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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

**MERCHANT INTERCHANGE FEE UMBRELLA
PROCEEDINGS**

TRIAL 1

A P P E A R A N C E S

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

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

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

Wednesday, 27 March 2024

(10.00 am)

Closing submissions by MS TOLANEY (continued)

THE PRESIDENT: Ms Tolaney, good morning.

MS TOLANEY: Good morning.

THE PRESIDENT: You will have received a somewhat stream of consciousness note from me.

It is very much intended to assist you to resolve the sort of fog that has descended over my brain, but originally was intended just as a series of questions that I would ask you orally, it got longer and so I thought let us give it to you rather than my read it out. Do feel free to address it whenever you want. I do not think it would be reasonable to expect any kind of response now because you probably have barely read it, so in your own time and as you choose to do it, you may answer the questions in the course of your submissions anyway, in which case, fine. But it is there for -- just to enable you to understand where I am unclear.

MS TOLANEY: Thank you very much, it is very helpful, I have not had the chance to read it, not least because I do not have my laptop set up at the moment.

THE PRESIDENT: No.

MS TOLANEY: But what I was going to ask you, sir, was which

1 you would prefer. One option might be given the
2 questions that you have posed for me to just move now to
3 issue 4 and 5 and then come back to issue 3 having had
4 the chance over lunch to look at and then hone an answer
5 to it?

6 THE PRESIDENT: I suspect that is best.

7 MS TOLANEY: Yes.

8 THE PRESIDENT: Because they obviously do matter to me, the
9 questions. It may be that the answers are actually
10 extremely simple but I think you need to see where I am
11 coming from. To be clear, there will almost certainly
12 be questions from other members as well because I did
13 that very rapidly on the train this morning and we have
14 not really been able to discuss our common difficulties
15 in understanding how exactly the bilaterals work.

16 But I suspect are difficulties are slightly
17 different and that is I think an additional difficulty
18 you will have to deal with, I am sorry about that, but
19 I suspect taking that order is the best course.

20 MS TOLANEY: That is absolutely fine and it is much better,
21 sir, for us to know what the questions are and we can
22 try and answer them appropriately.

23 So I will move on to issue 4 and we will come back
24 to that.

25 THE PRESIDENT: I am very grateful.

1 MS TOLANEY: Turning now to issue 4. The structure of my
2 submissions will be, first of all, to address the points
3 that are common to issues 4 and 5 which is obviously
4 inter-regional and commercial and then to turn to the
5 specific points on each issue and this is addressed, it
6 starts from section G of my roadmap, which is I think at
7 paragraph 98, if that assists you.

8 Sir, the first point is that the claim period in
9 relation to both inter-regional and commercial cards for
10 active Trial 1 claimants are the same and claims
11 predating 17 March 2011 are time-barred and you see that
12 at paragraph 100 of the note. Then paragraphs 101-102,
13 there is then the question of what the appropriate
14 counterfactual to determine whether there is
15 a restriction of competition and there are two options:
16 settlement at par or the scheme fee counterfactual.

17 Now, the focus of our submissions is on the
18 settlement at par counterfactual and I will develop
19 those submissions. But we have also addressed the
20 scheme fee counterfactual in our written closings for
21 both inter-regional and commercial card MIFs and it is
22 at paragraph 294 and 370 of our written closings
23 respectively.

24 I will say something about the scheme fee
25 counterfactual when I go back to issue 3 but I am just

1 flagging that we have made specific submissions on it in
2 relation to issues 4 and 5 and really the short point
3 for purposes of issues 4 and 5 on the scheme fee
4 counterfactual is that we do not need to say very much
5 about it because it is obviously right that the Tribunal
6 needs to consider what is the appropriate counterfactual
7 and how it would work separately for each MIF. But
8 ultimately the analysis is going to be the same on
9 issues 4 and 5 as 3 and so when I address it on 3, we
10 will engage with the substance of it.

11 But for the purposes now in summary, there is no
12 dispute that it is a realistic and viable counterfactual
13 and indeed that was the case put to the claimants'
14 witnesses. It is clear that Mastercard would have
15 preferred the scheme fee counterfactual to settlement at
16 par, for commercial reasons, and the same indicative
17 conclusions will apply as to post IFR MIFs and we will
18 touch on that, as I say, after lunch.

19 The third point is that the claimants have
20 incorrectly portrayed the defendants' case in relation
21 to both inter-regional and commercial cards and if you
22 look at paragraph 105 of our roadmap, you will see 104
23 and 105. Could we have the claimants' aide memoire on
24 screen at paragraph 91, that is {RC-S/3/26}. So if
25 I can just ask you to look at paragraph 91 and the first

1 sentence says:

2 "The defendants' case turns not on any of the
3 essential factual elements not being present."

4 Now, that is wrong and we are talking about the
5 factual elements in the *Sainsbury's* Supreme Court
6 decision. That is absolutely wrong. We made it plainly
7 in both opening and in our written closing, and in
8 cross-examination, that we dispute that essential fact
9 6, which is MSCs being lower in the counterfactual, is
10 made out. Just so that you have got our references,
11 this was set out in our written opening at
12 paragraphs 73-74, our oral openings on Day 3, pages 97
13 and 98 and my cross-examination of Mr Dryden, Day 12,
14 pages 4 and 5. {Day12/4-5}

15 Can I take you to the *Sainsbury's* Supreme Court
16 judgment again just to dispel my learned friend's
17 submission that our approach involves looking at a few
18 isolated words of the decision. If we could look at
19 {RC-Q2/12.1/25}, you see in paragraph 93 the six
20 essential facts determined by the Supreme Court. You
21 note the second fact, number 2 it has the reminder of
22 setting a minimum price floor for the Merchant Service
23 Charge and you can see the sixth fact, 6, in the
24 counterfactual the whole of the MSC would be determined
25 by competition and the charge would be lower.

1 Now, the dispute between the claimants and the
2 schemes is what Merchant Service Charges do you take
3 into account to work out whether the Merchant Service
4 Charge would be lower in the counterfactual? So that is
5 the dispute for these purposes.

6 MR TIDSWELL: Does that mean you are reading -- when you are
7 reading 6 -- the MSC in 6, you are talking about the
8 Merchant Service Charges but more broadly than Visa and
9 Mastercard?

10 MS TOLANEY: Exactly, that is the dispute and that is the
11 essence of the dispute. They say it is just Visa and
12 Mastercard, we say it has got to be wider and if it was
13 not, there would be no separate meaning to (ii).

14 MR TIDSWELL: It is a bit of a semantic, I think we are
15 clear on that distinction it is a bit of a semantic
16 dispute, is it not, about paragraph 91 of the
17 aide memoire because I think -- I mean, if you are
18 saying that the Supreme Court was talking about more
19 than just Mastercard and Visa in item 6 then that seems
20 somewhat unlikely because it was not an issue in that
21 case at all, I mean, that is not to exclude your
22 argument, I am not suggesting because of that you are
23 wrong. But it does not really matter how -- I mean, the
24 point -- it does not matter how the point emerges but
25 the point is quite clear, I think.

1 MS TOLANEY: That is very helpful, sir, the only reason
2 I highlighted it because the point was I think made in
3 my learned friend's written closings as well at
4 paragraph 439(4) and so I just wanted to be absolutely
5 clear what the essence of the dispute was and that we
6 were making that point in case it was being suggested it
7 was somehow unclear.

8 MR TIDSWELL: Yes, thank you.

9 MS TOLANEY: What I would just -- while we are in the
10 judgment, I wanted to just highlight to you that the
11 Supreme Court's own analysis of the issue of whether the
12 consumer MIFs in that case restricted competition is
13 relevant to my argument and this is at paragraphs 95-104
14 and in particular can you look at, please,
15 paragraph 101, which is on page 26. {RC-Q2/12.1/26}

16 So you see there:

17 "Whilst it is correct that higher prices resulting
18 from a MIF do not in themselves mean there is a
19 restriction on competition, it is different where such
20 higher prices result from [and these are the words I
21 emphasise] a collective agreement and are
22 non-negotiable."

23 So you see there the focus of the Supreme Court's
24 analysis is on whether there are higher prices resulting
25 from the collective agreement and that is what we say is

1 fundamentally the key issue.

2 Can I then move to my fourth point, which is that
3 whether it is permissible to take account of switching
4 in order to determine whether the essential factual
5 basis of Mastercard CG applies and whether there is
6 a restriction of competition, i.e. whether it is
7 relevant to your consideration of essential fact 6, and
8 this is addressed in my roadmap at paragraphs 104-111.
9 As we say in 104 there are first of all two points to
10 clear away before I deal with the detail.

11 The first point to clear away is that the claimants
12 argue that switching involves looking at the issuing
13 market, that is again in paragraph 91 of their
14 aide memoire, and that is wrong. We are always
15 ultimately looking at what would happen in the acquiring
16 market but because the markets are interconnected you
17 cannot determine what would happen in the acquiring
18 market without considering the issuing market but we are
19 only doing so in order to consider what would happen in
20 the acquiring market and the reason is obvious: if there
21 is substantial switching in the issuing market, that
22 inevitably will impact on the number and type of
23 transactions conducted in the acquiring market.

24 So to give the Tribunal an example we assume in the
25 factual there are 100 Mastercard and Visa card

1 transactions, whereas in the counterfactual let us say
2 there are only two. Now, there is an obvious question
3 whether in those circumstances the MIF had an
4 appreciable effect but what we say is you have to
5 consider what happened with the other 98, so the 98 from
6 the factual that do not happen in the counterfactual and
7 if they move to higher cost alternatives in the
8 counterfactual then that is obviously relevant to the
9 question of the effect of the MIF in the acquiring
10 market. Interestingly, neither of the claimants'
11 experts have suggested that there is no need to take
12 account of switching because it looks at the issuing
13 market. That has not been part of their testimony. All
14 of this, we say, demonstrates the artificiality of the
15 claimants' approach which is to treat the market as
16 static without taking account of how it would develop
17 and that is not only artificial but it is actually
18 legally wrong.

19 The Tribunal obviously has to look at the market,
20 not only as to its static position but what the likely
21 developments would be if you change the dynamic and that
22 much is obvious.

23 The second point to clear away which we address at
24 104(2) is that the claimants are also wrong to suggest
25 that it is not open to Mastercard to argue that since

1 the relevant market is the acquiring market
2 a market-wide effect on Merchant Service Charges must be
3 demonstrated and this point goes to the question of
4 whether or not Amex is to be treated as part of the
5 acquiring market.

6 Now, it is wrong for the claimants to try and imply
7 that Amex should not be treated as such, not least
8 because all of the experts agree it should be and that
9 was in the joint expert statement at page 4 and the
10 reference is {RC-H5/1/4}, we do not need to bring it up,
11 and the claimants seemingly seek to row back on that
12 common ground position, notwithstanding Mr Dryden's own
13 first report, in which he says:

14 "However, I have explained why I consider it is
15 better to consider Amex as part of the market".

16 Now, for completeness, Mr Dryden did start to try
17 and row back a bit in his cross-examination and suggest
18 he would like to look at it in more detail, that was at
19 {Day 12/24: 7-18} but he did not say he was disavowing
20 his evidence and it would be difficult for him to do so
21 having given very clear evidence both in his report and
22 in the joint expert statement. So it is clear that Amex
23 can be taken into account.

24 So having cleared away those points, can I now
25 address why Mastercard's position that switching should

1 be taken into account is right as a matter of law and
2 economic analysis and it is right for four reasons. The
3 first three are points of law, the fourth is economic
4 principle.

5 First of all, CJEU case law makes clear that
6 counterfactual analysis is about considering what would
7 happen in the absence of the allegedly restrictive
8 agreement and this includes taking account of likely
9 developments as we say in paragraph 107 and that is
10 clear from the CJEU judgment in Mastercard which we have
11 looked at, and that judgment specifically refers to the
12 need to look at the actual context including taking into
13 account the likely developments in the market.

14 The need to look at the reality of the market, as
15 well as being obvious, I am sure, to this Tribunal, is
16 also emphasised in the Tribunal's judgment in the *Dune*
17 decision at paragraph 52 where it was said that the
18 effects of an alleged restriction must be tested against
19 the reality of the then prevailing situation as opposed
20 to ignoring aspects of market conditions that would be
21 present in the counterfactual.

22 Now, can I just show you one authority, the
23 *Delimitis* authority which is at {RC-Q3/11/9}. If we
24 could please go to paragraph 19, where the CJEU explains
25 the appropriate approach to take to assessing whether

1 the beer supply agreements that were in issue in that
2 case impeded access to the market.

3 Then please could we go to paragraph 22, which is
4 dealing with a very similar question to switching and
5 making it clear one needs to look at the trend taking
6 account of the number and size of producers in the
7 market, degree of saturation and customer fidelity to
8 the existing brands and I will let you read that.

9 (Pause)

10 So there is no hint of any static analysis as you
11 would expect, and for good measure the Commission
12 guidelines on the applicability of Article 101(1) also
13 make that clear, and if we could go to that, it is
14 {RC-J5/49/13}. It is paragraph 32B, please, if we could
15 look at that, which is on page 13.

16 What you see there is:

17 "In order to assess whether an agreement has
18 restrictive effects it is relevant to consider the
19 actual context in which the undertakings concerned
20 operate, the nature of the goods and services affected
21 and the real conditions of the functioning and structure
22 of the market or markets in question."

23 If you could look at footnote 39, it may need to be
24 blown up, that makes clear that actual context of the
25 co-operation may include factors such as:

1 "... the presence of sufficient possibilities for
2 customers to switch supplier, the likelihood that
3 competitors increase prices increase ..."

4 Et cetera.

5 The second of my four points is in paragraph 108 of
6 my roadmap, which is that -- and I have made this point
7 I think in answer to Mr Tidswell -- the claimants'
8 approach deprives essential fact 6 of any meaning at all
9 because it would automatically be met as soon as the
10 essential fact 2 was complied with and that is because
11 if the MIF acts as a floor, it would necessarily mean
12 that the price of the transaction to which the zero MIFs
13 applies would be lower and so it conflates them and that
14 cannot be what was intended.

15 The point I will make is that the claimants' written
16 closing does not grapple with the case law or with that
17 essential criticism.

18 The third of my four points, which is addressed in
19 paragraph 109 of the roadmap, is that contrary to the
20 claimants' submission taking account of switching has
21 nothing to do with Article 101(3) and you remember this
22 was a bit of a major topic at times in the
23 cross-examination of Mr Dryden and my learned friends'
24 submissions. The short point is that Article 101(3) is
25 concerned with cases where a measure has already been

1 found to have an adverse effect. It is after that
2 finding that the defendant then has the opportunity to
3 try and justify the measure by showing it generates
4 benefits which exceed the detriment but assessing
5 whether the measure actually has an adverse effect which
6 the authorities make clear the Tribunal has to do, has
7 nothing to do with pro-competitive effects and none of
8 the arguments Mastercard is making is concerned with
9 identifying any efficiency gains for merchants or
10 determining whether merchants receive benefits from the
11 MIFs which exceed the adverse effect of the MIF.

12 The question for this Tribunal is: is there any
13 adverse effect on a parameter of competition with price
14 here being the relevant parameter, that is said to be
15 affected here. So unless there is an adverse effect on
16 price, then there would be nothing to justify under
17 Article 101(3).

18 If I can just show you Mr Holt's explanation, this
19 was at Day 17, page 109, line 17, {Day17/109:17} and if
20 you can just read that, it starts from:

21 "Yes, but that is not the analysis I am doing."

22 (Pause)

23 Then if we can go over the page when the Tribunal is
24 ready.

25 THE PRESIDENT: Yes.

1 MS TOLANEY: The crucial passage really starts at line 6:

2 "No, I have. I do not think that would be relevant
3 at this stage of the analysis, that would be something
4 to do at the 101(3)."

5 That is the benefits detriment.

6 "All I am doing is saying that if you change the
7 competitive dynamics by removing the inter-regional
8 MIFs, it has a very significant, in my view at least in
9 the inter-regional and commercial context, impact on how
10 the market will operate and that in my view is directly
11 relevant to the question of restrictiveness".

12 So it is wrong to characterise the switching
13 analysis as somehow being an analysis of benefit and
14 detriment and we can test it in this way:
15 hypothetically, let us say in the factual there is
16 a transaction which is put through on a Mastercard card.
17 The merchant incurs a certain cost in relation to that
18 transaction including the cost of the MIF. Now, in the
19 counterfactual, let us assume the transaction remains
20 a Mastercard transaction but in that counterfactual, the
21 transaction goes through at a lower cost to the merchant
22 because the MIF is zero.

23 So the question we are looking at is: what effect
24 does the MIF have in the factual compared to the
25 counterfactual? In the example I have just given you,

1 the merchant's Merchant Service Charge is lower in the
2 counterfactual because the transaction has gone through
3 at lower cost and in that scenario, the MIF has an
4 adverse effect on the competition in that case because
5 prices would be lower in the counterfactual.

6 But let us take the alternative scenario now. We
7 are still looking at the same transaction as in the
8 factual but now the consumer has switched to a different
9 payment method which carries a higher cost to the
10 merchant: Amex, for example, PayPal, Klarna.

11 The question is still: what effect does the MIF have
12 in the factual compared to the counterfactual? The
13 answer is that the MIF does not have an adverse effect
14 because the merchant is paying a lower price in the
15 factual than in the counterfactual.

16 MR TIDSWELL: There is an artificiality in that, though,
17 because Mr Holt talks about looking at the change in the
18 competitive dynamics and how -- the impact on how the
19 market will operate but really what you are saying is
20 that is just limited to analysis of price, is that the
21 point you are making?

22 MS TOLANEY: That is the point I am making.

23 MR TIDSWELL: Why would you just limit it to analysis of
24 price?

25 MS TOLANEY: Because when you were looking at the question

1 of price, the competitive dynamics come in.

2 MR TIDSWELL: But it is not the only feature of competitive
3 dynamics, is it?

4 MS TOLANEY: No, but here for the purpose of restriction on
5 competition the relevant point for this Tribunal -- and
6 I never speak on all cases because I would be out of my
7 depth if I did, but the relevant point for this Tribunal
8 is we are fighting about price and I think on both sides
9 we are fighting about price and the question is: how do
10 you assess what goes into the question of what is the
11 effect on price? My learned friend says: well, you only
12 look at the Mastercard and Visa products, therefore by
13 definition, the minute you change the Merchant Service
14 Charges that they have, then it is -- that is the end of
15 the debate. We say well, that cannot be right because
16 you are not looking at the proper dynamics of the market
17 and what would happen in a counterfactual where you
18 changed Mastercard and Visa's Merchant Service Charge
19 only because you have to look at then what would happen
20 and we say what would happen -- and we will come on to
21 this -- is switching and if there was switching there
22 would be an increase in the price, so merchants would be
23 worse off and --

24 MR TIDSWELL: Sorry to interrupt. You say merchants would
25 be worse off, they would be worse off in the respect

1 that they paid a higher price?

2 MS TOLANEY: Exactly.

3 MR TIDSWELL: They might not be worse off, they may be
4 better off because of the nature of the transactions
5 that if, for example, they were using a card -- the
6 customer was using an alternative of a Buy Now Pay
7 Later, or if they used an Amex card with a higher
8 average transaction value pattern, I mean, we have
9 evidence of that.

10 Let us not get into argument about whether that is
11 right or not, but just assume that is the position that
12 there might well be some countervailing benefits to
13 merchants from the alternative payment schemes, then the
14 question is why are we ignoring those, if we really want
15 to know what the competitive dynamics are and as you say
16 work through the consequence properly to see what has
17 happened, why are we not looking at the benefits?

18 MS TOLANEY: Because I think the question of competition and
19 adverse effect focuses here on price. Benefits may come
20 into 101(3) which is offsetting the detriment of the
21 competitive, anti-competitive aspect because of the
22 countervailing benefits.

23 PROFESSOR WATERSON: Can I raise a different point. You are
24 assuming that the person switches to PayPal or Klarna or
25 whatever. But if I am paying a tradesman, they might

1 say: here is my bank account details, pay the money into
2 my bank rather than saying: give me your debit or credit
3 card details, in which case the price would be lower for
4 them.

5 MS TOLANEY: That is right. But obviously in my --

6 PROFESSOR WATERSON: So it depends therefore --

7 MS TOLANEY: Of course.

8 PROFESSOR WATERSON: -- on quite what you are assuming
9 people would move to in the counterfactual.

10 MS TOLANEY: Quite.

11 PROFESSOR WATERSON: That seems to me quite a difficulty
12 because given there that it is a counterfactual we do
13 not have any evidence on that.

14 MS TOLANEY: Well, I think we do because we have the Oxera
15 study and the experts' conclusions, certainly Dr Niels
16 and Dr Holt, that switching would lead to higher -- and,
17 sorry, I am also being reminded Mr Dryden, so it is
18 actually the claimants' own experts agree that if there
19 was switching, it would be higher cost. So I do not --
20 yes, in general overall. That may be, sir, you are not
21 wrong to make the point about cash but it may be now and
22 in the relevant period we have to accept that cash was
23 less used than maybe some of the other options even if
24 it is used for some things. But you have got the
25 evidence I think is the short answer to your point and

1 obviously I will come on to it, so I think you do have
2 that evidence.

3 The real fight seems to be: do you have regard to
4 that evidence or do you look through, in my respectful
5 submission, an entirely blinkered and unrealistic prism,
6 which is what the claimants are inviting you to do and
7 exclude everything that would happen in the market and
8 just look at Mastercard and Visa as if they were the
9 only two payment processes that existed? We say that
10 just has got to be wrong because it is not a commercial
11 logical or legally sound way to approach the question.

12 My fourth reason out of the four which was set out
13 at paragraph 110 of my roadmap is that as a matter those
14 points were going to the legal analysis and the legal
15 analysis was we were being accused of having -- muddling
16 101(1) and 101(3) and I am saying I am actually being
17 quite rigid about it, I am really focusing on 101(1)
18 which is why I am focusing on price. But the fourth
19 reason is an economic reason, not a legal reason, which
20 is that we are looking at the same transactions in the
21 factual world and the counterfactual world to ascertain
22 the effect the MIF has and you will remember the example
23 I put to Mr Dryden, this was at {Day 12/6:18}, that you
24 assume in the factual a merchant puts through 100
25 inter-regional transactions on Mastercard cards and in

1 the counterfactual, where the inter-regional MIFs are
2 zero, they are switching to Amex which results in the
3 merchant putting through only 30 of the 100 transactions
4 as Mastercard transactions and 70 as Amex and in that
5 scenario the merchant's overall costs in respect of the
6 100 transactions would increase because Amex's charges
7 are higher, I think Mr Dryden accepted that, and even
8 though the costs in respect of the remaining 30
9 Mastercard transactions would have decreased, the
10 overall effect therefore would be it would be more
11 expensive in the counterfactual and it is clear the MIF
12 had not caused any detrimental effect in the factual and
13 there would be simply no economic reason to ignore the
14 70 more expensive transactions.

15 Now, I do not know if you remember, Mr Dryden really
16 struggled at that point because he could not give an
17 economic reason to ignore the 70 transactions and indeed
18 the approach of doing so leads to two rather absurd
19 outcomes because it is absurd either to artificially
20 only consider the price of the transactions that remain
21 with Mastercard and ignore the 70 as if they never
22 happened or what you would have to do is assume contrary
23 to reality that all the 100 transactions remain with
24 Mastercard and both of those as well as not just being
25 logical is actually ignoring the facts because you have

1 to actually on that hypothesis have regard to what is
2 likely to have happened and I am saying it is
3 a hypothesis but his answer was to struggle with why you
4 would not take the 70 into account and it makes no
5 economic sense and his only answer was not an economic
6 or commercial one; it was a legal one, if you remember.
7 What he said was switching only arises for consideration
8 under Article 101(3). But that is (a) wrong and (b)
9 clearly not a matter for him.

10 He also argued -- I think you will remember this as
11 well and this was the other mainstay of his point --
12 that the overall effect on the acquiring market leads to
13 risk of under-enforcement under Article 101(1), that was
14 at Day 12, pages 18-19 and again this was a theoretical
15 objection because he accepted he had not conducted any
16 analysis which would demonstrate that it was a real
17 concern.

18 The short point is that if there was some
19 alternative scenario in which merchants would be better
20 off, then the claimants and Mr Dryden would have put
21 that forward but he provided no economic justification
22 for his approach. He just simply said to the Tribunal:
23 ignore the 70 and I cannot tell you why other than
24 a legal point which was not for him.

25 PROFESSOR WATERSON: But can I come back on this. We know

1 that following the IFR, the interchange fees went down.

2 Did we see switching then?

3 MS TOLANEY: Yes, we did and we also saw an increase in
4 decline rates was very high as well. Sorry, I am
5 confusing IFR and commitments, I beg your pardon.

6 Sorry I am going to come on to all of this sir, I am
7 jumping out of turn. With the IFR I am reminded that
8 Amex was also subject to that so we did not see the
9 level of switching that I am positing because you have
10 got a different counterfactual.

11 We saw the effect after the commitments came in and
12 that is possibly more indicative and I will show you
13 that and we also saw the Oxera study and I am going to
14 come on to that.

15 At the moment, Professor, I am trying to just go
16 through each of the building blocks of the arguments
17 that have been put forward by the claimants and this is
18 first of all their legal and overarching theoretical
19 reasons for not taking and switching and then we will
20 come on to the effects of it if you do take it into
21 account. But at the moment what I am saying to you is
22 that you have not actually got any evidence that
23 justifies ignoring the 70 transactions on my hypothesis
24 from Mr Dryden because ultimately he could not give you
25 one.

1 Now, by contrast, Dr Niels and Mr Holt did give
2 a very clear explanation in support of the approach they
3 took and Dr Niels explained that the dynamic that
4 merchants are actually paying will end up in this
5 counterfactual, will end up being a higher cost overall
6 and that is a core part of the counterfactual analysis.
7 That was at Day 16, page 55. Mr Holt similarly
8 explained that one is looking at the same transactions
9 in the factual and the counterfactual on his approach in
10 order to work out whether there has been a breach of
11 Article 101(1).

12 Just standing back, it seems very obvious that you
13 would actually look at, in any counterfactual, what
14 would happen to the same 100 transactions. Now, subject
15 to the Professor's point that do we know and we will
16 come on to that, assume on the hypothesis that we know
17 and that there are 30 on Mastercard and 70 move to Amex,
18 the only point I am making to this Tribunal at the
19 moment is that there is just no way that logically one
20 can just therefore ignore the 70 and that is what the
21 claimants are asking you to do.

22 Now, can I move to the next topic, which is which
23 payment method should be taken into account on
24 switching. There is a separate question as to that
25 because experts have carried out different analysis and

1 we note that in paragraph 111 of the roadmap. Now, the
2 starting point is to tell you it does not matter, it
3 does not matter the difference between the experts
4 because ultimately there is a core of agreement. But
5 Dr Niels' approach looks at all payment methods to which
6 the transactions would have been diverted and you see
7 that in his second report at paragraph 4.5 3, whereas
8 Mr Holt only takes account of how switching to Amex
9 would have affected merchants' costs in the
10 counterfactual.

11 Now, we say that Dr Niels' approach of looking at
12 everything is the right approach but it does not matter
13 because both Dr Niels and Mr Holt conclude merchants'
14 costs would have been higher in the counterfactual and
15 similarly and this was answering I think the Professor's
16 point a moment ago, Mr Dryden's position, as I have
17 shown you, is that it was also better to treat Amex and
18 the acquiring market and to take Amex into account in
19 the switching analysis. So he also therefore would
20 accept that merchants' costs would be higher in the
21 counterfactual subject to his point about Amex dropping
22 its fees and we will come on to that separately.

23 Can I now move, having dealt with those common
24 points, if I can put them that way, to the specific
25 points that arise on inter-regional MIFs and my first

1 topic is why essential fact 6 does not apply to
2 inter-regional MIFs and we address this in paragraphs
3 112 and 113 of the roadmap.

4 We have set out the fundamental differences between
5 inter-regional and domestic transactions in our written
6 closing at paragraph 306 and we note seven factual
7 differences there. So this is at {RC-S/5/132}. Because
8 that is the starting point, can we distinguish?

9 I am not going to take you through all of them but
10 can I highlight two of them, please. First of all, as
11 we say at paragraph 306, these are confidential figures,
12 306(4) if you can note the very high proportion of CNP
13 transactions and then secondly at paragraph 306(5) we
14 see the evidence that issuers face higher costs on
15 inter-regional transactions due to higher fraud levels,
16 higher levels of non-fraud charge-back and the cost of
17 funds during the interest free period on credit card
18 transactions. Indeed Ms Sarmiento highlighted that
19 issuers' costs could be twice as much as domestic
20 transactions, that was Day 9, pages 251-252 of the
21 transcript.

22 Now, the distinction, the nub of the dispute between
23 us is what we identify in paragraph 13 of the roadmap.
24 It appears that the claimants do not disagree that
25 issuer costs are higher in relation to inter-regional

1 transactions and it seems as though their target is that
2 there is no link, they say, between the level of
3 inter-regional MIF and the distinctive features of the
4 inter-regional transactions and that is a finding of
5 fact they invite the Tribunal to make and you can see
6 that in the claimants' written closings at paragraphs
7 266-268.

8 Now, putting this very bluntly, there is just no
9 basis on which this Tribunal could make that finding.
10 Mastercard's evidence on interchange fee setting in
11 terms of the process is summarised at paragraph 85 of
12 Mastercard's written closings and if we can pull that
13 up, please, it is {RC-S/5/30}. Now, that evidence makes
14 clear that Mastercard adopts a strategic approach to
15 setting interchange fees. It takes into account cost
16 data including in the form of cost studies regarding the
17 costs of issuers and acquirers, the rates set by
18 competitors such as Visa and Amex, and any relevant
19 objectives of the scheme including new technology,
20 innovation, fraud prevention.

21 As Mr Kennelly mentioned yesterday, the precise
22 detail of how interchange fees are set and how issuer
23 costs are taken into account is not an issue in
24 Article 101(1). That goes to Article 101(3) and it is
25 why it has not been addressed in evidence for this

1 trial. But there is plenty of evidence and disclosure
2 from previous litigation on how interchange fees are set
3 and issuer cost studies and much of it is in the bundle.

4 If I can give you some references to it, you have
5 Mr Willaert's witness statement at paragraphs 5-77, cost
6 studies are address the further in Mr Sidenius' witness
7 statement which is at {RC-M1/9} -- we do not need to
8 pull it up -- and it was also addressed in some detail
9 in the Tribunal's judgment in the *Sainsbury's* litigation
10 in 2016 and I am not going to take you through it given
11 the time but I will give you the references, in
12 particular paragraphs 214-219. The Opus reference is
13 {RC-J5/24.01/135}.

14 So in conclusion, there is no basis to conclude that
15 there is no link between higher costs for issuers in
16 inter-regional transactions and inter-regional MIFs and
17 it is an even more remarkable submission to make in
18 circumstances where the European Commission had
19 specifically agreed that Mastercard and Visa can set
20 higher MIFs for inter-regional CNP transactions than
21 they do for domestic transactions precisely because of
22 the higher costs associated with those transactions.

23 So we say it is not open sensibly to make that
24 finding. Can I now, having met with those introductory
25 points, identify the three points the claimants make in

1 support of asking the Tribunal to make the finding and
2 then address why they are wrong.

3 We identify these in paragraph 113 of the roadmap
4 onwards. First of all, as you will see in subparagraph
5 (1), they refer to the evidence given by the Visa and
6 Mastercard witnesses to suggest that those witnesses
7 agreed that inter-regional MIFs do not bear any relation
8 to issuer costs. That is what is said and that is the
9 paragraph it is said in. Now, that is not a correct
10 account of the evidence before the Tribunal.

11 We can see that they rely on the evidence of
12 Mr Knupp, Ms Sarmiento and Mr Korn so can I take each of
13 them in turn and show you. Starting with Ms Sarmiento,
14 if we can -- she was taken to a document on Day 9,
15 page 257, lines 11-13, and it was put to her that the
16 primary driver for setting inter-regional MIFs was
17 competitive positioning as against Visa.

18 Now, if we can go to the document, it is at
19 {RC-J3/13/3}, and it is the pre-read for the 23rd
20 European Interchange Committee dated 25 June 2007 and if
21 you could go, please, to page 3. At the top of the
22 page, you can see with "Additionally", specific
23 interchange rates will be introduced for Mastercard
24 World. Proposed World Mastercard interchange rates
25 reflect the relative high value of the World programme

1 content and cost of recruiting etc.

2 Then under section 3 in the middle of the page you
3 can see that Mastercard commissioned a cost study in
4 relation to cross-border pay later cost.

5 So Ms Sarmiento was justified in the evidence she
6 gave but my learned friend simply omitted to take her to
7 the relevant part of the document --

8 MR BEAL: Are you going to go on to page 4 and 5?

9 MS TOLANEY: I was not, you can do that in reply.

10 We say in those circumstances the criticisms of
11 Ms Sarmiento's evidence, if you do not take her to the
12 relevant bits of the documents, are not justified.

13 Now, if we go to Mr Knupp's evidence, again the
14 claimants rely on a passage from his evidence at Day 7,
15 page 163 line 4, {Day 7/163:4} and this is at
16 paragraph 261 of their closing. The suggestion here by
17 the claimants is that Mr Knupp's evidence was that
18 issuers' revenue will reflect their costs. But that is
19 wrong. The evidence before the Tribunal makes clear
20 that schemes dictate the cost to the issuer and the
21 evidence, if we go to our written closing {RC-S/5/20},
22 you see we summarise that evidence at paragraphs 31-35
23 and in particular, if you could just look at
24 paragraph 34(1) of our written closing we summarise
25 Mr Livingston's evidence and this was given in a private

1 session, so I will not read it out.

2 The submission made by my learned friend that --
3 about Mr Knupp's evidence is a puzzling submission
4 because it is obviously right that issuers take account
5 of their costs and revenues in deciding what
6 functionality to offer and if revenues decrease and
7 costs increase the issuer has to scale back issuance of
8 that card because it will not be profitable to issue the
9 card and if revenues are commensurate or exceed costs
10 then the issuer may offer more functionality and so on
11 but that does not show that inter-regional MIFs have no
12 link to the higher costs associated with inter-regional
13 MIFs.

14 Then finally, Mr Korn made it clear that he was not
15 an interchange expert so the claimants were asking
16 questions to someone who was not in a position to answer
17 them, and that was at {Day8/203}.

18 The second point that the claimants rely on is the
19 PSR interim report. They rely on that in suggesting
20 that it supports their position but as we have said in
21 our written closing at paragraph 345, the Tribunal needs
22 to exercise some caution in respect of what the
23 claimants seek to get out of that interim report. You
24 will remember, sir, that the PSR's interim report set
25 out its provisional views only and it specifically said

1 so on the basis that it was inviting submissions on its
2 provisional views and proposals and the observations
3 made by the PSR are not determinative or even persuasive
4 evidence in circumstances where their review is not yet
5 complete.

6 So the Tribunal would need to be very cautious in
7 placing any weight on provisional views.

8 The other point is that it is not clear and
9 the Tribunal could not be satisfied on what basis the
10 PSR even reached the limited provisional views they did.
11 The Tribunal has not seen what data or information was
12 available to the PSR and the PSR only considered
13 a subset of transactions in issue because they only
14 consider CNP transactions between UK merchants and
15 consumers holding EEA issued cards following Brexit.

16 So one cannot really treat that as a proxy for
17 inter-regional transactions generally. Mr Dryden's
18 evidence rather showed the dangers of relying on the PSR
19 because twice he mistakenly invoked the PSR as
20 supporting his position when in fact he was not right to
21 do so. So he said on Day 12 at page 57, {Day12/57:1}
22 the PSR did not find a relationship between the IFR and
23 the decline rates and then on Day 12, page 65,
24 {Day12/65:1} he went on to suggest that the PSR could
25 not establish that connection between an increase in the

1 decline rates after the commitments given in 2019 and
2 the loss of the inter-regional MIF revenue.

3 So he relied on the PSR as demonstrating those two
4 points but in fact the PSR report did not address either
5 of those matters. So it is an example of just a lot of
6 caution being exercised over that and I think the
7 Tribunal would want more persuasive data.

8 The third point the claimants rely on, as we note in
9 paragraph 113(3) of the roadmap is that they seek to
10 make something of the fact that intra-EEA transactions
11 were reclassified as inter-regional transactions
12 post-Brexit. We heard a lot in cross-examination that
13 costs cannot have gone up overnight for those
14 transactions. Now, again, one has to look at the
15 evidence.

16 Both Ms Sarmiento and Mr Knupp made clear that costs
17 did not go up overnight. The CAT rate set under the IFR
18 which predominantly reflected card present transaction,
19 because those were the norm in the pre IFR world, those
20 cap rates were not appropriate for card not present
21 transactions. We know from the commitments set that the
22 Commission concluded that the IFR cap rates were
23 appropriate for card present transactions but agreed
24 that rates several times higher were appropriate for
25 card not present transactions, so all Mastercard was

1 doing is applying the same principle which the
2 Commission had already accepted and Ms Sarmiento's
3 evidence, which I would invite you to look at is that --
4 not now, but I will give you the reference at
5 {Day9/251:3-9} and Mr Knupp's evidence is at Day 7,
6 page 158 lines 21 to 24 {Day7/158:21-24} and these
7 fundamental points cannot be skirted over. It is quite
8 clear from the evidence what they were saying.

9 So in conclusion, when you are considering whether
10 fact 6 is made out, it is vital to have regard to the
11 seven fundamental differences between domestic and
12 inter-regional transactions because they fundamentally
13 affect the economic analysis and what would have
14 happened in the counterfactual.

15 Can I turn now to counterfactual switching and
16 I want to start by addressing two red herrings which
17 I pick up at paragraph 114 of the roadmap. The first
18 point is that my learned friend submitted in his
19 aide memoire at paragraph 98 that there is no prospect
20 of the scheme shutting off inter-regional functionality
21 for the sake of a MIF revenue represented by foreign
22 transactions in the UK and Ireland. If you remember, he
23 made the same point orally on Day 18, that was at
24 Day 18, page 178, line 17, saying: essentially they are
25 saying the entire inter-regional functionality would be

1 shut down and I think this was put to Dr Niels in that
2 way in cross-examination as well.

3 Now, that is a complete red herring because
4 Mastercard and Visa have never suggested that
5 inter-regional functionality would be switched off
6 generally. Our case is that one of the options
7 available to foreign issuers faced with this enormous
8 loss of revenue on inter-regional transactions in the UK
9 and Ireland would be to switch off inter-regional
10 functionality for those transactions. We are not saying
11 it is the only option. There are a number of other
12 options including higher chargeholder fees, reduced
13 benefits and we are not saying it is an option that
14 every issuer would adopt.

15 Our submission is that the evidence shows that
16 switching off inter-regional functionality for
17 inter-regional transactions in the UK and Ireland is
18 a realistic option that many issuers would adopt.

19 MR TIDSWELL: Are you going to go on to talk about the
20 evidence?

21 MS TOLANEY: I am going to. I am just clearing away what is
22 not our case, any red herrings, and then I can address
23 what is our case.

24 The second red herring is the one we identify at
25 paragraph 114(2) which is on Friday my learned friend

1 made a submission to the Tribunal about whether a bank,
2 in his example a South African bank, faced with a loss
3 of inter-regional MIF income, would say: it is annoying
4 we are not getting the MIF income but we cannot be
5 bothered to decline authorisation for a given market
6 just because there is no MIF income coming from that
7 particular transaction, that was at page 179 of the
8 transcript. {Day18/179:6}

9 So he was specifically addressing whether a loss of
10 MIF income was likely to result in an increase in
11 decline rate. Now, my learned friend was then asked by
12 Professor Waterson and this was at page 179 of the
13 transcript, line 6:

14 "Just so I understand it, we have not had any
15 evidence either for or against your particular thought
16 experiment there."

17 That is what the Professor asked.

18 My learned friend responded:

19 "No, I mean, it is speculative on every level and
20 I recognise that."

21 I do not know if the Professor remembers that
22 exchange.

23 You said we are not in a position therefore to test
24 that either way and my learned friend said no.

25 Now, that is not right. There is relevant data

1 before the Tribunal and we set that out at paragraph 327
2 of our written closing, so I could pull that up, it is
3 at {RC-S/5/142}. The Tribunal will recall Mastercard
4 gave commitments on inter-regional MIFs in 2019 by which
5 those MIFs were capped and for card present transactions
6 at the IFR caps, it was 0.2% of the value of the
7 transaction for debit cards and 0.3% for credit cards
8 and for card not present transactions it was 1.15% of
9 the value for debit cards and 1.5% for credit.

10 Now, it is common ground that the commitments given
11 in 2019 had only a limited impact on the inter-regional
12 MIF revenues and there is a significant reduction in the
13 card present MIF but that only applies to a small
14 percentage of transactions and notably the commitments
15 resulted in very little change to the card not present
16 inter-regional MIF which made up the vast majority of
17 the transactions, as the capped MIFs for CNP
18 transactions were around the level of the MIFs before
19 the commitment.

20 So the caps just did not do anything is the short
21 point and -- they did not do very much at all and that
22 is Mr Dryden's own evidence, which is at paragraph 110D
23 of his first report, so that is at {RC-H2/1/229}. But
24 did not cause much change on CNP MIFs as these were
25 already around the level of the cap. You see that, so

1 that is Mr Dryden's own evidence.

2 Now, just to address one point. The claimants argue
3 that the cap on the inter-regional MIFs did not result
4 in a wide-scale switching to Amex and this was the point
5 I think, professor, you asked me and I slightly muddled
6 up. The reason it did not is as their own evidence
7 states as I have just shown you, the impact of the
8 commitments was limited and Mr Knupp's evidence is that
9 decline rates increased from 17.7% to an average of
10 46.4% over a 12-month period.

11 So can we just pause on that information.

12 That means essentially one in two transactions was
13 declined over a yearlong period. So a payment product
14 that only worked 50% of the time was what occurred and
15 that is not very attractive. What that demonstrates is
16 that the claimants' case just does not hold. Their case
17 is that because customers value being able to use their
18 cards abroad of course banks would continue to provide
19 that functionality, no matter what the revenue.

20 But that ignores commercial reality. As the data
21 shows, even with a very limited cut in interchange fees,
22 banks were prepared to decline 50% of transactions.

23 MR TIDSWELL: Quite a lot of cold water being poured on the
24 causation between those two things, I think there was
25 certainly a question as to whether there was

1 a difference between the 17% and the 21% that came out
2 the other end. But there were suggestions that there
3 might have been other factors that lead to the rise to
4 46.

5 MS TOLANEY: I agree and what I say to you is, two points:
6 one, no evidence that that was not the link; and two,
7 the only thing that was really posited was Covid and
8 I will come on to that.

9 So if you remember, what was said is that the
10 decline may have been positively affected by Covid, that
11 was the positive case put as the other reason.

12 MR TIDSWELL: Well, I thought I may be wrong, I thought it
13 was put to one or both of the experts if there was
14 a general acceptance it seemed unlikely that the change
15 of interchange fee would have resulted in that spike,
16 albeit that there may have been some increase that was
17 reflected in the settled level later.

18 But maybe I am wrong about that but I understood
19 that Mr Beal had put that.

20 MS TOLANEY: I think it was put to Dr Niels, I do not think
21 he accepted that but we will check that. Can I just
22 show you what was put, which is -- Mr Knupp's evidence
23 was at Day 7, page 165, lines 8-25 {Day7/165:8-25} and
24 what he pointed out was the data related to a yearlong
25 period from 2019 to 2020 and Covid could only have had

1 any potential impact in the final four to six weeks at
2 the end and you see that from page 164, line 8.

3 {Day7/164:8}

4 If you go over the page then, please. So lines 3-7
5 over that page you can see {Day7/165:3-7} and he
6 explained that the decline rate then came down from
7 October 2021 to 2022 but that still remained higher than
8 the pre commitments level at 21%, so it was an 18.6%
9 increase over the previous level and if I can just show
10 you that, that is at {RC-F4/8/14}.

11 I am just trying to --

12 MR TIDSWELL: Bottom of the page, para 48?

13 MS TOLANEY: Yes, it is paragraph 48, thank you.

14 What you may be remembering is Mr Dryden's evidence,
15 which was at {Day12/57:7-12}.

16 MR TIDSWELL: I think I was looking at that being put to one
17 of either your or Visa's experts but no doubt Mr Beal
18 will remind me of that if that is the case.

19 MS TOLANEY: We will find that. I remember it being put
20 certainly to Dr Niels and I do not think he accepted
21 that it was Covid skewed, although it may have been
22 a factor, but I will get the reference for you.

23 PROFESSOR WATERSON: Just to remind me: this is transactions
24 from people in other countries taking place in the UK;
25 is that right? Sorry.

1 MS TOLANEY: (Nods)

2 PROFESSOR WATERSON: Of course many of those other countries
3 would have gone into lockdown before us.

4 MS TOLANEY: Yes. I am being told reliably nobody went into
5 lockdown before February 2020.

6 PROFESSOR WATERSON: Nobody, not even in Italy?

7 MR BEAL: We may have to call Mr Cook to give evidence.

8 MS TOLANEY: I am being told very assertively, Mr Cook can
9 look that up for you. I have to say, I, like most
10 people, I think, regard that period as a bit of a blur.

11 PROFESSOR WATERSON: Okay.

12 MS TOLANEY: But the upshot is that we have a 20% at least
13 -- looking at those figures from Mr Knupp's evidence we
14 have at least a 20% increase on the previous rate of
15 declines even looking at the rate as it is in
16 October 2022 and that is one in five transactions being
17 declined and whilst that may be better than one in two
18 transactions being declined, that is still not
19 a reliable product.

20 What we suggest is you have a natural experiment
21 there relating to inter-regional MIFs albeit one which
22 concerns only a limited reduction in the MIF income
23 which shows a marked reaction to even that small change
24 and we say that is data. So the answer that it was
25 entirely speculative is not right, that is data, and it

1 is data that demonstrates that my learned friend's
2 arguments that banks will happily provide a service at
3 a loss or that they do not need MIF income is not right.

4 I am going to come on to other data about switching
5 shortly.

6 Mr Cook is very pleased to tell you that the first
7 lockdown began around 21 February 2020 covering 10
8 municipalities of the province of Lodi in Lombardi and
9 affecting only 50,000 people.

10 So those are the two sort of red herring points, if
11 I can put it that way; they are quite lengthy red
12 herring points, but I have cleared them away.

13 Can I turn to address the reasons why there would be
14 substantial switching in the counterfactual and there
15 are five reasons which we set out at paragraphs 115-120
16 of the roadmap.

17 The first reason, as we say in paragraph 116 of the
18 note, is that it is an important aspect of the factual
19 and economic context to take account of the competitive
20 threat posed to Mastercard and Visa in the
21 counterfactual and Mastercard and Visa have a number of
22 competitors in the inter-regional transactions market
23 and it is important not just to focus on the market
24 shares that these competitors have in the factual
25 because that is what the claimants are asking you to do

1 because, again just standing back, we are positing
2 a world in which Mastercard and Visa did not have
3 a competitive inter-regional offering. In the factual,
4 they do. So you cannot compare the two as translating,
5 reading directly across.

6 The important thing is the capacity that Mastercard
7 and Visa's competitors would have had to take market
8 share in the counterfactual in a world where Mastercard
9 and Visa issuers were unable to compete. Our position
10 on Amex in particular is addressed at paragraph 116(2)
11 in the roadmap and 316 of our written closings.

12 There have been a lot of references to Amex being
13 a niche product not very focused on universal acceptance
14 but the reality in the UK market is very different.
15 Amex acceptance rates are very high and by the end of
16 2020 84%, with evidence that the gap is likely to have
17 narrowed even further after that and that is at 316(2)
18 of our written closing.

19 Can I just pull up that so you can see the
20 confidential figures, so it is {RC-S/5/136}.

21 MR TIDSWELL: While we are waiting for that, can I ask you
22 a question. It may be a silly question. We are dealing
23 with a period of a claim that goes back potentially to
24 2011 here. You have just given us a figure for 2020,
25 obviously we know that has changed over time. Is it

1 necessary for us to look at the way the counterfactual
2 might apply at different times in that period in order
3 to reach a conclusion?

4 MS TOLANEY: Well, I think you cannot -- yes and no is the
5 answer. I think yes, logically, if you could say well
6 obviously in 2011 it would not be the same as 2020 and
7 that may be a given. But all you can do is assessing
8 the data you have got, and obviously the data you have
9 got will show you, and one has to do it by building
10 blocks, is Amex a niche product? The answer is: well,
11 we have got evidence that it is not now. Can Amex
12 quickly or could a card scheme quickly acquire market
13 share if it wished to? I will come on to this but you
14 remember the figures in Ms Suttle's table which showed
15 how quickly Mastercard, for example, acquired a very
16 large market share in one particular sector very
17 quickly.

18 Taking that information you then have to look at
19 an analysis in which you are positing an unreal world in
20 which Mastercard and Visa did not have a competitive
21 offering and you are asking yourself the question based
22 on the data you have which obviously relates to various
23 time periods: would Amex have managed to or could it
24 have managed to, might it have managed to, whatever the
25 test is you apply, is it likely, is it realistic that

1 Amex could have increased its market share?

2 What we are saying is with the combination of data
3 that you have from the different sources, the answer is
4 manifestly yes.

5 MR TIDSWELL: Well, just -- that may well be right but just
6 to test you on a hypothetical level. At a hypothetical
7 level without getting into what the answer is, and I am
8 not sure we have data about Amex in 2011, we may have it
9 somewhere. But if the position was very different in
10 2011, and let us just assume it bears some resemblance
11 to reality that Amex actually was quite a popular method
12 for merchants in 2011 and actually a lot of the
13 acceptance rate was probably quite a lot lower, do we
14 need to go through an exercise of determining what the
15 likely switching position would be in 2011 and then
16 again in 2015, if it is different in 2020, because the
17 answer might be quite different, might it not?

18 MS TOLANEY: I think, sir, if you could do it it would be
19 open to you, but I think it is unnecessary and it may be
20 just too nuanced because what you have to do is in a way
21 the question that you are trying to ask from not quite
22 100 feet but some distance is in a world where
23 Mastercard and Visa had no competitive offering, and
24 other people did, logically what might have happened?
25 I think the common sense view would be, well, the other

1 people might try and capitalise on that. The next
2 question is: could they have capitalised on it to which
3 the answer is; well, is there any evidence that they --
4 looking at what -- have we any examples of what they
5 have done and I will show you those and the "could they"
6 is therefore answered by analogy with seeing that Amex
7 did do certain things with its 3.5 model when it needed
8 to, so the answer is yes, it could have done because it
9 would have taken steps, one has to assume as
10 a commercial entity that has shown itself as willing to
11 do that, it would have done.

12 The next stage is: what data do we have that shows
13 that it could have made a significant shift in the
14 market? To which the answer is, well, by 2018 we knew
15 it was 82%; 2020 it is 84%. You do not actually have
16 any data that suggests to you in 2011 it was
17 significantly lower. What you have is evidence showing
18 in 2018 and 2020 that it was certainly at higher rates
19 than it has been posited when it is described as a niche
20 product.

21 Then finally what you say is: well, in the sectors
22 in which Amex -- we are talking about Amex at this
23 point -- had no coverage, is it actually possible for
24 any scheme to rapidly acquire a market share or would it
25 have taken years? Then you have got evidence by analogy

1 with what Mastercard has shown you.

2 So it is a stage of building blocks because I cannot
3 say to you here is the evidence of what would have
4 happened in 2011, because of course we do not know.

5 MR TIDSWELL: I understand that, I am not necessarily asking
6 for the answer, I am trying to get the principle right
7 because the principle may apply itself to other
8 different situations as well, you mentioned the GNS
9 scheme and so there is a question, is there not, as to
10 whether we are applying a counterfactual at a time when
11 the GNS scheme existed or we are applying it at a time
12 when it did not, and obviously there is a sharp
13 (inaudible) maybe where it ceases to. In that case,
14 the latter case we are asking ourselves the question
15 whether Amex might re-enter the market and that is quite
16 a different question in terms of analysis that
17 (inaudible) still here. Of course I am sure you are
18 right about it being a nuance, but the trouble is the
19 nuance has potentially large amounts of money attached
20 to it because the claimants who are bringing a claim for
21 the period 2011-2012 would say no doubt that they are
22 entitled to recover if it is shown that there was
23 a restriction of competition, although the switching
24 argument in relation to that period might not be any
25 good, whereas the claimants in the period 2019 to 2020

1 might be in quite a different position because the
2 switching argument is much better.

3 So I take the point it might be a nuance, I think
4 the question I am asking you is: how important a nuance
5 is it?

6 MS TOLANEY: Well, two answers to that. The first is the
7 claimants have not advanced that case.

8 MR TIDSWELL: I am sure that matters, does it, because --

9 MS TOLANEY: Because --

10 MR TIDSWELL: I do not want to get into the sort of burden
11 of proof or pleading point but the simple fact is that
12 we are being asked to determine a counterfactual on
13 which we have to say with whether certain things would
14 happen and we are going to have to say when we do that
15 whether that counterfactual is a 2021 or a 2024 one or
16 a whole period one based -- as I think you are
17 encouraging us to, based on a broader brush.

18 MS TOLANEY: Yes, sir, because what you have to do realistic
19 is look at what the counterfactuals are that are argued
20 by the parties. I know that sir, you have identified
21 another potential one and we are addressing that. But
22 all of these counterfactuals, as I understand this, and
23 I will be corrected by somebody leaping up, apply across
24 the board. The question is which is the right one, not
25 when do they apply?

1 MR TIDSWELL: I think that is the very question I am testing
2 because --

3 MS TOLANEY: But then you would have to have an argument --
4 so the claimants' case -- all we can do in any case is
5 answer as a defendant the case that is put against us.

6 MR TIDSWELL: That is not quite right, this is an argument
7 you are putting forward about switching. The claimants'
8 case on this is it is not relevant.

9 MS TOLANEY: Exactly.

10 MR TIDSWELL: So I think it is a question -- if I may so,
11 I think it is a question for you. I am not pressing you
12 in the sense I am not suggesting that you are wrong in
13 your broad assessment and indeed we see the claimants
14 praying in aid what happened in 2006 in Australia.

15 MS TOLANEY: Yes, exactly.

16 MR TIDSWELL: So, you know, as being a likely indication of
17 a natural experiment as to outcome. So I think
18 everybody is playing this a little bit.

19 MS TOLANEY: Yes.

20 MR TIDSWELL: But I think what I am really interested in is
21 your guidance on what we need to do in our judgment in
22 order to properly construct a counterfactual that makes
23 sense.

24 MS TOLANEY: I think the only reason I mention what the
25 claimants have argued is not because I am taking

1 a pleading point. It is because it is important to
2 frame what they think they could run, if you like, based
3 on the data precisely because of the point that you have
4 made about the claimants themselves praying in aid
5 material from 2006 in Australia.

6 The point is that what we are trying to look at is
7 in the counterfactual what will would the main players
8 have done and then, separately, there may be a question
9 which is really your question: is there a time period
10 over which they could have got to, if you put it full
11 tilt? So if it was 2011 could they have got to the
12 relevant market share, if you remember Mr Dryden was
13 positing in 2011, or would it have taken longer?

14 All I can say to you on that is that we have got
15 a combination of material and evidence that suggests
16 that you would not need to be saying: right, they could
17 not have done it in 2011 but they could have done it in
18 2016, because we have got the data showing from
19 2018/2020 very high acceptance rates even when
20 Mastercard and Visa had their competitive offering so
21 one has to assume that if they did not have that
22 offering, Amex would have moved more quickly.

23 The next building block is: would Amex have been
24 able, willing to move more and do anything? We have got
25 evidence to show by analogy it would have done and the

1 next question is: could they have done it quickly? We
2 have got evidence to show by analogy they could have
3 done.

4 So I think what I am saying to you is that there is
5 no basis on which the Tribunal would need to be saying:
6 well, actually, it was shown to us and demonstrated that
7 even if this counterfactual existed it could not have
8 come into play in a full tilt until X, because there is
9 no basis or evidence on which that would be put forward
10 and I am putting forward the opposite to you and at no
11 point have the claimants suggested to you that the
12 evidence would go the other way and show you a different
13 scenario.

14 What they have said is just ignore the whole thing.

15 So you have my evidence and my submissions, now
16 those can be rejected but I am saying that there is no
17 alternative, I would say to you, because I can make good
18 all of the planks that you would need to be satisfied
19 enough for you to form a rounded picture that this is
20 a realistic counterfactual and whilst acceptance levels
21 may have fluctuated, and market share may have
22 fluctuated, it would still be at a level that was
23 significant enough to make the counterfactual where we
24 say it is.

25 THE PRESIDENT: Following on from that, articulating the

1 questions regarding counterfactuals at a higher level of
2 generality, you are presumably not suggesting that
3 assuming perfect information of what is going on in the
4 real world, one disregards temporal differences? In
5 other words, if you are looking at what might have
6 happened in a counterfactual world, having defined what
7 it is one is assessing; in other words, what one is
8 removing to establish the counterfactual, you need to
9 look at the circumstances as they changed over time.

10 That cannot be controversial.

11 MS TOLANEY: It is not controversial, sir.

12 THE PRESIDENT: No, okay.

13 MS TOLANEY: But I think what I am saying to you is that
14 because of the nature of the exercise --

15 THE PRESIDENT: No, I will come on to your qualifications.

16 MS TOLANEY: Yes.

17 THE PRESIDENT: But as a starting point.

18 MS TOLANEY: If I was looking at the factual, then time
19 differences obviously are relevant because we have got
20 the information.

21 THE PRESIDENT: Well, yes, you never have the information in
22 a counterfactual because it is a counterfactual.

23 MS TOLANEY: Exactly.

24 THE PRESIDENT: So you start by working out what the factual
25 state of play is across time so let us say we are

1 looking at a 10-year period and you have a fluctuating
2 factual matrix fluctuating in a material way, it is not
3 the price of oranges in Africa, it is something which is
4 material to the period you are considering. So you need
5 to look at that fluctuating factual baseline. You then
6 ask yourself: what is the counterfactual world that we
7 are hypothesising? In other words, what element are we
8 removing to work out what is going on in the
9 hypothetical world? You then need to work out whether
10 the effect of removing that fact in the real world is
11 itself affected by the changes in the real world over
12 time.

13 So there has to be a temporal approach to any
14 counterfactual that is spanning a period of time.

15 MS TOLANEY: Yes.

16 THE PRESIDENT: Okay.

17 MS TOLANEY: But?

18 THE PRESIDENT: But you then come to the question of: is the
19 evidence there and if the evidence is not there because
20 all Tribunals operate on an imperfect record, we do not
21 know everything, we have to decide matters on the facts
22 that are before us, you may say: well, take the end of
23 the period and extrapolate back, in which case the
24 question is one of counterfactual fact for us to work
25 out how safe that extrapolation backwards is.

1 But to be clear, the fact that you have got some
2 evidence does not mean that we are going to accept as
3 safe the counterfactual in earlier years; it all depends
4 on what load you are expecting the evidence to bear.

5 MS TOLANEY: The reason -- that all sounds, sir, as I would
6 expect incredibly sensible.

7 THE PRESIDENT: Right.

8 MS TOLANEY: But the reason I am pushing back a little is
9 because in this case, and that would be absolutely true
10 in every case usually, and it may well be true in this.
11 But in this case, first of all nobody has suggested that
12 time period makes a difference. So if in a case that
13 you were hearing one side was saying the counterfactual
14 could not have existed in years 2000-2005 because
15 widgets had not been invented, right, then that would be
16 an argument you would be grappling with and factoring in
17 or there was a method of supply that did not exist
18 that -- let us take that, let us take that email did not
19 exist and we are talking about something that was
20 delivered in a particular way or a product and we knew
21 in a particular time period that did not exist.

22 So you would obviously then be saying to me: well,
23 you have to have a different counterfactual there
24 because that does not exist and that is exactly the case
25 that is being run against you or whether it was not

1 being run against me, but it would be, you would assume.

2 Here nobody is suggesting time period makes
3 a difference because we are not talking about
4 a counterfactual that is relying on me saying to you:
5 Amex would have to have 95% acceptance rate for this
6 counterfactual. We are not talking about that. So we
7 are talking about a much higher level of generality
8 where we are saying.

9 THE PRESIDENT: Well, that may or may not be right. But we
10 need to be satisfied, we need to satisfy ourselves that
11 what you are saying is right because the one thing that
12 is clear is that over the period of time that we are
13 considering there have been a number of changes both in
14 regulation and in technology --

15 MS TOLANEY: Yes.

16 THE PRESIDENT: -- which may very well affect how one
17 assesses the counterfactual over time.

18 Now, you may very well be right that when one has
19 taken into account and looked at them, they do not make
20 a difference but I do not think we could responsibly say
21 we are not going to look.

22 MS TOLANEY: I understand that, sir. I think I am trying,
23 though, to -- I think it is quite important and --

24 THE PRESIDENT: Well, yes, okay, push back, but are you
25 disagreeing with that proposition?

1 MS TOLANEY: I am not but what I am saying is it is very
2 easy as an advocate to agree with a general statement
3 and of course I agree with the general statement.

4 THE PRESIDENT: Yes, right.

5 MS TOLANEY: But one then has to go on to apply it to this
6 case and that is what I need to do.

7 THE PRESIDENT: It may very well be that you are saying that
8 taking that general approach and accepting it as correct
9 in fact we do not need to worry about the temporal
10 differences over time because none are material and it
11 seems to me that if that is the substance of your
12 submission, then I am prepared to go along with it. But
13 what I am saying is that it is not for the advocates or
14 indeed their witnesses to tell us what we look at.

15 MS TOLANEY: No, of course not.

16 THE PRESIDENT: We look at the counterfactual situation, we
17 reach what is essentially a rather odd factual
18 conclusion on the totality of the evidence and we decide
19 whether your submission that we can extrapolate back
20 from the latest point in time because everything in the
21 past is actually an immaterial change, well, if that is
22 right, then that is right.

23 MS TOLANEY: Absolutely.

24 THE PRESIDENT: If that is wrong, then that is wrong.

25 MS TOLANEY: I think where -- the only point I will make and

1 then I will move on, because I do not think there is
2 anything between us, is that I suppose what I would say
3 to you is if there was something that made a huge
4 temporal difference, all I am saying to you is I think
5 you would have heard about it by now.

6 What I will do certainly in my submissions is try
7 and show you, I will hesitate to say the totality of the
8 data because I do not know if that is possible, but
9 obviously the key data for the periods we have got in
10 different respects.

11 As I said, there are a number of different building
12 blocks and I think that what I will be inviting you to
13 find is first of all that our counterfactual is taking
14 into account that the switching is the right one. Then,
15 secondly, that you can be satisfied through the various
16 bits that you will have to analyse and put together that
17 that counterfactual applies across the board based on
18 the data that you have. I will therefore definitely try
19 and satisfy -- I am not suggesting that you would not
20 engage in the exercise, I am just simply making the
21 forensic point that other than Covid as an incident in
22 this time period, nobody has identified something
23 specific that would make you think, well, actually,
24 Ms Tolaney, you have not addressed X and you have got to
25 deal with that very important development. That has not

1 been the approach taken by either side because we have
2 not identified anything as far as I am aware and the
3 question for you to be satisfied on really has been put
4 at a more general level is: are we right on the
5 counterfactual per se?

6 Obviously we can then go into a more detailed
7 enquiry over time period, but I think the fight has been
8 very much on the first point because there is less
9 concern over time period.

10 THE PRESIDENT: Okay. Well, that sounds as if we are in the
11 same ballpark.

12 MS TOLANEY: Yes.

13 THE PRESIDENT: I think the only point that I would make
14 before you move on is that we see this as essentially an
15 evidential question, albeit with a significant
16 hypothetical tale.

17 MS TOLANEY: I understand that.

18 THE PRESIDENT: We will look in determining that factual
19 question to the totality of the evidence on the record
20 before us, subject to this qualification that we have
21 made clear that we will be making data requests of both
22 schemes regarding a number of factors that may or may
23 not be material to this counterfactual but we will be
24 articulating those requests as we indicated much earlier
25 on in these proceedings and we will be deciding the

1 question on the basis of that evidence.

2 Now, obviously you are right, we would expect the
3 witnesses to identify points that we ought to be paying
4 regard to because that is part of the evidential record.
5 But at the end of the day, and I do not think you are
6 disagreeing with this, we need to look at the
7 counterfactual that the evidence leads us to.

8 MS TOLANEY: Yes.

9 THE PRESIDENT: Okay.

10 MS TOLANEY: Very much so and I think one of the points
11 which I will obviously touch on, I think Mr Kennelly
12 touched on, is for example if you were to think that the
13 scheme fee counterfactual was the right counterfactual
14 there might be a need for more evidence if there was not
15 sufficient available.

16 So we do rely heavily on the evidence and I will be
17 showing that to you. But just in answer to
18 Mr Tidswell's point, we have helpfully found an Amex
19 acceptance figure for 2010, if that helps you?

20 MR TIDSWELL: A piece of the jigsaw.

21 MS TOLANEY: Yes, which is 75%.

22 MR TIDSWELL: In the UK?

23 MS TOLANEY: In the UK. That is at {RC-M1/15.1/5},
24 paragraphs 14 to 16 so it may be we may have to trawl
25 through some of that material and it is -- obviously

1 there are specific questions like that we can definitely
2 look through the evidence as the President is saying and
3 find it as best we can.

4 Is that a convenient moment for a break? I am very
5 happy to carry on, or to stop whenever --

6 THE PRESIDENT: No, we started early so that seems like
7 a good point. We will rise for 10 minutes.

8 (11.37 am)

9 (A short break)

10 (11.53 am)

11 THE PRESIDENT: Ms Tolaney.

12 MS TOLANEY: I said I would come back to Mr Tidswell on ...
13 we cannot find -- we may be wrong -- that the impact of
14 the decline rates being affected by Covid was put to
15 Dr Niels or Mr Holt in relation to the commitments which
16 was what I was dealing with, that the commitments had
17 had that effect on the decline rates, Mr Knupp's
18 evidence and so on. But we could not find a passage
19 where it was put to Dr Niels and Mr Holt. I put it to
20 Mr Dryden, which I showed you.

21 MR TIDSWELL: Yes, we saw. I am sure Mr Beal can come back
22 to it.

23 MS TOLANEY: I say it cautiously, because we may have missed
24 it --

25 MR BEAL: That is a different section dealing with the

1 switching scenarios for inter-regionals.

2 MS TOLANEY: That is right, we think we saw it under
3 issue 4 -- in scenario 4, I beg your pardon, remember
4 Dr Niels' four scenarios about what would have happened.
5 I think decline rates were put to him in that context
6 but I am not aware it was put to him in the context of
7 the 2019 commitments, which is what I was addressing you
8 on.

9 MR TIDSWELL: Yes, I think -- never mind, I am sure it will
10 wash out in due course.

11 MS TOLANEY: I am sure. So if the question is: was decline
12 rates put to him? Yes, but not on the point I was
13 making. So that is why I just thought I would come back
14 on that and obviously Mr Beal can address you on what it
15 was put on but I say it may not be the same point.

16 So I was on Amex. Just without going back over the
17 whole debate, the point I was addressing, because I am
18 going to come on to data and particularly now, sir,
19 I have in mind your steer on that. But the point I was
20 addressing was that the claimants suggest in their
21 written closing at paragraph 458 that Amex acceptance
22 rates are low and the point I am addressing at this
23 point in 116(2) of our roadmap is that it is not right
24 that Amex acceptance rates are low. As I said to you,
25 the rate which we now know in 2011 is 75%, by 2020 it is

1 84%, you also have in our written closing at
2 paragraph 316(5), so if we can pull that up,
3 {RC-S/5/136}, confidential figures which Mr Holt
4 provided and which the claimants did not challenge and
5 the important point is that Amex may have had poor
6 acceptance rates in small businesses in provincial
7 towns, but it is accepted in those places typically
8 where international visitors would be.

9 The claimants' suggestion therefore that Amex's
10 acceptance rates are low is not right. The proportion
11 of Amex transactions at a particular merchant who
12 accepts Amex cards is not an indication of what
13 percentage of merchants accept Amex and we will come on
14 to that particular data. There is also the option for
15 issuers to switch to Amex under the GNS model as
16 I mentioned and Ms Sarmiento gave evidence to that
17 effect, that is at {RC-F3/5/16} and it is paragraph 60.

18 It is -- thank you. She was not challenged on that
19 evidence.

20 MR TIDSWELL: So this is -- just so we are clear, we are
21 talking about inter-regional MIFs and we are talking
22 about issuers outside of the UK switching where there is
23 a GNS service?

24 MS TOLANEY: Exactly.

25 MR TIDSWELL: Yes.

1 MS TOLANEY: The point is -- the important point here is to
2 consider what would happen in the counterfactual and
3 with an opportunity to win international traveller
4 business from Mastercard and Visa, we say rhetorically
5 why would Amex not have expanded its GNS offering to do
6 so? Even if it did not do that, it would have been well
7 placed to get customers' business directly anyway.

8 MR TIDSWELL: So that is a slightly different point from the
9 one she is making, is it not?

10 MS TOLANEY: Yes.

11 MR TIDSWELL: You are going on to the next point?

12 MS TOLANEY: I am going to the next --

13 MR TIDSWELL: There I am afraid I do have to ask you about
14 whether that is a -- are you talking about Amex coming
15 back on to the market in the UK or are we back into the
16 conversation we have just had about whether we are pre
17 their exit in terms of the counterfactual?

18 MS TOLANEY: I think we are for the whole period for the
19 counterfactual, those are my submissions.

20 MR TIDSWELL: Well, I appreciate that. In that case I am
21 not quite sure why you are making the point, maybe you
22 were not, maybe it is my mistake. But I thought
23 Ms Sarmiento is talking about GNS networks outside --

24 MS TOLANEY: Exactly, and I am saying she gave evidence
25 there was the option to switch to Amex under that model.

1 MR TIDSWELL: She does not say anything here about Amex
2 expanding the GNS --

3 MS TOLANEY: No, no that is the next point. I am saying the
4 next point in the counterfactual is to consider whether
5 it could have expanded --

6 MR TIDSWELL: Outside the UK.

7 MS TOLANEY: -- outside of the UK.

8 MR TIDSWELL: Do we have any evidence on that?

9 MS TOLANEY: I am simply saying as a commercial offering why
10 would it not have done if it could have won the business
11 that way?

12 MR TIDSWELL: So we have no evidence on that.

13 MS TOLANEY: No, but I think the Tribunal are entitled to
14 say it is a commercial entity, when it needed to
15 introduce a new model it did and even if it did not do
16 that, I am saying it makes no difference because it
17 would have been well placed to win the business anyway
18 without that model. The point is that -- and I think
19 this is a very important point and I am sure
20 the Tribunal has, but I know with all the evidence it
21 can get lost -- we cannot look at the counterfactual and
22 say: well, you read across the market share, the use of
23 debit credit cards, I am coming on to this -- the type
24 of model as if it would have been the same in the
25 counterfactual because what you are starting with is the

1 premise that the counterfactual looks very different
2 because you have taken out Mastercard and Visa and they
3 do not have the same competitive offering and,
4 therefore, one is saying when you have other competitors
5 in the market who are not so constrained commercially,
6 what do we think is likely to happen and that is
7 a combination of looking at the behaviour of the
8 competitors such as Amex, the issuers and the merchants
9 and that is the stages I am going to take you through.

10 But I think what we can all agree is that when you
11 have got anybody who is hungry for business as you can
12 see that Amex clearly was when it introduced different
13 models at different times, as well as other competitors,
14 you can say commercially, well, it looks like Amex was
15 reacting when it was appropriate to do so to market
16 changes, we can see that from some of the evidence and
17 therefore one has to assume that if it was possible for
18 it to increase its market share it would have looked at
19 doing so.

20 If we then go to paragraph 116(3) of the roadmap,
21 you will see that I note there that there are
22 substantial other competitors for inter-regional
23 transactions. There is China UnionPay, which is the
24 biggest card scheme in the world with 9.4 billion cards
25 issued worldwide, so that is more than 1 per person, and

1 cards issued in over 70 countries. You also see
2 Discover and PayPal as other alternatives.

3 I think at this point, what I am trying to do -- and
4 it may not be very helpful -- is I am trying to take
5 this in stages. I appreciate the Tribunal has questions
6 coming in at different angles but the starting point is
7 are there other competitors, are there serious other
8 competitors in the market? That is the target here, and
9 there are. So that is what I am saying now.

10 The second point I am making here in this context is
11 at 317 of our written closing and can I just turn that
12 up.

13 PROFESSOR WATERSON: Sorry, just before we come on to that.

14 Do we know what rates China UnionPay, Japan Credit
15 Bureau etc charge?

16 MS TOLANEY: That is exactly what I am going to.

17 PROFESSOR WATERSON: Okay, sorry.

18 MS TOLANEY: Do not worry, {RC-S/5/138}. It is
19 paragraph 317 and this is from Ms Sarmiento's evidence
20 and you can see there that China UnionPay cards are
21 issued as I said in the statistics and it was put to
22 Ms Sarmiento that there was a negligible share of issued
23 cards and acceptance levels in the UK were lower than
24 Amex at 50% and there were similar levels for Japan
25 Credit Bureau and Discover Global Network and we see

1 that at paragraph 18. But the point is that one sees
2 that here in the current factual, where Mastercard and
3 Visa have a competitive offering you have Amex with an
4 84% acceptance rate and other offerings at 50% and you
5 also have PayPal which is an alternative for large
6 majority of CNP transactions.

7 So all I have to I think establish at this part of
8 the building block is that there are other card schemes
9 or payment alternatives where it would plainly be
10 realistic given their acceptance rates in the factual
11 that if Mastercard and Visa were no longer able to
12 provide income for inter-regional transactions then they
13 would have been attractive options because they are
14 already attractive options even where Mastercard and
15 Visa have a competitive offering.

16 PROFESSOR WATERSON: So I was just going to say the point
17 I was actually going to ask you was: do we know anything
18 about their interchange fees? I know we know about
19 PayPal but do we know about China?

20 MS TOLANEY: I think we do and I will come back to you on
21 that when we checked the rates.

22 PROFESSOR WATERSON: Mr Cook knows, I can tell.

23 MS TOLANEY: We will come back to you on that. I think it
24 is actually Merchant Service Charges rather than
25 interchange fees but we will come back on what we know

1 on that.

2 PROFESSOR WATERSON: Okay.

3 MR TIDSWELL: When you say an attractive offer, you mean
4 to -- so, for example, take China UnionPay -- Chinese
5 cardholders switching from Mastercard to China UnionPay
6 because China UnionPay is offering a better
7 international experience?

8 MS TOLANEY: Yes, but it could go wider than just the
9 domestic market of each of those offerings.

10 MR TIDSWELL: Yes. So does that mean that it is a necessary
11 part of the analysis of -- we talked a bit before about
12 working out what the price is going to be in the
13 counterfactual, the average price to merchants, does it
14 mean we have to take into account the China UnionPay,
15 Discover, Japan Credit if they are 50%, it could be 60%
16 or 70% acceptance, therefore attractive to lots of
17 tourists coming from China, does that all play into the
18 analysis?

19 MS TOLANEY: I think all that one has to have at this stage
20 of the analysis is if the situation was Mastercard and
21 Visa dominated the market and there was just no one else
22 in it, then the whole concept of switching being
23 relevant would not be something that this Tribunal would
24 be terribly concerned with.

25 Here what we have got is the experts agreeing and by

1 the experts I mean I should be careful, Mr Dryden,
2 Mr Holt and Dr Niels, that Amex should be taken into
3 account and we have got the Amex figures which I will
4 come on to. So we know that Amex is a competitive
5 offering and there would be or could be switching to
6 Amex and Mr Dryden has his point as to whether Amex's
7 fees would have been lower, and I will come on to that,
8 but accepts that switching to Amex is a real
9 possibility.

10 Dr Niels obviously considers these other payment
11 alternatives and we say that is part of the picture
12 because it is not just about Amex, there are other
13 people too. But the other experts do not consider those
14 alternatives and so it is a matter for the Tribunal as
15 to whether you consider that those other alternatives
16 come into play.

17 MR TIDSWELL: But you are saying I think that the
18 consequence of all this is that the price would in fact
19 be higher on the higher counterfactual?

20 MS TOLANEY: That is right.

21 MR TIDSWELL: In order to get that point, should we be
22 looking at Amex, China UnionPay, Discover, Japan Credit
23 and PayPal and -- is that I am not asking you whether --
24 just as a matter of principle is that the exercise we
25 are carrying out?

1 MS TOLANEY: Yes, we suggest yes because Dr Niels says it is
2 important to take into account all payment methods.

3 MR TIDSWELL: Yes.

4 MS TOLANEY: Mr Holt just looks at Amex --

5 MR TIDSWELL: I understand, I want to know where you are.

6 MS TOLANEY: That is right. As I said I think when looking
7 at the points of principle, in a sense it does not
8 matter because Dr Niels and Mr Holt and Mr Dryden, if he
9 is wrong on Amex's dropping its fees, I have to meet
10 that.

11 MR TIDSWELL: Yes, I understand.

12 MS TOLANEY: Assuming he is wrong about that, all of them
13 agree that even Amex alone would push up merchants'
14 costs.

15 MR TIDSWELL: Well, I understand the point of switching but
16 that is just a mathematical experiment, is it not? From
17 Mr Dryden, it is.

18 MS TOLANEY: Yes. Because the point is that what we are
19 trying to establish here is that if Mastercard and
20 Visa's fees offering was limited and less attractive,
21 are there other competitive alternatives who would not
22 be so limited?

23 MR TIDSWELL: I think there are two things, are there not,
24 there is "can they" and "will they" in the
25 counterfactual obviously?

1 MS TOLANEY: Yes, and the "can they" is not just Amex there,
2 are lots of other options and that is what the Oxera
3 study, which I am going to come on to, shows you.

4 MR TIDSWELL: The analysis that Mr Holt and Mr Dryden debate
5 through cross-examination. But that is the "can they",
6 the "will they" is a separate question --

7 MS TOLANEY: Is a separate question which I also have to
8 satisfy you on, sir, I accept that. But at this stage
9 of the building block, point one is: do they exist?

10 MR TIDSWELL: Yes.

11 MS TOLANEY: I am showing you that they plainly do exist.

12 MR TIDSWELL: Yes.

13 MS TOLANEY: The next question then is we say the first
14 reason why we say there would be substantial switching
15 is because there is a competitive alternative.

16 The second reason why we say there would be
17 substantial switching in the counterfactual is because
18 we say issuers would switch and this is addressed at
19 paragraph 117 of the roadmap and what we say is that
20 inter-regional fees on inter-regional transactions are
21 in an important source of revenue to issuers and
22 Mr Willaert gave unchallenged evidence that issuers can
23 switch schemes on a rolling basis at limited cost and
24 a price differential of 5 to 10 basis points would be
25 enough to cause an issuer to switch schemes and that is

1 in his evidence, if we can pull that up, at
2 {RC-M1/10/12}, at paragraphs 37-39.

3 MR TIDSWELL: Is he talking about -- which of the MIFs is he
4 talking about here, do you know? Is he talking about
5 inter-regional MIFs? Because obviously five to ten
6 basis points on inter-regional IFs for most issuers is
7 going to be a smaller number.

8 MS TOLANEY: I will check that because I have not got it on
9 screen, I am afraid.

10 MR TIDSWELL: Yes.

11 MS TOLANEY: We will come back on that, sir.

12 MR TIDSWELL: Yes, thank you.

13 MS TOLANEY: What -- to put it in context, inter-regional
14 MIFs are 15 to 30 times higher than the level which
15 Mr Willaert says is sufficient for an issuer to switch
16 and the claimants did not cross-examine Ms Dooney on how
17 an issuer would respond to the total loss of
18 inter-regional MIF revenue and we address that in our
19 written closings at paragraph 338.

20 Now, our position is it cannot be seriously disputed
21 that an issuer would take MIF income into account in
22 deciding which scheme's card to issue and Mr Dryden, the
23 claimants' expert, accepted that in terms both in his
24 report and in oral evidence. If I can give you the
25 reference, that is 110B of his first report, and Day 12

1 at page 67, lines 5-11 and if we pull up
2 {Day12/67:5-11}, you can see.

3 Now, in terms of evidence, as well as the evidence
4 of Mr Dryden and Mr Willaert, we have got two clear
5 examples of when issuers will switch away or issuers
6 will switch away from cards in light of an interchange
7 fee differential and neither of them I should say
8 concerned a substantial reduction in interchange fee
9 revenue.

10 So first you had the Maestro example and Maestro
11 lost its entire market share over a few short years and
12 the percentage of market share figures are in
13 Mr Justice Popplewell's judgment, as he then was, in the
14 AAM proceedings. Can we go to that, please, it is
15 {RC-J5/24.2/76}. It is at paragraph 238 if you could
16 also please read paragraph 249.

17 My learned friends seeks to --

18 PROFESSOR WATERSON: Was Maestro a domestic scheme?

19 MS TOLANEY: Yes, it was. Sorry, I am going to check that
20 with -- worldwide. It is worldwide.

21 PROFESSOR WATERSON: Thank you.

22 MS TOLANEY: So my learned friends seek to make something of
23 the fact that the CAT rejected Mastercard's evidence in
24 *Sainsbury's* but even there the Tribunal accepted that
25 lower interchange fees were one of the factors which had

1 led certain banks to move the Maestro card and
2 Mastercard also adduced specific evidence in relation to
3 Maestro following the Tribunal's judgment including
4 evidence from Mr Willaert and it was on the basis of
5 that more detailed evidence that Mr Justice Popplewell
6 made those findings.

7 That is all set out in the evidence adopted by
8 Mr Willaert in these proceedings which was not
9 challenged by my learned friend. Instead my learned
10 friends wrongly suggested to Dr Niels that
11 Mr Justice Popplewell's decision on this point had been
12 overturned by the Court of Appeal when it was not and
13 the reference for that is {Day15/28:25}, so there is one
14 example which meets two of the points that I was
15 positing earlier in the discussion with Mr Tidswell.

16 The second example is Visa's experience in Hungary.
17 In Hungary Visa's consumer debit card MIFs were lowered
18 to 0.2% following competition proceedings and as
19 a result issuers migrated en masse from Visa to
20 Mastercard with Visa losing 45% of its market share,
21 more than 1 million cards in the first "semester" of
22 2012, as compared to 2009. The reference to that was in
23 Dr Niels' first report at paragraph 2.48. Again this
24 was not challenged as a matter of fact; instead, it was
25 suggested to Dr Niels and Mr Holt that the

1 Court of Appeal in *Sainsbury's* "dealt with the Hungarian
2 example" this was at {Day15/28} and {Day17/137} and
3 again that was wrong.

4 The Court of Appeal did not reject the evidence on
5 interchange fees in Hungary or the impact on Visa's
6 market share. What the Court of Appeal held was that it
7 would not be appropriate to assume an asymmetrical
8 counterfactual as between Mastercard and Visa such that
9 one scheme would be prevented from setting default MIFs
10 and the other not.

11 That was, just for the Tribunal's reference, at
12 paragraph 203 of the Court of Appeal *Sainsbury's*
13 decision.

14 But for our purposes, it does not alter the
15 relevance of the Hungarian example in showing that
16 issuers are willing to switch schemes if an interchange
17 fee differential exists. I have already mentioned the
18 decline rates that followed the inter-regional
19 commitments.

20 Now, the claimants, in the face of those examples,
21 rely on the fact that they say the IFR -- I think this
22 was one of Professor Waterson's points -- did not cause
23 issuers to switch from Mastercard and Visa, and we
24 address that at paragraph 118.1 of the roadmap and in
25 our written closings at 387.

1 Can we go first to the written closings. I am going
2 to check the paragraph reference. I think it is 328,
3 {RC-S/5/145}. You can see the overall impact the IFR
4 had. The figures and chart is confidential.

5 The reason we say it is not an example the Tribunal
6 could take into the process I think the President was
7 describing, the evidential trail, is because in this
8 analogy, issuers had no other scheme to switch to and
9 Mastercard and Visa were regulated by the IFR, as was
10 Amex's GNS model. So it is not a good comparator when
11 you are weighing up which evidence helps you.

12 You can see the evidence set out at paragraph 315(2)
13 of our written closing, which is at page 146, please, of
14 the same document. Sorry, I am just going to check that
15 reference. (Pause)

16 It is 328(2)(b), so it is page 146, please
17 {RC-S/5/146}. This is the RBR 2021 extract and this
18 makes plain that issuers did respond to the loss of
19 interchange revenue. Scaling back rewards programmes,
20 RBS ceased its cards reward programme as of
21 November 2019.

22 So we say even this natural experiment, which does
23 not provide the same counterfactual that we are
24 positing, shows issuers will react to a loss of
25 interchange fee revenue.

1 We also say that the claimants' reliance on the
2 Australian natural experiment after fees were capped in
3 2003 is misplaced, and we address this in
4 paragraph 118(2) of our roadmap. Of course, here this
5 is an example, as Mr Tidswell mentioned, that the
6 claimants are themselves also relying on material in
7 different periods. This is 2003.

8 Now, there are obvious and important differences
9 between the facts of the Australian example and the
10 conditions in the counterfactual. Again, in Australia,
11 the schemes were able to remain competitive relative to
12 Amex because MIFs were reduced and not removed. The
13 regulation restricted weighted average MIFs, which
14 allowed the schemes to set higher MIFs where necessary
15 to remain competitive with Amex and Amex was starting
16 from a relatively weak position in the Australian market
17 in contrast to the sort of acceptance level we have seen
18 in the UK. Surcharging was permitted in Australia and
19 was more common in that market, which would inevitably
20 have constrained Amex in growing its market share.

21 We address all of that in our written closing at
22 paragraph 416.

23 Now, the claimants seek to get away from all of that
24 by saying inter-regional functionality is not standalone
25 and issuers will make up for the lost income through

1 other means because cardholders will want to use their
2 cards abroad. Now, that is -- we are talking about
3 evidence -- based analysis -- unsupported by any
4 evidence, but it is also contradicted by the evidence
5 which I have just shown you.

6 Even the best case put forward by the claimants,
7 which was, as Mr Dryden put it, issuers would need to
8 "reoptimise" in the light of the lost inter-regional MIF
9 revenue and they would do so by increasing cardholder
10 fees, not limited to inter-regional transactions -- that
11 was at Day 12, pages 47 to 48 {Day12/47:1} -- that, he
12 accepted, even on his best case scenario, for which
13 there was not evidence, would have had an impact on the
14 attractiveness of the card to the cardholder. That was
15 at Day 12, page 48 lines 18 to 24 {Day12/48:18}.

16 Crucially, Mr Dryden had carried out no analysis at
17 all to support the idea that issuers could sustainably
18 fund lost MIF revenue income through other means.

19 So, again, if we are looking at an evidence-based
20 assessment, the Tribunal could not take any comfort from
21 what would boil down to a theoretical suggestion. We
22 say even if you test that suggestion on its theoretical
23 basis, if issuers could have raised fees profitably,
24 they would have done so. So one begs the question why,
25 if they could have done so, they would not already have

1 done so and why this would be an appropriate reaction?

2 Dr Frankel similarly suggested that issuers could
3 make up lost inter-regional MIFs through reduced scheme
4 fees -- that was at Day 14, pages 112 to 113
5 {Day14/112:1} -- but, again, not supported by any
6 analysis and in fact he had not even looked at the
7 detail of how much schemes fees were and whether his
8 suggestion could be worked out mathematically.

9 We can see the scale of the loss of the
10 inter-regional income that issuers would need to be
11 making up for in Mastercard's written closing at
12 paragraph 331(4). So that is at {RC-S/5/148}.

13 So can I just stand back on the topic of issuer
14 switching, because I am very mindful of the President's
15 approach on evidence. We have got two clear examples of
16 issuers switching away from Mastercard and Visa in the
17 face of a price differential on interchange fees.

18 Secondly, we have seen how issuers reacted to the
19 commitments decision, which again only had a limited
20 impact on inter-regional MIF revenue by increasing
21 decline rates. Then the only answer from the claimants
22 are (1) the IFR example, which is not evidence-based
23 because it is not comparable, and (2) the entirely
24 speculative assertion based on no evidence that issuers
25 could somehow make up a very substantial sum for lost

1 inter-regional MIF revenue by somehow increasing scheme
2 fees or cardholder fees.

3 What we would suggest is if we are looking at
4 an evidence-based assessment, even where you have got
5 limited tinkering with the levels of interchange fees,
6 there is a reaction, and that is the second building
7 block.

8 The other point I need to deal with is the
9 suggestion made by Mr Beal in his aide memoire at
10 paragraph 98 that issuers are not permitted to refuse
11 cards based on geographic area. That is a point that
12 Mr Beal made by reference to a Visa scheme rule, which
13 is obviously irrelevant to Mastercard, and it is also
14 not a point that Mr Beal put to any of Mastercard's
15 witnesses.

16 Mr Willaert gave clear and unchallenged evidence in
17 relation to issuers being allowed to decline
18 transactions that Mastercard would not have applied the
19 rules which forced issuers to accept transactions which
20 were not on competitive commercial terms. That was
21 {RC-F3/1/19} at paragraph 41.1. I am sure Visa's
22 approach is the same. Mr Kennelly will confirm that.

23 The point is it reveals, actually, the issue
24 I mentioned right at the start of my submissions, which
25 is if you take the claimants' static analysis, the fact

1 that one scheme operates in one way with a competitive
2 interchange fee does not mean that everything would
3 remain unchanged if the interchange fees were set at
4 zero. Things would change.

5 That is the whole point of the counterfactual and
6 why it is complex and why the President, no doubt, is
7 saying you want evidence, because it is a very complex
8 analysis because you are starting with having removed
9 a massive plank of the factual and working out its
10 impact. What I am trying to do, and I am sure
11 over-laboriously, is to take each plank so then we can
12 look at the totality of where that gets you to give you
13 the evidence that we can.

14 So the next stage is cardholder switching. That is
15 the next plank, which is my last topic on switching in
16 this context. This is addressed at paragraph 119 of the
17 roadmap. This is where the cardholder survey that we
18 looked at, which was commissioned by Mastercard in 2015,
19 is relevant. That was to estimate how cardholders would
20 have reacted to four potential measures that issuers
21 could have taken to make up for lost inter-regional MIF
22 revenue.

23 He uses that data to analyse what it would mean for
24 the average cost of inter-regional transactions, i.e.
25 the market-wide Merchant Service Charge. The

1 four scenarios are set out in Mastercard's written
2 closing at paragraph 334, which is {RC-S/5/150}, if we
3 could pull that up, please.

4 So scenario 1 is Mastercard or Visa not being
5 available at all for inter-regional payments. So this
6 was the counterfactual, again, if we are looking at
7 evidence, that Ms Sarmiento and Mr Knupp described.
8 That is issuers blocking inter-regional functionality
9 for the transactions.

10 Now, my learned friends, as I said, present this
11 about a shutdown of entire inter-regional functionality,
12 but that is just not right. It is blocking
13 inter-regional functionality for inter-regional
14 transactions in the UK and Ireland or constructively
15 doing so, if you like, by adopting decline rates for
16 those transactions, which would have the same effect for
17 cardholders.

18 Again, evidence-based; it is Ms Sarmiento's witness
19 statement at paragraph 48 and oral evidence, Day 16, 172
20 to 173 {Day16/172:1}.

21 Scenario 2 is cardholders paying a 1% increase in
22 the transaction fee for merchant -- Visa and Mastercard
23 purchases in Europe. Now, it was suggested to Dr Niels
24 there was no basis for selecting 1%, but in fact there
25 was an obvious reason to do so because that is roughly

1 how much issuers would need to increase cardholder fees
2 to make up for lost inter-regional MIF revenue and it
3 provides a useful way to test price sensitivity. His
4 evidence was at Day 15, page 215, lines 8 to 10
5 {Day15/215:8}.

6 Then you have scenario 3, cardholders not receiving
7 any reward programme points on inter-regional
8 transactions. Again, that is realistic given what we
9 have seen in the wake of the IFR, which only involved
10 a reduction in fees.

11 Then there is scenario 4, higher decline rate;
12 again, backed by a real life example which I have shown
13 you.

14 So the cardholder survey is a useful one in terms of
15 the evidence before the Tribunal, but it has been
16 criticised by the claimants as not reliable or of poor
17 quality, and that is at 449(2) of their written closing.
18 They suggest as a starting point that the respondents
19 were small in some categories, but we need to bear in
20 mind the overall sample size.

21 So if we can go, please, to {RC-J3/79/1} and we see
22 the sample described at A4.5. Sorry, I need a page
23 number, I think. Page 84. Thank you very much. I am
24 not sure that is right. 78, please, sorry. If we can
25 go down, sorry. I am struggling here a little bit. We

1 need A4.5 if you do not mind scrolling down
2 {RC-J3/79/79}. Thank you.

3 That is the sample, 2,000 US respondents, 500 in
4 both Russia and Australia, so overall 3,000 respondents.
5 The sample targeted those who travelled to the EU in the
6 past year.

7 The claimants argued that the sample was not
8 representative, but that was through the evidence of
9 Mr Dryden and notably, Mr Dryden did not say what
10 countries the samples should be drawn from and how it
11 would be representative and this criticism was not even
12 put to Dr Niels.

13 In terms of what the survey shows, you can see that
14 from the summary in our written closing at {RC-S/5/151}.
15 It is paragraph 335. (Pause)

16 Again, this is evidence that cardholders would
17 respond to reductions in the payment card service
18 proposition by switching a large proportion of their
19 purchases to alternative payment methods and cardholders
20 are most responsive to increases in direct transactions
21 fees or increases in decline rate, but they also respond
22 to reductions in benefits.

23 Now, the claimants make various criticisms of this
24 survey, but the starting point is that when we are
25 talking about the Tribunal's process, as we just have,

1 this is undoubtedly the best available evidence of how
2 cardholders would have reacted. The claimants' experts
3 were unable to put forward any competing evidence or
4 even specifics about how a sample could have been drawn
5 instead, as I said.

6 We have dealt with the criticisms put forward by
7 Mr Dryden to the extent he still maintained them, and
8 you will remember he abandoned some in
9 cross-examination.

10 We have dealt with that at paragraph 336 of our
11 written closings. That is at {RC-S/5/154}. We do this
12 in some detail over, I think, four of five or six pages.
13 I am not going to go through each of them, but I note
14 that some of the criticisms pursued in the claimants'
15 written closing were not even put to Dr Niels -- for
16 example, the point about how representative the sample
17 was -- and the claimants continued to make criticisms
18 that Mr Dryden himself acknowledged were overstated.

19 So, for example, at the claimants' written closings,
20 paragraph 449(2), the claimants refer to the survey not
21 following best practices. Mr Dryden made that point in
22 relation to the survey referring to a 1% increase in
23 fees rather than giving an absolute figure. In
24 cross-examination, he accepted that his criticism was
25 "overstated": Day 12, page 102, lines 20 to 24

1 {Day12/102:20}.

2 So I would exercise some caution when reading the
3 claimants' criticisms, but in any case, we have answered
4 them. No evidence that the Tribunal will have before it
5 on any survey is going to be perfect, but this evidence
6 is compelling and it has asked relevant questions to the
7 issues before this Tribunal and the evidence of what
8 came back is persuasive.

9 Then finally, at paragraph 120 of the roadmap and at
10 paragraph 337 of our written closing, we address the
11 criticisms that are made of the costs inputs that
12 Dr Niels used. It was wrongly put to Dr Niels that he
13 had correctly -- he had corrected his costs inputs in
14 his third report, but that is not right.

15 Dr Niels explained that subject to small corrections
16 which largely increased the costs of competing products,
17 he was presenting a sensitivity analysis to reflect
18 further comments and data put forward by other experts.
19 You can see that from paragraph 2.11 of his
20 third report.

21 To take the example of Amex, my learned friend put
22 to Dr Niels that the Amex Merchant Service Charge could
23 be as low as 1.9% plus VAT by reference to Pendragon's
24 figures. We address this at paragraph 120(2) of the
25 roadmap.

1 Now, the claimants make the same point in their
2 written closings at paragraph 457, but this is not what
3 the experts were trying to determine. The experts were
4 trying to determine what an average MSC would be and
5 like any average, some merchants will have better rates
6 and others lower rates, because that is the nature of
7 an average.

8 Mr Dryden used the figure of 3.25% in his table in
9 his first report at page 226 of that, table 24. In
10 fact, therefore, there is not a great gap between
11 Mr Holt, Dr Niels and Mr Dryden. Dr Niels' sensitivity
12 analysis shows that it does not matter exactly which
13 figure is used.

14 So the conclusion on switching on this part of it is
15 that when the Tribunal does the exercise of looking at
16 the evidence before you, all the available evidence
17 shows is that, first of all, issuers would react and
18 react in very substantial ways to a complete loss of
19 interchange fee revenue. The most likely option is that
20 they would switch to competing schemes and there are
21 obvious candidates for competing schemes and other
22 payment alternatives.

23 Even if that is not right, they would be likely to
24 switch off inter-regional functionality for
25 inter-regional transactions in the UK and Ireland and

1 cardholders would switch in very large numbers either
2 because inter-regional functionality was not available
3 from Mastercard and Visa issuers or because the changes
4 required would make competing payment methods far more
5 attractive.

6 Dr Niels' analysis is, in fact, conservative because
7 it takes no account of the transactions that would
8 be entirely lost, i.e. the transactions that take place
9 in the factual, but just do not happen in the
10 counterfactual. But even on the assumption that all the
11 transactions would have gone through, Dr Niels' analysis
12 of the average cost for UK merchants in the
13 counterfactual demonstrates that in each of the
14 four scenarios, save for the lower band estimate in
15 scenario 3, the proportion of cardholders that would
16 have switched to other payment schemes which are more
17 expensive for merchants is such that UK and Irish
18 merchants' costs would have increased as compared to
19 their costs in the factual.

20 We see that at {RC-H3/2/124}. You also see it on
21 page 125.

22 So what we suggest to you is that when we are
23 talking about an evidence-based assessment, you have all
24 of those building blocks to show that switching would
25 have happened.

1 Now, I dealt with restriction by effect and the
2 essential factual basis of *Sainsbury's* and why it does
3 not apply to inter-regional MIFs. That is in
4 section H.2 of the roadmap at paragraph 121.

5 In terms of object restriction, there does not
6 appear to be an independent case on why inter-regional
7 MIFs are a restriction of competition by object. In
8 fact, the need for a default MIF is highlighted by
9 Ms Sarmiento and Mr Knupp's evidence and they were not
10 challenged on it. We address that in paragraph 350 of
11 our written closing.

12 Turning then to whether inter-regional MIFs are
13 objectively necessary, my learned friend takes a legal
14 point. He says that schemes cannot rely on the doctrine
15 of objective necessity if a MIF is found to be an object
16 infringement and he took you to the CJEU's decision in
17 *Wouters* yesterday in relation to this argument. That
18 was at {Day19/11:6-18}.

19 My learned friend's reliance on this case and the
20 other cases he mentioned are misplaced. We have dealt
21 with it in detail in our written closing at
22 paragraphs 76 to 80. In summary, *Wouters* and the other
23 cases relied upon are concerned with the doctrine of
24 objective justification and not objective necessity.

25 Turning then to the claimants' response to our case

1 on objective necessity, they refer to some evidence that
2 there are schemes which operate without MIFs around the
3 world. That is at their written closings at
4 paragraph 461 and we address this at paragraph 122 of
5 the roadmap.

6 The test for considering whether a measure is
7 objectively necessary is obviously set out in the
8 *Sainsbury's* Court of Appeal decision, if we could pull
9 that up, please, {RC-J5/28/17}.

10 At paragraph 58, we can see the Court of Appeal's
11 discussion of the question of objective necessity. Then
12 if I ask you, please, to read paragraph 59
13 {RC-J5/28/18}. (Pause)

14 Then if you could please go to paragraph 72, please.
15 I think it is page 21 {RC-J5/28/21}. It is the last
16 two sentences, please. (Pause)

17 The relevant test is impossibility. Would the main
18 operation be impossible to carry out in the absence of
19 the restriction? You cannot take into account whether
20 the particular operation in question needs the
21 restriction to compete with operations which are
22 materially identical.

23 Then if we could go, please, to paragraph 200. That
24 is at page 48 {RC-J5/28/48}. You see the reference to
25 a four-party card payment scheme. (Pause)

1 There are two points in light of that. First of
2 all, there is no suggestion that the competitors I have
3 identified, Amex, if we just take Amex, or PayPal,
4 China UnionPay, JCB, etc, are the same type of main
5 operation as Mastercard or Visa. That means they would
6 not be constrained in the counterfactual. So taking
7 account of the threat they pose to Mastercard or Visa
8 does not fall foul of the test for objective necessity
9 as set out in this judgment at paragraph 72.

10 Secondly, the evidence before the Tribunal in
11 relation to decline rates and the general willingness of
12 issuers to switch schemes, coupled with the evidence
13 showing the reaction of cardholders if issuers try to
14 recover the loss of revenue in some other way, is
15 obviously important evidence of the approach that would
16 happen and the reaction of cardholders to any issuer
17 that did try and stick with the scheme.

18 All of that strongly indicates that without positive
19 inter-regional MIFs, the level of switching would be
20 such that Mastercard would no longer have a viable
21 inter-regional payment service.

22 Ms Sarmiento makes this very point in her evidence
23 at {RC-F3/5/16} at paragraph 61. So what she is saying
24 is, look, however it happened, the basic point is losing
25 inter-regional MIF revenue would deal an extraordinarily

1 large blow to the competitiveness of four-party schemes
2 for inter-regional transactions. Her evidence is
3 supported by evidence about other schemes because to
4 Mastercard's knowledge, there is no four-party payment
5 scheme operating at settlement at par which offers
6 cross-border functionality without co-badging under --
7 with an international scheme such as Mastercard. So
8 that rather underlines the need for inter-regional MIF
9 revenue in order to offer that functionality.

10 For example, and, again, real life examples, you
11 have EFTPOS and BankAxept, the only two card schemes
12 which still appear to operate at settlement at par.
13 Neither of them offer cross-border functionality and
14 they do not, in fact, even offer online functionality,
15 which we know is the vast majority of inter-regional
16 business.

17 You can see the evidence on EFTPOS in Mr Jensen's
18 statement at paragraphs 23 to 25. That is {RC-F1/4/7}.
19 In BankAxept, you can see the reply report of Mr Holt,
20 which is {RC-H4/7/7}. Similarly, Mr Holt's evidence is
21 that he is not aware of any schemes offering
22 inter-regional functionality without inter-regional
23 MIFs, and that is at {Day17/117:3-16}.

24 MR TIDSWELL: Can I just be clear with you. I think you are
25 saying that, when you're talking about the main

1 operation in terms of the test set out in the
2 *Sainsbury's*, Court of Appeal, you are defining the main
3 operation as being a four-party scheme with
4 inter-regional functionality.

5 MS TOLANEY: I am.

6 MR TIDSWELL: So you say that it is permissible to -- so
7 main operation is not just a four-party scheme. You say
8 you have to look at the specific product, if you like.
9 Perhaps there is a better word, but the specific feature
10 that we are talking about here with the interchange fee.

11 MS TOLANEY: I do not think I need the additional bit
12 because it is the four-party scheme and we are looking
13 at a counterfactual in which they do not have that
14 functionality as opposed to a three-party scheme that
15 does. The nature of the operation is the four-party
16 scheme as opposed to the not four-party scheme and this
17 is the differential.

18 MR TIDSWELL: Well, I think it does matter. This is my
19 second question. It does matter, does it not, when you
20 get to the next point, which is: is it essential for
21 survival? Because obviously -- well, I do not know.
22 Maybe you are going to disagree with me --

23 MS TOLANEY: Well, survival of that functionality, yes.

24 MR TIDSWELL: Precisely. Precisely.

25 MS TOLANEY: Yes.

1 MR TIDSWELL: So you are talking about this -- you are
2 limiting this to an assessment of a four-party scheme
3 with international functionality and then that
4 international functionality ceasing to exist.

5 MS TOLANEY: Yes, and I suppose the reason -- I suppose you
6 could take it either way, but the reason is because that
7 is the focus of the case --

8 MR TIDSWELL: Yes.

9 MS TOLANEY: -- in a way, you do not need the gloss because
10 that is what it is all about.

11 MR TIDSWELL: Yes.

12 MS TOLANEY: But I can see your point.

13 MR TIDSWELL: No, I think the question -- it is really just
14 for clarification. I do not think you are suggesting --
15 well, I am sure you are not suggesting --

16 MS TOLANEY: No.

17 MR TIDSWELL: -- that the four-party scheme would cease to
18 exist --

19 MS TOLANEY: No, I am not.

20 MR TIDSWELL: -- (overspeaking) the test.

21 MS TOLANEY: I am not, but I think the way one is
22 approaching -- this is: inter-regional MIFs, are they
23 necessary? You are not saying: is the existence of the
24 four-party scheme necessary when we are approaching this
25 question?

1 MR TIDSWELL: Yes, I understand the position on that.

2 MS TOLANEY: Yes.

3 MR TIDSWELL: Then when you come to Ms Sarmiento, I think
4 again it is right, is it not, that you have to show --
5 I think you are accepting you have to show it is
6 essential to survival to the extent that effectively
7 Mastercard and Visa would not be able to offer the
8 service? So I was not completely sure that is -- she
9 was going that far, but that is the position that you
10 are advancing.

11 MS TOLANEY: Yes, the question is -- the issue that is being
12 argued against me is whether or not MIFs, inter-regional
13 MIFs, are objectively necessary, so it is put in that
14 way. In order to assess then the question, regard is
15 having to -- whether the four-party scheme, offering
16 that, can survive, i.e. offering that function, because
17 that is what is said not to be or to be objectively
18 necessary.

19 Ms Sarmiento is -- you are right to say that she is
20 saying that however it is structured and all the
21 different arguments, the basic point is that the loss of
22 the MIF would deal an extraordinarily large blow to the
23 competitiveness because the precise detail of what would
24 have happened does not detract from the fact that
25 Mastercard and any other four-party scheme would not

1 compete for inter-regional transactions and would have
2 lost their share of the payment card market if default
3 interchange fees did not exist.

4 So she is saying -- I think the evidence is saying
5 could not compete and would have lost.

6 MR TIDSWELL: Well, and I think that is my question.

7 I think you are saying -- well, it is really a question
8 of: are you accepting the test is you have to
9 essentially come to the conclusion that the
10 inter-regional functionality is shut down, not for
11 the -- we had the debate about before it being shut
12 down, but this is because of the lack of demand for the
13 Mastercard and Visa service because issuers do not want
14 to use it any more.

15 MS TOLANEY: Yes. So the test, we accept, is would the main
16 operation not be able to carry out that functionality
17 and we are saying that they would not because it would
18 have to be shut down because all the other options would
19 not actually make up for the fees and her evidence
20 supports that they would not, could not compete and
21 would have lost their share of the market.

22 MR TIDSWELL: When you say all the other options, you mean
23 the issuers?

24 MS TOLANEY: That is right.

25 MR TIDSWELL: Yes. So the issuers will all switch and

1 ultimately you say that the economic consequence of that
2 is that everybody will switch because Mastercard and
3 Visa do not have a response to it.

4 MS TOLANEY: Exactly.

5 MR TIDSWELL: Yes.

6 MS TOLANEY: What I am saying is and that is borne out by
7 the fact that there is no four-party scheme, payment
8 scheme, operating at settlement at par which offers
9 cross-border functionality without co-badging and I have
10 given two examples of EFTPOS and BankAxept who are the
11 only two operating at settlement at par who do not offer
12 cross-border functionality or even online functionality
13 and Mr Holt's evidence is that he is not aware of any
14 schemes offering inter-regional functionality without
15 inter-regional MIFs and the reference for that was
16 Day 17, lines 3-16.

17 So I was saying you have got that as evidence that
18 if there were lots of people doing it -- if there were
19 one person doing it, then I might struggle maybe to say
20 that that was the consequence, but they are not.

21 MR TIDSWELL: If you had a region of the world where Amex
22 did not operate, I do not know where that is but just
23 for argument's sake some bit in the Middle East or the
24 Stans or somewhere where Amex does not do business. So
25 you really only have, for international transactions you

1 really had very limited choice. If those issuers were
2 still using Mastercard or Visa, would that -- that might
3 be a reason why you did not get over the threshold of
4 the test then? Would you accept that?

5 MS TOLANEY: I think I would because it is such
6 a fundamental part of my case on switching. I accept
7 that.

8 MR TIDSWELL: Yes.

9 MS TOLANEY: Now, the claimants do not grapple with the
10 evidence I have just referred to because what their case
11 is in general terms it is technically possible for
12 a four-party scheme to operate without MIFs. That is in
13 their written closings at paragraph 461 and the debate
14 I have just had with Mr Tidswell is helpful because it
15 shows that what the claimants are suggesting is not the
16 correct inquiry and that is our point. So we suggest
17 that based on the evidence you can see that if
18 inter-regional MIFs are held to be a restriction of
19 competition they are objectively necessary.

20 I am moving on to -- actually I can finish this,
21 which is the final topic, which is the Mastercard's
22 Commitment decision, which is the separate issue
23 regarding the effect of the Mastercard commitments
24 decision in relation to inter-regional MIFs and in fact
25 we address this quite fully in our written closings at

1 paragraphs 360 onwards in the roadmap at 123.

2 The simple point is it is wrong to suggest that
3 a commitments decision means that the Tribunal is bound
4 to find that the inter-regional MIFs are a restriction
5 of competition and that is clear from the face of the
6 decision and I do not propose to say any more about that
7 orally.

8 I am moving now to issue 5 and I wonder whether that
9 is a convenient moment before I do.

10 THE PRESIDENT: Yes, indeed, Ms Tolaney. How are you doing
11 for time?

12 MS TOLANEY: Not brilliantly, I have to say, but I will do
13 my best to speed up because I am conscious I need to
14 deal with the questions on bilaterals.

15 THE PRESIDENT: Yes. Probably not a good idea, given that
16 matter, to start earlier than 2 o'clock. Should we
17 resume then?

18 MS TOLANEY: I think I probably do need the time, I am
19 sorry, but I am grateful to you.

20 THE PRESIDENT: No, that is fine. We will resume then at
21 2 o'clock.

22 MS TOLANEY: Thank you very much.

23 (12.27 pm)

24 (The short adjournment)

25 (2.01 pm)

1 THE PRESIDENT: Ms Tolaney, good afternoon.

2 MS TOLANEY: Good afternoon, could I just clear up a few
3 references and things I said I would come back to before
4 I move to issue 5.

5 Professor Waterson, you asked if the fees for China
6 and other payment competitors were anywhere to be found.
7 They are, they are in Mr Holt's first report at
8 paragraph 449(c) and we do not need to bring it up, for
9 your note, it is {RC-H4/3/140} and Mr Holt's
10 second report table 5.1 and 5.2, which is
11 {RC-H4/4/75-76}.

12 Mr Tidswell, you asked if Mr Willaert was addressing
13 inter-regional MIFs when I took you to the passage of
14 his evidence about issuer switching and the answer is it
15 does not concern any particular type of MIF. What he is
16 describing is the process by which issuers could switch
17 and explaining how that is possible.

18 The other point just to clear up is I think you were
19 asking me at the end of the morning at page 95 of the
20 [draft] transcript, you were posing the hypothesis of
21 Amex not being available in a part of the world.

22 MR TIDSWELL: Yes.

23 MS TOLANEY: I was taking your questions to be on the basis
24 of Amex and/or any other competitor when I said to
25 you --

1 MR TIDSWELL: Yes, that is fine. In other words, they
2 practically have no option --

3 MS TOLANEY: Exactly, I think you said that but I wanted to
4 be clear that I was not limiting it to Amex.

5 Secondly, there is obviously the point that even if
6 there was not a competitor there at the moment one could
7 come in. But I understood your question to mean if they
8 literally were the only two people there and there was
9 not going to be any choice ever, would you maintain the
10 same position?

11 MR TIDSWELL: Yes, and I was not suggesting there was such
12 a case, I just wanted to test the principle.

13 MS TOLANEY: Exactly, I had understood it that way but
14 I wanted to be clear.

15 Could I then turn to issue 5, please, which starts
16 in the roadmap at section I, following the same
17 structure as my submissions on inter-regionals. So
18 starting with the fundamental differences between
19 commercial and consumer MIFs. We have set out six
20 differences in our written closing at paragraph 374,
21 which is {RC-S/5/173}, and can I highlight two points in
22 particular.

23 First, there are again higher issuer costs in
24 commercial cards as compared to consumer cards and again
25 I do not think the fact is disputed but rather the

1 claimants asked the Tribunal to find that there is no
2 link between the level of commercial card MIFs and the
3 distinctive features of commercial card transactions and
4 that is at paragraph 269 of their written closing.

5 Again, we say that as a matter of the evidence before
6 the Tribunal that is plainly wrong and the Tribunal
7 could have made that finding.

8 There is clearly a relationship between the higher
9 interchange fees payable in respect of commercial cards
10 and the more sophisticated product features offered and
11 as we note at paragraph 126 of the roadmap, there is
12 ample evidence before the Tribunal making that clear.

13 So starting with, for example the presentation
14 referred to in our written closings at 377(1), and if we
15 call that up please, {RC-S/5/175}, and the documents
16 that Ms Suttle was taken to in cross-examination are
17 also pertinent and we refer to that at 378. So if we go
18 over the page, please. {RC-S/5/176}

19 We refer to, as you see in the first paragraph, the
20 74th European Interchange Committee pre-read paper and
21 summarise the proposal. If I can just show you that
22 once you have read the paragraph in our closing, that is
23 at {RC-J3/50/5}, and this is the pre-read paper and if
24 we go to page 5, under section 3, please, you see it is
25 proposed to increase fleet, multi and purchasing cards

1 rates to the level of corporate cards in order to
2 stimulate issuance.

3 Then if you go below the text "rationals for this
4 alignment are multiple" you will see the costs and
5 mandates associated to the different commercial products
6 are similar.

7 Now, Ms Suttle was taken to this document but it was
8 suggested to her that interchange fees cannot reflect
9 the underlying common costs of cards and that was at
10 {Day9/116:7-23} lines 7-23, but this document
11 illustrates interchange fees being set to reflect the
12 underlying cost.

13 Then if we go, please, to RC-J3/81/1, you see
14 a Mastercard document dated 12 July 2016, setting out
15 a proposal regarding debit Mastercard for business and
16 if we go to page 4, please, in the middle of the page
17 you will see rational for this proposed DMC interchange.
18 That has not come up.

19 MR TIDSWELL: I do not see the whole page but it does not
20 look right.

21 MS TOLANEY: I will just check the reference, it should be
22 {RC-J3/83/1}. Then page 4, please. Page 5, is it,
23 sorry? Thank you. No. {RC-J3/83/4}, so in the middle
24 of the page you have the:

25 "Rationale for this proposed DMCB commercial

1 interchange rate and structure is based on five pillars"

2 If you read the second pillar. (Pause)

3 Then on page 5, {RC-J3/83/5}, you have the fifth
4 pillar. Again, Ms Suttle was taken to this in her
5 cross-examination at {Day9/161-162} page 161-162 and it
6 was suggested to her that interchange fees were being
7 set not by reference to issuing costs but we can see
8 that that is wrong. All of these documents supported
9 her oral evidence that interchange fees were set taking
10 account of costs and based on her interactions with
11 issuers which is an inherent part of her job and
12 interchange fees are predominantly used to fund the
13 product features. Her evidence was at {Day9/157:4-18}
14 and also at {Day9/176:20}, and if we can pull that up,
15 please, Day 9, page 176, line 20. You see her saying,
16 line 22:

17 "Answer: If you remove the interchange as you saw
18 from the table in my witness statement, it is
19 significant. I do not see anywhere in the mid to large
20 corporate space where they would be able to cover those
21 costs."

22 So we say on the basis of the evidence before
23 the Tribunal, there is not the evidence to be able to
24 make the finding the claimants suggest the contrary is
25 true.

1 Commercial card MIF income is particularly important
2 to issuers of commercial cards and we address this with
3 figures in our written closing at paragraph 380 which is
4 {RC-S/5/178} and we can see that income from interest is
5 very limited from commercial cards which means
6 interchange fees are the key revenue stream, we see that
7 from subparagraph (2), paragraph 380. Therefore you see
8 that if it is taken away you would have the higher costs
9 and not an obvious alternative revenue stream so that is
10 the first key distinction I wanted to highlight.

11 The second key difference is that commercial cards
12 operate in a different competitive context to consumers'
13 cards and we address that in paragraph 127 of the
14 roadmap and in 382-386 of our written closing.

15 If we can pull up the written closing, please,
16 {RC-S/5/179}, we note that in paragraph 382 card
17 payments make up a small part of the transactions and in
18 the UK card market, commercial card market, Amex in
19 particular has a very significant presence and you see
20 Ms Suttle's table at paragraph 383 of our written
21 closing, which you will be familiar with from the
22 cross-examination of Mr Dryden and I am going to come
23 back to that table.

24 Just dealing with Amex's acceptance rates and in
25 particular following the exchange that we had this

1 morning, if I can give you some references, we do not
2 need to pull them up but {RC-J5/22.3.1.2/997} is the RBR
3 report which sets out acceptance rates and when one
4 calculates percentages in 2011 it was 74.5%; 2012, 77;
5 2013, 85; 2014, 88; and it goes on.

6 So we do that information and the reference I have
7 given you.

8 We also have, if we can pull up {RC-M1/15/5}. This
9 is the third witness statement of Mr Douglas and it is
10 paragraphs 14-16.

11 So I think Mr Tidswell was posing do we only have
12 the material for 2018 and 2020 and we do have more
13 information which supports the submission that the
14 acceptance rates were high in the relevant period and
15 there was some misstatements in my learned friend's
16 cross-examination of Ms Suttle on Amex's market share
17 and we have addressed that in our written closings at
18 paragraph 384 and those mis-statements are the basis of
19 the claimants suggesting that Amex did not have high
20 acceptance rates. But we would say in response the
21 evidence before the Tribunal in the material I have
22 shown you clearly suggests otherwise and in any case the
23 key question is not what is Amex's market share in the
24 factual world, and I appreciate you have this point,
25 because that all is about a world in which Visa and

1 Mastercard were competing effectively. The key question
2 is: what would Amex do and how much business could it
3 take when Mastercard and Visa were hamstrung?

4 The evidence I am showing you is that even in the
5 factual world, Amex had high acceptance rates in the UK
6 and a strong market share. In the counterfactual world
7 we suggest it could only ever have got better.

8 Now, can I turn to counterfactual switching in the
9 context of commercial cards and the focus for commercial
10 cards in the UK market is on switching to Amex. We
11 address it at paragraphs 128 onwards in the roadmap.
12 Again, I have broadly four topics to cover, starting
13 with issuer switching.

14 So the first point is: it is right that in the
15 factual Amex did not offer its 3.5 party GNS model for
16 commercial cards but the competitive conditions would
17 have been very different in the counterfactual if Amex
18 could offer issuers revenues that Mastercard and Visa
19 could not compete with.

20 There is no suggestion that there is anything
21 preventing Amex from having offered the GNS model for
22 commercial cards and in fact again focusing in on the
23 evidence before the Tribunal, Mr Holt noted the
24 possibility of an expansion of Amex's GNS system in
25 a world with a settlement at par counterfactual and that

1 was at Holt 2, paragraph 399 and it is {RC-H4/4/107}, we
2 do not need to bring it up, and notably Mr Dryden also
3 accepted that Amex might restart or expand its GNS
4 scheme in the settlement at par counterfactual and that
5 was in his second report at paragraph 8.43(b) which is
6 {RC-H2/2/46} and he reiterated that orally in {Day12/76}
7 and {Day13/11}.

8 So it is clear that the possibility of the GNS model
9 is something that was a possibility and two experts
10 including one of the claimants' own experts recognise
11 that.

12 In the counterfactual of course we suggest that
13 issuers would have been desperate to move and it would
14 have been an obvious opportunity for Amex to massively
15 increase its market share in the commercial card market
16 and just to clear off one thing. I think it is
17 suggested by the claimants that Mr Holt's evidence
18 preceded on a false basis, that the GNS was still open,
19 that is paragraph 451(2) of their written closings but
20 that is not right. Mr Holt makes it clear in his
21 evidence that he is not assuming the GNS is still in
22 existence. His evidence is as to what could happen in
23 the counterfactual and we see that from his
24 second report at paragraph 399 and if we could just pull
25 that up, it is at {RC-H4/4/107}. (Pause)

1 So the evidence is from Mr Holt and supported by
2 matters I have referred to that Amex might likely
3 introduce its GNS style offering for commercial cards
4 and issuers might well have raced to switch. But even
5 if issuers did not switch, we suggest it is obvious that
6 commercial businesses would have moved with Amex
7 offering an unmatched commercial advantage.

8 The second point is that Mr Dryden accepted that
9 there may be significant switching in the counterfactual
10 absent positive commercial card MIFs and we note that in
11 paragraph 129 in the roadmap and if we could go to our
12 written closings at {RC-S/5/183}, we set out a relevant
13 extract there. (Pause)

14 Similarly Mr Holt makes clear that it is unreal to
15 suggest that issuers could have made up for the loss of
16 commercial card MIFs without impacting the quality of
17 their card offering and again we set out a relevant
18 extract at 394, if we could go over, please. So you
19 catch the end of Mr Dryden there may be significant
20 switching is at the top of the page and then Mr Holt's
21 evidence is at 394.

22 So you have the experts accepting in the commercial
23 card sector that there would be significant switching
24 and here with Mr Holt's evidence, the economic logic of
25 what he is saying is incontrovertible. How are issuers

1 going to be able to have products which would compete
2 with Amex when it has much higher revenues than they do?
3 The claimants do not grapple with this issue in their
4 case.

5 My third topic is the critical loss analysis and the
6 question of how Amex's market shares would have improved
7 in the counterfactual and we address that at
8 paragraph 130 of the roadmap.

9 So again, as I say there, there is no real dispute
10 that there would be switching by cardholders in
11 particular to Amex and the Tribunal therefore can start
12 on that basis. I accept that the question is how much
13 and here we are into the question of the evidence and
14 the evidence before the Tribunal we suggest makes it
15 clear that there would have been sufficient switching to
16 Amex to cause the market-wide Merchant Service Charge to
17 increase.

18 So can I turn now to the degree of switching to Amex
19 and looking at our written closings given the
20 confidential material I refer to. So {RC-S/5/185},
21 paragraph 396, please.

22 At 396(1) we can see the market share that Mr Dryden
23 said Amex would need to get in order for the market-wide
24 Merchant Service Charge to increase assuming no change
25 in Amex's Merchant Service Charge and at 396(2), we see

1 Amex's figures in the small business credit segment and
2 we can see Amex has easily achieved the relevant market
3 share in several years, 2017, 2018, 2019 and 2022. That
4 share was achieved as we say even in a fair fight
5 against Visa and Mastercard.

6 Mr Dryden did not dispute that Amex could gain share
7 in the segments in which it is present so he focused his
8 arguments on the supposed difficulties/impossibilities
9 of Amex entering and growing its market share in the
10 segment of small business debit. He focused for three
11 reasons on why it would be a problem on that one
12 segment.

13 First he argued that the current level of Merchant
14 Service Charge had already been rejected by merchants.
15 That was {Day13/35:13-22}.

16 Secondly, he said Amex acceptance levels might be
17 more important for small businesses that you have
18 universal acceptance for debit than for credit. That
19 was at {Day13/37} as well.

20 Then, thirdly, that led him to argue Amex would be
21 under pressure to enter that segment.

22 So he hung it on current level of the Merchant
23 Service Charge having been rejected by merchants, and
24 Amex levels were relevant to the acceptance of debit
25 rather than credit for a small business and relying on

1 that, the claimants rather hang their hat on a case that
2 it is important to distinguish between credit and debit
3 cards, that is at paragraph 452 of their closing.

4 Now, they are wrong on that for five reasons as we
5 say in the roadmap at paragraph 130(3) and the starting
6 point is that you will remember that in his oral
7 evidence, Mr Dryden was not very clear, he was confused
8 about what the small business debit segment related to
9 because he thinks it relates to the identity of the
10 merchant, but in fact it referred to the business that
11 takes out the cards and not the merchants who accepts
12 them. There was complete confusion on his part and he
13 realised that somewhat late in the day. His approach
14 was geared towards answering the intellectual problem he
15 posed for himself which was something was stopping Amex
16 having a share of that segment at present and he could
17 not understand why. That was {Day13/82:6-7}.

18 So he started with some confusion about what exactly
19 the table was showing.

20 Then that takes me to the second reason why he was
21 wrong. The reason why Amex is not present in the
22 segment is because its business has always been about
23 credit and charge cards, but there is no reason to
24 assume that that would remain the same in the
25 counterfactual because Amex offers a debit card in the

1 US and Mr Holt explained that, that was
2 {Day16/67:17-19}, so again you had evidence of that.

3 Thirdly, Mr Dryden wrongly suggested that Mastercard
4 and Visa's Merchant Service Charge for debit cards
5 revealed a "Maximum willingness to pay" in the SME debit
6 segment. Now, we see the erroneous approach I have just
7 been talking about of mixing up cardholders and
8 merchants in action because he is suggesting that small
9 business debit card holders are transacting with some
10 unique category of merchants who are steering against
11 Amex and that is the reason he says Amex is not present
12 in the small business debit segment. But there is no
13 evidence at all of that and that is an area where again
14 the Tribunal want to examine what is the basis for that?

15 There is absolutely no suggestion that a substantial
16 number of merchants who accept commercial debit cards do
17 not accept commercial credit or charge cards.

18 In fact the evidence clearly points the other way
19 because first of all we know as I have shown you that
20 Amex has good acceptance levels in the UK and, secondly,
21 the evidence from the small business credit segment
22 shows that Amex's levels of acceptance meet the
23 requirements of small businesses because obviously they
24 take the credit card and so much so that Amex has nearly
25 as much, if not greater, market share than Visa and

1 Mastercard combined in some years.

2 So if I can just ask our written closings to be
3 brought up again {RC-S/5/185} and we are looking at
4 396(2).

5 Then the other relevant piece of evidence for
6 the Tribunal is that we also know that merchants cannot
7 distinguish between commercial debit and commercial
8 credit cards. Mr Steeley's evidence made it clear that
9 M&S staff could not distinguish between a consumer and
10 a commercial card, that was at paragraph 41 of his
11 statement which was {RC-F2/8/7}, we do not need to bring
12 that up but we also know from the evidence that
13 merchants do not steer generally let alone against Amex
14 given its very high acceptance levels.

15 So in the end when you look at Mr Dryden's concern
16 about this one segment and that is what his entire case
17 about Amex reducing its Merchant Service Charge came
18 down to, he literally focused in on that one segment and
19 said: well, in order to get into that, they have got to
20 be more competitive. But it was clear that he was
21 mixing up the question of merchants and cardholders,
22 that he was assuming they could distinguish between
23 debit and credit cards and he was assuming that small
24 businesses would not take debit cards as well as credit
25 cards and he was also assuming the offering would remain

1 exactly the same.

2 The reality is here that is all wrong because we are
3 talking about merchants that largely already accept
4 Amex, we know that Amex offers a debit card in the US
5 and if there are more Amex cardholders, their motivation
6 to accept cards -- merchants' motivation to accept cards
7 is going to be even greater.

8 The fourth reason why Mr Dryden's theory falls down
9 is that he in fact accepted ultimately that the split
10 between credit and debit cards could be different in the
11 counterfactual and we note that in paragraph 130 (3) (d)
12 of the roadmap. Mr Dryden's segment by segment
13 analysis, as we say there, suffers from taking a static
14 perspective to what is obviously a dynamic situation and
15 indeed ultimately he accepted that.

16 If Amex credit cards were able to offer much more
17 attractive benefits than Mastercard's debit cards, the
18 relative shares of credit and debit cards could shift in
19 Amex's favour and Amex would not even have needed in
20 that scenario to have entered the small business debit
21 segment in order to win some transaction share of that
22 market.

23 Can I just show you paragraph 404 of our written
24 closings so you see this, it is {RC-S/5/188}. So we set
25 out there some of the evidence from Mr Dryden.

1 Mr Holt gave similar evidence. So the suggestion
2 that businesses have to have debit cards misses the
3 point and it is wrong because there is no magic to
4 a debit card from a commercial business's perspective.
5 The important point is having a means to pay and it also
6 misses the point because the question is whether
7 a commercial business would prefer an attractive Amex
8 credit card rather than an unattractive Mastercard debit
9 card and it also misses the point because Amex could in
10 fact offer a debit card, as we know it does in the
11 States.

12 The fifth reason why Mr Dryden's theory was wrong is
13 that he based his theory in part on the fact that there
14 are substantial numbers of small businesses who require
15 debit cards with higher levels of Mastercard Visa
16 acceptance and those customers would not be willing to
17 switch to Amex. But again that was all premised on
18 Mr Dryden's confusion about who is the customer and who
19 is the merchant and you remember the hairdresser
20 example. But even his hypothetical hairdresser would
21 almost certainly be purchasing from larger merchants,
22 for example buying hair products online. So there is no
23 evidence that Amex's high levels of acceptance are not
24 good enough for small businesses; quite the contrary,
25 when you look at the share of the small business credit

1 segment. If anything, commercial cardholders are likely
2 to have an alternative payment method in the unlikely
3 event their Amex is not accepted.

4 Then finally returning to my four topics, the fourth
5 topic is addressed at paragraphs 133-135 of the roadmap,
6 relating to Mr Dryden's argument that in the
7 counterfactual Amex would need to reduce its Merchant
8 Service Charge to retain a price delta between the
9 scheme's Merchant Service Charge and Amex's Merchant
10 Service Charge.

11 Now, that argument does not hold good and as we note
12 in the roadmap at 132(1), Mr Dryden's position in his
13 expert report was that Amex would need to wholly or
14 partly maintain the price delta between Amex and on the
15 one hand and Mastercard Visa on the other and that was
16 in his second report at paragraph 8.3 8.

17 But in his oral testimony you will remember he moved
18 away from that. He accepted that Amex would not be
19 seeking to maintain a price delta but might reduce its
20 Merchant Service Charges to some extent from the level
21 of the factual and that was at {Day13/49:10-17}, if we
22 bring that up.

23 He ultimately conceded that Amex was under less
24 pressure to reduce its Merchant Service Charges as
25 a result of lower Mastercard and Visa Merchant Service

1 Charges. But the premise that Amex would be under any
2 pressure in the counterfactual was itself flawed and
3 there was not a justification for it.

4 So can I look at why he said that and what the
5 justification was. Essentially, there were natural
6 experiments that were relied on by Mr Dryden but they
7 actually do not lead to the conclusion that he suggests
8 and it was the Australia experience and the post IFR
9 period experience and the evidence of what happened to
10 Amex Merchant Service Charges in the Australian example
11 is addressed in detail in paragraph 416 of our written
12 closing. I am not going to repeat all the evidence
13 orally because we have addressed it there but I will
14 identify the two reasons why Australia is not the
15 appropriate comparator to the counterfactual and that is
16 first of all the regulations put in place by the Reserve
17 Bank of Australia only regulated Mastercard and Visa
18 weighted average MIFs, so Mastercard and Visa were able
19 to offer premium cards with higher MIFs and were able to
20 encourage uptake of those cards.

21 So basically they remained very able to compete with
22 Amex. Therefore Amex did not get a competitive
23 advantage which is completely different to the
24 counterfactual we are positing here and if you want some
25 evidence in support of that, that is in Dr Niels'

1 second report, at paragraphs 4.65 to paragraph 4.66.

2 Secondly, the other big change introduced by the
3 Australian regulation as I mentioned already is that
4 surcharging was introduced and unlike in the UK,
5 Australian merchants were willing to surcharge and that
6 is another reason why Amex's Merchant Service Charges
7 reduced rather than any desire or need for a particular
8 delta and that in fact strikingly is Dr Frankel's own
9 explanation of why Amex's Merchant Service Charges fell
10 in Australia.

11 So it is Day 14 at page 83, if we can pull that up
12 {Day 14/83:22}, I think it starts at. Yes, that is --
13 if we start at line 15 for the full passage.

14 So you can see that Australia is not a helpful
15 comparison for what would happen in a UK market in which
16 there is very little surcharging and where Amex would
17 have the competitive advantage that we have identified.

18 Then the second natural experiment is the claimants'
19 reliance on post IFR and again we have addressed this in
20 paragraph 417 of Mastercard's written closings and it is
21 also addressed at 132(b) of the roadmap and I have dealt
22 with it orally earlier.

23 There are then the natural experiments the claimants
24 point to to argue that Amex's market share would not
25 increase in the counterfactual and we address this at

1 132(2)(c) of the roadmap and this is covered in the
2 claimants' written closings at paragraph 455. In
3 paragraph 445(1) the claimants refer to the intra-EEA
4 MIFs reducing to 0% from June 2008 to June/July 2009.

5 Now, that only applied to EEA cross-border
6 transactions which is a very small percentage of
7 transactions at this time. It did not concern
8 commercial cards and it was a temporary change known to
9 be a temporary change and market participants in that
10 scenario can be expected to wait and see unlike in the
11 counterfactual which we are positing would be
12 a unlimited change. We are not suggesting it would have
13 been something introduced for a short period of time and
14 indeed all the experts agree that you are more
15 appropriate to look at the long-term horizon when
16 considering switching. For example, the claimants' own
17 expert, Mr Dryden says so in his second report at
18 paragraph 32A, he says:

19 "As I explain in section 6, I consider that
20 a long-term view is appropriate."

21 That is on switching.

22 Then at paragraph 455(2) of the claimants' written
23 closing, they refer to inter-regional MIF commitments
24 and I have already dealt with that, the commitments had
25 a very limited impact on interchange fees and again it

1 is Mr Dryden's own evidence that supports my case at
2 paragraph 110D of his first report. 445(3) is the
3 Australian example which I have dealt with and 445(4) is
4 New Zealand which is a new point none of the experts
5 have addressed Amex's position in the wake of the Retail
6 Payment Systems Act 2022 and it is not an appropriate
7 comparison because the Act was not concerned with
8 commercial cards, it did not set the caps raw MIFs at
9 zero. If you need any evidence on this point you have
10 Ms Riviere's statement at paragraph 25 and again it
11 tells you nothing about what would happen to the UK
12 commercial card market if Mastercard and Visa were
13 unable to have positive commercial card MIFs.

14 Then lastly on this point about Amex reducing fees,
15 Mr Dryden's suggestion that Amex would have been
16 pressurised to reduce its charges because merchants
17 would refuse to accept Amex or would surcharge are not
18 correct and we address this in 132(2)(d) of our roadmap
19 and in our written closing at paragraph 418.

20 The evidence before the Tribunal, for example
21 Mr Steeley's statement, again claimants' witness at
22 paragraph 31, is that the merchants generally are loath
23 to refuse Amex and if they wish to decline Amex
24 commercial cards, merchants would likely have to decline
25 Amex consumer cards because, as Mr Steeley said at

1 paragraph 41 M&S staff cannot distinguish between the
2 two. So Mr Dryden's approach of suggesting it would be
3 just the commercial cards just does not work on the
4 evidence before the Tribunal and as for surcharging,
5 Mr Dryden himself accepted in his oral evidence that
6 surcharging does not really come into it and is not key
7 and that was at {Day13/86-87}.

8 So standing back, Mr Dryden's theory that Amex could
9 not capture market share in the small business debit
10 segment is not based in any evidence. There is no
11 evidence to support the assertion that Amex would need
12 to reduce its Merchant Service Charges in the
13 counterfactual and once you accept that, then all of the
14 evidence on that just falls away.

15 Then going back to Mr Dryden's estimation of how
16 much market share Amex would need to capture in order
17 for there to be a market-wide increase in service
18 charges, we can see the figures in Mastercard's written
19 closings at paragraph 421 and that is at {RC-S/5/196}.
20 Mr Dryden abandoned his position that Amex would need to
21 maintain a price delta so the higher figure in the range
22 is no longer relevant and as we say at paragraph 422 of
23 our written closing, even taking a mid-point of
24 Mr Dryden's figures, which I will not say the number,
25 that would be perfectly achievable for Amex in

1 circumstances where it had a similar level of acceptance
2 in one segment of the market and Amex would have an even
3 better competitive position in the counterfactual, as
4 I said, than the real world.

5 There is also a suggestion in my learned friend's
6 closings that there could be switching to payment
7 methods like EFT in the counterfactual which might be
8 lower cost and this is at the claimants' written closing
9 at 454. Again, no evidence is cited for the suggestion
10 that EFT is lower cost and if we go to Dr Niels'
11 first report, {RC-H3/2/158}, at table 5.1 we can see the
12 costs estimate that Dr Niels has used for bank transfers
13 there.

14 Now, please can you note the Mastercard commercial
15 card figures and the figures for bank transfers. Now
16 the figures were not challenged. It was not put to
17 Dr Niels that he had used the wrong estimate for the
18 cost of bank transfers so it is now not open to my
19 learned friend to suggest without evidence and not -- in
20 the face of this evidence which was not challenged that
21 switching to bank transfer would have resulted in lower
22 costs overall.

23 We can see the cost estimates for the different
24 payment methods and my learned friends have made some
25 criticisms about these costs inputs but their experts

1 have not put forward their own costs estimates, so it is
2 unclear how the Tribunal should proceed with their case
3 other than to reject it.

4 Can I then turn to what would have happened in
5 Ireland, which we address.

6 PROFESSOR WATERSON: Just before you go to Ireland. On
7 these Amex -- in the commercial card sector, what are
8 the benefits of Amex compared with Mastercard and Visa
9 to a small merchant?

10 MS TOLANEY: Well, in the counterfactual I cannot really
11 answer, I cannot answer what might have become more
12 attractive because things may have been introduced.
13 Obviously in the factual, generally Amex offers better
14 rewards.

15 PROFESSOR WATERSON: What sort of rewards are we talking
16 about?

17 MS TOLANEY: I think we are just querying at the moment are
18 you talking about the merchants or the cardholder?

19 PROFESSOR WATERSON: For the cardholder.

20 MS TOLANEY: Yes, it is all the -- I am doing my best in
21 terms of points for holidays, all the facilities that
22 Amex offers which are great developments. We can get
23 you a little bit more information on that.

24 PROFESSOR WATERSON: I am a bit puzzled because, I mean,
25 clearly on a commercial card for a business, things like

1 say Air Miles or whatever are relevant.

2 MS TOLANEY: Well, they could be, sir.

3 PROFESSOR WATERSON: Take the hairdresser example.

4 MS TOLANEY: It depends. Hairdressers often go and do shows
5 abroad. Businesses do.

6 PROFESSOR WATERSON: But then that would be a -- they would
7 have to declare that.

8 MS TOLANEY: Yes, but if it is a business they would offset
9 the benefits against the cost, so take the flight, for
10 example. If the business did actually, and actually
11 hairdressing is an example where there are multiple
12 shows over the world, if the business was able to have
13 that for free, rather than incur the cost of paying for
14 it, that is a benefit that they might be interested in.

15 The point is in a world where Amex was the main
16 player -- so if I could take the converse of
17 Mr Tidswell's example to me, imagine a world where you
18 only had Mastercard and Visa. Well, imagine a world
19 here where essentially in the commercial card sector you
20 really only have Amex and everybody else is a poor
21 relation. Then Amex just becomes the dominant player
22 and the result of that is Amex's offering is higher
23 charges, more benefits, but they are the main player.

24 So that is really -- and the reason I put it that
25 starkly is, in a sense, that is where the experts have

1 come out. They all say Amex is the one that you focus
2 on for switching in the commercial card sector and they
3 all accept there would be substantial switching.

4 Mr Dryden accepted that there would be substantial
5 switching. His only line of attacks were, one, could
6 Amex actually get into the particular segment that he
7 identified? I have explained why he got it actually
8 quite wrong. Secondly, because of the pressure to
9 acquire market share or getting into that segment, he
10 posited Amex would have to reduce its own charges, but
11 as I have just shown you, there is no evidence to
12 support that.

13 So if you recognise there is no evidence on his
14 two caveats, you are left with a position where
15 essentially even his evidence says Amex is the main
16 player, would charge more and would be the dominant one,
17 and then the answer to the counterfactual, how it would
18 operate, is actually quite clear in the commercial card
19 sector particularly.

20 Can I turn now to what would have happened in
21 Ireland, and this is addressed at 134 in our roadmap and
22 in our written closing at paragraph 424. (Pause)

23 Mr Cook has just mentioned helpfully that
24 Ms Suttle's evidence in paragraphs 9 to 12 deal with the
25 benefits points more fully, if that would help your

1 question, Professor.

2 We address Ireland in our written closing at
3 paragraph 424 and in 134 of the roadmap. Again,
4 Ms Suttle's evidence is pertinent. She makes the point
5 that Ireland has a different competitive context as Amex
6 has a limited presence there. Her evidence again, which
7 was not challenged, is that customers would have
8 switched to an alternative payment method in Ireland
9 such as cash, cheque and EFT.

10 So wrapped up together and standing back, the
11 evidence, we would suggest, very clear-cut in commercial
12 cards issue 5, is that in the UK, there would have been
13 significant switching to Amex in the counterfactual and
14 Amex would have obtained more than sufficient market
15 share such that Merchant Service Charges would have
16 increased in the counterfactual. In Ireland, there
17 would have been switching to other payment methods,
18 which are more expensive for merchants. That means
19 essential fact 6 is not made out in respect of
20 commercial card MIFs.

21 We then have to address objective necessity again in
22 this context, and I have dealt with it in paragraph 136
23 of the roadmap and our written closings at 430-434.

24 I have already taken you now in detail through the
25 evidence on switching and the degree of switching in the

1 counterfactual. Mr Dryden accepted, as I have shown you
2 as well, that absent commercial card MIFs, Mastercard
3 and Visa would be at a competitive disadvantage. That
4 is Day 13, pages 89-90 {Day13/89:1}.

5 The Tribunal also heard the evidence of Ms Suttle,
6 who made clear that absent commercial card MIFs, as she
7 put it, Amex would have come fighting tooth and nail.
8 That was Day 9, page 178, lines 4-7 {Day9/178:4}.

9 Now, based on that evidence, we suggest the
10 likelihood is that absent commercial card MIFs,
11 Mastercard would have been seriously hampered in its
12 ability to compete with Amex. That is not really
13 disputed. The loss of market share and other payment
14 methods would ultimately render Mastercard's four-party
15 model unviable for commercial cards in the UK and
16 Ireland. Commercial card MIFs are, therefore,
17 objectively necessary either generally or at least as
18 regards the certain segments in which Amex already has
19 a substantial market share.

20 Those were my submissions on issue 5, unless I can
21 help you further on that. Then I was going to turn
22 back, as I promised, to issue 3.

23 THE PRESIDENT: Yes.

24 MS TOLANEY: I have got the bilaterals counterfactual to
25 deal with, which I had already started, and then

1 obviously I wanted to touch on the scheme fee
2 counterfactual as well.

3 I was on the topic of what the bilaterals
4 counterfactual involved and the processes of it. In
5 that context, sir, you have obviously posed some
6 questions. So what I proposed to do was to go through
7 the submissions based upon the two notes, as I was going
8 to do, and then come on in that context then to do my
9 best to answer your question. Obviously, if there are
10 further questions, I will do my best or we can look at
11 them further again if it is easier for us to do it by
12 way of a note, depending on how intricate they are.

13 So we said in our note on the bilaterals
14 counterfactual -- I do not know if you have that to
15 hand. It may be helpful to have both the bilaterals
16 counterfactual note and the clearing settlement notes.

17 (Pause)

18 PROFESSOR WATERSON: Is it this one under tab 6?

19 MS TOLANEY: We have appendix 1 and appendix 5. So
20 appendix 1 is the bilaterals counterfactual.

21 So there are two different points, and I will just
22 take this step by step and I apologise if some of the
23 things I am saying are obvious. First of all, there is
24 the contractual position.

25 Sir, I will wait until you have the notes. I am not

1 referring at the minute to the notes, but I will do.

2 I will just wait for Mr Tidswell. Thank you.

3 So, first, there is the contractual position, which
4 is what is the issuer contractually obliged to pay the
5 acquirer to settle the transaction? Then, second and
6 separately, there is processing, which is the question
7 of how that sum is in fact paid. There are two separate
8 questions and I will take each in turn.

9 So the first point is obviously Mastercard has
10 a role as scheme owner and I went through, and this is
11 appendix 5, yesterday. If one has that, that is
12 {RC-S/6/40}. That is that Mastercard -- this is set out
13 at paragraph 3 -- has a role as scheme owner, which
14 covers licensing financial institutions to join the
15 scheme, use trademarks, setting the rules, including
16 uniform messaging standards which allows banks to
17 communicate, and ensuring the rules are complied with.

18 As I said yesterday, that is entirely separate from
19 the question of processing a transaction. Prior to the
20 IFR, licensees always had the option to have some or all
21 of the processing carried out by themselves or through
22 a third party. They did not have to use Mastercard.
23 Then the IFR Article 7 in fact required Mastercard to
24 separate its processing services from its role as scheme
25 operator, so the two cannot be done as if it were just

1 Mastercard as scheme owner.

2 Then moving then to the contractual position in the
3 factual, so what it is now, the current contractual
4 position that is determining when the issuer is required
5 to pay the acquirer is currently determined by
6 Mastercard's scheme rules subject to the right for
7 issuers and acquirer to reach a separate bilateral
8 agreement, which -- they have always had that right.

9 If we can go to our bilaterals counterfactual note,
10 which is {RC-S/6/2}, you will see there that the scheme
11 rules are set out from paragraph 7, which is on page 3
12 {RC-S/6/3}. It is rules 8.2 to 8.4 which require the
13 issuers to pay the transaction value less the relevant
14 default interchange fees, with overall netting off of
15 sums due. If I just allow you to read those rules, that
16 is what the current position is. So it is
17 paragraphs 7-9. (Pause)

18 Now, the issuer's obligation to settle is provided
19 for in the scheme rules, and this is the crucial point,
20 because the scheme is setting the MIF. This is why,
21 when we come on to the bilaterals counterfactual, there
22 is a difference because the scheme is setting the MIF,
23 the scheme rules provide for payment of the issuer's
24 obligation to settle.

25 The scheme also needs to make some provision in its

1 rules to determine what the issuer should pay the
2 acquirer to settle a transaction. You also see that the
3 rules in paragraph 11 and 12 therefore are relevant.
4 So, first of all, 12 is the point I have just made and
5 11 is the exception for bilaterals, and similarly 13.

6 Now, the contrast is with processing, which is
7 a different situation, so we are not talking about
8 settlement any more. Processing, and we were talking
9 about this yesterday, is an umbrella term and covers
10 three separate functions. I think you were saying, sir,
11 it is not very helpful sometimes the way "processing" is
12 used and you are right. It covers authorisation,
13 clearing and settlement.

14 Authorisation refers to the process of the issuer
15 approving or declining a transaction and it is the
16 process by which the issuer checks the card is valid,
17 not stolen and so on. In practice today, this will be
18 an electronic message from the POS which ultimately goes
19 to the issuer. The issuer's systems will carry out
20 various checks and will then reply with either
21 an "authorised" or "declined" message, which goes back
22 to the merchant.

23 We can see from the description in the 2006 report,
24 which I have referred to in the clearing note, how it
25 would work in practice. This is at {RC-R/33/23}. You

1 can see steps (1) to (14) below the diagram which set
2 out how the authorisation process works. That is quite
3 a helpful in practice explanation.

4 Clearing refers to the process by which information
5 is communicated by the acquirer to the issuer about
6 completed transactions and calculating the amount due.
7 It is obviously efficient for this to be done in
8 batches. Clearing results in the calculation for total
9 sums due.

10 Settlement is the process by which the issuer pays
11 the acquirer the sums calculated as due, which can be
12 done through direct payment between the banks or payment
13 through a settlement agent, which, prior to the IFR,
14 might have been Mastercard.

15 We can see how clearing and settlement work in
16 practice in step (15) below the diagram. That is again
17 on screen. You can see what is said is:

18 "The acquiring processor forwards this message ..."

19 I.e. an acceptance acknowledgement:

20 "... to a 'clearing house', which sends information
21 on all successful transactions in batched form
22 (a package of several messages) to the acquiring banks
23 for payment to the merchant's account and to the issuing
24 banks for debiting from the cardholder's account."

25 We have not identified in research overnight any

1 formal legal definition of the separate stages, because
2 the IFR uses the umbrella term "processing" and then
3 makes specific reference to separating authorisation and
4 clearing without actually defining those terms. So what
5 I have given you are practical descriptions of the
6 different stages based upon the report. I have also
7 shown you the definitions from the *Merricks* judgment,
8 which were quite helpful, and they are set out in our
9 settlement note at paragraph 5.

10 There has been no suggestion from my learned
11 friend ...

12 THE PRESIDENT: There is a suggestion made it is getting
13 rather warm in here.

14 MS TOLANEY: It is very warm in here.

15 THE PRESIDENT: Perhaps we should rise to, first of all,
16 adjust the blinds and, secondly, see if we can kick the
17 air conditioning into a higher --

18 MS TOLANEY: Many jokes have been made about my submissions
19 coinciding with hot air, but I am resisting that.

20 THE PRESIDENT: No. We will rise for 10 minutes to deal
21 with that.

22 MS TOLANEY: Thank you.

23 (3.05 pm)

24 (A short break)

25 (3.18 pm)

1 THE PRESIDENT: I hope that is better, Ms Tolaney.

2 MS TOLANEY: I think it is, thank you very much.

3 Sir, I was just on the point that we had shown you
4 the *Merricks* definitions and there had not been any
5 suggestion they were not right.

6 The next point is that it has always been the case
7 that Mastercard's scheme members can carry out each of
8 the three stages of processing themselves, or through
9 a third party processor or subject to the IFR now
10 through Mastercard. So the short point is there is no
11 requirement to use Mastercard for the processing
12 services.

13 Prior to the IFR, Mastercard offered separate
14 processing services if scheme members wished to use them
15 with additional fees if they did but they did not have
16 to. Since 2016, the IFR Article 7 mandates the
17 separation of payment card schemes and processing
18 entities in order to promote competition between
19 processors and requires that authorisation and clearing
20 can be separated and processed by different entities and
21 as a result Mastercard has separated its processing
22 business which is independent, although in practice the
23 effect is the same because it was -- before that it was
24 the same.

25 MR TIDSWELL: Am I right in thinking that most -- I picked

1 up from your roadmap that most of the members do use the
2 Mastercard processing facility; is that right? I think
3 it said that.

4 MS TOLANEY: I think currently that is right.

5 MR TIDSWELL: I do not know if you --

6 MS TOLANEY: I do not know if that is true historically.

7 MR TIDSWELL: I do not know if you have any data on that or
8 maybe --

9 MS TOLANEY: We will check.

10 MR TIDSWELL: I do not know whether it is sensitive or not.

11 MS TOLANEY: We will check if we have, Mr Cook is making the
12 point that because it is independent.

13 MR TIDSWELL: Yes.

14 MS TOLANEY: We may not know but of course we will check in
15 case there is anything that we would have.

16 MR TIDSWELL: Understood.

17 MS TOLANEY: That then takes me to my next point which is
18 how exactly -- and I think this has led in from the
19 question actually, how exactly processing takes place
20 will depend on the choices made by the scheme members.

21 So if they choose to clear and settle peer-to-peer,
22 the clearing process will calculate the balance due
23 between them. If they choose to process through
24 Mastercard or a third party processor, then Mastercard
25 or the processor will calculate the net amount payable

1 or due to each scheme member who participates in the
2 process and it is obviously open to scheme members to
3 have the funds flowing directly between them or to use
4 a settlement agent.

5 So the exact operation of the clearing and
6 settlement process depends on the choices made by the
7 relevant scheme members. So, for example, if bank A and
8 bank B choose to settle and clear on a peer-to-peer
9 basis then it will not be clear as I said to Mastercard
10 necessarily what the position is and whereas if the
11 scheme members choose a multilateral net settlement
12 process whether through a third party or through
13 Mastercard, that will calculate the net amount payable
14 or due to each scheme member.

15 So it really depends on the choices, one cannot give
16 chapter and verse on it except to say those are
17 potential options.

18 MR TIDSWELL: Sorry to keep bombarding you, you may not know
19 the answer to this one but I am assuming that in order
20 to be an issuer, you have to be a member of the scheme,
21 so regardless of how it is processed and whatever it is
22 you cannot be an issuer without being a member, because
23 presumably you have to access the licences and so on.

24 MS TOLANEY: You have to be licensed, so yes.

25 MR TIDSWELL: That is my question, really. I am assuming

1 you have to be a member in order to get the licence.

2 MS TOLANEY: I am assuming so, but again I will check.

3 MR TIDSWELL: Equally on the other side it would be quite

4 interesting to know what the membership requirements are

5 for acquirers because it is not so obvious that you

6 would have to, but it would be useful to know whether

7 you can be -- you can acquire Mastercard transactions

8 and not use the Mastercard scheme processor and

9 therefore have actually no interaction at all with the

10 scheme or whether you have to be a member in order to

11 be --

12 MS TOLANEY: I think in order to be within the scheme you

13 have to be licensed and we will check the exact rules on

14 it for you.

15 MR TIDSWELL: That is really my question: when you say "to

16 be in the scheme" what does that mean?

17 MS TOLANEY: A scheme member.

18 MR TIDSWELL: Yes, but that is the -- what I want to know is

19 what you have to be a scheme member in order to do. Put

20 another way, what are the things you can do without

21 being a scheme member and the things you cannot do?

22 I do not mean in gory detail but really the point is if

23 I want to be an acquirer if I make the choice that I am

24 going to deal with issuers through separate processors,

25 nothing to do with Mastercard's processing, I am going

1 to do a bilateral, not have anything to do with anybody,
2 do I still have to be a scheme member? I expect the
3 answer to that is probably nobody has had to confront
4 that because there have not been many, if any,
5 bilaterals.

6 MS TOLANEY: You have to be licensed to have the logos and
7 to use the Mastercard scheme and then how you interact
8 in terms of the -- whether you have a bilateral between
9 the issuer and the acquirer and the terms of that are
10 provided for currently within the scheme rules and it is
11 up to you, you can negotiate, but why do I not --

12 MR TIDSWELL: I want to be absolutely clear -- it is my
13 fault I am sure because I have not expressed myself very
14 clearly, but I am interested in the need for being
15 a member of the scheme and you have said licensing, and
16 maybe members are quite (inaudible) but basically the
17 test I think is: am I bound by the -- in what
18 circumstances am I bound by the rules of the scheme?
19 That is the test, however one describes that, whether it
20 is licensing or membership or whatever. Then as you say
21 one assumes that in order to access some things like
22 licensing and the use of the logo you have to be a
23 member. I do not know whether an acquirer is using
24 a logo, maybe they are on the machines, I do not know,
25 but that is the question. I suspect that the answer is

1 to date anyone has ever cared about that because most
2 people -- no-one has done bilaterals, as I understand
3 it, at least not very much. So everybody has accepted
4 at some stage they need to be engaged with the scheme
5 obviously that is going to be different in the world you
6 are postulating.

7 MS TOLANEY: Yes. If we go to the section on Mastercard's
8 scheme rules in the bilateral note.

9 MR TIDSWELL: Yes.

10 MS TOLANEY: You will see that obviously the bilaterals was
11 provided for and is provided for under rule 8.4.3.

12 MR TIDSWELL: Yes, but I do not think this is providing
13 a test for membership if I am using membership in
14 a loose sense because, as you say, there are people who
15 do not use the interchange system. The interchange
16 system is the process, or is it not?

17 MS TOLANEY: You would be part of the scheme -- on this
18 hypothesis, even with the bilateral, you would be within
19 the scheme because you are operating here in accordance
20 with the scheme rules, so I will get the relevant
21 provisions as to --

22 MR TIDSWELL: It is not even provisions, I hope it is
23 a really simple question to answer and no criticism at
24 all with that, because I am not saying I am expecting
25 you to know, but I do think it seems to me to be quite

1 an important thing which is: is there an expectation --
2 let me put it a different way perhaps it becomes more
3 obvious why it is important. In the bilaterals
4 counterfactual are we proceeding on the premise that
5 prior to entering into a bilateral people are already
6 subject to the scheme rules because they are subject to
7 the scheme rules for whatever reason? If so, why?

8 Or are we in a world where, until I have done the
9 bilateral and I have agreed in accordance with amended
10 rule 8.2 to use the interchange system I have no
11 contractual relationship with the scheme, that is the
12 question?

13 MS TOLANEY: So if -- I think the best thing for me to do is
14 we obviously have extracts of the scheme rules and let
15 me get the relevant rules and check they are in the
16 bundle.

17 THE PRESIDENT: The trouble is they are going to be
18 500 pages long.

19 MS TOLANEY: But they should talk about the issuer and
20 acquirer and so on.

21 THE PRESIDENT: Look, I know you do not like it very much
22 and no one -- but let us get the diagram up again
23 {RC-R/41/1}. Right, now, the red line between the
24 scheme and the issuer and the scheme and the acquirer
25 are some form of subscription between the issuer and the

1 scheme and the acquirer and the scheme agreeing to the
2 scheme rules whatever they may be.

3 MS TOLANEY: Yes.

4 THE PRESIDENT: If they deal with only licensing then
5 I would be astonished.

6 MS TOLANEY: Exactly.

7 THE PRESIDENT: They will deal with a whole raft of things.

8 MS TOLANEY: Yes.

9 THE PRESIDENT: My understanding -- but clearly we have
10 different understandings -- is that under your
11 bilaterals counterfactual, these contractual relations
12 remain in place. They may be changing in certain
13 respects, specifically as regards the bilateral
14 agreement of the interchange fee.

15 MS TOLANEY: Exactly.

16 THE PRESIDENT: But that is the full extent of the change.

17 MS TOLANEY: We just leave the issuer and the acquirer to
18 negotiate it themselves.

19 THE PRESIDENT: Yes. So what we are talking about is
20 a material -- highly material change, but not one that
21 is involving a jettisoning of the shape of this.

22 MS TOLANEY: No.

23 THE PRESIDENT: Of the apex.

24 MS TOLANEY: The shape of the current structure.

25 THE PRESIDENT: We are creating, however, a new line,

1 a contractual line in place of the purple arrow which is
2 a contractual one between issuer and acquirer; is that
3 what you are doing?

4 MS TOLANEY: Well, yes, the issuer and the acquirer
5 bilaterally agree rather than the scheme imposing the
6 fee.

7 THE PRESIDENT: Yes, so at the moment the purple arrow is
8 not contractual; it is a payment that is mandated by the
9 acquirer to the issuer by the contractual relations
10 running up either side of the apex.

11 MS TOLANEY: Because the scheme sets the fee.

12 THE PRESIDENT: Because the scheme says so.

13 So we are jettisoning that. So you need to have
14 some form of agreement that arises in place of the
15 purple arrow that has to be contractual.

16 MS TOLANEY: Yes, and the point is I was saying that
17 currently rule 8.43 already permitted any two customers
18 by bilateral agreement.

19 THE PRESIDENT: Yes, that is true but there is a default in
20 that, in that if you do not reach an agreement, the
21 scheme rules apply.

22 MS TOLANEY: Yes, correct.

23 THE PRESIDENT: So that does not in my book count as
24 a bilateral, I do not think it is the bilateral that you
25 are advancing now.

1 MS TOLANEY: It is not the bilateral I am advancing because
2 you are right.

3 THE PRESIDENT: Because you are advancing a bilateral that
4 has no default, if you do not agree --

5 MS TOLANEY: Except that obviously you have the IFR caps.

6 THE PRESIDENT: Well, that is not an agreed default, that is
7 a rule of law or am I wrong?

8 MS TOLANEY: It is a rule of law but it would provide
9 obviously levels and --

10 THE PRESIDENT: Yes, but in the same way that UCTA tells you
11 you cannot make certain agreements; it is a mandatory
12 rule, it affects what you can agree contractually.

13 MR TIDSWELL: It is not a default in the sense if you do not
14 agree a bilateral, you will not be pay the interchange
15 fee because there is no agreement.

16 MS TOLANEY: Exactly, that is right.

17 MR TIDSWELL: Yes.

18 THE PRESIDENT: Right. So we are, I think, clear that we
19 are now drawing a crossbar that turns this pointy arrow
20 into an A?

21 MS TOLANEY: So yes, and so turning to the bilaterals
22 counterfactual. As I said many times, I am sure
23 everyone is bored of it, Mastercard would have no rules
24 on settlement at all and issuers and acquirers would
25 make their own terms of settlements including any

1 applicable interchange fee as you have shown on the
2 arrow through bilateral negotiations.

3 THE PRESIDENT: Right. Okay. What about all of the other
4 rules that we have been talking about over the last few
5 weeks, like the Honour All Cards Rule, that sort of
6 thing; they would remain unchanged?

7 MS TOLANEY: They would remain unchanged and as you know one
8 the experts' position is -- the claimants' position is
9 that the Honour All Cards Rule is a problem and what we
10 have addressed is that we do not think the Honour All
11 Cards Rule is a problem and it would be part of the
12 bilateral counterfactual, but even if it was not, it
13 would operate too.

14 THE PRESIDENT: Well, no, look, it is quite important to me
15 at least to locate where these rules come from because
16 let us take the Honour All Cards Rule. Are you saying
17 that that would remain a scheme rule binding on issuers
18 and acquirers by virtue of their participation in the
19 scheme or are you saying that it would come into play in
20 some other way?

21 MS TOLANEY: It would be by virtue of the scheme.

22 THE PRESIDENT: By virtue of the scheme. Right, okay, thank
23 you.

24 MS TOLANEY: So the contractual position under the
25 bilaterals counterfactual is that Mastercard would not

1 have rules imposing settlement obligations and the
2 amount payable would not be imposed, so currently what
3 exactly I think you were identifying is the amount of
4 the interchange and it being settled is provided for by
5 8.2 to 8.4 and instead, under the bilateral
6 counterfactual, those rules would not be applied and the
7 amount would be left to issuers and acquirers to agree
8 themselves.

9 THE PRESIDENT: Look, let us leave settlement and all that
10 stuff to one side for the moment. We will come to it.
11 But let us suppose I am an acquirer and Mr Cook is the
12 issuer, so he has all the market power and I do not.

13 So I am a member of the scheme, as is Mr Cook, but
14 we have not reached any agreement as to the level of the
15 interchange to be paid. So we can negotiate and we can
16 reach whatever figure we like.

17 MS TOLANEY: Subject to the IFR caps.

18 THE PRESIDENT: Subject to the IFR, but, I mean, it could be
19 that Mr Cook pays me, we could have a reverse.

20 MS TOLANEY: Unlikely, but --

21 THE PRESIDENT: I know.

22 MS TOLANEY: For many reasons.

23 THE PRESIDENT: To be determined, maybe. That is not
24 precluded by your regime.

25 MS TOLANEY: No, as long as it is compatible with the IFR,

1 as you say, which is a point of law.

2 THE PRESIDENT: Sure. Let us presume whenever we mention
3 agreement it is a lawful agreement, one that is subject
4 to the IFR and whatever other mandatory rules exist in
5 a local jurisdiction.

6 MS TOLANEY: Yes.

7 THE PRESIDENT: Subject to that, we are free to negotiate
8 and improbable though it might be, one could have
9 a payment going the other way but one could have
10 an agreement that there be no payment or one could have
11 an agreement subject to the IFR that I pay Mr Cook.

12 MS TOLANEY: Yes, because following the IFR it is no longer
13 open to an issuer to pay less than 99.7% of the
14 transaction.

15 THE PRESIDENT: Sure, I have got that.

16 MS TOLANEY: Yes.

17 THE PRESIDENT: Right. How many Mr Cooks are there?

18 MS TOLANEY: I am going to come on to that because the issue
19 I perceive from your note and I think some of the
20 questions from the Tribunal is: is this scenario
21 workable because do you have too many acquirers and
22 issuers and actually the number of issuers and acquirers
23 we are talking about is a relatively small pool.

24 THE PRESIDENT: Well, workability is perhaps the tip of the
25 iceberg.

1 On my facts it is 2,500 contracts I think, because
2 I was presuming 50 issuing banks and 50 acquiring banks,
3 which is a lot, but I am not taking the view that that
4 makes it impossible. It is -- I am quite happy to
5 assume fewer if that makes the point easier but why do
6 you not address us on practicality and then we can go on
7 to the other issues that arise out of that?

8 MS TOLANEY: Yes, so can I just finish?

9 THE PRESIDENT: Sure.

10 MS TOLANEY: As I say, it may be that you are following
11 completely now everything I was going to say so I do not
12 need to say it, but all I was going to say was on the
13 bilaterals, exactly as you have said, Mastercard's rules
14 would not impose any obligation on the issuer to pay or
15 determine the amount payable for transactions and it
16 would be left to, exactly as you have said, individual
17 negotiations subject to obligations of law and the IFR.

18 I can address settlement at a different point but
19 the only reason I have been addressing it is because one
20 of the points made by Mr Beal was that this scheme
21 leaves settlement uncertain and it does not and the
22 reason it does not is because of the IFR broadly.

23 What I was going to say is that processing --

24 THE PRESIDENT: Sorry, because why does the IFR solve the
25 problem? Because you have a maximum that constrains

1 Mr Cook's ability to squeeze --

2 MS TOLANEY: Exactly, exactly.

3 MR TIDSWELL: But you still have to reach an agreement, do
4 you not?

5 MS TOLANEY: You do, but the point is if you have not got
6 the agreement then it is not settlement that is the
7 issue and what my learned friend's position was even if
8 you had the bilateral agreement, would there be an issue
9 over settlement? The answer is no.

10 MR TIDSWELL: I had assumed -- I am sorry if this is taking
11 you backwards, but I had assumed from your rule that the
12 bilateral agreement would have to provide for settlement
13 because as I understand your amendment, it says that you
14 cannot use the interchange system unless you have got
15 a bilateral which includes a term as to settlement in
16 it; is that right?

17 MS TOLANEY: Yes, but because you cannot be squeezed,
18 I think the issue he was positing was that maybe the
19 issuer would hold out for so much that you would never
20 get an agreement or settlement.

21 THE PRESIDENT: Yes, but then you do not get to clearing or
22 settlement at all.

23 But let us assume we have got a case where Mr Cook
24 and I have reached terms and frankly I am not sure
25 whether it matters if the IFR is in play or not because

1 if we have not reached terms then no dice, I cannot
2 participate. If we have reached terms, even if they are
3 non-IFR compliant, you then input those terms into the
4 clearing and settlement systems and they just do the
5 math. Am I missing something?

6 MS TOLANEY: I do not think so.

7 THE PRESIDENT: Right. So I mean, the scheme works, you may
8 not get many people buying in but the scheme works even
9 if you delete IFR and allow Mr Cook to extract 5% from
10 me.

11 MS TOLANEY: Subject to the IFR, yes.

12 THE PRESIDENT: Subject to the IFR, yes, that is right.

13 MS TOLANEY: Yes.

14 THE PRESIDENT: Subject to the IFR, yes, that is right. But
15 the IFR is not a problem, the bilaterals work even --

16 MS TOLANEY: I think, sir, this is why we have been
17 advancing this, because pre the IFR you had the hold-up
18 problem.

19 THE PRESIDENT: Right.

20 MS TOLANEY: That is why the bilaterals counterfactual is
21 now very viable because you no longer have that hold-up
22 problem.

23 THE PRESIDENT: Well, you are defining "hold-up" as
24 a situation where there is no mechanism for making
25 Mr Cook reasonable, basically.

1 MS TOLANEY: Yes, but then.

2 THE PRESIDENT: I am sorry, Mr Cook, but there we are.

3 MS TOLANEY: I am trying so hard not to make any jokes at
4 Mr Cook's expense.

5 THE PRESIDENT: You go for it!

6 MS TOLANEY: But I think if you remember in the *Dune* case,
7 this was the point that was focused on, which is that
8 because of the hold-up problem it was suggested that
9 issuers had too great a bargaining power and it would
10 all cause issues and then the scheme would collapse and
11 the IFR was a seismic change which meant that that did
12 not exist which is why bilaterals now are perfectly
13 acceptable and in fact commonplace in other countries.

14 THE PRESIDENT: Right, okay, so we have got Mr Cook
15 constrained to reasonableness by the IFR and if and to
16 the extent hold up was a problem -- and I am not really
17 that interested in that as an issue at the moment, if
18 and to the extent it was a problem solved by the IFR.
19 But once one has an agreement, I mean, whether it is
20 constrained by the IFR or not, but once one has
21 an agreement that Mr Cook can extract X from me,
22 clearing and settlement just are not a problem because
23 you have the input data, you tell whatever clearing and
24 settlement machinery there is: this is what we have
25 agreed, these are the deductions that are being made and

1 the contractual agreement is simply implemented by the
2 clearers and settling systems. I mean, am I missing
3 something?

4 MS TOLANEY: I do not think you are. I think that is right.

5 THE PRESIDENT: Right. Good. So I do not want to cut you
6 short, but are you going on to complexity of there being
7 too many --

8 MS TOLANEY: I am, because I do not think I need to labour
9 any further point which I was doing, I am sorry to say.

10 The only other point I just wanted to cover, just so
11 I have done it, is that the complaint made by my learned
12 friend about the bilaterals counterfactual is he tries
13 to say there is some sort of collective agreement and as
14 you will have appreciated from our exchange, a bilateral
15 is the absolute opposite of the collective agreement.

16 THE PRESIDENT: Well, it is certainly on my list of points
17 so we will come to that.

18 MS TOLANEY: Right. So the points that we need to address
19 with you, sir, are the workability of the -- if I could
20 use that term of the bilaterals counterfactual, but also
21 the question that has been advanced, the submission that
22 has been made by my learned friend that settlement at
23 par is the only counterfactual and I just should also
24 clear that away.

25 THE PRESIDENT: Would you mind doing that after we have

1 worked out how bilaterals work because I really do want
2 to understand either the simplicity or the hidden
3 complexity of our case and I am just not sure which it
4 is?

5 MS TOLANEY: I hope it is the simplicity; I am going to say
6 it is anyway.

7 So the points about the difficulties of implementing
8 the bilateral counterfactual are addressed in the
9 roadmap at paragraphs 66-77, if we can just pick that
10 up, and the starting point is if I can just put this in
11 context that the potential value of the capped
12 interchange fees was 1.6 billion for 2016 alone, it
13 would be a multi-year process in the markets growing
14 rapidly, so it is over 1.6 billion for 2022 and over
15 a multi-year period well over 10 billion.

16 So these are enormous sums and the only reason for
17 mentioning that is Mastercard and Visa and in turn
18 issuers would have seen any initial inconvenience and
19 cost associated with bilateral agreements as a very
20 insignificant price for securing the flow of revenue.

21 The second point of contest as I have also said is
22 that bilaterals are not unknown in the UK and I have
23 given the examples in paragraph 67 to the roadmap.

24 The third point is that we are talking about
25 sophisticated and well-versed --

1 THE PRESIDENT: When you are saying bilaterals there,
2 though, are you referring to bilaterals which have
3 a default built in or bilaterals that do not?

4 MS TOLANEY: I imagine it is bilaterals with a default built
5 in.

6 THE PRESIDENT: Okay, so not what I would call true
7 bilaterals.

8 MS TOLANEY: No, but what it shows is the possibility of
9 negotiation has been -- between two parties has been
10 upheld, held up.

11 THE PRESIDENT: Yes, but negotiation is one thing when one
12 party is -- well, when hold-up is possible. Where you
13 have a default that applies in the absence of agreement,
14 then in my book that is not really a bilateral; that is
15 an imposed rate which I can agree to vary but which if
16 I do not reach agreement is the imposed rate.

17 PROFESSOR WATERSON: Can I just raise an issue about this.
18 In *Merricks* you will know that there were bilateral
19 agreements, that there was a default and also the other
20 feature of the period for *Merricks* was -- I mean, I do
21 not want to sound sort of pejorative but it was a club
22 of jolly good chaps that would meet together regularly
23 and agree their bilaterals and in a way that they
24 thought, because they did not write it down, was legal.
25 So it was -- but it was simple because there were

1 only a few of them and they were all both issuers and
2 acquirers so it is a very different system that we have
3 now.

4 MS TOLANEY: I do not think, sir, but I do not think I need
5 to labour it, that they were both issuers and acquirers.

6 PROFESSOR WATERSON: Certainly in the *Merricks* period they
7 were it was only when the monolines came in late in the
8 period that they were not, but initially they certainly
9 were.

10 MS TOLANEY: Well, at this point in time, if I can just take
11 that point and the workability point head on. None of
12 the experts suggest that the bilaterals counterfactual
13 would be unworkable. That is quite an important point,
14 or that it would involve serious practical difficulties
15 and Dr Frankel in fact argued in favour of bilateral
16 agreements in an article in 2006, which we have set out
17 an excerpt of in our closing submissions at paragraph 2
18 and --

19 THE PRESIDENT: By "workability" you simply mean there are
20 too many counterparties --

21 MS TOLANEY: Too many agreements.

22 THE PRESIDENT: -- to enable this important but limited
23 agreement to be reached between the acquiring class and
24 the issuing class.

25 MS TOLANEY: That is right and I think because my learned

1 friend takes that point that it is too uncertain, too
2 unworkable, too many agreements.

3 THE PRESIDENT: Yes, which was a point which was taken in
4 *Sainsbury's* first instance.

5 MS TOLANEY: That is right.

6 Now, post IFR the hold-up problem has gone.
7 The Tribunal has heard from the experts and witnesses so
8 again this is evidence-based that five acquirers account
9 for 90% of the acquiring market here and that is the
10 claimants' evidence, Mr Dryden's first report at E.76.

11 Now, as for issuers, in the UK market 13 banks --
12 only 13 -- account for 70% of the market and
13 the Tribunal has heard from Mr Willaert that around --
14 there are around 30 to 50 issuers in the Mastercard
15 scheme in the UK. So that is {Day9/119:12-14}.

16 So with a relatively small number of bilateral
17 agreements, most of the UK market would have been
18 captured.

19 THE PRESIDENT: Right. So what you are saying is in terms
20 of market coverage, it is way less than the 2,500
21 thousand contracts that my note postulates?

22 MS TOLANEY: Exactly.

23 THE PRESIDENT: You might be talking about, say, to cover
24 the whole market 10 on each side, assume they are
25 different; that is about 100 contracts.

1 MS TOLANEY: We have got -- those are quite stark figures
2 that this is actually something that is possible.

3 THE PRESIDENT: Okay.

4 MS TOLANEY: I think Professor Waterson asked me yesterday,
5 this was at page 176 of the transcript, Day 19,
6 {Day19/176} whether a new acquirer or issuer would have
7 to negotiate with all the issuers and acquirers in the
8 scheme and the answer to that is Mastercard would not be
9 requiring this new issuer or acquirer to negotiate with
10 anyone because we would not be mandating the agreements
11 but we say that the likelihood is that the new issuer
12 and acquirer would enter into bilateral agreements.

13 The second point on the workability is that in
14 practical terms, what we would expect is that most of
15 the, or all of the, issuers and acquirers would enter
16 into bilateral agreements in advance of a transaction,
17 not after, and you again have evidence --

18 THE PRESIDENT: You mean a transaction as between the
19 merchant and the cardholder?

20 MS TOLANEY: Yes.

21 THE PRESIDENT: They would have to because otherwise there
22 would be uncertainty as to how the debt between the
23 cardholder and the merchant would be discharged.

24 MS TOLANEY: So --

25 THE PRESIDENT: That must be right.

1 MS TOLANEY: The position is that the evidence is that
2 issuers and acquirers would likely agree bilateral terms
3 in advance of any transactions taking place between the
4 cardholder and the merchant and on that basis all parts
5 of the contractual framework would be in place from the
6 outset, just as in the factual.

7 THE PRESIDENT: Right.

8 MS TOLANEY: I think in your note, sir, you addressed the
9 possibility of transactions taking place before
10 an issuer and acquirer reached agreement?

11 THE PRESIDENT: Yes, I was saying I did not see how that
12 could be proper.

13 MS TOLANEY: What we would say to you is two points: one is
14 you are right in one sense, it probably would not ever
15 arise because the evidence is, and again it is Ms Devine
16 and Mr Willaert, I will give you the references, that
17 the likelihood is bilateral terms would be agreed in
18 advance, so this point will not arise.

19 But if it did arise, we do not think it would
20 generate a problem from a technical legal perspective
21 because of the IFR providing acquirers and merchants
22 with sufficient certainty that at least 99.7% credit or
23 99.8% debit would be paid. So if a transaction happened
24 we assume that the levels would have to be around that
25 level reached.

1 THE PRESIDENT: I do not understand how that can work and
2 let me explain why and you can tell me why I am wrong.
3 If we are postulating, as I think we did a few minutes
4 ago, that the only way you get to input the necessary
5 deductions to enable clearing and settlements to work is
6 by entering into a bilateral you cannot have
7 a transaction without clearing and settlement and you
8 cannot have clearing and settlement without a bilateral.
9 So chronologically it runs bilateral transaction,
10 clearing and settlement, does it not?

11 MS TOLANEY: One would assume, yes, I am just positing --
12 I thought your note was positing a different scenario.

13 THE PRESIDENT: No, I was positing that scenario and bear in
14 mind, Ms Tolaney, we are not really talking about
15 evidence here, we are talking about how your
16 counterfactual works.

17 MS TOLANEY: Exactly.

18 THE PRESIDENT: It is obviously going to be informed by the
19 realities of the market but what we are talking about is
20 how this would work, one would I am sure have
21 problematic cases where something slips through the net.

22 MS TOLANEY: Exactly, that is what I was --

23 THE PRESIDENT: But we are not really interested in those.
24 We are interested in how this would work according to
25 your thinking.

1 MS TOLANEY: It is not just my thinking, it is the evidence
2 as well, that Mr Willaert and Ms Devine gave clear
3 evidence that issuers and acquirers were likely to enter
4 into a bilateral agreement before a transaction
5 occurred.

6 THE PRESIDENT: Right, okay.

7 MS TOLANEY: We give those references at paragraphs 71(2) of
8 the roadmap. In particular, Ms Devine made it clear
9 that Mastercard could have given issuers and acquirers
10 a period of time to enter agreements to take place and
11 we also -- if you remember Mr Willaert was asked
12 questions on the basis that would you not have to have
13 you know an agreement per transaction, I do not know if
14 you remember that cross-examination and in
15 re-examination, he was shown the standard form template
16 which showed that actually it was not a question of
17 having to make a bilateral agreement per transaction,
18 you could have a standard form between issuer and
19 acquirer and he was also referring to that.

20 THE PRESIDENT: Yes, well, I mean again let me be clear how
21 I am seeing it and those who say I have it wrong,
22 Mr Beal or yourself or indeed Mr Kennelly if he has
23 anything to say on this can correct me, but my
24 understanding is that these bilaterals would first of
25 all be agreed in advance; and secondly not be quite as

1 simple as one might think because we know we have got
2 a huge range of potential interchange fee rates that if
3 they were translated over from the MIFs would result in
4 a bilateral that was quite complex but you do not need
5 to have that complexity, you might say we are going to
6 have a flat interchange fee that would be subject to the
7 IFR, a rate that is indifferent as to the nature of the
8 card, be it corporate or private or as to the nature of
9 the transaction, be it domestic or cross-border.

10 I mean, that is something which is free for negotiation,
11 I take it.

12 MS TOLANEY: Well, that is right, but in fact the evidence
13 was I think before the Tribunal that because of the IFR,
14 it narrowed -- the position was quite simple because it
15 narrowed the range of possibilities and Dr Niels was
16 saying, his evidence was at {Day15/108}, that in
17 domestic schemes the problem becomes a lot more
18 tractable and he was saying:

19 "The point that with the IFR the dynamic changes
20 providing a clear focal point for negotiation and the
21 IFR limiting the range over which you can even negotiate
22 to 0 to 0.3, which is a much narrower range than what we
23 had before and then the competitive incentives on
24 issuers. In my mind those are the reasons why it is
25 practical to have the bilaterals in that situation post

1 IFR."

2 So his evidence was bilaterals negotiations would
3 actually pretty swiftly result in agreement post IFR
4 because the range of negotiation was actually limited
5 and the caps provided the target and an acceptable
6 range.

7 THE PRESIDENT: But again just so that I understand how this
8 works. Subject to the IFR, there is no reason why you
9 cannot have any amount of complexity that Mr Cook and
10 I choose to incorporate in our bilateral as to what is
11 or what is not charged by reference to different types
12 of transaction?

13 MS TOLANEY: I think that is right because it would be
14 a free negotiation.

15 THE PRESIDENT: Right.

16 MS TOLANEY: But my point is, which was what the experts
17 were saying, that because the IFR has the caps, it is
18 likely that the range of negotiation in practice would
19 be very narrow.

20 THE PRESIDENT: Okay, that is fine.

21 PROFESSOR WATERSON: On that point, can I just ask, firstly,
22 would cross-border acquirers have to negotiate as well
23 with the issuers?

24 MS TOLANEY: So one of the points that my learned friend
25 takes is that an acquirer would have to reach

1 a bilateral agreement with all issuers present in the
2 EEA, that is a point he makes at 77 of his aide memoire
3 and what he says is that there are probably 3,000 or
4 more issuers. Now, that is a figure plucked completely
5 from the air and there is no evidence.

6 MR BEAL: I am sorry to rise, I did get that figure wrong.
7 It is 8,000 and it is in the Mastercard statement of
8 objections.

9 MS TOLANEY: But that is worldwide.

10 THE PRESIDENT: Okay.

11 MS TOLANEY: So it is not an accurate figure for this
12 purpose.

13 THE PRESIDENT: Well, look --

14 MS TOLANEY: But what I was going to say in answer to that
15 point and the Professor was that the focus of this trial
16 is the UK and Irish market which means that we are
17 concerned with transactions in the UK and Ireland and
18 not the whole of the EEA.

19 Now, insofar as my learned friend is suggesting that
20 all EEA issuers and acquirers would need to have
21 bilateral agreements in place in the bilaterals
22 counterfactual, we have to put that in context. We know
23 the vast majority of the transactions in the UK are
24 domestic transactions, and the figures are given in
25 Mr Holt's first report at {RC-H4/3/105}, figure 5.1.

1 For intra-EEA transactions the degree of concentration
2 on the acquiring market still limits the number of
3 agreements that would be needed and --

4 THE PRESIDENT: Ms Tolaney, I am so sorry to interrupt, but
5 why are you making this point? I mean, is your better
6 point, or at least logically anterior point that I,
7 an acquirer, can choose with whom I have a bilateral
8 agreement? I mean, let us -- I am sorry, Mr Cook, let
9 us assume we have ten Mr Cooks, the UK issuing bank
10 market, or we can assume 8,000 Mr Cooks, the worldwide
11 issuing market.

12 But there we are, there is one of me, and there is
13 8,000 issuing banks. I do not have to contract with all
14 8,000 or all 10, do I?

15 MS TOLANEY: No.

16 THE PRESIDENT: Right, I can choose to contract with one?

17 MS TOLANEY: Yes.

18 THE PRESIDENT: Or two?

19 MS TOLANEY: You can.

20 THE PRESIDENT: Right.

21 MS TOLANEY: You are right to say that is an anterior point,
22 but one of the points I was also making is even if one
23 took the view that you wanted a system that operated and
24 included everybody, my point is that (a) it is not so
25 much of an issue in this case because most of the

1 transactions are UK; and, secondly, that which is
2 I think your point, bilateral agreements do not have to
3 be terribly complex and it is unlikely that anybody with
4 these sorts of sums would not be able to reach
5 an agreement if they wanted to.

6 THE PRESIDENT: Okay. But you see I think Mr Beal's point
7 -- and he will I am sure correct me in reply if I am
8 wrong -- is that in order for the system to work you
9 actually do have to have each acquirer entering into
10 a bilateral with each issuer and if that is the
11 position, then one is looking remarkably much closer to
12 a kind of collusive arrangement than a true bilateral.

13 So I am attaching considerable importance to your
14 answer that I, a single acquirer, am able to say I am
15 going to contract with that issuing bank but no one
16 else; have I got that right?

17 MS TOLANEY: Well, I think that the Honour All Issuers Rule
18 would prevent that approach.

19 THE PRESIDENT: Ah, right. So what are you saying, then?

20 MS TOLANEY: We are saying that the vast majority of the
21 transactions --

22 THE PRESIDENT: No, I mean what you are saying, I think, is
23 that the Honour All Issuer Rule which would be a scheme
24 rule; am I right?

25 MS TOLANEY: That is right.

1 THE PRESIDENT: That that would oblige me, a single
2 acquirer, to accept a card even if it was presented by
3 a cardholder whose issuing bank I was not in contractual
4 relations with? Is that right?

5 MS TOLANEY: Yes.

6 THE PRESIDENT: I see. So how does that work given that we
7 have agreed that the only way you can have settlement
8 and clearance is if there is a bilateral and
9 ex hypothesi there would not be?

10 MS TOLANEY: Because the reality of the situation, sir,
11 is -- that is what I am trying to work through.

12 THE PRESIDENT: Right.

13 MS TOLANEY: Is that everybody would want to be able to have
14 the relationship and the transactions and so -- and
15 there are only -- that is why the figures are important.

16 THE PRESIDENT: Okay.

17 MS TOLANEY: Because the position is that there are not very
18 many domestically, as I have said to you, and the
19 reality is that they would all wish to have a piece of
20 the action and it would be quite straightforward to do
21 so and the idea that because everybody makes their own
22 agreements and you have still got the point about what
23 terms, that there is some form of collective agreement
24 does not work, and my learned friend and I need to
25 really address that, cannot even identify what the

1 collective agreement is because there is not one.

2 Really he has to fall back on the point that: oh, this
3 is terribly impractical, and that is why I am honing in
4 on that because it is not.

5 THE PRESIDENT: Sure, but just to be clear. If I, a single
6 acquirer, sweep up most transactions by volume by
7 entering into agreements with eight out of ten Mr Cooks
8 but I leave two on one side, because we just have not
9 done a deal, those transactions -- let us suppose one
10 has a cardholder coming into my shop or rather
11 a merchant shop, contracting with the acquirer in
12 circumstances where there is no bilateral between that
13 acquirer and that issuer, what happens to the
14 transaction, how does it unspool? We have a situation
15 where I am 80, 90% covered, 99% covered, but how does it
16 work in the case of the transaction where there is no
17 bilateral? What happens?

18 MS TOLANEY: That is where the IFR guarantees the levels
19 that have to be settled.

20 THE PRESIDENT: But why is there any deduction permitted at
21 all?

22 MS TOLANEY: Because if the cardholder has presented the
23 card to the merchant and it is authorised.

24 THE PRESIDENT: Yes.

25 MS TOLANEY: The processes of clearing and settlement will

1 follow but the IFR guarantees the levels of deductions.

2 THE PRESIDENT: Yes, but I have two questions there. First
3 of all, how does one get into on clearing without having
4 agreed the deduction? Are you saying actually the IFR
5 is a default even absent a bilateral agreement?

6 MS TOLANEY: De facto yes, which is why --

7 THE PRESIDENT: De jure what is the position? De facto --
8 I mean, the contracts and clearers are going to require
9 a degree of specificity. They are not going to say:
10 well, we do not know the answer. They will want
11 an answer. So what do they plug into their systems by
12 way of deduction when there is no bilateral specifying
13 what the deduction should be?

14 MS TOLANEY: Well, what is obliged by law.

15 THE PRESIDENT: Why is it not nil?

16 MS TOLANEY: Because the IFR has set the levels of the caps.

17 THE PRESIDENT: No, the IFR has set the level of the cap but
18 it does not mean to say that it has to be at the cap.

19 Why is it not nil?

20 MS TOLANEY: I think what we understand is the IFR, we can
21 get a better --

22 THE PRESIDENT: Because the IFR is setting a ceiling, it is
23 not setting a floor, as I understand it.

24 MS TOLANEY: Well, it is setting the maximum deduction, you
25 are right.

1 THE PRESIDENT: What it is doing is it is constraining the
2 rapacious Mr Cook from extracting more than what the IFR
3 allows. We discussed earlier that the bilateral could
4 say anything below the IFR and indeed in the case of the
5 spectacularly ill-advised Mr Cook it could have the
6 payment go the other way. All of that would have to be
7 sorted out through the netting off and clearing systems
8 that we are talking about. But you would need to have
9 the agreement and that I understand.

10 MS TOLANEY: But that is --

11 THE PRESIDENT: My concern is what happens when you do not
12 have an agreement, even if you try to cover most of the
13 market off?

14 MS TOLANEY: I think that is why I returned to the fact the
15 evidence before the Tribunal is there would be
16 an agreement so you are talking about very limited
17 cases.

18 THE PRESIDENT: Okay.

19 MS TOLANEY: Very limited, if any.

20 Then the second point is one would assume in those
21 cases they would be sorted out because the issuer and
22 acquiring market would not just be left and not dealing
23 with those transactions and the IFR would provide the
24 maximum or the ceiling levels. So it is quite clear
25 where it would come out.

1 But I think one has to go, I mean, obviously we are
2 talking about hypotheticals here at the moment. But
3 that is what we are saying is that the evidence from
4 Mastercard's witnesses is two-fold which is (1) that
5 Mastercard would have adopted the bilateral scheme and
6 (2) that agreements would have been entered into in
7 advance because that is the way that the sophisticated
8 parties would have managed this between them.

9 I think the working assumption would be that
10 everybody would want to have organised themselves in
11 advance, but certainly would not renege on transactions
12 if you like or allow them to be left in abeyance, if in
13 the very unlikely scenario you are positing, it would be
14 resolved and because of -- and I think the reason why
15 the IFR caps are so significant, and you may be right to
16 pull me up on the de jure/de facto, but the reason why
17 they are so significant is because they give so little
18 room for negotiation that it is not, without them you
19 could see that you could have a stand-off, but because
20 we are talking about such small room for negotiation,
21 the working market expectation is that is where it would
22 come out.

23 THE PRESIDENT: Okay. That has been very helpful.

24 One last question and I think I am done then: what
25 about those cases where the IFR does not bite? How are

1 they treated in your bilateral universe?

2 MS TOLANEY: Are you talking about commercial cards?

3 THE PRESIDENT: I am talking about anything which is outside

4 the scope of the IFR.

5 MS TOLANEY: But that is not part of our bilateral

6 counterfactual.

7 THE PRESIDENT: Okay, so your bilaterals case only bites --

8 MS TOLANEY: Yes.

9 THE PRESIDENT: -- where there is an IFR.

10 MS TOLANEY: Yes, and that is why we were saying that there

11 is a difference between what was advanced in the

12 *Sainsbury's* case where the IFR was not in force and was

13 no part of it and therefore it was not pursued for that

14 reason, whereas --

15 THE PRESIDENT: It was not for that reason, I do not think,

16 but was argued against --

17 MS TOLANEY: I was there not, but I had understood that it

18 certainly was not -- let me put it a different way, it

19 was not viable because there was no IFR.

20 THE PRESIDENT: It was said it was not viable because of the

21 number of transactions.

22 MS TOLANEY: Exactly, exactly. Whereas now there is

23 a difference because first of all the evidence is that

24 there is actually a limit on how many agreements we are

25 talking about; and secondly, you have got the IFR which

1 there is the evidence that it limits the scope of
2 fall-out negotiation complexity. Then, thirdly, which
3 is the biggest point and I have not yet gone to it,
4 which is actually in my submissions the relevant
5 structure of this is as follows: the question for
6 the Tribunal first, the anterior question -- and
7 I appreciate to be satisfied it is a real
8 counterfactual, the first question is: what would
9 Mastercard have done?

10 Then you do not actually necessarily even get into
11 these questions of practicalities, assuming you are
12 satisfied that it is -- it could be worked through.

13 THE PRESIDENT: Well, except it is not: what would
14 Mastercard have done? It is: what would the acquirers
15 and the issuers bilaterally have done assuming
16 Mastercard amended its rules to abrogate the MIF and
17 allow the parties to float freely in agreeing or not
18 agreeing a bilateral interchange fee. So it is
19 a stepping back from Mastercard and a stepping forward
20 in bilateral negotiations of individual acquirers
21 agreeing terms with individual issuers. That is what we
22 are talking about, is it not?

23 MS TOLANEY: I understand that, but --

24 THE PRESIDENT: But if I have it wrong, do tell me.

25 MS TOLANEY: No, I understand that is in terms of your

1 analysing the operation of the bilaterals counterfactual
2 when you say that.

3 THE PRESIDENT: Yes.

4 MS TOLANEY: But what I was going back to was the prior
5 point which is on the evidence, what counterfactual is
6 the likely counterfactual?

7 THE PRESIDENT: Right.

8 MS TOLANEY: That is the first point. Because my learned
9 friend actually expressly put to the witnesses and
10 seemed to confirm that they relied on Mastercard's
11 witnesses confirming that Mastercard would have adopted
12 the bilaterals counterfactual, and indeed the claimants
13 expressly asked the Tribunal to find that Mastercard
14 would have adopted the bilaterals counterfactual because
15 of its expectation that it would produce positive
16 interchange fees.

17 Now, the reason I am emphasising that and
18 I understand there is a second stage that the Tribunal
19 have to be satisfied because I could not suggest to you
20 that there was a counterfactual that would be
21 a nonsense, but it follows that once the Mastercard
22 would have adopted the bilaterals counterfactual, which
23 is what its witnesses all said, then it must follow that
24 the other complaints about the --

25 THE PRESIDENT: Sorry, when you say "would have adopted",

1 you mean had Mastercard pushed away from the MIF?

2 MS TOLANEY: So instead of settlement at par, the evidence
3 was if the choice was settlement at par or some other,
4 what is the correct counterfactual: is the correct
5 counterfactual settlement at par, which is what the
6 claimants say it is; or is it, the UIFM, the bilaterals
7 or the scheme fee counterfactual? We say that the
8 witnesses' evidence is it would have been the bilaterals
9 counterfactual or the UIFM, it would not have been
10 settlement at par.

11 THE PRESIDENT: Well, yes, I understand that. But the
12 moment you say what Mastercard adopted --

13 MS TOLANEY: Yes.

14 THE PRESIDENT: -- as the outcome, you are into collusion
15 because adoption is the creation of a scheme which
16 people sign up to and that is the very reverse of what
17 you are saying, as I understand it.

18 MS TOLANEY: Yes, I am not using adopted in that sense, I am
19 using it colloquially, they would have preferred.

20 THE PRESIDENT: I think you are using it -- if I may say
21 so -- very dangerously.

22 MS TOLANEY: I will not do it again.

23 THE PRESIDENT: Because what you are saying I think is this:
24 there is no question of adoption by Mastercard. There
25 is a decision by Mastercard to abrogate the

1 multi-lateral interchange fee and to insert a right in
2 each individual issuer and each individual acquirer to
3 do a deal. The likelihood is that that deal has got to
4 be concluded before you can clear or settle, as we have
5 discussed.

6 MS TOLANEY: Issuers and acquirers would want to do that,
7 that is the evidence.

8 THE PRESIDENT: Well, that is outside Mastercard's control.

9 MS TOLANEY: Yes.

10 THE PRESIDENT: That is why I do not like the word
11 "adoption" because what you are saying is if Mastercard
12 did that, which I accept is in Mastercard's control,
13 then the following consequences will unspool but
14 according to the individual choices of the market
15 players other than Mastercard.

16 MS TOLANEY: Yes. Well, I think you are exactly right and
17 what I was positing was that is the correct
18 counterfactual because Mastercard would have abrogated
19 in that way.

20 THE PRESIDENT: Yes.

21 MS TOLANEY: Rather than have gone for settlement at par.

22 What I was also trying to say inelegantly is in
23 a sense it appears to be common ground because it seemed
24 to be a plank of the claimants' case that Mastercard
25 would have abrogated rather than anything else in order

1 to positively generate fees in some way.

2 MR TIDSWELL: I think Mr Beal was putting that to you as
3 part of his collusion theory, was he not? I do not
4 think he is saying as part of his case that that is the
5 right counterfactual and I think he says it is not only
6 for that reason but because it is not workable. But
7 I think he was putting that because he was saying if
8 that is what you are planning to do then you are doing
9 it because you are going to end up with exactly the same
10 outcome and that is part of his argument about
11 collusion, as I understand it.

12 So I just do not mean to --

13 MS TOLANEY: Pour cold water on my --

14 MR TIDSWELL: Pour cold water on it, you are entirely right
15 that he did put that proposition but I think that is the
16 reason why he was doing it.

17 MS TOLANEY: Let me put it therefore on that basis, that the
18 Tribunal following Mr Beal's questioning can be
19 absolutely satisfied that all of the witnesses and
20 experts confirmed that they would have regarded as
21 commercially preferable to abrogate than to be faced
22 with settlement at par, so the consistent evidence
23 before the Tribunal, because perhaps Mr Beal was trying
24 to establish a different point but the consistent
25 evidence is that is what was likely to have happened and

1 the Tribunal does not have any other evidence suggesting
2 that is not what is likely to have happened.

3 In which case, then that is the correct
4 counterfactual.

5 MR TIDSWELL: Well --

6 MS TOLANEY: Subject to his collusion point.

7 MR TIDSWELL: -- I am not sure that is right, is it, because
8 you jumped over the bit, it is not just about being
9 right, it has got to be realistic. So the workability
10 point is all about realistic and I think that is the
11 exchange you have been having with the President.

12 MS TOLANEY: But on the realistic point, sticking with the
13 theme of the evidence, I may be corrected on this but
14 I do not think the reality -- the realistic aspects of
15 this were significantly challenged and the evidence came
16 out that, from Mr Willaert for example, that it was
17 realistic.

18 MR TIDSWELL: That may be so and I do not know whether
19 Mr Beal would accept it was unchallenged, it was, but
20 I think the dialogue we have been having is not so much
21 about the evidence, it is about the intellectual
22 integrity of the counterfactual.

23 MS TOLANEY: I accept that and that is why I said, but
24 taking it in logical stages, if I may, the first
25 question is what is the evidence before this Tribunal.

1 MR TIDSWELL: Well, I am sorry to disagree with you but
2 actually I think the problem we are having with this is
3 citing the evidence is not very helpful because if we do
4 not understand exactly what the counterfactual is, then
5 the evidence does not really inform us very much as to
6 whether or not it is meeting -- I think it needs to be
7 the other way round, which is why I think the President
8 has been pressing you a bit.

9 MS TOLANEY: Yes.

10 MR TIDSWELL: We have been into that workability, have we
11 not?

12 MS TOLANEY: Well, if I put it then in the order that you
13 are positing.

14 The first point is that I think I have shown you the
15 basis on which it would operate and that is as the
16 President described, it is the taking away Mastercard's
17 imposition of a fee and allowing unilateral negotiation.
18 The next -- sorry, bilateral negotiation between pairs
19 of issuers and acquirers. The next question then is: is
20 that viable and I was referring to the evidence to show
21 you that given the limited numbers actually involved and
22 the amount of money involved and therefore the appetite,
23 it is viable, and it is viable (a) because of the
24 concentration in the market and therefore the
25 practicality but (b) because when you are talking about

1 sums of about 10 billion, questions of inconvenience and
2 how you are going to sort it out, the arrangement,
3 whilst initially might have some aggravation would not
4 be -- render this non-viable.

5 MR TIDSWELL: Yes, and that is right but I think that the
6 helpful bit of the dialogue we have had today is it
7 takes us beyond that into the question of what level of
8 contracting do you need in order for it to be realistic
9 and then you have had the discussion about the Honour
10 All Cards Rule and the need therefore for the issuer to
11 put themselves in the position they do have a contract,
12 what happens if they do not. I am still not entirely
13 sure where that got to in relation to EEA issuers
14 because it seems to me -- I do not know whether we got
15 the answer on that but if the principle is that in
16 relation to domestic coverage is pretty important
17 because of the Honour All Cards Rule and the
18 consequences if not, because I think of the slight
19 disagreement on the significance of the IFR, what is the
20 position in the EEA? I am not sure whether you accept
21 that that is the same position or whether you are saying
22 it is something different?

23 MS TOLANEY: I think we are saying two things, which is that
24 for intra-EEA transactions the high degree of
25 concentration on the acquiring market still limits the

1 agreements that would be needed. If the IFR applies,
2 domestic or not, then we say that would be relevant
3 because the issuer cannot withhold more than 99.7% --

4 MR TIDSWELL: Sorry to interrupt you. We have had that
5 argument --

6 MS TOLANEY: Yes.

7 MR TIDSWELL: -- and I think there is some scepticism about
8 that. We can follow that further if it is helpful but
9 I am really just asking you as a point of principle.

10 Whatever the analysis is in the UK, do you accept it
11 is the same with the intra-EEA or are you saying
12 something different?

13 MS TOLANEY: I do not think I am saying something different.

14 What I am saying is ultimately, that with a degree
15 of realism it is not likely that EEA issuing banks are
16 going to fail to put in place an agreement.

17 MR TIDSWELL: Okay, thank you.

18 MS TOLANEY: So I do not accept that it would be hugely
19 complex and I do not accept it would be of the level of
20 numbers that has been posited and there would be
21 correspondent banks involved if necessary.

22 So the fact is that we think for all these reasons
23 it is a perfectly realistic and workable bilaterals
24 counterfactual.

25 The third question if I am putting it in that order

1 is, well, is there evidence before the Tribunal that
2 Mastercard would have abrogated in this way and the
3 answer to that is yes because the witnesses and experts
4 said so.

5 MR TIDSWELL: We understand that, yes.

6 MS TOLANEY: So you can be satisfied about that.

7 Then the next point is: is it collusive?

8 MR TIDSWELL: Yes.

9 MS TOLANEY: To which the answer is absolutely not because
10 the essence of it is the individual negotiation and if
11 there is constraint on the room for negotiation that
12 comes from the IFR as a matter of law and not because
13 there has been a collusive agreement.

14 MR TIDSWELL: If I just explore that with you a little bit.
15 Can we go back a little bit just to the current position
16 and the current settlement rule at 8.2 because I think
17 you have said a couple of times that it is designed to
18 provide for the payment of the MIF and I actually wonder
19 whether there is support of that.

20 As I understand it, is it not designed to provide
21 contractual certainty, in fact the very contractual
22 certainty we have been debating between merchants,
23 acquirers and issuers so that everybody knows that the
24 system is going to work, so in order to have that you
25 have to have somewhere something that says the

1 transaction that the cardholder has initiated in the
2 merchants will be settled -- forget about the
3 interchange fee for a minute -- but the settlement rule
4 in 8.2 just starts with that premise, that we all know
5 this it is going to be settled. Is that fair, do you
6 think?

7 MS TOLANEY: Well, I think that to the extent that you are
8 posing would the bilaterals counterfactual which does
9 not have the benefit of that rule will therefore be --

10 MR TIDSWELL: Can I come to that because I just want to make
11 sure I have got the logical chain right because we are
12 definitely going to come to that. But just as it stands
13 now before you get any agreement bilaterals, I read
14 8.2 --

15 MS TOLANEY: Sorry, this is 8.2 of the bilaterals note.

16 MR TIDSWELL: No, yes of the rules. So paragraph 8 of the
17 bilaterals note and 8.2 of the rules.

18 MS TOLANEY: Yes.

19 MR TIDSWELL: I read that as being primarily there to make
20 sure that there is in fact a settlement. Forget about
21 the interchange fee, that is obviously part of it, but
22 for present purposes the most important thing about
23 this, it seems to me, is that it provides the
24 contractual certainty that the merchant knows it is
25 going to get paid and the acquirer knows it is going to

1 be able to pay the merchant, so therefore the merchant
2 is happy to accept the card.

3 MS TOLANEY: I think that is right, but it is in the context
4 obviously of the scheme having set the fee and the
5 amount so there can be no negotiation.

6 MR TIDSWELL: Yes, that is dealt with, is it not,
7 separately in --

8 MS TOLANEY: Yes, but it is premised on the idea that it
9 would not be part of the bilateral negotiation between
10 issuer and acquirer --

11 MR TIDSWELL: Well, sorry --

12 MS TOLANEY: -- because there would not be a bilateral --

13 MR TIDSWELL: Sorry, you are just jumping ahead a bit. Just
14 to take your point 8.3 does deal with the interchange
15 fee, does it not?

16 MS TOLANEY: Yes.

17 MR TIDSWELL: So in a way I would say it is the other way
18 round; that you start with the idea that you are going
19 to have a settlement and then logically you want to make
20 sure the settlement catches the interchange fee and that
21 is what 8.3 does.

22 MS TOLANEY: Yes, but the net effect of this is that the
23 scheme sets the fee as well as any other fees --

24 MR TIDSWELL: Yes, of course it does.

25 MS TOLANEY: -- and imposes it and therefore there is no

1 question of the issuer and the acquirer themselves
2 negotiating any aspect.

3 MR TIDSWELL: No, that is right. Absolutely. So coming to
4 the bilaterals and the counterfactual essentially the
5 way this works, as I understand it, with the amendment
6 is that when you look over at 16, what now happens --
7 and I appreciate this is just to participate in the
8 interchange system so obviously there is a group of
9 acquirers and issuers who might not fall into this --
10 but broadly speaking in order to get into the new 8.2B,
11 you have to have a bilateral agreement and so the
12 bilateral agreement is the fact that -- it is membership
13 of the club to get in or rather perhaps that is the
14 wrong way to put it because I think they are probably
15 already members of the scheme. But it is a ticket to
16 participate.

17 MS TOLANEY: That is if the customers choose to clear and
18 settle through the Mastercard system.

19 MR TIDSWELL: That is right, and it talks in there about the
20 customer being the issuer in this case, I think, is that
21 right? The issuer, it is also the customer is required
22 to net settle.

23 MS TOLANEY: It is issuer or acquirer.

24 MR TIDSWELL: It could be the acquirer?

25 MS TOLANEY: Yes.

1 MR TIDSWELL: I suppose it could be, yes, I see. In
2 accordance with the terms of this bilateral agreement.
3 So it is anticipating there that the settlement
4 obligation is now going to sit in the bilateral
5 agreement and so you would expect there to be in these
6 bilateral agreements something that says, something akin
7 to what was in 8.2 saying: you must settle this
8 transaction in accordance with the scheme's standards.
9 But the settlement provision sits in the bilateral now
10 that is the whole point, is it not?

11 MS TOLANEY: Yes, and if you look at paragraph 17 over the
12 page, that, I think, sets out the parameters of this
13 that the rule makes clear that customers can still
14 choose to use Mastercard's system to authorise
15 transactions and in relation to clearing the rule makes
16 clear that Mastercard will only clear if there is
17 a bilateral agreement in place because then otherwise
18 Mastercard would not know what sums are due.

19 That does not require the issuer/acquirer to enter
20 into a bilateral agreement and obviously they are free
21 to clear and settle directly. All this rule is doing is
22 offering the benefit of Mastercard's services if they
23 wish to make use of them on terms that there must be
24 an agreement in place.

25 MR TIDSWELL: So it is mandatory. If you decide to use it

1 you must have terms in place that included that
2 settlement provision?

3 MS TOLANEY: Yes, but it is not insisting on a bilateral.
4 So it is not mandatory to that extent.

5 MR TIDSWELL: No, I understand that. But if you have got
6 one and you want to use them, then you have to have
7 a settlement provision?

8 MS TOLANEY: Yes.

9 MR TIDSWELL: That again seemed to me to be because you are
10 replicating in the bilateral the certainty of contract,
11 the legal certainty that we saw in the previous rule.
12 So the point of that is that now everybody again knows
13 that they are going to get paid as they should be. Is
14 that fair, do you think?

15 MS TOLANEY: Yes, I think that is fair. But I think one of
16 the things I would say is that I do not think there is
17 any fear of this being too uncertain on the evidence
18 because the evidence of Mr Willaert and Ms Devine was
19 that the bilaterals counterfactual was desirable as
20 compared to settlement at par and there was no relevant
21 challenge to that evidence and they gave clear and
22 unchallenged evidence that it was very likely that
23 bilaterals would in fact be reached.

24 MR TIDSWELL: Well, I am now not really in the uncertainty
25 world. That is not really where I am going with this.

1 MS TOLANEY: You are in the operation of it.

2 MR TIDSWELL: Well, I am in the collusion bit.

3 MS TOLANEY: Right.

4 MR TIDSWELL: I think this is Mr Beal's case about collusion
5 and I am really trying to just make sure I understand.

6 It seems to me the settlement provision is the bit
7 that really matters here and it matters because of legal
8 certainty and also of course because the MIF gets paid,
9 but it is the central bit of the contractual arrangement
10 that is the bottom of the A.

11 It is very easy for us all to sit here and think
12 about the MIF being the important thing. But if you are
13 the merchant, you are actually bothered about getting
14 paid and so presumably to make it all work you have to
15 have a contractual obligation that delivers the money to
16 the merchant.

17 MS TOLANEY: Well, there cannot be any collusion in saying
18 that if you have freely negotiated an agreement you can
19 use our services.

20 MR TIDSWELL: No, I am not saying that.

21 MS TOLANEY: That is why I was saying I do not think the
22 fact that the rule is providing that settlement can only
23 be reached through Mastercard, if there is an agreement
24 in place, is collusive.

25 MR TIDSWELL: So when you talk about freely negotiated if

1 I am an acquirer, do I have any choice but to enter into
2 a bilateral, is that not a practicality? I have to, do
3 I not?

4 MS TOLANEY: Yes, but the terms of it are entirely up to
5 you. The reality is that the caps are presenting limits
6 on it, but, as the President said, the point is that you
7 get to make your own terms and different issuers and
8 acquirers may reach different terms, so there is no
9 collusion in that.

10 MR TIDSWELL: Well, you say that you are free to negotiate.
11 You are not, are you, because everybody knows the
12 outcome is going to be the interchange fee --

13 MS TOLANEY: But that is not because Mastercard is imposing
14 something on all of the issuers and acquirers; that is
15 as a matter of law.

16 MR TIDSWELL: Well, I have not put that to you. I have just
17 put to you, it is right, is it not -- I mean, I think if
18 you step through this I am an acquirer, I have got no
19 choice but to enter into a bilateral otherwise I go out
20 of business because of the Honour All Cards Rule and
21 because no one is going to want to contract with me.

22 If I am going to enter into one the outcome is
23 preordained from the start because I know I am going to
24 end up paying at the cap because no issuers are going to
25 want to agree a lower figure.

1 So I am struggling a little bit to see where the
2 free negotiation is in all this. In fact actually the
3 acquirer has no choice effectively but to accept the
4 cap, has it?

5 MS TOLANEY: Well, but that is not a collusive agreement.

6 MR TIDSWELL: Well, I am not asking you to answer that
7 question. I am asking you whether you agree or not with
8 the proposition I put to you.

9 MS TOLANEY: When you say no choice, I think ultimately this
10 is -- every issuer and acquirer has commercial freedom
11 to choose what they wish to do.

12 If I can put it this way, if they wish to play in
13 the market they are going to have to play on terms that
14 work within that market. They can choose not to be in
15 the market at all. If they want to participate, you are
16 right, they have to enter into a series of bilateral
17 agreements, they have to negotiate the terms of those
18 agreements. The presence of the IFR means that issuers
19 do not have unlimited bargaining power because of the
20 caps, which means that the reality is the scope for
21 negotiation between the issuer and acquirer is limited.

22 MR TIDSWELL: The theoretical scope. The practical scope is
23 not limited at all, is it? It is just one number. It
24 is the IFR cap, is it not? That is what I understood
25 all the witnesses to say.

1 MS TOLANEY: Yes. They -- I think the outcome is likely to
2 be at the level of the caps.

3 MR TIDSWELL: More than just likely. It is overwhelmingly
4 likely, is it not?

5 MS TOLANEY: But that is the operation of the caps.

6 MR TIDSWELL: I appreciate that, but I just wanted to get
7 clear on the -- (Overspeaking)

8 MS TOLANEY: That is why in a way I appreciate I cannot have
9 my cake and eat it, that is why in a way the system
10 works because there is not so much scope for the issuers
11 holding up the system by demanding more and more and
12 more.

13 MR TIDSWELL: No, I understand that. I understand that.
14 Where we get to, so the issuer has to enter into the
15 bilateral agreement as a matter of practicality. It is
16 almost certain that that is going to end up with an
17 interchange fee at the cap and the expectation is that
18 there is going to be in the bilateral contract the
19 settlement provision that was previously in 8.2 and 8.3
20 which will require settlement and the deduction, the
21 interchange fee and that is all undertaken by
22 institutions that are members of the scheme throughout
23 the process.

24 MS TOLANEY: I think it is right, as I say, that it would
25 come out around the caps, that is our case. But I do

1 not accept that takes away the contractual freedom
2 between the issuer and the acquirer.

3 MR TIDSWELL: Other than not contracting at all, which is
4 commercially unviable.

5 MS TOLANEY: Or not participating.

6 MR TIDSWELL: Fine, but what is the contractual freedom
7 apart from that? If I am Elavon and I have this huge
8 acquiring business, am I now just going to exit the
9 market? I am not going to do that, am I? I am clearly
10 going to do exactly what we have just stepped through
11 and I have got actually no choice whatsoever about that
12 and the outcome is completely preordained. So I do not
13 understand why you talked about freely negotiated and
14 individual choices, I do not understand what they are.

15 MS TOLANEY: Well, I think the individual choices are to
16 participate. The individual choice -- well, it may be
17 that an issuer and acquirer reach a different bargain,
18 but we say that it is likely that it would come out in
19 the level --

20 MR TIDSWELL: Less than the cap. But if that is the case,
21 then I think you then have a problem, do you not, that
22 you have got a restriction of competition problem
23 because your counterfactual is more competitive than
24 your factual? So I think as I understood it your case
25 must be premised on the fact.

1 MS TOLANEY: We say it is likely the caps but if you are
2 talking about, you know, an individual having absolutely
3 no choice, we cannot guarantee that but we say that is
4 the likely outcome and here --

5 MR TIDSWELL: That is turning it on its head a bit, if I may
6 say so, because you have been telling us this freedom of
7 choice and negotiation is going to take place and I do
8 not think there is. I cannot see what it is.

9 MS TOLANEY: Well, if -- I think what we would say is that
10 in a sense that is and maybe it is my fault for using
11 that expression, but the question for this Tribunal is:
12 is there a restriction of competition and one of the
13 aspects obviously of that is: is the counterfactual
14 lawful or is it collusive? All we are answering here in
15 this particular debate is that there is no collusion if
16 Mastercard is not itself setting the scheme and if it is
17 leaving it to the issuer and the acquirer.

18 Now, the fact that as a matter of law, it is likely
19 as to where it would come out is not because of -- and
20 this was why the President was pulling me up on the word
21 "adopted", is not because of Mastercard's actions, it is
22 because of an external factor --

23 MR TIDSWELL: If you construct something that is inevitably
24 going to end up in a particular place and you do that
25 with the agreement of the other members of the scheme,

1 why is that not collusion?

2 MS TOLANEY: Can I just show you the *Dune* Court of Appeal
3 decision?

4 THE PRESIDENT: Well, I apologise because I have a meeting
5 at a quarter to. This has been from I think all our
6 points of view a very helpful discussion and I do not
7 want to cut you short save to say we will carry on
8 tomorrow morning, because I do not think you should
9 worry about time, Ms Tolaney.

10 MS TOLANEY: Thank you.

11 THE PRESIDENT: Because we are taking up your time by trying
12 to understand what is obviously a very important part of
13 your case. So I think the battlelines are quite clearly
14 drawn in terms of the concerns that we are expressing
15 about, even with the bilateral negotiation it is so
16 constrained by other elements of what is essentially
17 a network of agreements that it is not even on your
18 hypothesis a genuine bilateral but something more akin
19 to collusion; that is I think what has been put to you?

20 MS TOLANEY: Yes, and I will certainly answer that --

21 THE PRESIDENT: Have a think.

22 MS TOLANEY: Can I just quickly answer it before we rise,
23 which is that obviously the Court of Appeal in *Dune*
24 cited the CAT decision in which the CAT held we think it
25 is clear that bilaterals counterfactual would not

1 involve any restriction of competition since under that
2 scenario the interchange fee is not determined by
3 collective arrangements.

4 THE PRESIDENT: Ms Tolaney, we will come to *Sainsbury's*,
5 but, I mean, it is old money, is it not, *Sainsbury's*?

6 MS TOLANEY: No, this is *Dune* so this is on point.

7 THE PRESIDENT: Look, we are going to call time now.

8 MS TOLANEY: Right.

9 THE PRESIDENT: We will resume tomorrow morning.

10 The other point that goes into this question which
11 is related to it is even if you have an answer to the
12 points that Mr Tidswell has been putting --

13 MS TOLANEY: Yes.

14 THE PRESIDENT: -- what is the answer to the fact that
15 certain obligations like the HACR and the Honour All
16 Schemes Rules are present in the scheme rules on your
17 case which obviously also constrain to a degree the
18 commercial freedom and manoeuvre of the acquirer and to
19 an extent the issuer?

20 MS TOLANEY: Yes.

21 THE PRESIDENT: So one does need I think to take a step back
22 and say that what one has got is a partial abrogation of
23 a rule with relocation of both the interchange fee
24 negotiation and the settlement rules into the bilateral,
25 but one is keeping an awful lot of superstructure going

1 on and the mere fact that you say: oh, but these are all
2 just bilateral agreements is not going to cut much ice
3 with a competition lawyer looking at collusion, so it is
4 much more a question of whether there is a genuine
5 independence of choice that arises rather than this is
6 in form a bilateral agreement and I think that is where
7 the assistance that you can provide us could come from.

8 But obviously you will take a view overnight and we
9 can resume tomorrow morning.

10 MS TOLANEY: Thank you, that is very helpful.

11 THE PRESIDENT: I anticipate that 10 o'clock is probably
12 best?

13 MS TOLANEY: Yes, I think that is right. Thank you very
14 much.

15 THE PRESIDENT: We are very grateful to you, Ms Tolaney.
16 Thank you very much. We will resume at 10 o'clock.

17 (4.43 pm)

18 (The hearing was adjourned until 10 o'clock,

19 Thursday, 28 March 2024)

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