IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS

TRIAL 1

A P P E A R A N C E S

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

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

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

Thursday, 28 March 2024

Closing submissions by MS TOLANEY (continued)

(10.00 am)

THE PRESIDENT: Ms Tolaney, good morning.

MS TOLANEY: Good morning.

May I start with just clearing away some of the points I said I would come back to yesterday.

THE PRESIDENT: Of course.

MS TOLANEY: Starting with Mr Tidswell asked yesterday at pages 139-140 of the transcript, Day 20, {Day20/139:1} in what circumstances is an acquirer bound by the rules of the scheme? The short answer to that is in order to acquire Mastercard transactions, a financial institution or other qualifying entity has to: first of all, apply to be a member, which is referred to as a customer of the scheme; secondly, obtain a licence for acquiring activities; and thirdly sign up to the scheme rules and standards and you can see that from the Mastercard rules in the bundle. I will just quickly show you that, {RC-J3/130/1}.

If we could go, please, to page 35, {RC-J3/130/35} you see at the top of the page, 1.1, "Eligibility to be a customer". I will come to the definitions and show you, but there are two parts: if the entity wants to be a customer under the rules then it must apply; and,

secondly, the entity cannot carry out a relevant activity until it has, first of all applied; secondly been approved as a customer; thirdly obtained the licences for the activity in question; and fourthly paid all associated fees and costs.

As I said yesterday, a would-be acquirer comes into the screening by applying to be a member and obtaining the requisite licence for the acquiring activity.

If we then go please to page 41 {RC-J3/130/41}, rule 1.6, you will see here the customer, a would-be acquirer here, agrees to comply with the provisions of the licence and with the standards and you see the reference to the use of Marks, with a capital M, so the Mastercard or Maestro brand, for example.

If you then go, please, to page 87 {RC-J3/130/87} you see rule 4.2, "The requirements for use of a Mark", and what we see at (i) is that the Mark may be used only pursuant to a licence and one of the listed uses of the mark over the page, please, {RC-J3/130/88}, (e), is:

"Signing a merchant to a merchant agreement ..."

So an acquirer cannot sign up a merchant for Mastercard acceptance without having a licence allowing it to offer Mastercard acquiring services and to use the brand in its offering to merchants.

If you then go, please, to page 99, {RC-J3/130/99},

looking briefly at the first paragraph you see that this requires the acquirer to enter into merchant agreements and the second paragraph requires the acquirer to accept all valid transactions.

So pausing there: the acquirer must first therefore apply to obtain a licence to act as such; secondly is bound by the rules; and then thirdly is required to acquire all valid transactions from the merchants that it signs up and then if we go to page 105 for rule 5.4.1, {RC-J3/130/105}, the acquirer must pay the merchant for all transactions acquired by the acquirer in accordance with the merchant agreement and the standards.

So from the merchant's perspective, the acquirer is bound under the Merchant Service Agreement to pay the merchant the transaction price less the Merchant Service Charge, but also the acquirer has an obligation to pay the merchant under the rules.

Then finally I said I would come to the definitions. So if we go to page 410, please, {RC-J3/130/410}, you see the definition of "customer" almost at the bottom of the page, essentially any entity approved for participation.

"Member" is defined at page 424, {RC-J3/130/424} essentially any entity approved to be a Mastercard

customer.

"Participation" is defined at 427, {RC-J3/130/427} and essentially participation means the right to participate in an activity and is an alternate term for membership.

"Activity" is defined on page 402, {RC-J3/130/402}, essentially the acts pursuant to the licence.

"Acquirer" is also defined at page 402 as a customer in its capacity as acquirer of the transaction.

I hope that puts everything --

MR TIDSWELL: Thank you, that is helpful, slightly curious that you have a member and a customer and participation which seem to be all pretty much the same thing, but I do not suppose anything turns on it.

MS TOLANEY: I agree, I saw that, but belt and braces, I assume.

MR TIDSWELL: At least it means when we use the words interchangeably we are not wrong.

MS TOLANEY: That is right, that is right.

Secondly, then, going back to just sweeping up from yesterday, can I just put some context down on two points from yesterday. First of all, the bilaterals counterfactual, I think I made this point but I just wanted to be clear about it, it only applies to consumer UK, Irish and potentially intra-EEA transactions

involving the UK and Ireland. Those are all transactions which are subject to the IFR caps or the specific Irish cap in the case of the Irish debit.

THE PRESIDENT: That is because you say it does not work without the IFR.

MS TOLANEY: Exactly and there is no suggestion therefore it is the correct counterfactual for commercial or inter-regional for exactly that reason, sir.

So any negotiation would be just for domestic consumer transactions.

My second point of context is that the interchange fee rates for domestic consumer transactions have been harmonised at the level of the IFR caps and the evidence for that is Mr Willaert's statement, which is {RC-F3/1/7} at paragraph 22. The important point is, because I think, sir, this came up in conversation yesterday, our discussions yesterday but again I think you are alive to this, that effectively there is a single MIF because while there are potentially multiple different categories, in practice there is a single rate, prior to the IFR there were different rates but they have all been pushed down by the caps to a single rate and that is why we say the negotiation would in practice be very simple because there is no longer scope for higher rates that existed prior to the

IFR and while there is in principle scope for differentiation, the practical outcome is likely to be a single rate.

Then may I move on to one question that was posed by the President yesterday, which was that you asked me in the course of submissions whether I accept there has to be a bilateral agreement in place between an issuer and an acquirer before a transaction between a cardholder and merchant takes place and we had various exchanges yesterday afternoon.

THE PRESIDENT: Yes.

MS TOLANEY: Having looked at the transcript I wanted to be sure that I gave you one answer as opposed to a variety. This was, I think, the particular exchange I had in mind was at page 157 of the transcript {Day20/157:1}.

Now, the starting point as we discussed yesterday is that the evidence is that it is likely that there would always be a bilateral agreement in place in advance of transactions taking place so it is very unlikely this situation would actually arise in practice and that is what the evidence shows and all the references for that are in 71(2) of our roadmap, but if there was not an agreement in place, our position, sir, is that there is no legal or practical necessity for there to be an agreement in place in advance and in the unlikely

event that an acquirer and issuer have not reached an agreement in advance of a transaction, we say that would not give rise to real difficulties and this is again because of the IFR. I am relying in particular on Articles 3(1) and 4 of the IFR which I was going to show you yesterday but did not get the chance to in the time.

So can we go to, please, {RC-Q1/14} -- I am sorry, let us start at 1 so we see the beginning of the document {RC-Q1/14/1} and then go please, to page 14. That is where "payment service provider" is defined which could mean an issuer or acquirer -- sorry, page 13, I beg your pardon. {RC-Q1/14/13} I will just show you that definition but we go on to 14.

Then if we go, please, to page 14 {RC-Q1/14/14} you see Article 3(1):

"Payment service provider shall not offer or request a per transaction interchange fee of more than ... "

Article 4, on the same page, you see that is for credit cards.

Then Article 5, over the page, please, {RC-Q1/14/15} prohibition of circumvention. So if we are in a situation where there is no bilateral agreement between the issuer and the acquirer and assuming the Honour All Cards Rule applies, and I will come on to that, the merchant will need to accept the issuer's card

and the acquirer will need to acquire the transaction.

THE PRESIDENT: Yes.

MS TOLANEY: As a result of Articles 3(1), 4 and 5 of the IFR, the issuer cannot request more than 0.2% or 0.3% as the interchange fee.

In answer to your points yesterday, sir, if the issuer were to simply refuse to settle, so to pay the acquirer nothing, that would amount to 100% interchange fee and would fall foul of the IFR.

THE PRESIDENT: Hang on though. What about the other extreme, though? Settling at par, why is that not the outcome where you do not have a bilateral?

MS TOLANEY: Well, the --

THE PRESIDENT: I can see the IFR creates a ceiling.

MS TOLANEY: Exactly, but because it is in the issuer's control, if I can put it that way, the issuer has to pay 99.8% for debit or 99.7% for credit, it cannot pay less exactly as you are saying and it is unlikely that they will choose to pay -- to pay everything, leaving no interchange fee.

THE PRESIDENT: Right. But then if that is the case, why bother concluding a bilateral at all?

MS TOLANEY: Well, as I say, the answer to this is that -- the evidence is that there will be bilaterals in place. This is, I would put it, a hypothetical situation and

all we are positing is you are right to say that there are two possible outcomes in that scenario, one is that there is no interchange fee at all and the other is that we say the interchange fee would be where the IFR cap is and we say it is more likely that -- but you are right, it could be the other extreme.

THE PRESIDENT: Right, because looking at the commercialities of this, if I were an issuing bank and I know that if, absent a bilateral, settlement will still proceed and I get what I would have got anyway, the maximum under the IFR, then why do I bother? Why waste resources negotiating? If, on the other hand, the default absent a bilateral is settlement at par, then I can see a reason for the issuing bank engaging.

MS TOLANEY: Yes, and I accept that.

THE PRESIDENT: Okay.

MS TOLANEY: But what I say is that the reality is that the acquirer is on the hook to pay the merchant, the issuer will want an interchange fee but obviously cannot get more than the cap, and we think therefore the commercial reality is that the issuer and the acquirer will reach an agreement and it is in everybody's interests to do so and you can see the incentive to do it in advance, which is why the evidence has come out as it is and maybe you are right, sir, that the threat to the issuer of

actually having -- getting nothing will incentivise it to co-operate with acquirers in advance.

So you are right those are the two options.

MR TIDSWELL: But you are saying, are you not -- I think you are effectively saying that the IFR requires the issuer to settle?

MS TOLANEY: I am.

MR TIDSWELL: Yes. So it replaces the current (inaudible) point 2 and acts as a substitute for what might be in the bilateral for --

MS TOLANEY: I think, to put it differently, it does not require it but the commercial reality of it is that it being there means that people will treat it as the level at which settlement occurs.

MR TIDSWELL: I think -- okay, I mean, I thought you were saying to the President that it has the effect of creating an obligation because I think the point here is what is it that has replaced the settlement obligation if no bilateral was entered into? So I had understood you to be saying that an issuer would have no choice.

MS TOLANEY: I think -- I think I started with that debate with the President and he rightly pulled me up between de facto and de jure obligation and he was right to do so because I think I was eliding the commercial reality with I think the way you are putting it, with a strict

obligation and again the President is right that I think that the -- it is not an obligation, it is where it comes out as a matter of reality because the issuers and the acquirers would reach the bilateral at that level in advance and I say that is where the evidence has come out both factually and on the experts and I think I have -- or we have, I should say -- used the IFR as the end point because that is where it ends up but if we are taking it in a very strict analytical way, as you are saying it, I do not think one could say it requires settlement. I think the reality is it will lead to settlement.

MR TIDSWELL: Yes. So the point is just there is an inevitability about the outcome.

MS TOLANEY: Exactly, I will come on to your point as to what that means.

MR TIDSWELL: Yes.

MS TOLANEY: But I think it is important I make that distinction, it having been debated now and I think that is an important distinction.

MR TIDSWELL: To put it another way, if an acquirer were to say: I am going to have a go and try and negotiate a bilateral below the cap, and the issuer were to say: well, in that case, you can acquire and I am not going to pay you, I mean, that is how you could see

a negotiation going?

MS TOLANEY: Exactly.

MR TIDSWELL: But actually you are saying that there is no point in that negotiation because eventually the acquirer is going to realise they have no choice but to accept the IFR cap?

MS TOLANEY: Well, what I would say is the commercial reality is --

MR TIDSWELL: That is what I mean, the commercial reality.

MS TOLANEY: Exactly, it is not just my theory, the experts actually all agree that is the outcome. If I can have show you the joint expert statement.

MR TIDSWELL: Yes, I am -- unless you particularly want to, but I think we are all familiar with it.

MS TOLANEY: For your reference, it was page 4.

MR TIDSWELL: Yes.

MS TOLANEY: The reality is we are debating all of this because I understand we have to test the theory and also because I appreciate it goes to the next point on collective agreement but all this is just confirming where the evidence has in fact come out before the Tribunal, which is that issuers and acquirers would make bilateral agreements in advance because they would want the certainty of having their contractual arrangements in place to avoid this debate even if, as

I say, the commercial inevitability is what it is, it still if they do not sort it out would not be quite sensible and that is why I think the evidence has come out the way it has.

PROFESSOR WATERSON: Can I -- sorry -- raise a question? So I notice that the regulation does not actually say 0.2%, but it says a weighted average leading to 0.2, and so this is Article 3 in the document you just took us to, and then it struck me that --

MS TOLANEY: I do not think it does sir, it says, sorry, RC-

PROFESSOR WATERSON: It says until -- well, unless it has been repealed:

"Until 9 December 2020 in relation to domestic debit card transactions, Member States may allow payment service providers to apply a weighted average interchange fee of no more than the equivalent of 0.2% of the average transaction value."

MS TOLANEY: Right. Sorry, I am just checking where you are reading from.

PROFESSOR WATERSON: I was reading from --

MS TOLANEY: Sorry, I was missing --

PROFESSOR WATERSON: Sorry, I was not specific.

MS TOLANEY: I am sorry, I was looking at the wrong bit.

PROFESSOR WATERSON: So then it struck me that actually there is a potential benefit of your scheme of the

bilateral scheme in that there is potentially money left on the table by charging 0.2% because Mr Knupp in his evidence said: well, a fixed level is fine above a certain amount -- his case I think it was $15 -- up to about $15,000 -- but then in a sense that is leaving money on the table because a firm like Pendragon does not want people paying by debit card or credit card because they -- it becomes a big amount.

So actually, Pendragon, or an acquirer, might come to Pendragon and say: we have got a deal for you, so we are not going to charge you 0.2%, we are going to have something which will weigh out at 0.2% but we are going to charge you less on the really big amounts when people pay for a car, and more for when they have their brake linings replaced or whatever, or something small. I mean, brake linings are probably quite a lot of money on a Jaguar, but if they have their washer fluid topped up or something.

So that might be very attractive to Pendragon because it avoids this problem of trying to persuade customers not to use a debit or credit card. So I do not know whether you think that is feasible?

MS TOLANEY: I will certainly give it some thought and come back. But just looking at this, what I can see is this is dealing I think with Member States and the

weighted -- I do not think there is a weighted average for credit but if I can --

PROFESSOR WATERSON: Okay.

MS TOLANEY: I will come back to you on it just so that I do not --

PROFESSOR WATERSON: Yes. Because then it struck me that actually there is the potential for the bilateral scheme to be more competitive than the factual because it allows the opportunity to differentiate between customers in terms of the way that the acquirer gives them -- pays them back.

MS TOLANEY: I can see the argument. I think, to be fair, obviously the evidence in this case from the experts was that it would all come out at the caps, so I do not know what the experts would answer to that given their evidence.

PROFESSOR WATERSON: Yes, yes. No, I accept that four economists have said that; here is another one that has said that.

MS TOLANEY: It may be they did not spot that. But I think I am duty bound to point out that the experts have all come out on the cap level.

PROFESSOR WATERSON: Yes, thank you.

MS TOLANEY: So may I then turn to the *Dune* point which I threatened yesterday, just to say that this obviously

is -- and I will show you on point, it is not, to use Mr Beal's favourite expression -- is it old wine in new bottles, or the other way round? But it is not that because it is actually a case that postdates *Sainsbury's* on this very topic.

The relevant passage in the transcript yesterday was at page 192, lines 20-23, {Day20/192:20-23} where Mr Tidswell put to me if you can construct something that is inevitably going to end up in a particular place and you do that with the agreement of the other members of the scheme, why is that not collusion?

Can I answer that question, but before I do can I just say that the assumption in your question, sir, is not what we submit or what the expert evidence shows because what we have submitted the evidence shows is that you could expect negotiations to lead to fees at the caps in the overwhelming majority of cases and that is our written closing, paragraph 487. The expert agreement is that the IFs would not be appreciably different from their factual levels under the IFR.

MR TIDSWELL: I think that is the tension you alluded to earlier, is it not, that you have on the one hand -- this is the way you have to put your case, is it not, because on the one hand you have to persuade us this is going to work, and for it to work there has to be quite

a drive towards a particular outcome and it has to be one that is not less restrictive of competition?

MS TOLANEY: Yes.

MR TIDSWELL: On the other hand you have got to persuade us that in all of that there is no collusion. So you are positioning yourself, as I understand it, by saying we have done just enough to make sure that it is pretty likely to end up in the right place, but we have not done so much we have crossed the line on collusion. That is how I understand the position.

MS TOLANEY: Well, I am and I think that has in part come out quite clearly with the President's questions to me because the reality -- the commercial realities of where things are likely to end up, i.e. bilaterals in advance at the level of the caps, is a different statement from it is inevitable and one understands that --

MR TIDSWELL: I am not sure much turns on the wording, does it? I mean inevitably there is going to be some question of degree, but -- but absolutely fair for you to pick me up on, if I am expressing it as an absolute -- and obviously that was what I put to you, but I understand the point you are making is that this is not necessarily an absolute and so therefore there is a judgment to be exercised.

MS TOLANEY: That's right. The reason is probably quite

important, is it not, because the reason it is not an absolute is because you have a bilateral process and that is why it is not an absolute because it is a distinction between the scheme setting the MIF and having a bilateral process, and I have said, because it is very much part of my case, that where the evidence has come out as to where that bilateral process would reach, but it is not, as the President picked me up on this morning again, it is not set in stone.

MR TIDSWELL: That is helpful and the reason I think put to you that is an absolute, I think it is Mr Beal's case it is an absolute because it is absolutely inevitable, I understand that you are saying that is not right and the question becomes: well, have you positioned it at a place that avoids the two --

MS TOLANEY: The tension.

MR TIDSWELL: Yes.

MS TOLANEY: I hope so but for now in terms of the submissions what I was proposing to do was to address the case on the basis of the absolute.

MR TIDSWELL: Yes, of course.

MS TOLANEY: So I will do that but I just wanted to make the position clear. But assuming against myself for now that the evidence is that bilaterally agreed fees would always be at the cap level, then we have a legal

question as to whether that means that there would be collusion, so just putting that very clearly.

If I am right in the way that I have positioned myself then I think one does not assume collusion because it is not inevitable, but against myself if I assume the inevitability point, I am then going to answer would there be collusion even then?

MR TIDSWELL: Right, you are saying inevitability in itself is not enough.

MS TOLANEY: That is right, but let us assume against myself.

MR TIDSWELL: Yes, yes, no, I understand. That is clear.

MS TOLANEY: Can I start with an example before we go to *Dune* of why a common outcome does not demonstrate collusion. The Tribunal may remember that during the winter of 2021 there was an energy price cap set by Ofgem which was significantly lower than the wholesale price of electricity and all energy suppliers set their prices at that cap because if they had not been constrained by the cap, they would have independently set their prices much higher and there was no collusion about that outcome because it was an example of every company having similar economic imperatives and setting prices at the cap independently and we say a similar dynamic would take place in the bilaterals

counterfactual.

THE PRESIDENT: It is no more than an articulation of the *Wood Pulp* doctrine when one is acting independently, but with knowledge of what the market will do.

MS TOLANEY: Yes.

THE PRESIDENT: That is not collusion; that is simply independent action.

MS TOLANEY: Exactly and you are spot on, because the reason I raise that point and I was going to mention that case, but I obviously do not need to, is because that is the submission the Court of Appeal accepted in *Dune* and that is why I say this point has been determined.

MR TIDSWELL: Just before you get there, we should look at *Dune* but there is a difference, is there not, between the example you have given and the example here because all the people involved in this are members, customers, participants -- call them what you want -- of the scheme and so are you saying that makes no difference.

MS TOLANEY: I am saying it makes no difference because obviously Ofgem's regulation in the example I have given you would be of an analogous basis.

MR TIDSWELL: Well, it is not analogous though, is it, because Ofgem carries out a statutory function and this is a private scheme which has members.

MS TOLANEY: But I do not think that -- the private/public

distinction or the statutory function, the point is that what you have got here is it is the IFR caps that are the relevant point here, not the scheme.

MR TIDSWELL: Yes.

MS TOLANEY: I think the complaint is that because of the caps, which we say makes this viable, because you would always end up at the level the caps is what Mr Beal is saying, that is the mischief, whereas my analogy just shows that that is the same point in a different context and it was not regarded as mischief because it is where you independently assess having regard to the cap.

Can I show you the *Dune* case because my submission is that the Court of Appeal has already determined as a matter of law that the bilaterals counterfactual does not involve a collective agreement or collusion merely because the fees end up at the caps.

THE PRESIDENT: That is helpful, Ms Tolaney. Can I just put down two markers because you may want to push back on me. First of all, it does seem to me that in circumstances where we have heard quite a lot of evidence about how bilateral works, which was not before the Court of Appeal, the most that the Court of Appeal can be doing in what they say about the operation of bilaterals is persuasive, I cannot see it being a rule of law that binds us, no matter what evidence we have

heard regarding the operation of bilaterals here. So you may want to push back on that, you may not, persuasive versus absolutely binding.

Frankly, if it was absolutely binding I do ask myself why we spent the last four weeks listening to extremely interesting evidence on bilaterals, but you can take us to that.

The second point is more important, which is the question of the default, if you like, if there is no bilateral. Now, I think you have accepted that it is quite possible and indeed better for bringing the issuing bank to the negotiating table but if there is no bilateral, the settlement which you say has to occur occurs at par, because there is no incentive on the issuing bank to do anything by way of negotiation. If all they are doing is getting the same thing after negotiations as before, you know, why bother? The transactions costs themselves would suggest you just sit back and say: I am not interested in bilaterals.

So it does seem to me that the likelihood of a default rate absent a bilateral is either the transaction does not go through and you have addressed us on that, or it goes through at par.

Now, if that is right, then it may be that the incentives not to do a deal swing the other way on to

the acquirers because they will be saying: well, let us not do a bilateral because the default is we get settlement, we honour all cards but we do not pay the interchange. So there may be a problem in terms of the commercial incentives to not do a deal actually outweighing the commercial incentives to do a deal given that even if no deal is done, the card is accepted and the settlement takes place. So the benefits of the scheme exist no matter what but what is difficult to see is actually what the bilateral really brings to the party if one has a default which either which way favours issuing bank if it is at the regulation rate, or the acquirer if it is at the par rate.

MS TOLANEY: So, sir, I think I will come back to this after *Dune* but just in a short answer, I am not sure the transaction going through at par would be regarded as the default, so that would be my first point.

THE PRESIDENT: Right, so what is the default? You say it is the IFR maximum?

MS TOLANEY: I think that is our case.

THE PRESIDENT: Right, so --

MS TOLANEY: Let me develop that after I have addressed you on Dune. As I understand, this is the point that is troubling you and I would like to come back on it.

THE PRESIDENT: No, no.

(Lines redacted for confidentiality purposes)

MS TOLANEY: I will take instructions on that but immediately what I would say is first of all bilaterals is known to be a -- within the scheme, you saw the scheme rules, bilaterals are possible already, and we know are commonplace in other countries. All I can say is the evidence that you have heard here from Mastercard's witnesses is that it would be workable, viable and preferable to settlement at par.

I will check if we have had anything further and come back to you with a concrete answer once I have got instructions beyond what I have said.

PROFESSOR WATERSON: Thank you.

MS TOLANEY: So on *Dune* on the persuasive binding point that the President has raised I will come on to show you why I do say it is binding but not because the evidence in this case has been irrelevant; because the point of principle, and it is a point of principle which was subject to evidence in any particular case, is the best way I can put it and that was the way in which I think Lord Justice Newey approached it. But because of the way the evidence has come out in this case there is no exception within the *Dune* reasoning that would take us outside and it is binding and that is how I am going to position that.

THE PRESIDENT: If you read the evidence in a particular way.

MS TOLANEY: I will show you the evidence in this case has gone one way on this point.

THE PRESIDENT: Ms Tolaney, we are not going to be drawn on that.

MS TOLANEY: I will show you why I say it anyway.

THE PRESIDENT: Absolutely, you are completely entitled to submit on that basis and of course if we find facts which are completely in line with the facts that are found by the Court of Appeal on an assumed basis for strike-out, then the persuasion is all the stronger. But at the end of the day, we are the finders of fact.

MS TOLANEY: I agree and in a sense, sir, one never likes to fall back as an advocate on the submission that a court is bound, one hopes to persuade the court hearing the case that you are right and that is what I am going to try and do.

MR TIDSWELL: Can I just add we did go through this with Mr Kennelly, or I did and, no doubt rather painfully for him, being difficult about it. I do not want to discourage you from doing whatever you need to do but we have been through precisely the argument we have just heard. By all means --

MS TOLANEY: I was going to take it quite swiftly but it is

helpful for me to show you exactly why I am saying what I am saying and hopefully not do it more badly than Mr Kennelly.

So can we please go to the *Dune* Court of Appeal decision, which is addressed in paragraph 87 of our roadmap and is {RC-J5/46/1}. We want paragraph 24 on page 12, please. {RC-J5/46/12}

Here this is Lord Justice Newey's decision, notes that:

"Visa and Mastercard maintain that had the counterfactuals which they contend been adopted interchange fees would in practice have been set at the maximum amounts permitted by the IFR."

So point number 1 you can see that that is the same argument, that is where it has come out. That being so, they say their default MIF rules can no longer have had the effect of restricting competition. The competitive situation, they say, would have been no different with or without those rules.

THE PRESIDENT: That is not your case, is it? You say the IFR is actually critical to the competitor situation?

MS TOLANEY: Well, it is the same argument because of the IFR.

THE PRESIDENT: Yes, but he is saying --

MS TOLANEY: No, this is the default MIF rules, so I think

it is:

"The competitive situation, they say, would have been no different with or without those default MIF rules. In each case, there would have been interchange fees at the highest levels authorised under the IFR."

So we are saying it makes no difference in this argument. You can see the key point is that the counterfactual for which they contend would have been adopted interchange would in practice have been set at the maximum amounts.

Then you see paragraph 25 refers to the evidence served by Mastercard and Visa in support of that contention and from senior executives would have adopted the bilaterals counterfactual had the MIF rules not existed.

Now, again, you have heard extensive evidence to that effect and of course this, as you said, sir, was a summary judgment case. You have now heard in a trial all of the Mastercard witnesses saying exactly that. Further Mastercard filed evidence from Dr Niels, and it goes on.

Now, if we go over the page, please, {RC-J5/46/13} the questions left open by the CAT questions, as Lord Justice Newey records, would be whether it is likely and realistic Mastercard would have preferred the

bilaterals counterfactual and at what level interchange fees in fact would have been set, or come out at, I should say, would have come out in the bilaterals counterfactual.

At paragraph 27, we see the two grounds on which -- so that was paragraph 26, sorry, I will let you just read that:

"... CAT accepted that these contentions gave Visa and Mastercard reasonably arguable defences ..."

It is stressed in paragraph 44 that it was not deciding whether the bilaterals counterfactual was correct or whether they would have resulted in the interchange fees at the level of the IFR caps.

So those were the two questions and you have now, as you have said, heard evidence which was that we suggest -- and we have given the references -- that the bilaterals counterfactual would have been -- I say adopted, we have had that debate, the abrogation of it, the rule would have been preferred and that it would have resulted in reality commercially in interchange fees at that level.

So you have heard evidence now that was not before the Court of Appeal.

At paragraph 27 we then see the grounds of appeal and there are two grounds, as you see, and we are

interested in the second ground that the CAT had erred in finding from the counterfactuals proposed by Visa and Mastercard would not involve collective collusive arrangements and so would not involve a restriction of competition.

So here the ground is: does the bilaterals counterfactual involve collusion? That was what was appealed and that is what is addressed in the Court of Appeal's judgment from paragraph 43 onwards. If we go to page 19, please. {RC-J5/46/19}

In paragraph 43, the Court of Appeal cites paragraph 41 of the CAT's judgment and you can see that what the CAT held was:

"We think it is clear that the Bilaterals counterfactual would not involve any restriction of competition since under that scenario the interchange fee is not determined by a collective arrangement."

Now, you see the last bit is the bit that I know that Mr Tidswell will be particularly interested in:

"A rule that enables each issuer independently to determine the level of its interchange fee is not restrictive of competition."

I am coming to that because I appreciate you say: well, is it?

At paragraph 44, please, we see the legal argument

that is being made by the claimants relying on CJEU case law regarding the breadth of the agreement in Article 101 and you can see the quotation from the *Unie* case in the second half of the paragraph and if I let you read that and then we will go over the page. (Pause)

So if we can now go over the page and see the quotation particularly at paragraph 174, please. {RC-J5/46/20} (Pause)

Then if we come to paragraph 45, we see the argument made by the *Dune* claimants that the bilaterals counterfactual was an agreement, a collusive agreement.

The reason I am going back through this is in a sense this is the same point that Mr Tidswell is putting to me, this was the very argument and that is the same argument that the claimants are making in this case, the bilateral counterfactual amounts to co-ordination or collusion because the negotiations would not be free or genuine.

They say that at paragraph 423 of their written closings and the reason they suggest that was essentially what I think Mr Tidswell was suggesting yesterday, is because it is suggested that the outcome of the negotiations would be predetermined and that is one of the key planks of my learned friend's arguments. If you look at paragraph 46 you see how the

Court of Appeal addresses that and how Lord Justice Newey rejects that argument. (Pause)

MR TIDSWELL: I do not think he does reject it, he records it, does he not? Just records the argument raised by your client and Visa.

MS TOLANEY: I think he is making plain --

MR TIDSWELL: The way he deals with this is in 48 where he says I cannot deal with this on a summary basis so it needs to go to trial and I think it is as plain as that, is it not?

MS TOLANEY: I do not think so and that is what I am just going to try and show you.

If we then go down to -- you have got 47 with the submission on the Honour All Cards Rule, which I will come back to, and in 48:

"In all the circumstances, I do not accept that the CAT ought to have found that the counterfactuals proposed by Visa ... would involve collusive ... [agreements]. I would not ... exclude the possibility of the claimants succeeding ... at trial ..."

In summary it is not possible to arrive at a conclusion now. Now let us go over and see why: {RC-J5/46/21}

"... it may in the end transpire that the arrival of the IFR did not change the appropriate counterfactual or

that, even if it did, it can be [said] using the alternative counterfactual(s) that the rules providing for those MIFs remained restrictive of competition."

If we go back to 46, {RC-J5/46/20} what was left open by the Court of Appeal in relation to conclusion is apparently from the last sentence of 46 that there might be the possibility that the claimants could argue relying on evidence that there was some tacit collusion between issuers rather than the bilateral that was being posited. Now, that argument has not been pursued.

All the evidence --

THE PRESIDENT: Well, no, but the fact is we have got a number of other variables which might push one over the line to a form of collusion. For instance, we discussed yesterday -- and I do not want to go into the debate again, but we discussed yesterday the extent to which rules in the scheme which would be binding on both acquirers and issuers might --

MS TOLANEY: I will come on to that.

THE PRESIDENT: -- affect the content. Now, you say they do not?

MS TOLANEY: I do. I will come on to that; that is a separate point Lord Justice Newey highlighted, I think.

THE PRESIDENT: But my point is this is something which we

have to consider as a question of fact in the counterfactual?

MS TOLANEY: Yes.

THE PRESIDENT: Again it means that this is not a legal question at all. I am perfectly happy to accept whatever any court says about what is and what is not collusion versus independent conduct. But when it comes to characterising that which is before us, then that is fact, not law.

MS TOLANEY: So if I can extract what I am saying here. The argument I think that was put to me yesterday by Mr Tidswell was: if you know where you are going to end up, then how can it be freely negotiated, therefore it is collusion?

MR TIDSWELL: No, I think it is much more nuanced than that. I do not think it is that at all. I think it is in the context of all the rules we have seen and the evidence we have heard about what is going to happen is there any free negotiation, is it predetermined, and because of the way in which the members interact with the scheme does that give rise to an inference of collusion or --

MS TOLANEY: If I can --

MR TIDSWELL: I am afraid to say I think those are all factual questions --

MS TOLANEY: That is fine, and if I could take those each in

order --

MR TIDSWELL: Sorry to interrupt you again, and not questions that were either before the Court of Appeal or could possibly be before the Court of Appeal because whatever was said in evidence before the Court of Appeal was not tested.

MS TOLANEY: I completely understand that and I think it was a summary judgment case but I think all I can do is take in stages.

As a matter of law I think what I can take from the Court of Appeal decision is the fact that the bilaterals counterfactual was said to be a counterfactual where it was likely, or even put higher I think in that case, that -- inevitable that the amounts paid would come out at the level of the caps, was considered by the Court of Appeal as a principle not to amount to collusion.

MR TIDSWELL: I do not think that is what it says at all. I do not think it says that at all. I think it says that if that was perhaps the only point that existed in this case and was apparently (inaudible) time, then fine but that is obviously not the case. It is obvious that there were all sorts of factual questions that might give rise to a different interpretation, that is precisely what Lord Justice Newey says when he says in

paragraph 48 "I cannot deal with it now".

MS TOLANEY: That is right. But I will not keep pressing it. I think if you read 46 and 48 together what he left open was -- as I said, it is my submission -- the two points on evidence, which were: would the counterfactual be the one that was preferred by Mastercard and Visa as a matter of fact? I think he also left open: was there some other form of collusion implicit with the issuer?

So he was saying --

MR TIDSWELL: I think we completely get your submission, I do not think you need to worry about whether we have got it or not.

MS TOLANEY: So what we would suggest here is just taking the evidence therefore that now the argument is to be looked at in light of that in this case, all the evidence that the Tribunal has heard is that interchange fees would be likely to be at the cap level, not because of any collusive process or collusion but because that is the outcome commercially when left to issuers and acquirers and it was common ground that interchange fees would converge at the level of the caps as a result of the commercial incentives and that was the expert, joint expert statement I mentioned and Mr Dryden's first report at 7.39-7.40 where he was quite clear that what drove the outcome is the different balances of

negotiating power between issuers and acquirers but not any -- he was not suggesting it was collusion.

That is why we have taken some comfort from that decision.

Now, there is a separate point which I think the President and Mr Tidswell have just raised and raised yesterday which is whether the Honour All Cards Rule/Honour All Issuers Rule is a restriction of competition and I understand from Mr Tidswell's question is that the concern may be that the facts that the issuers and acquirers are negotiating within the framework of being part of the Mastercard scheme whether that has a relevant bearing on the analysis. The first question is that the real question has to be: is any part of that scheme structure unlawful? If the structure is lawful, that cannot amount to a collective anti-competitive agreement. There was an argument about the Honour All Cards Rule and it is right to say at paragraph 47 which is on the screen that the Court of Appeal flagged that that might be relevant to the analysis but there was no suggestion that the existence of the scheme itself would be an issue.

Now, therefore, the real question is not the existence of the scheme per se; it is the existence of the Honour All Cards Rule/Honour All Issuers Rule, those

rules, and that is what I was intending to focus on in my next submission.

So just turning to that, the President asked me about that yesterday as well, that was {Day20/194:11-16}. Mr Tidswell similarly asked me yesterday if the acquirer would have no choice but to enter into a bilateral agreement at the cap because of the Honour All Issuers Rule, that was {Day20/188}. I think obviously, and that has been clarified in our debate now, the perspective of those questions is whether the Honour All Cards Rule essentially itself ends up imposing a collective agreement in some way.

So can I address that argument in three stages.

The key point first of all is that the bilaterals counterfactual is not dependent on the Honour All Issuers Rule and I am going to deal with what would happen in practice if that rule was not in existence.

Secondly, the evidence makes clear that the Honour All Issuers Rule makes no difference; the financial outcomes will be the same regardless of whether the bilaterals counterfactual includes the HAIR or not and the HAIR makes no difference because acquirers would enter into bilateral agreements at the IFR levels anyway and the bilaterals counterfactual only applies where the IFR applies. The cross-examination of Mr Dryden, in

particular, established that for IFs capped at that level, the acquirers have a powerful incentive to enter into bilateral agreements with all possible issuers in order to maximise their attractiveness to merchants.

So it is not the HAIR that compels the outcome of the bilateral agreements at the caps, it is the commercial incentives of acquirers and through their merchants along with the fact that the caps are much lower than the rates that the merchants voluntarily agreed to pay for alternative payment methods.

Then the third point is I would like to address you very briefly on why the HAIR is simply not relevant to Issue 3 at all.

So the first submission is that the bilaterals counterfactual is not dependent on the existence of the HAIR and that is set out at paragraph 82 of my roadmap and there is some suggestion by my learned friend that Dr Niels accepted the bilaterals counterfactual crucially depends on the existence of the HAIR and that is wrong as we have explained in the evidence that we refer to at paragraph 82.

Just to be absolutely clear about this, we say the bilaterals counterfactual would work and result in the same financial outcomes with or without the HAIR and I will not repeat it but it is because of the commercial

incentives.

I know that the Tribunal has said we have discussed what would happen in practice if the acquirer and issuer did not reach a bilateral agreement in the bilaterals counterfactual. If there is no agreement between issuer X and acquirer Y, and assume there is an Honour All Cards Rule in the bilaterals counterfactual, assume a customer tries to pay with issuer X's card at a merchant who is served by acquirer Y, the merchant is subject to the Honour All Cards Rule, so accepts the card and the obligation will be in the Merchant Service Agreement between the merchant and acquirer Y. Acquirer Y has to acquire the transaction and pay the merchant under the Merchant Service Agreement in the rules.

So acquirer Y is obliged to accept issuer X's card even absent a bilateral agreement. It does not matter that there is no bilateral agreement between, X and Y because we say that pursuant to the IFR, the issuer will settle and deduct at the level of the interchange fee caps.

But now assume that there is no Honour All Cards Rule in the bilateral counterfactual, acquirer Y therefore is not obliged to accept issuer X's card. Our case, and this is on the evidence before you, is that the acquirer's commercial incentives would mean that

they are likely to enter the bilateral with as many issuers as possible and agree the interchange -- well, no fees, the fees at the level of the IFR caps because they want to have as many issuers connected to them.

So we say in practice therefore we do not need the HAIR or Honour All Cards Rule as part of the bilaterals counterfactual so that if the Tribunal considered that, all things being equal, the bilaterals counterfactual was a counterfactual that Mastercard on the evidence would have preferred to settlement at par is realistic and workable, but is concerned that because of -- not because of the inevitability of the caps but because of these other rules has a potentially or does a collusive agreement aspect to it, our position is we could take those rules out and we have advanced that as our alternative case on the bilaterals counterfactual because we do not need it. We say the outcome would be the same.

PROFESSOR WATERSON: Can I just come back on that and on a point that you made earlier, where my ears pricked up, which is to do with the energy price cap and so there is still an energy price cap, I looked it up, Ofgem have issued an energy price cap for April to June.

So I then Googled Octopus Energy and in the headline it says "Octopus customers pay less -- cheaper than

price cap prices".

Now of course there is no Honour All Cards Rule involved in electricity, but they appear to have chosen prices lower than the cap and so, I mean, obviously this is not the same case, but what they do of course is that they, recognising that electricity is different price in a wholesale market at different times of day, they are able to offer deals that are attractive to people and they have a range of deals. They are actually run by an economist, I gather.

THE PRESIDENT: It might still be right.

MS TOLANEY: Right. I accept there may be examples in that, that is why I cannot remember who said an analogy is never on point or perfect. But what I would say to you is that, as Mr Tidswell rightly pointed out to me and the President, we have had a lot of evidence in this case and the evidence in this case has come out on the basis that issuers and acquirers would want to reach their agreements in the way that I postulated with or without the Honour All Cards Rule or the HACR and it has not been suggested that somebody would try and undercut in that way. Obviously I cannot answer that, I can only go on what the evidence has been in this case and that is why I am putting forward that what we are trying to do at the moment is looking first as a matter of

principle whether the existence of those rules or anything else would lead to the concern about collusive conduct.

Then the next question is for the Tribunal, if you are concerned about it, does it make a difference to the Tribunal that the bilaterals counterfactual on the evidence would -- could be viable in exactly the same way without those rules? It may be and it is open to the Tribunal to say the correct counterfactual would be the bilaterals counterfactual with the clarificatory rules that were put forward and no Honour All Cards -- no HAIR.

MR TIDSWELL: Can I just try and understand? It seems to me that the Honour All Cards Rule could operate in two ways in the counterfactual, bilaterals counterfactual. One is it could operate as being itself a restriction and obviously the claimants say it is itself a restriction, in which case obviously you do need to answer that question, you need to ask what would happen if it was not there, which I think is part of the analysis you have advanced earlier.

The second way it could operate is that it could create that inevitability, if I can use that as shorthand.

MS TOLANEY: Yes, that is the point you put to me yesterday,

exactly.

MR TIDSWELL: Yes, it is especially the case if you are wrong about the IFR.

MS TOLANEY: Yes.

MR TIDSWELL: So an acquirer feels that is at risk if it has not got a contract, but actually maybe that does not -- maybe that does not matter. Put it aside for one minute. I am not sure in that analysis it makes that much difference as to what would happen if it was not there, because the fact is in the counterfactual it is there. So really the question -- I think -- so you are asking us to determine a counterfactual in which that is a present element and the reason why it creates potentially an issue which I have raised with you is that it draws the umbrella of the scheme into the scenario you are talking about and may be operative to lead to the outcome which is, as we discussed, one where there may or may not be free negotiation.

So I think, if I understand it, I think you are saying if that is where we get to you are advancing an alternative bilateral which does not have it in it.

MS TOLANEY: Exactly, I think we have done that --

MR TIDSWELL: Yes, and albeit that you say that is partly because you do not need it.

MS TOLANEY: Exactly.

MR TIDSWELL: Because you are going to get to the same inevitability because of a matter of commercial incentive.

MS TOLANEY: Exactly.

MR TIDSWELL: So that is the position.

MS TOLANEY: Exactly, that is exactly right.

So what I say is I have heard the concern and if the concern results in the Tribunal considering that the existence of that rule creates such an inevitability that it is problematic it was always our alternative case because, as I say, we have taken that approach of the positive case with the HACR in it because as you know we say, and Mr Kennelly has addressed this, that there is nothing anti-competitive about that rule per se but what we say is in this scenario as in the other counterfactual advanced the UIFM, the HACR actually just makes no difference, so it does not need to be -- it is not a necessary element of the counterfactual and it not being a necessary element, it would be surprising if that then became the element that rendered the counterfactual in breach of the competitive -- anti-competitive provisions and it can be -- the Tribunal can take a decision that it should be part of the counterfactual and that we advance that in the alternative.

Could I just make good that the references to the -- it would be the same outcome, so even absent the HAIR, acquirers would still have entered into bilateral agreements with issuers and would have done so at the levels we suggest, that is set out at paragraph 83 of the roadmap and we put the arguments there by reference to the outcome of the negotiations between the acquirer and the issuer and whether the claimants can demonstrate that the interchange fees agreed would have been at the level of the IFR caps. The points are relevant in analysing the commercial incentives of the acquirers and why they would want to enter into bilateral agreements with as many issuers as possible.

If I can just make two brief points on the evidence. First, as a matter of factual evidence, as we note in paragraph 83(1), in order to understand the acquirer's commercial incentives, we would need to of course understand the acquirer's customers' needs, so what the merchants want. That informs more than anything else what the acquirer's commercial incentives and bargaining powers are and the thrust of the evidence from the claimants is that the merchants wants to accept as many payment methods as possible in order to maximise their volumes of sales and they are understandably extremely reluctant to try to constrain customers' choice because

that risks losing the sale altogether. We set that out in detail at paragraph 548 of our written closing.

At paragraph 83(4) of the roadmap we have summarised that Mastercard's witnesses also gave clear evidence that without the Honour All Cards Rule they would still expect fees to be agreed at the IFR caps and again their evidence is set out at paragraph 257 of our written closing.

Then as a matter of the expert evidence, that also makes clear that the financial outcomes would not have been different in the bilaterals counterfactual absent the HAIR and we address that in paragraphs 83(2) and 83(5) of our roadmap.

May I pick up Mr Dryden's evidence which is the point in 83(2)(d). You may recall that Mr Dryden posited that absent the HAIR, interchange fees would have been agreed at a lower rate than in the factual because the outside options for the issuer and the acquirer of not reaching an agreement were symmetric and we have addressed this in detail in paragraph 254 of our written closing.

That theoretical analysis broke down precisely because Mr Dryden had not taken into account correctly the acquirer/merchants' incentives in his analysis and if I can just pull up our closing, it is {RC-S/5/102},

please. So this is 254 and I am going to go on to 255 when you have started that. (Pause)

So if we go to please, page 107, {RC-S/5/107} unless the Tribunal wants to read this first, did you want to go back, sir?

MR TIDSWELL: Did you want us to read the end of --

MS TOLANEY: If we could please go back a page. One more page over, please.

MR TIDSWELL: Yes.

MS TOLANEY: Thank you.

MR TIDSWELL: How far do you want us to read.

MS TOLANEY: I was just letting you read the submissions. If you read that page and then go over to the next, if you do not mind. What it is just showing you is the evidence we are relying on that the claimants' witnesses, and then we are into Mr Dryden's evidence at (4) {RC-S/5/104}.

(Pause).

We will go over the page, please, thank you. {RC-S/5/105}. It is at (6) that he recognised the flaw in his argument and we can see that particularly from 12-21. Then Ms Devine's cross-examination is at (7).

If we go over the page {RC-S/5/106}.

(Pause).

Then over the page again, please. {RC-S/5/107}. If

you could just see paragraph 255. Sorry, that was a long extract but what we have set out there is the evidence about why the HAIR would make no difference and the commercial incentives of the merchants and the acquirers mean that one would end up in the same place with a bilateral agreement with or without the HAIR.

Dr Niels and Mr Holt gave clear evidence on the same point which we note in paragraph 83(5) of the roadmap. The third point I mentioned is as we say at paragraph 84 of the roadmap, even assuming the claimants are right that the HAIR has restrictive effects, the effect of the HAIR would be the same both in the factual and in the counterfactual. So again the argument about the HAIR in a sense we would say adds nothing therefore to the analysis of either the UIFM or the bilaterals counterfactual.

If I can just make that good briefly, if you start with a situation where there is a MIF but no HAIR, all the commercial incentives of the participants in the scheme are the same as the factual. Merchants want lower interchange fees but they crucially want the transaction more so they have no realistic threat not to accept the card. Issuers want higher interchange fees, so the outcome in the factual is the MIF. Even if assuming in the claimants' favour merchants had the

ability to lower the interchange fees through negotiation, absent the HAIR, then they would have been able to do so in a world with a MIF because they would negotiate down from a MIF if there was a realistic prospect that they would not accept an issuer's card.

Now, we say the position is exactly the same in the bilaterals counterfactual and the evidence shows there is no realistic threat of them not accepting the issuers' cards, but even if there was it would be the same negotiation as they would have with a MIF, and Mr Dryden accepted those points. His evidence is at {Day11/197-198}.

So what we suggest is there is no magic to the existence of the HAIR in the bilaterals counterfactual. If the claimants are right that it has a restrictive effect then it would have that effect no matter what the interchange fee setting process was, and that is why we suggest that the arguments that the HAIR makes the bilaterals counterfactual unlawful is not right. But as I have said, if it is unlawful then it should just simply be excluded from the counterfactual because it adds nothing to the outcome of the bilateral counterfactual.

MR TIDSWELL: Your table on page 28 suggests you accept there might be some, albeit minimal, negotiation that

occurred without the HAIR?

MS TOLANEY: Yes, we say at most.

MR TIDSWELL: Yes. But you would say that is just not appreciable --

MS TOLANEY: Exactly.

MR TIDSWELL: -- or would not give rise to a (inaudible).

MS TOLANEY: Exactly. That is why we say -- and I appreciate that puts in play another scenario, but I am trying to work through the different elements, as you say, of why there might be a conclusion.

I appreciate the whole package comes to the question you posed to me but trying to, if you like, pick off each element of it, that is where one would end up and it makes no difference.

So if that was the aspect, ultimately, that troubled you, we would say the bilaterals counterfactual could be the appropriate counterfactual without the HAIR.

I think I am going to briefly cover the scheme fee counterfactual.

THE PRESIDENT: Yes.

MS TOLANEY: I wonder whether we might take the transcript break now, just so that I can check that there is nothing I need to pick up.

THE PRESIDENT: No, that seems sensible. How are we doing for timing, Mr Kennelly? You have got something more

yourself, or have I got that wrong?

MR KENNELLY: Well, the rules. I do need to make our closing submissions on those, but I will be much shorter than I was even in opening. But probably half an hour/40 minutes for the rules is what I need. I do need to pick up some points as well, again very briefly, that arose from the discussion between the Tribunal and Ms Tolaney.

THE PRESIDENT: We would not want you not to. Ms Tolaney, how much longer do you need?

MS TOLANEY: Not very long at all because I am going to take the scheme fee counterfactual very briefly, unless the Tribunal wants to be engaged with --

THE PRESIDENT: Yes, you cannot exclude that. But we will try and restrain ourselves as well. Mr Beal~...

MR BEAL: I am not inviting anyone to cancel their holiday next week just yet.

THE PRESIDENT: Just yet, excellent. Keep that threat --

MR BEAL: I will try and keep it under control.

THE PRESIDENT: -- under control. But it is nonetheless quite a helpful one for the moment. So we will rise for 10 minutes.

(11.23 am)

(A short break)

(11.36 am)

THE PRESIDENT: Ms Tolaney.

MS TOLANEY: Thank you, sir. I appreciate I am on borrowed time here so I will try and take this quite briefly but obviously if there are questions, I will take my lead from you.

THE PRESIDENT: Of course.

MS TOLANEY: The scheme fee counterfactual was dealt with by my learned friend on {Day19/21} and we have addressed the points in paragraph 97A to 97G of our roadmap, and we have six points briefly in response to my learned friend's submissions.

First of all, my learned friend did not dispute that the scheme fee counterfactual would be a realistic and practical alternative. He also did not dispute that it was likely that the schemes would adopt that counterfactual in preference to settlement at par, and he also did not advance any reason to dispute that the likely outcome of the negotiations, bilateral negotiations in that counterfactual, would be appreciably different from the factual.

The second point as we note in paragraph 97B of the roadmap is my learned friend suggested that in the scheme's fee counterfactual there would be settlement at par. Now, we accept that but my learned friend went on to submit that because there would be settlement at par

the Merchant Service Charge would be lower because the MIF is zero. We say that is simply wrong: IC plus plus pricing operates, as the Tribunal knows, on the basis that the Merchant Service Charge is the MIF plus applicable scheme fees, plus acquirer margin. So you need to take account of what would happen in the scheme fee counterfactual.

If the scheme fees the acquirer would pay in that counterfactual would not appreciably differ from the MIF that the acquirer pays in the factual, then the Merchant Service Charge would not be appreciably different in the counterfactual.

The third point, as noted in my roadmap at paragraph 97C, is that my learned friend suggested Mastercard is seeking to rely on consequential steps taken in other markets and said this was impermissible. That, we suggest, is also wrong. As we have explained in 97D in the roadmap, the MIF has always been a payment which takes place outside the acquiring market because it is a charge deducted by the issuer in paying the acquirer, and the MIF is alleged to have had an effect on the acquiring market because it is an input cost for acquirers in their Merchant Service Charge charged to merchants.

The difference in the counterfactual in relation to

the scheme fee counterfactual is that we are looking at scheme fees payable to Mastercard rather than MIFs payable to issuers, and again the relevance of the scheme fee is that it becomes an input cost for the acquirers as a MIF does, so we are looking at exactly the same analysis. In any event, I have addressed the fact that case law makes it clear it is appropriate to look at likely developments in the market.

The fourth point is at 97E of the roadmap. My learned friend suggested that there was no evidence that scheme fees for acquirers would increase in the counterfactual. As we have noted in our written closings at section H.4.2 and I have taken you through the evidence, albeit limited in there, from some of the experts which was to the effect that the scheme fee counterfactual would result in materially the same outcomes as opposed to IFR MIFs, and that is addressed in the written closing.

The fifth point, which is at 97F of the roadmap, is that my learned friend raised the prohibition of circumvention in the IFR which I showed you, Article 5, and suggested that the scheme fee counterfactual may well engage that provision. We do not dispute that Article 5 would apply to scheme fees or incentives on post-IFR consumer, domestic and EEA transactions, and

any scheme fee incentives given to issuers could be no higher than the caps in the IFR. That is why we say -- precisely why we say there is no appreciable difference between the scheme fee counterfactual and the real world.

As we note in paragraph 97E it was also suggested by my learned friend that there might be scope for an allegation of excessively high scheme fees under Article 102, but it could not realistically be suggested, we say, that it would be abusive for Mastercard to negotiate a scheme fee with acquirers which would still amount to a fraction of the freely negotiated price that merchants pay to Amex, PayPal Klarna or ClearPay.

Sixth, and finally, as we note in paragraph 97F, the second paragraph, which I think should be actually paragraph 97G, that may have been corrected -- yes, it has. My learned friend argued that the availability of scheme fees was an issue before the Tribunal in relation to the commercial viability of the schemes and he said that this further confirmed our objective necessity case does not work. But in that case my learned friend has confirmed that we are right that scheme fees would rise to a level which would maintain a competitive offering subject to the IFR caps, and Merchant Service Charges

would not be appreciably different from the factual; in other words there would be no restriction of competition.

So, sir, that was everything I was going to say on the scheme fee counterfactual unless you had anything further for me.

THE PRESIDENT: No, we are very grateful to you, Ms Tolaney. Thank you very much.

Further submissions by MR KENNELLY

MR KENNELLY: Thank you, sir. So I will begin, if I may, in reverse order and just pick up some points arising from the exchanges between the Tribunal and Ms Tolaney before going to the scheme rules.

On the question of the Honour All Issuers Rule, and the bilaterals counterfactual, which also touches on the UIFM, and as Ms Tolaney submitted to you, our case is that the Honour All Issuers Rule makes no difference, no difference at all, in the case of interchange fees capped at the IFR levels.

Now, as Mr Tidswell noted, there is a dispute about the extent of the IFR's application and that is ultimately for the Tribunal to resolve, and to be clear both the UIFM and the bilaterals counterfactual apply only to those interchange fees covered by the IFR caps, so to the extent that you find the scope of the IFR, our

counterfactuals apply only in relation to those situations.

For MIFs capped at the IFR levels, the evidence shows you overwhelmingly that acquirers have a powerful incentive to enter into bilateral agreements with all issuers whose cardholders might be of interest to the acquirer's merchant customers, even with issuers which have a small presence in the United Kingdom like some EEA issuers. We went over all this at length with Mr Dryden. It is overwhelmingly clear from the claimants' evidence that merchants want to be able to accept all issuers' cards, especially to avoid losing sales.

Each individual issuer knows that -- in any negotiation with an individual acquirer he knows the acquirer cannot afford a no deal outcome. So the acquirer has no incentive to risk a no deal, especially in order to save a fraction of 0.1%, 0.2% or 0.3% which are the interchange fees at issue in these scenarios.

So to Mr Tidswell's question about whether the Honour All Issuers Rule may play some appreciable additional role in inhibiting free negotiation in a way that is operative of the outcome, our submission is there is no evidence to support such a finding.

MR TIDSWELL: Well, there is a difference between analysis

as to whether it would be different without it and the fact that it exists in a structure which leads to a certain outcome, is there not? I mean, you may be saying that -- you may say that in a comparative sense if you have not got it then the outcome would be the same but that does not mean that it has no consequence in the discussion about whether it connects to the outcome, does it?

MR KENNELLY: It really does, sir. We have to put our case that way. We are concerned here with an effects analysis and in the claim period we do say that if you remove the Honour All Issuers Rule, it makes no difference to the negotiation process between issuers and acquirers.

MR TIDSWELL: I understand.

MR KENNELLY: No difference to the outcome.

MR TIDSWELL: I think I am making a different point, which is if you say it people: in order to participate in this you have to be bound by this rule, that is a fact, is it not? I mean, that is a fact that you have imposed on them.

MR KENNELLY: Yes.

MR TIDSWELL: Whether they would have acted differently may matter for a competition analysis but it does not matter if one is looking at the context of what is happening

here, and to the question of collusion I am not sure it does matter; you have established that as part of the framework in which your bilateral sits.

MR KENNELLY: I will come to collusion in a moment, sir. But just on the question of the incremental effect of the Honour All Issuers Rule, to what extent does it intensify or aggravate any other restriction, as you said there are two different questions: its independent restrictive effect and its incremental effect.

MR TIDSWELL: Yes, I think the comment you attributed to me was on the second question not the first, which is fine, I understand the point you are making. But just to be clear, when I am talking about the inevitability point that is about collusion.

MR KENNELLY: Indeed, and our case on the HAIR is supported by, as I said, really overwhelming evidence. Dr Frankel does not even claim that the Honour All Issuers Rule has an intensifying or independent restrictive effect on competition. He focuses on the Honour All Products Rule. But the evidence from Mr Dryden and from the claimants' own witnesses is very clear on whether the HAIR has an increment additional influence even on the bargaining dynamic between issuers and acquirers in any bilateral negotiation.

On the question of collusion, in the exchanges

between the Tribunal and Ms Tolaney, the claimants' case on collusion was summarised as follows: that for collusion for restriction of competition it was sufficient to show scheme rules which led to an outcome anticipated by all concerned whereby the acquirers had effectively no choice but to accept interchange fees at the IFR caps, and it was suggested that that may be sufficient to show collusion and a restriction of competition. To be clear, that situation arises in the counterfactuals, not because of collusion but because of features of the market that have nothing to do with collusion.

That situation arises because of the market power of the issuers relative to the market power of the acquirers, which itself largely arises from the fact, as the Tribunal heard, that merchants multi-home whereas cardholders usually single-home. Dr Frankel on this question really was intellectually honest when he said to remove what he regarded as the restrictions, you would need to assume away nearly all of the features of the retail economy as they have developed since the 1970s. But that is not the correct legal approach.

The market features in our claim period which include that powerful market power that the issuers have independently and individually, they are part of the

picture that must be accepted in the counterfactual, and if bad outcomes arise for reasons that are not collusive, for reasons that arise because of the individual issuer's market power and the countervailing lack of bargaining power on the part of individual acquirers, it is not for Article 101(1) to step in, it requires a regulatory solution. That really is the key submission that we make on collusion in this context.

If I may move on then to the rules. Sorry, before I get to the rules there was a further point on evidence and burden of proof. The President referred yesterday to data requests that may be made post-trial of material that may or may not be material to the counterfactual, and we had discussed data requests and filling in gaps at the very beginning of the trial. But the reference to counterfactual raised a slight concern on our part because it is one thing to fill in a table for a factual background, which we are doing, but if evidence is being sought by the Tribunal now to reach a conclusion on the counterfactual, that may be different.

THE PRESIDENT: No, I do not think we can do that. I do not think we can do that.

MR KENNELLY: No, you will have anticipated my submission. I was not going to go as far as saying you could not do it. I would not be so bold.

THE PRESIDENT: I do not think we can do it.

MR KENNELLY: It is because of the fairness concern and because the experts would not have analysed it, we would not have tested them on it. That was the concern.

THE PRESIDENT: I mean, I think you need to be aware that we do not regard the assessment of the counterfactual as a purely factual question. That is in a sense obvious but quite important.

Ms Tolaney, a number of times yesterday, said: the evidence referring to the experts says this ... and each time she said it I bridled slightly because it does not seem to me to be quite right in terms of how one approaches the counterfactual question in that if you have a pure question of fact, if a witness comes along and says: well, there was a conversation along these lines and this is my evidence, then you can quite properly say, "The evidence shows this".

But if one has an expert saying: well, if you ask me to presume a certain state of affairs in order to work out how the counterfactual will work, well, that is an assertion of opinion, admissible because it is expert opinion, but emphatically not in relation to a question of fact but a question of counter fact, a hypothesis, which is of course informed by the facts which are before the Tribunal.

What we are not going to do is require the parties to produce additional factual material, which has not gone into the expert assessment so as to construct our own counterfactual, that would not be proper. Requests for data -- and I think if you are doing this I would stop because I think Mr Cook had some issues about our table last time, quite rightly, with reference to standard deviations and averages. Rather than try to meet something which is clearly a request that is too hard, I would wait for us to frame the data requests but those data requests will be purely directed to a better understanding as to what is in the record now rather than creating an additional record for us to go off on a frolic of our own in regard to a point that is not properly before us.

The last point on this. We do not regard that entirely obvious, I think, statement as to what is and is not proper to commit us to following hook, line and sinker whatever any particular expert says, as I think we said as long ago as *Cardiff Bus*, when we were presented with this: you can have any option as long as it is one that has been fully articulated by an expert and you have to choose between them. That is emphatically not the way we do things here. We look at the evidence of the experts. We may accept one hook,

line and sinker, we may not. But the general trend is to synthesise and to work out what the true position is in light of the different approaches of the various experts. But that is not a factual point, that is simply an evaluation of evidence point.

MR KENNELLY: I am obliged to the President for that.

On the question of evidence, though, there is a separate point I wanted to make about burden of proof because my learned friend made a submission, may I ask the Tribunal to see it, at {Day18/180:10-13}, and the question he says here:

"MR BEAL: ... the evidential burden must be on the card schemes, not on us, to show that this is a plausible and realistic consequence if they get through all of the previous hurdles about it being legally relevant and not the correct question for the right analysis here".

"But the absence of evidence is a problem for them, not for me, because I am entitled to say, well, there is no evidence that actually people sensibly would behave in that way."

To the extent my learned friend there was referring to the evidential burdens in relation to the counterfactual, he is quite wrong. The burden of proof is on the claimants to show a restriction of competition

by reference to a counterfactual. The burden of proof is on the claimants to plead in evidence the counterfactual they advance. If there are evidential gaps, it is for the claimants to seek disclosure in evidence to fill those gaps.

We made this point to the claimants repeatedly in the CMCs leading to this trial. Even in a cartel case, even in a cartel case, where the documentary record is fragmented, and a claimant may have only a few incriminating documents to make good the allegation of a cartel; even then, where inferences can be drawn against an alleged cartelist, the evidential burden is not reversed in the way that my learned friend is suggesting.

MR TIDSWELL: Mr Kennelly, I suspect we are not going to profit much from a discussion about evidential burdens. But just to be clear, if Mr Beal was saying once you put forward another counterfactual from the one he does, then the evidential burden is on you. That must be right, must it not, once you have put one forward? He has put one forward and he says it flows from the Supreme Court judgment and he does not have to do much more to establish it and you come along and say: no, it is something quite different, and you have actually given us lots of evidence to show what it is, that is

all perfectly sensible, is it not?

MR KENNELLY: Indeed, and if for example there is evidence that we could have produced that we did not to support our own counterfactual, again, inferences can be drawn about that. What I was concerned about was the suggestion that if there is a gap, it is automatically resolved against us. He was going quite far in that submission that you saw about the fact that even in relation to counterfactuals that we have advanced, if there is any gap at all, it must be assumed to tell against us.

MR TIDSWELL: A gap does not matter unless there is a problem but if there is a problem in your counterfactual, and you have not -- then you have not produced an answer to it, then you are going to fail. I mean, is that not -- that is not even an evidential burden point, that is just deciding the outcome.

MR KENNELLY: Well, the ultimate burden is still on the claimants, the claimants have to persuade you of the correct counterfactual. We put forward evidence which serves to refute the counterfactual they have advanced by reference to alternative counterfactuals, and as I said if there are gaps in what we have produced you have to ask why there are gaps and the implications of those.

MR TIDSWELL: I am not sure we are getting anywhere with this, I do not think it is terribly helpful. I think to the extent -- if that is the proposition, that is fine but I am not sure it adds much to the pile of wisdom that has been dispensed in the case, if I may say so.

THE PRESIDENT: I do not know Mr Kennelly, it may help you, it may not. But can I just make a couple of points which will inform the way I think we are going to try and approach this.

First of all, you will know -- from your experience you will all know that courts and Tribunals are spectacularly reluctant to decide things on burden of proof and it is really only in the last edge of desperation when you have no way of deciding between two cases that you say, well, if all the burden rests here and therefore you lose or you win.

I do not think I have ever decided a case on burden of proof strictly and it is a vanishingly rare outcome even where one has contested points of fact. I do not think counterfactuals are like contested points of fact. I mean, you mentioned adverse inferences, I do not think there is any real likelihood of that sort of adverse inference being drawn in this case. I say that generally.

When one has got someone who has a unique

perspective on a question of fact, a factual witness who can contribute to an evidential point, and that person is not called for no good reason by a party who could have called them, well then yes, inferences lie, and there is a lot of law on that.

But here we have got a massive universe of data. Economists, as Professor Waterson will say, can never have too much data and the role of the economists is actually to identify the data they say that matters and to get rid of the chaff that does not. We are not going to criticise them by saying adverse inferences should be drawn because they have winnowed away what they say is the wheat from what they think is the chaff; if they have got that line wrong, well, they have got it wrong. But it is not going to play in the way you are suggesting, that we will say: well, this expert failed to adduce material on this, and therefore we are going to say it requires an adverse inference to be drawn. It is far more like the point that Mr Tidswell just made; if you cannot answer an obvious question of how it works, because you simply have not got the evidence, well, we cannot go down the route of that counterfactual because it does not work. But that is why it will lose, not because of any burden of proof question or any adverse inference question. It just will not work.

Now, I am not saying that is the case in any situation here but that is how we are going to approach it.

MR KENNELLY: Yes, and I think on that basis, I am grateful and I am content. I was concerned by the suggestion that the evidential burden was being reversed but I think I am content, if I may -- and to move on, if I may then, to the rules.

The first is the cross-border acquiring rule.

The gist of the claimants' complaint against the old cross-border acquiring rule was that Visa forced cross-border acquirers to pay the domestic MIF for domestic transactions instead of any lower MIF rate which might have been available in the cross-border acquirer's home jurisdiction. I think that was the gist of their complaint. But that was the very effect of the Debit Commitments Decision. My learned friend in closing urged the Tribunal on this issue to focus on the mischief which the Debit Commitments Decision sought to address in order to understand what it required.

As you saw in the Debit Commitments Decision -- I am not going to go back to it, I will give you the paragraph reference but you have been taken to it twice, it is paragraph 21, footnote 8 -- the mischief identified by the Commission was that cross-border

acquirers were not getting access to the domestic interchange rate for the domestic transactions that they were acquiring, and where that domestic rate was lower than the rate the cross-border acquirers had, the cross-border acquirers were at a competitive disadvantage. Therefore, the Debit Commitments Decision required Visa from December 2010 to ensure that registered domestic MIFs be applied to cross-border acquired transactions. We were required to do the very thing which they now say was a restriction of competition by object and effect.

As for the new cross-border acquiring rule, that very rule was expressly required to be implemented in the credit Commitments decision from January 2015. So Visa maintained and implemented these rules under compulsion. Had we not done so at the claimants' urging, we would have been punished by fines of 10% of our turnover by the Commission. Our short point here is that Visa cannot be liable for cross-border acquiring rules that it was required to maintain and implement.

On the substance of the claimants' case, of the experts only one, Professor Frankel, contended that the cross-border acquiring rules restricted competition and he said it was by object and effect. Mr Dryden, Mr Holt and Dr Niels agreed that no restriction of competition

by object or effect had been demonstrated by these rules.

The claimants, as you heard in my learned friend's oral closing, had been forced to move away, unsurprisingly, from an allegation that the cross-border acquiring rules distort competition and now they base their case on a single market objective and an internal market objective which is somehow different from traditional anti-trust analysis. Just for your reference that is in the claimants' written closing, at paragraph 473 {RC-S/1/285}.

My learned friend said in closing the economists cannot really help you because this allegation turns on internal market considerations. But the claimants have positively pleaded that these rules restrict competition, that is a specified issue in the case, it is hardly surprising that the experts addressed the rules on the basis of whether they restricted competition or not, and save for Dr Frankel they found that no restriction had been demonstrated.

As to whether the cross-border acquiring rules actually restricted cross-border acquiring and harmed the single market to any appreciable extent, I would like to show you our written closing, if I may. {RC-S/4/225}. You see the heading:

"Cross-border acquiring has continuously increased throughout the Claim Period."

This is all confidential.

You can see in table 1 during the first part of the claim period the increase in cross-border acquirer transactions in the UK and then at figure 5, and you have seen this before, the year-on-year growth by value in cross-border acquirer transactions. The figures obviously are confidential, the Tribunal can see for itself what this shows.

So the idea that somehow the cross-border acquiring rule allocated markets or restricted trade between member states just does not stack up on the face of the evidence. As regards restriction by object, the claimants argue that competition law requires, just to characterise their argument, that a cross-border acquirer should be allowed to apply any lower regulated rate in its home territory even to a domestic transaction in a foreign country with different conditions of competition, and even if a domestic acquirer could not access that regulated rate, and that competition law requires that outcome.

That arbitrage, as we submitted, is just based on different regulated rates in different countries, it does not reflect any efficiency on the part of the

cross-border acquirer. It allows, if the claimants are right, a more effective and more efficient domestic acquirer to be beaten on price by a less effective and less efficient cross-border acquirer just because of the prevailing rate in the cross-border acquirer's territory.

In fact, you saw that after 2014, domestic UK acquirers simply relocated as a matter of legal form and offered services from lower MIF countries like the Netherlands. They were not true new entrants, that was not the result of any genuine economic value or enhanced competition; it was straightforward pricing arbitrage as a result of a regulatory action by the Commission. This relocation came at a cost to the relocating acquirer, which was passed on, so only the larger merchants in general could benefit from these lower cross-border acquirers' MIFs.

Even Dr Frankel, the lone voice on this issue, accepted in oral evidence that the arbitrage was based purely on geography-based regulatory rates; it was not the result of any genuine localised conditions or other quality advantages in the service being offered by those who had relocated their operations elsewhere. {Day14/177:5-13}.

Moving on to restriction by effect, the claimants'

written closing fails to engage with the key question of the counterfactual, the counterfactual which is indispensable in an effects analysis. The evidence of the claimants' own expert, Mr Dryden, explains why there is no restriction by effect, why there would be no greater competition between acquirers in the counterfactual. For that, it is useful to look again at what Mr Dryden said.

Could you please have {RC-H2/1/112}, paragraph 11.31, Mr Dryden's analysis of restriction of competition. He says, second sentence:

"I now explain why I do not consider that the cross-border acquiring rules restrict competition, while also explaining what this depends on and thus how a different conclusion may be reached."

11.33:

"One possibility is that the MIF should be determined by the location of the acquirer, rather than the location of the merchant. In practice~..."

This is the key bit:

"... this would most likely result in either (i) most or all acquiring activity moving to the lowest MIF country~..."

That is his first outcome. Second outcome:

"... the schemes setting uniform MIFs for most or

all countries."

At 11.34 {RC-H2/1/113}:

"Another possibility is that the counterfactual should be a uniform MIF across countries, such that the location of the merchant and acquirer is irrelevant. I have already noted that the first counterfactual would likely produce a similar outcome (as regards MIFs) to this one~..."

That is where all the acquirers moved to one country, or to low MIF countries:

"... but the mechanism is different: in the first counterfactual uniform MIFs arise as an outcome~..."

Where they are set by the scheme:

"... in the second counterfactual they arise by construction."

The scheme does not do anything, but the acquirers all move to the same low MIF countries.

At 11.39:

"I do not consider that the former concern [he has canvassed] arises since I would expect a similar level of intensity in acquirer competition in the factual and either counterfactual. This is because in both factual and either counterfactual acquirers would face the same MIF costs as each other."

So then we ask ourselves what do the claimants say

about that? For that we need to go to their written closing, paragraph 478, that is {RC-S/1/288}. Paragraph 478 at the top of the page. Faced with the evidence from their own experts, this is what the claimants say, referring to our response. They say:

"The Schemes' only response is to suggest that they would have artificially coordinated prices on a pan-EU level to bring the MIF rates up uniformly to the UK rate."

Then they say, last sentence:

"That suggested counterfactual falls foul of the evident objection that to do so would have been an anti-competitive restriction of competition by object."

But what the claimants in their written closing fail to acknowledge is Mr Dryden's additional counterfactual, which is that the acquirers would simply move to the same low MIF locations and there would be no greater intensity of competition between them in that counterfactual, as between them and the actual.

It is telling that when Mr Dryden suggested that counterfactual, of the acquirers all moving to the same place, he presumably did not regard that as so inherently harmful to competition as to amount to a restriction by object, otherwise he would not have suggested it as a valid counterfactual in his effects

analysis.

MR TIDSWELL: If they did that, Mr Kennelly, would not the overall MIF level be lower, though?

MR KENNELLY: It would.

MR TIDSWELL: Is that not relevant?

MR KENNELLY: It is not sufficient by itself to demonstrate a restriction of competition. The intensity of competition has to be different. That is what is the difference between a restriction and no restriction. The price itself going up and down does not tell you whether there was a restriction of competition.

MR TIDSWELL: Well, so what happens is that the acquirers are able to access a lower price for the MIF. Is that not an effect on the intensity of competition?

MR KENNELLY: No, because all the acquirers are accessing the same price and the intensity of competition between the acquirers is the same whether the price is X or 10X.

MR TIDSWELL: Then at least there might be the ability for them to differentiate on the basis of efficiency rather than the artificiality of the MIF, though.

MR KENNELLY: Whether the MIF is X or 10X makes no difference to the competition on efficiency between the acquirers.

MR TIDSWELL: Because you say that in the factual they are stuck with the same price?

MR KENNELLY: Yes.

MR TIDSWELL: Yes, I see.

MR KENNELLY: That was -- I mean, far be it for me to go behind the evidence of qualified economists on this question of pure economics, Mr Dryden, Mr Holt and Dr Niels were very clear on the point and Dr Frankel said nothing to contradict it.

In any event, the cross-border acquiring rule cannot make any difference independently of the MIFs for the reasons in the opening and the closing adduced by ourselves and Mastercard and which we say the claimants we say have not refuted.

I will move on then, if I may, to the Honour All Cards Rule.

The Honour All Issuers Rule I have addressed to death in Issue 3 and again today I will spare you any more pain on that subject. I will deal only with the Honour All Products Rule. The claimants claim it is a restriction by object and the question for you then is: is the rule so obviously so inherently harmful that an effects analysis is redundant, unnecessary? Again there is no evidence that the Honour All Products Rule at any time during the claim period had any appreciable effect on merchant behaviour, any appreciable effect on their acceptance of Visa branded card products or the

MIFs applied to those products.

Mr Dryden said only that the reason I am quoting a case for treating the Honour All Products Rule as a restriction by object but no more, Dr Frankel does not contend that the Honour All Products Rule independently restricts competition by object or effect.

As regards the effects of the Honour All Products Rule, a good natural experiment is the period since the IFR because of course the IFR significantly changed the Honour All Products Rule in 2016 so that merchants could decline commercial cards and you will recall of course that commercial cards had higher MIFs than consumer cards and they were not capped by the IFR and the evidence shows that the vast majority of merchants continued to accept commercial cards even in the post-IFR period. We ask why, why was that? Because declining those cards would result in lost cardholder business and even a relatively high commercial card MIF rate was an insufficient reason to justify the risk of such loss. The Honour All Products Rule made no difference.

Now, Mr Dryden accepted in cross-examination that there was no evidence as to actual effects of the Honour All Products Rule and his theory of harm was not borne out by the evidence, that is in our written closing at

paragraph 550 where you have the references. The only evidence the claimants now can rely on as to actual effects of the Honour All Products Rule is in their written closing at paragraph 490 and I would ask you to look at that, it is in the {RC-S/1/295}. It is paragraph 490(4) and the only hard evidence that they can cite is the confidential text in blue where there is a reference to Visa's commercial card MIFs and the direction which they travelled after the introduction of the IFR and you see what is claimed about the direction in which those commercial card MIFs travelled after the introduction of the IFR in 2015.

So we look to see the evidence the claimants cited because my submission is they have made a mistake and a surprising and obvious mistake in circumstances where the correct data was shown both to the Tribunal in my opening and to the witnesses in cross-examination.

So to see the data they cite, we go to {RC-H4/3/278}. It is figure A3.1. You see -- again it is all confidential, I need to be careful -- the data goes up to 2018 only. It is an average of the debit and credit commercial card MIFs, we are looking at the MIFs only for this purpose and you see it appears to be going in a particular direction slightly after the coming into force of the IFR.

But now I ask you to go to the better data, the more useful information {RC-H4/4/197}, and paragraph A130. First the point this was missed by the claimants in their written closing, when you look at the average of credit and debit card commercial MIFs and you can see figure A6.1, the average MIF in red, more probative since it goes up to 2022 than the average credit MIF in blue in the average debit in green and you see the directions in which they are travelling.

Then if you go over the page, please, {RC-H4/4/198} they are the Irish average commercial MIF rates, blue for the credit, green for debit, red the average. Then one sees how the average can be misleading for the reasons given in paragraph A130. The claimants cited what they said was the direction of travel in commercial card MIFs in order to suggest that because they were being declined selectively, that was having some pressure presumably downward pressure on the levels of the commercial card MIFs and that is not borne out by the evidence before you.

So we go back to the claimants' closing, please, {RC-S/1/295} paragraph 490(5), what do they have left? They say Mr Buxton gave evidence there was a possibility that in the absence of the HACR Jet2 might restrict the use of the cards of the highest MIFs but in fact

Mr Buxton said that the Honour All Products Rule made no difference and I am quoting, he said: we have to be in the position where we will accept commercial and consumer cards, we have to accept the cards that our customers want to pay with, so we accept all Visa and Mastercard. {Day4/48:13} to {Day4/49:7-10}.

Now, in oral closing, my learned friend mentioned Mr Steeley's evidence as to whether a relaxation of the Honour All Cards Rule would cause lower bilateral interchange fees to be negotiated. But on this, as you will see from the transcript, Mr Steeley was extremely vague. I will just give you the reference, {Day5/6-7}. Mr Steeley referred to the probability of doing a promotion with an issuer but not specifically to getting a lower interchange rate from one, not in any specific sense. The overwhelming evidence before you was that the Honour All Products Rule had no appreciable effects on MIF levels.

I will move on then, if I may, to surcharging.

Our primary point on the no surcharging rule is that the law, the law of the land either overrode the no surcharging rule by requiring surcharging to be permitted or the law banned surcharging, such that the no surcharging rule had any effect. The only aspect where surcharging would have taken place by law and was

potentially blocked by a Visa rule was in respect of inter-regional transactions between 2011 and January 2018.

On this issue the claimants' case is rather confused. If you look at their closing, paragraph 502, {RC-S/1/300}, it said:

"In their cross-examination of the Claimants' witnesses, the Defendants put their case. That what restricted merchants' activity was the law and not the NSRs. That is no answer to the .. case on object restriction, because it is a matter for counterfactual analysis relevant only to restriction by effect."

It is not entirely clear but what appears to be suggested is that even if as a matter of law the no surcharging rule was overrode could have no effect at all, you have our point that the rule actually provides that it is subject to local law. Even in circumstances where it can have no effect because it is barred by local law it can still be found to be so inherently harmful to competition that an effects analysis is redundant and that is a very surprising submission.

It is contradicted, I think, by what the claimants say in their own aide memoire, if you go to that, it is in {RC-S/3/39}, paragraph 141: in dealing with Issue 11.2, did the surcharging rule have the object of

restricting competition and/or the effect of appreciably restricting competition?

My learned friend says:

"For so long as they were applicable in the material period, yes."

I infer from that that he accepts that if they were -- if the law required surcharging to be permitted so that the contractual rule was overridden or the law banned surcharging such that our rule had no effect, it is not applicable.

As regards the claimants' case then, on the no surcharging rule, they maintain that it is an infringement by object and effect. There is no support from their experts on the case by object. Dr Frankel did not positively conclude that the no surcharging rule restricted competition on the -- in the UK or Ireland during the claim period by object or effect.

His conclusion was that the no surcharging rule by Visa was a restriction by object and effect in Ireland until 2009; our claim period begins in 2011. That is Frankel 1, paragraph 15, paragraph 390 and page 155; Frankel 2, paragraphs 274-280 and 292.

For his part, Mr Dryden accepted it was not clear that the no surcharging rule is so inherently harmful to competition that actual harm can be presumed,

{Day13/118:18-21}, {Day13/120:10-21} and really what that shows is that their case on object is unsustainable which is why in opening I invited them to withdraw it.

As for restriction of competition by effect, we see a very surprising submission in the claimants' closing, I do not need to show it to you, it is at paragraph 294, where they say:

"There is no basis for finding that merchants are reluctant to surcharge per se."

Now, it must be attending a different trial. Whether it is ultimately determinative one way or the other on the big issues, the one thing that we saw that was crystal clear was that the merchants are overwhelmingly reluctant to surcharge and even in the few rare instances when they attempted to surcharge, like in the case of Pendragon it was very difficult to do so.

Only a very small proportion of the sampled claimants said that they surcharged Visa or Mastercard transactions at any time during the claim period even when they were free to do so and when the MIFs were at higher levels in the early part of the claim period, the pre IFR period.

That was consistent with the survey by the European Commission in 2008 which showed that 92% of

merchants did not surcharge the vast majority for fear of losing customers, not because they were prohibited from doing so. That was in the 2012 SSO, {RC-J4/31/106}.

The claimants also seek to argue in their written closing at paragraph 294 -- no need to turn it up -- they say that surcharging was relatively common for corporate cards based on Mr Korn's second witness statement at paragraph 15.4. The Tribunal will check these points, no doubt, post-trial. I am not going to go through each reference but I can tell you now that is not what Mr Korn says at paragraph 15.4 of his second statement. He says that there was some corporate card surcharging by airlines. That is not the same as saying it is relatively common for corporate cards to be surcharged.

Again in relation to commercial cards and corporate cards, the evidence in these proceedings does not show that surcharging of corporate or commercial cards was relatively common. Again merchants were very reluctant to surcharge, even for commercial cards.

As regards the claim that the ability to surcharge differentially led to a reduction in interchange fees in New Zealand, that is also a point still maintained by the claimants. I took Dr Frankel to the New Zealand

material on this question and it was clear in our submission that the reduction in interchange fees that we saw in New Zealand was not the result of any differential surcharging. There was no evidence to support that.

Finally, in oral closing, Mr Beal gave the example of Mr Bailey in Pendragon facing a Visa Premium consumer credit card. Visa had no Premium consumer credit cards in the claim period, Mr Beal's example of a £30 MIF on a £1,000 transaction made no sense, no Visa MIF in these proceedings was 3%. His example of a vehicle for £100,000 being purchased with a credit card in Mr Bailey's example again made no sense because his evidence, Mr Bailey's own evidence, was they set upper limits on card spend and that was paragraph 25 of Mr Bailey's statement.

Finally, co-badging. Again, no evidence, no evidence before you of any reluctance on Visa's part to co-badge with domestic schemes. The claimants' experts focused on co-badging with other international schemes like Mastercard. Visa, as I said in opening has two main points in response.

First, and very important from an effects analysis perspective, there was no demand from issuers for co-badging between Mastercard and Visa. Absent the

co-badging rule, we still would not have seen Visa and Mastercard co-badged cards.

The second point was the technical difficulty in co-badging between schemes like Mastercard and Visa.

On the first point, the question of issuer demand, we have another excellent natural experiment. The IFR positively requires Visa to permit and not even to hinder co-badging, eight years approximately have passed since then. In that time, Visa has never received an issuer request to approve a co-badging arrangement.

That was Mr Korn's first statement at paragraph 69 and why, why would they? It comes back to the issuer bargaining power point that I made that really permeates this whole case. It is common ground that issuers play the schemes off against each other to obtain higher interchange fee, that is intra-system competition. It is not in the issuer's interests to allow merchants to pick and choose schemes on a card in order to pay less interchange. That is a fortiori for the post-IFR period where credit card MIFs in the UK and Ireland are now among the very lowest in the world, it is highly unlikely that issuers would positively seek co-badging in order to allow merchants to get lower interchange fees.

The example of Lloyds having Mastercard and Amex

available at the same time to its customers was not strict co-badging, but it made Amex and Mastercard available at the same time for its customers, supports my point. This was a way for an issuer to get more interchange, not less.

Finally, as I said, even if issuers had wanted to co-badge, there were substantial technical and operational difficulties of doing it. You saw the evidence in Mr Holt's second report about that from paragraph 569 and the claimants' experts had no substantive answers to those points.

My learned friend's reference to *Cartes Bancaires* and co-badging with domestic schemes is nothing to the point. The technical and operational difficulties arise when you co-badge Visa and Mastercard, not when you co-badge with a domestic scheme and again the evidence before you is clear as to why that is the case.

Finally, just for your note, the claimants' aide memoire suggests at paragraph 147 that Visa continues to prohibit co-badging for payment cards in the UK, since the UK is not in the EEA, the suggestion since the IFR somehow does not apply, we prohibit co-badging here and that is wrong as a matter of fact. Mr Korn explained this in his oral evidence, {Day8/209:15} to {Day8/210:2}.

Those are my submissions on co-badging. Before I sit down, I will check to see whether there is anything else I need to say. I think that is everything from our side, unless I can be of any further assistance to you.

THE PRESIDENT: Mr Kennelly, thank you very much, we are very much obliged. No further questions than the ones we have been dealing with so far. Ms Tolaney?

Further closing submissions by MS TOLANEY

MS TOLANEY: In the interests of time, I am obviously not going to develop my submissions on the Mastercard specific rules. We adopt --

THE PRESIDENT: I think we know where you are coming from.

MS TOLANEY: Exactly. Can I just give you references, we adopt Mr Kennelly's submissions on the cross-border acquirer rules and the challenged rules.

On the two Mastercard-specific points there is first of all the Central Acquiring Rule, the CAR, and the reference for our submissions on the objective necessity of the CAR are at section J of our roadmap and Section K.6.4 of our written closing. The second Mastercard-specific rule where allegations are made is the non-discrimination rule and our submissions are at Section K of the roadmap and Section L.4.5 of our written closing.

Thank you very much.

THE PRESIDENT: Thank you very much, very helpful.

Mr Beal.

Reply submissions by MR BEAL

MR BEAL: Forgive me, I am just going to do some furniture removal. There we are.

I appreciated I was going to be squeezed and so what I have done is I have prepared a note, can I hand that up. I have also prepared a table, the table you will be pleased to hear I am not going to go through, it is three different ... (document distributed).

Those are going to be passed out behind my back. We will try and get some more produced over lunch so that all shall have prizes.

I am going to be making reply submissions solely by reference to my note and then I obviously have not had the benefit of the submissions I have had today and I do have a couple of points on cross-border acquiring, one point on surcharging and one point on co-badging. They are not in the note but I can make them shortly at the end.

Starting off, I would like to respectfully endorse the observation that the Tribunal made earlier. This is a point that occurred to me last night when I was again looking back through the written closings, not wishing

to align myself unduly with the Tribunal because people will no doubt say even a stopped clock can tell the right time twice a day, but it occurred to me there has been an awful lot of assertion about what the evidence says. The evidence says this, the evidence says that, things are uncontested, unchallenged. What is it about the nature of the factual mix and expert evidence in this case that means that is the crucial determinator? The majority of the issues in this case are legal ones, in my submission, and that is unsurprising given that we are dealing with one half of a liability question and that one half is: are we within the scope of Article 101(1) chapter 1 prohibition, subject to justification at 101(3) and Section 9?

So it is hardly surprising that we are predominantly focusing on legal questions. What is the evidence of what has happened in the past that the Tribunal might be required to determine on the standard classic judicial basis? What actually happened, what took place, when, what factual conclusion should we draw? The answer is that comes up surprisingly little in this case. It is predominantly issues 2 and 7 where there is a question about who set MIFs over a given period and you have got something of a side issue about whether it was a VESI or VESL setting at a particular rate upon which of course

the Tribunal is going to be asked to make factual findings and it can do so by reference to the witness evidence and the documentary record.

But aside from that, our submission is that the majority of the disputed issues between the parties are matters of evaluation and evaluative assessment before the Tribunal. So Issue 3 paradigmatically, once we get over the legal questions, what is the appropriate counterfactual? As I said in opening, that involves a mixed question of law and fact or, as I would put it, factual evaluation, evaluation from all the evidence before the Tribunal including, dare I say it, an element of common sense.

It is not a purely factual determination, but what the Tribunal has to do is select an appropriate hypothetical state of affairs within certain legal limits where within reason different opinions might be had as to hypothetically what might happen.

The CAT will exercise its specialist judgment to select the most fitting counterfactual in the light of all those relevant considerations, it will adopt a multifactorial evaluation on the basis of the full suite of evidence before it.

Whether or not Mr Willaert, Mr Knupp, any of the other witnesses who were put forward to say, "Well, we

would definitely do this and therefore this is what would happen" are right, cannot simply be taken at face value because of course there is a heavy measure of hindsight and it is in their interests to say that, they would say that would they not and that is the point that is really made in paragraph 3 of my note that given that we are dealing with an evaluative assessment that involves speculation and hypothesis, we are in the territory recognised by Lord Neuberger Master of the *Rolls in Scullion v Bank of Scotland* and dealt with by Mr Justice Leggatt in the *Gestmin* case when they were both dealing with hypothetical situations, what would happen if the correct advice had been given? How would witnesses react when faced with hypothetical questions? A degree of caution is needed and of course this Tribunal would bring that caution to bear.

So a view of a particular witness of fact is not going to be terribly meaningful. I do take on board that expert opinion evidence as to economically how things might work in principle is of more relevance. But even there, one has to be cautious that is it economic expertise that is being brought to bear or is it simply an expression of opinion as to how something might work, where a lawyer's view arguably might be as

good as an economist's view, and of course it is for the Tribunal to work out where the boundary between expert opinion and submission truly lies in this case. Turning then back to paragraph 2.2 and looking at issues 4 and 5, depending on the resolution of some threshold legal questions, i.e. is it market-wide MSC or is it the specific Mastercard Visa transactions in the counterfactual. Again we are principally focusing on the likelihood and extensive switching if we lose those threshold points. So we are looking at how likely is it that people will switch in the counterfactual and what are the consequences of that switching and again this involves predictions as to future behaviour in the face of a hypothetical scenario which call for evaluative assessment. They cannot sensibly be described as findings of pure fact because they have not happened yet and the Tribunal is having to put itself in the position of what is likely to happen or how people might conceivably react.

Then on co-badging, we have got an evaluative assessment to be made as to whether or not potential competition might have emerged but for the co-badging rule, is it likely that Amex and Visa could have been brought together on a single card by an issuing bank seeking to derive customer demand from something that

would be jolly useful if it is taking the place of a companion card and that too requires an evaluative assessment given that the prohibition means that we are dealing with potential competition rather than actual competition in the factual world.

So it is in the light of trying to frame the nature and extent of the evidence that is in this case that I invite the Tribunal to consider the Defendants' frequent references to evidence being uncontested, unchallenged or common ground. The reality is we put to a number of witnesses that we would not be cross-examining them on matters which were properly ones for legal submission, or on points that we consider to be relevant. So, for example, with Mr Willaert, when he had exhibited a whole series of witness statements both from himself and others and the others were not being called to give evidence from previous proceedings, I specifically said to him: I am not going to be cross-examining you on all of that evidence, we do not say it is relevant; to the extent that it were to be relevant we, do not say it is accepted but I would not have had time to relive all of the previous proceedings and go through all of that cross-examination and a lot of it was directed towards 101(3) issues rather than 101(1) issues. But that does not mean that we have

somehow accepted that whole raft of evidence, as my learned friend Ms Tolaney suggested yesterday.

The reality is that we had assumed we respectfully suggest rightly, that he had concentrated on issues that are relevant for this trial in his umbrella proceedings statement and that anything he wanted to say that was of relevance for this trial would be found in that particular document and it was on that basis that I was then cross-examining him on that evidence primarily rather than other evidence.

Now, as it happens, I did dip into the previous witness statements but that was very much with the caveat that a lot of it was not relevant and I was not proposing to go through it all.

What we did do -- we think that the transcript bears this out and ultimately the Tribunal will be the judge of whether I am right or wrong on this -- is that we did put all of the core points of our case to each of the witnesses where it was appropriate to do so and you will recall that in particular with the experts, I put in closing to each of them in closing my cross-examination exactly what the core points of my case were, so it could not be suggested that they were under any illusions as to what the legal fault lines were.

That was particularly important, in our respectful

submission, because the expert evidence was very long. I think I said to both of them: if I ask you everything that is contested we will be here until Christmas. Now we have had over 600 pages of written closing submissions from the Defendants, it is abundantly clear that they know exactly where the legal fault lines lie because they have been able to deal with all of them at great length.

So despite the frequency with which it is said against us that evidence is not disputed or points were not challenged, the reality is that a lot of the evidence was disputed, and properly disputed, a lot of the evidence was contested and still is, and the fact that both parties have developed detailed written closing submissions shows exactly where the issues are between the parties.

Now, that sort of inaccurate "it was accepted that", "it was not contested that", "it is unchallenged that", in circumstances where, if one reads further in the transcript or further in the witness evidence or further in the overall statement of the case, it is apparent that it is in fact contested is, I am afraid, simply the product of either indolence or guile on the part of advocates. We have all been through enough trials where this happens all the time and it is often said: well,

you have not challenged this, therefore the Tribunal has to rule that it is an accepted fact.

That simply is not a sensible way of dealing with the morass of information that we have in this case and it is regrettable that it has been deployed so frequently and with such inaccuracy.

We have produced a table. The reason I think you will be happy that I am not going through it is it is 64 pages long and what that seeks to do is every time it is said wrongly that something has not been covered or we have not accepted something, it does not even cover every instance of this, it simply covers the ones that we have been able to do in the time available. But time after number, especially I am afraid during Mastercard's submissions, where it was repeatedly said, both in writing and orally, that something was the true position and we had accepted it or that it was not challenged, it was just wrong; and if you go back and look at the underlying transcript and the underlying material it becomes clear that it is wrong. I have not had the time to pick up every instance of that but I do therefore urge the Tribunal to treat with caution that repeated assertion that has been made.

Again -- and I do not say this lightly -- just looking at the roadmap which we only got a day and a

half ago at the start of my learned friend's submissions, the reality is it is riddled with errors. There is no other way of putting it.

It just has a series of inaccurate statements, both characterising our case, characterising Mr Dryden's evidence, characterising how we put things, characterising what witnesses have said and I will come to some specific examples. For example, it was said well, I unfairly did not go and take a witness to a particular document and if only I had taken the witness to this particular page, it would have borne out what the witness was saying. The reason I did not take that particular witness to a particular document was because she said she did not know anything about setting the rates. So what is the point of taking a witness to a document dealing with setting of rates in circumstances where she has said she does not know anything about it? I will just get a blank look and the Tribunal will not thank me for taking the Tribunal to a document that the Tribunal can read. I have been told off for that before by Lord Lawrence Collins. I am not about to repeat the same mistake.

However, turn from page 3 to page 4, and we will look at this document in a minute, and there was the very point I was making. My learned friend says: Well,

if you had taken her to page 3 you will have seen it was all about costs. No, I was going to take the witness to page 2, 4, 5 and 6 which make it clear it is not about costs, it is about trying to keep parity of rates with Visa and that is the point I was making.

But that selective citation of an example of failing to put something to a witness is characteristic, I am afraid, of something that has become endemic, certainly in this case, in the written closings and the oral closings that you have heard.

Can I just run through some background points from the roadmap, which I am going to call "the map" because it is quicker, and again these are non-exhaustive points because there is just so much that we could correct had we but world and time.

So paragraph 3 of the map says in terms -- let me not misquote it and fall into the very conduct I am criticising -- it says there somehow Dr Niels' diagram demonstrates a fallacy of our submission that there is anything odd about the scheme being involved in determining the amount paid between the issuer and the acquirer. It is in fact the claimants who want Mastercard to determine this sum, albeit they want 100% payment.

So that is simply a recalibration of the zero MIF is

still a price point. A zero MIF is still a MIF and of course that ignores the citation I have taken the Tribunal to in *Sainsbury's* Court of Appeal where there is the magic of zero issue is dealt with. We do not object -- of course we do not object to genuine bilaterally negotiated MIFs that the current scheme envisages, but we have noted that there are no examples of any such negotiated agreements.

Next in paragraph 7.4, my learned friends for Mastercard say a three-party scheme can adopt skewed pricing and that enables the skewed pricing between two sides of the platform and contribute to the greater costs incurred on the issuing side. They then cite their own submissions. There is simply no evidence, with respect, that there is -- there are greater costs on the issuing side, that is an assertion. But it has been made clear time and again when I have taken witnesses to what is the evidence to support the costs analysis, each of the witnesses has said: oh, well, we had some data somewhere, or we spoke to somebody from an issuing bank 10 years ago, or I had coffee in the corridor with somebody who was at Barclays. There is a number of explanations given. But what we lack, and it is a point I have made repeatedly, is hard data for the costs analysis to work out exactly what those are

and the fact that the only witness that was called from an issuing bank was Ms Dooney and she was only able to speak about one particular department within Barclays, and she gave no costs evidence whatsoever until re-examination, that tells the Tribunal something about how this case is being conducted in terms of putting the Tribunal in a position to make a sensible decision about what the level of costs are.

The answer is it is not even Article 101(3) lite; it is trying to get Article 101(3) arguments in under the radar with no evidential basis for doing so properly whatsoever, as series of assertions which are simply not backed up and you have my point that they have simply ignored the other side of the ledger, the question of countervailing benefits, it is a point that the Tribunal has repeatedly made. You do not have the data, they have not taken into account the other side of the fence and that is the way they want to run things.

Now, then paragraph 9-10 of the map deals with other payment methods and it is said, well, you have a complete ability to make a finding because there is substantial evidence before the Tribunal as to the relative costs of other payment methods. When pressed on this, as I understand it, Mastercard referred to a paragraph in Mr Holt's report that does not have the

underlying data and gives ranges. Of course, that is a thoroughly unsatisfactory way of dealing with it. We had incomplete witness evidence, as I have said, from one issuer and we have had no evidence from merchant acquirers at all.

We do have evidence available from the merchant service agreements that will give you an indication of the relative costs of different payment products, but of course what we do not have is a fully costed analysis of pros and cons of different payment methods such as you would expect in an Article 101(3) analysis. We do have indications from Mr Hirst and Mr Steeley that different payment methods produce different benefits but those have not been costed. We have got the helpful diagram from Mr Steeley that I have referred to time and again which gives you an indication that there is an issue out there that will need to be grappled with, but that is for Trial 3, not for now.

There is then a rather extraordinary suggestion in paragraph 14 of the map where the Tribunal is invited to deprecate what is said to be our attempt to sidestep engagement with the factual and expert evidence by relying on untested material from outside these proceedings, I am afraid I simply do not understand the criticism that is being made there. But with the

greatest of respect, we have tried to engage with the factual and expert evidence, that is why you have a detailed section in our written closing setting out the *32 Woodrow Wilson* points that we would like the Tribunal to make factual finding of where we have backed it up, with not simply statements from a witness who may have been damaged in cross-examination, but actually from the transcript testimony of the witnesses themselves and with the supporting underlying documentation.

Paragraph 17 of the map then suggests that market power is only relevant for Article 102 analysis and again with the greatest of respect that is simply not right. If we look, please, at {RC-J5/45.1.2}, page 6, {RC-J5/45.1.2/6} then we find within the guidelines issued by the European Commission -- it is not flashing up on mine but I will read it here: Recital (11):

"Undertakings with market power may in certain cases use vertical restraints to pursue anti-competitive purposes that ultimately harm consumers."

Last three lines:

"The degree of market power required to establish a restriction of competition within the meaning of Article 101(1) ... is less than the degree of market power required for a finding of dominance under Article

102."

So two different concepts and that is even in the context of vertical restraints where traditionally competition law takes a more relaxed appropriate because of the pro-competitive benefits of having a non-exclusive distribution network as the Tribunal is well aware.

The denial of market power and the absence of what is said to be an absence of countervailing bargaining power is, with respect, simply untenable.

Then in paragraph 19 of the map, my learned friends refer to Mr Dryden and his evidence of MIFs above a level resulting from a restriction of competition and so on and socially optimal levels. I think I may have the wrong reference there, it is paragraph 19, but it is dealt with -- but they do deal with Amex at some point and the point I make is that Amex does not pursue a strategy of universal acceptance, it is a specialist, not a generalist, and it therefore, as its submission to the PSR made clear -- and I have taken the Tribunal to that so I do not need to bring it back up -- when it was responding to the PSR's call for evidence as part of the first review, it said: look, we do not compete with Mastercard and Visa, they are a duopoly, we do not seek to compete with them, we are a niche product, we are

aiming at a particular market and we do not want to try and occupy the universal acceptance market and so the suggestion that somehow Amex is pursuing or has significant market power is simply not made out.

Last point really before, if I may, the short adjournment, is the map also takes exception with our criticism of Dr Niels. Could I refer, please, to paragraph 30 at (2)(c). That is 30(2)(c). {RC-S/7/11}. They say there that the point I put to Dr Niels was manifestly bad because it was said Maestro had not been put to him and it was wrong to suggest that Mr Justice Popplewell's assessment of the Maestro evidence had been overturned by the Court of Appeal. The point I took Dr Niels to on Maestro was the CAT's judgment, where -- I have been through it in opening as well, so it was no surprise that I took Dr Niels to it but it is that finding from the Competition Appeal Tribunal back in 2016 that says there were more factors in play than simply a switch in the underlying MIF that led to the difficulties that Maestro experienced.

In terms of -- what I actually said about Mr Justice Popplewell was that his judgment had been overturned, I made no assertion whatsoever that that specific finding had been overturned, it did not matter what the factual findings were because

Mr Justice Popplewell's judgment was overturned by the Court of Appeal on the law.

So the way I put it to the witness was entirely right, with respect, you cannot read into something I have not put to the witness and then say I am wrong for not having put it that way and then defend Dr Niels on that basis. At 30(6), {RC-S/7/13}, exception is taken to the fact that I said Dr Niels had adopted data for analysis which was skewed in favour of the answer he sought to achieve. The reality is, and we can track back through this if we absolutely need to, but I think probably not for today, what happened was Mr Dryden pointed out that the figure selected for Amex was probably unduly low, and Dr Niels then responded in Niels 3 by going not to a number that Mr Dryden had in fact himself suggested, but to a number that was much higher than that. We suggest that he picked the highest number he could find, and that is a perfectly legitimate criticism of what Dr Niels had in fact done. I am not suggesting that motive was a sinister one, I am just simply saying that is what he did and that was the sequence of events.

So, with respect, our criticism of him is entirely borne out by the underlying material that we have relied upon.

That is probably a convenient moment. I am obviously about 20% of the way through a 21-page note. My learned friend stood up. I shall sit down.

MS TOLANEY: Sir, I am sorry to rise at this point. I have been in practice for 29 years, I am in court a lot. Never before have I had an advocate on the other side say that I have been indolent or acted with guile.

Now, "indolent" is just plain rude, but "guile" is a very serious allegation and my learned friend has made lots of criticisms of witnesses and experts which we have dealt with in writing, which we thought was inappropriate. That is a professional misconduct allegation. I would invite my learned friend to withdraw that. If he wants to give examples of professional misconduct, he better produce it in writing and I will deal with it.

MR BEAL: So, that is adding far more heat than light to the submission.

MS TOLANEY: Well, it is your words, [draft] line 20, page --

MR BEAL: It is in the note, I do not need to be reminded on the transcript.

MS TOLANEY: So it is in writing, is it, as well?

MR BEAL: It is in writing.

MS TOLANEY: Right, so in writing he has accused me of

guile, personally.

MR BEAL: No, that is not true.

MS TOLANEY: Well --

THE PRESIDENT: I think you had better both sit down.

MS TOLANEY: Yes, and I am not sure whether Mr Kennelly is also accused.

THE PRESIDENT: Now, it is obvious these are hard-fought proceedings and inevitably there is a degree of personal engagement in what is a hard fought case. We listened in silence to what Mr Beal said and that silence was deliberate because we do not think that it was a point that amounted to an assertion of professional misconduct because if that had been made then we would have had to become engaged ourselves.

Whether it is an appropriate description of what has gone on is something that we absolutely will not be drawn on at this point. But I do not think that it is right to say that it is an assertion of professional misconduct.

I can see why you are on your feet, Ms Tolaney.

MS TOLANEY: "Guile" is misleading deliberately.

THE PRESIDENT: Well, Ms Tolaney, I have made clear how we regard what has been said.

MS TOLANEY: Yes. Thank you for that.

THE PRESIDENT: You are well within your rights to stand up

and indicate an objection. Frankly, I think we understood that you would not be accepting that description in any event. But you are well within your rights to stand up and make that point, but I do not think we need take it any further.

MS TOLANEY: Thank you.

THE PRESIDENT: You certainly can take it that we will be reaching our own views as to the assessment of the evidence, the assessment of the submissions --

MS TOLANEY: Yes.

THE PRESIDENT: -- and we will look at these points and give our own view.

MS TOLANEY: Yes. I mean, sir, this litigation has been hard-fought, and at the end of every case one generally says things have been put, not put, people accepted things and I understand entirely from your indication that perhaps none of that is helpful at all. But those arguments have been made and you will assess them, to the extent they are relevant.

What I would say is on this side of the court, we have acted with courtesy. At no point have I said anything personal about my learned friend. I have put it on the basis of as an advocate whether what submissions he made, with I hope great courtesy, and I think Mr Kennelly has done the same thing.

THE PRESIDENT: Well, thank you. That is noted.

I think there has been courtesy all round in terms of how points have been presented, what has been said. It is a hard-hitting point that Mr Beal has made and I understand why you are on your feet, but I do not think given what I have indicated, that the Tribunal's approach will be to the totality of the evidence, we need take it any further.

MS TOLANEY: Thank you.

MR KENNELLY: I am sorry, sir, just to echo what Ms Tolaney said. I have had a chance to read what my learned friend said. At paragraph 5 it appears he was also accusing me of indolence and guile and inaccurate submissions, so I echo what Ms Tolaney said.

THE PRESIDENT: I will not repeat what I have just said to Ms Tolaney but the same goes. I mean, frankly I read it as being a double-barrelled point made agnostically as between Visa and Mastercard, so for what it is worth I did not read it as merely addressed to one team but both.

MR KENNELLY: I am obliged, sir, thank you.

MR BEAL: Thank you very much.

THE PRESIDENT: We will resume at 2 o'clock.

(1.06 pm)

(The short adjournment)

(2.00 pm)

THE PRESIDENT: Mr Beal.

MR BEAL: Sir, please could we start at the top of page 5 of the reply submissions note. I am going to move on to deal with some suggestions made by Visa in its note of 26 March, that we have been unduly critical of their witnesses. I mean, a number of points have been made. We have sought, whenever we have criticised a witness, to identify why that criticism has been made, so we have footnoted references and we have given transcript references and we have tried to articulate precisely why that has been done.

Visa has also suggested that part of the problem was I was asking the wrong questions to the wrong witnesses. As the Tribunal will be aware, a number of the witnesses dealt with a number of the issues concurrently with one another, so it was not immediately obvious who was necessarily going to cover a particular point. For example, if Messrs Stokes, Steel and Korn all covered the anti-steering rules, there was not a natural hierarchy as to who was the appropriate person to ask the right witness to.

I do note that Mastercard, for example, have told us off for not asking Ms Dooney something about which she gave no evidence, it was said that we should have put

something to her which we did not. So we are in the difficult position where we have, in our submissions, been obliged to make these observations because if we do not then of course the Tribunal is not aware of why we object to the way a particular witness handled something. But we have tried to substantiate it.

It is, however, correct that we made a mistake, for which we apologise, and that relates to Mr Butler in his evidence. What we said was that he had not even acknowledged his earlier statement and that was, I am afraid, wrong and we apologise. That was wrong because he had acknowledged his earlier statement.

The point we were trying to make was that unlike other witnesses who had, for example, said: here is a summary judgment witness statement and I refer to it and adopt it, he had not followed that procedure. What he had done was he had referred to his earlier summary judgment application witness statement and then incorporated it, with some modifications, in the main body of his witness statement. So you had one witness statement rather than two, which was the model for everyone else.

The remaining criticisms we stand by. He was the witness, for example, who could not understand why the VESI board minutes were the VESI board minutes rather

than the VEL board minutes. But I took him to the repeated subsequent board minutes which all endorsed the previous board minutes, which made it clear that the board had considered the previous minutes and endorsed them as accurate, so that is an obvious point for us to make, doubting the credibility that VESI did not intend to do what they did.

It has also been suggested that we were unduly harsh with Mr Holt. The way we put matters to Mr Holt is there on the transcript. What we sought to do was to suggest that his concentration on some only of the older Visa regulatory decisions indicated a lack of independence. That was put to him. It was suggested to him that an independent witness would have given the full picture of regulatory decisions rather than concentrating on the ones that went one way from 2001 and 2002, and I was then obliged to put to him the decisions he had not expressly covered. We do suggest, with the greatest of respect, that suggesting that Visa and Mastercard do not have power in the acquiring market is not a tenable position and that was an issue that Mr Tidswell pressed with him as well.

His statement that the question was not economically meaningful is belied by the work that Rochet and Tirole have done in associating the problems economically from

high MIFs, and therefore that is a meaningful question and we have seen that the question of market power is a meaningful question for an Article 101 analysis.

There is also the discrepancy between his willingness to accept that a merchant-orchestrated response to pricing would be considered to be collusive behaviour following Mr Kennelly's categorisation of that in cross-examination with Mr Dryden. When I put the force of the point the other way round, from the issuing bank's perspective, he was not prepared to accept that.

Then, at the final end of my cross-examination with Mr Holt, I put our case to him and I said quite clearly that it was economically meaningful to consider whether the schemes had market power in the acquiring market, and there was no direct answer to that.

I put to him that he had failed to refer to the full range of regulatory decisions. I then put to him that his approach had relied upon incorrect assumptions and a flawed analysis, and I also put to him that he had failed to apply the correct test for objective necessity. So we stand by those criticisms and they were ones that were fairly -- in our respectful submission they were fairly put to him.

Can I then please come on to issues 2 and 7. I have got no further observations to make on that, they will

involve some factual findings. You have heard enough from me on those points already.

Next, Issue 3, restriction by object. Mr Kennelly said that no finding of restriction by object had ever been made against Visa or Mastercard. The keyword there is --

MR KENNELLY: Just Visa. I only said Visa. No findings against Visa, I did not say Mastercard.

MR BEAL: This is in relation to the MIFs?

MR KENNELLY: Yes, in relation to the MIFs by object.

MR BEAL: I take it back, I am sorry. Mr Kennelly said there was no finding that had been made of restriction by object ever.

The keyword there is "finding", what does finding mean? Again, the Tribunal is well across this point. You have heard it from me now, this will be the third occasion I have referred to it.

You have the Commission decision in Mastercard II and a number of regulatory decisions involving Visa, including most recently the inter-regionals decision, which was a Commitments decision.

If the point is that the Commitments decision is not a final and binding infringement decision, then of course I accept that. If the point is that the Commission has never expressed a view that MIFs can be

a restriction by object, then I respectfully disagree with the proposition for the simple reason that the Commission has repeatedly expressed the view that that is the case.

Could we look please at Article 9(1) of regulation 1 of 2003. That is {RC-Q1/5/9}. This deals with the threshold criteria for a Commitments decision being made and we see in Article 9(1):

"Where the Commission intends to adopt a decision requiring that infringement be brought to an end and the undertakings concerned offer Commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those Commitments binding~..."

So the threshold is that the Commission intends to adopt a decision requiring that the infringement be brought to an end. You do not get to that place unless the Commission has a fairly well formed and settled view that there has been an infringement of Article 101(1).

The benefit for both parties of a Commitments decision is two-fold. Firstly, the undertakings are able to ward off a finding of an infringement by offering Commitments that deal with the Commission's concern, and the Commission does not become embroiled in lengthy litigation with a party fighting an infringement

decision for many years with deep pockets. Obviously, in the history of Mastercard I and the litigation that followed, one can understand why the Commission thinks that that is a valuable approach to take in certain circumstances.

But Visa's submission that you cannot take the Commitments decisions at face value as evidence of Article 101(1) infringements -- and by infringement I mean a restriction of competition by object or effect, not an overall finding of an anti-competitive infringement which requires the Article 101(3) analysis as well -- with the greatest of respect simply does not withstand scrutiny because the whole point of offering a Commitment is that you are dealing with the decision that the Commission is about to take formally, that there has been an infringement and it must therefore be the case that Visa, for example, has implicitly accepted that the competition concerns of the Commission are justified, to the extent that they are prepared to stave off an infringement decision and meet it.

What we do say is objectionable is staving off that infringement decision with a series of Commitments which are offered to the Commission, and you have seen the chronology, what typically happened was that a set of Commitments would be offered, the Commission would say

those are not acceptable and a second set of revised Commitments would then be offered. If it is now being suggested that through that process of quasi-horse trading with the Commission that it is appropriate to take the view that the Commission has never had any concerns about the MIF, then that with respect goes too far and it would amount to gaming the system.

The second point that we make is that those Commitments decisions are still in force, from the 2019 one they ran for five years and six months from April 2019, so we are about next week to enter the five year stage and there is therefore a further six months to run.

The consequences of that can be seen on page 10 of the document that is currently open, in regulation -- sorry article 9(2)(b) regulation 1. {RC-Q1/5/10}. This says that:

"The Commission may, upon request or on its own initiative, re-open the proceedings~..."

Under (b):

"Where the undertakings concerned act contrary to their Commitments~..."

So the Commission still has, within the six-month duration that is left of the Commitments decision, the opportunity to re-open the proceedings if they consider

that either Visa or Mastercard have acted contrary to their Commitments. That would include, for example, if they started imposing MIF rates that exceed the committed level, so there is -- the Commission still has competence to deal with whether or not the Commitments decisions have been complied with.

That competence is maintained following Brexit, because of the terms of Article 95 of the EU UK (Withdrawal) Act. I took the Tribunal to that provision in my closing oral submissions and that particular provision is then given effect to domestically through Section 7A of the 2018 Withdrawal Act. I do not think I need turn that up. But there is a mechanism in place legally whereby the Commission could, if it decided that Visa or Mastercard had breached their Commitments, bring the matter back before a national court for enforcement, and that is contemplated by the EU UK (Withdrawal) Act.

It follows from that that if this Tribunal were to rule that the MIFs were entirely lawful so that no exemption was needed at all, then that would run counter to the decision of the Commission to accept a cap of the MIFs because it would necessarily follow that if this Tribunal were to find that there was no need for an exemption, full stop, the Commission's decision to have accepted what amounts to a de facto exemption level of

0.2 and 0.3% for inter-regional MIFs, would be wrong.

I think that is for card present. The figures for card not present are higher.

That conclusion would then not just be intentioned with but it would run counter to an essential premise of the Commitments decision.

Moreover, in Irish law, which also applies here in the pleaded claim for the Irish MIFs, then we have the provision at page 13 of this regulation {RC-Q1/5/13}, in Article 16, that still governs the position under Irish law, which is that:

"When national courts rule on agreements~... [etc]~... they cannot take decisions running counter to the decision adopted by the Commission."

Obviously, as a matter of Irish law the Commitments decisions remain fully binding under EU law because that is still the law of Ireland.

At the top of page 8 of my note, I then move on to make a follow-up point which is not simply are the schemes trying to obtain a negative clearance decision, to what extent are they seeking to suggest that for example a lower exemptible level should be provided or a higher level should be provided.

Of course, that is all matter for Article 101(3) but as matter of logic if, for example, this had been

a trial of both Article 101 and Article 101(3), if the schemes were seeking to persuade this Tribunal that 0.2% and 0.3% was too low as an exemptible level, and were inviting this Tribunal to find, I do not know, that 0.8 and 1% were the appropriate levels, then that of course too would clearly run counter to the terms of the Commitments, and it would put the schemes in a position where they were contending for an outcome that exceeded the cap that had been set by the Commitments that they had offered. We say that that also would not be permissible in accordance with *Gasorba* and *Canal +.*

Can I make some very briefly comments on *Cartes Bancaires* and *Budapest Bank*. We have looked at these decisions in some detail. I do not think I need to turn up *Cartes Bancaires* again, I would like to just focus on some paragraphs in *Budapest Bank* in a moment. In terms of *Cartes Bancaires* the case did not involve a MIF, it was a levy that was charged by the scheme to encourage behaviour between issuers and acquirers who each conducted issuing and acquiring activity. So, to use Professor Waterson's expression, they were common members of a club which incurred common costs and they were all in it together. The levy was designed specifically to have an incentive effect on individual banks who were both issuing and acquiring and it only

kicked in if the individual level, for example of issuing, was significantly higher than the level of acquiring.

The idea behind that incentive was to keep them broadly approximate in terms of their balance and so it would have a deterrent effect in the same way that a high tax on cigarettes, for example, may discourage smoking even if you do not end up paying that tax because you end up being deterred from smoking. We say that is very different from the type of MIF operation where to all intents and purposes what it involves is deliberately a transfer of significant funds from merchant via acquirer to the issuing side in order to give a subsidy to the issuing side with a view to therefore encouraging the issuing banks to favour that particular scheme.

There was no suggestion in *Cartes Bancaires*, for example, that the levy was passed on in a particular MSC or that it formed a non-negotiable component of the MSC. You have the point I made already in my closing submissions, that when one sees Advocate General Wahl's opinion, footnote 5, he was recognising that the *Mastercard* case was running in parallel with the *Cartes Bancaires* case, both judgments were handed down in fact on the same day, and the Advocate General said

they are very different cases on different rules.

None of the Commission, the Court of Justice, or the Court of Appeal or Supreme Court in *Sainsbury's* thought that *Cartes Bancaires* changed the proper analysis of the MIF, even though it was available to each of them and considered by each of them.

Sorry, let me clarify that. The Commission obviously was before *Cartes Bancaires* but the CJEU was handing down its judgment on the day that *Cartes Bancaires* was decided and they were not saying: well, we are giving this ruling for *Mastercard* but by the way we have decided something is fundamentally different in *Cartes Bancaires*. I think the Court of Justice could have been expected to have cross-referred back to the other decision in terms, if they thought it was meaningful.

Budapest Bank obviously comes later, it was handed down in 2020. That was in fact the submission from Ms Rose KC on behalf of Visa in the Supreme Court did seek to rely heavily on the *Budapest Bank* case, saying this was effectively a significant change in the legal landscape.

The Supreme Court, as we have seen at paragraphs 87 and 88, rejected that submission on two bases. One, it was said to involve a very different set

of arrangements; and two, it was dealing with an object case rather than an effects case, so I appreciate the second point is against me to that extent.

But the facts in *Budapest Bank* did not involve a MIF being set by a single scheme. What it involved was an agreement between the domestic banks to tie the MIFs from two competing schemes to one another, so that whatever the scheme developed as a MIF, it would be applied in common to the other scheme.

Could we pick up, please, at {RC-J5/35.1/11}, if we could just have a look at paragraph 73 of the judgment. The court there said:

"It cannot be ruled out that such information~..."

That is the fact that the banks were trying to peg the MIFs to one another, and that the -- and so on:

"It cannot be ruled out that such information points to the fact that the MIF Agreement was pursuing an objective consisting not in guaranteeing a minimum threshold for service charges~..."

So it is not trying to set a floor to the MSC:

"... but in establishing a degree of balance between the 'issuing' and 'acquisition' activities within each of the card payment systems at issue ... in order to ensure that the certain costs resulting from the use of cards ... are covered, whilst protecting those systems

from the undesirable effects that would arise from an excessively high level of interchange fees and thus, as the case may be, of service charges".

So that is aimed at the point the learned judge Mr Tidswell was making about well, it is geared towards the upward pressure on MIFs that arise from intersystem competition.

We then see in 74:

"The referring court also states that, by neutralising competition between the two card payment systems at issue in the main proceedings as regards the aspect of the cost represented by the interchange fees, the MIF agreement could have had the result of intensifying competition between those systems in other respects."

So if you have this upward only pressure on MIFs from intersystem competition and you stop that happening, they may actually start competing with each other more effectively on other issues such as quality of service, reliability and so on.

The last two lines, the last sentence on that paragraph:

"According to ... [the referring] ... court, setting the interchange fees at a uniform level may have triggered competition in relation to the other features,

transaction conditions and pricing of those products."

We then see in 76 and 77 that -- well, 76 deals with the question of whether or not it can be classified as a restriction of competition by object and that requires you to identify from the arrangements themselves that the nature of the arrangement is such that by its very nature it is harmful to the proper functioning of competition.

In contradistinction to that type of case, in this case, the court noted at 77:

"... competition between the two card payment systems, it is not possible on the basis of the information available to the Court to determine whether removing competition between Visa and Mastercard as to the aspect of the cost represented by the interchange fee reveals, in itself, a sufficient degree of harm~..."

What they are saying is you have removed price competition between the two systems by pegging the MIFs at the same level, but the mere act of doing that does not by itself give rise to an inference that it is overall restrictive of competition, because it might be suppressing the upwards only effect.

If we see then at the last three lines of paragraph 79, on {RC-J5/35/1/12}, the specific effects that the court thought it would need more information in

relation to were whether or not the agreement:

"... actually had the effect of introducing a minimum threshold applicable to the service charges and whether, having regard to the situation which would have prevailed if that agreement had not existed, the agreement was restrictive of competition by virtue of its effects."

Just pausing there. What they are saying is we cannot tell from the MIF agreement by itself whether the whole point of that was to establish a floor for the Merchant Service Charges in the acquiring market. That is the specific information that is missing because it may be that if you remove the MIF agreement and free up this upward only pressure on MIFs, then the MIFs are higher in the counterfactual and that would lead to higher MSCs and therefore you cannot a priori say that is a restriction of competition.

We then see at paragraphs 81 and 82 the focus is very much on the possibility of that upwards only pressure giving rise to higher fees for merchants, and that therefore the MIF agreement was a way of constraining the prices that merchants would otherwise have to pay. That is made clear there.

We then see in paragraph 83:

"... if there were to be strong indications that, if

the MIF Agreement had not been concluded, upwards pressure on interchange fees would have ensued, so that it cannot be argued that that agreement constituted a restriction 'by object' of competition on the acquiring market ... an in-depth examination of the effects~..."

Would be needed.

So it is if you are not able to say in advance that it necessarily constrained or represented a floor to the pricing for MSCs, because in fact it could have had the opposite effect, you are not then in a position to say it is an object restriction.

We then see in paragraph 85 it is dealing with the question of balancing. It says, well perhaps I can invite the Tribunal to read paragraph 85.

THE PRESIDENT: Yes.

(Pause).

Yes.

MR BEAL: So the issue of balancing requires further exploration, what the court said is you cannot simply point to balancing and say that is a legitimate objective and therefore you cannot find a restriction by object. It says the fact that there is balancing taking place between the issuing and acquiring side does not by itself preclude a finding of a restriction by object.

So the submission that was advanced to you, that the -- if it is a legitimate objective of the MIF, that it somehow brings balance to the force, that does not stop there being a restriction by object, and that is what the court said in terms in *Budapest Bank*.

But in any event, what we are not dealing with in our case is a situation in which the issuers and acquirers are part of a common club. It is clear that there are only two major issuers in the UK who are also acquirers and disaggregation on the acquiring side since 2009 means that most of the acquiring volume in the UK is dealt with by entities that are not also issuers. The exception is Barclaycard, but the evidence on the two main acquirers is Barclaycard and Worldpay, and Worldpay does not have an issuing entity.

Yes, I am told that the other issuer is Lloyds, who has both. But Lloyds is, as you have seen from the market shares in the PSR report, further down the pecking order than Barclaycard and Worldpay, who are the two leaders in the acquiring market.

Now, Mastercard at paragraph 8.1 of the map has suggested that balancing -- a balancing objective by itself is inherently pro-competitive and cannot lead to a finding by object. My response to that is simply that is gainsaid by the very wording of paragraph 85 of

Budapest Bank that they rely upon. But in any event, you have heard the evidence and you have seen the Rochet and Tirole reports, that if there is to be a pro-competitive justification for the MIF, it must lie in trying to solve the externality issue.

Rochet and Tirole rejected the issuer cost methodology and it is that issuer cost methodology that the schemes have tried to adopt in this case by pointing to the need for the MIF to represent compensation for issuers' costs. That, I am afraid, is simply not the methodology that Rochet and Tirole have vouchsafed. What Rochet and Tirole have said is you need to work out what is the benefit that the merchant receives from use of a payment card that it is not paying for and that whole analysis requires you to look at what are the benefits that the merchant will receive and what would the merchants' costs be if that particular form of payment was not used? That has triggered the Merchant Indifference Test which you have heard an awful lot about and this Tribunal will be well aware that the Merchant Indifference Test has been considered in every case so far at the 101(3) stage and not at the 101(1) stage.

Visa in its oral closings said it was relevant to look at the fact that the IFR had somehow implicitly

approved an efficient level of 0.2% and 0.3% and that that was relevant to the restriction by object. With the greatest of respect, that is simply not right. Recital (14) of the IFR confirms it was not the competition decision and it did not set an exemption level. Recital (21) which I think we have not looked at yet is at {RC-J5/22.2/4}. The first paragraph on that page, the Commission said -- sorry, not the Commission, the legislature said:

"... as shown in the impact assessment, in certain Member States interchange fees have developed so as to allow consumers to benefit from efficient debit card markets in terms of card acceptance and card usage with lower interchange fees than the merchant indifference level. Member States should therefore be able to establish lower interchange fees for domestic debit card transactions."

That of course we know is precisely what Ireland have done by introducing the 0.1% rate for consumer debit in that country.

I have given you a reference in paragraph 28 to the impact assessment and they look at some of the zero rates that are available in certain countries -- I think Denmark and Norway from memory -- but also rates that were lower than 0.2% in other countries.

In any event the IFR, if it is dealing with what is said to be an implicit, efficient, therefore exemptible level, is looking at the Article 101(3) issue, not the Article 101(1) issue and it is the Article 101(1) issue that is the focus of this trial.

Can I please move on to the UIFM. Dune. Both parties, both Defendants -- sets of Defendants have sought to rely upon Dune. I am not sure I need to say an awful lot more because it has been canvassed extensively and I do not think I can sensibly add to any of the observations, if I may say so with respect, the Tribunal made as to why it is of limited assistance. It was a summary judgment application and this Tribunal is in a much better position to work out what the answer is.

Contrary to the map from Mastercard, paragraph 61(2) it is not right that the IFR guarantees settlement; settlement is a thing apart. What the IFR does is prescribe a maximum cap for an interchange fee in the same way that there are prescribed maximum caps for payday loans set by legislation in this country.

If you have a coordinated approach to setting a rate below the cap, that is still price co-ordination of a rate. The fact that there is a perceived acceptable rate above that, does not go to the question of whether

or not you have price co-ordination at a given level, it simply means that for 101(3) purposes, I anticipate that my learned friend's submissions in due course will be what the IFR tells you that is an exemptible level. Our response is: well, that will be a matter for evidence because the IFR is a cap and it is deliberately not setting any restrictions on what national competition authorities or national courts can find is the proper exemptible level on a bigger point, on a bigger dataset.

Visa's case on the UIFM, with respect, involved reading words into exactly what the competitive concern identified was. So Visa looked at the Supreme Court's six essential facts and said that it was implicit in the way that the Supreme Court had dealt with things that it was the collaborative or coordinated specific fixing of the MIF rate which was the concern and therefore if you have a MIF that is set unilaterally, that does not fall within that description. So if you have an individual issuer saying the MIF rate will be X and so long as X is beneath the IFR cap, then that gets rid of the competitive concern that the Supreme Court expressed.

In my respectful submission, that is simply not right. The default MIF was never set on a multilateral basis. It was set by the schemes and the scheme entity that set it was either Visa Inc or Visa Europe depending

on the particular MIF in question and the period in issue. That was always an individual decision by an individual entity, namely Visa, and indeed that was an argument that was run post the IPO of both Mastercard and Visa to say that it was no longer an association of undertakings, so it went to a different point, but the Supreme Court's reasoning is very clear.

It is: you have collectively decided to arrange a scheme and that scheme establishes a MIF and that MIF is at a given rate and that MIF at a given rate then forms a significant component of a subsequent price which is the price agreed between the merchant and the merchant acquirer and that particular element of the MSC as a price is non-negotiable and that was sufficient in our respectful submission for a finding of anti-competitive effect to be made by the Supreme Court. It did not matter who had set it, it was simply the overall mechanism by which the MIF was set and its impact on a price in a different market, namely the acquiring market.

So who sets the MIF was not part of the essential facts. What mattered was that MIF was part and parcel of a coordinated or agreed approach to a price that was felt in the downstream market, in the acquiring service market, and that was sufficient.

Another point that was taken was that Dr Frankel's 2006 article had somehow endorsed the UIFM or a pure bilaterals approach. Please could I invite you to look at his conclusion, that is {RC-J5/10.6.1/45-47} starting please at page 45, at the bottom of the page, there is a conclusion.

THE PRESIDENT: Yes.

MR BEAL: Dr Frankel said:

"There will always be some transaction costs in the economy resulting from the imperfections in and the competitively determined costs of engaging in retail trade ... An interchange fee, however, artificially increases those costs. It acts much like a sales tax but it is privately imposed and collected by banks, not the government. It significantly and arbitrarily raises prices based not on technologically and competitively determined costs, but through a collective process."

We say that it as good then as it is now and it finds echoes in the "I, Pencil" argument that the learned President drew to the parties' attention.

Turning over to page 46, {RC-J5/10.6.1/46} there is a citation from Michael Katz and Dr Frankel endorses that. He said:

"The mere ability to construct a theoretical model in which it might be possible for an omniscient and

benevolent social planner to fix an interchange fee in a way that improves upon a decentralised, competitive market, does not mean that this is what the banks do if given the unrestricted right to fix these prices -- particularly when there is a clear and plausible mechanism by which such price fixing, in fact, harms the public."

He then deal with interchange fees being set too high and, finally, page 47, {RC-J5/10.6.1/47} there is a paragraph beginning: "Decentralised competitive alternatives exist". Please can I invite you to read that paragraph because it is in that context that he is referring to other options but he then concludes that it is default settlement at par that should be preferred.

(Pause)

THE PRESIDENT: Yes.

MR BEAL: Moving on to bilaterals. It was suggested in the map, paragraph 6, that this had been raised late by me after the witnesses had given evidence, I think it is the way it is put.

In fact, I raised it in opening. I raised it in opening because I was struggling to understand how the bilaterals counterfactual would work in practice, so what then happened, as the Tribunal will recall, is that the learned President shared some of my concern as to

not having full vision of what was envisaged by the no settlement rules at all argument that was being advanced and it therefore asked for clarification. That clarification did not arrive for a month. In the meantime, I had sought to ask questions seemingly of the wrong witnesses for Visa as to how settlement worked and I got two different answers and duly chastened, I tried to asked Mr Willaert how it worked and he said: well, I am not really the person for that. I protested that there did not seem to be anyone else who I could ask these questions of, so I pressed ahead with questions for him and I seem to receive an answer as I thought I had it, that the way that the settlement system worked was broadly the same as the way that the Visa settlement system worked, which is now subject to the nuance that the Visa settlement system works in a slightly different way for inter-regional transactions than for purely domestic transactions.

But the reason it came about at all was because we had an unparticularised bilaterals counterfactual and it is only -- this is important because of course it is an essential part of Mastercard's case when advancing the bilaterals that the counterfactual has to lead to a situation where the bilateral interchange fees are driven up to the level of the cap. If they are not

driven up to the level of the cap, then you still have divergence in price between the factual and the counterfactual which would give rise to an appreciable restriction of competition if it is big enough.

So it is Mastercard who have asserted that the bilaterals counterfactual issuer could threaten to withhold the settlement amount and we have given you the written opening references.

I would like to, if I may, go through the settlement process because my learned friend for Mastercard's submissions suggested that this could all be at large. You could have settlement, clearing, payment divorced from the scheme but still have a scheme. So I would just like to if I may track through how it works.

Could we start, please, at {RC-J3/130/180}. There is a reference in clause 8.2 to net settlement and it says:

"A customer that uses the interchange system for the authorisation and clearing of transactions is required to net settle in accordance with the corporation settlement standards."

Just pausing there. We will come to look at the settlement standards because they are in the settlement manual, but the settlement manual envisages you can have bilateral settlement. What this seems to suggest,

however, is that the Mastercard system still requires even if you use bilateral settlement you still have to have net settlement and of course that makes sense if you have got a scheme because it is not simply one transaction you are netting off many, many transactions and in order to do that you have to have the authorisation and clearing process to produce a figure for net settlement even if you have hived off the transfer of funds to separate agents.

It has been suggested that you can also hive off authorisation and clearing. I accept of course that you can have processing agents that assist with the issue of authorisation, they can be interposed interstitially between, say, the merchant acquirer and the issuing bank to communicate the relevant messages from one to the other if necessary through the scheme.

What I still simply do not understand, and I am afraid it may well reflect ignorance on my part, is how you could have a system where none of the authorisation codes, none of the clearing takes place through the scheme. I just do not understand how the scheme can work out what is going on and when I come to look at the settlement, I have not been able to detect any suggestion that there is a way of hiving off clearing so that the scheme is no longer involved and it

makes much more sense to have the scheme overall involved in the clearing process that it knows where it stands with the scheme giving directions as to what settlement should be with other people then operating as agents for the settlement process.

Could we look, please, at {RC-J3/130/286-288}. This deals with particular rules for the Europe region. We see a "Definitions" section at the bottom under clause 8.1.

In the Europe Region, the:

"'Interchange fee' is the fee that passes between the Acquirer and the Issuer with respect to the interchange of a Transaction conducted at a Merchant, the 'purchase' part of a 'purchase with cash back' Transaction or a Merchandise Transaction ..." a

So that does not find -- that is a defined term and of course that is a scheme defined term. It does not tell you who is setting the interchange fee; it simply says it has to be paid. So even if you have a "purely bilateral agreement" as to what the MIF rate should be, it is still the scheme that requires that fee to pass from the acquirer to the issuer.

Next paragraph down, 8.2, we see a reference to "net settlement" and that is modified to say:

"A Customer must refer to the documentation of the

registered switch of its choice for currency conversion information."

But otherwise the net settlement principle still applies.

Then under 8.2.2, one sees some changes for the Europe Region for "Settlement Messages and Instructions".

If I could invite the Tribunal, please, to read that paragraph. (Pause)

THE PRESIDENT: Yes.

MR BEAL: That is not a paragraph that my learned friends' revised clauses, as I understand it, has done anything with, so you still have this overarching framework of the scheme knowing what is going on by co-ordinating the transfer of information and co-ordinating the financial messages that lead to the net settlement position which is a core part of the scheme.

Then 8.3 on that page has a modification for the interchange and service fees and that says:

"Detailed information on how interchange fees are applied in the Europe Region is contained in the Interchange Manual - Europe Region. An Acquirer must submit Transactions completed at Merchants with the interchange rate designator for the lowest fee tier applicable to them."

So that is the scheme saying what has to go into the assessment of the interchange fee regardless of how the interchange fee itself may be set.

Then "Bilateral agreement" is dealt with in 8.4.2 and that says:

"Bilateral agreements must not exceed the maximum set pursuant to the applicable law or regulation."

So even with bilateral arrangements for what the actual MIF rate will be, that is embedded into the overall architecture of the system, judging from this.

Can I then please come on to look at {RC-J3/130/35}. I am dealing now with a point that was covered by my learned friend Ms Tolaney earlier today, which is how do you become a member of the scheme and some of these points have been covered already, so I will deal with them briefly. But essentially an entity eligible to be a customer can apply to be a customer. No entity may participate in activity unless it has been approved to be a customer.

So you have then a principal or affiliate categorisation that enables you to conduct activity within the scheme.

At page 36, {RC-J3/130/36} clause 1.4, there is a reference to payment transfer activity customers. From looking at the definition that comes much later

that principally seems to apply to gaming entities which therefore need not detain us because the gaming claimant no longer has a claim, it was settled out.

But clause 1.4 at page 40 {RC-J3/130/40} then deals with participation and activity within the scheme and it talks about "Special conditions of participation, licence or activity" and the court -- Mastercard:

"... may condition Participation, the grant of any License, or the conduct of Activity on compliance by the Customer with special conditions, such as ... escrow arrangements [and so on]."

Then at page 41, {RC-J3/130/41} clause 1.6, it deals with the terms of the licence and essentially the licence will then dictate what activity is carried out, what compliance conditions need to be met and it is a condition of the licence that the standards of the corporation as in effect from time to time are met. Indeed, if there is an inconsistency between standard and provision in the licence, the standard prevails.

It is relevant because we will come on to look at the settlement manual that is part of the set of standards in a moment.

Clause 1.9, page 45, {RC-J3/130/45} deals with the participation and activity, each customer may participate only in activities as set forth in its

licence.

We then see page 57, please, {RC-J3/130/57} under clause 2.1, Mastercard sets the standards to be followed, giving itself the sole right to interpret and enforce those standards. That enforcement if we scan, please, over that page and the rest of 58 through to 60 {RC-J5/130/58-60} you will see that there is a scope for non-compliance assessments and certain charges to be imposed as a non-compliance assessment which a member of the scheme will have to pay.

At page 62, clause 2.2, {RC-J3/130/62} customers are obliged to comply with standards when they engage in any activity, so if you are part of the scheme you are duty bound to comply with standards and with all applicable laws and regulations.

Then there are some specific provisions which I have set out in my note but which I think I do not need to go through at this stage where different requirements are set for issuing customers and different requirements are set for acquiring customers. My learned friend Ms Tolaney went through some of the obligations on acquirers, but also issuers have to issue customers with issue cards and then ensure the viability of transactions.

Let us just have a quick look at that one, page 70

{RC-J3/130/70} clause 3.1. This is an obligation on an issuing member. They are licensed to use the Mastercard Marks to issue a reasonable number of Mastercard cards based on criteria which the corporation may deem appropriate.

3.2:

"Each Principal and Association is responsible to the Corporation and to all other Customers for transactions arising ..."

So where a card is used the issuing member has to take responsibility for transactions being effected compatibly with the rules and standards.

At page 244, {RC-J3/130/244} we see that for the Europe Region, under clause 1.6 -- for the Europe Region the licence:

"... will cover both issuing and acquiring, unless the applicant or Customer wishes to receive a License for issuing only or acquiring only."

So the default position is you get a licence for both, but obviously if you only do one then you can apply for just that activity to be covered.

Could we then please move on to the settlement manual, that is at {RC-R/51/12}. We see at the top of that page "Settlement Definition":

"Settlement is the process by which Mastercard

facilitates the exchange of funds on behalf of its customers that have sent or received financial transactions through a clearing system."

Next substantive paragraph down:

"The exchange of successfully processed detailed financial transaction data through a clearing system represents an obligation to exchange funds."

Then it refers to some bespoke software that Mastercard uses.

"Participation in Mastercard Settlement" is then dealt with and the last paragraph on that page, please could I invite the Tribunal to read that paragraph.

"Participation in Mastercard settlement"

THE PRESIDENT: Yes.

MR BEAL: Turning over the page -- well, perhaps all of that page, given that I do not think you have been referred to this yet.

THE PRESIDENT: No. (Pause)

You do not need us to read the note?

MR BEAL: Well, it then just deals with notification requirements. You essentially have to send a form in to Mastercard on a net settlement information form saying how you are proposing to operate settlement. So if you want to use your own transfer agent or transfer agent bank etc you have to notify Mastercard of that effect.

So it is right that obviously you can enter into settlement arrangements off your own bat on a bilateral basis, but you have to notify Mastercard what you are doing and we will come on to see that dealt with more specifically.

At page 15 {RC-R/51/15} one of the important principles is settlement finality, bottom right hand table on that page, page 15. There should be a reference at the bottom the page to settlement finality and it defines where that happens within national interbank settlement systems.

"... funds become irrevocable when [they] funds are no longer subject to unwinding or a revocation period."

Page 16 {RC-R/51/16} under "Discharge". The discharge of the payment obligation only arises for a net debit customer when:

"... funds [are credited] in full to the Mastercard settlement agent's central bank account, and (ii) when such receipt of funds becomes irrevocable. The payment obligation to a net-credit customer is deemed discharged upon debiting of funds in full from the Mastercard settlement agent’s central bank account ..."

Page 17, {RC-R/51/17} again we see confirmation of local payment systems and how they are used and what constitutes discharge and then there is a reference to

the net settlement information form which has to be submitted.

Page 18 {RC-R/51/18} then discusses clearing.

Sorry, just at the bottom of page 17 on the page before, it says:

"Mastercard processing systems are used to determine the net monetary value [at the bottom of that page] of a transaction ...

"Mastercard clearing systems are used to enable an acquirer and an issuer to exchange financial transaction information."

That includes the global clearing management system. What I have not found anywhere is a suggestion that that system is disengaged at any point or that you can somehow opt out of it.

Next page, page 18. {RC-J3/51/18}.

The first substantive paragraph begins:

"After transactions are submitted to the Mastercard clearing systems in various currencies, the Mastercard clearing system converts the transaction amount to the chosen settlement currency.

"The Settlement Account Management ... system then accumulates the settlement transactions resulting from the clearing process and calculates the customers' daily net settlement position."

Bottom of the page:

"Along with the Mastercard settlement agent and the customer's transfer agent bank, the actual settlement or exchange of funds occurs through various banking systems."

Then there is a settlement operational flow shown in diagrammatic form on the next page, page 19. {RC-R/51/19}.

Page 20 {RC-R/51/20} explains how the funds are transferred among parties during settlement and there are several methods by which that can happen. The most -- well, the easiest way to understand it is standard settlement with a two-party procedure, see the bottom of page 20.

That standard procedure is then dealt with at page 21 {RC-R/51/21} which shows the payment process flow for the two-party standard settlement having certain characteristics.

Page 39 {RC-R/51/39} moves on to consider a range of settlement services that are offered by Mastercard and the standards do recognise that settlement services can operate on a bilateral basis. So it offers bilateral settlement. That is one of the settlement services. But it then says:

"All customers must participate in at least one

regional settlement service. In the defined regional settlement service, customers can settle in either US dollars or a local currency supported by Mastercard."

Page 40 {RC-R/51/40} deals specifically with bilateral arrangements. The second and third paragraphs down on that page are quite important for explaining how the bilateral arrangements for settlement interact with the rest the scheme. Please can I invite the Tribunal to read those two paragraphs. (Pause)

Page 43, please. {RC-R/51/43} We see halfway down that page there is a paragraph that begins:

"After the customer determines the settlement parameters necessary to guide the transactions for settlement, the customer must complete ... "

The form that I have mentioned.

Then two paragraphs further down:

If, during the settlement service selection process, it is determined that the transaction qualifies for multiple settlement services within the same level, Global Clearing Management System ... will use the parameters with the most specific matching criteria; otherwise, the parameters with the most recent effective date and time are used."

As I have said, I have not found anything that suggests you can disengage that particular system from

the overall arrangement even if you are using bilateral settlement.

Page 61, please. {RC-R/51/61} Bottom of the page, "Bilateral Agreements":

"When two customers decide to settle directly between themselves, they enter into what is referred to as a bilateral agreement.

"Both of the customers' principal contacts must send written notice of the bilateral agreement to the Head of Global Settlement Services (GSS) at least 30 days before they process the initial transactions through the clearing system. If Mastercard has no record of receiving such written notification of direct customer-to-customer settlement from both customers, the transactions will be rejected.

"If customers choose to settle directly between themselves, the transaction will not be a part of the settlement positions processed through the Settlement Account Management system."

It then deals with settlement fees, settlement liability, understandably under settlement liability if you go it alone on a bilateral basis, then it is not Mastercard's fault if settlement does not happen and there are certain penalties imposed for non-settlement.

It does not appear, however, that you can elect to

have bilateral regional settlement services. So, for example, if we look at page 75, {RC-R/51/75} there is a Euro standard with a long list of zeros then 7. It says:

"This regional settlement service is for all licensed customers."

Then over the page {RC-R/51/76} a series of long zeros and then 8 at the bottom of the page, it then says that regional settlement service is for all licensed customers as well. I just have not found anything in the settlement manual that suggests you can opt out of the regional service that is offered to all licensees and settlement banks there. This chimes with the approach that Visa has adopted are either in London or Frankfurt.

Page 321, please. {RC-R/51/321} This sets out settlement requirements for all customers and in short the obligation to perform net settlement is a condition imposed on anyone using the scheme and third party providers require Mastercard's approval. Please would the Tribunal be kind enough to cast an eye over that page.

THE PRESIDENT: Yes. (Pause)

Yes.

MR BEAL: Next page, page 322 {RC-R/51/322} imposes

an obligation for:

"All customers that have a net credit settlement position on a given day [to be] paid from the funds transferred into the Mastercard net settlement account by the customers that receive a debit position on the value date. Where applicable, Mastercard generates [the] transfer funds order ..."

So obviously if you have bilateral settlement those funds instructions will come from the parties themselves and the parties' banks, but it looks as though Mastercard needs to be kept abreast of the net settlement position because net settlement seems to be a core feature of the scheme.

Page 324 {RC-R/51/324} contains an obligation to use at least one regional settlement service. Obviously that makes sense if you have international transactions and not purely a domestic scheme, it is an international scheme, so you need to have regional settlement where it is appropriate.

Now, that was a pretty quick canter through the settlement manual but I do not detect from that that somehow there is an obligation for a divorced processing entity to be responsible for clearing, settlement or payment. Instead, in fact what Regulation 7 of the Article 7 of the IFR requires is simply the unbundling

of the process. So if you have a scheme, the scheme has to have a functioning independent processor for certain activities, it can be functionally independent but still part of the Mastercard entity, i.e. it is part of the group as a whole, but it is then functionally independent and what that allows is decoupling of processing from the operation of the scheme so that somebody can, if they wish to do so, use an independent processor and that independent processor then slots into the overall Mastercard scheme.

However, I understand the evidence to be that most people use the Mastercard processing entity for no doubt a variety of reasons.

Any independent processing services entity must be operating as an agent either for the issuer or the acquirer and we have seen that there is no suggestion that you can simply ignore the clearing aspects that are part of the global clearing management system and the scheme still requires net settlement.

So it follows in my respectful submission that the scheme still dictates that whatever interchange fee is determined by whatever agreement is reached for the interchange fee in the counterfactual, that interchange fee is still locked into the overall architecture of the scheme and still dictates an answer that the interchange

fee will form part of the MSC in an IC plus plus pricing model and the fact that there is even -- well, the fact that you end up with a scheme which has endorsed a method of selecting the MIF does not stop it being a coordinated approach to pricing in the way described by the Supreme Court.

So that is sufficient for my purposes to say that the essential criteria for finding that the Supreme Court central facts are met is capable of being applied to the bilaterals model as advocated by Mastercard, but you obviously have my other submissions, which is that the nature and effect of what has been developed as a thought experiment for this counterfactual is such that it does not represent actually a genuine series of genuine negotiations, they are sham negotiations which, to all intents and purposes the objective for which is to achieve a positive MIF at the level set by the IFR with a view to generating the positive transfer of funds from merchants via acquirers to issuers. In other words, to keep the old system going under a new device.

Now, at paragraph 42 of our note in reply we do say that Mastercard is essentially trying to make three different claims that are in tension with one another. Firstly that there is no sufficient element of agreement

in the bilaterals counterfactual which renders its outcome the product of an agreement between undertakings. What they say essentially is that there would be no scheme rules as to settlement and what I have been trying to do by looking at the settlement rules is to say, well, you cannot get away from the scheme entirely, you are still locked into it.

The second proposition is that issuers would all have -- would have all the negotiating power because the interchange fee is actually a deduction from settlement at par and therefore issuers could in particular threaten to withhold settlement. I think that is actually the core way that my learned friend Ms Tolaney runs her case which is because issuers have all the negotiating power, that means that it will as a matter of commercial reality, is the way she put it today, lead to a situation where everyone is pricing at the cap.

They still maintain -- and this is the third point, that settlement would still function in the bilaterals counterfactual, i.e. even though you stripped out on their extreme case clearing, settlement and payment, you still have an obligation to settle.

But we respectfully suggest it is hard to see how all of those three propositions can be true at the same time. That includes explaining how settlement would

work. This involves saying that there would essentially be no scheme rules for settlement whatsoever but that there may be scheme rules when it comes to actually processing an individual transaction. So there is this tension between trying to deal with it on a scheme-wide basis, ie, well do not worry about settlement of an individual transaction because we have no scheme rules whatsoever for settlement. So put settlement to one side. But then faced with the logical consequence of that, how does anyone guarantee that they are going to get paid. It is at that point that my learned friends' arguments descends into, well, of course they get paid because there is going to be an obligation under the scheme for payment to take place and it is managing those two key arguments which are in fundamental tension with each other that is the difficulty with the bilaterals counterfactual as advanced.

Simple propositions are as follows: if there are underlying rules requiring settlement of the transaction amount then in the absence of a specific deduction for a MIF, the default settlement would be at par and this is a point that the Tribunal made yesterday.

If it is right that you have an obligation to settle and if it is right that you do not need to have reached agreement for a given transaction, then surely the

logical consequence of that is you have got no agreement to deduct anything, therefore you have settlement at par. That is true whether settlement is carried out by a processor, a third party or anyone else.

But if that is right then of course a core element of the issuers having all the negotiating power is not made out because the default position will be there will be no deduction and you simply have settlement at par.

If, on the other hand, there are no underlying rules requiring and governing clearing settlement and payment, then you do not have a situation in which settlement is still a function in the bilaterals counterfactual for the simple reason that you do not end up with no scheme whatsoever with no guarantee of a payment. So if a merchant does not have a guarantee from the scheme that it will be paid, it simply will not enter into the transaction.

If the merchant is somehow given a guarantee on a purely bilateral basis with a given acquirer or an issuer pair then there may be a settlement given for that transaction, but you cannot read that across into a wider scheme and you certainly do not get to the net settlement position of lots of different transactions being netted off against each other, which as I have tried to explain must necessarily be the backbone of any

payment scheme.

The way I read the bilaterals note that was prepared by Mastercard was that clearing was a necessary part of the Mastercard process because otherwise the scheme does not know what is going on and indeed it cannot therefore levy scheme charges for the transactions it does not know anything about.

It was being suggested in the map and in closing submissions that even clearing could be farmed out to somebody else, and with the greatest of respect I just do not understand how that could work because if the scheme has no knowledge whatsoever of which transactions are being processed through the scheme, then you do not have a scheme controlling anything other than arguably IP rights to use the licence. But it would not know what transactions were, so it would not be able to enforce those IP rights. So the whole thing does rather collapse.

When push comes to shove, it is our submission that this counterfactual must necessarily recognise a process of mandatory bilateral agreements. So you do not get access to the scheme unless you have already agreed a bilateral agreement, therefore, access to the scheme is conditional upon the conclusion of a bilateral agreement and you do not get to get paid unless you have

a bilateral agreement in place and certainly with the HACR in place, what that means is that every acquirer, every merchant that wants to accept a Mastercard card has no choice but to accept a bilateral agreement. If you have no choice but to accept a bilateral agreement, then you are in a position whereby the issuers can charge what it likes and the whole counterfactual descends into what is essentially a unilateral selection of a rate by an issuer relying upon the mechanism of what otherwise would purport to be a bilateral negotiation, but that would be window-dressing.

Now, on a particular point that is made by us it was said that somehow I had suggested to Dr Niels that Mastercard would prefer bilaterals. I did not. I simply put to Dr Niels that that was his case was that that was preferred as a point of fact and this was something I explored with Mr Willaert, it seemed to me that his preference was for the UIFM and I have cited in paragraph 47 the evidence that supports that proposition.

Now, it would have been simpler of course if Mr Willaert's view had prevailed and we were only dealing with one counterfactual, but that is in a sense wishful thinking because we are where we are.

It has also been suggested that somehow I did not

put the impracticability of the scheme to the Mastercard witnesses. Without going through the detail, we have given detailed references in our closing submission, that was a core feature of my cross-examination of a number of witnesses and indeed Dr Niels. I spent a considerable time with Mr Willaert looking at practicalities and then with Dr Niels as well to the extent that Dr Niels ultimately recognised that he had not really thought about the position with EEA issuers and consequently, see {Day15/119-120}, and so the position is when I was questioning the practicality with Dr Niels he said:

"I had not really thought about extending this experiment to the EEA."

That is in specific quotes at the bottom of 119 and I said:

"Of course we are dealing here not just with the UK and Ireland but also EEA so we have to spell out the analysis, do we not, to issuers and acquirers throughout the EEA?"

He said:

"I had not in my assessment -- I had not really considered bilateral negotiations, also to have to take place for intra-EEA with acquirers and issuers outside the UK".

The reason that makes a significant difference is that the figures for EEA issuers are significantly higher on any view. Could we look, please, at {RC-J3/73/30}. If we look, please, at the recital itself bottom of the page, in 2012 Mastercard had issued 8,834 licences in the EEA of which 8,306 licences covered issuing payment cards and 7,130 covering acquiring. The vast majority of these licences is 6,600 who covered both issuing and acquiring activity.

So this gives the figures as at 2012. I am not aware of any evidence that suggested that that figure has gone up or down and the consequence of that is EEA is obviously a relatively big kitchen, but there is an awful lot more cooks than there would be in the UK.

The Tribunal's questions yesterday, in our respectful submission, simply cannot be improved upon for showing both the necessity for the HACR in this bilaterals counterfactual and more generally difficulties with the case being advanced and I do not propose to tread over that ground.

Scheme fees counterfactual, I dealt with this in our oral closing, whenever it was, feels like a long time ago.

On the map, paragraph 97a, it was somehow suggested that we did not dispute all sorts of things that we did

in fact dispute. So 97a, page 33 of the map, says I did not dispute the scheme fees counterfactual would be a realistic and practical alternative to operating with the MIF.

I do not think I have made any submissions one way or the other about its realism or practicality because our starting position was it had not been advanced.

It then says the schemes would be likely to adopt this in preference to settlement at par, it is said I had not disputed that. It is exactly what I did dispute because I said it would not be open to the scheme simply to replace the MIFs with the equivalent by way of scheme fees for a whole host of reasons I gave in my oral closing on Tuesday.

So that is, with the greatest of respect, simply not right.

It was then said I did not put forward any reason to dispute the likely outcome would be as set out above.

I mean, that is simply wrong. I gave a number of reasons, including the anti-circumvention provisions and the fact that it would give rise to other competition issues as to why it could not be said in advance that the scheme fees would simply replace the MIFs but my fundamental point was we had no evidence one way or the other as to what levels the scheme fees would reach.

When I was talking about the removal of MIFs from the counterfactual, the point I was making is on IC plus plus pricing, if you remove the MIFs it naturally comes down, if it is appropriate, and we say it is not, to then think what would the consequential decision by the scheme be, there is no evidence that it would replace scheme fees to the same extent, there is no evidence one way or the other on that and it necessarily follows if MIFs are removed and you do not know what the scheme fee element that is going in, you have a position where the MSCs, even in this counterfactual cannot be said to be at the same level and I do not want to get involved in evidential burdens either, but this is not my argument. I say it is default settlement at par is the argument.

What we do have is a wholesale absence of any evidence to suggest that scheme fees would be set at the same level and there are a number of reasons I have given as to why it would not be.

So I just cannot see how any of these statements are accurate.

On objective necessity I do not think that this is said to be a point that is raised here. It is only raised in the context of the HACR and in the context of the HACR, the schemes' position is that that rule is

said to be crucial for the operation of the scheme because it is said to be objectively necessary and so if as the Tribunal listed yesterday you need the HACR in place to support the bilaterals counterfactual, then the position is that the HACR is said to be crucial and therefore objectively necessary. We disagree with that, as it happens, but what that means is the HACR is said to be the way in which countervailing bargaining power is removed.

It was said there was no evidence of -- from the claimants confirming that countervailing bargaining power would be exercised. Well, there we have the evidence from M&S about doing a deal with new entrants, we have got the findings from the Commission that the HACR is not objectively necessary, we have got evidence that, given an ability to deal with different prices, Mr Bailey from Pendragon said for example if he could deal separately with premium cards he would. It was then said by Mr Kennelly today there was no evidence of premium cards.

Can I, before the transcriber's break simply bring up, please, {RC-J5/48.1/1}. It is possible that I misunderstood and Mr Kennelly was only referring to consumer cards in which case we do have their consumer debit.

MR KENNELLY: I was only referring to consumer cards.

MR BEAL: Right.

That is probably a good moment for the transcriber break.

THE PRESIDENT: Thank you very much. Mr Beal, we will rise for 10 minutes.

(3.20 pm)

(A short break)

(3.34 pm)

THE PRESIDENT: Mr Beal.

MR BEAL: Thank you, sir. What I am proposing to do is to direct my submissions on issues 4, 5 and 8 principally by reference to this note but only pick up certain of the references. Time does not permit to go to each of them and nor indeed do I think the Tribunal would thank me for doing so.

So on the question of market-wide analysis versus do we simply look at the transactions in issue for Visa and Mastercard, it was suggested by Mastercard that our experts had effectively accepted the market-wide approach. I have given the Tribunal the reference in paragraph 53.1 to Mr Dryden's position on that, it is not right.

The Supreme Court clearly did not think it was necessary to look at the market-wide approach because it

did not conduct any analysis of the switching issue, at least in the context of Article 101(1) and the Court of Appeal had looked at it in the context of Article 101(3).

Delimitis was, as the Tribunal is well aware, a case about the cumulative effect of a network of individual beer tires for individual pubs that did you not actually deal with the counterfactual.

The high point of my learned friend's case on this is at {RC-J5/49/13}, where Ms Tolaney relied upon footnote 39 in the Commission guidance at the bottom of that page, which in fact is citing from the *Generics* case and what the *Generics* case was dealing with -- and I will come on to it in a moment -- is the factual scenario, it was looking at the conditions of competition in the factual world because it wanted to understand, for example, matters such as demand substitution for competing products, in that case pharmaceutical products versus *Generics*, so it was not actually dealing with the counterfactual.

I will come on to show you where the Court of Justice did deal with the counterfactual in that case. But if we could scan up, please, back to paragraph 32 from which that footnote is derived it is clear from its terms that it is dealing with whether or

not an agreement has restrictive effects in the real world, so you look at the nature and content of the agreement, context in which the co-operation occurs, economic and legal context, a degree of market power and then restrictive effects on competition which can be actual or potential, but in any event have to be appreciable.

So it is not actually geared towards the counterfactual analysis at all, it is simply geared towards the factual analysis of what is the impact of a particular aspect of an agreement or an agreement itself on competition in the actual world.

Generics is {RC-Q3/56/20}. If we pick it up at paragraph 112 at the bottom, what the referring court had been asking, this was in the context I think -- I went to this in opening, this is in the context of an agreement essentially that compromised a patent dispute and had the effect of keeping a *Generics* manufacturer out of a domestic market, relying on an IP dispute to settle and pay money to the *Generics* manufacturer.

The national court raised a question as to whether or not if the settlement agreements at hand had not existed, would there have been a real possibility that the manufacturers of *Generics* would have been successful

in the proceedings in contesting the patent process, or alternatively did they have to show on the balance of probabilities that a less restrictive form of settlement agreement would be reached.

At 113 and 114 we see that part of the concern that was driving that was that the referring court added that:

"If before the existence of restriction by effect can be included, it is necessary to find that there was more than a 50% probability that the manufacturer of *Generics* medicines would have succeeded in proving that it was entitled to enter the market or alternatively, would have included form of settlement agreement such a finding cannot be made on the information available to it."

So what the referring court is saying is: look, if we have to deal with this on the balance of probabilities and look at the balance of probabilities in the counterfactual, we would not be able to say hand on heart that the *Generics* manufacturer on balance would have won that IP case and the IP case may therefore have lead to the position where it was not able to enter the market.

The answer that was derived from that is set out at paragraphs 118 through to 122, please could I invite

the Tribunal to read those paragraphs, that is 118 to 122 where the court concluded that it was not necessary to establish on the balance of probabilities what would have happened. (Pause)

What that means in context there, if you did not have the settlement agreement by which you agreed to stay out of the market in the counterfactual that agreement would not have existed therefore you could have entered the market, the court did not say: but you need to analyse to the nth degree what else might have kept you from entering the market. It was sufficient that agreement had the substantial effect of keeping you out. The possibility that you might have won or lost the ensuing patent litigation was irrelevant for the assessment of the actual or potential impact on competition from that agreement keeping you out of the market.

I have then got a series of points, just picking up things that have been said principally in the roadmap served by Mastercard who have essentially led the charge on issues 4 and 5 which is why the concentration is on them.

Paragraph 56, it was suggested that Mr Dryden had tried to change his evidence in cross-examination to say Amex must be disregarded. In fact, if we look at the

underlying way that the evidence is put by Mr Dryden, it is clear all along he was saying I do not actually think Amex is technically part of the market for the reasons he gives. He then accepted that it was unattractive for the analysis to turn on market definition and therefore he did not insist upon the purist view. He set out arguments for and against Amex being included and his own view for what it is worth was I think it makes more sense to consider Amex transactions are not wholly in the acquiring market.

That qualification was to deal with Amex GNS which of course is now the defunct product from Amex and he also stated his view that switching to Amex was not a relevant consideration.

Paragraph 108 of the map suggests that the wide MSC view was needed because otherwise fact 6 merged into fact 2 and did not add anything. With respect, that is not right either. Fact 2 and fact 6 are obviously closely related but one relates to the floor issue and the other relates to pass-on. So they are dealing with different issues. That can be shown by the fact that Mr Holt did not conduct an assessment of narrow pass-through as he thought the data was not available but he did not appear to treat that as simply an aspect of the floor and we have given you the references to his

paragraphs in his evidence.

More generally, the *Mastercard* case on market-wide was somehow you would be ignoring economically relevant material if you treated this as simply being an assessment of whether or not the level of the MSC for Visa and Mastercard transactions in the counterfactual would be higher or lower, but of course the economic reality in the analysis of the impact of a particular position in the wider market are all matters that are traditionally dealt with under Article 101(3).

My learned friend Mastercard's submissions in map 110 we say simply fail to give effect to the overall evidence given by Mr Dryden, which was that in the absence of inter-regional MIFs, the MSCs would be lower and that the risk of switching was irrelevant and even if it were not irrelevant, then it is -- the risk of switching has been significantly overstated. He also dealt with the overstatement of alternative payment methods. Now, all of that is not, we say, reflected in the way it is cast in the roadmap.

It was also suggested as I alluded to earlier that I had not taken a witness properly to a relevant section of a document and if I had, that witness' evidence would have been confirmed, not disputed.

Could I now look at the document I mentioned earlier

it is {RC-J3/13/2}. Under "Background" at the bottom of the page:

"Currently MasterCard faces a competitive advantage for issuers on cross-border transactions between EEA countries. However, for cross-border transactions between non-EEA countries, as well as between EEA and non-EEA countries, Visa's interchange fees are significantly higher."

There is then a reference in passing on the next page to a cost study and you will see that is dealt with. {RC-J3/13/3}.

Then on page 4, {RC-J3/13/4} we come to look at the competitive analysis and the last paragraph on that page at the bottom says:

"It is now recommended to implement the second step to reduce MasterCard issuers' competitive disadvantage and gives them a competitive advantage for MasterCard World and World Signia cards. This second step also allows a rate differentiation between the Consumer and World cards in order to compete effectively versus the T&E cards issuers such as American Express which fees are usually higher."

What is driving the recommendation for the interchange change is not the cost study that is alluded to at page 3, but the perceived need to compete

effectively with both Visa and Amex.

We then see at page 6, bottom of the page, {RC-J3/13/6}:

"Given the significant difference between the current interchange fees between MasterCard and Visa, it was proposed to reduce MasterCard issuers interchange competitive disadvantage gradually. After approval of MasterCard CEO in August 2006, the first step was implemented in January 2007. It is now recommended to implement the second step to reduce MasterCard issuers' competitive disadvantage and gives them a competitive advantage for all MasterCard Commercial cards."

So what is being suggested is a hike in the MIF rate for commercial cards in order to meet the competitive disadvantage that it was perceived existed. None of that MIF rate setting has any reference to the cost study. So my learned friend said if you had taken the witness to the cost study that would have endorsed her view that these MIF rates were set by cost. In fact, viewed in context at pages 2, 4, 5 and 6, it is clear it was not the cost study that was driving the eventual setting of the MIF.

Indeed, my learned friend said -- and I have given the transcript reference -- the evidence before the Tribunal makes clear that the schemes dictate the cost

to the issuer which of course is not the correct way round, the issuer setting out what its costs are and the MIF then giving effect to them.

Small point of detail, paragraph 62, Mr Dryden does deal with the costs of bank transfers and says that the cost is lower than the costs for commercial -- sorry he says the costs are lower than the costs for other payment cards, that is {RC-H2/2/104} I think he may have been dealing with commercial cards at that point.

Let us just have a quick look at the costs of banks transfers are being dealt with generally and he says that the costs of these payments are significantly below the cost of commercial card payments.

I have put that in the wrong section, I am sorry.

But the point is that Mr Dryden had been dealing with the costs of alternative payments and he did not simply accept that all the other payment costs were higher.

There is a contradictory element in Mastercard's case on the two 2019 Commitments because part of their case involves saying that the impact to the reduction in the MIF rate was small and therefore there was limited scope for switching and they say that when I used the 29 Commitments as being a natural experiment for understanding what would happen if MIF rates were

reduced. On the other hand, they then say adopting the evidence of Mr Knupp that of course it was that reduction in the MIF rates in 2019 that led to the declines in authorisation and that was a direct response to the absence of the revenue. So on the one hand they are saying you do not get switching because the change in rates was too small, but they then say: but the change in rates was enough to stop authorisation being given.

Well, of course, if it is right that the change in MIF rates was big enough to lead to a change in issuer behaviour, then on the schemes' case you would have expected at that point mass switching to Amex because of course they would be deprived of the revenue which was said to be significant for the purposes of the decline rates analysis and we simply do not see that at all.

As a factual matter, the European Commission's press release, which I have already taken the Tribunal to, said that the overall drop in rates was about 40% and there is a graph that is available in confidential material which is {RC-H3/2/96}, which confirms the average consumer MIF by transaction type and it gives an inter-regional figure at the top of the three lines on the graph, I am not obviously going to deal with the details. But you can see what the graph shows,

evidently.

Now that is not a disaggregated figure; it includes both consumer and commercial cards and it says:

"I have restricted inter-regional transactions to consumer card transactions."

So he has excluded commercial cards for the interregional figures, but otherwise the figures are the same.

So what we have from Mr Dryden suggested a less severe fall for card not present transactions but what we do not have is disaggregated figures on Mr Dryden's evidence.

So the best that we can do, looking at the material is to consider the impact of the full consumer card transactions following the Commitments and that is shown there. But I appreciate that is not disaggregated more generally between card present and card not present.

Mr Tidswell asked about decline rates. At paragraph 65 I have given the references and 66 deals with the substance of the point so the references were put to Dr Niels in the context of Scenario 4. Scenario 4 was the survey evidence for inter-regionals where it was put to consumers that: if your card was declined, what would you do? It was in that context I had some discussion with Dr Niels about the

consequences. That point is in fact addressed by Mr Dryden in Dryden 2 {RC-H2/2/42}, paragraph 8.27. He deals specifically with Scenario 4 and he refers then to the evidence from Mr Knupp.

Can I just briefly give you my highlighted points about Mr Knupp's evidence. I maintain that the basis upon which the increase in authorisations were said to derive from lower MIF income was not apparent to me, so we have the bare statistic from him derived from Visa data that has not been disclosed to us of an increase in declines for inter-regional transactions rising from 17.7% to 46.4%. That then came down the following year to just under 21%.

So there was an increase but not a sustained increase over time. What we do not have is any suggestion in evidence other than Mr Knupp's statement, assertion, that the two events are causally connected and I did put to Mr Knupp you are in a position where for the last two months of the period you are looking at you had international lockdown and he denied that that would have a material effect but of course international lockdown would mean that card not present transactions became increasingly unlikely because people were not moving and if they were all locked into their domestic regimes or their home countries, then the idea of

suddenly having a card not present transaction seems unlikely on an inter-regional basis and certainly a card present inter-regional basis seems even more unlikely.

So the position we are in is that is one explanation but I am not in a position to say one way or another whether there is a causal connection, it just seemed to me it was assuming too much to simply say there was an increase in declines and that must necessarily follow as a result of the restriction of MIF income from the Commitments decision.

That is Commitments.

There is a subsidiary point at paragraph 67 about Dr Frankel explaining that if there is a rise in decline rates that might actually be an economically good thing because it means you are not subsidising a higher level of fraud in order to generate MIF income, but I think that is rather a technical point and I do not need to dwell on that unduly at 10 to 4 on Maundy Thursday.

There is however a degree of inconsistency in Mastercard's case on the counterfactuals for inter-regionals. There was this acceptance as I read it that the appropriate functionalities considered would be removed as a response to the decline in MIF income would be functionality for the UK and Ireland and that was the approach that Dr Niels adopted when cross-examined. But

the scheme then relies upon the absence of MIF income across the board in order to justify what it says would be cardholder and issuer switching, and there is a disconnect there between the MIF income that is attributable to the lack of functionality and the MIF income that is then taken into account more generally in order to justify what is said to be the risk of switching.

There are also some inconsistencies that we have pointed out at paragraph 69 between Mastercard and Visa's position on this where it appeared that Mr Holt for example thought it was appropriate to look at functionality potentially being shut off more broadly than in UK and Ireland as I understood it but also he was insistent that we should, come what may, take into account the global income because he said otherwise you would have the risk of everyone saying: well, it is only our income that is at issue and you would have this patchwork quilt effect.

If one is to compare like with like it seems to me either you assume that entirely international functionality is shut down, full stop, for the sake of UK and Ireland which is implausible, or you have to constrain the MIF that is affected by the absence of functionality to the markets in which functionality

would be withdrawn because otherwise you are not comparing like with like.

Finally, on this point of Inter-regionals, Mastercard said that they did not have the same prohibition on geographical -- on transactions in a geographically prohibited area being accepted. So if you remember the Visa rule is you can have a geographical restriction, but if somebody presents a card there, you still have to honour it. In fact the Mastercard equivalent provision is to be found at {RC-J3/130/130}.

That is a prohibition on selective authorisation, I put this to Dr Niels in cross-examination. The first part of clause 6.4 says:

"Without the express prior written approval of Mastercard, the customer must not launch or maintain a card programme that has the effect of selectively authorising transactions arising from the use of cards."

So you think, well, hold on, obviously Mastercard could then, in theory, give an issuer permission to authorise selectively. Except we then see, in the second substantive paragraph down:

"An issuer's authorisation decision must be made on an individual transaction basis and not on the basis of merchant or terminal country location, acquirer

...(Reading to the words)... type..."

Etc. So it is not open to Mastercard on its own rules to give permission to exclude all transactions coming from Ireland or the UK because to do so would be selective authorisation.

On objective necessity, we make the simple point that just because the schemes have said there is no four-party regime that does not have a MIF that allows international acceptance, therefore, it is necessary to have a MIF. Our short point on that is the objective necessity test requires effectively an understanding of whether or not it would be impossible to have a four-party payment regime that operates with a zero MIF and still allows international transactions and our case on that is it is not impossible.

If, as we say it would, cardholder demand for international functionality would be strong and if as is the case the proportion of MIF income attributable to international transactions is small, then it is implausible to suggest that the entire system would pack up if MIF income was reduced to zero.

Commercial cards. Top of page 22, paragraph 72.

There has been a series of debates with Mastercard's and Visa's witnesses as to distinctions between commercial card transactions. I do not propose to go

through all of that, the Tribunal has been through it all. You know that we disagree that these are matters that are relevant to the assessment and we disagree that some of them are accurate, but I think that is as far as I need go.

Mastercard also suggested that Mr Dryden was confused about SME debit. I have given you some references again. It is going into the detail but our submission is that that simply is unfounded, that criticism. He was clear what he was talking about and he was making the point that Amex is not present in the debit and SME and that SME debit is a huge chunk of the commercial market. That was clear from his cross-examination and it is also clear from his expert evidence and therefore the criticism is unfounded.

Mastercard submitted that the cost of alternative payments had been considered in previous proceedings and therefore there was evidence on which this Tribunal could reach conclusions on that, but of course that previous proceeding was on the basis that there was full and proper disclosure for Article 101(3) purposes which is precisely what this Tribunal lacks and then the specific criticism about electronic payments I have already dealt with but in the wrong place. It seems in my tired state last night, I included it both under

inter-regionals and under commercials. But there we are, belt and braces.

I am not going to go through paragraph 75. I have already made the point about it being suggested I put the wrong documents to the witness, but I will leave that point to make itself.

On the Central Acquiring Rule, so Mastercard's case on cross-border acquiring, the map essentially suggests that Mastercard has to benefit from Visa's treatment as a result of the Commitment decision.

Their case otherwise, however, is that *Gasorba* means that this Tribunal is free to decide what the position is regardless of the Commitments decision. So there is a tension there. But my fundamental point is that claim to be able to rely upon asymmetric treatment must be wrong because one has to assume that the old CBAR was an unlawful rule. Visa chose to cure it by the offer of Commitments, which were accepted, Mastercard stuck to its guns and fought it through to an infringement decision and the infringement decision went against it, ultimately as a settlement decision rather than a full out infringement decision, but Mastercard accept that following the VOL AB case that is a binding decision against it.

On non-discrimination rule, I do not think I need

add anything else.

On Visa's cross-border acquiring rule, following Mr Kennelly's submissions this afternoon, on the object point our case on object is that there is quite clearly an object restriction and that cases such as *Generics* establish that as a matter of EU Competition Law provisions or agreements that partition a market along national lines is not simply a question of single market functionality, it is an object restriction of Competition Law for Competition Law purposes. True it is that there is underlying single market rationale for that, but the objection to compartmentalisation is that it leads to artificial barriers being erected between markets that are supposed to be part of a single market and it leads to different prices being capable of being sustained in different national markets.

The classic example is indeed the *Generics* one where if you have national territories for pharmaceutical products and you seek to prohibit *Generics* cross-border parallel importation, then that leads to artificially high prices being maintained by the patent holders to the detriment of the consumer who would prefer to have *Generics* medicines competing away some of the high prices charged by a patent holder to the extent that there is no patent issues.

My point with the experts, including Mr Dryden, was that they did not view the competition analysis through the lens of CJEU case law. It makes it clear that compartmentalisation of national markets in that way is an object restriction of competition. Instead they tended to view the matter as being: is it open to an acquirer in a different national market to get access to a domestic market in the host member state and they viewed it as a market access point.

Having concluded that it was open under the cross-border acquiring rule for an acquirer based in the Netherlands to acquire transactions in the UK market, albeit at the domestic MIF rate, that was sufficient for their purposes to say: Well, there is no problem with that from a competition perspective.

Mr Dryden's point on effect was a different one and I will come on to that. But the problem with viewing this solely as a market access point is that that then ignores the way that EU Competition Law has looked at this, which is if you stop people who are perfectly capable of offering a service cross-border on a different cost basis then you are restricting cross-border competition on the merits in the host member state. So if you do not need to be physically established, as you do not as an acquirer, in the UK,

why should a Netherlands bank not be able to offer a cheaper mortgage rate if it has access to a wholesale lending market in the Netherlands that gives it a lower cost base? Why should a Dutch acquirer, if it has a benefit of a lower MIF rate, not be able to offer the lower MIF rate through MSCs charged in the UK for UK transactions?

What is being said against me is, well, this is like a tourist paying a US price for a UK burger. If that tourist has imported the US burger for a US price and then consumes it in the UK, that is the equivalent of the cross-border service being provided by the acquirer from the Netherlands to the UK, not somehow the acquirer taking advantage, unfair advantage of rates which are not available on a purely domestic basis. Another example would be the common occurrence for example in the United States where you have sales outlets along the frontier between States where there are discrepancies in sales tax payable from one State to another, you have a conglomeration of sales outlets to take advantage of the difference in tax so that people can drive across the border of a State and pay less sales tax.

Cross-border acquiring is eminently suitable to cross-border delivery because it is all electronic, it has a platform and the only reason why it is said to be

unfair arbitrage is that it is able to tap into different MIF rates that are set by the schemes. If the schemes have chosen to offer a MIF rate in one national market that is different from another national market and the technology exists, which it does, to be able to free flow the services across the border then the only difference between the competitive analysis is the underlying costs for that service provider.

They are competing on the margin on a purely efficient basis. My learned friend says: Well, the competition below that level, at the MIF level, is arbitrage and unfair competition. But it is not. It is simply a consequence of the way that the schemes have chosen to set their MIF arrangements.

Looking at the competitive framework and the density of competition point or intensity of competition point that my learned friend Mr Kennelly made that is akin to the idea that you do not have any competition where you have a common cost that is applicable to everyone and the argument that has been made before in the Mastercard I proceeding was: you do not have to worry about competition, everyone pays the common cost, it is like a tax and then the competition takes place above that so therefore there is no restriction of competition and that is the very argument that the Commission rejected

and was upheld by the General Court and the Court of Justice.

Coming on to effect. The way that Mr Dryden dealt with this was to say, as has been pointed out, either you have the lowest common MIF approach or you have the scheme set uniform rates. But the lowest common denominator approach would lead to for example MIF rates of zero or 0.1 being available and so that would lead to an appreciable effect of competition because potentially but for the CBAR you would have able to tap into the Irish rate at 0.1, offer cross-border services and the MSCs would come down.

In terms of the scheme setting uniform rates, you have my point that that essentially amounts to a promise that if the CBAR was removed the schemes would co-ordinate prices in multiple different national markets to hit a uniform higher level and that would amount to naked price co-ordination on the market and that would be unlawful so that would not be an appropriate counterfactual. Either way what is being deterred is the potential for competitive cross-border entry to drive down prices for MSCs in the UK as the protected market that is shielded by this rule.

Non-surcharge rule. We say it was restriction by object for so long as it was maintained as a rule

precisely because when it is maintained as a rule it finds its way into the merchant services agreements because we know that the acquirers are required to ensure that merchants comply with the scheme rules and we say that in that way for so long as it was written as a rule it would be a restriction by object. Now, that is not the same point as saying for so long as it is lawfully permitted, there is no issue with restriction because there is this residual operative effect.

If the schemes say: Well, we do not need to have the no surcharge rule because nobody in practice does it then you do not need the rule in the schemes in the first place and in any event we say that the potential effect of the restriction is that where merchants are in fact able to surcharge, they would be deterred from doing so by virtue of the terms of the scheme rule.

Co-badging. Again here it is a very short point.

It was said that the EEA region point only was a bad point because of changes with Brexit. My point is nothing to do with the regulatory regime, it is the scheme rule itself says that it is relaxed only for the EEA region and therefore that relaxation is no longer operative when the UK is not part of the EEA region. That is simply a construction of the rule itself and that is the basis upon which we say that therefore it is

non-compliant with the UK IFR.

That brings to an end my submissions on the rules.

It remains for me to deal with two points. Firstly, the degree of unpleasantness we had earlier before the short adjournment. You have seen that we have taken a detailed response to the number of allegations that are made of things not being contested, things not being argued, not being challenged and my suggestion was that, a number and extent of those being inaccurate, needed to be called out for attention.

As the Tribunal rightly pointed out there was never any implicit or explicit suggestion by me that that amounted to professional misconduct on the part of anyone and I am very grateful to the learned President for making it clear that that was not the way it was perceived because that certainly was not the way it was intended so I just want to make that clear.

You will understand the force of the forensic point I am making, which is that faced with a serious number of allegations like that that we have had to deal with in a very long and detailed table that was the subject of a forensic response from me, which I put in that note. But I reiterate there was never an implicit or explicit suggestion of professional misconduct.

The second point is simply to, on behalf of the

entire Bar I am sure, thank the Tribunal for their patience and endurance over the last six weeks, sitting some long hours, dealing with long witness testimony, long expert evidence testimony and to thank you very much for your indulgence in that regard.

THE PRESIDENT: Thank you, Mr Beal.

Ms Tolaney?

MS TOLANEY: Thank you, sir, for that. I obviously reiterate on behalf of the schemes thanks to you and particularly when some of the days have been gruelling and we do appreciate, on this side of the court, that that is often because we took a little longer and therefore we are particularly grateful.

In relation to Mr Beal's point, I am not going to labour the position but I am going to put down two markers. The first is that this table and the note were presented as examples of things that were inaccurate and they were said to be the product of indolence and guile, both in writing and orally, which was -- so a) it is said that this is inaccurate and b) it is said that that was the product.

Now, on a very quick look at this, most of the examples in this table are about a legal submission that was made by Visa or Mastercard and the responsive position of the claimants so they are not, as described,

factual inaccuracies in the main. That is the first thing.

The second thing is that the dozen of examples that are given that are in the category of being said to be factual inaccuracies are not and there is a great deal of factual inaccuracy in this document and the note including, for example, the repeated assertion we heard about clearing. Well, clearing is mandated to be a separate process by the IFR, so the idea that this is a Mastercard dreamt up idea for example is just a factual inaccuracy.

We will have to think about whether, for the Tribunal's benefit and also given what this table is said to demonstrate, whether we need to put our own point on the record and obviously the team is not delighted to have to do that.

THE PRESIDENT: Ms Tolaney, let me at least say something before you go on about how we are going to deal with these sort of notes.

Generally, we acknowledge and indeed applaud the long hours that have gone in on all sides in producing this sort of material. What you have done, all of you, in the space of very few days is truly very impressive, but we are not going to take something that was produced in the morning of the reply as anything other than

an effort by counsel, just as your documents were, to provide us with material that you would otherwise read with undue haste into the transcript.

But the idea that we are going to take this as the last word is obviously not right.

MS TOLANEY: I understand, sir.

THE PRESIDENT: I mean, even Mr Beal would not expect us to do that. So we will be looking at all of the submissions, but certainly those that you have received last because they are reply submissions, with enormous care.

MS TOLANEY: Of course.

THE PRESIDENT: If of course you want to put in something in response, my having said that, I am obviously not going to stop you.

MS TOLANEY: Thank you.

THE PRESIDENT: But I do not think it is likely to help us very much because either we will look at this and say yes, it is right, or look at it and say: yes, it is wrong in which case the question is done. Or we will think, actually we do not know what the answer is in which case you can expect us to be reverting to the parties for assistance.

MS TOLANEY: I am very grateful for that. I am just putting a marker down given the nature of what has been said.

THE PRESIDENT: It is a marker you are perfectly entitled to put down. I just would not want people in your teams Easter to be spoiled because you feel it is necessary.

MS TOLANEY: No, well, I am grateful for that.

THE PRESIDENT: My signal to you is I do not think it is, but at the end of the day that is your call, not ours.

MS TOLANEY: Thank you very much.

I think that leads me to my second point. I am not going to labour it. I am appalled. My team and that of the Visa team -- because of course this submission was made about the team -- have worked incredibly hard. For juniors to be told, who have had the contribution, as you can imagine, to the written documents, that their work is indolent or deceptive is extraordinary for a senior member of the Bar to do. For it to be said that advocates, Brian Kennelly and myself, who I think are known to be reputable, careful advocates are guilty of guile, which the dictionary definition refers to as dishonesty.

I am very grateful to the Tribunal for making it plain as to your perception of it.

I would say that, however, I think Mr Beal would have been appropriate to have withdrawn that and to have apologised. It is not a necessary allegation. It is not justified on the documents he has put forward. It

is not justified in any sense and I have put that marker down because it was appropriate for my team and for the Visa team that somebody said so. Thank you very much.

MR KENNELLY: Sir, I also wish to echo the comments of counsel, to thank the Tribunal and the Tribunal staff for working so hard to support us and to support the progress of this trial.

I also unfortunately have to echo the submissions of Ms Tolaney in relation to what Mr Beal said.

Just to remind him, he did say that the inaccuracies he identified were the product of either indolence or guile on the part of the advocates and like Ms Tolaney I have to, in defence of my own team, protest at the unfairness of that. There were inaccuracies in his document, too. Inaccuracies arise in litigation like this.

It is quite inappropriate to suggest that where those inaccuracies arose, if there were any, they were the product of indolence or guile on the part of very hard working lawyers who are not in a position to defend themselves to accusations like that and so I echo what Ms Tolaney said. Thank you.

THE PRESIDENT: Thank you.

MR BEAL: Sir, the words are the words. I stand by them because what I said is the level and extent of errors is

usually associated with people who have not picked up on things or people who are trying strategically to give a certain light to things.

That is not an allegation of deception and I do not read the word "guile" in the dictionary as involving dishonesty. It involves native cunning and it was intended in that way. Now, for whatever reason if my learned friends are seeking to import words in the transcript for future whatever references may be made to whomever, then I am afraid they are inaccurate in their summary of exactly what I put.

The words speak for themselves and they were caveated. They said: the level and extent of that sort of error and inaccuracy across a sustained period is usually indicative of indolence or guile and I do stand by that as a proposition because -- and it will be for the Tribunal ultimately to judge whether the repeated references to my witnesses and my experts having accepted things or for me to have accepted things is accurate as a statement and I do not have time to go through all of them and nor does the table go through all of them. But I can sustain that criticism with a very detailed response if it becomes necessary.

THE PRESIDENT: I, indeed we, are not going to say anything more about this than what I said before we rose for the

short adjournment, which is that we do not regard this as a statement of professional impropriety in any way.

It is a hard-hitting point and for that reason we entirely understand and have permitted Ms Tolaney and Mr Kennelly to rise in defence of their teams. It would not I think be appropriate for us to say anything more on this, save what we choose to say in our judgment and I will leave it there.

But I do not want to leave the proceedings on that note because I think it would not reflect the very considerable efforts that we know the parties have undertaken to bring this case to trial and I do not want to leave it unsaid that any six-week trial of this complexity is a huge undertaking and requires enormous commitment and skill on the part of all, but this was no ordinary six-week case.

It bears casting our minds back to August and September of last year, when all of the parties collectively suggested that a trial at least on the issues that we have tried was not possible and it is a tribute I think to all of the parties that that partial or whole adjournment was avoided and we have tried the case more or less to timetable.

That could not have been done without the very significant efforts of I am sure everyone in the room

but I am quite sure a large number of people not in the room and I do hope that this statement of our appreciation, which really can only be rendered before a judgment is handed down rather than after, that our statement of appreciation is on the record because it is no mean feat what you have all achieved in the last few weeks and I think that is worth saying.

On behalf of us all I think we need to extend our thanks once again to the transcribers and shorthand writers and technicians, to the Tribunal staff who have, somewhat involuntarily, been forced on this journey. I mean the Tribunal are to an extent volenti but I do not think the Tribunal staff or those who have been assisting Opus fall into that category and I just want to repeat the thanks that we expressed at the end of the oral evidence to everyone. Thank you all and we will reserve our judgment and hand it down as soon as we can.

Thank you all very much.

(The hearing concluded)