Objections, a charge sheet, a provisional view. There is no admission of infringement. It would be perverse and procedurally unfair if the effect for a defendant undertaking of entering into a Commitment decision was that a national court like this Tribunal was bound to make a finding of infringement in line with the

provisional views of the Commission and in our submission, this judgment, *Group Canal +*, cannot possibly be read as compelling that outcome.

Those are my submissions on infringement by object.

Before I move on to UIFM, I wish to address you briefly on the question of witnesses because the Claimants have made -- and the Tribunal may have seen this -- in their written closing unfortunately, a large number of personal attacks on Visa's witnesses and on Mr Holt. The Tribunal is invited on my reading to find that at least four of them were not credible in the evidence they gave you they were accused of being evasive and uncooperative and Mr Holt is accused of being in breach of his duties as an expert, that is the implication, the clear implication of what they say. We did not include such a section in our written closing.

Our view is that all the witnesses and experts in these proceedings for the defendants and the claimants have sought to assist you as best they could remembering that these proceedings concern complex factual and economic matters. Now, how you regard the credibility of the witnesses who appeared you before you is obviously ultimately a matter for the Tribunal and you will have formed your own views on the witnesses including the extent to which they were co-operative.

But because these criticisms are so serious and because of the frankly misleading way in which they have been made, we have drafted a short note on this point only identifying the claimants' most obvious errors and mischaracterisations and we sent it to the Claimants and it has not been uploaded on Opus.

I am not going to take you through all of it now but I want to give it to the Tribunal and give you a couple of examples and show you that my concerns, I hope, are not misplaced. We have given a copy to the Claimants. (Document distributed).

THE PRESIDENT: Thank you very much.

MR KENNELLY: We have gone by reference to the claimants' written closing to each of the findings which the Tribunal is invited to make about the witnesses and experts and just to pull out a couple, could I ask the Tribunal to go to paragraph 11.4 of our note on page 5. It deals with the evidence of Mr Livingston and it was said in the written closing by the claimants that Mr Livingston was argumentative with counsel and required that counsel provide examples of settlement at par payment schemes and that is supposed to be a bad thing.

But you skip down two lines, and I am not going take you to the transcripts, the Tribunal will have time to

examine those separately, but when you look at the passage cited by the Claimants, you see the question that my learned friend asked Mr Livingston and it was: why do we see examples around the world of settlement schemes, payment schemes with settlement at par? All Mr Livingston said was: what would some examples -- what would be some examples that you would raise? He was not being argumentative and in fact he went on, Mr Livingston, to identify a number of additional examples of settlement at par national schemes that had not been identified by the Claimants.

His evidence was manifestly helpful and yet he is criticised for being uncooperative and argumentative.

If you skip on, please, to Mr Butler's evidence, page 9, paragraph 18.1, we see first of all at the bottom of paragraph 18.1 the allegation, it was said about Mr Butler that he did not adopt or even acknowledge his previous statement in his Umbrella Proceedings statement because he had earlier given a witness statement in these proceedings. It said that in his umbrella proceeding statement, the one before you in this trial, he did not adopt or even acknowledge his previous statement but instead quietly re-served it in a reconstituted form, again said to be an example of an uncooperative and untransparent approach. But again

that is just wrong. As you see in the top of that paragraph, Mr Butler said in terms in his witness statement: I previously provided a witness statement in the case numbers listed in response to an application for strike-out for summary judgment brought by the Claimants in these proceedings.

Over the page at paragraph 18.3 -- I am only taking to you to a couple -- the Claimants say that Mr Butler was an unforthcoming witness more generally. Here we see a real problem with the claimants' approach and the unfairness of their criticisms because they accuse Mr Butler of being unforthcoming on matters which he said himself were not within his knowledge. He answered questions despite the fact that the questions were on topics where he declared he did not have the appropriate expertise, for example the Worldpay complaint and the cross-border interchange fees. We saw that, repeatedly, Claimants' counsel put questions to scheme witnesses on matters which were not within scheme witness' expertise. That is fair enough, but you cannot then say that they should be criticised for being uncooperative on matters outside their own understanding.

Finally, Mr Holt, at page 12 of our note, paragraph 22.1, top of the paragraph, the Claimants in their written closing accuse Mr Holt of not providing

the Tribunal with objective, unbiased opinion, but instead avoiding making statements undermining Visa's position. He is accused of not giving you objective, unbiased opinion.

Now, the unfairness of that can be seen straight away by reference to a point that the Claimants adopt, which is that in his first report Mr Holt reached conclusions which were directly contrary to the interests of my client. He made findings that the inter-regional and commercial card MIFs were likely to set a floor under the relevant MSCs and are likely to be passed on by acquirers to merchants. We had to drop that point because Mr Holt could not support it. That is Mr Holt being objective and independent and doing his duty. It is quite unfair for the Claimants then to turn around and accuse him of, by implication, being in breach of his duties to the Tribunal.

Now, the Tribunal depends on counsel to be accurate, especially when attacking the credibility of a witness or an expert, and it is disappointing to see criticisms like these made of witnesses and an expert without a proper check of the record and transcripts and it is disappointing to see serious allegations in a written closing which were not put to the witnesses concerned or addressed in oral closing submissions.

If I were to invite the Tribunal to find that my learned friend was evasive, uncooperative and lacked credibility, he would insist, and rightly so, on those allegations being put to him directly, he would expect them to be substantiated and he would expect an opportunity to respond to them in oral evidence.

I do hope that before my learned friend makes his reply submissions he will reflect on whether all these allegations in the written closing should be maintained.

I will move on then, if I may.

MR TIDSWELL: Before you do, can I just drag you back to object for a minute.

MR KENNELLY: Yes, of course.

MR TIDSWELL: I am afraid we are back to the balancing discussion, if we can use the shorthand. If you -- so if you have a situation where the MIF is being set, and I appreciate this is not your case but just make this assumption, the MIF was being set without any reference at all to any argument about externalities or indeed any other justifiable cost; in other words, it was just being set at a very arbitrary very high level by your client, just treat that as the assumption. Is there any reason why that could not be treated as an object infringement, notwithstanding that it was still said to be carried out in pursuance of some sort of balancing

exercise; in other words, does there come a point at which, as a matter of credibility, the argument that there is a balancing exercise that delivers some competitive benefits ceases to apply and therefore one can look at it as an object infringement?

MR KENNELLY: Sir, in our submission, the mere fact that one has a two-sided market does not mean there can never be a by object infringement. It is conceivable in two-sided markets that one can have by object infringement findings, and logically that includes payment card systems, because there must be situations where the decisions of the scheme could be so inherently harmful to competition that they would amount to an object by infringement. I cannot conceive of every possible outcome, but I cannot exclude the possibility that such an outcome could be reached or such an outcome could arise.

My point is limited to the facts of this case and the particular objectives of the balancing mechanism here, as identified by Professor Tirole and in the factual evidence before you.

The authorities I took you to did not say that one could never have a by object infringement in two-sided markets either. As I said earlier, I took the Tribunal to those to refute the point made by the Claimants that

balancing was not a matter for a by object analysis at all.

MR TIDSWELL: I understand. I am asking you separately from that analysis, really just trying to get a handle on where you say that analysis should sit because I think -- I think perhaps it does come back to the same point, which is that ultimately we have to make a decision about whether the objective that is being put forward to us is actually the objective, the proper objective, and therefore one that could justify it falling outside of Article 101. That is the -- and actually that applies whether or not there is said to be a balancing exercise or not. It is a matter of substance, is it not, as to whether we accept that?

MR KENNELLY: To be absolutely clear, sir, I am not saying that the balancing objective means that the MIFs fall outside the scope of Article 101.

MR TIDSWELL: I am sorry, that is my mistake in putting it that way. Outside the object.

MR KENNELLY: Yes, indeed.

MR TIDSWELL: The object, indeed.

MR KENNELLY: But, just since I have the opportunity, it would be truly striking to find that where the balancing objective exists that there is a by object infringement, in view of Professor Tirole's thesis, which is the

economic consensus and the evidence before you from the witnesses.

MR TIDSWELL: Well, let me just push back a bit on that because, as I understand it, Professor Tirole says that there is a construct where you could justify a MIF because of externalities, and there may be a debate about what that includes, but that does not, as I understand it, go as far as some of the evidence that has been presented by the schemes generally as to the way in which costs are treated. I mean, I think there is a dispute about that, is there not?

MR KENNELLY: But, sir, this really has nothing to do with costs. What Professor Tirole was speaking about was using interchange fee as a way of addressing externalities, which are not limited to questions of issuers' costs, and the point he made at the end of his 2011 article was that where interchange fees are set by reference to the merchant indifference test, that is a socially optimal and efficient level. MIFs higher than that, much higher than that, may be questioned but his point was at the IFR caps, which is what the merchant indifference test leads you to in the European Union's analysis, according to Professor Tirole that is a good guide for the efficient level. So that is why it would be striking that MIFs set by reference to the IFR

caps could be found to be so inherently harmful to competition that no effects analysis would be required.

MR TIDSWELL: I absolutely understand why you say that. I understand that bit of the case, but just before you got to that point, it is not right, is it, that Professor Tirole is saying -- when he is talking about externalities, he is not necessarily -- I do not think he is talking about some of the benefits that might accrue to issuers and to cardholders and to the schemes. I mean, that is not -- that goes further than he does, does it not?

MR KENNELLY: Well, again, sir --

MR TIDSWELL: Don't you have to bring it back to the externalities by reference to the acquiring market?

MR KENNELLY: Yes, indeed, and Professor Tirole said -- the reason why he says the merchant indifference test is appropriate is because it recognises the benefits that merchants receive from interchange in the acquiring market.

MR TIDSWELL: It may be that -- it is probably my fault for the way I put it and we may be at cross-purposes slightly -- in fact we may be agreeing again -- but --

MR KENNELLY: I hope so.

MR TIDSWELL: -- the simple point I am making is it is said, and I am not saying I accept it, but it is said that the

extent of the interchange fee -- put aside the IFR for a minute and let us think about the other MIFs, about inter-regional, for example. It is said the extent of that does not reflect the externalities and that there are other incentives, if you like, being provided on the issuer side of the market --

MR KENNELLY: Yes.

MR TIDSWELL: -- which cannot be put into that box and that is what I am putting to you, that Professor Tirole does not answer the question completely for you. You get into the question, do you not, as to whether, if there is not a sensible relationship between the size of the transfer represented by the interchange fee --

MR KENNELLY: Yes.

MR TIDSWELL: -- and the externalities, whatever might or might have come into the bucket?

MR KENNELLY: Absolutely. For commercial card and inter-regional MIFs, we do not have the shield of the IFR from the schemes' perspective and Professor Tirole's focus on the merchant indifference test. We still have Professor Tirole's analysis of the fact that MIFs are capable of producing efficiencies but the level, that is a different thing.

MR TIDSWELL: Yes. The question I am asking you, and I think I am asking you the question as to whether you

accept that if you go beyond the level, whatever that is, in a way that is obvious you have gone beyond it so that we were to find that, whether you would accept that that could put what would not otherwise be an object infringement into the object box as a matter of principle?

MR KENNELLY: In the context of a two-sided market and a payments platform, it would have to be really extreme to be a by object infringement, even if you were above the MIT MIF because the point about externality is not limited to MIFs set at the MIT level. Professor Tirole was careful to express his view that the MIT level was a conservative level and Professor Tirole was astute to include within his benefits on the acquiring side a number of other things, such as not just reducing fraud but also broader social and optimal levels.

So, in the examination of the externalities in issue, there may be separate externalities which have to be addressed in relation to commercial card and inter-regional MIFs, but, in principle, sir, I agree with you. Beyond the regulated caps set at the efficient level, the examination becomes more difficult. From the schemes' perspective, it is not as clear as it is for the MIFs set at the MIT MIF level, but the inter-regional MIFs were set pursuant to the commitments

at the merchant indifference test level. The merchant indifference test varies -- the application of it, its result, varies depending on the MIF at issue.

MR TIDSWELL: So I should have chosen commercial cards as my example.

MR KENNELLY: So for the inter-regional MIFs, they were set at the MIT MIF level.

MR TIDSWELL: No, I understand. I think I understand that point. I mean, I think we do have a difficulty, do we not, that actually, as the evidence has turned out, we do not have an awful lot about externalities or indeed actually what the detail of the usage and benefits that comes from the transfer of the MIF is? You are asking us to accept, in essence, that there is a rationale behind it that leads to that. I mean, is that unfair?

MR KENNELLY: Well, again, distinguishing between the different MIFs in issue, for the domestic and intra-EEA MIFs it would be an unfair criticism because we have put forward a great deal of material demonstrating how unlikely it would be that they are by object infringements and we are concerned here with by object infringement.

For the commercial and inter-regional MIFs, because of the limited data, the Schemes have been forced to limit their arguments. You have heard from the Schemes

as to what our principal arguments are in defending the commercial and inter-regional MIFs, and you either find in our favour on those or not, but on object, for both you have to ask, for commercial and inter-regional MIFs, are they by their very nature harmful to competition such that an effects analysis is not required? For inter-regional MIFs, that is not sustainable because they are set by reference to the MIT level and for commercial cards, they are in quite a separate category because of the market in which they operate and the competitive dynamic is very, very different for commercial card MIFs.

PROFESSOR WATERSON: Can I just check. I am going to put a hypothetical to you, which is if, instead of Visa accepting a Commitments Decision, the European Commission had found against you on object, if they had made that decision, then could you argue against that?

MR KENNELLY: Well, no, because if they have made a finding against us on the basis of an object infringement before the termination of the implementation period, we would, as a matter of law, be bound by that and so would the Tribunal, unless we successfully appealed, but there is the world of difference between a provisional finding and an allegation, which has not even been responded to

in the administrative process, and a final determination, which has survived appeal, that the schemes have committed a by object infringement.

The Tribunal should not assume for a moment that, had such a finding been made by the Commission, we would have failed in our appeal against it on that point. The Tribunal should not assume that simply because the schemes enter into Commitments Decisions we have admitted liability. That is the very thing a Commitments Decision does not involve. It involves no admission. There are many, many reasons why a party enters into a Commitments Decision and they do not involve an acknowledgement of liability.

PROFESSOR WATERSON: Thank you. I just wanted to check.

MR KENNELLY: But just to come back to Mr Tidswell's question, because I know it is of interest to him and to repeat I know which is obvious, we are concerned only with objectives at this stage. I am not seeking a finding from the Tribunal that the balance has been properly struck. We may fail on that in a 101(3) analysis if you find these are restrictions by effect. My submissions focus solely on object for the purpose of the balancing issue.

MR TIDSWELL: Yes, I understand. Thank you.

MR KENNELLY: So on the UIFM, the claimants' case has three

parts. The first is that the IFR must be ignored in any counterfactual. The second is that, in any event, the UIFM still involves collusion in breach of Article 101(1) because the positive interchange fees are still the product of a scheme arrangement, and, thirdly, when combined with the Honour All Cards Rule, the UIFM gives the issuers the power to keep the interchange fees at the IFR caps.

I will take those points in turn, if I may.

As to whether the IFR must be disregarded entirely, the Claimants ran this point for the very first time in oral openings and even then it was not clear precisely what they meant. Now, in their written closing, they seem to criticise us for not answering it immediately in our oral openings, but that is, with respect to my learned friends, a little unfair when this argument had never been mentioned in any of the pleadings, evidence, the CMCs or even in their own very substantial written opening.

In any event, the Claimants have completely missed the point in the H3G which they cite because in that case, as I think the Tribunal saw from the judgment when you were taken to it, the Court of Appeal held that an entity could not point to a regulation specifically designed to constrain its SMP in order to argue that it

lacked SMP. That would be obviously circular. If correct, it would have allowed the entity to escape the regulatory consequences of having SMP.

I would ask the Tribunal to go, please, to {RC-Q2/4.1/19}. The Court of Appeal relied in its conclusions on a decision of the European Commission addressing a similar point in a German case. If you look at paragraph 47, and internal paragraph 22, we see the Commission's conclusions in the German case. Skipping down to "In economic terms", the Commission concluded, it said:

"... it is not appropriate to exclude regulatory obligations that exist independently of a SMP finding on the market under consideration but that can have an impact on the SMP finding on the markets under consideration."

So if the regulation in question is independent of the SMP finding, you should take it into account:

"From a methodological viewpoint, obligations flowing from existing regulation, other than the specific regulation imposed on the basis of SMP status in the analysed market, must be taken into consideration when assessing the ability of an undertaking to behave independently of its competitors and customers on that market."

If you could skip down, please, to page 24, and paragraph 53 {RC-Q2/4.1/24}, we see the analysis of the Court of Appeal, echoing what the Commission said in RegTP, the Commission decision:

"... the point of the modified Greenfield approach is to avoid circularity in relation to a market assessment as regards [significant market power]. SMP is not to be found to be absent from a market if its absence is the result of regulation which is in place. Correspondingly, looking forward, an undertaking which would otherwise have SMP is not ... entitled to argue that it does not have it because its freedom of operation is or would be limited ... by regulatory provisions such as are designed to be put in place in order to constrain the exercise of SMP."

If you skip down, please, to paragraph 61 -- sorry I do not have the page. I hope it is the next page. Yes, thank you {RC-Q2/4.1/26}:

"A question as to how an undertaking would operate on a market cannot be answered, in this context, by saying it would behave in a way that would comply with the regulatory controls that might be imposed on it if it did not. That would result in a regulatory system being self-defeating. Its existence would mean that the mischief which it exists to deal with would be found not

to be present because of the very existence of the system, thereby negating ... the conditions for the application of regulatory control but leaving it open to the undertaking, in practice, to operate ... uncontrolled by regulation."

Now, in this case, by contrast, the IFR is not designed to prevent a restriction of competition by effect. The IFR says in terms that it is without prejudice to competition law. We are not arguing that the IFR means that no post-IFR MIF can be a restriction of competition. We only rely on the IFR to contend that the hold-up problem has been addressed in a way that was absent in the *Sainsbury's* case before the Supreme Court.

The hold-up problem was the only reason why the settlement at par counterfactual was accepted by the Schemes in that case because the alternative would have involved the collapse of the schemes.

Post-IFR, because settlement at par is no longer the only feasible counterfactual, the schemes have raised alternatives to the MIFs which they would have adopted in the claim period.

So these alternative claim -- sorry, these alternative counterfactuals do not depend on the IFR for their lawfulness. So the H3G case in the Court of Appeal really does not take us any further at

all.

The thrust of this argument was also rejected by this Tribunal in the *Dune* case. Can I show you that please, at {RC-J5/44/23}. At page 23, paragraph 51, the claimants submitted that:

"... if there had not previously been the sustained restriction of competition caused by Visa and Mastercard's positive MIFs, there would have been no need for the IFR and it would never have been introduced. On that basis, she argued that it was wrong to have regard to it for the purpose of the counterfactual since a counterfactual represents the hypothetical world without the restriction of competition."

The Tribunal found the claimants may be correct as regards the reason for the IFR {RC-J5/44/24}:

"But we regard the legal consequence which [is sought to be drawn] as misconceived. The restrictions under the Visa and Mastercard rules continued over many years, and the counterfactual against which the anti-competitive effect is to be assessed may not only change over such a period but must realistically reflect all the surrounding circumstances ..."

The question -- sorry, the claimant said:

"You cannot rely on the regulatory response to one

restriction in order to justify another restriction which has exactly the same effect."

The Tribunal held that that misstated the issue:

"The question whether the other restriction does have the same effect on competition arises in a market subject to the 'regulatory response'. Therefore, whatever the reason for the IFR, the question whether the MIF default rules in the period post-IFR actually had the effect of restricting competition must be addressed against the reality of the then prevailing situation, which includes the IFR."

So we must turn next to whether the UIFM is in fact lawful or whether it would be a breach in itself of Article 101(1). That is the claimants' second point, that the UIFM is a collusive scheme, even if the level of the interchange fees is set unilaterally by each issuer independently, because the claimants accept that under the UIFM the interchange fee is set independently by the issuers. The claimants do not suggest that the issuers, in setting the level of the interchange fees, will be colluding as between themselves.

So, for that reason alone, we are moving away from the analysis in the Supreme Court. Just to recall what that analysis was, could I ask you to go back briefly to the Supreme Court's judgment {RC-J5/36/29}. At

paragraph 99 we see the measure:

"... the collective agreement to set the MIF is to fix a minimum price floor for the MSC [or the MSCs]."

Paragraph 101, over the page {RC-J5/36/30}:

"Whilst it is correct that higher prices resulting from a [multilateral interchange fee] do not in themselves mean there is a restriction on competition, it is different where such higher prices result from a collective agreement and are non-negotiable."

It is an important paragraph because it makes the point, first, that the fact that the MIF drives up the level of the MSC is not enough to make it a restriction, contrary to the point which has been made repeatedly by the Claimants in these proceedings. The fact that the MSC is inflated is not enough by itself to show restriction. Two further things are required.

I will deal with non-negotiable first. Again, by itself, that is not enough to show a restriction. A price for a must have input may in reality often be non-negotiable. The key feature which makes it a restriction of competition is that the multilateral interchange fee is a charge resulting from a collective agreement. The people charging the MIF and the people paying it have all agreed the level of the interchange fee collectively. That is the restriction of

competition.

The Supreme Court then examines the difference in competition between the real world and the counterfactual and we see that in paragraph 103 {RC-J5/36/30}:

"There is a clear contrast in terms of competition between the real world in which the MIF sets a minimum or reservation price for the MSC and the counterfactual world in which there is no MIF but settlement at par."

What is the difference?

"In the former a significant portion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement made."

So why is a significant portion of the MSC immunised from competitive bargaining? Because of the collective agreement fixing the level of the MIF.

"In the latter [that is the settlement at par world] the whole of the MSC is open to competitive bargaining. In other words, instead of the MSC being to a large extent determined by a collective agreement it is fully determined by competition and [and this is a separate point] is significantly lower."

Because open to competition and prices are lower are two different things and both need to be blocked to show an appreciable effect in breach of Article 101.

This reasoning -- this essential reasoning is reflected in paragraph 93 on the previous page, page 29, where we see the six key facts {RC-J5/36/29. To recall them, fact (i):

"The MIF [the multilateral interchange fee] is determined by a collective agreement ...;

"(iii) the non-negotiable MIF element of the MSC is set by collective agreement ..."

Fact (v), the counterfactual they were looking at was where there was no bilaterally agreed interchange fees and (vi):

"... in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower."

So for that reason, we say, the fact that in the UIFM the issuers set the interchange fees independently is key. The interchange fees are not set collectively. If in the end they end up at the caps, that is a function of independent conduct and independent decision-making by the issuers and not a collective agreement.

Now the claimants' response is, even if the interchange fees are set independently, they are still the result of a collective agreement, the Visa members have simply delegated interchange fee-setting to the

individual issuers. My learned friend said the issuers' independent interchange fees are still plugged in to the Visa scheme and they require the Visa machinery to be recovered from acquirers, but this very same submission was made in *Dune* and that argument was central to the appeal in *Dune*.

To see the significance of that, I would ask the Tribunal to go to the grounds of appeal in *Dune* and the skeleton, just to see how essential it was and to explain where the Tribunal and the Court of Appeal ended up. So the grounds of appeal are in {RC-R/53/2}, please. I am obliged. There we go, it is paragraph 2(a)(ii):

"The Tribunal erred in finding that the counterfactuals proposed by the card schemes were arguable ... by ...:

"ii. Finding that the proposed counterfactuals would not involve collusive/collective arrangements and therefore would not involve a restriction of competition."

Then if you go, please, to {RC-R/54/20}. R/54. Is there no 54? {RC-R/54/1}. This was uploaded today so it may not have -- great. {RC-R/54/20}, please. In paragraphs 60 to 62, I would ask the Tribunal to read those paragraphs to see the similarity between the

points that were made in *Dune*. This was the way the appeal was put and it will assist then in understanding where the Court of Appeal came from and the findings it made. (Pause)

If you could go then, please, to {RC-J5/46/1}. This is the Court of Appeal judgment. My point here is that, even though this was an appeal against a summary judgment finding, the Tribunal and the Court of Appeal were not precluded from determining points of law conclusively. It was open to them to grasp the nettle and determine the points of law conclusively or conclusively subject to specified caveats. Whether they did so we can judge from the way in which they expressed themselves in the judgment.

Please go to page 13 {RC-J5/46/13}. You see the heading, "Failure to analyse the competition concern". Then paragraph 29, in the middle of the paragraph we see the argument -- we have seen it in the skeleton and grounds:

"... the collusive imposition on merchants of an artificial fixed cost that sets the floor for the MSC."

If you go, please, to page 16 {RC-J5/46/16}, just to track through the reasoning of the Court of Appeal. The Court of Appeal dismissed the point, that settlement at par had to be the counterfactual post-IFR because

settlement at par had formerly been adopted because of the hold-up problem. The Court of Appeal accepted that the hold-up problem was mitigated by the IFR.

Then at page 19 {RC-J5/46/19}, please, the key question. We see it in the heading, "Do the proposed counterfactuals involve collusive/collective arrangements?"

At paragraph 43, the indented passage, we see the tribunal's conclusion, which repays close attention:

"We think it is clear that the Bilaterals counterfactual would not involve any restriction of competition since under that scenario the interchange fee is not determined by collective arrangement. Insofar as [counsel for the claimant] sought to argue ... that the UIFM counterfactual was a restriction of competition because it depended on a common scheme rule~..."

It was common ground that the UIFM did depend on a common scheme rule:

"... we do not accept that submission. The restriction arising from the current rule is that it provides for a commonly determined default level of positive MIF that applies as between all issuers and acquirers. A rule that enables each issuer independently to determine the level of its interchange

fee is not restrictive of competition."

It is hard to imagine the Tribunal expressing itself in clearer terms.

Then, over the page, we see the analysis of the Court of Appeal in paragraph 45 (RC-J5/46/20}. The claimants renew their argument that the tribunal:

"... had failed to consider whether there was a mutual understanding which would inhibit issuers' freedom to determine interchange fees independently ..."

But, at 46, the Court of Appeal held:

"... the mere fact that the UIFM and the bilaterals ... might, if [the schemes] are right, result in all issuers raising interchange fees to the levels allowed by the IFR does not of itself demonstrate that the UIFM and bilaterals counterfactual involve collusion."

Relying on *Wood Pulp* in the Court of Justice:

"... Article 101 ... 'does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors'. It is on that basis ... that the UIFM and bilaterals counterfactual would both have resulted in interchange fees being set at the maximum levels permitted by the IFR."

Visa positively pleaded that:

"... 'issuers would have been likely to choose to

stipulate the maximum interchange fee permitted by the IFR ... because it would have been in each of their economic interests, evaluated on an independent and individual basis (i.e. without any collective decision-making or collusion), to do so'."

Then the Court of Appeal says:

"There can ... be no question of evidence from the claimants rendering such assertions untenable: the claimants did not file any evidence at all on these issues."

So the Court of Appeal is leaving open the possibility that there might be evidence at trial that the issuers would set these interchange fees, not on an independent individual basis but by way of collusion. So true it is there was scope for that evidence to be adduced at this trial.

Then paragraph 47, there was reference to the Honour All Cards Rule. That, again, was left for trial and I will come back to that.

Then at 48:

"In all the circumstances, I do not accept that the [tribunal] ought to have found that the counterfactuals proposed by Visa and Mastercard would involve collusive/collective arrangements."

The Lord Justice says:

"I would not myself exclude the possibility of the claimants succeeding in establishing at trial that one or both of the suggested counterfactuals would involve [collusive or collective] arrangements."

But he cannot decide that on a summary basis.

So it is possible, said the Court of Appeal, that new evidence would emerge at trial that would show that these interchange fees were being set on a collusive or collective basis.

So we ask ourselves: what evidence was adduced before you that was different from the evidence that was before the Court of Appeal? We know what was before the Court of Appeal. It is in Mr Livingston's statement, {RC-F4/3/3}, paragraph 8, paragraph 9 and then down to paragraph 13. That was the very same evidence before you. There is nothing new before you that was not before the Court of Appeal on this point.

MR TIDSWELL: Sorry, are you suggesting that there has not been an evidential basis for us to reach a conclusion as Lord Justice Newey anticipated might be possible. We have heard lots of evidence about the UIFM and we have had cross-examination of witnesses which did not happen and summary judgment, of course. You are not seriously suggesting that somehow the position has not moved on factually from the Court of Appeal, are you?

MR KENNELLY: No, on the contrary, that question of whether the UIFM was adopted -- the UIFM would have been adopted by Visa because it would have led to the issuer setting their interchange fees at the caps and that the issuers were likely to prefer that and done it and would have reached those interchange fees independently without any need to be dictated to by a benign dictator, it was open to you in this trial to take a different view on the basis of the evidence before you to say, having heard the evidence, we will take a different view as to whether these interchange fees are genuinely set independently by issuers or not.

MR TIDSWELL: Different view from whom?

MR KENNELLY: From the Court of Appeal.

MR TIDSWELL: The Court of Appeal did not express a view.

MR KENNELLY: A different -- sorry -- they made findings of law based on limited evidence before them, a great deal of evidence has been ventilated in this trial. The question is; is the evidence before this trial any different, does it make a difference? Paragraph 13 --

MR TIDSWELL: They are different questions, are they not? Is the evidence different? Yes, it is, it is clearly different, is it not, because we have had an awful lot more of it and we have heard about all sorts of other things that the Court of Appeal did not get anywhere

near, but does it make a difference? Of course that is a matter for your submission as I understand it, but I just -- it was the former that was bothering me that you seem to be suggesting that somehow there was no advancement in the factual material that helped us make a decision as to what Lord Justice Newey refers to as being an open question.

MR KENNELLY: Lord Justice Newey did not close off the possibility that new evidence would emerge at this trial. My point is that the evidence before him was paragraph 13 of Mr Livingston's statement and that remains, that remains the high point of the claimants' evidence on how the interchange fees would be set under the UIFM. My point is that the Claimants have not adduced or have not attempted to go behind this. This is still their high point. They seek to draw different legal conclusions from it different from the conclusions which the Court of Appeal --

MR TIDSWELL: That is just not right, Mr Kennelly, we have had days of cross-examination of people about the UIFM and how it might work, which goes well beyond this, have we not? It may be it turns out that it does not alter the difference. I am just questioning the proposition that somehow this is the extent of the evidence that we have in front of us to make the decision and it is not

about what the Claimants have put, the cross-examination of your witnesses who have been very helpful in describing all the different elements that might be taken into account. I do not understand the point you are making.

MR KENNELLY: The point I am making is having heard all of that evidence --

MR TIDSWELL: Does it add anything?

MR KENNELLY: -- does it add anything?

MR TIDSWELL: That is a perfectly fair question, that is the question I was clarifying.

MR KENNELLY: Having heard all of that, you will have to find whether the Claimants ultimately have gone any further than they went in paragraph 13 of Mr Livingston's statement.

MR TIDSWELL: There is clearly a lot more evidence in paragraph 13. Whether it amounts to anything is a separate question.

MR KENNELLY: Exactly. It all goes to the same effect which is that the UIFM will operate precisely as it was explained to the Court of Appeal and the legal conclusions which the Court of Appeal drew from that, therefore, are equally applicable now because the evidence you have heard does not go any further to any material extent on the matters for the purpose of

analysing whether it is a restriction of competition or not than what the Court of Appeal heard.

Obviously on the Honour All Cards Rule it was wide open in this trial because it was not addressed by the Court of Appeal at all and I will come back to that, but on the operation of the UIFM, on whether the setting of interchange fees involves collusion, my submission is that the evidence you have heard takes the Claimants no further than what they had before the Court of Appeal.

MR TIDSWELL: Well, I mean, I still am going to push back a little bit more because I do not think you can read the Court of Appeal decision as reaching a conclusion, I think that is what you are sort of inviting us to do. The Court of Appeal made it plain this was a matter for trial and that was entirely consistent with there being a summary judgment application which was declined. So surely we are -- and I absolutely take the point that if there was nothing more than the evidence in front of Court of Appeal on which it was not possible for them, they thought, to reach a conclusion, that as a matter of law there was collusion, of course that makes perfect sense but really that does not help us very much, does it, and you may say that all the material we have in front of us does not alter that conclusion. But it does not really help us because you still have to address the

material in front of us, I do not really see where this reliance on the Court of Appeal decision takes you.

MR KENNELLY: If I may, where it is of particular utility is the claimants' argument that the mere fact that the UIFM relies on a scheme rule to be implemented, the mere fact that to work the UIFM needs the fees to be plugged into the Visa machinery and Visa needs to be used to retain the funds and transmit them to the issuer, the fact that that still remains in the UIFM, that very same point was made to the Court of Appeal and the Court of Appeal reached a conclusion which was expressed in the clearest possible terms. It was open to the Claimants to go further, adduce other evidence, make other points. But if that is all there is, if that is the claimants' answer to why the UIFM is still a collusive scheme, then I do say that that issue has been addressed by the Court of Appeal.

MR TIDSWELL: I have some difficulty with that. It seems to me the Court of Appeal has said on the evidence that was there that was unchallenged, because it could not be on cross-examination, there was not enough to reach a conclusion on a matter that was clearly a factual matter for trial and that is the extent of it and I think if you try and go beyond that, I think you are really stretching the decision of the Court of Appeal.

MR KENNELLY: The problem is that the evidence was not going to be tested in cross-examination because it was the claimants' evidence. The Claimants said the UIFM relies on the Visa scheme, the IFs still have to be plugged in to the Visa scheme, it requires the Visa machinery and so because the UIFM is procuring at the end of the day interchange fees at the cap that means it must be collusive. So there was no question of that being tested, that was the --

MR TIDSWELL: We are in danger of going round in circles, I think, Mr Kennelly.

My point is at the end of the day this turns on the evidence we have in front of us and that is the basis on which we are going to make our decision and it does not seem to me that the Court of Appeal backstopping this in some way is saying on the evidence they had they were not prepared to make a decision on it really helps us very much; we have to make a decision on the basis of the evidence in front of us and you will have to convince us, as does Mr Beal, that it goes one way or the other.

MR KENNELLY: I understand. If you bear with me just for one second, I will move on.

MR TIDSWELL: Of course, of course, yes.

MR KENNELLY: The difficulty I have is that the tribunal and

Court of Appeal express themselves in such clear terms, they did not say that it is open to us to find a different view or that on this question our conclusions may be different. On the basis of the facts as I have summarised them, the tribunal and the Court of Appeal made findings that could not be clearer and on those findings they did not say: this is just on the arguability standard or for summary judgment, which is why I --

MR TIDSWELL: I understand that, but really that has been superseded, has it not, because we have had days and days of evidence including some of them heard in closed session, which has some relevance to this, and there is an awful lot of material there. You may say it does not advance the legal position any further but I think it is really stretching it to say there is no more material. I mean, we have lots of material and I think that is what we need to focus on, is it not?

MR KENNELLY: I will move on --

THE PRESIDENT: Mr Kennelly, just to see exactly where you are coming from. I think what you are saying is that in a strike-out one proceeds on assumed facts and those assumed facts are, generally speaking, taken as the applicant's high point or the respondent's high point; in other words you say assume these facts, this is the

best case, it will not get any better than this and if you can strike out on that basis, then that is great. What you are saying is the strike-out failed and because of that assumption, namely that it cannot get any better, all of the evidence here cannot shift that point, in other words, it cannot exceed the assumed high point in the Court of Appeal and you are saying that effectively the evidence that we have heard can only go in one direction in favour of your clients and that it is effectively not pertinent. Let us see.

MR KENNELLY: Much as I am always anxious to grab a lifebelt if it is being thrown in my direction --

THE PRESIDENT: I am not sure it is a lifebelt.

MR KENNELLY: I think that that is not the point I am seeking to make. The point that I am making is one I tried to make to Mr Tidswell, which is that true it is that in the summary judgment case the Claimants put their factual story at its high point and my point is that they have not gone further than that in this case. A huge amount of evidence has been before you but on the operation of the UIFM --

THE PRESIDENT: That is simply a point about -- a submission about the evaluation of the evidence here?

MR KENNELLY: Indeed, but the implications, if I am right about that, if I am right that they are left with --

they have made nothing -- they have not advanced their factual case beyond what was before the Court of Appeal, despite all the evidence you have heard then the implication is that you should follow what the Court of Appeal said about whether the UIFM in reality involves collusion.

THE PRESIDENT: Okay.

MR KENNELLY: Which is I think why Mr Tidswell has a difficulty because he says, really, that cannot follow because it is all open to you, regardless of the facts.

THE PRESIDENT: Well, the only reason it follows is if we characterise the evidence that we have heard over six weeks exactly your way, and since that is the question that we are going to have to grapple with, it is not I think a point that we really need spend very much longer on. I mean, what you are saying is that if in light of mature consideration we find that the evidence we have heard over weeks adds nothing, then you may win.

MR KENNELLY: I think I will take that lifebelt at least and I will move on because in substance that is really where I was going, and my point was despite what you have heard the Claimants are still making the same points on the facts that they made before the Court of Appeal.

PROFESSOR WATERSON: Just to locate myself in this, the UIFM

only relates to which areas?

MR KENNELLY: Domestic and intra-EEA MIFs post IFR.

PROFESSOR WATERSON: Okay, thank you. So the argument cannot extend beyond that?

MR KENNELLY: No, indeed, we are only concerned with domestic and intra-EEA MIFs post IFR and I am still -- I am sure you are delighted to hear this -- in issue 3 but making good progress.

Even if I am wrong, even if I have not persuaded Mr Tidswell and the Tribunal on my last point, the claimants' argument that the interchange fees are still collusive because they are plugged into the scheme arrangements and they rely on the Visa scheme machinery to work does not get them any further because that is also the case where interchange fees are agreed bilaterally. Even on the voluntary bilateral basis that the Claimants have mentioned, if interchange fees are agreed on a voluntary bilateral basis, they still need to be plugged into the Visa scheme, settlement still needs to happen through Visa with Visa acting so as to deduct the interchange fees and remit the funds to the relevant recipients.

So that fact alone cannot render an otherwise lawful scheme collusive. If that were the case, it would apply equally to the bilateral arrangements which have never

been suggested to be anti-competitive.

In substance, what the Claimants seek to persuade you is that competition law requires Visa to prohibit issuers from setting their own independent terms of settlement. Post IFR the hold-up problem has gone, issuers are free to set IFs independently without the risk of setting them at ruinously high levels. The Claimants ask you to find that competition law must prohibit them from setting their own interchange fees independently, but that would be a restriction of competition on the issuing side of the market.

It would be an agreement between undertakings which prohibited individual issuers from insisting on an interchange fee before settling in the absence of a bilateral agreement. It would be a rule that would compel the issuer to pay in full and prohibit the individual issuer retaining any fee.

It is highly unlikely, we say, that competition law would seek to prohibit that scope for independent action. The Supreme Court made clear that what is prohibited is a collectively agreed MIF, whether set by the banks or a third party; all the acquirers and issuers have agreed it together. The settlement at par counterfactual was adopted not because positive interchange fees are inherently restrictive but because

without a price control on issuer interchange fee setting the schemes would likely collapse and that was why settlement at par was adopted as the counterfactual in the *Sainsbury's* case.

So that is why we say on the basis of the six facts in the Supreme Court judgment the UIFM interchange fees are not a restriction of competition.

As for the economists, Mr Dryden we saw fell back in his reports on his legal interpretation of the Supreme Court judgment, that was not his role. As for Dr Frankel, his 2006 article provided a number of valuable insights. He raised the UIFM and bilateral counterfactual specifically as possible alternatives to MIFs, and could I ask you to go back to Dr Frankel's article, it is in {RC-J5/10.6.1/13}.

I see the time. Before I get into this article, is this a convenient moment for the shorthand writer?

THE PRESIDENT: Yes, indeed, thank you, Mr Kennelly.

We will rise in that case for 10 minutes.

(3.12 pm)

(A short break)

(3.25 pm)

THE PRESIDENT: Mr Kennelly.

MR KENNELLY: We were in Dr Frankel's 2006 article, page 13, so it is {RC-J5/10.6.1/13}. At the bottom of the page

he is identifying alternatives to MIFs, he calls them a decentralised system and the first he says:

"Each issuer would announce the fee it will charge to acquirers when redeeming its cardholders' transactions."

That, Dr Frankel acknowledged in cross-examination, is the UIFM or he says pairs of banks would enter into bilateral contracts, that is the bilaterals counterfactual.

He identified two problems with these and we see them at page 16, page 16 of this article. {RC-J5/10.6.1/16} The first was the hold-up problem, of course he was writing in 2006, and in the United States and at the top of page 16, he notes in the first full paragraph that bilaterals can lead to a hold-up problem but, he says, it is not clear that collectively set interchange fees -- interesting that he distinguishes between bilateral negotiated fees, he says collectively set interchange fees are not necessarily the solution to the hold-up problem.

The second problem he identifies with the UIFM and bilaterals is the Honour All Cards Rule. He made the point that if such a rule gives each issuer the collective power of all issuers and if -- importantly, if that rule leads to higher prices, it would be

anti-competitive and we see that under the heading "Voluntary bilateral fee agreements" on page 16.

He said:

"The most significant conceptual problem with bilateral interchange fee contracts arises from the presumption [skipping down] that each transaction in a bilateral fee system must fall under the coverage of a fee contract due to the association's Honour All Cards Rules."

His concern about the Honour All Cards Rule is expressed four lines down:

"But if such a rule .... "

Skipping what is between the hyphens:

"... would lead to higher fees then the rule would be anti-competitive."

That begs the question: would there be higher fees absent the Honour All Cards Rule? I will come back to that when we look at the evidence in this case. Dr Frankel, when I put this to him, did not disavow his analysis. He said: I wrote what I wrote. He said he had not anticipated the IFR, but the IFR point only goes to the hold-up concern.

What is interesting is that away from the heat of litigation, Dr Frankel produced a much more thoughtful examination of the merits and difficulties, potential

difficulties with the UIFM and the bilateral counterfactuals and as he said himself, the most significant concern he had with it was the Honour All Cards Rule and that is the claimants' third point against the UIFM, the operation of the Honour All Cards Rule.

Now, it was common ground that in theory the Honour All Issuers Rule increased the bargaining power of the issuers in the UIFM so that removing the Honour All Issuers Rule would reduce the bargaining power of issuers. But the key question, bearing in mind we are concerned with domestic and intra-EEA MIFs post IFR, is whether that reduction in the issuers' bargaining power was likely to lead to bilaterally agreed interchange fees below the IFR caps.

As Mr Dryden said in assessing whether merchants and acquirers could negotiate bilateral interchange fees below 0.2 or 0.3 with issuers, it was necessary to consider each side's outside options in that negotiation and I want to take you through Mr Dryden's evidence and Dr Frankel's evidence without cross-references, all the references are in our closing submissions, but Mr Dryden said if one party to negotiation has more to lose than the other, if no agreement is reached they are in a weaker bargaining position and are likely to agree to

worse terms.

So starting with the position of merchants, which invariably informs the bargaining power of acquirers in any negotiation, the evidence before you shows that merchants, and therefore acquirers, have strong incentives to accept cards with interchange fees at 0.1% or 0.2% or 0.3% and that is for two main reasons. Merchants want to avoid lost sales by allowing customers to pay with their preferred payment method as easily as possible; and the costs to merchants of alternative payment methods are likely to exceed those of cards where the interchange fees are 0.1, or 0.2 or 0.3%.

On the first point, the fear of losing sales, Mr Dryden said the merchant, unless the MSCs become extremely high, is not going to turn it down -- is not going to turn down that means of payment because the risk is they will lose the entire surplus or gross margin they would have made from that transaction to another merchant who does pay and the claimants' own evidence demonstrates overwhelmingly merchants' preference to process as many payment methods as possible, as many issuers' cards and methods of payment as possible so as to increase the number of sales. For similar reasons, merchants generally do not surcharge and they did not surcharge even when they were permitted

to do so despite the fact that the MIF rates earlier in the claim period were much higher than they were in the post IFR period.

This, we say, is entirely unsurprising because in all -- well, almost all cases, the costs of processing a payment method fell considerably below the profit margin, the profit margin that a merchant would make on the sale. Mr Dryden said in oral evidence there is going to be a distribution of gross margins but many of them will be well above, indeed orders of magnitude above, the IFR capped rates and Dr Frankel made the same observation.

No rational merchant would turn away a payment method, let alone one with interchange fees at 0.1 or 0.2 or 0.3 where that would risk losing a sale and there is a mass of evidence to support that. The references are all in the written closing. The evidence also demonstrates that the alternative payment methods to cards with interchange fees at 0.1, 0.2 and 0.3 would be more costly for merchants and this again Mr Dryden accepted.

The only evidence of a merchant threatening to decline Visa was the reference to Amazon in the PSR report but the confidential evidence made clear that that had nothing to do with UK or Irish MIFs post IFR.

As regards the position of acquirers in a negotiation, Mr Dryden accepted that in seeking to negotiate an interchange fee, the only bargaining power that an acquirer will have over an issuer is a threat not to process that issuer's transactions, Mr Dryden said it is the credibility of this threat that --

(Audio issue)

THE PRESIDENT: We will rise for five minutes.

(3.36 pm)

(A short break)

(3.54 pm)

THE PRESIDENT: Mr Kennelly, it was not me.

MR KENNELLY: Even the microphone is turning on me ...

Sir, the point I was making was Mr Dryden had said in cross-examination looking at the aquirer's bargaining power that it was the credibility of the acquirer's threat to decline the issuer's card that determined the outcome of the negotiations, Mr Dryden said it is the threat points that determine the price.

But Mr Dryden again very fairly accepted that for an acquirer not being able to accept even a single issuer's cards was a very bad outcome indeed. It would severely damage that acquirer's ability to compete for merchants and as a consequence Mr Dryden accepted that a no deal scenario is not something that an acquirer can

live with. That meant that the acquirer's threat is simply not a credible one. No merchant would choose to contract with an acquirer that was unable to process even one issuer's transactions.

If the threat is not credible, it is implausible it will be taken seriously by an issuer. Mr Dryden suggested at one point that merchant multi-homing might be the answer but then he conceded that this would make the issuer's bargaining power stronger, not weaker.

Turning, then, to the position of issuers in the negotiation, an issuer is in a far stronger position than an acquirer. Mr Dryden accepted any small profit margin that an issuer loses as a result of losing an acquirer would pale in comparison to the merchant's losses from lost sales with the outcome being "much worse for the merchant".

If an issuer does not do a deal with an acquirer there is a risk of course that its cardholders may be unhappy because their cards would not be accepted everywhere, but again as Mr Dryden accepted that risk would evaporate if there was multi-homing or switching, he accepted there was likely to be a degree of inertia on the part of cardholders regarding switching banks and cardholders may not be unduly affected if there are readily available alternatives to the merchant.

Mr Dryden accepted, and I quote, in a lot of negotiations, the reality is that it is the acquirer who chooses to refuse an issuer's card is facing "potentially very, very damaging commercial outcomes" whereas the issuer is facing "some cardholder inconvenience but not" --

May I continue?

THE PRESIDENT: Yes.

MR KENNELLY: Okay. Mr Dryden -- Mr Dryden said in a lot of negotiations the reality is that the acquirer who chooses to refuse an issuer's card is facing "potentially very, very damaging commercial outcomes" whereas the issuer is facing "some cardholder inconvenience but nothing like the very severe commercial harm that the acquirer faces".

The consequence of that is that even without the Honour All Issuers Rule, the bargaining power of issuers and acquirers is far from equal. Mr Dryden accepted that the issuer may, without the Honour All Issuers Rule, still have considerable bargaining power, the issuer may have considerable bargaining power compared to the merchant. My learned friend Mr Beal suggested in closing without any evidence that it was plausible that a small issuer might enter and be forced into a low MIF deal by a large merchant or acquirer.

Mr Dryden again accepted in that scenario which I put to him that the issuer would suffer competitively and risk being forced out for want of interchange revenue and any low interchange fees that it agreed were by definition not appreciable.

Dr Frankel for his part in his reports did not even contend that removing the Honour All Cards Rule would lead to negotiated interchange fees below the IFR caps. Dr Frankel accepted that issuers and acquirers would have unequal bargaining power even when there was no requirement to treat all issuers without discrimination.

In cross-examination I took him to the MBIE New Zealand 2016 issues paper, paragraphs 131-132, which the Tribunal will recall was the list of reasons or the description of the negotiating dynamic between acquirers and issuers and Dr Frankel agreed with the conclusion of the MBIE that issuers appear to have very little reason to agree to charge a lower rate of interchange.

Dr Frankel also agreed with the MBIE's explanation as to why that was the case. That explanation by the MBIE did not mention the Honour All Cards Rule or any restrictions on differential surcharging and Dr Frankel confirmed that this analysis, because we were discussing New Zealand, was equally applicable to the United Kingdom.

The only evidence that Mr Dryden could point to in support of lower bilateral interchange fees being agreed were certain statements by the schemes' factual witnesses and I took him to those, and Mr Dryden summarised his position orally as follows: it does not seem completely impossible or indeed it seems quite conceivable that interchange fees might be set below the IFR caps in the UIFM without the Honour All Issuers Rule but he said that is as far as I can take it.

That leads to the claimants' conclusion at paragraph 286 of their written closing and could you look at that, please, this is their conclusion on this point, {RC-S/1/169}.

The claimants say:

"Absent the anti-steering rules, the HACR and the NSR in particular, it is entirely possible that the threat of such steering practices would place a downward pressure on interchange fees as a whole in the UIFM and the bilaterals counterfactual driving fees down below the caps."

"Entirely possible" is the highest the claimants can put it.

Now, even that we say is hopeless on the evidence that you have heard but in any event this is manifestly insufficient to demonstrate a restriction of competition

by effect. The burden of proof is on the Claimants to show that any restriction of competition caused by the Honour All Issuers Rule in the UIFM is appreciable so the burden of proof is on the Claimants to show that removing the Honour All Issuers Rule is likely to lead to negotiated interchange fees below the IFR caps and that they have clearly failed to do.

The claimants' final point on the UIFM was that it was not feasible and here there is an air of unreality in the claimants' arguments, at least a tension between the contention on the one hand that the UIFM is all window-dressing and a ruse to maintain the status quo and an argument that it could never work in practice and issuers would not accept it. The Tribunal has the evidence from New Zealand, and other evidence that demonstrates in the clearest terms that the UIFM would have been feasible.

The Claimants argue in their written closing that the UIFM is not feasible because it will be challenged by regulators but that is an obvious bad point. We only come to examine practicability if the Tribunal is satisfied that it is lawful and in any event we say the UIFM is unlikely to attract regulatory scrutiny in Ireland if the issuers set their interchange fees at the approved IFR caps.

My learned friend said in oral closing that the fact that the New Zealand legislature stepped in to cap rates under the UIFM was, he said, inauspicious but we have to ask why is that inauspicious? The regulated caps in New Zealand were the equivalent of the IFR. The New Zealand Commerce Commission said, in terms, that that regulatory action was necessary because the persistently high interchange fees involved no breach of competition law. The Commerce Commission said that it required regulatory action because the higher than desired interchange fees were not reaching the competition provisions in the Commerce Act; that was {RC-J3/65/8}, paragraph 22.

Those are my submissions on the HACR and the role of the HACR and the UIFM.

Before I move on very briefly to the scheme fees counterfactual I want to wrap up on the UIFM and address the point I was discussing with Mr Tidswell and the Tribunal before the interruption. It goes to the implications for *Dune* in the Court of Appeal just to be clear, because I read the transcript and I want to make absolutely clear what my position is on this issue.

In *Dune* the claimants appealed on points of law. They said that as a matter of law the UIFM was a restriction of competition for two reasons: because it

required a scheme rule for it to operate; and it involved a mutual understanding that the result would be interchange fees at the cap. The Court of Appeal held that as matter of law those reasons were not sufficient to show a restriction of competition but of course it is open to the Claimants to advance other reasons, more detailed reasons in this trial and as Mr Tidswell explained, and we obviously agree having been here there is a huge amount of material for the Tribunal.

The Tribunal will have to go through all of it to see what are the reasons for the UIFM, what does the evidence demonstrate as to what the reasons are? It is a matter entirely for you of course to decide what the reasons were and whether they are sufficient to show restriction of competition. However, as I sought to explain, if, if the reasons for the UIFM are the very same reasons they put forward to the Court of Appeal as a matter of law, they are not sufficient to show a restriction of competition and the reason why I make the point is because when we look at what the Claimants say is the outcome of all the evidence in this trial, it is revealing because the question is what does all this evidence lead to? There has been a huge amount of it, but what does it lead to, and we see what the Claimants say it leads to.

If you go to the claimants' closing submissions {RC-S/1/4} first of all just for the index or the table of contents, and go down to the findings of fact which the Tribunal is invited to make and the findings of fact which you are asked to make in relation to the UIFM counterfactual. I pause there to recall that as I showed you in the *Dune* judgments, the Tribunal as quoted in the Court of Appeal and in the Court of Appeal, the two reasons which were advanced as showing as a matter of law that the UIFM was a restriction of competition was the fact it depended on a scheme rule and resulted from a mutual understanding that the IFs would be set at the caps. E(18) on page 4, the first finding of fact that you are invited to make is the implementation of the UIFM would take place through a new scheme rule establishing a process for setting interchange fees; and the second finding of fact is the schemes' confident expectation and/or assumption and/or purpose in implementing the UIFM rule would have been that substantial positive interchange fees and/or interchange fees at the same level as in the factual would continue to be set.

The confidential paragraph in E(20) goes to a very similar point. Then we see what the Claimants say arises from the evidence, the conclusions that the

Claimants say should be drawn from all the evidence that you have seen, I would ask you to go to {RC-S/1/252} and paragraph 420. True it is that what the evidence shows you is a matter for the Tribunal but this is what the Claimants say you should conclude from the evidence. These are the findings of fact they ask you to make to show whether UIFM is a restriction of competition.

At paragraph 420(1), applying these principles to the UIFM reveals an anti-competitive agreement and/or converted practice for the following reasons:

"(1) The implementation of the UIFM [post IFR] would have been effected by a new Scheme Rule ..."

That was actually quoted by the Tribunal in *Dune* in the paragraph I showed you.

Over the page, {RC-S/1/253} subparagraph 2:

"The collective agreement between the scheme participants on the UIFM is the critical ... the current factual amounts to the unilateral setting by the scheme of a MIF ... the UIFM counterfactual amounts to the unilateral setting by the issuer of an IF ... agreed by all the participants and sets the floor."

That is exactly what was put to the Court of Appeal in *Dune* then paragraph 421, what are the reasons here:

"(1) The Schemes' confident expectation and assumption in implementing that Rule would have been

that positive interchange fees at the level of the ... caps ..."

Would have been adopted.

Over the page, {RC-S/1/254} the confidential part is to similar effect. The experts agree that the UIFM would amount to collective agreement to set the interchange fees at the cap levels for the reasons just given.

(4), the schemes would retain significant involvement in the overall running and implementation of the UIFM including by providing the basis for which clearing and settlement of payment transactions would take place.

(5), the entire purpose of the rule was to ensure continuity of significant interchange fee income for issuers.

That is it, sub (6) simply dismisses our reliance on *Wood Pulp*.

Those are the conclusions which the Claimants draw from the evidence and that is why I say that they had not advanced their factual case any further. The reasons they ask you to find a restriction of competition are the same reasons that the Court of Appeal said as a matter of law were not sufficient to find a restriction of competition and we

say that is binding on you, if I am right on the evidence, those findings are findings of law.

The very final point I wish to make before I sit down is to touch briefly on the scheme fees counterfactual because in the course of the hearing, the Tribunal occasionally raised a new potential counterfactual whereby scheme fees would be used instead of interchange to transfer money between two sides of the platform where each acquirer and issuer would negotiate their scheme fees bilaterally with the scheme. We addressed this in our written closing but to the extent that the Tribunal is still considering it, I will discuss it briefly now.

THE PRESIDENT: Yes.

MR KENNELLY: Just four points. I repeat that the appropriate counterfactual in our submission for the post IFR period is the UIFM. If it is lawful all four experts agree that the UIFM would be the schemes' preference that is in the Joint Expert Statement, all four experts agree that if -- if -- it is the appropriate counterfactual, the post IFR MIFs do not restrict competition because the interchange fees under the UIFM would be same or not appreciably different from their current levels. That is also in the Joint Expert Statement.

My second point is that if the Tribunal considers that the UIFM and the bilaterals counterfactual are not lawful counterfactuals, then the Tribunal must consider whether the Claimants have satisfied their burden of demonstrating on the balance of probabilities that settlement at par is the appropriate counterfactual.

If the Tribunal has identified another more likely counterfactual, like for example the scheme fees counterfactual, it necessarily follows that the Claimants have not demonstrated on the balance of probabilities that settlement at par is the appropriate counterfactual and that is a fortiori in circumstances where the Claimants disavow any reliance on the scheme fees counterfactual and for that reason the claimants' claim in respect of the post IFR MIFs -- this is just about post IFR MIFs -- should be dismissed.

Actually, sorry, the -- logically the counterfactual should work for commercial card and inter-regional MIFs also but I am focusing for the moment on the post IFR MIFs.

My third point -- and this is the bit that Mr Beal objected to -- was that if the Claimants have failed to satisfy their burden of proof that settlement at par is the appropriate counterfactual, it would be impermissible we say for the Tribunal in this trial to

reach a final determination on the scheme fees counterfactual. Contrary to what Mr Beal said, it is open to you to find that the scheme fees counterfactual is an appropriate counterfactual, but there is a separate question that you would have to ask and that is: is there a restriction of competition using that counterfactual? You have to ask would the MSCs be lower in that scheme fees counterfactual than under the MIFs?

That is where the fairness issue arises because Visa has not had the opportunity in this trial fairly to address that issue. Because the scheme fees counterfactual was not pleaded and there is no factual or expert evidence advanced in relation to it, there is no evidence before you as to what would have happened in the scheme fees counterfactual, what negotiations would have taken place between the individual issuers and acquirers in the scheme, would there have been differences between the negotiations with small issuers, small acquirers, large issuers, large acquirers? In producing such evidence we would have regard to the negotiations that do take place between issuers and acquirers and the schemes and we would have to ask what would have happened had there been no interchange fee, how the negotiations would have gone in those circumstances and none of that is before the Tribunal.

But fourthly and finally, this is not a case contrary to what Mr Beal suggested that you can say: we do not need further evidence on the scheme fees counterfactual because it is obvious that MSCs would have been lower in the scheme fees counterfactual. To the extent that there is any evidence on the scheme fees counterfactual it all points in one direction, and that is that Visa and Mastercard's MSCs because of course the scheme fees feed into the MSCs, the MSCs would not have been any lower in the scheme fees counterfactual and if the MSCs would not have been lower in that counterfactual then the domestic and intra-EEA consumer MIFs post IFR produce no appreciable restrictive effects in the acquiring market relying on the sixth fact in the *Sainsbury's* judgment and all four experts gave consistent evidence on that point and that evidence was consistent with the respective bargaining power of issuers and acquirers in the post-IFR world.

To the extent permitted under the IFR, permitted by the circumventions provisions, Visa would likely have set its fees to generate significant revenue from acquirers that it would have used to transfer to issuers so as to achieve the same balancing objective as I seek to pursue using interchange fees in the actual.

But all of that is for another day, because the

evidence simply is not before you fairly to determine that question of restriction of competition. So if the Tribunal were to conclude that the scheme fees counterfactual was the appropriate one, you would need a further trial to decide whether it follows that the post IFR MIFs involved a restriction of competition. But obviously we all hope that will not be necessary but I think that is the logical conclusion of where it leads.

So unless I can be of any further assistance, those are my submissions and Ms Tolaney takes over.

THE PRESIDENT: Thank you very much.

Ms Tolaney.

Closing submissions by MS TOLANEY

MS TOLANEY: I have an aide memoire Road Map as well so may I hand that to the Tribunal, please.

THE PRESIDENT: Of course.

MS TOLANEY: To my learned friend as well, thank you.

In relation to issue 3 I am going to focus on the bilaterals counterfactual and that is addressed at section F of the Road Map and so may I invite the Tribunal to turn to -- I think it is paragraph 32 of the Road Map and like Mr Kennelly, at the end I will briefly touch on the scheme fee counterfactual as well.

Mr Kennelly has addressed you on the UIFM and

Mastercard gratefully adopts Visa's submissions on that. I am going to address the bilaterals counterfactual in six stages as noted at paragraph 34 of the Road Map.

First of all, I am going to just briefly explain the three stages of a card transaction following questions from the Tribunal authorisation, clearing and settlement.

Secondly I want to focus in on exactly what the bilaterals counterfactual involves.

Thirdly, I will touch on the significance of the IFR although this has largely been covered by Mr Kennelly.

Fourthly, I would like to address what is the correct counterfactual from a factual perspective, so putting lawful to one side; and on the factual point to explain why the evidence demonstrates that it is far more likely, which is the relevant test from *Mastercard CJ* that Mastercard and Visa would have adopted the bilaterals counterfactual rather than settlement at par.

Fifthly, I will address why the bilaterals counterfactual is lawful.

Sixthly, I will explain why if the bilaterals counterfactual is the correct counterfactual, there is no restriction of competition.

So that is the structure.

May I start with four points about the processing of

a card transaction which are set out at paragraphs 36-45 of my note and the reason I am addressing this is to explain why the claimants' case that settlement would somehow be in doubt in the bilaterals counterfactual is wrong. So all of this goes to answering what is said to be a problem with the bilaterals counterfactual and it is not a correct problem.

Looking at paragraph 37 of my Road Map, Mastercard's note of 16 March explains how clearing and settlement works in a four-party scheme and we reproduce this at appendix 5 to our written closings, can we look at it on screen, please {RC-S/6/40}. Just to clear one point which we touch on in paragraph 37, my learned friend complained in his oral closing submissions -- that was {Day18/151:21} -- that this note had been produced late but he has no grounds for that complaint and just to clear it away for the tribunal's note, there are three points.

First of all, the mechanics of clearing and settlement have never actually been in issue in this case because the Claimants had never suggested that settlement would be in doubt under the bilaterals counterfactual and likewise it was never suggested that the mechanics of clearing and settlement were relevant, it was not a pleaded issue, there was no disclosure

request and it was not addressed in the claimants' written openings.

Secondly, there is in fact however nothing complex or surprising about the basic mechanics of authorisation, clearing and settlement. They are described in innumerable public documents including dozens of documents in the bundle.

Thirdly, the note was of course produced in response to a general question from the Tribunal, there was no suggestion at that time or thereafter from the Claimants that this was important or urgent. So any complaint about timing really falls away.

Turning then to the substance of the note. We referred in paragraph 39 of my Road Map to the Commission Payments Card Sector Inquiry Interim Report 2006 and that is a useful independent statement of how processing operates, and for the tribunal's note the reference to that -- we do not need to bring it up on screen -- is {RC-R/33/21-23}.

Now, there are four points and if we can have Mastercard's note of 16 March on screen, which I think it is, it is {RC-S/6/40}, if the Tribunal can also have in front of you paragraphs 40-45 of my Road Map where it is set out.

So the first point which is noted in paragraph 3 of

what is on screen, is that the 2006 report states that a scheme owner is responsible for granting licences to issuers and acquirers for the use of a card logo and for performing, issuing and acquiring services.

The scheme owner may also certify non-financial institutions to perform technical activities such as clearing and processing.

The scheme owner also sets network rules and the technical message standards and that ensures every bank can communicate with each other.

Finally, it implements network rules and standards.

So the scheme owner determines who are the members of the scheme and sets a framework for them to deal with each other. You will note from this that the report makes no mention of the scheme members having to clear and settle transactions through the scheme and you see why from the quotation at paragraph 7 of the note on screen and I will let you read that.

THE PRESIDENT: Yes. (Pause)

MS TOLANEY: So it has never been necessary for issuers and acquirers to connect with each other through the scheme and, in fact, since the IFR schemes are prohibited from requiring that issuers and acquirers connect through the scheme and what you can see at paragraph 8 of that note if we can just bring that up, please, is a diagram which

shows that in addition to the four participants in the scheme and the scheme owner there may be a clearing house but there is no reason for that clearing house to have any connection with the scheme.

If we then go to paragraph 42 of the Road Map, which refers to the point made at paragraph 9 of the notes on screen, if we can bring that up, we set out in our note that Mastercard offers its licensees the option to use Mastercard services for authorisation, clearing and/or settlement but licensees are not required to use Mastercard for all or indeed any of these services and licensees are only charged for the services they actually use and at present there is no requirement for issuers and acquirers to use Mastercard to authorise, clear or settle transactions. Processing can in fact take place bilaterally between pairs of banks, so peer-to-peer or through the use of a third party processor and indeed historically in the United Kingdom in the 1990s, domestic transactions were cleared through a third party processor and you can see that from the *Merricks* judgment which we set out an extract from at paragraph 10 of our note on screen.

So what you can see is that the bilaterals counterfactual does not involve any radical change. Issuers and acquirers have always been free to clear and

settle with each other outside a scheme and often do.

The third point which we cover in paragraph 43 of the Road Map is the one made in paragraph 13 of the note if we can bring that up on screen, please. That is since 2016 the IFR has mandated that settlement and processing should be separated and we have quoted the relevant parts of Article 7 in our note.

So since 2016, Mastercard has separated its processing function from its role as scheme owner and Mastercard has an independent processing business which competes with third party processors to provide authorisation, clearing and settlement services and you can see the reference in footnote 3 of the note, if we can pop down the page, thank you, to the 2020 E&Y report which makes that very point and that is why Mr Willaert said in his evidence scheme and process are two separate things.

The fourth point is if we could go to paragraph 16, please, of the note on screen and this is covered in paragraph 44 of the Road Map. To the extent that UK issuers and acquirers choose to settle through Mastercard's independent processing business as scheme operator, Mastercard understands that where a sum is due from a licensee following netting off, they are required to transfer that sum to an account controlled by the

processing business and then the processing business then transfers funds to the accounts of those licensees which have a net sum due to them. Where Mastercard is not involved in the clearing, so where it occurs through peer-to-peer or with a third party, Mastercard does not impose any requirements in relation to authorisation, clearing or settlement. It only sets the technical messaging standards so different parties can speak to each other and issuers and acquirers are not hindered in their choice of processing services by any technical incompatibility for that reason.

So all of that demonstrates the fallacy of my learned friend's argument that if clearing and settlement takes place outside of the scheme, there is no scheme at all. He says that for example at paragraph 75 of his aide memoire and it is particularly not a correct argument because the legislation, as I have shown you, specifically requires that clearing takes place outside the scheme. In any event, that has always been possible and it has been common in many markets for processing to be done entirely separately.

PROFESSOR WATERSON: Can I just check; how does Mastercard know what is going on then?

MS TOLANEY: Well, Mastercard I think is just -- it understands it as its role as scheme owner and is aware

that it is not providing the services but provides the standard for other people to do so.

PROFESSOR WATERSON: But it has to get its fees somehow. So how does it know -- and its fees are presumably partly based on the level of transactions, so how does it know that?

MS TOLANEY: Well, I think we get a report on total volume and charge on that basis. I do not think there is any difficulty in Mastercard getting its fees. The point is that it does not get the fees through providing these particular services and they are not mandatory.

PROFESSOR WATERSON: Yes, yes, I understand.

MS TOLANEY: Can I then please move to what the bilaterals counterfactual involves and I am emphasising this because there has been some ambiguity perhaps in the way the Claimants have tried to identify it and we address this in paragraphs 46-53.

As noted in our Road Map at paragraph 46, the essence of the bilaterals counterfactual is that Mastercard would have had no rules on settlement at all and issuers and acquirers would have been left therefore to negotiate their terms of settlement including any applicable interchange fee through bilateral negotiations and can I make five points on this topic and then I will stop for the day.

The first is that my learned friend suggests that the fact that there would be no rules on settlement is somehow a belated addition to Mastercard's case and just so you have got the reference, that is in the claimants' written closings at paragraph 15.1.

Now, that is completely wrong and we have addressed that in paragraph 47 of our Road Map. It is quite clear that Mastercard's case has been pleaded in these terms since 2020 and moreover it was clearly explained by the tribunal in the *Dune* CAT decision at paragraph 40B. So it is clear that this is part of the bilaterals counterfactual.

My second point as we note at paragraph 48 of the Road Map is at the tribunal's request, we produced a mark-up of Mastercard's rules to show how this would be implemented in practice and as we have explained in the note that accompanied that mark-up which is reproduced at appendix 1 to our closing submissions, the modifications to the rules involve specifying that the existing scheme rules on settlement do not apply to transactions of the relevant kind, so UK domestic transactions and there are two clarificatory rules as we say in paragraph 4 8.2 of our Road Map. The first is one that makes clear that Mastercard rules do not impose any settlement obligation on acquirers and issuers in

relation to those transactions and the second is one that states that customers may agree to clear through the interchange system provided there is a relevant bilateral agreement in place.

THE PRESIDENT: Right. I mean, I think we are going to need to be very clear about where the borderline between clearing and settlement exists and you have already said that there is, as it were, a separate market in clearing in that you do not have to clear through a particular system, you can clear however which way you want.

So in a sense we are not going to have any scheme rule modifications there because that has already been detached from the scheme.

MS TOLANEY: Exactly.

THE PRESIDENT: So can we actually for the sake of this point forget about clearing altogether?

MS TOLANEY: Well, I think the point, if you just look at, sir, 48.2 because it is easier to see it written down, I think, there is no settlement obligation and what is there in the clarificatory rule is that they may agree to clear through the interchange system provided there is a relevant bilateral agreement in place. For transactions cleared through the interchange system the customer is required to net settle in accordance with the terms of the bilateral agreement.

THE PRESIDENT: Yes, I think this may be clearly my fault but it is important I think that I understand where your rule changes are biting because the paragraph that you have just referred us to refers to --

MS TOLANEY: May do so and if, sir, it may help you if you read on I am going to come on to the paragraphs in 49 and 50 which I think may be answering the question you are posing.

THE PRESIDENT: You see, yes, 49, I mean it may be we have only just had this and I probably ought to read it before I ask my questions, but at the moment it probably is my fault, I am seeing a degree of murkiness between where clearing ends and where settlement begins because if it is the case that a participant in the scheme has a free choice in terms of where to clear, then that must be something which the rules of the scheme cannot affect because you have got free choice.

MS TOLANEY: That is right.

THE PRESIDENT: So what we are talking about when you are talking about a change to the scheme rules is a change to the rules in regard to settlement and how those settlement rules feed through into a neutral clearing scheme and I think that is the borderline that I am trying rather badly to articulate, but it may be that I need to think through what you are saying in this note

and press you a little further tomorrow morning.

But I suppose I am putting a marker down that I may have further questions on that.

MS TOLANEY: That is fine, sir. I think the point is that the clarifications are to make clear that the Mastercard rules do not impose settlement obligations and the clarificatory rule which deals with clearing is, first of all, to really make that point and it addresses, I think as well, or anticipates in a way an argument made by my learned friend, which is on one reading that Mastercard would still compel clearing through their scheme and that is not correct because of the point you have just made, sir, that licensees have always been free to clear bilaterally through a third party or through the scheme so you are right about that and there is nothing in this draft which makes any reference to compulsory clearing and of course the IFR makes it illegal for a scheme to require licensees to clear through the scheme and I have already shown you that and it is not, therefore, compelling settlement; this is to just do with a may agree to clear --

THE PRESIDENT: Yes.

MS TOLANEY: -- rather than settlement. But I will come back to you tomorrow, if I may, once I have just checked the note --

THE PRESIDENT: That would be helpful.

MS TOLANEY: -- to try and address whether there is any murkiness, which I do not think there is, between that clarification and settlement.

THE PRESIDENT: Well, I think it may be that we need to be definitionally very clear and I imagine there is a definition in the rules that require clearing to be separately provided or as an option separately provided. It may be that there is somewhere a clear definition as to what clearing is and where the borderline between clearing and settlement exists in terms of legal understanding and that may be the way in which we can address this.

MS TOLANEY: I think I can give you the reference because it is in our note, we have given the definitions.

THE PRESIDENT: Yes.

MS TOLANEY: I am just asking Mr Cook to find me the reference. If you just give me a moment. It is in our appendix 5.

THE PRESIDENT: Appendix 5 to your fuller document?

MS TOLANEY: {RC-S/6/41}, paragraph 5, thank you.

THE PRESIDENT: Right, yes, I see. Provided this is an accurate demarcation of what the systems are actually doing, then we can work from this but that is --

MS TOLANEY: It comes from the *Merricks* causation judgment.

THE PRESIDENT: Yes.

MS TOLANEY: It is quite a recent judgment, 2024.

THE PRESIDENT: Well, indeed. It may be that that is articulating precisely where the regulatory borderline exists and I for one on my part am quite happy to take this as the borderline provided everyone is happy that we take it as the borderline.

PROFESSOR WATERSON: Can I just check in relation to this. Obviously the *Merricks v Mastercard* although it is a very recent judgment actually refers to a period quite a long time ago. So are these definitions still current?

MS TOLANEY: Doing the best we can, we think they are current as broad descriptions.

THE PRESIDENT: Because I imagine there will be a whole myriad of regulations which define what a clearing house is doing and what it is not doing and if we have to track through what over time those functional definitions are, then we will do so, but I would much rather not if we can avoid that.

MS TOLANEY: I do not think so, sir. I think the point is that both clearing and settlement were hived off.

THE PRESIDENT: Okay.

MS TOLANEY: The point is that under the bilaterals counterfactual, nothing new is happening, that is point

number 1. We are leaving it to the issuers and acquirers to negotiate themselves and the clarificatory rules the purpose of them really, if you see at paragraph 50, is to avoid misapprehension because -- and notably that is something that is still advanced by my learned friend -- that Mastercard could through some involvement in clearing, before a bilateral agreement is in place, be said to dictate the terms of settlement and that is the point.

MR TIDSWELL: Can I make -- just when you said then clearing and settlement were hived off, did you mean -- do you mean settlement because I thought settlement was something, as I understood it, settlement was something that the rules as they currently stand before amendment is something that Mastercard --

MS TOLANEY: That is right, sorry. I use that term --

MR TIDSWELL: Yes.

MS TOLANEY: -- I use that term, sir, because the point is that since 2016 the IFR has mandated that settlement and processing be separated from the running of the scheme so both clearing and settlement have been hived off.

MR TIDSWELL: Right. Well, I think that is where I suspect that is where the President's observations start to -- in your paragraph 13 it talks about authorisation and clearing and I wonder if maybe the point I have made,

perhaps not very helpfully, maybe there is a distinction between the requirement in the rules that settlement take place --

MS TOLANEY: That is right.

MR TIDSWELL: -- and the process by which settlement is effected.

MS TOLANEY: Exactly. Exactly, and that is what Mr Willaert was trying to say in his evidence as to the distinction.

MR TIDSWELL: Yes. So when you come to the definition it is not only a question of what this says but it is also making sure and being clear about what we mean by settlement as opposed to either the contractual requirement that sits at the rules prior to your amendment and the actual functional activity of effecting it.

MS TOLANEY: Exactly.

THE PRESIDENT: It may be, and I will try and frame this better overnight, that we ought to ask ourselves if there is a deduction from par that is the interchange fee, how that, on the various formulations we have got, how that would actually be implemented through the processes of authorisation, clearing and settlement, in other words zone in on exactly how the process of deducting from 100%, whatever amount is being deducted, is effected through the various processes that we have

been articulating and that is where the borderlines may begin to matter.

They may not, I am simply flagging now a sense of uncertainty. It may be completely my fault because I have not read your very helpful summary note and I have looked at it but have not looked at enough your annex 5, it may be completely my fault but there being no such thing as a stupid question, I thought I would put it out there so that you can tell me that it is a stupid question.

MS TOLANEY: Not at all, sir. I think to some extent this has all come in quite late because of the suggestion that it is somehow relevant to the bilaterals counterfactual that there is a problem if settlement -- clearing settlement occurs outside the scheme and what we are trying to explain is that there is nothing radical or new about parties in fact clearing and settling outside the scheme and in a way, therefore, your question, although we will answer it, in a sense what we are saying is it does not matter. The only thing that would matter is if my learned friend was right in saying that the fact that it can be done outside the scheme means there is a problem.

THE PRESIDENT: Well, indeed you are absolutely right but in order to work out whether there is or is not a problem,

we need to go through the hard yards of understanding the system. It may be that those hard yards are, after they have been run, completely redundant. But I think we do need to be able to go through it in order to work out that the question is answered one way or the other.

MS TOLANEY: Of course.

THE PRESIDENT: I think that is probably what I am saying.

MS TOLANEY: Of course I can do that tomorrow, when I start.

PROFESSOR WATERSON: In this context, what would happen with a new issuer, if a new issuer came along or a new acquirer, would a new issuer have to negotiate with all the acquirers and a new acquirer have to negotiate with all the issuers?

MS TOLANEY: Well, if you do not mind sir, I am going to come on to that because that is the one of the other issues that is raised, is it workable if everybody has to negotiate with each other? Various specters were raised by my learned friend and I can answer it quite quickly which is no, it is not a problem but if I can go through the mechanics of that tomorrow.

PROFESSOR WATERSON: Yes, thank you.

MS TOLANEY: That would be more helpful.

THE PRESIDENT: Ms Tolaney, we certainly do not want to take you out of order but what we are trying to do is identify the lacunae in our own understanding where you

can assist us that is.

MS TOLANEY: That is very helpful to know.

THE PRESIDENT: Well, we are very grateful. We will resume then at 10.30 tomorrow morning?

MS TOLANEY: I think 10 o'clock, or 10.15 if you are content to sit a little earlier, please.

THE PRESIDENT: Well, is that all right? 10 o'clock it will be. Thank you very much.

MS TOLANEY: Thank you.

THE PRESIDENT: We will see you then.

(4.50 pm)

(The hearing was adjourned until 10 o'clock, on Wednesday, 27 March 2024)