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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS

TRIAL 1

A P P E A R A N C E S

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

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

1 Thursday, 15 February 2024
2 (10.30 am)
3 Opening submissions by MR BEAL (continued)
4 THE PRESIDENT: Good morning, Mr Beal.
5 MR BEAL: Please may we go to {RC-J5/11/117}.
6 This is the part of the Commission's *Mastercard 1*
7 decision where they move on to consider the effect of
8 the MIF and the answer that they reach set out in
9 recitals 408 to 410 is that the MIF operates to have an
10 anti-competitive effect by inflating the base of the MSC
11 and therefore requiring acquiring banks to pay more.
12 The Commission then looks at the Central Acquiring
13 Rule for *Mastercard* at pages 118 to 119 {RC-J5/11/118}
14 and in a nutshell at recitals 413 to 415 it finds that
15 the effect of the Central Acquiring Rule is that foreign
16 acquirers are deterred from entry into a domestic market
17 because they are required to pay a higher MIF, namely
18 the default MIF in the local jurisdiction, than the MIF
19 that they would be charging in their own country. So it
20 produces an artificial cost disadvantage for acquiring
21 transactions because it must pay the default MIF to the
22 local issuers.
23 That is recital 415.
24 Recital 435, page 126, {RC-J5/11/126}, the
25 Commission sets out the conclusion from its analysis of

1 the evidence that it has looked at and it says the
2 evidence indicates that the *Mastercard* MIF sets a floor
3 to MSCs for both small and large merchants.
4 At page 131, {RC-J5/11/131}, recitals 454-458, the
5 Commission deals with the alleged countervailing
6 benefits on the issuing side and finds that these are
7 not relevant to the analysis of restriction of
8 competition for the purposes of article -- what was then
9 Article 81(1).
10 So we see "Under Article 81(1)" at 454, it says:
11 "... there is legally no reason why the negative
12 effect of the MIF on prices in the acquiring markets to
13 the detriment of merchants ... should not constitute
14 a restriction of competition because of potential
15 benefits which a MIF may create for cardholders."
16 At recital 458, they then say:
17 "If the concept of a restriction of competition
18 within the meaning of ... 81(1) had to be interpreted as
19 *Mastercard* suggests, then [it] would be deprived
20 entirely of its effet utile."
21 So what it is saying is that analysis of perceived
22 benefits to cardholders or perceived benefits in the
23 issuing markets goes into the article 81(3) analysis, ie
24 Trial 3.
25 At page 132, {RC-J5/11/135} recital 460, the

1 Commission looked at what would happen if there was
2 genuine negotiation and we see for example halfway down
3 that recital, it says:
4 "The uncertainty of each individual acquirer about
5 the level of interchange fees which competitors
6 bilaterally agree to pay to issuers would exercise
7 a constraint on acquirers. In the long run this process
8 can be expected to lead to the establishment of
9 interbank claims and debts at the face value of the
10 payment ..."
11 Ie settlement at par.
12 The Commission recognises, as has the PSR, we saw
13 that yesterday, at recitals 467-468, page 133,
14 {RC-J5/11/133} that the issuing market dynamic leads to
15 upward pressure on the interchange fees, that is the
16 competitive pressure for Visa and *Mastercard* to increase
17 the interchange fees for issuers.
18 Then we see that there was an absence of competitive
19 constraint from the acquirer side, that is page 140,
20 {RC/J5/11-140} recitals 494-495.
21 The Commission then moved on at page 141
22 {RC-J5/11/141} to look at the overall mechanics and in
23 recital 499, *Mastercard* was recorded to acknowledge
24 that:
25 "... the setting of interchange fee rates is not

1 akin to a contentious process such as price negotiation
2 where opposing interests of buyers and sellers meet.
3 Rather, all banks eventually share a common interest
4 that the merchants pay a higher price than they would in
5 a fully competitive environment."
6 Page 144, please, {RC-J5/11/144} recitals 508-509
7 deals with the effect of the Honour All Cards Rule and
8 the conclusion that is reached in 509 is that the Honour
9 All Products functionality reinforces the restrictive
10 effects of the *Mastercard* MIF on price competition
11 between acquiring banks.
12 Then at the bottom of that recital, the more general
13 conclusion is reached that:
14 "The Honour All Products functionality therefore
15 further decreases the countervailing buyer power of
16 merchants in the presence of a MIF."
17 They also looked at the non-surcharging rule at
18 recital 510. It says:
19 "*Mastercard* used to operate with a no discrimination
20 rule until 1 January 2005. That rule used to prohibit
21 merchants from passing on the costs of accepting
22 *Mastercard* and Maestro cards in the form of a surcharge
23 fee."
24 Now, in fact, as we have seen from the rules,
25 a non-discrimination rule has come back into the

1 *Mastercard* rules and I will need to make submissions on
2 that probably now substantially in closing.
3 At page 147, {RC-J4/11/147} recital 523, the
4 Commission recognised that the setting of the MIF
5 remained a collective endeavour, collective exercise of
6 market power by member banks, notwithstanding the IPO.
7 Then at the bottom of that page, 525 and onwards,
8 the Commission comes on to look at the question of
9 objective necessity and one sees at recitals 525 and
10 over the page {RC-J4/11/148} that it is setting out the
11 test by reference to the case law that my learned
12 friends are relying upon and they say at the bottom of
13 525, page 147, that case also illustrates, that is the
14 Pronuptia case, clearly the narrow scope of the
15 ancillary restraint doctrine and the distinction between
16 restrictions that are necessary for the implementation
17 of an agreement and those which are desirable in terms
18 of commercial success.
19 Turning over the page, end of that recital, top of
20 page 148, {RC-J4/11/148};
21 "In other words, restrictive clauses desirable with
22 a view to the commercial success have to be assessed
23 within the context of Article 101(3) of the Treaty. If
24 a restraint is merely needed to render the main
25 operation profitable for some of the parties involved,

1 it is not for that reason an ancillary restraint."
2 Of course I am going to interject here: the whole
3 concept of something being an ancillary restraint is you
4 have a main restraint to which it bolts on and the main
5 restraint is perfectly acceptable. That is not the
6 case, we say with a parameter of competition like price
7 because that is not something that is ancillary to
8 anything else, that is a core feature of the competitive
9 dynamic.
10 Then page 149, {RC-J4/11/149}, recital 532 sets out
11 the test that the Commission decided to apply on this
12 issue, namely whether or not the MIF was indeed
13 necessary for the co-operative -- for the open card
14 payment system to function. Would banks co-operate on
15 an open payment system without it and is there a less
16 restrictive means of finding that that co-operation
17 could be achieved?
18 At page 152, {RC-J4/11/152} recital 542, the
19 Commission rejected *Mastercard*'s suggestion that it was
20 appropriate to look at efficiencies at this stage. They
21 say that falls within the Article 101(3) analysis and
22 the conclusion is then reached at page 153,
23 {RC-J4/11/153}, paragraph 548, that:
24 "... the only provision that is necessary for the
25 operation of an open payment card system, apart from

1 technical arrangements on message formats and the like
2 are the obligation on the creditor bank to accept any
3 payment validly entered into the system by a debtor bank
4 and a prohibition on ex-post pricing by one bank to the
5 other. A mechanism that shifts costs and revenues
6 between issuing and acquiring banks is not necessary for
7 the banks' co-operation as issuing and acquiring
8 services can be remunerated directly by the respective
9 consumer groups. Thus the free play of market forces
10 will then determine the revenues that banks can obtain
11 from the consumers and businesses."
12 So all of the evidence that is adduced before this
13 Tribunal going to the perceived benefits or balancing of
14 the system is not a matter for the objective necessity
15 test and we will see that the courts have upheld that
16 legal conclusion.
17 I then have already taken you to recitals 550 to 552
18 ending at page 154 {RC-J4/11/154}. That was the
19 description of how things would work in a competitively
20 unconstrained scenario. I took you to that yesterday
21 morning.
22 Then the specific counterfactual is identified at
23 page 155, {RC-J4/11/155} paragraph 554, which was
24 effectively:
25 "As already set out in the Commission's *VISA II*

1 decision, the possibility that some issuing banks might
2 hold up acquirers who are bound by the HACR could be
3 solved by a network rule that is less restrictive ... by
4 default ... The alternative solution would be a rule
5 that imposes a prohibition on ex-post pricing on the
6 banks in the absence of a bilateral agreement between
7 them."
8 So in other words you have got to accept a full
9 settlement, HACR, that solution protects acquirers if
10 issuers should indeed abuse their power under an HACR,
11 and that was a less restrictive approach than having
12 a minimum price set by a MIF.
13 To the extent that that was said to be not a viable
14 solution, there is then a very long section where the
15 Commission goes in detail through payment systems that
16 have enabled open payment systems to function with
17 a settlement at par system, mechanism, and that was
18 found to be perfectly viable. The conclusion is then
19 reached finally at page 171. {RC-J4/11/171}
20 171, en passant, is recital 616 which is the
21 rejection of a suggestion that there should be
22 a collective reallocation of costs in the scheme.
23 "Contrary to *Mastercard*'s assertion, the allocation
24 of fraud and default costs between issuers and acquirers
25 as well as the timing of settlements in its system are

1 not intrinsically linked to the level of the MIF."
2 Then the final conclusion that is reached is that
3 the system is not objectively necessary. That is at
4 page 179, {RC-J4/11/179} paragraph 648.
5 So the consideration of the recitals below shows
6 that the MIF and its restrictive effects between
7 acquiring banks are not objectively necessary for the
8 co-operation of the banks under the scheme.
9 There was an important section in between where the
10 Commission specifically dealt with the question of
11 switching. This is a slightly longer section. Could we
12 start, please, at the bottom of page 172, recital 621
13 and then please could I invite the Tribunal to read 621
14 through to 625. {RC-J5/11/172-173}
15 THE PRESIDENT: Next page, I think. Thank you. (Pause)
16 Thank you.
17 MR BEAL: The overall conclusion that then is reached is at
18 page 183 {RC-J4/11/183} at recital 663 to 665.
19 "The *Mastercard* MIF constitutes a decision of an
20 association of undertakings ..."
21 That restricted competition and it was not
22 objectively necessary.
23 That decision was then the subject of an application
24 for annulment before the General Court. The
25 General Court's judgment is in bundle {RC-J5/16/1}

1 starting at page 1. The court at paragraph 77 and
2 onwards, page 12, {RC-J5/16/12} dealt with the test for
3 objective necessity, in largely the same terms as the
4 Commission had, and at paragraph 84 recorded the
5 complaint that *Mastercard* had made that apparently the
6 Commission had failed to analyse the MIF in its legal
7 and economic context. On the contrary, they say it is
8 clear in the case law that if without the restriction
9 the main operation is difficult to implement, the
10 restriction may be regarded as objectively necessary.
11 That submission was rejected at paragraphs 88-89 at
12 page 13. {RC-J5/16/13} Only those restrictions it says
13 at 89 which are necessary in order for the main
14 operation to be able to function in any event may be
15 regarded as falling within the scope of the theory of
16 ancillary restrictions. That was the test to be
17 applied.
18 At paragraph 90:
19 "... the fact that the absence of the MIF may have
20 adverse consequences for the functioning of the
21 *Mastercard* system does not, in itself, mean that the MIF
22 must be regarded as being objectively necessary, if it
23 is apparent from an examination of the *Mastercard* system
24 in its economic and legal context that it is still
25 capable of functioning without it."

1 Page 14, paragraph 96, {RC-J5/16/14}:
2 "The fact that there are default transaction
3 settlement procedures less restrictive of competition
4 than the MIF precludes the latter from being regarded as
5 objectively necessary ..."
6 So you could have a default settlement system
7 instead.
8 At 107-108, page 15, {RC-J5/16/15} the General Court
9 took into account the high revenues available to issuing
10 banks from other sources to confirm the MIF was not
11 essential for the viability of the scheme, full stop.
12 The Commission then moved on to look at
13 anti-competitive effect, so having dispensed with the
14 suggestion that the MIF fell outside Article 101(1)
15 altogether and then went on to consider whether it was
16 restriction of competition by effect.
17 At recital 125, page 17, {RC-J5/16/17} they set out
18 the basis for the Commission's decision.
19 At page 18, {RC-J5/16/18} recital 130, one finds
20 that the applicants the *Mastercard* organisation were
21 referring to the failure of the Commission to -- sorry,
22 the fact that the Commission had taken into account
23 bilateral negotiations they said was wrong. So they
24 were challenging the reliance by the Commission, the
25 limited reliance placed by the Commission on bilateral

1 negotiations in the scheme of things.

2 But then at 132, the General Court -- well, 131,

3 that complaint was rejected.

4 At 132, the General Court then said you can have

5 a default settlement at par which is viable.

6 At 134, they explain that how the bilateral

7 negotiations would interact with that. They said at the

8 bottom of page 18, {RC-J5/16/18} recital 134:

9 "The view might reasonably be taken that no such

10 assurance would be available in a system operating

11 without a MIF, and that, therefore, the passing on to

12 merchants of an interchange fee accepted bilaterally

13 would be likely to affect the competitive position of

14 the acquiring bank in question."

15 So what they are suggesting is that to the extent

16 that there would be bilateral negotiation it would

17 quickly lead to a position where you had a default

18 settlement at par in practice.

19 At 139-141 at page 19, {RC-J5/16/19} the

20 General Court made some observations on the distinction

21 between object and effect and it hints perhaps that it

22 is possible to think of the MIF if it is a price setting

23 function as being an object infringement, they say

24 however at 141 insofar as the Commission did not

25 expressly rely on there being a restriction of

1 competition by object then it should be only assessed on
2 the basis of its effect which involves looking at a
3 counterfactual.
4 At page 20, {RC-J5/16/20} paragraph 143, it had been
5 acknowledged by *Mastercard*:
6 "... that the MIF sets a floor for the MSC and in so
7 far as the Commission [therefore] was legitimately
8 entitled to find that a *Mastercard* system operating
9 without a MIF would remain economically viable, it
10 [followed] that the MIF has effects restrictive of
11 competition. By comparison with an acquiring market
12 operating without them, the MIF limits the pressure
13 which merchants can exert on acquiring banks when
14 negotiating the MSC by reducing the possibility of
15 prices dropping below a certain threshold."
16 The General Court was not at that stage endorsing
17 some sort of hypothetical thought experiment as to
18 whether or not there might be other arrangements out
19 there which would not violate Article 101(1). Having
20 identified that the system could operate with par
21 settlement, it then said the restriction here is the
22 setting of the MIF, what does the world look like
23 without the setting of the MIF? Answer: the MSCs will
24 be lower and you remove that competitive constraint on
25 the price negotiation between acquirers and merchants.

1 So that was their reasoning. They did not get into
2 flights of fancy about what particular arrangements
3 could conceivably be put in place by the card schemes if
4 it were found to be a restriction.
5 That I think there is next point I just need to
6 cover off is recital 180. There is obviously detail
7 here that A, the Tribunal is familiar with; and B, I may
8 need to come back to. But what I am trying to do is
9 clear the decks on the regulatory and legal history so
10 that I do not necessarily have to come back to it in
11 closing.
12 Page 24, {RC-J5/16/24} recital 180, the argument was
13 rejected that the Commission had somehow wrongly failed
14 to take into account any constraint exercised by other
15 payment methods and they rejected the consideration that
16 the Commission -- the allegation, sorry, that the
17 Commission failed to take into account the two-sided
18 nature of the market in question. They said:
19 "Thus in essence the applicants state that the MIF
20 enables the operation of the *Mastercard* system to be
21 optimised by financing expenditure intended to encourage
22 cardholder acceptance and use."
23 Pausing there, that is pretty much the thrust of the
24 argument from the defendants in this case.
25 "They deduce from this it's not in the interests of

1 the banks to set a MIF in an excessive rate and moreover
2 that merchants benefit from the MIF."
3 Commission's response to all that, 182, top of
4 page 25, {RC-J5/16/25} was such criticisms have no
5 relevance in the context of a plea relating to
6 infringement Article 81(1) in that they entail
7 a weighing up of the restrictive effects of the MIF on
8 competition legitimately established by the Commission
9 with any economic advantages that may ensue. In short,
10 that is within the framework of Article 101(3) that that
11 takes effect and as I have repeatedly said, that is
12 a Trial 3 issue.
13 That was reinforced at recital 192, page 26,
14 {RC-J5/16/26} where the General Court pointed out that
15 the Commission in the *VISA II* decision had also treated
16 efficiencies as being an Article 101(3) issue. The
17 balance of the system argument was therefore dealt with
18 in this context as part of the Article 101(3) analysis
19 and that starts at pages 28-29. {RC-J5/16/28-29} I do
20 not need to go through that in detail; it is simply to
21 show you where the General Court was taking it into
22 account.
23 Finally, at page 33, {RC-J5/16/33} recitals 242 to
24 246, the General Court rejected the suggestion from
25 *Mastercard* that the fact of its IPO meant that it was

1 essentially free in one leap from the confines of EU
2 Competition Law.
3 That then, at pretty breakneck speed, was the
4 General Court's decision.
5 As the Tribunal is aware, it went to the Court of
6 Justice, that is bundle {RC-J5/22/1}. Could we turn,
7 please, to page 16, {RC-J5/22/16} paragraph 76 of the
8 court's judgment.
9 The court here found that:
10 "... it is apparent from the foregoing that the
11 General Court correctly found that, when those decisions
12 are taken, those undertakings intend or at least agree
13 to coordinate their conduct by means of those decisions
14 and that their collective interests coincide with those
15 taken into account when those decisions are adopted."
16 So again, notwithstanding the IPO, notwithstanding
17 the rate setting by a single entity, it is still
18 a collective co-ordination of the MIF.
19 The second substantive issue was objective
20 necessity. That was then addressed at paragraphs 89-91
21 at page 18. {RC-J5/22/18}
22 88-91 sets out the test to be applied which is in
23 substantially the same terms as both the Commission and
24 the General Court.
25 The response to that legal test here is then dealt

1 with at paragraphs 92-94, page 19. {RC-J5/22/19} Please
2 could I invite the Tribunal to read those paragraphs.
3 THE PRESIDENT: Of course. (Pause)
4 MR BEAL: At page 21, {RC-J5/22/21} recital 109, the court
5 then recognised that the Commission could rely on the
6 existence of realistic alternatives that are less
7 restrictive of competition than the restriction at
8 issue, and at 111 it recognised that the counterfactual
9 hypothesis put forward by the Commission could be taken
10 into account in the examination of objective necessity.
11 At page 22, {RC-J5/22/22} recital 113, the court
12 upheld the General Court's finding that the MIF was not
13 objectively necessary to the operation of the *Mastercard*
14 system.
15 Now, the next appeal point was the challenge to the
16 findings on effect, the restriction of competition by
17 effect and the test for this is dealt with at paragraphs
18 161-164 at page 29. Please would the Tribunal read
19 161-164. {RC-J5/22/29}.
20 THE PRESIDENT: Yes, of course. (Pause)
21 MR BEAL: In this case, page 30, {RC-J5/22/30}
22 paragraph 167, the Court of Justice found that the
23 General Court had erred by simply assuming that the same
24 counterfactual could be applied for objective necessity
25 which was concerned with viability to the question of

1 counterfactual analysis, namely to what extent will
2 things change in the counterfactual. Therefore they
3 found that the General Court had made an error of law.
4 As is *OFT*en the way, the Court of Justice was
5 nonetheless prepared to make its own decision on the
6 uncontested facts as had been found and that is found at
7 paragraphs 172-173.
8 They found that a prohibition on ex-post pricing
9 would be economically viable and plausible and indeed it
10 would be likely. No suggestion had been made by
11 *Mastercard* that it would let its system collapse rather
12 than introducing such a rule.
13 At paragraph 180, top of page 32, please,
14 {RC-J5/22/32} the court upheld the General Court's
15 approach to the treatment of the two-sided nature of the
16 market, recognising that it was in the context of
17 Article 101(3) that that analysis fell to be conducted.
18 At paragraph 181, they talked of the need for the
19 question of economic advantage to be dealt with only in
20 the context of Article 101(3).
21 That point is also reiterated at paragraph 231,
22 page 39 {RC-J5/22/39} and so there was no error of law
23 in dealing with balance to the system, see
24 paragraph 233, only at the stage of Article 101(3).
25 At paragraph 238, page 40, {RC-J5/22/40} the

1 Court of Justice concluded that the General Court had
2 not ignored the two-sided market, but at paragraph 242,
3 when dealing with the question of article 81(3) they
4 said that:
5 "The question whether the advantages derived from
6 the measure at issue are of such a character as to
7 compensate for the disadvantages resulting therefrom."
8 So that was the question, this is in the context of
9 the Article 101(3) analysis.
10 But even there, so even when we are in the Trial 3
11 issue, what the court found was:
12 "... where, as in the present case, restrictive
13 effects have been found on only one [side] of a
14 two-sided system, the advantages flowing from the
15 restrictive measure on a separate but connected market
16 also associated with that system cannot, in themselves,
17 be of such a character as to compensate for the
18 disadvantages resulting from that measure in the absence
19 of any proof of the existence of appreciable objective
20 advantages attributable to that measure in the relevant
21 market ..."
22 So it is no good pointing to benefits in the issuing
23 market if you are not also able to point to tangible
24 benefits in the acquiring market and here that was why
25 the exemption decision was correct: there was no

1 exemption available here and the appeal against the
2 failure to give an exemption was therefore dismissed.
3 So even if we do get into Article 101(3) analysis,
4 which is not for today or indeed this trial, in any
5 event, we say the defendants have real problems showing
6 appreciable advantages on the acquiring side of the
7 market. If this is all about preferring issuing
8 banks -- issuing banks' interest to anyone else's, and
9 it is, then that provides no answer to the exemption
10 issue either.
11 Again, that was a whistlestop tour through the
12 Court of Justice judgment but I am conscious that this
13 Tribunal is very familiar with it and I am sorry to have
14 to weary you with looking at it yet again.
15 Can we move on to some decisions that may or may not
16 be quite as familiar. The first is the *VISA I*
17 Commitments Decision from December 2010. This is in
18 bundle {J5/14.8/1} starting at page 1, but if we could
19 turn please to page 5, that is {RC-J5/14.8/5}.
20 This Commitments Decision, we are at recital 18,
21 records that:
22 "... the Commission took the preliminary view that
23 Visa Europe has a strong position on the relevant
24 markets in terms of its membership network ..."
25 At recitals 20 through to 22, which start at page 5

1 and span the page, the Commission identifies competition
2 concerns. Please would you read recitals 20 through to
3 22. {RC-J5/14.8/5-6}.
4 THE PRESIDENT: Next page, please.
5 MR BEAL: The commitments are then dealt with at recital 25
6 and they proposed an immediate consumer debit payment
7 cap at 0.2% and that essentially was the reduction in
8 MIFs for consumer debits to that. There were then also
9 some transparency measures dealt with in recital 26
10 where essentially Visa was being encouraged to promote
11 non-blended pricing.
12 The position was reserved in relation to HACR and
13 cross-border acquiring, one sees that at pages 12-13
14 {RC-J5/14.8/12-13} at recitals 47 through to 50. In
15 short, in recital 48 it says:
16 "The Commission identified the HACR and the NDR
17 [non-discrimination rule] as rules that reinforce the
18 restrictive effect of the MIFs ... In the context of
19 commitments on immediate debit MIFs, it is not necessary
20 to require the abolition of [those] ... The Commission
21 will be free to further investigate [those]"
22 Essentially in due course and at the bottom of
23 recital 49, page 13, {RC-J5/14.8/13} it said:
24 "As regards the obligation for a cross-border
25 acquirer to pay the MIF of the place of the transaction,

1 the Commission has not investigated that point fully and
2 reserves its right to investigate it further in the
3 future."
4 So that is putting that on hold.
5 The next decision was the *VISA II*
6 Commitments Decision, that was taken in February 2014.
7 One finds this in bundle {RC-J5/20/4}, starting, please,
8 at page 4. Recitals 2 to 4 confirm the provisional view
9 that the Commission took that setting MIF for credit
10 cards and inter-regionals as well as the rules on
11 cross-border acquiring infringed Article 101(1) and it
12 makes reference to a Statement of Objections and
13 a supplemental Statement of Objections that I do not
14 have time to take the Tribunal to now that but which
15 I may need to explore with some of the witnesses and
16 which at some point I will have to go through, which
17 does not fill me with any more enthusiasm than I suspect
18 it does the Tribunal.
19 The reason for that is they are very substantial
20 documents but they have quite a lot of meat of the
21 Commission's reasoning. When you get a Commitments
22 Decision, as we saw yesterday, it is a short form
23 decision that reflects the fact that there is
24 a collaborative process with the person who is willing
25 to commit to a certain course of action and you have my

1 submissions from yesterday on the legal effect of that.
2 MR TIDSWELL: At this time, can I come back to that with
3 apologies, going backwards a bit on it, but just
4 reflecting on the points you made, I want to make sure
5 I understood what you were saying about that because
6 I think your proposition was that in relation to
7 commitments, it was in some circumstances not open to
8 a court to find that there was not a breach of
9 article 101.
10 MR BEAL: Yes.
11 MR TIDSWELL: Obviously in *Canal +* there is the particular
12 effects that the General Court is said to be undermining
13 the commitments because it is effectively ordering that
14 a third party can do something which the commitments
15 prohibit.
16 MR BEAL: Yes.
17 MR TIDSWELL: I was not completely sure. When you come to
18 these, what you said the effect of the principle is, and
19 it may be that is why we need to get into the Statement
20 of Objections. But just at a sort of high level, are
21 you saying that -- what is it that you are saying we are
22 not able to depart from here in terms of if you like
23 relief for the defendants as opposed to the other way
24 round?
25 MR BEAL: Yes, of course. What the national court could not

1 do is rule that there is a restriction of competition
2 but the exemptable level is higher than the level of the
3 commitment that has been given. So they could not say
4 looking at the pros and cons, efficiencies and so on and
5 recognising if there is one, that there is an
6 appreciable benefit on the acquiring side of the market,
7 we think the proper rate is 0.5%.
8 So that could not be an outcome. Why? Because you
9 would be requiring -- endorsing really the suggestion
10 that the card scheme could then charge 0.5% and that
11 would run counter to the level of the commitment MIF
12 here.
13 In contrast, it is open to this court to find that
14 there has been a restriction of competition and it is
15 not capable of an exemption because that is clear from
16 the *Gasorba* case and *Canal +*.
17 Where *Canal +* went slightly further than *Gasorba* was
18 to say this court could not make a declaration that
19 there was no infringement of article 101 whatsoever
20 because it is a necessary premise of the
21 Commitments Decision that there has been restriction of
22 competition and it is a restriction of competition for
23 the reasons given in more detail in the Statement of
24 Objections and the supplemental Statement of Objections,
25 therefore you are stuck with a restriction and then it

1 is up to you. If you wanted to say that the whole thing
2 was unlawful, you can go that step further and say there
3 is no legitimate exemptable level.
4 MR TIDSWELL: This *VISA II* I think is inter-regionals; is
5 that right?
6 MR BEAL: It is, inter-regionals and also credit cards
7 I think.
8 MR TIDSWELL: Yes, but just for the purposes of just this
9 dialogue, so it is the subject of an issue, subject of
10 issue 4?
11 MR BEAL: Let me just check.
12 MR TIDSWELL: Is that right? Tell me if I am going down the
13 wrong path on this.
14 MR BEAL: Issue 4 is inter-regionals.
15 MR TIDSWELL: Yes. So are you saying that if, for example,
16 we were to reach the conclusion that issue 4 was decided
17 in the defendant's favour and maybe that is because we
18 accepted the counterfactual arguments in relation to
19 that, are you saying that is not open to us because of
20 the Commitments Decision?
21 MR BEAL: It is not open to you for the period covered by
22 this Commitments Decision.
23 MR TIDSWELL: Yes, I understand.
24 MR BEAL: That is the submission.
25 MR TIDSWELL: Thank you.

1 MR BEAL: We say that that is vouchsafed by the case law
2 I took you to yesterday.
3 Visa obviously make a contrary submission in their
4 opening submissions. They say: well, this is somehow
5 endorsed an approach of setting a MIF at that level.
6 They have not engaged at all, I am afraid, with the
7 *Gasorba* and the *Canal +* case, *Mastercard*'s submissions
8 do engage with that.
9 *Mastercard* do recognise that case law but then seek
10 to essentially say: well, it does mean that we are
11 entitled to the benefit of this decision and I took you
12 to the passages yesterday that said there is no
13 legitimate expectation that a national court will not
14 strike down something as being anti-competitive simply
15 because a Commitments Decision has been entered into.
16 MR TIDSWELL: Yes.
17 MR BEAL: I described it as a one-way street. I may have
18 wrongly described it as ratchet, thinking about it
19 overnight, because I am not sure the ratchet goes the
20 right way. But if you imagine a negative ratchet, that
21 is what it would be.
22 MR TIDSWELL: Yes, that is helpful, thank you.
23 MR BEAL: So this case was -- in terms of the subject matter
24 of the decision I just need to clarify that, that is at
25 page 4, recital 1. {RC-J5/20/4} It is the setting of

1 multi-lateral interchange fees applied to inter-regional
2 certain domestic and intra Visa non-EEA point of sale
3 transactions, plus the rules relating to cross-border
4 acquiring. Those are the MIFs in issue and the proposed
5 commitments were then set out at -- sorry, before I get
6 there. I am not sure I took you to page 6 and the
7 relevant market, recitals 17-18, {RC-J5/20/6}.
8 Commission concluded that neither acquiring nor issuing
9 of cards was sufficiently substitutable for any
10 equivalent services for other means of payment, in
11 particular cash, cheques, direct debits etc.
12 So it was simply the acquiring market for card
13 payments.
14 At recital 23, the Commission concluded that the
15 MIFs represented an object restriction. Please could
16 I invite the Tribunal to read recitals 23 and 24.
17 {RC-J5/20/7-8}. (Pause)
18 So some core points emerging there on some core
19 themes. Firstly, the MIF inflated the base of the MSC
20 charge, the cost element common to all acquirers. The
21 MIF was not objectively necessary and that restrictive
22 effect was reinforced by the HACR, the NDR and the
23 segmentation of national markets by the CBAR.
24 Recitals 28 to 29 at page 9 {RC-J5/20/9} then set
25 out the commitments that are given and in recital 30 we

1 see that caps are to be introduced, 0.3% credit cap and
2 a 0.2% debit cap, so that presages the rates set by the
3 IFR.
4 In recital 31, Visa undertook to implement
5 international MIFs at the level agreed in the Commission
6 decision pursuant to Article 9 with third parties who
7 are responsible for setting international MIFs.
8 So this was Visa undertaking to enter into
9 contractual arrangements with the people it needed to
10 enter into in order to restrict the level of the
11 inter-regional MIF. One of the arguments that is raised
12 by *Visa I*s: how on earth in the counterfactual can you
13 make us agree anything with *Visa I*nc if *Visa I*nc are
14 settling the inter-regional fee? The answer is they are
15 willing to offer undertakings to enter into agreements
16 to make it happen on the face of this decision. That is
17 one of the answers, I have others.
18 Recital 32 then says Visa commits to amend its rules
19 on cross-border acquiring to allow cross-border
20 acquirers to offer either the domestic debit MIF or the
21 domestic credit MIF if applicable in the location of the
22 merchant or a MIF rate of 0.2%. So it is offering the
23 lowest of the domestic MIF rate or the intra-EEA MIF
24 rate that they have already agreed to do effectively.
25 Then over the page, top of page 10, {RC-J5/20/10}

1 they agree to introduce a rule which requires acquirers
2 to offer merchants MIF plus plus basis pricing. That
3 goes to the emergence of IC plus plus pricing as part of
4 the legal and economic context of this regime. This is
5 something that *Visa I*s being required to make acquirers
6 offer.
7 The next decision in time was in 2019, it is the
8 *Mastercard CAR* decision, it is at {RC-J5/30/9}, starting
9 at page 9 and we see in recital 25, *Mastercard*'s
10 cross-border acquiring rules are summarised. I suspect
11 the Tribunal is very familiar with the impact of those
12 rules but it is dealt with then at page 13, paragraphs
13 45-46. Please could I invite the Tribunal to read those
14 recitals. {RC-J5/30/13}.
15 THE PRESIDENT: Of course. (Pause)
16 Yes.
17 MR BEAL: Top of page 14, {RC-J5/30/14} the Commission
18 finds that because both cards are "must take" cards, ie
19 both Visa and *Mastercard*'s cards are "must take",
20 merchants cannot threaten simply to move to another
21 scheme.
22 At recitals 58-59, page 16, {RC-J5/30/16} the
23 Commission looked at the principles governing object
24 restriction and in a nutshell they also took into
25 account the fundamental problem with segmentation of the

1 single market international markets and that was
2 relevant to the CAR analysis and then at 62-64 at
3 page 17, {RC-J5/30/17} we find the Commission's
4 conclusions on restriction of competition by object.
5 Please would the Tribunal read 62-64. (Pause)
6 Recital 66 then says the actual purpose of the
7 cross-border acquiring rule was to shield the domestic
8 MIFs in individual Member States from cross-border
9 competition. That is an old-fashioned restriction of
10 parallel imports analysis.
11 For good measure, page 19, {RC-J5/30/19} recital
12 76, cross-border acquiring rules were not objectively
13 necessary for the operation of the scheme.
14 Finally page 21, {RC-J5/30/21} recital 85, did not
15 meet the conditions for exemption. So this was
16 a straightforward infringement decision by the
17 Commission. So I think actually technically it was
18 a settlement decision, I am sorry, I have got that
19 wrong, because they offered a settlement. They went
20 quietly, in the vernacular, rather than having a fully
21 contested issue on it.
22 The next series of decisions -- well, there is two
23 further decisions, two Commitments Decisions, one for
24 *Mastercard* which is called *Mastercard* II and one for
25 Visa which is called the Visa Commitments Decision II so

1 the *Mastercard* II decision from 2019 is at bundle
2 {RC-J5/31/8}, starting, please, at page 8.
3 Recital 25 noted in terms at the top of page --
4 sorry, bottom of page {RC-J5/31/8}:
5 "... the Commission also took the preliminary view
6 that card payments were characterised by important
7 network effects and that *Mastercard* had an important
8 merchant acceptance network in the EEA, comparable in
9 size of that of Visa but significantly larger than that
10 of other card payments schemes such as American Express,
11 China Union Pay, Japan Credit Bureau and
12 Diners/Discover."
13 {RC-J5/31/9} at recital 28 then set out the rules on
14 inter-regional transactions and concluded that bilateral
15 agreements covered only a very insignificant share.
16 {RC-J5/31/10}, recital 31, the Commission had also
17 taken the preliminary view that those rules constituted
18 a decision by an association or undertakings that had as
19 its object and effects an appreciable restriction of
20 competition in the market.
21 The conclusions supporting that are then dealt with
22 at recitals 33 through to 37. Please could I invite the
23 Tribunal to read 33-37. {RC-J5/31/10-11}. (Pause)
24 At 38, the Commission took the preliminary view that
25 *Mastercard*'s rules were not objectively necessary, at

1 page 12, {RC-J5/31/12} recital 40, the Commission had
2 taken the preliminary view that the inter-regional MIFs
3 did not meet the requirements for an exemption.
4 However, there were proposed commitments, they are
5 set out at page 13, {RC-J5/31/13} recital 47 through to
6 54 and they capped at certain rates the level of
7 inter-regional MIFs that were going to be charged.
8 Now, Visa's Commitments Decision starts at tab 32,
9 page 1 {RC-J5/32/1} and it is in substantially the same
10 terms. If I could cut to the chase perhaps, page 10,
11 {RC-J5/32/10} paragraphs 32-33, we find a finding that
12 Visa was still an association of undertakings
13 notwithstanding the 2017 IPO.
14 Then at recitals 34 through to 38, {RC-J5/32/11} on
15 page 11 and then overleaf to recital 39 on page 12,
16 {RC-J5/32/12} there is quite a long section dealing with
17 why these rules were both an object and effect
18 restriction and why there was a contributory role played
19 by the HACR.
20 Please would you read 34 through to 39.
21 {RC-J5/32/11-12}. (Pause)
22 THE PRESIDENT: Yes.
23 MR BEAL: Turning over the page to page 14, {RC-J5/32/14}
24 recital 51 recognised that Visa was committing to an
25 anti-circumvention undertaking, *Mastercard* had given

1 a similar one and this Commitments Decision, see
2 recital 54, remains in force for a period of five years
3 and six months after notification, so it runs through
4 essentially to -- I think the end of it is going to be
5 the end of September this year. So it is still binding.
6 Any counterfactual analysis will therefore have to
7 take into account that *Visa I*s willing to sign up, for
8 example, to the type of anti-circumvention undertaking
9 that it has given to the European Commission.
10 That is all I need to say at this stage on the
11 Commission's decisions.
12 Can I turn, please, to the UK's decisions and the
13 first of those is this Tribunal's decision in the
14 *Sainsbury's* case. Given the familiarity of this
15 Tribunal with that decision can I just make four points
16 on it and not turn it up.
17 First, it is true that the Competition Appeal
18 Tribunal found that MIFs were not an object restriction.
19 My submission on that is simply that the economic and
20 legal framework has moved on from that time and we now
21 have the benefit of for example cases like *Royal Antwerp*
22 and the recommendation pricing cases where a very
23 different view, if I may say so, is taken of situations
24 where you have an association of undertakings that are
25 putting out there some sort of recommendation for price

1 and that being then followed by the association members
2 and that representing an object restriction. So things
3 have moved on substantially from the *VISA II* decision
4 days in 2002.
5 We have seen also of course that Visa has been
6 required to introduce IC plus plus pricing which has the
7 automatic transition of MIFs into MSCs, so that also
8 changes things fairly substantially.
9 The second point that was made by the Competition
10 Appeal Tribunal in that case was that the counterfactual
11 should involve bilateral negotiations on the MIF. That
12 was obviously overturned by the Court of Appeal as
13 upheld by the Supreme Court.
14 The third point that the CAT made, which we
15 respectfully endorse, was that there was no real risk of
16 *Mastercard* losing significant market share to Amex in
17 that case.
18 The fourth point, see paragraph 266 of the decision,
19 was that detailed findings were made that the MIF
20 represented a restriction of competition by effect.
21 The fifth and final point for present purposes was
22 the finding at paragraph 279 that the scheme would work
23 perfectly well without the UK MIF, therefore the test
24 for objective necessity was not met.
25 I do not need to go any of the exemption analysis

1 because that is not for now.

2 The next decision is that of the Court of Appeal in

3 *Sainsbury's*.

4 THE PRESIDENT: Just pausing there. We may have to traverse

5 probably in closing, the distinction between fact and

6 law, but it strikes me, without having thought about it

7 very long, that most of what was said in *Sainsbury's* was

8 on the facts, ie rather than the law side. So to that

9 extent it is interesting but --

10 MR BEAL: Yes, I mean.

11 THE PRESIDENT: Not quite irrelevant, but interesting as

12 perhaps informing the factual evidence here.

13 MR BEAL: Yes, the counterfactual was never going to be

14 a pure question of law, in my respectful submission

15 because it involves an evaluative judgment

16 multifactorially on what would happen in a hypothetical.

17 THE PRESIDENT: Yes, it is a very peculiar area of fact

18 because it is not fact.

19 MR BEAL: It is not.

20 THE PRESIDENT: But it is informed by fact, it is not

21 informed by law.

22 MR BEAL: I mean, there is case law which we have not

23 burdened you with yet, which we may need to. I think it

24 was Bingham LJ in a counterfactual scenario said you

25 have to be quite careful with factual evidence in

1 a counterfactual because by definition it is not
2 factual --
3 THE PRESIDENT: Yes.
4 MR BEAL: -- and it is necessarily speculative and we can
5 all speculate about what might have happened. There is
6 an entire book called "What If", which is a history
7 analysis of what might have happened if various emperors
8 of Rome had not come to the throne. Is an economist
9 better placed than this Tribunal to judge what might
10 happen in the commercial world in a counterfactual? Am
11 I better placed than Mr Kennelly or Ms Tolaney to take
12 a view as to what might happen?
13 The reality is that we will need to look at the
14 economic and legal context and think about realistically
15 what would happen and on the basis of that, work out
16 what the difference is.
17 THE PRESIDENT: Yes. Well, I think the question of whose
18 burden it falls on is an easy one. It is much more the
19 process by which one obtains the answer and what the
20 nature of previous answers is and I suppose the
21 distinction I have got in my mind is at the moment it is
22 not law, it is a peculiar form of fact, very peculiar
23 because it does not actually involve fact and we may
24 need to traverse that a little more but of course it
25 goes to the weight that we attach to a great deal of the

1 material that has been traversed by you very helpfully
2 over the last few hours; namely, one has got an analysis
3 of what is going on in these schemes in various
4 different guises and manifestations, all of which feeds
5 into the assessment including the counterfactual
6 assessment that we make in this case. I leave on one
7 side the debate that you had with Mr Tidswell a moment
8 ago about the extent to which as a matter of law it is
9 a one-way street.
10 Now, I see that as a legal constraint that you are
11 arguing over whatever factual conclusions we might reach
12 otherwise and that is a sort of separate layer but just
13 looking at the matter without that point, it seems to me
14 that we can take decisions like *Sainsbury's* as a useful
15 source material for analysis, but really no more than
16 that.
17 MR BEAL: Certainly the factual findings I respectfully
18 endorse. The reason I am going to go to the
19 Court of Appeal is for the legal analysis.
20 THE PRESIDENT: Yes.
21 MR BEAL: But to the extent that the bilateral
22 counterfactual was not supported in the Court of Appeal,
23 I agree it is irrelevant because that is -- the
24 competing counterfactuals at that stage were either the
25 one that this Tribunal had found or it was a settlement

1 at par, which in that case both Visa and *Mastercard*, by
2 the time of the Supreme Court, recognised that that was
3 the appropriate counterfactual, so there was no factual
4 debate in that sense.
5 There is now a factual debate, you will have my
6 primary submission which I hope I have made -- let me
7 make it clearly -- that the effect of the decisions that
8 we have looked at on Commitments Decisions means that it
9 is not open to the defendants to say there is no
10 restriction of competition from for example the
11 inter-regional MIF.
12 THE PRESIDENT: Yes.
13 MR BEAL: One of the reasons for that is because it is an
14 object restriction. So let me just be clear about that.
15 If we were having a trial where both 101(3) and 101(1)
16 were in issue, there would be more of an issue as to the
17 extent to which it was appropriate to have an exemptable
18 figure below the level given by the commitments and that
19 may be where we end up in Trial 3, but it is not where
20 we are now.
21 THE PRESIDENT: No, but it is not uncontentiously where we
22 are now.
23 MR BEAL: No, I accept that and I have prefaced that by
24 saying it is a submission.
25 THE PRESIDENT: No, you are being absolutely clear. It does

1 mean that how we approach these matters may have to be
2 layered in the sense that we may take an approach, or we
3 will have to think about this, that we will reach a view
4 as to what the correct answer is on a factual including
5 counterfactual analysis and then we apply the law to
6 that and then we see how far it sits with what you say
7 is a constraint on our decision-making and work out
8 whether you are indeed right or whether the schemes are
9 right, that it is not or is a constraint should it
10 matter. So it may be you have to take that sort of
11 approach.
12 MR BEAL: Can I say immediately I wholly endorse, with
13 respect, a belt and braces approach whereby in the event
14 that I am wrong on the object and if you are therefore
15 wrong to find in my favour, there are fallback findings
16 that are made lest that should eventuate and you will
17 appreciate the strategic importance of having everything
18 dealt with in one go.
19 THE PRESIDENT: Yes.
20 MR BEAL: I do not know if that is a convenient moment
21 before I wade into the Court of Appeal in *Sainsbury's* in
22 terms of timings, I have made reasonable progress this
23 morning. I am going to have to go quite quickly through
24 the Court of Appeal in *Sainsbury's* and then
25 Supreme Court and if I may simply give you the bullet

1 point propositions and the paragraph number rather than
2 necessarily trawling through it in the way we have done.
3 THE PRESIDENT: I suspect that is the best course. We will
4 obviously be looking at these decisions again several
5 times.
6 MR BEAL: Then, I will, if I may, just deal with the issues
7 one-by-one, trying to give you a five minute summary for
8 each so I can sit down by 1 o'clock.
9 THE PRESIDENT: That will be very helpful, Mr Beal. We will
10 rise for 10 minutes until a quarter to.
11 (11.37 am)
12 (A short break)
13 (11.53 am)
14 THE PRESIDENT: Mr Beal.
15 MR BEAL: Please may I make some short points about the
16 Court of Appeal's decision in *Sainsbury's*. Firstly, at
17 paragraphs 127-129 the Court of Appeal simply adopted
18 the approach of looking to see whether competition would
19 increase if there was a default settlement at par or
20 zero MIF rather than a positive MIF set by default, so
21 that was the analysis they adopted.
22 At paragraph 161-162 they rejected the death spiral
23 argument and the relevance of considering the effect of
24 competition in the intersystem market, which they found
25 should be conducted at the 101(3) stage rather than

1 here.

2 At paragraphs 171-172 they found that the Court of
3 Justice had indeed ruled that positive MIFs as charged
4 by *Mastercard* would as a matter of law be a restriction
5 of competition given the counterfactual that was
6 identified as the correct one on the facts.

7 There is then a section starting from paragraph 185
8 onwards, where at 185-189 they reach their overall
9 conclusion on the fact that the MIF presented
10 a restriction of competition by effect.

11 At paragraphs 199-200 they dealt succinctly with the
12 objective necessity argument and they recognised that
13 plenty of system schemes exist which have a par
14 settlement rule.

15 Finally they dealt at paragraphs 201-202 with the
16 suggestion that there would be an asymmetrical
17 counterfactual, they recognised that it was not
18 appropriate for Visa and *Mastercard* to complain that
19 each of them would compete with the other one: they
20 would both be subject to the same rules.

21 That, we say, amounts to the core findings there.
22 I will need to go back to that decision in due course
23 because it is obviously an important one.

24 With the Supreme Court decision, I think having
25 reflected on it in the 10 minutes available to me, it

1 may actually be simpler to invite the Tribunal to read
2 some key paragraphs because they are actually quite
3 short.
4 THE PRESIDENT: Sure.
5 MR BEAL: So this is bundle {RC-J5/36/28}, starting, please,
6 at page 28. Paragraphs 87 through to 91 essentially
7 reject the reliance that the schemes were placing on the
8 *Budapest Bank* case. They found it surprising that
9 reliance had been placed on that, they distinguished the
10 type of system that was in question in the *Budapest Bank*
11 case and they say in paragraph 91: for all these reasons
12 in our judgment *Budapest Bank* does not support Visa and
13 *Mastercard*'s case on the restriction issue.
14 Then the key findings we submit are from 93-104. As
15 I say, they are succinct but they are powerful and they
16 are at pages 29-30, please could I invite the Tribunal
17 to read 93 through to 104.
18 THE PRESIDENT: Of course. {RC-J5/36/29-30}
19 (Pause)
20 MR BEAL: That analysis focuses on the mechanism of price
21 setting and the impact of that price setting in the
22 relevant market, which is the acquiring market, and the
23 impact on the Merchant Service Charges paid in the
24 acquiring market to merchant acquirers.
25 So that is the key analysis. We respectfully submit

1 that that key analysis applies with equal force
2 regardless of what the level of the MIF is or what the
3 type of MIF is so long as the same overall price setting
4 structure is adopted. In other words, it does not
5 matter that you have a commercial MIF, it does not
6 matter that you have an inter-regional MIF, it does not
7 matter that you have a domestic credit or debit MIF.
8 What matters is the overall mechanism by which that
9 price is set is the same and the effect of setting that
10 price in each case is going to be to set a floor for the
11 MSC. Those are the key facts coupled with, in my
12 respectful submission, the fact that the Supreme Court
13 is able to express itself with such economy, strongly
14 makes one think that the arrangements in place must be
15 by their nature such as to be harmful to competition in
16 terms of the competitive process and therefore we say
17 that reasoning is equally capable of supporting
18 a finding by object.
19 Now in contrast, at page 61, paragraph 172,
20 {RC-J5/36/61} the Supreme Court turns its attention to
21 the benefits, disbenefits, two-sided market bringing
22 balance to the force arguments that the card schemes run
23 and that is in the context of Article 101(3). So not
24 for today, it will be for some point in 2025.
25 That concludes my archeological trawl through the

1 regulatory decisions and the case law.
2 It brings me happily on to the speedier, pacier
3 section, I hope, which is dealing with the issues one by
4 one starting with market definition. This Tribunal will
5 be familiar with the approach of the Tribunal in
6 *Comparethemarket* and the fact that you have a two
7 aspects to a market does not mean that the focal point
8 of a particular market analysis should be both sides.
9 You have seen the decisions that say this is not a joint
10 product and you have seen the consistent approach of the
11 Commission and the court focusing on the acquiring side
12 of the market because that is where the anti-competitive
13 object and effect is found because it is the impact on
14 the MSCs for merchants. It is the inability of
15 merchants to do anything about the price that is set for
16 them that is the problem.
17 Here, as I understand it, the experts do agree that
18 the focus should be primarily on the acquiring market
19 and that it is national in scope, so happily the ambit
20 of dispute is very much reduced.
21 Dr Niels seeks to, I think -- and I may be wrong
22 and, if so, I apologise -- but I think he is trying to
23 broaden the market rather subtly to say: oh, well, of
24 course you have to take into account other payment
25 options. That has consistently been rejected by the

1 Commission and the courts as a definition for the
2 definition of the market purposes and, therefore, it is
3 important, we say, to focus on the right market which is
4 the acquiring market and the counterfactual must
5 therefore be appraised in the context of that market.
6 What you cannot do in a counterfactual is start looking
7 at what would happen in a different market because then
8 you are not comparing like with like.
9 There has also, with respect, been I think a slight
10 misunderstanding as to the role of American Express
11 here. Visa seeks to suggest that it is common ground
12 I think that Amex must be in the acquiring market. With
13 the greatest of respect, that is not quite right. Amex
14 acquires its own transactions; it is not an acquirer.
15 Now, to the extent that merchant acquirers do offer
16 American Express services as an intermediary, then that
17 might have some conceivable relevance, but it is wrong
18 to suggest, with respect, that American Express has
19 a well-established network in Europe such that it
20 becomes somehow a substitute for the Visa and *Mastercard*
21 cards, that clearly would not be right.
22 The market figures, for example, for Amex show that
23 even in the commercial card segment, which is not the
24 market in question because everyone agrees we should not
25 split the particular market, Amex's share was only 5% in

1 2016, see bundle {RC-J5/27/129}. There is also evidence
2 from Geraldine Burke -- yes, that is being flashed up on
3 the screen, the relevant diagram is on the right-hand
4 side of the page, share of value of card payments on the
5 chart, Amex is shown in green and it is 5%.
6 So we also know from the evidence both of
7 Geraldine Burke, at paragraph 14 of her witness
8 statement, she is not being required to attend for
9 cross-examination, so this must be accepted, that Amex
10 has even less of a role in Ireland and that is confirmed
11 by Ms Suttle at paragraph 51 of her statement.
12 So we do say that the only reason for focusing on
13 anything other than the acquiring market must be to try
14 and, with respect, muddy the waters. You only focus on
15 the issuing market if you want to try and rely on
16 something that would be a justification for
17 a restriction and that is not for this trial, it is for
18 Trial 3.
19 The PSR evidence is particularly helpful here
20 because it confirms that the relevant market is the
21 payment card market, the importance of the payment card
22 market, and the inappropriateness, I suppose, of
23 including within that market for example cash or giro
24 transfers.
25 That is issue 1. Issue 2: who sets the Visa

1 inter-regional MIFs? Well, I should point out I think
2 we thought issue 2.6 was still in issue but *Mastercard*
3 has made no submissions on it, so if it has gone you can
4 ignore our written opening on that because it is no
5 longer a written issue. Visa however has accepted in
6 correspondence that the findings in June preclude any
7 suggestion that rate-setting by *Visa I*nc or its absence
8 as a defendant to some of the claims means that there
9 was not somehow an agreement or concerted practice.
10 That is a rather inelegant way of saying the fact that
11 *Visa I*nc sets the inter-regional rate for the Visa
12 scheme does not mean that you cannot have a finding of
13 restriction here. That has been accepted in
14 correspondence, the relevant reference, I do not need to
15 turn it up, is {RC-N/146/2}, paragraph 6.1.
16 The essential point was made in June at
17 paragraphs 106 and 107, and again we went to this
18 yesterday so I do not need to turn it back up, that it
19 was not open to the schemes to say that a particular
20 entity set the MIF rate meant that it was a unilateral
21 act falling outside the scope of Article 101(1). That
22 has driven the acceptance by Visa that they cannot run
23 the unilateral argument based on *Visa I*nc setting the
24 rate. With respect, that is right. The simple point
25 that was made was you still have a collaborative

1 process, a co-ordination of price, even if a third party
2 is setting that price, so long as you all agree, as
3 members of a scheme, to follow that price. And that is
4 enough by itself.
5 There is then something of an issue about
6 a particular entity which used to be called VESI and is
7 now called Visa Europe Services LLC. My learned friend
8 Mr Kennelly in his opening says this does not make
9 a blind bit of difference because we have accepted it is
10 a single economic entity so why are you bothered about
11 it? The answer to that is we accept -- if it is
12 accepted that it is a single economic entity it does not
13 actually matter. But what they wanted was an acceptance
14 that we should simply not proceed with our claim against
15 that entity, which is a very different kettle of fish,
16 and I am afraid therefore this issue has remained as
17 a result of an inability of the parties to agree that it
18 is inappropriate to bring the claim against this
19 particular entity.
20 In terms of the position of that particular entity,
21 if we could turn please in {RC-J4/22/25}, we see at
22 recital 40 there a paragraph that deals with Visa Europe
23 and its wholly-owned subsidiary Visa Europe
24 Services Inc, which became the LLP in question. That
25 was, at the stage of this particular decision,

1 a Delaware company and it was said that it was:
2 "An operating company employing all staff and owning
3 all assets within the Visa Europe territory."
4 That implies that it was actively involved in the
5 management of the Visa organisation in Europe because it
6 owns all the assets and it employs all the people and it
7 will be the assets and the people who are employed in
8 dealing with the Visa scheme.
9 So that is why we say it is appropriate to include
10 it as a defendant and that will be explored in more
11 detail with one of the Visa witnesses in due course.
12 But in any event, as we say, it is sufficient for
13 this purpose that the Visa organisation as a whole is
14 a single economic entity and it matters not a jot who
15 actually set the rate and it is -- for example, the
16 LIBOR example I gave in opening yesterday.
17 Right, that is what I want it say on issue 2.
18 Moving on to issues 3, 4 and 5. There are some
19 common themes and I will deal with those briefly. One
20 common theme is restriction by object. You have heard
21 my legal submissions on restriction by object. All
22 I want to do now, if I may, is give you some references
23 without turning up the documents to places where Visa's
24 MIF has been found to be a restriction by object. That
25 is the Statement of Objections in April 2009 issued to

1 Visa, at paragraphs 247-253, which the Tribunal in due
2 course will be able to see at {RC-J4/22/86}.
3 The next decision is the Visa Commitments Decision,
4 from 2010, paragraph 21, which is {RC-J5/14.8/6} and
5 I think we did look at that one earlier.
6 Thirdly, the 30 July 2012 supplemental Statement of
7 Objections to Visa, where object is dealt with at
8 paragraphs 456-492 and that is in {RC-J4/31/146}.
9 Next up, the second Visa Commitments Decision, which
10 again we have looked at recital 23, page {RC-J5/20/7}.
11 Next up, a document we haven't been to and it is
12 a very substantial document, unfortunately, so at some
13 point I will need to turn to it, but it is the
14 supplemental Statement of Objections to Visa
15 from August 2017. Object is dealt with lengthily at
16 paragraphs 247-312. That starts at {RC-J4/80/71}.
17 Finally, the inter-regional decision that the
18 Tribunal has just read, recitals 34-35, noting in the
19 context of inter-regional transactions that the MIF
20 simply amounted to horizontal price fixing. That is
21 {RC-J5/32/11}.
22 Similarly, the Commission has consistently taken the
23 view that *Mastercard*'s default MIF is a restriction by
24 object, again rather laboriously the relevant findings
25 are in the Statement of Objections to *Mastercard* from

1 July 2015, paragraphs 170 through to 229. That is
2 {RC-J3/73/54} and then, secondly, in the inter-regional
3 decision that we have just looked at, at recitals 31-33,
4 again a parallel finding to the Visa Commitments, this
5 amounts to horizontal price fixing, reference
6 {RC-J5/31/10}.
7 The Interchange Fee Regulation at Article 9 has
8 required unblended rates to be set as default and
9 whether, as a result of that or otherwise, there has
10 been a significant growth in the use of IC plus and
11 IC plus plus pricing and we have seen -- I took you to
12 it in opening -- that the Visa rules now require
13 actually for cross-border acquiring a certain approach
14 to be taken to pricing, which you saw.
15 When the MIFs are set therefore the schemes must
16 know that they will be passed on to -- by acquirers to
17 the very large merchants which accounts for the lion's
18 share of the volume. We saw the figures from the PSR
19 saying I think large merchants accounted for about 76%
20 of the market by value. To the extent that that is
21 reflected in IC plus plus pricing, it is an inevitable
22 consequence of the structure of the way that the MIF is
23 set that the MSC will be higher. So whatever you set
24 for the interchange fee is going to be passed on to
25 acquirers, it will be higher for merchants, and that is

1 the inevitable consequence of the overall contractual
2 arrangements and structure. Indeed we will see and hear
3 that is the purpose behind it, that is what they want.
4 They want this chunk of money to be paid via the
5 acquirers to the issuers and indeed they are desperate
6 to keep that flow of funds going.
7 So we say the time has come, realistically, for the
8 mechanism of the MIF per se to be recognised as an
9 object infringement and it would not be a bolt from the
10 blue, for precisely the reason I have been through,
11 which is this would be entirely consistent with all of
12 the reasoning of the Commission over the years. It
13 would also, in our respectful submission, tie in with
14 the approach to object that you see in the pricing
15 recommendation cases that I have referred the Tribunal
16 to where, for example, a circular is issued by an
17 association of car dealers saying, here we think you
18 should be offering these discounts, or a recommendation
19 is put out by the Insurance Association saying, we
20 think, if you want to respond to the industry crisis,
21 you should be looking at premiums at this level, and
22 then, lo and behold, everyone follows that approach and
23 sets prices in that way. That is actually a weaker
24 version of what we have here and each of those cases was
25 found to be a restriction by object.

1 That is all I wanted to say on object.
2 In terms of effect, the test is, of course, whether
3 in the absence of the restrictive arrangement here, the
4 default MIF and its setting as a floor for the MSC,
5 there would have been a greater degree of competition,
6 ie the competitive process would have been less
7 trammelled. For your note, this is dealt with by us in
8 our opening at paragraphs 186 to 198.
9 There is an element to this which amounts to
10 causation, which is if you remove the restrictive
11 element and the dial does not change on the competitive
12 structure, then of course you cannot have a restriction
13 because it means that the restriction exists regardless.
14 If, however, you remove that restriction and the
15 situation does change meaningfully, then you end up with
16 a position where there is a restriction of competition
17 by effect.
18 Here, at the risk of stating the obvious, if you
19 replace a positive MIF with no MIF because you have
20 a par settlement rule you immediately remove the floor
21 to the MSC and, in our submission, that is sufficient to
22 find that there is a restriction by effect of setting
23 the MIF in the first place.
24 That is also supported we say by the Cartes
25 Bancaires decision of the General Court and I do need to

1 briefly turn to this if I may. It is in RC-Q51 starting
2 please at page 12 {RC-Q3/51/12}. That is in bundle Q3,
3 volume 3, page 12.
4 The *Cartes Bancaires* decision concerned arrangements
5 in the French domestic market for the operation of the
6 *Cartes Bancaires* scheme.
7 THE PRESIDENT: I think we have got a different thing now,
8 we have got *Metro Gross Marketing*. It was there.
9 MR BEAL: Let me give the reference again: it is
10 {RC-Q3/51/12}. Yes.
11 THE PRESIDENT: It is now back, I think.
12 MR BEAL: Tab 51, page 12.
13 THE PRESIDENT: Yes.
14 MR BEAL: Could the Tribunal please read paragraphs 81 and
15 82.
16 THE PRESIDENT: Of course. (Pause).
17 Yes.
18 MR BEAL: So of course one takes into account the fact that
19 this is -- the relevant market has two aspects to it, so
20 it is a connected or related market. That is
21 a necessary part of the economic or factual context.
22 But when one turns to page 16, paragraphs 109-111
23 {RC-Q3/51/16}, that does not mean that you slip in to
24 this weighing of pros and cons between different sides
25 of the market.

1 At 109-111, the General Court said, in terms, this
2 method of analysis, particularly with regard to the
3 consideration of the competitive situation which would
4 exist, does not amount to carrying out a review of the
5 pro and anti-competitive effects of the agreement or
6 applying a rule of reason.
7 You simply look to see, 110, and consider the impact
8 of the agreement on the current and potential
9 competition:
10 "The competitive situation in the absence of the
11 agreement, in this case the analysis of the competitive
12 situation in the absence of the measures, aims to
13 determine whether the measures restrict competition that
14 would have existed in their absence.
15 "This concerns, in particular, determining whether,
16 in the absence of the measures in question, the
17 competitive situation would have been different on the
18 relevant market, that is to say whether restrictions on
19 competition would or would not have occurred on this
20 market."
21 So it was looking at the impact of the restrictive
22 measures in this case on the issuing side of the market
23 rather than the acquiring side of the market; see
24 paragraph 112.
25 So what they did in that case was they said: what

1 happens if we remove the surcharges, which were
2 incorporated into the arrangements for issuers? The
3 answer is the issuers would not be paying the surcharges
4 therefore there was a restriction of competition. We
5 have got the opposite issue, which is the price is
6 increased for acquirers on the acquiring side of the
7 market. What impact does that have? If you remove it,
8 answer, MSCs are lower.
9 Then we also see at paragraphs 118-121 at page 17
10 {RC-Q3/51/17}, that the impact of the absence of the
11 measure had to be explored in the market in question,
12 not the related market.
13 So you look at it -- in this case it was for the
14 issuing market, you did not worry about the impact on
15 the intersystem market or the acquiring market. We say
16 that analysis also applies with equal force when it is
17 the other way round.
18 Page 17, paragraphs 124-125, bottom of page 17,
19 flipping over to the top of page 18 {RC-Q3/51/18}, you
20 do not look at the competitive situation of the Cartes
21 Bancaires system on the payment systems market, so
22 whether or not it would be strengthened, weakened, do
23 better, do worse, not relevant.
24 In particular, 125-127 confirms that that sort of
25 weighing of the balance of the competitive edge of the

1 system in question is for Article 101(3), not for
2 Article 101(1).
3 Here we do say that it is the relevant impact in the
4 acquiring market that matters. You have my submission,
5 if you remove the default setting of the MIF, you lower
6 the MSC and that produces a better competitive situation
7 for merchants and acquirers because they are able to
8 negotiate the price fully without having part of the
9 substantial component of the price already
10 pre-negotiated for them by someone else. That, we say,
11 is the vice here.
12 The intellectual exercise is to essentially strip
13 out the contested measure and leave everything else
14 intact and Visa, at paragraph 60 of their opening, seem
15 to accept that proposition. In any event, it is
16 vouchsafed by the *Mastercard* Court of Justice decision
17 at paragraphs 167-169.
18 That has an important impact, of course, because you
19 then need to keep in place those parts of the scheme,
20 such as the default settlement principle, ie you have
21 a settlement under the scheme which is otherwise not
22 impugned.
23 In contrast, if a measure is impugned then we have
24 a live issue between the parties as to whether or not
25 you need to strip that out. So something like the

1 Honour All Cards Rule, for example, in our submission,
2 because we have impugned it and because we say it
3 produces anti-competitive effects or reinforces an
4 anti-competitive effect, and because we say it has in
5 its own intrinsic mechanism an anti-competitive object,
6 that needs to be stripped out from the counterfactual
7 analysis. But if we are wrong on that we will deal with
8 the counterfactual on both premises, ie strip it out or
9 keep it in. I add only that if the HACR is stripped
10 out, then on *Mastercard*'s opening they accept that the
11 bilaterals would be implausible.
12 Right, I need to deal briefly, if I may, with the
13 role of the IFR. This can be found in {RC-J5/22.2/2},
14 starting at page 2. In recital 14 at page 3
15 {RC-J5/22.2/3}, the drafters of the legislation said:
16 "The application of this regulation should be
17 without prejudice to the application of Union and
18 national competition rules. It should not prevent
19 Member States from maintaining or introducing lower caps
20 or measures of equivalent object or effect through
21 national legislation."
22 And in fact Ireland did that because it introduced a
23 lower 0.1% cap for debit cards.
24 Recital 15 then talks about cross-border acquiring
25 and says:

1 "If merchants can choose an acquirer outside their
2 own Member State which would be facilitated by
3 the imposition of the same maximum level of both
4 domestic and cross-border interchange fees and the
5 prohibition of territorial licensing, it should be
6 possible to provide the necessary for legal clarity and
7 to prevent distortions of competition between payment
8 card schemes."
9 It is recognising that by dealing with cross-border
10 acquiring, as it does, it is helping prevent distortions
11 of competition but it is not a competition measure.
12 You have got my submission this is not an exemption
13 decision. It does deal with Honour All Cards at recital
14 37, page 6, and it recognises halfway through that
15 recital that Honour All Cards in the Honour All Products
16 form is essentially a tying practice that has the effect
17 of tying acceptance of low-fee cards to the acceptance
18 of high-fee cards.
19 In terms of the operative provisions, Article 3 at
20 page 10 imposes a cap on consumer debit card
21 transactions. Article 4, page 11, imposes a cap of 0.3%
22 on consumer credit card transactions. There is
23 a prohibition on circumvention in Article 5. Article 6
24 deals with licensing and territorial restrictions
25 through licensing. Article 7 suggests there is a --

1 well, it requires a separation of the payment card
2 scheme from processing entities.
3 Page 12 deals with co-badging and choice of payment
4 brand or payment applications and it says under
5 subparagraph 1:
6 "Any payment card scheme rules and rules and
7 licensing or measures of equivalent effect that hinder
8 or prevent an issuer from co-badging two or more
9 different payment brands or payment applications on
10 a card-based payment instrument shall be prohibited."
11 You have then got the rule for unblending in
12 Article 9, where essentially acquirers were required to
13 offer prices that had stripped out rates for interchange
14 fees and then in 10 the Honour All Cards Rule is split
15 between the Honour All Products Rule in Article 10(1)
16 where it says:
17 "[Provided] a card scheme shall not apply any rules
18 that obliges payees accepting a card-based instrument
19 issued by one issuer also to accept other card-based
20 payment instruments issued within the framework of the
21 same payment card scheme."
22 So you cannot have an Honour All Products Rule.
23 However, subparagraph 3:
24 "Paragraph 1 is without prejudice to the possibility
25 for payment card schemes and payment service providers

1 to provide cards may not be refused on the basis of the
2 identity of the issuer."
3 So that goes to the Honour All Issuers Rule.
4 Steering rules are then dealt with in Article 11 and
5 it discourages -- it prohibits, sorry, rules that go
6 towards treating card-based payment instruments within
7 a given payment scheme more or less favourably than
8 others.
9 There is a detailed impact assessment -- I do not
10 need to turn it up now but it is at {RC-J5/18/1} -- that
11 dealt with the reason and the rationale and it
12 identified various competitive difficulties with the
13 payment card system/payment card market in Europe.
14 I may come back to that if I need to but I don't think
15 I have time to go through it now.
16 The legal position in relation to the IFR is
17 obviously that it took effect in accordance with its
18 terms from the 9 December 2015. There were then
19 amendments made to it applicable from the IP completion
20 date as part of the Brexit process. This is dealt with
21 in {RC-Q1/19/1}, starting at page 1. We see that this
22 is the exit -- sorry, The Interchange Fee (Amendment)
23 (EU Exit) Regulations 2019. Various amendments are made
24 to the IFR. We see for example in Regulation 2 some
25 amendments made to the Payment Card Interchange Fee

1 Regulations 2015 substituting -- sorry, omitting the
2 United Kingdom from various points. Then within the
3 regulation itself, in Article 1's scope, there is,
4 substituted for "the Union", "United Kingdom". So from
5 this point, the regulation only applies to transactions
6 that take place in the United Kingdom, not within the
7 Union and that immediately means that it does not apply
8 to a UK merchant receiving and -- as payment an EU-based
9 card or EEA-based card.
10 What happened as a result of that we can see from
11 bundle {RC-H4/3/42}, which I hope will reveal Mr Holt's
12 figure 2.5.
13 MR TIDSWELL: I have 2.3.
14 THE PRESIDENT: We have paragraph 2.3 -- or section.
15 MR BEAL: Somebody has whispered 47, I hope that is the
16 right one. Thank you. Yes, it is 47, sorry, that is
17 fat finger syndrome on my part.
18 Page 47 has a figure 2.5 with MIF rates being shown,
19 average MIF rates, for intra-non-EEA consumer MIF card
20 transactions, UK and Ireland, over a period. We see
21 that at around 2020 or so there is a sudden hike in
22 debit and credit for intra-non-EEA consumer MIFs and
23 that would encompass, at this stage, EEA/UK MIFs because
24 they are now treated as non-EEA because we are no longer
25 part of the EEA.

1 In short there was a big hike in the MIFs as soon as
2 we came out of Europe.
3 The PSR is looking into that. Should the Tribunal
4 wish to see the report that dealt with the price hike,
5 it is at {RC-J5/48.001/1}. I do not need to call it up
6 but that is there for the Tribunal to consider in due
7 course. It was the investigation that led to the
8 interim report that I went through with some care
9 yesterday morning.
10 The current position is that the interchange fee
11 regulation was in fact revoked by section 1 of
12 FSMA 2023; that is {RC-Q1/22/1}. We see what section 1
13 of that does is to revoke legislation in schedule 1.
14 Schedule 1 is then at Q1, tab 23, page 2 {RC-Q1/23/2},
15 and halfway down page 2 I hope there is Regulation EU
16 2015/751 of the European Parliament on interchange fees
17 for card-based payment transactions. This is what is
18 described in page 1 as "assimilated direct principal
19 legislation". So what had happened in the meantime was
20 that the Retained EU Law Act had converted retained EU
21 law into something called assimilated law and the
22 species of direct regulation that was retained EU
23 legislation, direct legislation, became assimilated
24 direct principal legislation.
25 That revocation, as we understand it, took effect

1 from 1 January 2024 through the Financial Services and
2 Markets Act 2023, commencement number 4, and
3 Transitional Saving Provisions (Amendment) Regulations,
4 which we have, I think, at RC-Q1/26/34. This is
5 a 28-page document so it clearly is not page 34. It is
6 on page 4 {RC-Q1/26/4}, sorry.
7 The following provisions of the Act -- under
8 Regulation 3:
9 "The following provisions of the Act shall come into
10 force on 1 January 2024. In section 1 ..."
11 So far as it relates to the revocations coming into
12 force by virtue of paragraphs B to E of this Regulation,
13 so we then look at B and it says:
14 "In part 1 of schedule 1 the revocation of the
15 provisions specified in part 1 of the schedule."
16 We have just seen part 1 of the schedule has the IFR
17 so that is then revoked from 1 January 2024.
18 It also, for good measure, in part 2, I think,
19 revoked, in the schedule, revoked the Amendment 2019
20 Regulations so that those amendments also fell by the
21 wayside because they were no longer needed.
22 We then see what has replaced this is
23 a discretionary power on the part of the PSR to deal
24 with interchange fees; that is in {RC-Q1/24/7}. This is
25 a provision that amends the 2015 Payment Card

1 Regulations but at page 7 hopefully we have a new
2 Regulation 4A which says:
3 "The Payment Systems Regulator may give a direction
4 in writing to any person who is accountable for the
5 functioning of a payment card system ..."
6 And then under Regulation 4A(2):
7 "A direction may be given in relation to the
8 imposition of interchange fees by a payment service
9 provider as well as information about them."
10 So that seems to confer a discretionary power on the
11 PSR to put in place a direction in relation to the
12 imposition of interchange fees. It is pretty broadbrush
13 and we haven't been able, I am afraid, to find
14 a direction and what that means is the IFR no longer
15 applies from 1 January this year, full stop, and it did
16 not apply to EEA/UK transaction from 1 January 2021.
17 THE PRESIDENT: Mr Beal, you quite honestly said you could
18 not find it. It would be helpful to know if somebody
19 else has, just so that we know where we are at.
20 I appreciate that the welter of legislation and
21 delegated legislation is vast, but if you are wrong
22 I would like to know how you are wrong and, if you are
23 right, then it would be helpful to have that on the
24 record also.
25 MR KENNELLY: My Lord, I will be addressing the Tribunal on

1 this issue in the course of the afternoon.
2 THE PRESIDENT: Very grateful, Mr Kennelly, thank you.
3 MR BEAL: The position as we understand it in Ireland is
4 that the debit MIF has been capped under the IFR at 0.1%
5 and that the basis for that is bundle {RC-J5/48.1/1},
6 which gives the Visa domestic MIFs in Ireland and we see
7 that there is a reference somewhere to a cap of 0.20 in
8 the first box.
9 That deals with the IFR. The reason why the IFR is
10 said to be relevant is because it is said it leads to
11 a different counterfactual, so it leads to the UIFM or
12 the bilaterals. I am going to deal now with the UIFM.
13 In {RC-Q3/32/24} we have an extract from the
14 judgment of the Court of Justice in the *Volkswagen* case
15 at paragraph 37. What that says is that:
16 "In order to constitute an agreement within the
17 meaning of Article 101(1) it is sufficient that an act
18 or conduct which is apparently unilateral be the
19 expression of the concurrence of wills of at least two
20 parties, the form in which that concurrence is expressed
21 not being by itself decisive."
22 We then see at paragraph 48, page 26 {RC-Q3/32/26},
23 that in order to determine whether, in this case, the
24 calls that were made to the dealership -- members of the
25 *Volkswagen* dealership group were part of the overall

1 commercial relationship between *Volkswagen* and its
2 dealers:
3 "The Court of First Instance should have considered
4 whether they were provided for or authorised by the
5 clauses of the dealership agreement taking account of
6 the aims pursued by that agreement per se in the light
7 of the economic and legal context."
8 And so in that case what the court was looking at
9 was, in that case, if a motor dealer, *Volkswagen*, sends
10 a circular out with a recommendation to its members,
11 even though that is a unilateral act in the sense of
12 issuing a direction, can it nonetheless be -- if it is
13 acted upon can it be a form of coordinated behaviour?
14 So here, if you have a system rule that says it is
15 up to you, the issuers, to set a rate in the confident
16 expectation, indeed cast iron belief, that that rate
17 will be set at the capped rate prevailing under what was
18 then the IFR, that can still be a form of coordinated
19 conduct even though it purports to be a unilateral
20 mechanism for setting the price.
21 That, in a nutshell, is what we say the main vice is
22 with the UIFM, that it still amounts to a coordinated
23 approach to setting a price. The price is, admittedly,
24 to be determined on its face by the issuer, in theory,
25 but the issuer is fully expected to set it as high as

1 possible -- and indeed that is the entire purpose of the
2 UIFM. It is only there because it will maintain this
3 flow of money from acquirers to issuing banks.
4 We have, beyond that, four principal objections to
5 the UIFM. Firstly, it has not at any stage been part of
6 an underlying system in the United Kingdom. Therefore,
7 it is a thought experiment rather than something that
8 has been actually put into practice.
9 That does not necessarily preclude it of course, but
10 it does make one wonder, if it is such a good idea, why
11 it has not been done before now. Indeed we will look at
12 some of the evidence when I cross-examine Visa's
13 witnesses.
14 Secondly, the mechanism is, in truth, still one
15 established by the schemes as a fall-back arrangement
16 which permits an escape from what would otherwise be
17 settlement at par in circumstances where issuers can set
18 a MIF up to a maximum level and acquirers still have to
19 pay for it. It necessarily requires the HACR to enforce
20 that obligation and if you strip out the HACR then there
21 is a situation where it simply would not work. It is no
22 good, with respect, to say that the scheme does not set
23 the level because the regulatory cap is setting a level
24 and this is simply a mechanism by which a particular
25 level will be set albeit by reference to an extrinsic

1 event.

2 A different way of putting it is that it is no

3 different, really, to an indirect way of imposing MIFs

4 set at the regulatory cap. The point was really made

5 in June in the Court of Appeal at paragraph 37, where

6 *Mastercard*'s economic expert said:

7 "Each acquirer has to accept transactions on cards

8 issued by each issuer with the result that an acquirer

9 effectively has no choice but to settle the payment with

10 the issuer in question since the transaction was made by

11 one of that issuer's cardholders and the acquirer needs

12 to process the payment to provide the funds to the

13 merchant. This provides the issuer with all the

14 bargaining power."

15 So that statement still applies with equal force

16 here.

17 So we say it is inevitable given issuers' financial

18 incentives that the MIF will be set at the level of the

19 regulatory cap and, therefore, it is old wine, new

20 bottles. It is simply a means of achieving the same

21 end, same objective, same outcome by a different

22 contractual arrangement.

23 All of the relevant parties -- Visa, the issuers and

24 the acquirers -- would be aware of that in advance and

25 therefore by signing up to the scheme they were simply

1 in reality acquiescing to the setting of a common rate
2 in the same way that the *Volkswagen* dealers, responding
3 to the directive from the motor company, were responding
4 in a coordinated manner.
5 That therefore still amounts to a coordinated price
6 setting exercise which would be illegitimate and
7 unlawful and therefore cannot be taken into account in
8 the counterfactual.
9 Visa have said at paragraph 86 of their opening
10 submissions that somehow the experts have agreed that
11 this would have been implemented. With respect, that is
12 not what the experts have agreed. What they have agreed
13 is that the schemes will have preferred to implement
14 this scheme. That does not say whether (a) it could
15 lawfully have been done or (b) whether it realistically
16 would have been done. Those are two issues that I will
17 be exploring in greater detail in due course.
18 Contrary to Visa's opening submissions at
19 paragraph 92, we certainly do challenge the suggestion
20 that the issuers would inevitably set their fees at the
21 regulatory cap because of course that depends upon
22 whether or not scrutiny of what they were doing would
23 lead to the realistic and credible threat of anti-trust
24 litigation against them. Again, that is something
25 I will need to explore with the witnesses. But the

1 issuing banks have historically been loath to put their
2 necks on a block when they do not know which axe is
3 coming and we want to explore that with the witnesses,
4 in particular the issuing bank witness, who says that
5 she would have done this regardless.
6 New Zealand, we say, is not a Blue Peter moment,
7 this is not a system that has been made earlier. It
8 crucially is dependent on a relaxation of other rules
9 that led to the rebates we discussed yesterday in
10 opening. It also engendered a substantial regulatory
11 intervention in the 2022 Act, so it is, with respect,
12 a poor example of a premade system which leads to
13 a unilateral setting of the MIF.
14 Visa has also said in paragraph 83 of its opening
15 that:
16 "Settlement at par as a default rule is no longer
17 the counterfactual."
18 But, of course, a crucial part of the UIFM is that
19 this is the very default rule that applies but for
20 an issuer saying what it is prepared to accept, on their
21 case unilaterally and our case as part of
22 an orchestrated scheme to set the same fee.
23 Finally from a public policy perspective, and I will
24 deal with this more in closing if I need to, it would be
25 very odd if the effect of the IFR was to compel

1 a situation which led to a minimum level of MIF, ie it
2 is not a cap, it is actually rate setting, and that
3 would, we say, run counter to the public policy object
4 of the IFR, which was in fact to set a cap (sic) but to
5 envisage that there would be competitive forces driving
6 the relevant level of the MIF below that if necessary.
7 There is some learning on this in the *Hutchison 3G* case
8 in the Court of Appeal. Just for your reference, it is
9 at {RC-Q2/4.1/19}, where the Court of Appeal explored
10 whether it is appropriate to look at regulatory measures
11 that have been taken to confine market power when
12 looking at what the market situation would be in
13 a counterfactual.
14 That case involved some regulatory constraints on
15 Openreach and BT and some mobile phone providers but it
16 raised the issue of: do you end up with a circularity?
17 You have intervened by regulation, that necessarily puts
18 a cap on the market price, but can you then take that as
19 read when looking at whether or not there is still an
20 exercise of market power? So in a sense if you are
21 bringing in a regulation to confine market power does
22 the mere fact that you have brought in a regulation mean
23 that the market power does not exist and there ends up
24 being a circular situation there which one needs to be
25 wary of?

1 The short point here is, we say, that even under the
2 UIFM there would still be a scheme, prices would still
3 result from a collective agreement to apply that scheme,
4 and it still leads to a price that is non-negotiable
5 between the merchant and its acquirer. That fits the
6 bill for the very conduct which the Supreme Court said
7 was contrary to Competition Law in the *Sainsbury's* case.
8 Indeed, if we look at Visa's opening submissions at
9 paragraph 101 they appear to recognise that there will
10 be a collective price that is set, they recognise it
11 arises as a result of collective agreement, but they
12 then say that:
13 "The parties have agreed collectively to set a price
14 to be fixed on a unilateral basis."
15 Which is a slightly counterintuitive way of putting
16 it. If they have agreed a price but the person who sets
17 that price is simply an individual in the exercise of
18 a unilateral discretion, it is no different from
19 *Visa I*nc setting the price for inter-regionals. It is
20 still a collective determination of the price, it still
21 is thrust upon merchants and they cannot avoid.
22 Bilaterals. With respect, it is odd that this is
23 advanced. *Mastercard* and Dr Niels lobbied against
24 bilaterals in the *OFT* decision; that is {RC-Q2/3/1}.
25 They also challenged the use of bilaterals in the *GCEU*

1 decision we looked at that earlier paragraphs 130 to 133
2 of the *Mastercard* General Court decision. They then
3 contested the relevance of bilaterals before the CAT and
4 then argued the position in the Court of Appeal as
5 summarised at paragraph 182 of the Court of Appeal in
6 *Sainsbury's*. It then was not argued either way in the
7 Supreme Court because everyone proceeded on the basis
8 that settlement at par was the appropriate
9 counterfactual.
10 I took you in opening to Mr Knupp's evidence from
11 Visa where he said it would be chaos if pure bilaterals
12 applied and, of course, we end up in this surreal
13 situation where this is all dependent on the IFR in
14 circumstances where pre the IFR it did not work, we are
15 now in a situation, post-IP completion day, where the
16 IFR does not apply to EEA/UK transactions, and we are
17 now in a position post 1 January 2024 where the IFR does
18 not apply at all.
19 The Commission has repeatedly found that settlement
20 at par works is and viable and, with respect, having
21 a thought experiment based on genuine bilateral
22 negotiation that would fall apart is not a realistic
23 alternative to what has been found to be a viable and
24 realistic alternative.
25 If it is genuine bilateral negotiation and not the

1 sort of sham negotiation I referred to in opening, then
2 who does the negotiation? Is it merchant or the
3 acquirer? It cannot include the HACR, so how do you
4 maintain the scheme? Do you not default into a system
5 where you do not have any settlement at all? Is
6 a merchant meant to phone up each individual issuing
7 bank at the point of receiving the money at the M&S
8 checkout?
9 How is an acquirer meant to negotiate with so many
10 issuers? If the acquirer negotiates anything at all,
11 surely another acquirer would come along and said: well,
12 I am not willing to pay that and everyone would then go
13 to that acquirer rather than the acquirer who agrees to
14 pay something. So how on earth does this work? These
15 are issues that I will have to explore with the
16 witnesses and the experts.
17 Now, of course if you have HACR then, as I have
18 indicated, the whip hand is held by the issuer, the
19 issuer can charge what he wants and the acquirer has to
20 accept it if this is a must take card, which it is, and
21 there is no realistic alternative of simply saying:
22 Plague on both your houses, I am not going to take Visa
23 or *Mastercard*. So you end up with a position where the
24 market power entrenches a pricing regime which leaves
25 the merchants no option but to pay it and where you have

1 exactly the same theory of harm and competitive
2 restriction as you would do otherwise.
3 We say instead settlement at par is the correct
4 counterfactual in the post-interchange world. All the
5 Interchange Fee Regulation has done is to limit the --
6 what might be perceived to be something akin to the
7 exemptable level of a MIF. It has not said you can
8 ignore competition up to the level of that exemption,
9 quasi exemption, it is not an exemption. Therefore, it
10 envisages there will be competitive forces operating
11 properly below that level and, therefore, the fact that
12 it is capped at that level does not preclude this being
13 a restriction of competition.
14 We have seen many examples of settlement at par
15 being adopted and there is no suggestion it is not
16 a realistic decision. Indeed, as I have already
17 indicated, there was a discrepancy between Visa's MIFs
18 and *Mastercard* MIFs following the *VISA II* decision and
19 then once the *Mastercard* decision came in there was
20 a period of time when *Mastercard* had zero EEA MIFs and
21 the world did not fall in.
22 Objective necessity I can be very short on. The
23 short point there is it has consistently been held not
24 to be objectively necessary for a MIF to be put in place
25 and I do not need to, I think, do more than refer back

1 to -- each time in a regulatory decision it is found
2 that there has been no objective necessity, I have drawn
3 it to your attention.
4 Inter-regional MIFs. We say that the mechanism of
5 setting the inter-regional MIF is no different from
6 setting any other MIF. The pricing mechanism that takes
7 place is exactly the same. Appreciability is no longer
8 in issue, *Mastercard* have accepted that there is an
9 appreciable pass on of the inter-regional MIF into MSCs.
10 You have seen the Commitments Decisions that say this is
11 a restriction by object and effect and we pray those in
12 aid.
13 There is a wrinkle here which is that Visa are also
14 seeking to say that there is a different counterfactual
15 and this is seemingly based on an argument that was
16 raised in June and is maintained in Mr Butler's witness
17 evidence for Visa. What they say is: Well, if the
18 inter-regional MIF is reduced to zero in the
19 counterfactual there is no way we can enforce that
20 obligation on *Visa I*nc and, therefore, if any party that
21 has not sued *Visa I*nc the counterfactual cannot include
22 the possibility of the inter-regional being anything
23 other than the inter-regional.
24 Now there is a number of answers to this. Firstly,
25 it posits a counterfactual between those who have sued

1 Visa and those who have not, even though they recognise
2 that this is a single economic undertaking.
3 The true position in any counterfactual would be
4 that where a number of the claimants have sued *Visa I*nc
5 there will be a ruling from this Tribunal, or any other
6 regulatory body, that inter-regional MIFs are
7 a restriction of competition and that will necessarily
8 bind and tie the hands of *Visa I*nc and *Visa I*nc will
9 have to abide by it. As a reputable company it would
10 not do anything else.
11 The Commitments Decision I have taken you to has
12 an anti-circumvention measure and you saw that the
13 commitment that was given by Visa Europe was that they
14 would enter into agreements with the relevant Visa
15 organisations to make sure that the commitments were
16 maintained.
17 The short point is the counterfactual would see
18 *Visa I*nc abide by any ruling on the anti-competitive
19 nature of the inter-regional MIF and it would take steps
20 to ensure that the inter-regional MIF was reduced
21 accordingly in the relevant markets and that must be the
22 consequence, and I will wait to see whether Visa stands
23 up in this Tribunal and says: No, *Visa I*nc would ignore
24 this Tribunal's ruling and persist in maintaining
25 inter-regional MIFs and finding that UK acquirers were

1 in breach of the Visa rules for seeking not to pay those
2 because they were unlawful.
3 But, in any event, the MIFs charged to the MSC on
4 this basis would be lower. If *Visa Inc* has to remove
5 the inter-regional MIF for those claimants who have sued
6 it, then the MIF payable is lower and the MSC payable
7 across the board is lower as a result of the Visa and
8 *Mastercard* transactions. So it provides no complete
9 answer one way or the other.
10 If the argument that is being advanced is instead
11 simply one that certain defendants rather than others
12 have not taken a particular defendant to task, then the
13 analogy would be, for example somebody who sues a group
14 of 20 cartelists, suing only one on a joint and several
15 liability basis, and that one defendant then say: Ahh,
16 but if the other 19 are not sued, then they would
17 maintain the cartel in effect; to which the answer would
18 be, no, you have to assume in the counterfactual that
19 the cartel is not maintained and the choice of defendant
20 that you have chosen makes no difference to that proper
21 analysis. That is all I wanted to say specifically on
22 inter-regional cards.
23 Commercial cards it is much the same submission. It
24 is exactly the same mechanism, it does not involve any
25 different mechanism. The substantial difference between

1 them is on price, it is just simply a different price
2 rate that is set for the MIF.
3 All of the submissions, substantive submissions by
4 the card schemes on both commercial cards and
5 inter-regional cards, involve an analysis of switching
6 and that switching predominantly is said to be on the
7 issuing market. My primary submission is none of that
8 is relevant for the reasons I have been through so
9 laboriously this morning. I have taken you to each
10 decision that says commercial success or failure of
11 a scheme is not relevant to restriction or indeed to
12 objective necessity. You do not look at it for the
13 purpose of the counterfactual, it comes in at 101(3)
14 stage.
15 Nonetheless, belt and braces, we are going to go
16 through the process of challenging all of the evidence
17 that deals with switching. It is difficult to see how
18 issuers can switch to Amex, for example, when Amex is
19 a three-party scheme and does not allow anyone else than
20 Amex to issue the card. We will wait to see how Amex is
21 put. But on any view when Amex has less than 1% of the
22 UK market for payment cards and 5%, no more, for
23 a subset of cards, namely commercial cards, you would
24 require such an extraordinary degree of switching for it
25 to be a viable commercial ruin for these schemes that we

1 say it is simply not realistic.
2 Anti-steering rules. I have a minute for each of
3 them, I think.
4 Cross-border acquiring. You have got my submission
5 already. It is compartmentalisation, segmentation of
6 the market, internal market. That by itself is a EU law
7 no, no. Yes, the economists take different views
8 because they view it as a national market. The
9 economists principally treat it as a question of market
10 access and they say: Well, you can get into the market,
11 what is the problem?
12 That does not deal with the parallel importation
13 aspect that you are depriving a foreign-based acquirer
14 of the ability to acquire UK merchants, which operates
15 as a restriction on cross-border acquiring. So that is
16 the essential distinction.
17 The Honour All Cards Rule, you have seen recital 37
18 of the IFR said it was a tying obligation. In our
19 submission, that is the best way of looking at it and
20 tying obligations are quintessentially a competition
21 concern. If I am forced to accept a choice of products,
22 which I do not want to because of a contractual rule
23 that is forcing upon me different products, different
24 cards with different costs, and I have no choice about
25 it.

1 Now, there is an issue of fact as to what extent it
2 applied over what period but it has always been a core
3 part of the Honour All Products Rule that you have to
4 take -- within given categories you, have to take all
5 the cards in that category. So we say that is
6 anti-competitive by object and effect
7 In terms of the non-discrimination rule, this
8 applies to *Mastercard* only, that is the broader version
9 of the non-surcharge rule and again we say it has
10 prevented people from taking steps -- merchants from
11 taking steps to discourage the use of high cost cards,
12 simple as that. Merchants are bound to accept cards
13 that they do not like because they are a higher cost,
14 but they run the risk of falling foul of these rules if
15 they do. It is a clear restriction of competition by
16 object since it constrains the merchant's ability to
17 respond competitively to the price signals that it is
18 otherwise facing.
19 No surcharging rule. There is a very complex legal
20 analysis unfortunately about what applies when. We will
21 wait to see what Mr Korn says because it is acknowledged
22 that he got the law wrong.
23 There are periods within the claim periods which it
24 is accepted I think that there was no applicable law on
25 this until 2009, so the M&S claim against *Mastercard* is

1 in time for that. But more importantly there are
2 periods of time where, for commercial cards and
3 inter-regionals, there was no law restricting or --
4 sorry, there was no law requiring -- entitling somebody
5 to surcharge, so there was no countervailing restriction
6 on what could be done and the boxes, the tables we
7 produced in our opening tried to break out what was the
8 relevant legal position at a given time, and as soon as
9 you get to a position where somebody is precluded from
10 being able to surcharge by a contractual rule then you
11 are stopping somebody responding again to the pricing,
12 doing something about it, and that is a constraint on
13 their freedom
14 Finally, co-badging rule. The co-badging rule has
15 prevented other payment systems from issuing a card with
16 dual functionality. An issuer could not, for example,
17 issue a card with both *Mastercard* and Visa on it on any
18 version of the rules at any stage. So they have
19 segmented the market between them, you could not have
20 both of them and then choose whichever was cheaper at
21 the merchant end.
22 In contrast, we will see in New Zealand they do have
23 a function where you can dip or switch -- or whatever
24 the phrase is that they use. You can either plug it
25 into the terminal or you can swipe and that changes the

1 rate you can offer because it has two systems on the
2 same terminal and that proved very effective at driving
3 down the costs for merchants, particularly of debit
4 transactions.
5 To the extent that the co-badging rules require --
6 THE PRESIDENT: Who chooses in that situation?
7 MR BEAL: Well, the merchant has a discussion with the
8 customer.
9 THE PRESIDENT: Right.
10 MR BEAL: And says to the customer, if you are buying a flat
11 white, it is going to be $3.50 if you dip, plug it in,
12 or it is $3.75 if you swipe. I may have got that the
13 wrong way round, but there is a gradation of pricing
14 where effectively they surcharge at the terminal and
15 they give you the offer and then you can weigh up which
16 is in your preference.
17 THE PRESIDENT: I understand.
18 MR BEAL: Co-badging more generally we say falls foul of the
19 principle. There are certain variants of the rule at
20 certain times that allow permission to be given.
21 Following the *European Superleague* and the ISU case,
22 that permission does not have any objective criteria by
23 which it will be assessed so that in itself is an object
24 restriction, we say.
25 It is wrong, with respect, to say that this has

1 never had any effect because of course we have seen from
2 the PSR evidence and the Commission evidence that
3 domestic schemes have over the years fallen under the
4 weight of competition from the two incumbent schemes.
5 If a national scheme wanted to get a bigger foothold in
6 the market it would want an international presence and
7 being able to co-badge with a four-party system that has
8 an international presence, be that Visa, *Mastercard* or
9 one of the others, is a means of enabling them to get
10 the international foothold that they might need. So we
11 do say it is restrictive of competition.
12 That, I am afraid, was a rattle through but I have
13 finished at 1.
14 THE PRESIDENT: Well done, Mr Beal. We are very grateful
15 I infer from the intervention earlier, Mr Kennelly, it
16 will be you this afternoon.
17 MR KENNELLY: That's correct sir, yes.
18 THE PRESIDENT: Very good. Just one point so that we have
19 an idea of the timetable going forward. You mentioned
20 yesterday, Mr Beal, that some witnesses were not being
21 required to be called. At some point if you could give
22 us an idea of what sort of saving that entails on the
23 six days of factual witnesses that we have got that
24 would be helpful.
25 MR KENNELLY: Of course, we wrote to the claimants yesterday

1 and we will make sure that the Tribunal is informed as
2 well.
3 THE PRESIDENT: I am very grateful. In that case we will
4 resume at 2.
5 MR BEAL: You gave me some homework, day packs. Can I just
6 say we are very happy to do a day pack for you in the
7 way indicated, but we would like it to be the days
8 ideally where it is us speaking, or our witnesses, our
9 expert; and for those days where it is *Mastercard* or
10 Visa's witness or their expert or their speaker, if they
11 could take the baton for that day then we share the load
12 between us and that would be very welcome.
13 THE PRESIDENT: That sounds very sensible.
14 MR KENNELLY: I have no objection to that, sir.
15 MR BEAL: Thank you very much.
16 THE PRESIDENT: Thank you 2 o'clock.
17 (1.02 pm)
18 (The short adjournment)
19 (1.59 pm)
20 Opening submissions by MR KENNELLY
21 THE PRESIDENT: Good afternoon, Mr Kennelly.
22 MR KENNELLY: May it please the Tribunal, Ms Tolaney and
23 I have divided the main issues in our openings with one
24 of us leading and the other following as necessary. So
25 I will begin, if I may, with issue 3 and take the UIFM

1 counterfactual and Ms Tolaney will address the
2 bilaterals counterfactual for *Mastercard* issues 4 and 5
3 and *Mastercard*'s essential acquiring rule and I will
4 address then the Visa cross-border acquiring rule, the
5 HACR, surcharging, co-badging and Ms Tolaney then will
6 follow me with any *Mastercard* specific points on the
7 challenged rules.
8 I will begin, if I may, on issue 3 with the question
9 of by object infringement upon which my learned friend
10 Mr Beal placed so much reliance and having addressed
11 that, I will move on to the effects case and the UIFM
12 proper. But on issue 3 the claimants' primary
13 submission is that the MIFs set by the schemes under the
14 IFR since 2016 are an infringement by object and so
15 according to the claimants, there is no need to identify
16 a counterfactual at all. That, I say, is a surprising
17 submission. MIFs have been under scrutiny, as this
18 Tribunal well knows, by the European Commission and the
19 courts and national authorities almost continually in
20 the European Union since 1977 when Visa first sought an
21 exemption under what is now article 101 TFEU and in
22 almost 50 years of regulatory scrutiny and litigation,
23 Visa's domestic and intra-EEA MIFs have never been found
24 by the Commission or the EU courts to be an infringement
25 by object.

1 Now, as regards the legal test, my learned friend
2 took you to four judgments. *CJEU*, *Lundbeck* at length,
3 *Allianz Hungaria*, the *International Skating Union* and
4 *Royal Antwerp* and *UEFA* but none of the legal
5 propositions in those judgments is disputed. But they
6 are of very little assistance otherwise. As the
7 President pointed out, and my learned friend accepted,
8 none of those judgments concerned two-sided markets.
9 Mr Beal had very little to say about the judgments of
10 greatest relevance to by object infringements in the
11 context of MIFs and those judgments are *Cartes Bancaires*
12 in the *CJEU* and *Budapest Bank* and I will go to those if
13 I may, and I will begin with *Cartes Bancaires*,
14 {RC-J5/21.2/11}.
15 Actually if I could go back, please, 21.2, back to
16 page 1 {RC-J5/21.2/1} you see the judgment and then
17 page 2, {RC-J5/21.2/2} so we can see the measure in
18 question.
19 Now, as the Tribunal knows, this concerned
20 a domestic four-party scheme. In this case, the
21 European Commission did find an infringement by object
22 which was upheld by the General Court but then reversed
23 on appeal before the *CJEU*. We see at paragraph 4 on
24 page 2 the measure in question, the three pricing
25 measures. You see at the bottom about four lines down

1 from paragraph 4 and the first concerned a mechanism for
2 regulating the acquiring function. You see that in the
3 first sentence. That was aimed to encourage members
4 that are issuers more than acquirers to expand their
5 acquisition activities, it was a transfer of value to
6 acquirers.
7 If you skip down to the bottom of the first indented
8 passage, three lines from the bottom of that first
9 indented paragraph, in paragraph 4, it says:
10 "The sums levied under MERFA were to be distributed
11 among members of the Grouping that were not charged any
12 such sum, according to their contribution to the
13 acquisition business."
14 And they could then spend the money as they wished.
15 It was also reforms to membership fees, you see that in
16 the next indented passage, to make it potentially more
17 expensive to join the scheme. Then finally a mechanism
18 known as the dormant member wake-up fee applicable to
19 members that were inactive.
20 If you skip down to the next page, page 3,
21 {RC-J5/21.2/3} to paragraph 8, you see the Commission
22 decision. It adopted the decision at issue in which it
23 took the view that the grouping had infringed what is
24 now article 101 and that decision included the following
25 considerations: the relevant market is the market for

1 the issue of payment cards in France, it is an issuer
2 market, and thirdly those measures have an
3 anti-competitive object.
4 And if we move on, please, to the legal test we see
5 that at paragraph 49, which is on page 11.
6 {RC-J5/21.2/11}
7 Above 49 and 48 you can see the heading "Examination
8 of whether there is a restriction of competition by
9 'object' within the meaning of Article 81(1) ..."
10 At 49 we see the reasoning of the Court of Justice,
11 it is apparent from the court's case law that certain
12 types of co-ordination between undertakings reveal
13 a sufficient degree of harm to competition that it may
14 be found that there is no need to examine their
15 effects ..."
16 Pausing there, what we see throughout the cases
17 including those to which my learned friend referred is
18 that for certain types of conduct harmful effects can be
19 assumed because they are, by their very nature, harmful
20 to competition. And so because there is a sufficient
21 degree of harm it may be found there was no need to
22 examine their effects.
23 At paragraph 50, the case law cited arises from the
24 fact that certain types of co-ordination between
25 undertakings can be regarded by their very nature as

1 being harmful to the proper functioning of normal
2 competition.
3 At 51:
4 "Consequently, it is established that certain
5 collusive behaviour, such as that leading to horizontal
6 price-fixing by cartels, may be considered so likely to
7 have negative effects, in particular on the price,
8 quantity or quality of the goods and services, that it
9 may be considered redundant [unnecessary], for the
10 purposes of applying Article 81(1) ... to prove that
11 they have actual effects on the market ... Experience
12 shows that such behaviour leads to falls in production
13 and price increases, resulting in poor allocation of
14 resources to the detriment, in particular, of
15 consumers."
16 The court goes on to say:
17 "Where the analysis of the type of co-ordination
18 does not reveal a sufficient degree of harm to
19 competition, the effects of the co-ordination should on
20 the other hand be considered and for it to be caught by
21 the prohibition it is necessary to find that factors are
22 present which show that competition has in fact been
23 prevented, restricted or distorted to an appreciable
24 extent."
25 And at paragraph 53, again referring to the case law

1 of the court:
2 "In order to determine whether an agreement between
3 undertakings or a decision revealed a sufficient degree
4 of harm to competition that it may be considered
5 a restriction of competition by object within the
6 meaning of Article 81(1) ..."
7 And I emphasise the next passage:
8 "... regard must be had to the content of its
9 provisions, its objectives and [critically, I say] the
10 economic and legal context of which it forms a part.
11 When determining that context, it is also necessary to
12 take into consideration the nature of the goods or
13 services affected, as well as the real conditions of the
14 functioning and structure of the market or markets in
15 question ..."
16 Now, over the page, {RC-J5/21.2/12} page 12 at
17 paragraph 58, we see an error that the General Court
18 made. The General Court erred in finding that the
19 concept of restriction of competition by object must not
20 be interpreted restrictively and the Court of Justice
21 disagreed with that.
22 Then we go on to see why, in the views of the
23 Court of Justice, the conduct was not by its very nature
24 harmful to competition and we see that from paragraph 72
25 and following on page 14. {RC-J5/21.2/14}

1 "It is indeed clear ...that the General Court
2 rejected on several occasions the appellant's claim that
3 it was apparent from formulas prescribed for the
4 measures at issue that the latter sought to develop the
5 acquisition activities of the members in order to
6 achieve an optimal rate of balance between issuing and
7 acquisition activities."
8 One sees immediately a real echo of the balancing
9 rationale which we see in the four-party schemes in our
10 case:
11 "On the other hand, it is not disputed ... that
12 those formulas encouraged the members of the Grouping,
13 in order to avoid the payment of fees introduced by
14 those measures, not to exceed a certain volume of CB
15 card issuing that enabled them to achieve a given ratio
16 between the issuing and acquisition activities of the
17 Grouping."
18 So the transfer of value did cause consequential
19 changes to the behaviour of the members of the scheme.
20 And 73:
21 "After stating, in paragraph 83 of the judgment
22 under appeal, that the Grouping is active on the
23 'payment systems market', the General Court found, in
24 paragraph 102 of that judgment, in its assessment of the
25 facts -- which is not subject to appeal and is not

1 challenged in these proceedings -- that, in the present
2 case, in a card payment system that is by nature
3 two-sided, such as that of the Grouping, the issuing and
4 acquisition activities are 'essential' to one another
5 and to the operation of that system: first, traders
6 would not agree to join the CB card payment system if
7 the number of cardholders was insufficient and,
8 secondly, consumers would not wish to hold a card if it
9 could not be used with a sufficient number of traders."
10 Again, a rationale one has seen consistently in the
11 schemes' case here:
12 "Having therefore found, in paragraph 104 of the
13 judgment under appeal, that there were 'interactions'
14 between the issuing and acquisition activities of a
15 payment system and that those activities produced
16 'indirect network effects', since the extent of
17 merchants' acceptance of cards and the number of cards
18 in circulation each affects the other, the General Court
19 could not, without erring in law, conclude that the
20 measures at issue had as their object the restriction of
21 competition within the meaning of Article 81(1) ...
22 "Having acknowledged that the formulas for those
23 measures sought to establish a certain ratio between the
24 issuing and acquisition activities of the members of the
25 Grouping, the General Court was entitled at the most to

1 infer from this that those measures had as their object
2 the imposition of a financial contribution on the
3 members of the Grouping which benefit from the efforts
4 of other members for the purposes of developing the
5 acquisition activities of the system. Such an object
6 cannot be regarded as being, by its very nature, harmful
7 to the proper functioning of normal competition ..."
8 I emphasise the parallels with our case,
9 substituting issuing market for acquiring market in our
10 case.
11 Over the page, {RC-J5/21.2/15}, paragraph 78 and 79:
12 "In order to assess whether coordination between
13 undertakings is by nature harmful to the proper
14 functioning of normal competition, it is necessary, in
15 accordance with the case-law referred to ... to take
16 into consideration all relevant aspects [they are
17 repeating the need to take into account the real
18 condition of the structure of the markets] of the
19 economic or legal context it being immaterial whether or
20 not such an aspect relates to the relevant market, it
21 being immaterial whether or not such an aspect relates
22 to the relevant market."
23 Taking into account 79:
24 "That must be the case, in particular, when that
25 aspect is the taking into account of interactions

1 between the relevant market and a different related
2 market."
3 Skipping ahead in that same paragraph:
4 "... and, all the more so, when, as in the present
5 case, there are interactions between the two facets of a
6 two-sided system."
7 We are concerned obviously, members of the Tribunal
8 with the question of by object infringement here.
9 Then we move on to page 16 {RC-J5/21.2/16}
10 paragraphs 86 and 87:
11 "Although the General Court found ... that the
12 measures at issue encouraged the members of the Grouping
13 not to exceed a certain volume of ... card issuing, the
14 objective of such encouragement was ... not to reduce
15 possible overcapacity on the market ... but to achieve a
16 given ratio between the issuing and acquisition
17 activities of the members of the Grouping in order to
18 develop the CB system further.
19 "It follows that the General Court could not,
20 without erring in law, characterise the measures at
21 issue as restrictions of competition 'by object' within
22 the meaning of Article 81(1) ..."
23 Now, the claimants say notwithstanding this
24 judgment, and we see it in their written submissions at
25 paragraph 5, that the balancing function of the MIF

1 between the two sides of the market for the benefit of
2 the scheme as a whole in order to develop the four-party
3 system further is irrelevant to the question of whether
4 a restriction is by object for the purpose of article
5 101(1) TFEU. They say that is entirely a matter for
6 101(3) but my learned friend made that submission
7 without going to the next authority, *Budapest Bank*, and
8 to that I ask the Tribunal now to turn. {RC-J5/35.1/1}.
9 My learned friend said this judgment is irrelevant,
10 we will come to what was said about its relevance in the
11 *Sainsbury's* case but the Tribunal will judge for itself
12 how relevant it is to the question of: what are the
13 factors one takes into consideration in determining
14 whether a four-party scheme MIF is a restriction by
15 object or not. We see the measure in question, the
16 conduct at issue on page 2 at paragraph 4,
17 {RC-J5/35.1/2}.
18 The facts of this case were quite extreme, as we see
19 in paragraph 4 but the extremity of the facts does not
20 take from the legal analysis that we will see later in
21 the judgment. In the mid-1990s Visa and *Mastercard*
22 permitted financial institutions issuing their cards on
23 the one hand and the financial institutions providing
24 merchants with services enabling them to accept those
25 cards on the other hand to determine jointly the amount

1 of national interchange fees between issuing and
2 acquiring bank, that is to say the amount paid by the
3 latter to the former when a card payment transaction
4 takes place.
5 Paragraph 5, there was a forum where this
6 co-operation took place.
7 At paragraph 6 we see here reference to two
8 agreements, the MSC agreement and the MIF agreement,
9 they are two different agreements. Within this forum,
10 seven banks, most of which had joined the card payment
11 systems set up by Visa and *Mastercard* and which
12 represented a large part of the national market of
13 issuing and acquiring banks, reached an agreement on the
14 text of an agreement relating to the determination for
15 each category of merchant of the minimum level of the
16 uniform merchant service charge, the MSC, payable by
17 each category, that is the MSC agreement.
18 Subsequently we now see the second agreement. They
19 concluded an agreement by which they introduced
20 a uniform amount for interchange fees relating to
21 payments made by means of cards issued by banks
22 belonging to the card payment system offered by Visa or
23 *Mastercard*. That is the MIF agreement, so they had
24 agreed between them the level of the MIF.
25 Ultimately we see at paragraph 7 that the MSC

1 agreement was not signed by the banks, the one that
2 fixed the merchant service charge was not signed. The
3 interchange fees covered by the MIF agreement as a cost
4 factor had an indirect effect on determination of the
5 amount of the MSC. Throughout this judgment we see
6 a recognition that is common ground that the MIF that
7 was agreed between the banks operated as a reserve price
8 or floor in the MSC and we will see that as the judgment
9 progresses.
10 Paragraph 8, other banks joined the MIF agreement
11 and there were 22 banks over the course of 2006.
12 Skipping down to paragraph 11, it was subject to
13 investigation by the Hungarian Competition Authority and
14 at paragraph 11 at the top we see that the Hungarian
15 Competition Authority found that by determining the
16 level and structure of the interchange fee which were
17 applicable to Visa and *Mastercard* as well as to all the
18 banks in establishing a framework for such an agreement
19 in their internal rules and facilitating it, the 22
20 banks that were party to the MIF agreement and Visa and
21 *Mastercard* entered into an anti-competitive agreement
22 that was not exempt.
23 If you skip down, members of the Tribunal, about
24 four lines from the bottom of paragraph 11, you see that
25 it was a conduct -- the conduct constituted not only

1 a restriction of competition by object but also by
2 effect, so you see a by object finding by the Hungarian
3 Competition Authority.
4 Then skipping ahead to paragraph 45, which is on
5 page 8, {RC-J5/35.1/8} we see the question that the
6 referring court asked the Court of Justice, whether
7 Article 101(1) TFEU must be interpreted as meaning that
8 an interbank agreement which fixes at the same amount
9 the interchange payable where a payment transaction by
10 card takes place to the banks issuing such cards
11 offered by card payment services companies, operating in
12 the national market concerned may be classified as
13 an agreement which has as its object the prevention,
14 restriction, distortion of competition within the
15 meaning of that provision. So we are concerned squarely
16 with by object infringement here.
17 If the Tribunal moves on to paragraph 50, we skip
18 over 51 and 52, that is the case law we have seen from
19 *Cartes Bancaires*.
20 Paragraph 54, the court repeats, first line, that
21 the concept of restriction of competition by object must
22 be interpreted restrictively.
23 At paragraph 56, we see the relevant markets and
24 again I stress that the detail of these facts because of
25 the parallels with our case and the factors which my

1 learned friend says point directly to a by object
2 infringement are the same factors to a material extent
3 that were present here.
4 Three distinct markets in the field of open bankcard
5 systems. First the intra systems market on which the
6 card systems compete; next, the issuing market in which
7 the issuing banks compete to attract cardholders as
8 customers; and finally the acquiring market on which the
9 acquiring banks compete to attract merchants as
10 customers.
11 At 57, according to the information provided by the
12 referring court, in its decision the competition
13 authority took the view the MIF agreement was
14 restrictive of competition by its object, in particular
15 because first it neutralised the most significant
16 element of price competition on the intra systems market
17 in Hungary; and second and this is obviously material
18 for our purposes: the banks themselves gave it the role
19 of restricting competition on the acquiring market.
20 So it is just like our case, the allegation is there
21 is a restriction of competition on the acquiring market
22 in the member state and necessarily affected competition
23 on the latter market. MIF agreement necessarily affects
24 the competition on the acquiring market.
25 At paragraph 58:

1 "Before the Court, the Competition Authority, the
2 Hungarian Government and the Commission argued
3 In that same vein, that the MIF Agreement was a
4 restriction of competition 'by object' ..."
5 Now, pausing there. The European Commission
6 intervened in this case and said it was a restriction by
7 object. To the extent that my learned friend has
8 pointed out the European Commission's provisional views
9 in other decisions, we do not deny that the Commission
10 has taken this position. Whether it has produced
11 binding determinative decisions that is a different
12 matter which I will come to. We note here that the
13 Commission is offering its view to the Court of Justice
14 that this MIF agreement was a restriction of
15 competition. Why? Because it entailed indirect
16 determination of the service charges which serve as
17 prices on the acquiring market in Hungary, the very same
18 theory of harm that we have seen in the cases which have
19 been put to the Tribunal and which my learned friend
20 relies upon.
21 Here, the Commission is relying on that theory of
22 harm as a basis for restriction by object.
23 Skipping down to paragraph 60:
24 "So far as concerns the information actually
25 submitted to the Court, it should be observed, as

1 regards, first, the content of the MIF Agreement ... it
2 is not in dispute that that agreement established a
3 uniform amount for the interchange fees that the
4 acquiring banks paid to the issuing banks when a payment
5 transaction was made using a card issued by a bank which
6 was a member of the card payment system offered by Visa
7 or *Mastercard*."
8 So it is not in dispute the banks fixed the MIF paid
9 by acquirers to issuers.
10 What was the effect of that? We see at
11 paragraph 61:
12 "... it should be observed ... as the Advocate
13 General has stated ... whether it be from the
14 perspective of competition between the two card ...
15 systems or [and I emphasise this, or from the
16 perspective of] competition between the acquiring banks
17 concerning the service charges ..."
18 So as regards the competition between the acquiring
19 banks setting MSCs:
20 "... an agreement does not directly set sale or
21 purchase prices, but standardises an aspect of the cost
22 met by the acquiring banks to the benefit of the issuing
23 banks in return for the services triggered by the use of
24 the cards issued by the latter banks as a means of
25 payment."

1 Identical to the vice which my learned friend raised
2 with you yesterday and today.
3 Now, even though it is an indirect fixing of
4 a price, the court notes that it is clear from the very
5 wording of Article 101(1)(a) that an agreement which
6 indirectly fixes purchase or selling prices might also
7 be regarded as having as its object the prevention,
8 restriction or distortion of competition.
9 So the essential elements of the MIF are all present
10 here and well understood. Mr Beal says whether an
11 infringement is an infringement by object depends on
12 facts and in this case the facts were left to be
13 determined by the national court, the referring court,
14 but to be clear, the facts which Mr Beal my learned
15 friend says are sufficient for an infringement by object
16 are all here. The MIF determines a substantial
17 component of the MSC, to quote him, it sets the reserve
18 price or floor below which the MSC cannot go so why then
19 did the Court of Justice not say this is an object
20 infringement? We see what facts, what factors the
21 Court of Justice says are necessary to be assessed, what
22 assessments must be undertaken to determine whether
23 a MIF is an infringement by object or not and we see
24 that from paragraph 65:
25 "Although it is clear from the documents before the

1 Court that specific percentages and amounts were used in
2 the MIF Agreement for the purposes of fixing the
3 interchange fees, the content of that agreement does
4 not, however, necessarily point to a restriction 'by
5 object', in the absence of proven harmfulness of the
6 provisions of that agreement to competition.
7 "Next, as regards the objectives pursued by the MIF
8 Agreement, the Court has already held that, in the case
9 of two-sided card payment systems such as those offered
10 by Visa and *Mastercard*, it falls to the competent
11 authority or to the court having jurisdiction to analyse
12 [analyse what?] the requirements of balance between
13 issuing and acquisition activities within the payment
14 system concerned in order to ascertain whether the
15 content of an agreement or a decision by an association
16 of undertakings reveals the existence of a restriction
17 of competition 'by object' ..."
18 Far from it being irrelevant it is necessary to
19 examine the requirements of balance between the issuing
20 and acquisition activities.
21 Paragraph 67:
22 "In order to assess whether coordination between
23 undertakings is by nature harmful to the proper
24 functioning of competition, it is necessary to take into
25 consideration all relevant aspects — having regard, in

1 particular, to the nature of the services at issue, [and
2 quoting *Cartes Bancaires*] as well as the real conditions
3 of the functioning and structure of the markets ..."
4 Paragraph 68, again from *Cartes Bancaires*:
5 "That must be the case, in particular, when that
6 aspect is the taking into account of interactions
7 between the relevant market and a different related
8 market and, all the more so, when there are interactions
9 between the two facets of a two-sided system."
10 Paragraph 70:
11 "In that regard, the referring court states that the
12 pursuit of the objectives stipulated in the MSC
13 Agreement, even though that agreement did not enter into
14 force, played a role in the conclusion of the MIF
15 Agreement and in the calculation of the uniform scales
16 provided for therein. The specific purpose of the MSC
17 agreement was to determine per category of merchants the
18 minimum level of the uniform service charge to be paid
19 by those merchants."
20 An egregious anti-competitive, purpose you might
21 think, a price fixing agreement of the simple kind.
22 But then the court says this at paragraph 71:
23 "That said [so notwithstanding the MSC agreement]
24 certain information contained in the documents before
25 the Court tends to indicate that one objective of the

1 MIF Agreement was to ensure a degree of balance between
2 the issuing and acquisition activities within the card
3 payment system at issue in the main proceedings.
4 "In particular, first, the interchange fees were set
5 at a uniform level using not minimum or maximum limits
6 but fixed amounts.
7 It goes on to say that, bottom of that paragraph 72,
8 for two of the years:
9 "... the banks were informed by *Mastercard* and Visa
10 that cost studies conducted by each of them revealed
11 that the levels of the costs fixed in the MIF Agreement
12 were not sufficient to cover all the costs borne by the
13 issuing banks."
14 Part of the objective was to ensure that issuing
15 banks' costs were covered.
16 The cost studies were for two years. You have seen,
17 members of the Tribunal, that this agreement was from
18 1996 but the court thought this was relevant in the
19 question of balancing the issuing and acquiring sides of
20 the market.
21 73:
22 "It cannot be ruled out that such information points
23 to the fact that the MIF Agreement was pursuing an
24 objective consisting not in guaranteeing a minimum
25 threshold for [MSCs] but in establishing a degree of

1 balance between the 'issuing' and 'acquisition'
2 activities within each of the card payment systems at
3 issue in the main proceedings in order to ensure that
4 certain costs resulting from the use of cards in payment
5 transactions [issuer costs] are covered, whilst
6 protecting those systems from the undesirable effects
7 that would arise from an excessively high level of
8 interchange fees and thus, as the case may be, of
9 service charges."
10 Again, as Visa and *Mastercard* have been saying for
11 years, the function of the MIF to ensure that the
12 issuing side of the market is properly funded but also
13 to constrain the issuing side of the market because of
14 their own economic imperatives.
15 Now, I accept of course that these factors are
16 relevant to the 101(3) exercise but my point and my
17 answer to my learned friend is that they are relevant to
18 both the 101(3) exercise and the question of whether
19 MIFs are properly characterised as a restriction by
20 object or not. It is quite wrong and directly contrary
21 to the case law of the Court of Justice recent case law
22 to say that these are restrictions by object.
23 The only domestic consideration of this issue of
24 course was in the *Sainsbury's* Tribunal judgment, but
25 that was not appealed on this issue, on the question

1 about infringement, so I would ask the Tribunal to turn
2 to it. That is in {RC-J5/24.01/69}, please, just for
3 the heading. Sorry, I think I am in the wrong ... yes,
4 page 69:
5 "Restriction of competition by object."
6 The analysis begins at page 70, over the page,
7 {RC-J5/24.01/70} paragraph 98 and here when we look at
8 the arguments that are put by *Sainsbury's* to the
9 Tribunal about why the MIF was a restriction by object
10 we see that Mr Beal was engaged in exemplary recycling,
11 because the very same submissions made to you then are
12 being recycled for present purposes today.
13 98(1), the UK MIF was in essence a price fixing
14 agreement.
15 (2), various regulators in relation to the intra-EEA
16 MIFs and the *OFT* in relation to the UK MIF have found
17 these to be anti-competitive agreements by effect. By
18 effect, not by object.
19 I pause here to say this has a flavour of Mr Beal's
20 argument that, well, because the Supreme Court was so
21 clear that the domestic and intra-EEA MIFs were
22 restrictive by effect and their reasoning so pithy, that
23 this Tribunal can infer from that that the MIFs are
24 restrictions by object and I will put that submission in
25 the same bucket as the submissions here which

1 the Tribunal went on to reject, and rightly so.
2 We have the decisions which found restriction by
3 effect under subparagraph (2).
4 Again the Commission on page 71, {RC-J5/24.01/71}
5 you see the European Commission decision of 2007 which
6 my learned friend took you to at length, that was relied
7 on for the same purpose before you all those years ago
8 on the by object issue.
9 On page 72, {RC-J5/24.01/72} we see your
10 consideration of the law. You recite the standard test
11 noting the recent judgment of the Court of Justice in
12 *Cartes Bancaires* at the bottom of subparagraph (2) and
13 you quote *Cartes Bancaires* at length. There is no need
14 to go over that because I have taken you to the relevant
15 passages.
16 At paragraph 101 on page 75 {RC-J5/24.01/75},
17 the Tribunal said:
18 "It is clear that the essential criterion for
19 discerning restriction on competition 'by object' is
20 that the agreement by its very nature reveals
21 a sufficient degree of harm to competition so as to
22 obviate any need for an effects-based examination."
23 And further points can be made.
24 Certain types of agreement can be said by their very
25 nature likely to be anti-competitive. The Tribunal made

1 a reference to per se illegal agreements under the
2 Sherman Act.
3 Then at (2):
4 "Given that a finding of object restriction obviates
5 the need for a consideration of the anti-competitive
6 effects ... there is a symbiosis between [the two]."
7 And the economists echo this in their own analysis:
8 You cannot use restriction by object to avoid a
9 difficult investigation of anti-competitive effects.
10 "... the harm to competition ... needs to be
11 clear-cut and pronounced without an examination of
12 effects.
13 "Whilst the whole point of an object restriction is
14 to avoid the need for an effects investigation, it is
15 clear (not least from ... *Cartes Bancaires*) that the
16 anti-competitive restriction needs to be seen and
17 considered in context ..."
18 And that is very important, that is exactly what the
19 Court of Justice following the CAT's judgment in
20 *Sainsbury's* went on to do in the *Budapest Bank* case.
21 Now, 102:
22 "With this, we turn to the allegedly
23 anti-competitive agreement in this case, the agreement
24 setting the UK MIF."
25 The very same MIF that we are looking at today:

1 "It is our conclusion that this agreement is not
2 a restriction of competition 'by object' for the
3 following reasons:
4 "First, although it is fair to say that the UK MIF
5 is an agreement fixing a price, and that such provisions
6 might be said to have a presumptive anti-competitive
7 effect, it is ... a default provision ... it was
8 [always] open to [the banks] to agree a different
9 Interchange Fee. That ... has a diluting effect [says
10 the Tribunal] [even if] we appreciate that the ability
11 on the part of Issuing and Acquiring Banks to depart
12 from the UK MIF by way of bilateral agreement may have
13 been more illusory than real."
14 Sorry, the second point:
15 "Secondly, given that after voluminous factual and
16 expert evidence in writing, oral evidence over [several]
17 days and ... submissions from [the] legal teams, the
18 issue of whether the UK MIF was, or was not,
19 anti-competitive was very much at large, we do not think
20 that it can be said that the anti-competitive nature of
21 this agreement was either clear-cut or pronounced
22 without an examination of the effects.
23 "It is also worth bearing in mind that price-fixing
24 cartels (the classic by Object' restriction) are almost
25 invariably secret. The *Mastercard* Scheme Rules,

1 including the provisions regarding the MIF, are no
2 secret."
3 And the same can be said for Visa. What we do is as
4 public as could be:
5 "They are extant in every relevant licence agreement
6 and the MIFs (as well as the Scheme Rules) are published
7 by *Mastercard* on its website."
8 We do think it is relevant, says the Tribunal, why
9 *Mastercard* are setting a MIF.
10 You go on to consider the evidence that was given
11 and ordinarily one might say: what is the relevance of
12 evidence given in a different case years ago? It is
13 relevant in my submission for two reasons.
14 First of all, it strongly echoes the consideration
15 of balance which the Court of Justice in *Budapest Bank*
16 said was central to why the MIF was not a restriction by
17 object in that case.
18 It is also relevant because one sees the very same
19 evidence in the witness statements before you that the
20 basis upon which the MIFs are set has not changed since
21 the evidence put to you in 2016. We see it in the
22 evidence given by Mr Willaert to the Tribunal in that
23 case.
24 If you go to page 77 {RC-J5/24.01/77}, I am not
25 going to read all of this. He explains how in setting

1 MIFs the interchange team look at the costs involved
2 from an independent consultant, the costs incurred in
3 relation to a particular product, full costs or the
4 costs of the party as a proxy for total costs.
5 If you go over the page, page 78, {RC-J5/24.01/78},
6 indented paragraph 22, the scheme takes a strategic
7 approach to setting interchange fees, it takes account
8 of the cost data relevant to the *Mastercard* product but
9 also the rate set by *Mastercard*'s competition in this
10 respect and we will have more of that when we come to
11 look at Amex. Any relevant payment scheme objectives
12 which are relevant to this, such as the introduction of
13 new technologies, innovation, the need to fight fraud,
14 the objectives which require funding for which the MIF
15 is intended to contribute.
16 And then at paragraph 24 indented:
17 "'... there are multiple factors which are
18 considered when setting interchange fees: cost data,
19 competition, market conditions such as sensitivity to
20 cardholder fees and merchant service charges, payment
21 scheme objectives and innovation. In particular,
22 *Mastercard* must balance the competing interests and
23 desires of cardholders, issuers, acquirers and
24 merchants. For example, on one side, *Mastercard* needs
25 to assess and have reference to the level of issuer

1 costs incurred dealing with card use, a large proportion
2 of which arise from the other rules in the Scheme ...
3 and costs for attracting card holders - too low a
4 fallback interchange fee and there will be no incentive
5 for issuers to win cardholders or encourage card use; on
6 the other side, interchange fees consider the value that
7 merchants derive from card acceptance and cannot be too
8 high or merchants will either discourage the use of
9 payment cards or simply won't accept them ..."
10 If you go now, please, to page 80 {RC-J5/24.01/80},
11 skipping the cross-examination that is quoted there,
12 very bottom of page 80:
13 "It is thus clear that in terms of the level at
14 which it was set, the MIF was no ordinary price-fixing
15 agreement. *Mastercard* sought to set a considered default
16 Interchange Fee, reflecting multiple factors and diverse
17 interests. In particular, it was Mr Willaert's
18 evidence, which we accept, that Master Card sought to
19 balance the competing interests of Issuing
20 Banks/Cardholders and Acquiring Banks/Merchants, as well
21 as taking account of the competitiveness of *Mastercard*
22 cards with its rival schemes, Visa and Amex. Given this
23 approach, and given what *Mastercard* contended were the
24 potentially devastating consequences of a mismatch
25 between its Interchange Fees and those of its rivals, we

1 consider that it cannot be said that the MIF
2 demonstrates of its very nature a sufficient degree of
3 harm to competition so as to amount to a restriction 'by
4 object'."
5 To give the Tribunal, just for your note -- I am not
6 going to take you to it, that evidence of Mr Willaert
7 upon which the Tribunal placed reliance is recalled and
8 repeated and expanded by him {RC-F3/1/4}, paragraph 15,
9 and very similar evidence is given by Mr Knupp for Visa
10 {RC-F4/8/9}, paragraph 33.
11 As I said, this analysis and this finding was not
12 appealed and it is instructive that although this
13 judgment obviously preceded the judgment of the
14 Court of Justice in *Budapest Bank* which is we see a real
15 echo in the *Budapest Bank* case of the Tribunal's
16 consideration of that balancing exercise which precludes
17 a finding in our submission that a MIF is, by its very
18 nature, harmful to competition effects are quite
19 a different thing but as regards object, there is
20 nothing to support the claimants' case that the MIFs,
21 the domestic and intra-EEA MIFs, should be found to be
22 restrictions by object.
23 Turning then to the economics. All the experts rely
24 on the work of Professor Jean Tirole. His work is now
25 very familiar to you also because you have had to see it

1 in other contexts as well as this one. I am not going
2 to take you to his work in detail but there is a summary
3 of his view which -- a summary of his view, perhaps I am
4 denying you something enjoyable, but we will come back
5 to it. You may not agree with what he says but it is
6 relevant in my submission to the question of by object.
7 PROFESSOR WATERSON: No, I think it is.
8 MR KENNELLY: It is in J5/14.8.01 at page 1
9 {RC-J5/14.8.01/1}. If you go, please, to page 6
10 {RC-J5/14.8.01/6} in the second paragraph. I pause here
11 by saying I was not planning on going to this in such
12 detail but in view of how my learned friend has put his
13 case, as high as it has been put and the length of time
14 he took on the question of by object infringement and
15 his characterisation of MIFs, I am taking you back to
16 this basic starting point.
17 Second paragraph on page 6:
18 "IF regulation has sometimes been motivated by the
19 associated agreement among competitors (the issuers).
20 This 'illegal-price-fixing' argument, which was the
21 basis for the NaBanco case and was invalidated by the
22 courts in 1984, is based [says Professor Tirole] on an
23 incorrect analogy. An increase in the IF is not a price
24 increase for some final users like in standard cartel
25 theory, but a reallocation of cost between two

1 categories of end-users (merchants and cardholders).
2 This point was made by authorities' staff in some
3 regulatory hearings, and yet is not always taken on
4 board as a key principle for policy intervention."
5 And over the page, page 7, {RC-J5/14.8.01/7}
6 Professor Tirole is examining market failure and at the
7 last paragraph on that page, second sentence, he begins
8 there is widespread confusion about where the market
9 failure lies and because of that we start by identifying
10 it:
11 "It is sometimes believed that the joint
12 determination of an IF by banks represents an attempt to
13 cartelize and raise prices."
14 We had a real echo of that yesterday from our
15 friend:
16 "Economists and antitrust enforcers are rightly
17 suspicious of attempts by competitors to get together
18 and raise prices to users. The snag with this reasoning
19 in the case of payment cards, though, is that there are
20 two groups of users and that increasing the IF raises
21 the price of card transactions for one group (merchants)
22 and lowers it for another (cardholders). Put differently
23 [over the page] in a first approximation, the IF affects
24 the price structure and not the price level. This
25 feature by itself [says Professor Tirole] makes received

1 knowledge about 'cartelisation' inadequate."
2 For that reason in my submission the pure cartel
3 authorities that my learned friend took you to are of no
4 assistance to you in examining whether a MIF is truly
5 about object infringement or not.
6 I will turn then to how the claimants put their
7 case. Let us see their submissions. I do not have the
8 submissions -- I have them separately, I do not know if
9 the Tribunal has those in a separate hard copy or are
10 you using your screens? I am happy to go on the screen
11 I just need to --
12 THE PRESIDENT: No, it varies, I am afraid.
13 MR KENNELLY: At paragraph 177 is where they begin, it is
14 page 74 on the hard copy and I will just check if that
15 is the same on the screen -- sorry, I will have to give
16 you the reference: {RC-A/1.1/80}, paragraph 177. The
17 claimants say -- and this is the essence of the
18 allegation and skipping down about five lines they say:
19 "When MIFs are set by virtue of the card schemes'
20 rules rather than through voluntary bilateral agreements
21 with settlement at par as the default, the card scheme
22 essentially dictates that a sum of money will be paid by
23 the acquirer to the issuer, without any consideration
24 being given to the willingness of each contractual
25 counterparty to that transaction to pay or receive the

1 specific sum."

2 Pausing there. That effect arises in a very similar

3 way for the settlement at par counterfactual because

4 under the settlement at par counterfactual what the

5 acquirer pays and what the issuer receives is fixed by

6 a collective rule. It is a scheme rule that determines

7 what the acquirer receives and -- what the acquirer pays

8 and what the issuer receives. The parties can make

9 a bilateral agreement for the payment of an interchange

10 fee, they can agree that separately, but if they do not

11 the default collective scheme rule is that the acquirer

12 pays zero interchange to the issuer.

13 So in that sense, the card scheme under the

14 settlement at par rule is also dictating the sum of

15 money which the acquirer pays the issuer, it is zero,

16 and operates in the same way here except the other way

17 round.

18 At paragraph 178, that is not to go back to the zero

19 MIF argument that we lost in the Supreme Court, it is

20 simply to point out the error in the identification of

21 this feature as a vice in paragraph 177.

22 At paragraph 178 we see the characterisation of the

23 MIF by the claimants. Skipping about halfway down 178:

24 "Looking at the scheme arrangements in their context

25 and in the light of the various contractual

1 relationships between the issuer, acquirer and merchant,
2 the object of the MIF is to set a common cost which
3 acquirers must meet to process merchants' transactions
4 under each respective scheme. This is properly to be
5 characterised as a form of price setting which
6 inevitably also impacts on the prices paid by merchants
7 for acquiring services in the national acquiring
8 markets. The object of the schemes, properly analysed,
9 is to fix a significant component of the price which
10 merchants pay through MSCs."
11 And that is almost exactly the characterisation of
12 the MIF that was put to the Court of Justice in the
13 *Budapest Bank* case and which the Court of Justice
14 rejected as being sufficient to constitute a "by object"
15 infringement.
16 At paragraph 179:
17 "This form of horizontal price fixing between
18 competitors is by its nature harmful to competition and
19 reveals in itself a sufficient degree of harm to
20 competition to be considered a restriction by object."
21 Then this:
22 "Since 2009 the Commission has consistently
23 expressed the view that Visa's default MIF rule is
24 a restriction by object as well as effect ..."
25 And my learned friend repeated this to the Tribunal

1 today. He characterised what I am about to describe as
2 decisions or findings which the Commission has taken to
3 the effect that a MIF is a "by object" infringement.
4 But when we look at what is listed here, we see
5 statements of objection or commitments or decisions. It
6 is surprising to hear that a Statement of Objections is
7 to be treated by this Tribunal as a finding that the
8 Commission has determined that a MIF is a "by object"
9 infringement.
10 As the Tribunal well knows a Statement of Objections
11 and an SSO is a provisional view in an investigation and
12 necessarily since the Commission has not yet heard the
13 submissions of the investigated party on the matters
14 contained in it.
15 The European Commission's mind, as expressed in
16 a Statement of Objections, is necessarily still open as
17 to whether there was an infringement or not at all. It
18 is no more than an allegation at the Statement of
19 Objections stage and it is fundamental to the very
20 nature of what a Statement of Objections or
21 a supplementary Statement of Objections is. Similarly a
22 Commitments Decision is a preliminary view.
23 Mr Beal's submission that you are somehow bound to
24 find an infringement in view of the
25 Commitments Decision, in view of the preliminary view in

1 the Commitments Decision is entirely wrong. I will come
2 back to develop that when I look at the cross-border
3 acquiring part of the case in opening after Ms Tolaney.
4 But I can say to the Tribunal right now his
5 submission is quite wrong, is directly contrary to
6 Article 9 and recital 13 of Regulation 1 (2003) which
7 says in terms the national court is not bound:
8 "It is open to the national court to find whether or
9 not the matters considered by the Commission are an
10 infringement."
11 Moving on then in these submissions to
12 paragraph 181. We are now with Professor Frankel and we
13 have his reasons for identifying an object restriction.
14 He says all MIFs are object restrictions. He says:
15 "Whereas settlement at par has emerged naturally in
16 competitive banking and payment markets, MIFs were
17 invented and maintained specifically with the intention
18 to prevent MSCs falling to low, competitive levels near
19 zero."
20 He says:
21 "They are not necessary for the operation of a card
22 payment scheme."
23 I am not getting into objective necessity. I don't
24 disagree with what my learned friend said about
25 objective necessity at that stage. We are concerned

1 only with what are the components, what are the legal
2 ingredients for identifying a "by object" infringement
3 here.
4 For the purposes of Professor Frankel, it is
5 necessary to go briefly to his report and we will see
6 the basis for his finding that the MIFs constitute, all
7 of them, by object infringements. We see the
8 first report, it is in {RC-H1/1/114}, paragraph 269. So
9 Professor Frankel says:
10 "My opinion is that all scheme MIFs including MIFs
11 applied to commercial card transactions [he is speaking
12 here about inter-regional] have the purpose of
13 increasing MSCs paid by merchants for the benefit of the
14 issuers."
15 And that is sufficient for his purposes. His
16 opinion is based on his historical research into the
17 origins of MIFs and the clear price fixing effect that
18 MIFs have on MSCs.
19 If you go to his second report, that is
20 {RC-H1/2/30}, paragraph 76. This is his reply report
21 and this is interesting because of his view as to the
22 legal parameters of his analysis. Professor Frankel is
23 obviously not responsible for any legal analysis, but he
24 has to rely on what he is being told is the proper legal
25 question for him. And he says at 76:

1 "I disagree with Dr Niels's claim that MIFs cannot
2 be a restriction by object because the business
3 objective of MIFs is to increase the overall success of
4 the card scheme ..."
5 An echo of what the Court of Justice said in
6 *Cartes Bancaires*:
7 "... in competition with other payment methods
8 including three-party schemes ... unless success is
9 defined as equivalent to the maximisation of monopoly
10 profits [says Professor Frankel] in my opinion the
11 schemes' MIFs and anti-steering rules are designed to
12 increase the profitability of the schemes and their
13 issuers. I understand that detailed investigation and
14 expert evidence concerning alleged efficiencies and
15 pro-competitive justifications, which potentially could
16 lead to the exemption of anti-competitive conduct, are a
17 subject to be addressed in Trial 3."
18 Professor Frankel is under the misapprehension, in
19 my submission, that the question of the balancing
20 function of a MIF between the issuing and acquiring side
21 of the market is only a matter for exemption, echoing
22 the submission which my learned friend made to the
23 Tribunal. If that was his understanding, that was
24 an error, an error of law, not his fault of course, but
25 a plain legal error in view of the Court of Justice in

1 *Budapest Bank* and the Court of Justice in
2 *Cartes Bancaires*.
3 Back to the claimants' submissions. I move on to
4 paragraph 182 where the claimants note what Dr Niels
5 says. We will skip through this, making the same point
6 that I have made now several times that this balancing
7 objective is all for 101(3).
8 At 183, though, they run into the problem that their
9 own expert does not agree that the MIFs are
10 a restriction by object because Mr Dryden does not agree
11 with the claimants that the MIFs are restrictions by
12 object and we see here how the claimants deal with that.
13 It is true, they say, that Mr Dryden also concludes
14 that the MIFs do not present a restriction by object
15 since -- and this is what they say:
16 "... since from an economic perspective he considers
17 a factual analysis of the effects of a measure is
18 required to establish a restriction of competition."
19 Teeing up potentially a submission that, well, since
20 the Court of Justice and the national courts have said
21 there is no need to do an effects analysis to examine by
22 object, Mr Dryden may have been under a misapprehension
23 of law. The claimants say:
24 "Mr Dryden doesn't think it is a wildly different
25 infringement because he considers a factual analysis of

1 the effects of the measure is required to establish
2 a restriction."
3 That is not quite what he says. If we see the
4 footnote reference given for Mr Dryden, it is Dryden 1,
5 paragraph 14.7. We will go to that, please, at
6 {RC-H2/1/143}.
7 Here we see at 14.7(a):
8 "Mr Dryden says the boundary between object and
9 effect remains somewhat unclear. It is perhaps because
10 it is a binary distinction in relation to something
11 which is more continuous in nature. In any event [and
12 this is the important part], from the perspective of
13 economics, sufficient facts (whether for an effects
14 analysis or for context in a by object analysis) need to
15 be established to find a restriction."
16 In my submission, that is not the same as saying
17 Mr Dryden thought there had to be a full effects
18 analysis before one could find a by object restriction.
19 Mr Dryden is accurately and fairly acknowledging that in
20 order to understand the context for a by object finding,
21 a proper analysis of the facts and sufficient facts are
22 required.
23 He goes on at 14.8 to say:
24 "Dealing purely with the conditions for a by object
25 test there is an argument [he says] that the MIFs could

1 be considered a restriction by object."

2 14.10, first line:

3 "The counterargument is that the analysis of the

4 essential facts [the essential facts necessary for

5 context] is still reasonably involved."

6 At 14.11:

7 "On balance and given the restrictive interpretation

8 and the correct legal understanding, I do not consider

9 the MIFs at issue in this case are likely to satisfy the

10 'by object' box."

11 Returning then to the -- I see the time. I am not

12 sure when the Tribunal wants to rise for the shorthand

13 writer's break.

14 THE PRESIDENT: If that is a convenient moment, Mr Kennelly.

15 MR KENNELLY: It is.

16 THE PRESIDENT: While we do that, I don't know if the sun is

17 causing discomfort on that side of the room, but we may

18 be able to do something about the blinds.

19 MR KENNELLY: It is not bothering me.

20 THE PRESIDENT: I notice that there might be some --

21 PROFESSOR WATERSON: People have been shading themselves.

22 THE PRESIDENT: It will be sorted out. We will rise for

23 10 minutes. Thank you.

24 (3.02 pm)

25 (A short break)

1 (3.16 pm)

2 THE PRESIDENT: Mr Kennelly.

3 MR KENNELLY: I am still, members of the Tribunal, in the
4 claimants' submissions. We are now on paragraph 183 of
5 where we have dealt with the claimants' treatment of
6 Mr Dryden and they wrap this up in the second sentence
7 of paragraph 183 by saying:

8 "In this respect three of the economists [including
9 one of their own] part company with the analysis of the
10 EU Commission on which the SSH claimants rely."

11 I simply repeat when they say the analysis of the
12 European Commission, they mean the preliminary and
13 provisional analysis of the European Commission in the
14 SOs, SSOs and Commitments decisions upon which they
15 place reliance in the previous paragraph.

16 They go then on paragraph 184 to address Mr Holt's
17 reliance on the Tribunal's analysis in *Sainsbury's* CAT.
18 At the top of my page 77 -- so it is the next page,
19 thank you:

20 "... that ruling that this Tribunal's ruling needs
21 to be considered in the light of the case law and
22 regulatory practice since 2016 which has been addressed
23 above."

24 Pausing there, the suggestion that things have
25 changed radically since this Tribunal analysed the

1 question of by object infringement in 2016 is unreal.
2 My learned friend's own submissions to you were drawn
3 heavily from a judgment from 1988, the *Verband der Sach*
4 case and the Commission decisions he went to were the
5 same ones that were put to this Tribunal and that were
6 quoted in the Tribunal's judgment.
7 And then the *Budapest Bank* judgment he says, well,
8 that was all about -- that was making clear that it was
9 for the referring court, he says, to carry out the
10 relevant information or, that must be a mistake, the
11 relevant examination.
12 As he says:
13 "The *Sainsbury's* Supreme Court judgment made clear
14 the *Budapest Bank* case was dealing with different
15 arrangements and it was surprising that Visa and
16 *Mastercard* had placed so much reliance on it."
17 Suggesting, I am not sure, it is surprising that we
18 should be relying upon it today. Who knows what that
19 last sentence means? But we do need to go to the
20 Supreme Court in *Sainsbury's* to see what they said about
21 *Budapest Bank* and whether that makes any difference to
22 this Tribunal's reliance upon it for the purposes of "by
23 object" infringement.
24 The Supreme Court judgment is in -- {RC-J5/36/26} is
25 the one that I need, please.

1 At paragraph 80 we see the reliance that Visa and
2 *Mastercard* placed on *Budapest Bank* before the
3 Supreme Court and one sees right away it was for quite
4 a different purpose. Visa and *Mastercard* relied upon
5 *Budapest Bank*, relied on a different part of the
6 judgment from that which I took the Tribunal to, to
7 argue that the question of whether MIFs set a floor
8 under the MSC and restrict competition had not been
9 settled by *Mastercard* in the Court of Justice but had to
10 be determined by a national court. Perhaps a difficult
11 submission to make in view of the passages that I have
12 taken the Tribunal to and the analysis of what the MIF
13 involved by reference to a component of the MSC, but
14 that was the point relied upon by my clients in the
15 Supreme Court in reliance on *Budapest Bank*. It was for
16 an effects analysis case, it had nothing to do with
17 a "by object" infringement.
18 Over the page, page 28 {RC-J5/36/28} one sees at
19 paragraph 88 the reason for the Supreme Court's
20 dismissal of our reliance on *Budapest Bank* for the
21 purposes of the effects case that we were making:
22 "In our judgment the case can be distinguished."
23 First and foremost, in my submission, it concerned
24 restriction by object rather than effect, it involved
25 a different type of MIF agreements -- that is true, you

1 saw that in *Budapest Bank* it was a standard MIF
2 agreement like we have here but one that involved both
3 Visa and *Mastercard*. And they say:
4 "It was said to prevent escalation of interchange
5 fees."
6 That was an argument which the Supreme Court had
7 rejected in the course of the effects analysis. And
8 finally:
9 "It involved a different counterfactual, namely one
10 where each scheme had its own MIF rather than being no
11 MIF.
12 Of course, with the greatest of respect to the
13 Supreme Court, there was not a counterfactual analysis
14 in *Budapest Bank* because it was an objects case. But
15 the point they were making here was that it was of no
16 assistance to them in considering the effects of a MIF
17 which did require a counterfactual and we know the
18 counterfactual upon which they settled in the
19 Supreme Court *Sainsbury's* case.
20 There is nothing in that judgment to say that this
21 Tribunal should not rely on *Budapest Bank* for the
22 purposes of a "by object" restriction analysis in this
23 case.
24 The relevant considerations for assessing whether an
25 infringement was by object in a case concerning MIFs in

1 a four-party system remain those which the Court of
2 Justice referred to in *Cartes Bancaires* and Budapest
3 Bank.
4 Before I finish on this and go on to the UIFM
5 itself, my final point is to recall that the claimants
6 make this argument about a "by object" infringement in
7 relation to the domestic and intra-EEA MIFs set pursuant
8 to the IFR. This is an argument that is part of
9 issue 3. That is how high their case is. They say that
10 even the MIFs that are set pursuant to the requirements
11 of the IFR are "by object" infringements. I shall not
12 take you to the IFR now, but you have it and you will
13 see that in recital 9 there is a reference to the
14 pro-competitive -- the positive benefits that can arise
15 from MIFs. Again, unlikely to apply to something which
16 is, by its very nature, harmful to competition.
17 For that reason, because these MIFs are set pursuant
18 to the IFR, in my submission our case on by object is
19 stronger than the case -- much stronger than the case in
20 *Budapest Bank* and stronger even than the case in
21 *Cartes Bancaires*.
22 MR TIDSWELL: It is right I think, is it not, that Mr Dryden
23 says, it being an object, a "by object" infringement
24 would not prevent the application of 101(3) analysis?
25 MR KENNELLY: That's correct.

1 MR TIDSWELL: But, as I think you are pointing out, it may
2 be starting from a more difficult place if it is
3 intended to be harmful?
4 MR KENNELLY: Indeed, indeed. I am not saying from a moment
5 that it is determinative. Even by a "by object"
6 infringement can get a 101(3) exemption but if one asks:
7 is it by its very nature harmful to competition,
8 requiring no analysis of effects, as I think you said
9 Mr Tidswell, it is a difficult place for a claimant to
10 begin -- no, for a claimant to begin because they are
11 the ones arguing it is a "by object" restriction of
12 competition.
13 MR TIDSWELL: Well, I think -- either side (inaudible)
14 reflect the other side will make the same point.
15 MR KENNELLY: Very good. I do not rely on the IFR to say it
16 is determinative of the point; it is simply to draw the
17 court's attention to the fact that we are not just
18 concerned here with every MIF. We are concerned with
19 the MIFs under issue 3, which are the domestic and
20 intra-EEA MIFs set since 2016. So I am focusing for
21 these purposes on those MIFs to rebut the "by object"
22 case which is the starting point of the claimants' case
23 under issue 3.
24 MR TIDSWELL: Thank you.
25 MR KENNELLY: Moving on then to the UIFM itself. It is

1 important here to see where the battle lines actually
2 lie. It was not entirely clear sometimes from my
3 learned friend how much is in common between the
4 experts. So for that it is useful to take up the joint
5 expert statement {RC-H5/1/4}, and on page 4 we have
6 issue 3 and we see what is agreed. First bullet:
7 "The schemes would likely prefer to adopt either of
8 the alternative counterfactuals rather than settlement
9 at par in the post-IFR period."
10 And then this.
11 "Under the alternative counterfactuals, interchange
12 fees would not be appreciably different from their
13 factual levels under the IFR."
14 So the experts accept that if the UIFM is valid and
15 if it can be implemented the MIF levels will be
16 appreciably identical to those set currently.
17 What are the areas of disagreement? Three matters:
18 whether the alternative counterfactuals are valid
19 because they do not contain agreement as to default
20 MIFs; or are invalid because they contain a restrictive
21 agreement as to IF setting; there is disagreement as to
22 the relevance of economic analysis to this
23 determination.
24 Secondly, whether the alternative counterfactuals
25 are invalid because the HACR is restrictive and not

1 objectively necessary.
2 Thirdly, if otherwise valid, whether
3 a counterfactual without the HACR would be stable or, if
4 stable, would it result in interchange fees at the level
5 of the IFR caps. That is the feasibility point which
6 I will come to last.
7 I will take the three points of disagreement in
8 turn. I will begin then with the approach to
9 identifying a restriction of competition contrary to
10 Article 101 and national competition law. So in
11 summary, and it is common ground, to identify whether
12 a particular measure produces restrictive effects you
13 must remove that measure and ask whether in the likely
14 situation that results is competition more or less
15 restricted than before. In the pre-IFR cases when the
16 MIF-setting collective agreement was removed the likely
17 outcome was the collapse of the schemes unless
18 a settlement at par rule was adopted. That was because,
19 absent the MIF, issuers would drive bilateral
20 interchange fees higher and higher. That was
21 a function -- and my learned friend said this
22 yesterday -- of competition between the issuers. It is
23 a basic economic fact that issuers want positive MIFs so
24 that they can use them, among other things, to compete
25 with each other and to compete with other schemes, like

1 Amex, or to win the business of cardholders.
2 PROFESSOR WATERSON: So are you saying that that would
3 happen such that the interchange fees would go above the
4 level of Amex fees?
5 MR KENNELLY: Potentially yes.
6 PROFESSOR WATERSON: But then would they not suffer the same
7 problem that Amex suffers of not being widely accepted?
8 MR KENNELLY: But again potentially, yes.
9 PROFESSOR WATERSON: So in other words that would not be
10 optimal for Visa and *Mastercard*?
11 MR KENNELLY: On the basis of the schemes' current
12 objectives, there is no evidence, sir, on this question
13 of what the schemes currently regard as optimal.
14 PROFESSOR WATERSON: No.
15 MR KENNELLY: That would have to be a matter to put to the
16 witnesses who will come before you, although they may
17 not be able to speak to that particular question based
18 on the evidence they have produced. It is common ground
19 between the experts that the issuers have an incentive
20 to drive the interchange fees higher and higher. It was
21 common ground before the Supreme Court, Court of Appeal
22 and the lower courts in *Sainsbury's* that they would
23 drive those MIFs higher and higher to the point that
24 they would risk the collapse of the schemes.
25 I am focusing on now as to why, why the settlement

1 at par rule was found to be the appropriate
2 counterfactual at that stage in order to show what has
3 changed for the purposes.
4 PROFESSOR WATERSON: Okay. I was questioning the higher and
5 higher. That is the --
6 MR KENNELLY: Indeed. What I am speaking to here, sir, is
7 what was common ground and found to be the case in the
8 *Sainsbury's* case and that competitor pressure between
9 the issuers is there today and exists between them
10 today. The higher and higher is common ground; whether
11 it goes all the way to the collapse of the scheme the
12 experts may disagree, but higher and higher is common
13 ground between the experts, which is why it is agreed
14 between them that if the counterfactuals are valid and
15 implemented, the issuers will set their interchange fees
16 as high as they can, higher and higher to the point of
17 the caps.
18 The schemes are competing and, of course, that is
19 because, among other things, the schemes are competing
20 with each other for the business of issuers and with
21 third party schemes to attract those issuers. That is
22 why a scheme would not introduce a rule prohibiting
23 issuers from setting positive interchange fees unless
24 they really had to because they had no other viable
25 choice. Until the IFR, the schemes had no other viable

1 choice, absent the MIF, but to adopt the settlement at
2 par rule. That was the only option they had until the
3 IFR came along. Because, as I said a moment ago, the
4 economic consensus was until then that the issuers would
5 keep driving up the MIFs, the IFs if it was bilateral,
6 to the point of threatening the viability of the scheme
7 itself. The settlement at par rule was the only way to
8 prevent that risk of collapse of the scheme. It was for
9 that reason and only that reason that the courts found
10 the schemes were and likely to adopt such a rule. As
11 the Tribunal knows, because the courts found that
12 a settlement at par was less restrictive of competition
13 than a positive MIF, the positive MIF was found to be
14 a restriction of competition by effect.
15 With the IFR, it is very simple point in some ways,
16 the issuers can no longer threaten to cause the scheme
17 to collapse by setting bilateral interchange fees too
18 high because they are capped. The schemes do not need
19 to impose rules preventing issuers from setting their
20 own interchange fees. We, the schemes, can sit back and
21 allow the issuers to set their own terms of settlement
22 without fear that they will cause the scheme to collapse
23 or threaten its collapse.
24 All of this is a function of the two-sided nature of
25 these markets. That is exactly what Professor Tirole

1 was describing in his classic paper, summarised in the
2 sections I showed you a moment ago, and the IFR
3 recognises this as well. It is not only true for
4 four-party schemes, Amex operates, again as you know, on
5 the same basis that they charge fees to merchants that
6 are used to subsidise its offer or the offer of issuers
7 to cardholders.
8 Clearly schemes would prefer to allow issuers to
9 charge interchange fees than to set a rule that
10 prohibits issuers from setting interchange fees.
11 A model like the UIFM which simply allows issuers to set
12 their own unilateral terms of settlement involves no
13 restriction of competition because there is no longer
14 a multi-lateral interchange fee to which all the issuers
15 and all the acquirers have agreed collectively. In
16 fact, in examining whether the UIFM involves
17 a restriction of competition it is useful to compare it
18 to the settlement at par rule which the claimants say is
19 the only valid counterfactual because both the
20 settlement at par rule and the UIFM provide for
21 a default to a zero MIF in the absence of bilateral
22 agreement.
23 The difference between the two rules is the
24 settlement at par rule involves Visa or *Mastercard*, the
25 scheme prohibiting the issuers from setting their own

1 settlement terms unilaterally. But the UIFM does not
2 prohibit them from setting their own settlement terms
3 unilaterally, it allows issuers to set their own
4 settlement terms based on their own independent
5 commercial incentives arising from competition between
6 them.
7 I fully appreciate where that goes, where the
8 issuers go in vindication of their independent
9 commercial incentives; that is accepted. The question
10 for the Tribunal is: is that unilateral action or is it
11 properly described as collective action contrary to
12 Article 101(1)?
13 The claimants have to argue that Competition Law
14 requires Visa to prohibit issuers from setting their own
15 independent terms of settlement. And we say that would
16 be a very odd outcome when one is looking at what is and
17 is not permitted by competition law.
18 In determining whether the UIFM itself involves
19 a breach of Article 101(1) we need to understand why
20 MIFs have been found to be restrictions in the past.
21 I summarised it a moment ago but I will need to go back
22 to *Sainsbury's* in the Court of Appeal which contains
23 a useful summary of the earlier EU case law and the
24 function of a counterfactual. I will take you to that
25 now, if I may: {RC-J5/28/1}. It is page 33 that I need,

1 page 33 {RC-J5/28/33}, please.
2 Paragraph 126:
3 "The function of a counterfactual, quoting
4 General Court in *Cartes Bancaires* ..."
5 To save the shorthand writer I am going to ask
6 the Tribunal just to read that.
7 (Pause).
8 THE PRESIDENT: 126?
9 MR KENNELLY: 126 {RC-J5/28/33-34}, yes, please.
10 THE PRESIDENT: Yes, of course.
11 MR KENNELLY: At 127 we see:
12 "What is the measure said to be restrictive? The
13 measures in question are the agreements between the
14 issuers and the acquirers to be bound by the scheme
15 rules set by the scheme defendants."
16 And this is the important part:
17 "Those rules set default multi-lateral interchange
18 fees payable in the absence of bilateral agreements
19 being reached."
20 128:
21 "It is true there has to be a rule as to settlement,
22 but it is not true that such a rule has to include
23 a multi-lateral interchange fee, negative or positive."
24 And that is important because in a payment card
25 scheme there has to be some agreed basis whereby the

1 issuer settles with the acquirer when a transaction is
2 made. The Court of Appeal accepted there had to be
3 a collective rule as to settlement, there had to be some
4 collective rule as to settlement, but what the
5 Court of Appeal rejected was a collective rule setting
6 a common multi-lateral interchange fee binding all
7 acquirers and issuers alike.
8 Paragraph 129:
9 "It is therefore necessary to ask whether in a world
10 without the scheme rules that set a multi-lateral
11 interchange fee [that is the collective rules that set
12 the MIF] in default of a bilateral interchange fee being
13 agreed there would or would not be more competition in
14 the acquiring market."
15 So we are clear as to the measure being removed,
16 that is the scheme rules that set a multi-lateral
17 interchange fee in default of a bilateral interchange
18 fee, the Court of Appeal is distinguishing, I am sorry
19 to state the obvious, a multi-lateral interchange fee
20 from a bilateral interchange fee. In multi-lateral the
21 same interchange fee is agreed between all the issuers
22 and all the acquirers. A bilateral interchange fee is
23 agreed between one issuer and one acquirer.
24 Then when the measure is removed, what happens?
25 Paragraph 142, here we see the General Court's analysis

1 in *Mastercard*:

2 "The General Court said:

3 "'A *Mastercard* system operating without a MIF but on
4 the basis of a rule prohibiting ex-post pricing was
5 economically viable and that was sufficient to justify
6 it being taken into consideration in the context of the
7 analysis of the effects of the MIF on competition.'"

8 This, as we know, was what the Court of Justice said
9 was wrong about the General Court's analysis, but the
10 Court of Justice adopted the no MIF plus prohibition on
11 ex post facto counterfactual in its own effects
12 analysis.

13 Here the Court of Appeal notes:

14 "The no MIF plus prohibition on ex-post pricing
15 counterfactual is not materially different from the no
16 default MIF plus settlement at par counterfactual that
17 the parties are agreed upon in this case."

18 It has been common ground until my learned friend
19 suggested otherwise yesterday that a zero MIF is just as
20 valid a label for what we are describing as the
21 settlement at par counterfactual with a prohibition on
22 ex-post pricing.

23 Both admit the possibility of bilateral interchange
24 fees but assume that in default there will be no imposed
25 standard MIF, I would say positive MIF, and also

1 a settlement at par.
2 Then we go to 149, over the page, paragraph 149.
3 The criticism of the Court of Justice of the
4 General Court was that the General Court had not
5 considered the likelihood of settlement at par if there
6 was no MIF. The General Court relied only on economic
7 viability. The General Court did not explain whether it
8 was likely that there would be a settlement at par rule
9 in the absence of the MIF. But then at 150, the Court
10 of Justice held that:
11 "The ancillary restraint counterfactual that the
12 General Court had used was appropriate also for the
13 primary Article 101(1) analysis. The General Court and
14 Commission had been entitled to conclude that the
15 possibility [and I am relying on this] of issuers
16 holding up acquirers who were bound by the Honour All
17 Cards Rule could only, in effect, be solved by a scheme
18 rule prohibiting ex-post pricing."
19 This hold-up problem is the one that
20 Professor Waterson raised with me a moment ago and for
21 the purpose of the *Sainsbury's* case it was accepted in
22 the following terms that -- so far this is common
23 ground -- if we are to have a payment card system the
24 settling of payments between issuers and acquirers has
25 to be on terms, on some terms, we assume there is no way

1 of dealing with an inability to agree, such as a default
2 MIF, there would be no alternative but for the terms of
3 settlement between an issuer and an acquirer to be
4 determined bilaterally. The problem with that is the
5 acquirer has no choice but to settle the payment with
6 the issuer; that was the effect of the HACR.
7 Even absent the HACR, you will hear the claimants'
8 witnesses explain that these merchant claimants'
9 customers expect to be able to pay with every issuers'
10 cards. Ultimately I will be submitting the HACR makes
11 no difference. Even without the HACR merchants could
12 not realistically turn away cards from a particular
13 issuer. But at this stage, the hold-up problem I am
14 treating the HACR as, and I will come back to the
15 claimants' case about the separate role of the HACR at
16 the end of my submissions on the UIFM.
17 But assuming the HACR is in, the acquirer cannot
18 walk away, they must agree something, all the bargaining
19 power is with the issuer, and because the issuer has the
20 bargaining power the issuers could, and most likely
21 would, demand larger and larger interchange fees. That
22 is because, as I say, the more interchange fee the
23 issuer gets that helps the issuer to compete more
24 strongly against other issuers, to fund card protection,
25 attract cardholders, cardholder revenues. My learned

1 friend accepted much of this in his own opening.
2 For the same reason, there is no incentive for the
3 issuer to reduce interchange fees bilaterally or
4 unilaterally because of the HACR. If an issuer reduces
5 an interchange fee he will not find his card is being
6 accepted more than the issuers that do not reduce their
7 interchange fees. The only consequence for an
8 individual issuer -- this is with a HACR in place --
9 would be he would have less revenue per transaction and
10 less money to fund things like rewards and points that
11 cardholders like, he would be materially harming his
12 competitive position.
13 So as a matter of economic rationality it was
14 accepted in the *Sainsbury's* case that issuers, if they
15 are able to, will keep demanding higher and higher
16 interchange fees and the acquirers are forced to pay
17 them.
18 That is a summary of the hold-up problem.
19 THE PRESIDENT: It may be that it is simply a matter for
20 a short note of evidence that is already in, but is
21 there evidence dealing with the manner in which, for
22 instance, the security of card transactions is enhanced?
23 I mean I would assume that it is not just a card issuer
24 issue, but also that the schemes play a pretty
25 fundamental role in terms of speccing up the nature of

1 the security that governs transactions. Please do not
2 answer it now, but I think it would be helpful to have
3 some idea of the contributions that the various entities
4 in the scheme generally furnish in that sort of example.
5 MR KENNELLY: Indeed to the security of the card --
6 THE PRESIDENT: Well, the security -- fraud protection is
7 what I am thinking about.
8 MR KENNELLY: Yes.
9 THE PRESIDENT: But I mean how one stops fraud operates at
10 very many different levels.
11 MR KENNELLY: Yes, there are many, many references in the
12 papers to that point and I will not take you to them
13 now --
14 THE PRESIDENT: No.
15 MR KENNELLY: -- but we will produce a short note with those
16 references --
17 THE PRESIDENT: That would be very helpful.
18 MR KENNELLY: -- to assist the Tribunal.
19 But because of the hold-up problem and only because
20 of the hold-up problem, the settlement at par or zero
21 MIF counterfactual was the right counterfactual. It was
22 the only way of addressing the hold-up problem and
23 keeping the schemes from collapsing.
24 Having identified the right counterfactual, it
25 remained for the Court of Appeal and the Supreme Court

1 to decide whether there would have been more competition
2 in that counterfactual. That was the real battle that
3 we had in *Sainsbury's* because both the Court of Appeal
4 and the Supreme Court followed the earlier EU *Mastercard*
5 decisions in concluding that the MIFs, compared to
6 settlement at par, did restrict competition.
7 We will start with the claimants' submissions in the
8 Court of Appeal. Paragraph 118, that is on page 32, so
9 you understand the parameters of the debate before the
10 Court of Appeal and the Supreme Court. The claimants
11 submitted, even though charging higher prices alone
12 because of the MIF did not engage Article 101, charging
13 higher prices to customers because of an agreement to
14 impose uniformly agreed charges on them certainly did.
15 THE PRESIDENT: It is not on the screen.
16 MR TIDSWELL: We have not got it yet. I am sure it is on
17 its way.
18 MR KENNELLY: Sorry, I am speaking into the void.
19 THE PRESIDENT: We are listening.
20 MR KENNELLY: It is {RC-J5/28/32}. I am so sorry if I did
21 not say that. We have it, thank you. Yes, it is
22 paragraph 118, Mr Turner's submission for the
23 claimants -- and I am relying on this, as the Tribunal
24 will see straight away, to address the point that comes
25 again and again through the claimants' submissions that

1 somehow increasing prices is sufficient to show
2 a restriction of competition. The claimants in this
3 case correctly accepted that, even though charging
4 higher prices alone -- they said charging prices higher
5 prices alone because of the MIF did not engage
6 Article 101, the vice, they said, was charging higher
7 prices to customers because of an agreement to impose
8 uniformly agreed charges, that was the problem. The
9 fact that the MIF made prices go up was not sufficient
10 to show a breach of 101(1), it was the uniformly agreed
11 nature of them that was the problem.
12 Then at paragraph 135, which is on page 35
13 {RC-J5/28/35}, we see the Commission's -- the
14 European Commission's reasoning which was adopted by the
15 court and they relied upon the Commission's conclusion
16 at recital 410. I will read the indented passage:
17 "*Mastercard*'s MIF constitutes a restriction of price
18 competition in the acquiring markets."
19 And why?
20 "In the absence of a bilateral agreement, the
21 multi-lateral default rule fixes the level of the
22 interchange fee rate for all acquiring banks alike ..."
23 And I would add "and all issuing banks alike":
24 "... thereby inflating the base on which the
25 acquiring banks set charges to merchants."

1 Then they say:
2 "The prices set by the acquiring banks would be
3 lower in the absence of this rule. The *Mastercard*
4 multi-lateral interchange fee therefore creates an
5 artificial cost base [and then this] that is common for
6 all acquirers. The MIF creates the cost base that is
7 common for all acquirers and the merchant fee will
8 typically reflect the costs of the MIF and this leads to
9 a restriction of price competition between the acquiring
10 banks to the detriment of merchants ..."
11 And I am emphasising, as the Tribunal can see, the
12 multi-lateral rule which fixes the level of the fee for
13 all acquiring banks alike -- and I add all issuing banks
14 also:
15 "The multi-lateral rule fixes ..."
16 At paragraph 150, the paragraph we looked at
17 a moment ago, we have the conclusions squished in the
18 middle of the paragraph that:
19 "The rule the *CJEU* found [this is about halfway
20 through the paragraph] that a settlement at par rule was
21 for that reason less restrictive of competition than
22 *Mastercard*'s existing MIF solution."
23 Visa objected to that analysis as the Tribunal
24 knows. We argued that a zero MIF also sets a floor
25 under MSCs and results in higher MSCs when compared to

1 negative MIFs and we demonstrated that negative MIFs can
2 exist. We argued that lots of agreements between
3 undertakings result in higher prices compared to the
4 counterfactual agreement with different terms. So when
5 a retailer agrees a price for a product supplied by
6 a manufacturer, the manufacturer's price sets a floor
7 under the retailer's price, where the manufacturer sets
8 the same price for all the retailers buying from it,
9 that is a common floor under the price for that product
10 when sold by the retailer. It will result in higher
11 retail prices, higher than if the manufacturer had set
12 a lower price for its input.
13 We argued, what is special about positive MIFs, why
14 are not positive MIFs restrictive? And we can see how
15 the Supreme Court answered our argument at page 29
16 {RC-J5/36/29}.
17 In paragraph 99 first we see the measure, the
18 collective agreement to set a multi-lateral interchange
19 fee:
20 "On the facts as found, the effect of the collective
21 agreement is to set the multi-lateral interchange fee.
22 Its effect is to fix a minimum price floor for the MSC."
23 I would add "all Visa MSCs".
24 Then at paragraph 100:
25 "The minimum price is non-negotiable. It is

1 immunised from competitive bargaining and acquirers have
2 no incentive to compete over it. It is a known common
3 cost, a common cost fixed by the scheme which acquirers
4 know they can pass on in full and do so. Merchants have
5 no ability to negotiate it down. These are the
6 characteristics of the domestic and intra-EEA MIFs."
7 But again, we argued, that might be true of lots of
8 inputs that go to drive up prices that suppliers charge
9 to retailers, like import duties or lots of common costs
10 that serve to drive up prices for retailers and
11 ultimately for consumers. The Supreme Court
12 acknowledged that the mere fact that the MIF drove up
13 the level of the MSC was not sufficient to justify of
14 itself a finding of a breach of Article 101(1). We see
15 that at paragraph 101:
16 "While it is correct that higher prices resulting
17 from a MIF do not in themselves mean there is
18 a restriction on competition, it is different where such
19 higher prices result from a collective agreement and are
20 non-negotiable. The difference is that a multi-lateral
21 interchange fee is a charge resulting from a collective
22 agreement."
23 We see that at 101:
24 "While it is also correct that settlement at par
25 sets a floor, it is a floor which reflects the value of

1 the transports action but [this is the bit I rely on]
2 unlike the MIF it involves no charge resulting from
3 a collective agreement, still less a positive financial
4 charge."
5 The people charging the multi-lateral interchange
6 fee and the people paying it have all agreed the level
7 of the MIF collectively and that, the Supreme Court
8 found, is the restriction of competition.
9 The Supreme Court then examined the difference
10 between competition in the real world and in the
11 counterfactual and we see that at paragraph 103, just
12 the first two sentences:
13 "There is a clear contrast in terms of competition
14 between the real world in which the MIF sets a minimum
15 or reservation price for the MSC and the counterfactual
16 world in which there is no MIF but settlement at par.
17 In the former, a significant portion of the MSC is
18 immunised from competitive bargaining between acquirers
19 and merchants owing to the collective agreement made."
20 A significant proportion of the MSC is immunised
21 from competitive bargaining. Why? Because of the
22 collective agreement fixing the level of the MIF. But
23 then in the next sentence we are now comparing
24 settlement at par:
25 "In the latter [settlement at par] the whole of the

1 MSC is open [open] to competitive bargaining."

2 In other words instead of the MSC being, to a large

3 extent, determined by a collective agreement it is fully

4 determined by competition by being open to competition

5 and is significantly lower.

6 "Open to competition" and "prices are lower" are two

7 different things. Both need to be blocked in a manner

8 of speaking to show an appreciable effect in breach of

9 Article 101(1) here. But if the whole of the MSC is

10 open to competition, and this is the point we made to

11 show there is no restrictive effect, if the whole of the

12 MSC is open to competition and prices still do not fall

13 that tells you that there is no restriction of

14 competition, that the thing causing the prices to go up

15 is not restrictive of competition.

16 So as the Supreme Court explained here:

17 "An agreement between undertakings that sets a floor

18 under prices and results in higher prices is not

19 necessarily restrictive of competition but it is

20 different where the agreement sets [as they say here]

21 a positive charge that is determined by collective

22 agreement between all the parties paying and receiving

23 that charge."

24 The essential reasoning here reflected what the

25 Supreme Court said in paragraph 93 earlier in the

1 judgment, that is on page 29.
2 The six key facts at paragraph 93 that constituted
3 the essential factual basis for the Court of Justice's
4 decision in *Mastercard*. If these facts apply as
5 a matter of law -- we see here the ingredients for
6 restriction of competition and if these boxes are
7 ticked, there is a restriction of competition under
8 101(1).
9 We see fact 1:
10 "The multi-lateral interchange fee is determined, is
11 determined by a collective agreement between
12 undertakings."
13 Mr Dryden said in his first report that that first
14 fact has nothing to do with whether the MIF was
15 a restriction of competition or not; he said it went to
16 whether there was an agreement which is a necessary
17 component for Article 101(1). In my respectful
18 submission, that is an odd reading of paragraph 93. The
19 fact as to whether there was an agreement or not was
20 never in dispute. In my submission the Supreme Court
21 chose its words very carefully here. It is referring to
22 the essential facts necessary to find a restriction and
23 it is plain, I say, from paragraphs 100 to 103 that the
24 fact that the MIF was set collectively was fundamental
25 to it being a restriction of competition.

1 We see at (iii), fact 3:
2 "The non-negotiable multi-lateral interchange fee
3 element of the MSC is set by collective agreement rather
4 than by competition."
5 Then what are we comparing this to? The
6 counterfactual. Fact (iv):
7 "The counterfactual is a no default MIF settlement
8 at par."
9 And (v):
10 "In the counterfactual there would be no bilateral
11 agreed interchange fees."
12 But in (vi):
13 "The whole of the MSC would be determined by
14 competition and the MSC would be lower."
15 So in the first wave of litigation those facts were
16 satisfied and the MIFs were found to be restrictive for
17 those reasons.
18 But then, members of the Tribunal came the IFR.
19 I use the IFR as shorthand for the Interchange Fees
20 Regulation enacted by the EU legislature but also for
21 the domestic IFR regulation which followed the European
22 regulation. Mr Beal said yesterday that the IFR had
23 been revoked -- I see the Tribunal looks at the clock.
24 THE PRESIDENT: No, not at all.
25 MR KENNELLY: Before I get into this, sir, you sat until

1 4.30 yesterday --
2 THE PRESIDENT: Yes, we are very happy to.
3 MR KENNELLY: Is that okay because that that would be of
4 great assistance to me. I have taken rather longer than
5 I expected to.
6 THE PRESIDENT: I think you can expect the standard hours of
7 10.30 to 4.30
8 MR KENNELLY: I am obliged. That makes things a lot easier
9 for us, thank you.
10 My learned friend said that the IFR had been revoked
11 entirely as of January this year, that in fact no
12 regulatory caps exist currently in respect of UK
13 domestic MIFs. It would not surprise the Tribunal to
14 hear this that is just wrong. I will show you the
15 legislation and I will show you the Act that Mr Beal
16 took you to. It is the Financial Services Markets Act
17 2023 {RC-Q1/22/1}, just so you see the front page of the
18 Act.
19 This, as my learned friend said, established
20 a framework for the revocation of financial services
21 retained EU law. If you go to section 1.1 you see that
22 the legislation referred to in schedule 1 is revoked.
23 Then if you go to -- sorry, in section 1(2)(a) you see
24 there is a schedule to this Act and part 1 -- this is
25 section 1 subsection 2 sub (a). Part 1 refers to

1 assimilated direct principal legislation.
2 If you then go, please, to the schedule itself which
3 is {RC-Q1/23/1}, that is the schedule to that Act, the
4 same one we looked at. Go please to page 2
5 {RC-Q1/23/2}. Near the bottom of the page you see the
6 Interchange Fee Regulation, that is Regulation 2015/751.
7 Yes, it is about halfway down the page:
8 "Regulation EU 2015/751 of the European Parliament
9 and Council on interchange fees for card-based payment
10 transactions."
11 My learned friend took you to that and that is the
12 assimilated legislation. It is in part 1 of schedule 1
13 to the 2023 Act.
14 Could you go now, please -- sorry, at this point
15 I need to show you what governs revocation. Apologies,
16 this was not in the authorities bundle before the
17 hearing. Mr Beal's submission yesterday came as
18 a surprise to us, it was not what he had said in his
19 written submissions.
20 This is section 86 that governs the commencement of
21 the revocation powers.
22 Of course obviously it will be added to the bundle.
23 THE PRESIDENT: Of course.
24 (Document distributed)
25 MR KENNELLY: So this is section 86 of that same Financial

1 Services Markets Act 2023. It provides for the
2 commencement of the various parts of that Act. If you
3 go over the page to section 86 -- sorry, as you can see
4 first of all under subsection (1) it deals with various
5 parts and sections of the Act, none of which are
6 section 1(1), that is governed by subsection 3 under
7 section 6:
8 "The rest of this Act comes into force on such a day
9 as the Treasury may by regulations appoint."
10 And you can see where I am going with this, members
11 of the Tribunal: the Treasury has not made a regulation
12 commencing the relevant part of section 1(1) of the 2023
13 Act that covers the Interchange Fees Regulation.
14 To see that you need to go to the same commencement
15 regular that Mr Beal took you to. That is in
16 {RC-Q1/26/4}.
17 He took you to:
18 "The following provisions of the Act come into force
19 on 1 January 2024."
20 And section 3(a) of these regulations refers to
21 section 1(1) of the Act.
22 We know it is the Act because earlier in the same
23 regulations "the Act" is defined as the 2023 Financial
24 Services and Markets Act. So:
25 "Section 1.1 of the 2023 Act which revokes the IFR

1 comes into force on 1 January 2024 insofar as it relates
2 to the revocations coming into force by virtue of
3 paragraphs (b) to (e) of this regulation."
4 So remaining in regulation 3 we look at regulation
5 3(b), regulation 3(c), 3(d) and 3(e). It refers to --
6 3(b) is the one of particular importance to us because
7 it refers to part 1 of schedule 1 to the Act, that is
8 the part that contains the IFR, the revocation
9 provisions specified in part 1 of the schedule to these
10 regulations.
11 So we need to look at the schedule to these
12 regulations to see what from part 1 or schedule 1 of the
13 Act is being revoked and you will get that at page
14 {RC-Q1/26/13} of this document. Here we have the
15 schedule, part 1. This tells you what from part 1 or
16 schedule 1 of the 2023 Act is being revoked as of
17 1 January 2024 and it is these regulations here.
18 If you go over the page, next page, please
19 {RC-Q1/26/14}, we see the other regulations listed, but
20 the IFR is not among them.
21 So the IFR is not yet revoked and I understand will
22 not be for some time. So for domestic MIFs, as
23 I thought was common ground coming to the hearing, the
24 caps still apply.
25 Turning now to the impact of the IFR. It is useful

1 to go to the Tribunal and to the Court of Appeal in the
2 *Dune* case. I appreciate that these were determined on
3 a strike-out basis and I shall not rely on any of the
4 parts that tend to show the preliminary nature of the
5 Tribunal's or the preliminary nature of the
6 Court of Appeal's findings, but in parts there were
7 useful legal findings, which I wish to take you to.
8 The Tribunal's judgment is in {RC-J5/44/1} and
9 I would ask you to go please to page 17 {RC-J5/44/17}.
10 At paragraph 35, we see a reference to the IFR when
11 it was adopted, the cap that it imposed and, at 36, the
12 entry into force of the IFR was highly relevant as
13 regards the anti-competitive effect of consumer MIFs,
14 recalling the basis upon which it was found that the
15 MIFs were restrictive in the *Sainsbury's* case.
16 Skipping on to paragraph 39, the reason why in
17 *Mastercard* in the Court of Justice and in *Sainsbury's*
18 the counterfactual is not a situation of a series of
19 bilaterally agreed interchange fees but is a prohibition
20 on ex-post pricing or settlement at par is to preclude
21 what is referred to as the hold-up problem. There is
22 a reference to the Honour All Cards Rule, and the
23 hold-up problem itself is summarised in the indented
24 passage quoting from Dr Niels. I would ask the Tribunal
25 to read quickly to yourselves indented paragraph 2.9.

1 This is so familiar to you I am not going it read it
2 aloud.
3 Then, please, go on to paragraph 40:
4 "Both Visa and *Mastercard* contend that the
5 introduction of regulatory caps under the IFR means that
6 the hold-up problem is addressed. It is no longer
7 possible for issuers to demand interchange fees higher
8 than the IFR caps."
9 And that is the critical point for the purposes of
10 our analysis.
11 Accordingly, they submit a no default MIF with
12 settlement at par is not necessarily the counterfactual
13 any more and they argue for a different counterfactual
14 and you see how they are summarised in (a) and (b) and
15 those again are very familiar to you and I will move on,
16 if I may, to paragraph 41.
17 We think it is clear that the bilaterals
18 counterfactual would not involve any restriction of
19 competition since, under that scenario, the interchange
20 fee is not determined by a collective agreement.
21 Insofar as counsel sought to argue on behalf of the
22 claimants that the UIFM counterfactual was a restriction
23 of competition because it depended on a common scheme
24 rule, a submission again we have today, we do not accept
25 that submission. Why not? Again, useful analysis from

1 the Tribunal in the two sentences which follow: because
2 they set out here in their view what is the restriction
3 at issue and what is not a restriction.
4 The restriction arising from the current rule is
5 that it provides for a commonly determined default level
6 of positive multi-lateral interchange fee that applies
7 as between all issuers and acquirers. That is the
8 restriction. What is not a restriction, a rule that
9 enables each issuer independently to determine the level
10 of its interchange fee and that really is the submission
11 that I will be making to you in various ways for the
12 remainder of my time on this point.
13 At paragraph 44, the Tribunal rightly acknowledges
14 they are not deciding whether either of the
15 counterfactuals are correct or whether in those
16 counterfactual situations the interchange fees would
17 indeed have risen to the levels capped under the IFR.
18 Now, whether they would rise to the levels capped under
19 the IFR is to the extent I have shown you in the joint
20 experts' statement agreed. The question at this stage
21 is whether those counterfactuals are arguable.
22 In the light of the respective evidence from Visa
23 and *Mastercard* we accept they are as a matter of fact.
24 However, the claimants submit that Visa and *Mastercard*
25 are precluded from advancing them by reason of the

1 *Sainsbury's* judgment as a matter of law. It is
2 a question of law that we are examining here. If you go
3 on, please, to paragraph 47, it is noted that in none of
4 the previous English proceedings were the implications
5 of the IFR for the counterfactual considered and the
6 counterfactual reflected the hold up problem and it was
7 acknowledged that different factual circumstances, if
8 they arose, might give rise it a different
9 counterfactual.
10 With that in mind, we go to the Court of Appeal,
11 {RC-J5/46/13}, at paragraph 29. Here we have a real
12 echo of the submissions which the claimants made before
13 you.
14 Counsel submitted that the same competition concern
15 arose both before and after the introduction of the IFR
16 and regardless of whether the interchange fees had been
17 capped. The counterfactuals proposed by Visa and
18 *Mastercard* would involve the same anti-competitive
19 conduct as had already held to be unlawful in
20 *Sainsbury's*, namely the collusive imposition on
21 merchants of an artificial fixed cost that sets a floor
22 for the MSC. It is essential, it says, that
23 a counterfactual removes the vice, the anti-competitive
24 vice identified in the actual but neither the UIFM nor
25 the bilaterals counterfactual would do so.

1 If we go to paragraph 46, please, on page 16. We
2 see the analysis of Lord Justice Newey:
3 "It seems to me that the reasoning of the *CJEU* in
4 *Mastercard* was essentially that what has been called the
5 hold up problem meant that for the *Mastercard* scheme to
6 survive without a default MIF, ex-post pricing had to be
7 prohibited (or in other words there had to be settlement
8 at par), and *Mastercard* would have preferred to adopt
9 that solution than to let its scheme collapse. The
10 relevant counterfactual thus had to be taken to be one
11 incorporating a prohibition on ex-post pricing. The
12 prohibition was, in the circumstances, not only
13 economically viable, but also plausible or indeed
14 likely. The *CJEU* was not therefore saying anything
15 about whether a counterfactual [in that part about
16 whether a counterfactual] had to ensure better
17 competition, it was rather talking about the likelihood
18 of *Mastercard* having to adopt a prohibition on ex-post
19 pricing."
20 At paragraph 37, the hold-up problem is again
21 summarised. At paragraph 38, Newey LJ records what the
22 scheme said about the implications of the IFR for the
23 hold up problem.
24 Then at paragraph 40 we see the submission that we
25 made in the Court of Appeal:

1 "The hold-up problem has the consequence that before
2 the IFR took effect the schemes would have been likely
3 to adopt rules prohibiting ex-post pricing because their
4 schemes could otherwise have collapsed without default
5 MIFs. The counterfactual including such a prohibition
6 was thus appropriate. With the introduction of the IFR
7 the risk of collapse disappeared. That being so these
8 judgments are no longer determinative as to the correct
9 counterfactuals. If, as the schemes say, their schemes
10 would be likely to have been adopted the UIFM and the
11 bilaterals counterfactual without any prohibition on
12 ex-post pricing these will be right counterfactuals to
13 consider."
14 There is no requirement that the counterfactual
15 should remove what was characterised as the competitive
16 concern which was, at the end of the day, the prices are
17 higher. That is not the question. The question is does
18 the measure itself restrict competition?
19 At paragraph 42 -- sorry, before we leave 41, I am
20 not sure whether Mr Beal pressed this point, but I will
21 ask you to read 41 just to make sure that it is put to
22 bed. The suggestion that the counterfactual we put
23 forward has to have the same outcome, has to have an
24 outcome which does not involve prices increasing to the
25 level of the actual. The vice, which was how it was

1 described before the Court of Appeal, we made the
2 submission, which was accepted by the Court of Appeal,
3 that that cannot be right because if, if the
4 counterfactual has to remove the bad outcome, well, then
5 a restriction would be proven in every case.
6 The question is remove the measure and see does that
7 bad outcome still arise and then you know whether that
8 outcome is a result of the measure or not, and that was
9 upheld, that argument was upheld by the Court of Appeal.
10 My learned friend did not press it before you yesterday
11 and so I simply ask you to note what the Court of Appeal
12 said in paragraph 41.
13 At paragraph 42 the Court of Appeal said:
14 "In short I do not consider the claimants can impugn
15 the CAT's decision on the footing that it failed to
16 analyse correctly the competition concern which had led
17 the courts to find in the *Sainsbury's* litigation that
18 the appropriate counterfactual was a no default MIF with
19 settlement at par. As the CAT appreciated it needed to
20 ask itself about the likelihood of Visa and *Mastercard*
21 having adopted the UIFM and the bilaterals
22 counterfactual once the IFR was in force. The fact, if
23 it be one, that the UIFM and bilaterals counterfactual
24 would not dispose of the price increase arising from
25 a floor under the MSC will be a reason for concluding

1 that the rules providing for these MIFs were not
2 themselves anti-competitive, not a basis for rejecting
3 them."
4 At paragraph 43 we have the heading "Do the proposed
5 counterfactuals involve collusive/collective
6 arrangements?" Now we come to the meat of what is --
7 the main objection to these counterfactuals before
8 the Tribunal in this hearing. If we go to paragraph 44.
9 What is required to show a breach of Article 101(1) and
10 Suiker Unie is quoted where the Court of Justice said:
11 "The criteria of co-ordination and co-operation laid
12 down by the case law of the court which in no way
13 require the working out of an actual plan must be
14 understood in the light of the concept inherit in the
15 provisions of the treaty relating to competition that
16 each economic operator must determine independently the
17 policy which he intends to adopt on the common
18 market ..."
19 The key focus is, is the operator concerned
20 determining independently his own conduct in the market
21 setting a price which he wants to set according to his
22 own economic incentives?
23 Paragraph 45 over the page:
24 "[Counsel] ... submitted that the Tribunal had
25 failed to consider whether there was a mutual

1 understanding which would inhibit issuers' freedom to
2 determine interchange fees independently in either the
3 counterfactuals, the proposed counterfactuals, and that
4 had it done so it would have been bound to conclude that
5 each counterfactual involved collusive conduct and so
6 was unarguable as a matter of law."
7 However, said the Court of Appeal, the mere fact
8 that the UIFM and the bilaterals counterfactual might,
9 if Visa and *Mastercard* are right, result in all issuers
10 raising interchange fees to the levels allowed by the
11 IFR does not of itself demonstrate that the UIFM and
12 bilaterals counterfactual involve collusion. As the
13 court said in the Wood Pulp Cartel case [and this is so
14 well-established as to require no further analysis,
15 I will just take the reference here] article 101 of the
16 TFEU 'does not deprive economic operators of the right
17 to adapt themselves intelligently to the existing and
18 anticipated conduct of their competitors'. It is on
19 that basis that "the UIFM and the bilaterals
20 counterfactual would both have resulted in interchange
21 fees being set at the maximum levels permitted by the
22 IFR."
23 In fact Visa pleaded that issuers would have been
24 likely to choose to stipulate the maximum interchange
25 fee permitted by the IFR or other regulation because it

1 would have been in each of their economic interests,
2 their well known economic interests, evaluated on
3 an independent and individual basis without any
4 collective decision-making or collusion to do so.
5 The HACR of course was not a focus of the
6 Court of Appeal or the Tribunal's judgment. We will
7 come back to that, but at 48 the Court of Appeal
8 conclude that the Tribunal made no error in allowing
9 Visa and *Mastercard* to proceed with their pleaded
10 proposed counterfactuals. It is possible the claimants
11 will succeed at trial but, as a matter of law, the
12 competition points that the claimants raised in *Dune*
13 were rejected, the legal points which my learned friend
14 made to you yesterday.
15 So there is no evidence of fact to suggest that the
16 issuers or acquirers or the screams under the UIFM were
17 involved in any collusion in the sense -- in any sense
18 other than what you have heard from my learned friend.
19 The claimants are in reality presenting to you, again to
20 use Mr Beal's word, recycled arguments. They are
21 arguments which they have been making previously. There
22 is nothing new, and, in our case in summary, under the
23 UIFM all that Visa's rules do is provide a platform
24 under which the issuers for good or ill are free
25 independently and unilaterally to choose their own terms

1 of settlement.
2 Now, there may well be a regulatory imperative in
3 constraining them, but as a matter of Competition Law
4 they are acting without any collusion or co-ordination,
5 they are acting in their own selfish interests, which
6 they are entitled to do under Article 101(1) TFEU and
7 under the UIFM there is no interchange fee set
8 collectively of any kind.
9 If interchange fees are paid, and they are likely to
10 be, it can only be because independent issuers making
11 their own commercial decisions in competition with one
12 another, there is competition, fierce competition
13 between them, have chosen to set those fees at that
14 level and against that counterfactual Visa's MIFs do not
15 restrict competition at all because as the experts
16 accept under the UIFM if it is valid and could be
17 implemented the fees will be at the same level as the
18 actual. There would be -- and by reason of that outcome
19 we can demonstrate that the MIFs produce no effect and
20 the effect would arise even if this counterfactual was
21 used instead -- sorry, the interchange fees would
22 independently reach the same level as the MIFs in the
23 actual.
24 Now, we turn then to the claimants' arguments and we
25 see what they say about this. The claimants'

1 submissions are at page 78, page 78 of the claimants'
2 submissions paragraph 187(1) and I will take each of
3 them in turn if I may.
4 Somebody will give me the page number for this.
5 My team is pleading with me to stop. They have had
6 enough and they are recommending that I stop talking and
7 let everyone go home.
8 MR TIDSWELL: We have got it here if you want it.
9 MR KENNELLY: No, I will take the cue and I will stop where
10 I have been told to stop if that is okay with the
11 Tribunal.
12 THE PRESIDENT: No of course. You are both okay for time?
13 MR KENNELLY: Yes, we are.
14 THE PRESIDENT: Well, in that case we will resume at 10.30
15 on Monday.
16 MR KENNELLY: I am grateful.
17 THE PRESIDENT: When I hope you get better reviews from
18 those behind you.
19 (4.24 pm)
20 (The hearing was adjourned until 10.30 am
21 on Monday, 19 February 2024)
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