IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS

TRIAL 1

A P P E A R A N C E S

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

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

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

Monday, 19 February 2024

Opening submissions by MR KENNELLY (continued)

(10.32 am)

THE PRESIDENT: Good morning, Mr Kennelly.

MR KENNELLY: Good morning.

Members of the Tribunal, I was on issue 3 and I was turning to the Claimants' arguments in response to the UIFM and I would ask the Tribunal to turn up the Claimants' submissions, their written submissions, {RC-A/1.1/84}, page 84, and we are looking at paragraph 187(1).

I will deal with each of these three points in turn. These are the three main submissions which the claimants make in response to the UIFM counterfactual and I will take them in order.

Looking at 187(1) first and the language which the claimants use, you see the basic argument and I will paraphrase some of the language that is used here: the scheme rules dictate that whenever an issuer required by way of MIF would contractually have to be paid by an acquirer. They make the point that the UIFM depends on the maintenance and effect of the HACR. They say, skipping down two lines:

"... in default of genuine agreement the issuer's choice of MIF is to be preferred ... the acquirers are locked into a bilaterally negotiated settlement whatever the terms may be."

That is the thrust of the claimants' first point against the UIFM.

What is interesting there, members of the Tribunal, is that the claimants accept that the -- in this first point that the interchange fee under the UIFM is set independently by the issuer. The issuer decides independently whether and what interchange fee it will apply. The problem, say the Claimants here, is that the scheme rule facilitates the exercise of bargaining power by the issuers, that is the point they are making here at 187(1), and there are three points we make in response to that.

The first: to the extent that issuers have bargaining power and acquirers are forced to make bilateral agreements, that is not a complaint about the UIFM. The UIFM does not create bargaining power for the issuers. The issuers are able to set positive interchange fees because that is how the economics of the two-sided market works. If there is a scheme rule that might give the issuers bargaining power, it is the HACR and I will come back to that separately at the end of my submissions on the UIFM.

Now, the only difference between the UIFM and

Mastercard's proposed bilaterals model is in fact that the UIFM introduces some practical constraints on the ways in which issuers can exercise their bargaining power, so the Tribunal sees we require them to state their fees openly in advance so that acquirers and merchants know what they are dealing with. But that is not what gives the issuers the power they have; that is not what enables the issuers to exercise their bargaining power.

Quick point on the bilaterals counterfactual, my learned friend suggested that *Visa* has said in evidence that it would not be feasible and my learned friend quoted from the witness evidence of Mr Knupp. The point that was being made there by Mr Knupp was that it would be difficult for bilaterals to work globally. Mr Knupp said in terms that domestically it would be much easier to implement a bilaterals counterfactual.

I will just give the Tribunal the evidence. It will be explored in evidence with Mr Knupp, no doubt. It is {RC-F4/8/8} paragraphs 27 to 29, paragraph 29 in particular.

The second point that I want to make in response to the claimants' submission is that as a matter of competition law, the schemes are not required to prohibit the issuers from exercising what bargaining power they have and that is a statement one would hope so obvious as to not require making. What we have seen from the authorities is that the schemes are forbidden from setting positive MIFs collectively and for that I would like the Tribunal to go to the Court of Appeal's judgment in *Dune* . This case is also relied upon by my learned friends for this point. I rely on it also, not this time for what it says about the UIFM, but where it addresses the question of VI setting the MIFs unilaterally. Can I ask the Tribunal to take up the Court of Appeal's judgment in {RC-J5/46/24}.

As the Tribunal knows, until 2016, the MIFs were set by *Visa* Europe Limited which was an association of undertakings, then *Visa* Inc acquired *Visa* Europe Limited and from then on *Visa* Inc set the MIFs. It was a single undertaking, a public company on the Stock Exchange, and we argued: well, surely then it is not a collectively set MIF because VI is setting these MIFs unilaterally and we see how the claimant successfully struck out that argument from paragraph 64 on page 25. {RC-J5/46/25}.

First of all, Mr Rabinowitz for *Visa* tried to make an analogy with airport landing charges. I will come back to this analogy and see what the Court of Appeal said about it and the CAT. Airlines, said Mr Rabinowitz:

"... will all enter into agreements with the airport in question to pay the charges, and the charges will effectively set a floor for what the airlines charge their customers. Acquirers, Mr Rabinowitz said, are in an analogous position to the airlines, and, just as no one suggests that an airport's unilateral imposition of landing charges is unlawful, so *Visa*'s unilateral setting of MIFs should not be susceptible to challenge."

And skipping down to paragraph 65 in the indented passage, we see in summary how the Tribunal dealt with that in dismissing our application for permission to appeal. The Tribunal said:

"Where competitors all enter into a common arrangement whereby, for their transactions with each other, they charge a common fee (i.e. here positive MIFs) set by a third party, there is manifestly an agreement or concerted practice that may have an anti-competitive effect."

And then if you go over the page, please, {RC-J5/46/26} we see a passage relied upon by the Court of Appeal. This is actually taken from the Tribunal's judgment in *Sainsbury's Mastercard* recalling what the vice was in the MIFs:

"In our view ..."

Skipping down three lines:

"... there is positive agreement on the part of all parties (*Mastercard* and the licensees) that *Mastercard* would set the default UK MIF which, absent bilateral agreement, the acquiring bank licensees would be obliged to pay and the issuing bank licensees entitled to receive."

And if you go next to paragraph 68 {RC-J5/46/26} you see how the airports analogy was rejected:

"I agree that airport landing charges do not provide a useful analogy in the present case. While airlines might all pay the same landing charges, the payments are made to the airport, for what the airport is providing. In contrast, the MIFs which *Visa* Inc sets are not paid to *Visa* for anything *Visa* is supplying. MIFs instead pass from one set of participants in the *Visa* scheme (acquirers) to another (issuers) in accordance with rules to which they have all subscribed. While the various acquirers and issuers cannot be assumed to have any control over the levels at which *Visa* Inc determines the MIFs, they all agree to abide by whatever is decided and to conduct business as between themselves on that basis."

So even though *Visa* Inc determines the level of the MIF, the competing acquirers plus the issuers are all agreeing between themselves with each other that the acquirers -- and this is the important bit -- will all pay a single common fee that is set by a third party and that is very like competing widget manufacturers and their customers all agreeing with each other that they will -- that they will set a price and pay a price determined by a third party cartel consultant and that is, we say, completely different from a scenario in which the competitors all set their own prices based on their own incentives, but they happen to alight upon the same number because it is individually rational for them to do so, in light of the economic features of the market.

The end level is very similar or the same but the way they got to it is through competition and not through collusion.

Under the UIFM there is no agreement between the acquirers to pay a multilateral interchange fee. There is an agreement to honour all cards in circumstances where the rules do not prevent individual issuers from deciding for themselves the terms upon which they wish to settle transactions on their own cards. If issuers, as I have said, all end up setting the same interchange fee up to the cap set under the IFR, then of course we accept that the MSC will be at the same level as it would have been if *Visa* had set a multilateral interchange fee, but the important thing is that the MSCs are not produced by collusion between issuers or between issuers and acquirers. They are the product, as I have now said many times, of the issuers in reacting intelligently to features of the market.

In fact, in a world with the IFR, it is not actually the MIF that is causing the MSCs to be at the level that they are at. It is something more fundamental about the economics of two-sided markets which gives the issuers the incentive to set the rates, their individual interchange fees, as they are likely to do. So the UIFM, unlike the MIF, is equivalent to the airport landing charges because the payments are set at a rate independently by the issuer. That rate is paid to the issuer for what the issuer is doing, the issuer is settling the transaction. There is no agreement between the acquirers -- this is important -- specifying a common cost to them all: if the cost turns out to be common that is not because of an agreement that it should be common, it is because that is how the market forces have operated.

So going back to the airport, as a matter of commercial reality, assume the airlines have to land at this airport and everyone knows they will pay the landing charges and that is likely to set a minimum floor below the prices that the airlines charge to consumers, each airline is likely to be paying the same charge. The issuer, so obviously the airports in this analogy, each airport is free to set its charges, it does so unilaterally in its own commercial interest, in competition with other airports within its geographic market. It is never suggested that this is an anti-competitive agreement between the airlines and the airport.

The third point that I wish to make in response to paragraph 187(1) of the claimants' submissions is that these aspects of the UIFM which the claimants say are critical arise in the settlement at par rule also and are no more restrictive of competition than in the settlement at par rule. In fact, we say the settlement at par rule is more restrictive of competition because it prohibits the issuers exercising their bargaining power in the way the UIFM does not and if you recall the language that was used in paragraph 187(1) of the claimants' submissions and apply it to the settlement at par rule, one could say that the settlement at par rule is a rule which dictates that issuers have to settle at par, they are prevented by an agreement between all of the issuers and acquirers from choosing their own individual terms of settlement.

What is preferred? The issuers' commercial preference is not preferred here, under the settlement at par rule; it is the acquirers' choice of a zero interchange fee that is preferred. It is a contractual device, the settlement at par rule, to ensure that issuers are locked into a settlement on the acquirers' preferred terms.

Turning, then, to the claimants' next argument, going back to their written submission, paragraph 187.2 {RC-A/1.1/84}. It is said here -- for the Tribunal, this is A/1.1, page 84, they say:

" ... each alternative counterfactual would therefore still be the result of a collective agreement operating at scheme level which aims at producing a situation that is indistinguishable from a positive MIF ..."

And it is said, well, the UIFM is proposed because *Visa* knows that the issuers are very likely to set positive interchange fees at or near the IFR caps and that, we say, elides collusion and independent but parallel conduct. The difference between the two we saw in the summary of the *Wood Pulp* judgment cited in *Dune* that I showed the Tribunal on Thursday, and you are very familiar with it, it is not a problem to anticipate the likely reactions of issuers when setting their interchange fees independently. It happens all the time. Firms make decisions which account for market dynamics and the likely reactions of stakeholders and their competitors and competition law does not require firms to ignore the way other undertakings are likely to react if they are able to independently set their interchange fees. As this Tribunal knows, anti-competitive collusion requires more, it normally requires some kind of contact, collusion, reciprocity or acquiescence, a concurrence of wills.

Here, the issuers -- and this is very clear from the evidence -- do not need to collude or coordinate or offer each other reciprocity or anything like that to decide that their interchange fee is to be set at the cap. It is the very process of competition between them that leads to that outcome, the opposite of collusion.

PROFESSOR WATERSON: Can I just ask, Mr Kennelly, are you saying that this is -- when you were talking about the airport landing fees, were you claiming that that is what airports actually do?

MR KENNELLY: No, not at all.

PROFESSOR WATERSON: Because I think the facts actually are somewhat different.

MR KENNELLY: Yes, the facts are very different and they are regulated.

PROFESSOR WATERSON: Well, or people bid for slots.

MR KENNELLY: Yes, indeed. I was taking an inaccurately and oversimplified version of the analogy and trying to pray it in aid for the purposes of my submissions. I accept entirely that from my own experience of doing airport litigation that it is a long way from the strict reality.

The point I am making, sir, as you can see, is a very simple one. I make it again and again. The claimants are confusing an agreement which is made in expectation that things will happen with an agreement that requires something to happen and they are different, as a matter of competition law, and the settlement at par counterfactual is a better example, maybe a better example than airports, because under the settlement at par counterfactual, issuers and acquirers can of course in theory agree to pay positive interchange fees bilaterally. That is always an option under the settlement at par counterfactual. There is no prohibition on acquirers agreeing to pay positive interchange fees, but the settlement at par rule allows an acquirer to force issuers to settle without any deduction of an interchange fee and because of the economic realities, acquirers are very likely to take advantage of that right. Because of competition between acquirers they want to pay the least amount in order to offer the best prices for their own customers. So without any coordination between them, under the settlement at par rule, notwithstanding the option to set a positive interchange fee, they will all do the same thing, they will all insist on settlement at zero and that is an example of undertakings operating without coordination but arriving at the same price.

MR TIDSWELL: I do not know whether you are drawing a distinction between settlement at par and zero interchange fee, but the question of settlement at par, that is the same thing, I think, you will have to educate me a bit here because I am a bit behind some of you in this, but I think settlement at par is the shorthand for the rule against ex post pricing, is that right?

MR KENNELLY: Yes.

MR TIDSWELL: So in those circumstances, all that is really happening there is the acquirer is receiving the money that it is due from the transaction that the merchant and the cardholder have undertaken and you might say why should there be any presumption that that gives rise to any fee absent the scheme and the objectives that you have talked about and others have set out, so is that really the same thing as setting a positive MIF? I am conscious I am treading into well-worn territory and this has been up hill and down dale, but I just want to be clear about what you are saying about that.

MR KENNELLY: The difference between the two has been determined ultimately in the Supreme Court. The point I am making is the extent that it is being said -- it is a point that was not ventilated in the Supreme Court. To the extent it is being said that these undertakings under the UIFM are all arriving at the same thing, that is the same as coordination. My simple point is: under settlement at par which is the same economically as the zero MIF, there is the option of the acquirers agreeing to pay an interchange fee bilaterally because the issuers are paying the money that their customers have spent but it is a two-sided market. There are things the issuers are doing which benefit merchants and so it is in theory possible, I put it no higher than that, for the acquirers to have an interest in making a payment to the issuers to promote -- to fund card promotion, which ultimately will be for their benefit, which is why it is not -- it is why the bilateral fall-back is always cited as part of the settlement at par rule. But the acquirers operating according to their own individual selfish economic interests are very likely, say the economists, to set their -- to not take up that option and to settle at zero or to settle at par and make no payment in respect of interchange to the issuers. They do that all together in parallel but there is no collusion between them and they are acting according to their economic incentives.

THE PRESIDENT: And to what extent is the relationship between bank and acquirer going to be informed on each side as to what their ultimate customers think; in other words, the people who have bank accounts with banks, with cards attached, and use those cards to effect transactions with merchants? Is not the competitive response of both bank and acquirer going to be, or perhaps should be informed by what the ultimate consumers at each end of the two-sided market, but the same group of people because they are using the card in it -- well, it is two sides of the same transaction. Is that not what ought to be driving the competitive reactions of the entities higher up the chain viz the banks on one side and the acquirers on the other?

MR KENNELLY: So, yes, the issuing banks in deciding how to set their interchange fees under the UIFM will be responding to the demands of their own customers and that will determine -- because that is the competition which exists between issuing banks for those cardholders.

THE PRESIDENT: Well, that is begging the question, is it not, that they are considering a bilateral arrangement with acquirers and deciding not to do it because they are happy with the multilateral that is otherwise imposed, but is not the problem that you are -- by having a multilateral imposed, losing the reaction of customers to the prices that are actually being charged by the scheme down the line to banks and acquirers and then possibly subject to pass on to the customers at the end of the chain?

MR KENNELLY: The -- this is ultimately a matter to be teased out with the economists.

THE PRESIDENT: Yes, I think it might be.

MR KENNELLY: But the economists agree that if the UIFM is valid, as a matter of competition law, and feasible, the interchange fees will be set at the same level as they are set currently with the MIF at the cap, so that the competitive response of the issuers, if they are free to set their interchange fees, bearing in mind their interest in what their own cardholder customers want to do, is to set the fees independently at the cap. That is where competition forces drive them, even in a two-sided market and that is in the joint expert statement.

THE PRESIDENT: Is that because the cardholder so values the utility of paying by card that they will be prepared to pay a great deal in order to have that benefit?

MR KENNELLY: Well, again -- I am sure the Tribunal will tease this out with the economists, but the reason why they say the interchange fees under the UIFM would go up to the cap, assuming they are valid, assuming they are feasible, is that the cardholders obviously value the rewards and everything else that the issuers can offer, funded by interchange fees set at 0.2 and 0.3 and the cardholders do not appear to put pressure on the issuers to say you ought to set a lower interchange fee so as to reduce prices that the merchants are charging us in the shops. The cardholders are concerned primarily with what the issuing banks are offering them and that is what is informing competition between the issuing banks.

THE PRESIDENT: Well, are cardholders actually concerned with that, or are they simply concerned with the ability to walk into a shop and it is becoming increasingly a trend -- I mean, time was when cards were a good deal less convenient than cash, but those times have long gone. We are now looking at a situation where both the merchants, but particularly the cardholders, are very keen to effect payment by this very keen way. No one carries cash.

So why is it -- and you are obviously right that this is a matter for the experts, but why is it the case that cardholders are prepared to pay more, assuming pass on, to the banks in order to get the frills when what they are actually wanting to get is the payment mechanism and they are prepared to pay quite a lot of money for that convenience and what they are getting is effectively an imposed price by way of the hypothetically passed on unilaterally agreed interchange fee which effectively they have no choice over because they want to have the card to use payments. They do not want the card for the bonus points, they want the card simply to walk into a shop and pay.

MR KENNELLY: So you are asking a question about cardholder incentives, what is driving cardholders, the issuing banks' customers and that is of primary concern to the issuing banks. They are competing for those cardholders, how can they attract them, how can they stop them from switching to other issuing banks and the economic consensus on this issue is that the cardholders are interested in what extras the issuing banks are offering them and are responding to the card promotions that the issuing banks develop and the technology and innovation that the issuing banks undertake and implement in order to make cards easier to use and more convenient for cardholders and that is what concerns cardholders.

THE PRESIDENT: Okay. Just -- we will obviously be looking at the economist reports quite carefully, but to what extent are the economists' reports underpinned by evidence and to what extent is it just an assumption that they are making about what is driving cardholder preference?

MR KENNELLY: It is underpinned by evidence. There is evidence from issuers and there is the served evidence from previous cases and the sample survey of the claimants in this case, so there is an empirical underpinning for what the economists are saying also, but the Tribunal will tease that out with the economists but what is important is that the joint expert report refers to an agreement between them that if the UIFM is valid as a matter of competition law and is feasible, the interchange fees which the issuer banks will set independently will go up to the cap and that must be driven by what the issuing banks think is most likely to help them compete against other issuing banks for the same bank customer cardholders that the President is mentioning.

THE PRESIDENT: Well, or saying that they can charge in effect as much as they like because on the other side of the transaction, on the paying side, the convenience is such that that is what impels the cardholder as cardholder to pay, so it is not necessarily a competitive choice, it is a choice which is informed about out of the very universality of the system that is the reason for its convenience, because actually the cardholder is not really in a very easy position as an individual to either select as to merchant -- they want to go in and pay wherever -- or as to issuing bank. I mean, there is not really very much choice there either because the charge to the extent it is passed on to the cardholder is passed on in a very aggregated way with all the other services that the bank will be charging for, one way or another, and of course that leads into how banks charge for their services.

MR KENNELLY: Just to be absolutely clear, the Tribunal is concerned with if the interchange fee is passed through to cardholders through merchant prices, to what extent does that influence cardholder choices when choosing their own issuing bank, are they --

THE PRESIDENT: Well, the pass-through will operate on both sides, theoretically --

MR KENNELLY: Yes.

THE PRESIDENT: -- in terms of the prices paid --

MR KENNELLY: Yes.

THE PRESIDENT: -- or in terms of the fees paid to the bank.

Now, it may be that actually on both sides the real parties bearing the cost are actually not the cardholders, so it may be on the banking side it is actually the people who are foolish enough to go overdrawn on their current account and we had all the OFT litigation about that, and it may be on the buying side it is the cash-paying customers who are actually subsidising the card, so even if one assumes pass-on, the incidence of where the cost goes is actually rather complex.

MR KENNELLY: Yes.

THE PRESIDENT: But what I am really putting to you is that do we not need to have a very good understanding, or at least thesis, as to how all this works in order to work out whether there is in fact what you are putting to me, actually competition between banks in terms of level of interchange fee, even assuming it is being passed on to the account holders or cardholders that are that bank's customer.

MR KENNELLY: To be clear, sir, we are discussing here in the context of the UIFM whether applying that counterfactual, there is more or less competition in the acquiring market. It is the acquiring market that we are concerned with.

The point that I make that issuers will raise their interchange fees to the cap because of competition between them, that is part of the argument and we can come back to that and the Tribunal will tease it out with the economists. I have already explained what their consensus view is in the joint expert statement.

The Tribunal is raising with me concerns about the issuing market and matters such as the level of transparency in the issuing market and the quality of competition in the issuing market.

THE PRESIDENT: Yes, but to be clear we are raising it because no one is denying that there is a nexus between the two. Indeed it is that very nexus that we are spending weeks of our time discussing, so there are obviously network effects between two sides, that is why it is a two-sided market, so whilst you are right of course, the acquiring side matters, I would be slightly reluctant to say that the issuing side did not matter as much and therefore we need to understand --

MR KENNELLY: Completely and I rely on competition in both, which is why I referred to competition in the issuing market, between the issuing banks, to show how they get to set their interchange fees under the unilateral interchange fee model.

I come back again to the key question which is whether the UIFM is a valid counterfactual, whether the

UIFM involves a breach of Article 101(1). The claimants' case is the UIFM is itself, if implemented, a breach of Article 101(1) because it is a collectively set multilateral interchange fee and that is the point I am meeting.

I can see the Tribunal's question and the concern about what is driving cardholder choice in the issuing market and that is very important for the HACR and the implications for the HACR and I will come back to that later this morning but for the moment we are just concerned with the UIFM and whether it is in substance an anti-competitive agreement which is the point that has been put to me and whatever problems may exist in the market with the lack of the cardholder awareness of how the market operates, questions of pass-through and incidence, they do not arise for determination now. We are concerned only with whether the UIFM involves an anti-competitive agreement and in my short submissions it obviously does not, because by definition the issuers are deciding themselves what to do.

The vice with the claimants' argument is that -- and this is their fundamental legal misunderstanding -- is that they say the *Visa* and *Mastercard* schemes restrict competition unless we actively prohibit the issuer demanding a positive MIF. They want a scheme rule which prohibits the issuer from charging a positive MIF and neither the Supreme Court nor the CJEU ever said that, it would be a very surprising thing if that was what competition law required. It is the very opposite of competition.

I will move on then if I may to the HACR itself and the argument that even if the UIFM is not itself restrictive of competition under Article 101(1), it is when combined with the Honour All Cards Rule. The claimants make two points about this. First, they say the Honour All Issuers Rule, that part of the HACR, puts acquirers in a much worse bargaining position than issuers compared to no Honour All Cards Rule; and the second point is because of that weak bargaining position caused by the Honour All Issuers Rule, acquirers cannot resist high interchange fees and interchange fees are higher than they would be absent the Honour All Issuers Rule.

So to be clear, in the counterfactual, with the UIFM but without the Honour All Cards Rule, issuers would set lower interchange fees and issuers would be forced to set lower interchange fees because, say the claimants, merchants would refuse to accept cards from issuers that set interchange fees at or below 0.2 or 0.3 in the UK, or at 0.1 for debit, so they would insist on interchange fees being set below those levels. That is the theory, and this turns on bargaining power and the incentives of cardholders. It comes right back to the point that was being put to me by the President a moment ago.

We will see what the claimants' experts say about bargaining power in the situation and the incentives of cardholders and issuers. Mr Dryden says the outcome of a negotiation is influenced by what happens to each side if they fail to reach an agreement, the outside options if they fail to reach agreement and I would ask you to turn up Dryden 1. I will be exploring this with him in cross-examination but just to give you an indication of our case on this. In Mr Dryden's first statement in {RC-H2/1/64}, it is paragraph 7.65, the very last sentence:

"In other words, if one party to a negotiation has more to lose than the other if no agreement is reached, they are in a weaker bargaining position and are likely to agree to worse terms."

The claimants say that without the Honour All Issuers Rule the outside options of the issuers and acquires are symmetric. They say:

"... if no agreement as to interchange fees is reached between an issuer and an acquirer, the issuer's cards would not be accepted by merchants using the acquirer. Likewise, merchants using the acquirer would not be able to sell to customers that used the issuers' cards." That is the symmetry Mr Dryden refers to. The claimants say:

"Both sides lose out but neither side loses out 'more' than the other."

They suffer equally, and we see how Mr Dryden deals with that in his second report {RC-H2/2/18}, paragraph 5.21. Just the penultimate sentence of 5.21, he says:

"... there is no reason to expect that issuers, absent a [Honour All Cards Rule], would have greater bargaining power than acquirers and therefore acquirers would not have to accept the highest possible [interchange fees]."

In the UIFM with the Honour All Cards Rule each issuer is likely to set their MIF -- interchange fees at their cap and merchants must accept the cards. Mr Dryden says absent the Honour All Issuers Rule, issuers and acquirers would have equal bargaining power in negotiating interchange fees and, says Mr Dryden, in consequence, interchange fees would be negotiated below -- Professor Waterson's point when I opened my submissions.

As a consequence, says Mr Dryden, the interchange fees would be negotiated below 0.2 and 0.3 in the UK and below 0.1 for debit in Ireland.

We say that is obviously wrong. The real problem with Mr Dryden's analysis is that even if, if you take away the HACR, the acquirers are in a stronger position, they are nowhere near being able to negotiate bilateral interchange fees below 0.2 and 0.3 in the UK and 0.1 in Ireland for debit.

It was common ground until the IFR that if issuers were not constrained by a rule, a scheme rule or a legal regulation, they would drive MIFs so high as to threaten the schemes themselves. The only reason that MIFs are at the level of 0.2 and 0.3 is because they are constrained by law and if we think about Mr Dryden's equal negotiating power in individual negotiations between issuers and acquirers, let us imagine one acquirer, say WorldPay, trying to persuade an issuer, let us say Lloyds, to drop its unilateral interchange fee below 0.2 or 0.3 and it does that, according to Mr Dryden, by threatening to refuse to accept Lloyds' cards, it says, "If we do not do a deal, we will not accept your credit or debit cards".

Mr Dryden tells us to think about the outside options, what happens if no deal is done? What happens if the issuer calls the acquirer's bluff. So let us think about that, no deal is done. WorldPay now cannot accept Lloyds' cards but WorldPay still needs to go out and say to merchants, "Please use me as your acquirer and not a different competing acquirer".

In these circumstances of course Lloyds has stuck to its guns. Lloyds are still charging its interchange fees at the cap to the other acquirers. We are assuming that WorldPay has this with Lloyds, the other issuers are still offering their interchange fees at the cap. So WorldPay has tried and paid to get a better deal on Lloyds. For all the other issuers, it is getting the same rates that the issuers are offering the other acquirers. So WorldPay has to say in the market to the merchants, "You, merchants, can take payments for all cards except Lloyds and we can offer you the same interchange fees that every other acquirer is offering, but for Lloyds cards, sorry, you cannot accept them at all".

That is a terrible offer for an acquirer to make to merchants. Almost any merchant would prefer to choose an acquirer that can offer all cards rather than one that can offer all cards except the cards of one issuer and is otherwise offering the same rates as everyone else and that is WorldPay's outside option if its bluff is called.

Again, the experts have said between them that profit margins on incremental transactions can be very high for merchants, much higher than the fraction of a percentage that is in issue for the payment of multilateral interchange fees, 0.1, 0.2, 0.3. Even if sticking with an acquirer that cannot accept Lloyds cards only causes a merchant to lose a tiny proportion of their sales -- and it is likely to be much more, but even if it only causes them to lose a tiny proportion -- that is still a far greater loss than any recovery in -- far, far greater than 0.1 or 0.2 or 0.3 on a transaction. It would be a disaster for a business relying on card payments.

So the acquirer who makes Mr Dryden's threat and has its bluff called can expect to lose vast amounts of business as merchants switch to other acquirers. In contrast, the issuer would not expect many cardholders to switch their personal current account or even their credit cards just so they can use it at whatever small set of merchants stick with that acquirer. There is obviously inconvenience for the cardholder, but in general -- and I will explore this in cross-examination -- that cardholder can shop at a competing shop, not just the shops which have to use that acquirer as their acquirer of choice, and for those reasons it is just not realistic for an acquirer to go down this road of threatening to refuse to accept cards. There is inconvenience on one side for the issuer for sure, but it is not at all equal for the consequences for the acquirer and the merchants if no deal is done.

On feasibility, this is the final issue on the UIFM, the key point here is the fact that it is a symmetric counterfactual. If the Tribunal finds that one or both of the alternative counterfactuals would have been lawful, you have to assume that both *Visa* and *Mastercard* would have implemented them at the same time and it is obvious, we say then, in those circumstances that the issuers would have signed up because even if the issuers had preferred the status quo, preferred MIFs, in this counterfactual, MIFs are forbidden so the choice for an issuer is a zero MIF or settlement at par with no ex post pricing, or the alternative counterfactual with positive MIFs and all of the evidence demonstrates that they would have signed up to an alternative counterfactual.

Now, on this question, my learned friend Mr Beal said in opening that he intended to cross-examine the issuer witness on whether they would in reality have signed up to the UIFM because of a fear of regulatory scrutiny or litigation, but to be clear, the question of feasibility only arises if the UIFM is lawful, if it is consistent with competition law, Article 101(1), the Chapter 1 prohibition. Feasibility does not arise unless the Tribunal is satisfied that it is legally valid, so it is not at all clear that those are even appropriate questions but we will see how Mr Beal puts it.

Finally on feasibility, a very similar scheme, as the Tribunal knows, was in fact implemented in New Zealand in the face of the same concerns raised as they have been raised here by the Supreme Court and the UIFM was designed to resolve those competition concerns. Now, the claimants say, "Well, it failed in New Zealand because the interchange fees remained at the caps", but if they -- because they did, regulatory action had to be taken in New Zealand. It was not suggested that when the issuers set their fees at the caps pursuant to their independent economic incentives that was itself a breach of competition law. In New Zealand it was addressed by regulation, not by any competition law enforcement.

Those are my submissions on the UIFM. Before I hand over to Ms Tolaney, I need to address you on the question of commitments. I said I would come back to this before I sat down because Mr Beal made the bold submission that a Commitments Decision binds national courts to find that there has been an infringement of Article 101(1) TFEU. The defendants' point -- we make a separate point -- is where an undertaking is required to do something by a Commitments Decision it cannot be found guilty of a breach of Article 101(1) for doing that which it was required to do. That is a different point, but I will address them both because they are covered by the same authorities.

What that means is the national court, the Tribunal, is free to find that the conduct investigated by the European Commission was or was not an infringement, but if the Commission has required the undertaking to do something, that thing that they are doing cannot be found to be a breach of Article 101(1) because it is done under compulsion.

To recall the claimants' case on this I would ask you to go back to their submissions again. This is {RC-A/1.1/34}. We are looking at paragraph 64, just the last sentence on 64:

"A national court could not declare that conduct which is made subject to binding commitments does not infringe Article 101(1) ... at all ..."

Relying on *Group Canal* and I will come back to that case.

Then if you go to page 59, please, {RC-A/1.1/59} this is paragraph 118, very bottom of paragraph 118:

"The very fact that these commitments were given by *Visa* and accepted by the Commission therefore gives rise to the inevitable inference that the *Visa* intra-EEA MIFs were a restriction of competition such as to infringe Article 101(1), since otherwise a formal decision would have been taken rejecting the complaints that had been received."

Just for the Tribunal's note -- I am not going to ask you to go back to the transcript -- Mr Beal said on Day 2, page 24: {Day2/24:1}

"It is a necessary premise of the Commitments Decision that there has been a restriction of competition and it is a restriction of competition for the reasons given in more detail in the Statement of Objections and the supplemental Statement of Objections."

Therefore, said Mr Beal, you, Tribunal, are stuck with the restriction finding.

That is a very surprising submission and it is entirely wrong. I will start with the provisions themselves and Regulation 1/2003, that is in authorities bundle {RC-Q1/5/3}. *Council Regulation 1/2003*, recital 13 on page 3, second sentence:

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

And this:

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

Whether or not, without concluding whether there has been an infringement or whether there has not been an infringement:

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

Pausing there, what does "such a finding" mean? It means whether there has been an infringement or whether there has not been an infringement. It is as plain as could be on the face of the legislation and it is the national authorities that may decide upon the case.

If you go on, please, to Article 9, page 9. {RC-Q1/5/9}

This is drafted in more succinct terms and refers simply to the fact that:

"Where the Commission intends to adopt a decision requiring that an 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 ... "

Noting that what is being offered by the Commission is only a preliminary view and not a final decision, the Commission's mind is still open to a finding that there may be no infringement at all.

The undertaking offers commitments and they bind the undertaking and that is:

"... adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission."

If we go over the page, please, {RC-Q1/5/10} and see the rest of Article 9, so although we know now the proceedings are closed because commitments have been accepted, (2):

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

In one of the three circumstances that follow: material change;

An act by the undertaking contrary to their commitments, or where the information provided by the parties was incomplete, incorrect or misleading. We will come back to that because it is relied on in one of the judgments.

Staying in Regulation 1/2003 you see the penalties for failing to comply and that is on page 17 {RC-Q1/5/17} because these undertakings require the undertaking to act on pain of serious sanctions.

Article 23(2) on page 17:

"The Commission may by decision impose fines on undertakings ... where, either intentionally or negligently ..."

(c):

"They fail to comply with a commitment made binding by a decision pursuant to Article 9."

And for the undertaking:

"... participating in the infringement, the fine shall not exceed 10% of its total turnover in the [previous] business year."

THE PRESIDENT: Mr Kennelly, I am sure Mr Beal will push back on this, but are we not talking about different binding effects in different contexts? I mean, here, for instance if one has a Commitments Decision and one has made the commitment, one cannot thereafter say, "Oh, it was a bit of a mistake I made it, in fact I completely misapprehended the concerns of the Commission and they are unfounded and therefore we are not going to do what we said we did". So to that extent you cannot resile from what informed your original decision to make the commitment.

MR KENNELLY: Yes.

THE PRESIDENT: Even if you made a terrible error, but it is -- that is one thing. It is another thing, though, to go to the other extreme and say in a civil action where damages are being sought against the party giving the commitment, one is bound by the theory of harm that was activating both the Commission in accepting the commitment and the alleged infringing party from offering it.

MR KENNELLY: The second part of what you said, sir, I absolutely agree. The first part may be more nuanced and it is not really material for present purposes as to precisely what is binding and what is not, in terms of what was put -- in terms of what the undertaking offering the commitment said to the Commission, but the second part is critical for these submissions.

Obviously the national court is not bound by the preliminary view and allegation the Commission raises. It is open to the national court to re-open the whole thing and to say, "Well, let us examine if this was an infringement or not." The undertaking involved can defend itself freely but what the undertaking cannot do is breach its promise to the Commission in terms of the action which it has undertaken to take.

THE PRESIDENT: No matter what the outcome in the hypothetical civil proceedings.

MR KENNELLY: Precisely, indeed. Because there is no exception for that. The sanctions apply if you breach them, even if a national court says -- we will come back to what a national court can and cannot do, but even if a national court says "you are free to breach it", the undertaking is bound by what it has been ordered to do by the Commission.

THE PRESIDENT: Yes. I mean, it would be surprising if a court said that. It is more if the civil proceedings undermined the thinking behind the offering of the commitment.

MR KENNELLY: Indeed.

THE PRESIDENT: In those circumstances all you can say is, "Well, we made a mistake".

MR KENNELLY: Too bad.

THE PRESIDENT: "We offered too much, too bad, we cannot get it out of it for that reason."

MR KENNELLY: Exactly, and find the lawyers who recommended signing up to them and deal with them in due course. Quite right, in my respectful submission.

So that is the legislation. There are two points here, one is the one we have been discussing just now, sir, but the other is the principle of autonomy. The first and main reason why an undertaking cannot be found to be breaching competition law when it does what it is required to do by a Commitments Decision is that it is not autonomous when it is acting under compulsion under pain of the sanctions we have seen in Article 23. It is complying with a legal requirement and for that we take the Tribunal to the *CIF* case. I see the time. I am happy to take you to this one authority and then we can give the stenographer a break.

So *CIF* is in {RC-Q3/26/51} and if we go please to -- the principle is well understood. I am not sure the principle is disputed. Page 16 and paragraph 51 {RC-Q3/26/16}. The Court of Justice was dealing here with what a national competition authority should do when national legislation requires undertakings to do something which is in breach of competition law.

51, the court says:

"... it is of little significance that, where [and I rely on this part] undertakings are required by national legislation to engage in anti-competitive conduct, they cannot also be held accountable for infringement of Articles 81 EC and 82 EC ..."

It is of little significance because the Member States' obligations, the court goes on to say:

"... which are distinct from those to which undertakings are subject ... nonetheless continue to exist ... and therefore the national competition authority ..."

Has to disapply whatever national rule that is.

But where national law requires an undertaking to act contrary to Article 101, the undertaking cannot be liable for an infringement.

Although this case concerns national law, the principle which is upheld by the Court of Justice must apply equally to where EU law requires the undertaking to do something.

Paragraph 53 {RC-Q3/26/17}:

"... if a national law precludes undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition, it must be found that, if the general Community law principle of legal certainty is not to be violated, the duty of national competition authorities to disapply such an anti-competitive law cannot expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned."

So if the undertaking is required to do something in the past by the law, it cannot be exposed for breach of competition law. That is based on the principle of legal certainty which is why I say it should apply equally where EU law requires something to be done. There is no reason why the shield should operate differently for EU law as for domestic law.

Then paragraph 54:

"The decision to disapply the law concerned does not alter the fact that the law set the framework for the undertakings' past conduct. The law thus continues to constitute, for the period prior to the decision to disapply it, a justification which shields the undertakings concerned from all the consequences of an infringement of Articles 81 ... or ... 82 ... and does so [and I rely on this] vis-à-vis both public authorities and other economic operators."

So if it is a legal rule that requires the undertaking to act in a certain way, it cannot be exposed either to an infringement finding by a public authority, or a damages claim by an economic operator.

That shield, to use the language of the Court of Justice, operates for both and it makes complete sense because the undertaking is acting under compulsion, it is not autonomous.

With that in mind we go to *Gasorba*, the first of the two authorities relied on by my learned friend.

I am in the Tribunal's hands as to whether it is a convenient moment?

THE PRESIDENT: If it is a convenient moment for you, Mr Kennelly, then it is for us.

MR KENNELLY: Thank you.

THE PRESIDENT: Before we rise, two possibly related points. We received very helpfully a letter from Linklaters but written on behalf of all the parties indicating that there is no need for certain individuals to attend and we are very grateful for that information, so we have five witnesses whose evidence will be received without cross-examination and that is absolutely fine.

It looks like it is inevitable that as a result we will have a spare afternoon tomorrow afternoon. Of course it goes without saying to the extent it is convenient, and is not placing undue burdens on counsel and witnesses available, moving people up is something that the Tribunal would approve, but we do not want people to be taken by surprise or inconvenienced, so we leave that in the parties' hands.

The related point is the more we look at the very helpful joint statement of the experts and the exchanges that we had this morning, for instance, with you regarding what the experts might or might not say, we are beginning to get a sense that it might be extremely useful, before the experts are cross-examined but after all of the factual evidence has been received, to have some time with them where the Tribunal can put a few -- I suspect to the parties they will be rather basic questions and even more so to the experts, but to put those questions before cross-examination occurs so that we are at least getting answers to those points which will probably be implicit in the cross-examination rather than explicit and thereby save everyone's time. I put that marker down because of course if one can save time on the witnesses of fact and have that time as being deployed in the gap between -- the scintilla temporis between the end of the factual evidence and the experts, that would be great - but that may not be possible because witnesses are already booked in, so I put that down simply as a marker.

MR KENNELLY: I can say right away -- well, three things in response.

First of all, Mr Beal and I have discussed whether we could move witnesses forward for the very purpose that the Tribunal described. Unfortunately, it has been so hard to find time to slot these witnesses in I think we are rather constrained by how we can move them. My learned friend may have something to say about that, but we have explored that already. The claimants have tried to do that and I think it has been difficult.

The second point of course is hot-tub. It is something which the Tribunal has already mentioned to us, so what the President says is not a huge surprise and I am sure that can be facilitated, even if the claimants' witnesses have to remain where they are and sometimes we finish early or start a bit later, that does not mean that what the President has outlined cannot take place. I am sure we can facilitate that within the timetable that we have which is relatively generous.

With that final reference to generosity in the timetable we may overrun in our opening. Ms Tolaney has to address issues 4 and 5. I will try and be as brief as I can on the rules, but we may end up taking rather more time than Mr Beal took, for which we apologise, but that is just to warn the Tribunal that we probably will not finish today.

THE PRESIDENT: Frankly you know that the Tribunal is keen to ensure that everyone has appropriate time. I will say now you have been using your time appropriately, you have not been, you know, requiring roping in, so we are very sympathetic to that. We will endeavour to make that happen and of course Tuesday afternoon becomes useful from that point of view in any event.

Mr Beal, that is no indication of any sense of wanting to favour one side over the other. We will always indicate when we stop being helped by counsel and at the moment I think we are still being helped and we would like that to continue, but the same will go for you when you come to a point where you need more time, then you can expect similarly sympathetic treatment, so can we leave it like that.

MR BEAL: Thank you.

THE PRESIDENT: I am very grateful. In that case we will rise for ten minutes.

(11.40 am)

(Short Break)

(11.52 am)

MR KENNELLY: So we are going to *Gasorba* now, please. It is {RC-Q3/53/15}. I will go straight to the paragraphs recording the commitments since the Tribunal is already familiar with the facts of this case, so we are on page 15, paragraphs 13 and 14, and the Tribunal sees there that it was a case -- a Commission -- competition investigation against Repsol in Spain and the Commission found on a preliminary basis that Repsol's long-term exclusive supply agreements were incompatible with Article 101.

At 14, in response to the Commission's preliminary assessment, Repsol offered the Commission commitments whereby Repsol would refrain from concluding these kinds of agreements in the future, Repsol would offer the petrol station tenants incentives to terminate these agreements early and refrain from buying any independent service stations.

Those are the commitments which Repsol entered into.

If we go, please, to paragraph 17 on page 16 {RC-Q3/53/16}, one of the service station owners, Mr *Gasorba*, brought an action saying that that long-term agreement was actually contrary to Article 101 and void and he wanted compensation for having been stuck with that agreement which he argued was void.

If you go, please, to paragraph 25, we see the Court of Justice considering the question to what extent did the national court have a free hand to find that the agreement, which was the subject of the Commission's investigation, was or was not in breach of Article 101 and void.

At paragraph 25 the Court of Justice said:

"It is apparent from the wording of Article 9(1) of that Regulation [1/2003] that a decision taken on the basis of that Article has ... the effect of making binding commitments, proposed by undertakings, to meet the ... concerns identified by the Commission in its preliminary assessment. It must be found that such a decision does not certify that the practice, which was the subject of concern, complies with Article 101 ..."

Well, that is hardly in dispute. It has never been suggested in this case that when you get a Commitments

Decision all of the matters investigated are somehow blessed by the Commission, that has never been our case.

Paragraph 28:

"It follows that a decision taken on the basis of Article 9(1) of Regulation 1/2003 ..."

Does not create an expectation in respect of the undertakings concerned as to whether their conduct, that conduct examined, complies with Article 101:

"... the Advocate General observed ... the commitment decision cannot 'legalise' the market behaviour of the undertaking concerned and certainly not retroactively."

So the focus is on the practice of the market company which has given the commitments, the matters which were investigated by the European Commission.

Then at 29 {RC-Q3/53/18} -- actually, I will skip 29 and go to 30, 30 is the conclusion:

"... the answer to the first question is that Article 16(1) of Regulation 1/2003 ..."

That is the article that says that these are binding decisions and national courts should not make orders that conflict with them:

"... Article 16(1) of Regulation 1/2003 must be interpreted as meaning that a commitment decision concerning certain agreements between undertakings, adopted by the Commission under Article 9(1) ... does not preclude national courts from examining whether those agreements comply with the competition rules and, if necessary, declaring those agreements void ..."

So the first point is it is the agreements, the practices which were investigated by the Commission which the national court is free to investigate and the national court is free to find whether those agreements comply with competition law which means whether they comply or not. You are open -- you are free to decide either. It is a very odd reading to say that you are obliged only to find that the agreements breach Article 101(1). You are precluded from finding that they do not. That is contrary to the language of the legislation and the Court of Justice in *Gasorba*.

Back to paragraph 29, this is the weight which you are to -- pre-Brexit -- you are to give Commitments Decisions:

"... national courts cannot overlook that type of decision. Such acts are, in any event, in the nature of a decision ... both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment ... and regard it as an indication, if not prima facie evidence, of the anti-competitive nature of the agreement at issue ..."

Again not what the Commission ordered the company to do, but the agreement that it investigated.

The first point to make here is that even pre-Brexit, this is a long way from tying your hands. The court is saying you should take it into account and regard it as an indication of a breach but this is of course no longer the law. The duty of sincere cooperation under Article 4(3) no longer applies in this court. That provision, as again my learned friend knows very well, Article 4(3) TEU was never implemented into English law. It bound the court pursuant to the European Communities Act 1972, which ceased to have effect on 31 January 2020.

Just for the Tribunal's note, this is not in dispute, section 1 of the European Union (Withdrawal) Act 2018, read at section 20(1) of the same Act, so the duty of sincere cooperation under Article 4(3) does not apply here any more and if it is said that there is a general principle of EU law upon which the claimants place reliance, those general principles were also repealed from 1 January 2024 under section 5(A4) of the European Union (Withdrawal) Act 2018.

The claimants' submissions in part refer to the duty of sincere cooperation as if it was still in force and that is wrong. Today the weight that is to be given to a pre-Brexit Commitments Decision is governed by section 60A of the Competition Act 1998. I would ask the Tribunal, please, to turn that up {RC-Q1/3/11}.

That is the beginning of section 60A and please go to the next page {RC-Q1/3/12} and the first part -- sorry, please go to the previous page so I can begin the section {RC-Q1/3/11}. So the person -- for these purposes, the person is the court in section 60A(2):

"... must act (so far as is compatible with the provisions of this Part) with a view to securing that there is no inconsistency between ..."

The principles that you are applying, and next page, please:

"The principles laid down by the Treaty on the Functioning of the European Union and the European Court before IP completion day ..."

That is the duty of consistency with the judgments of the European Court. What about the Commission? We see that in (3), this Tribunal:

"... must, in addition, have regard to any relevant decision or statement of the European Commission made before IP completion day and not withdrawn."

And that is a weaker obligation, an obligation to have regard and that is the extent to which you are bound by these Commission decisions.

I would ask you then to go on that point to the *Group Canal* case. The judgment is in {RC-Q3/58/1} and the page I would like to go to, please, is page 17 {RC-Q3/58/17}. Page 17, the Tribunal will recall that Canal + had an agreement with a film company, Paramount, and the European Commission regarded that agreement provisionally as anti-competitive. The Commission issued an SO to Paramount and Paramount consented to a Commitments Decision in which it was bound not to honour its contract with Canal +. That was the obligation under the Commitments Decision.

Canal + challenged that successfully because its interests as a third party had not been taken into account, but for our purposes I would ask you to go please to paragraph 107 and it is paragraph 107 on the top of page 18 {RC-Q3/58/18}. At the top of page 18 the General Court was reversed by the CJEU but here they are saying the General Court pointed out correctly that Paramount's commitments made binding by that decision automatically mean that Paramount will not honour some of its contractual obligations vis-à-vis *Group Canal* + under the licensing agreement which is the subject of the Commitments Decision.

If you go, please, to paragraph 108:

"It is true that ..."

Under recital 13 and decisions under Article 9 the courts of the Member States -- these are:

"... without prejudice to the powers of ... the courts of the Member States to make a finding of infringement."

And to decide on the case concerning a commitment decision concerning certain agreements does not preclude national courts from examining whether or not those agreements comply with the competition rules and, if necessary, declaring them void.

However, paragraph 109:

"According to the first sentence of Article 16 (1) ... when national courts rule on agreements ... which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission."

That is my point, that where the Commission orders someone to do something, the national court cannot decide that the undertaking can disregard what it has been ordered to do. That is the decision taken by the Commission:

A decision of a national court requiring an undertaking which has entered into commitments made binding ... to contravene those commitments would clearly run counter to that decision.

"If it follows that by holding ..."

Skipping ahead:

" ... that a national court hearing an action for enforcement of the contractual rights of *Group Canal* + could, if necessary, order Paramount to contravene its commitments, made binding by the contested decision, the General Court [erred]."

And I will come back to it, we rely on it when we come to the cross-border acquiring rules which we were ordered to maintain and implement by the European Commission and which the claimants say breach Article 101.

Skipping ahead, please, I will come back to paragraphs 112 and 113 and just go to 114 to see the conclusion:

"... the General Court [they said] ... erred in law by holding ... that a national court could, where appropriate, declare that clauses such as the relevant clauses do not infringe Article 101(1) TFEU and uphold an action brought by an undertaking for the enforcement of its contractual rights adversely affected by commitments made binding by the Commission or uphold an action for damages."

To be clear, the General Court had found at first instance that a national court was free to order Paramount to breach its commitments under the Commitments Decision and to make Paramount liable in damages for Paramount's compliance with those commitments. That is what the General Court said the national court could do and the Court of Justice found that a national court could not order Paramount to breach its commitments and could not find that Paramount was liable in damages for its compliance with the order in the Commitments Decision. As I say, that is relevant here because we argue that the 2010 and 2014 Commitments Decisions require *Visa* to maintain and implement the cross-border acquiring rules and I will come back to those when we look at that in more detail, but those -- we make two points: the first we did it under compulsion and so I rely on the *CIF* authority I took you to on the general principle; and second, when it was in force Article 16 of Regulation 1/2003 prevented a national court finding that the undertaking -- *Visa* here -- should not comply with commitments or be liable in damages arising from our compliance with those commitments.

But my learned friend Mr Beal went further in his submissions. He submitted that this court is barred from finding that there was no infringement of Article 101 in respect of the conduct which was the subject of the Commitments Decision. You have my point that that is irreconcilable with recital 13 and Article 9. It is obviously irreconcilable with *Gasorba* that I have taken you to, but he relies on paragraphs 112 and 113 of *Group Canal* +. If you look at the first sentence of 112, the Court of Justice referring to the *Masterfoods* judgment codified in Article 16 which is:

"... the coherent application of the competition rules and the general principle of legal certainty ... when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, [the national courts must] avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of [those provisions]

Then at 113:

"Since decisions based on Article 9 (1) of [the regulation] are ... taken 'where the Commission intends to adopt a decision requiring that an infringement be brought to an end', it follows from the case law referred to ... that, when a decision based on that provision exists, national courts cannot issue, in relation to the conduct concerned, ‘negative’ decisions finding that there has been no infringement of Articles 101 and 102 ... if the Commission may still reopen the proceedings, pursuant to Article 9(2) of that regulation, and ... adopt a decision containing a formal finding."

So although it was not entirely clear, in any case where a commitment decision is enforced, a national court cannot find that there was no infringement because the Commitments Decision could theoretically be reopened under Article 9(2). I think that was the submission that he was making and there are three points as to why that is wrong.

The first and obvious one is that this is referring to a *Masterfoods* stay and the principle again of sincere cooperation. If my learned friend is right and the effect of the submission is that this court cannot make a finding while the Commitments Decision is in place, it is not that the court is precluded from finding no infringement, applying *Masterfoods* you are precluded from finding any infringement either way. The *Masterfoods* principle is that the court should not make a decision as to whether or not there has been an infringement until the Commission has made up its mind to avoid a ruling which would conflict with the future decision of the Commission.

The future decision of the Commission could be there was no infringement if new facts emerge which cause them to open the Commitments Decision, so contrary to what my learned friend was saying, is what his submission leads to is a finding that you should take no decision as to whether matters covered by Commitments Decisions are in breach or not.

The second point -- and you have this already -- is that to the extent that my learned friend is relying on the *Masterfoods* duty now, for some purpose now, and Article 4(3) TEU, they have fallen away. The duties of sincere cooperation fell away, as I said, on 31 January 2020. Article 16 of Regulation 1/2003 ceased to apply on 31 December 2020.

But thirdly and finally, even if *Masterfoods* did apply, it cannot be right that the national court, the Tribunal here, is bound to find an infringement while the Commitments Decision remains in force. That would be an extraordinary outcome and this language does not support such an extraordinary interpretation. As I said, that obligation under *Masterfoods* applies where there are potentially conflicting Commission decisions in contemplation. It cannot be sufficient that there is some theoretical possibility of a Commitments Decision being reopened. At the very least there has to be some factual basis to anticipate such reopening, such as an allegation that there has been a failure to comply with the Commitments Decision.

Any other interpretation would make these paragraphs completely irreconcilable with the express language of the legislation in Regulation 1/2003 and what the Court of Justice said so recently in *Gasorba*, but happily the Tribunal does not need to get into this at all because this does not reflect the law which binds you today.

Those are my submissions on the Commitments Decisions.

MR TIDSWELL: Can I just ask you about your position in relation to the -- you mentioned the cross-border acquiring rules and I can see, I think, the argument you are putting there is that if, as part of the commitments, you are obliged to implement certain rules, then your submission, I think, is that it would not be right, in accordance with *CIF*, for there to be liability as a result of that position.

Are you taking that further to say that in relation to those commitments which deal with the level of interchange fees there is an application to this case? Because it seems to me it would be quite different if the interchange fees are capped under commitment arrangements. You are not suggesting that we could not then find that the competitive level was a lower figure, is that --

MR KENNELLY: Not at all. I am making a distinction between something which a commitment decision requires you to do and something which a commitment decision permits you to do. That is the distinction. *CIF* applies only where the undertaking is required to do something under compulsion and our case is for the Commitments Decisions, as distinct from the caps applied to the interchange fees, the commitment decisions required us to put things in place and I will take you to the detail of that in the commitment decisions when we come to look at cross-border acquiring later.

MR TIDSWELL: Yes, thank you.

MR KENNELLY: Unless I can be of any further assistance to you, I will hand over to Ms Tolaney.

THE PRESIDENT: Ms Tolaney.

Opening submissions by MS TOLANEY

MS TOLANEY: *Mastercard* gratefully adopts Mr Kennelly's submissions on issue 3 and you will have seen our submissions are in our written opening in section D.

There are two short topics I just need to add to from *Mastercard*'s perspective. The first is the bilaterals counterfactual and the second topic, briefly, is the Honour All Cards Rule in the context of the bilateral rules counterfactual.

Can I just start with explaining quite clearly what we mean by the bilaterals counterfactual. I am sure the Tribunal has this, but most of my learned friend's submissions on that counterfactual either advanced incorrect propositions about it, or conflated it with the UIFM counterfactual, so just being very clear from the outset, we mean a scenario in which *Mastercard* would have had no scheme rules of any kind in relation to settlement. Settlement and the terms of settlement would have been left entirely for acquirers and issuers to negotiate bilaterally, including any applicable interchange fees, and then the terms of any settlement would have been freely negotiated between issuers and acquirers.

So with that introduction, can I clear away three points that my learned friend made. The first point he made was that the bilaterals counterfactual advanced, as I have just explained it to you, was identical to the counterfactual which was considered and rejected in the *Sainsbury's* litigation and he said that at {Day1/21:6-15}. He is wrong about that, that is the first error.

The bilaterals counterfactual we are advancing is not the same, as I am sure the Tribunal knows. What was put forward by the Tribunal in the *Sainsbury's* litigation and was referred to in Popplewell J's judgment, as he then was, was that the correct counterfactual on the facts of the *Sainsbury's* case had to start with a zero default MIF and settlement at par and you see that -- we do not need to go to it -- in paragraph 141 and 143 of the CAT decision in *Sainsbury's* --

The Tribunal went on to conclude, at paragraph 548.3 of the CAT judgment, that even with a zero default MIF, merchants and acquirers would voluntarily agree to pay positive interchange fees in order to preserve the *Mastercard* scheme, which would have equated to 0.5% for credit cards and 0.27% for debit cards.

So that was based on a bilateral negotiation of interchange fees in a counterfactual where there were scheme rules and in particular a default scheme rule which provided for a zero default MIF. Now, that is fundamentally different from the bilaterals counterfactual here based on the evidence before the Tribunal here because the contrast is that there would be no settlement rules of any kind, simply free negotiation.

So there was no recycling, that was the first error.

The second error on a similar nature was made by my learned friend when he said that *Mastercard* was recycling the OFT's suggestion from the 2005 decision that bilaterals is the correct counterfactual, despite *Mastercard* and Dr Niels then having argued that bilateral negotiation was not viable. That was said on {Day1/21:15} and {Day2/73:25} onwards.

Now, just unpicking that, the OFT did propose bilateral negotiations and no default settlement rules as the relevant counterfactual in 2005. That was not accepted by *Mastercard* or Dr Niels at the time, so ten years before the IFR, because it was not viable due to the hold-up problem.

The IFR has now changed the regulatory framework and the analysis and that is precisely *Mastercard*'s and Dr Niels' point before this Tribunal.

The third error made by my learned friend was to suggest that *Visa* is not relying on the bilaterals counterfactual and of course Mr Kennelly has clarified that.

So having cleared away those inaccuracies can I make three key points about the bilaterals counterfactual advanced by *Mastercard*.

The first, which I have just highlighted, is that it is the IFR which made the bilaterals counterfactual a realistic option and my learned friend just did not grapple with that point. The IFR was a seismic change to the regulatory landscape. It severely curtailed the commercial freedom of issuers and acquirers and it undoubtedly had a corresponding impact on the correct counterfactual and it is fairly obvious that it would have done.

Previous interchange litigation, as the Tribunal knows, concerned the pre-IFR world and in that world, the bilaterals counterfactual was not considered viable, as I have said, because of the hold-up problem and we explain this in paragraph 46 of our written opening. In essence, the hold-up problem arises because in the absence of any constraint on interchange fee levels in the pre-IFR world, if issuers and acquirers were negotiating without any default mechanism, issuers could and would hold out against acquirers and push for higher and higher interchange fees and both the CAT and the Court of Appeal accepted this in the *Dune* case and for your references it was the *Dune* CAT decision at paragraph 39 and the *Dune* Court of Appeal decision at 36 to 41, and Mr Kennelly took you to those decisions at {Day 2/162:1}, so I will not traverse the same grounds.

The only point I wanted to remind the Tribunal about was that the CAT accepted that the hold-up problem does not arise in the post IFR world because of the caps on the fees that can be now charged by the issuer and we address that at paragraph 47 of our written opening. Just standing back, the short point is it is no longer possible for the issuers' natural desire to drive up interchange fees to get in the way of agreements being reached at a viable and mutually acceptable level and the bilaterals counterfactual becomes a realistic counterfactual in the post IFR world. That is why, when the claimants say, as they do at paragraphs 4 and 187 of their written opening, that the IFR changes nothing, it is hopeless and it is also not sustainable on the expert evidence.

The second of my key points on the counterfactual advanced by *Mastercard I*s that on the factual evidence before the Tribunal, there is no doubt that in the post IFR period, *Mastercard* would in fact have preferred the bilaterals counterfactual or the UIFM to settlement at par and that is very powerful, that is the evidence that the Tribunal has. That is what would in fact have happened and, for example, the reference I can give you again for your note is Mr Willaert's witness statement at paragraphs 25.10 to 25.14.

So on the evidence, it is clear that those two counterfactuals are not just realistic but were likely.

Now, my learned friend's only argument against this was to try to suggest that the bilaterals counterfactual was somehow not workable, but he was wrong. He put the point in two ways and he was wrong on both ways.

The first thing he said was that *Visa*'s evidence suggested that bilateral negotiation would not be possible, that was at {Day1/29-30}, and Mr Kennelly has already addressed this today at [draft] Day 3, page 4, to say that that is just not right.

Read properly, the evidence of *Visa* is that domestically it can be seen that bilateral arrangements are more commonly seen and that is at paragraph 29 of Mr Knupp's statement and I will just show you that because my learned friend did not take you to that. So that is at {RC-F4/8/8}. So what my learned friend showed you was paragraphs 27 and 28 and you see those are addressing the inter-regional context and the number of issuers and acquirers participating.

What he did not show you was paragraph 29, if we could go down when the Tribunal is ready {RC-F4/8/8-9}.

(Pause)

So the point being that in the context of 27 and 28 you have the number of issuers and the number of acquirers worldwide making it impracticable, whereas bilateral arrangements are more commonly seen in a domestic context, so he is not saying that it is impractical to have interchange fees negotiated bilaterally domestically where there are a limited number of acquirers and issuers.

MR TIDSWELL: So what happens to international -- what happens to the inter-regional payments then? Is it *Mastercard*'s case that there would still be a bilateral regime for the inter-regional cases?

MS TOLANEY: No. We are focusing on domestic.

MR TIDSWELL: Because you are addressing the counterfactual term, issue 3?

MS TOLANEY: Exactly right and that is why the point was misplaced and it is important we correct that.

The second point that was made about the bilaterals counterfactual not being realistic was it was suggested that the scheme could not operate without an obligation to settle and that was at {Day1/32:2-6}, because unless there was confidence that the transactions would be settled pretty quickly, no one would use the card, was the suggestion made.

Now, that was a straw man point. No one is suggesting that issuers and acquirers would operate for extended periods without bilateral agreements in place. That is why the issuers and acquirers would negotiate the agreements bilaterally so they had certainty about the terms of settlement, so again that is not a sound point.

Then going back to my -- I said I had three key points about the bilaterals counterfactual. The third and final key point is that as Mr Kennelly emphasised, it is agreed between the experts that in either the UIFM or the bilaterals counterfactual, the IFs would not be appreciably different from their factual levels under the IFR.

Now, it is again important that I correct something that was said in opening. At {Day2/70:21} my learned friend suggested that it remains in issue whether, under the UIFM, issuers would have set interchange fees at the level of the IFR caps, but in fact it is clear that the experts all agree that in both counterfactuals the interchange fees would not be appreciably different from the IFR caps and can we just look at the joint experts' statement, please, that is {RC-H5/1/4} and it is page 4. Can the Tribunal see under issue 3 "Areas of Agreement"? You see the two bullet points.

(Pause)

Now, when you see the second bullet point you can see that there is no basis therefore for my learned friend to suggest, as he did, that interchange fees agreed in either of the counterfactuals put forward by

Visa and *Mastercard* would be appreciably lower than the caps in the IFR.

My learned friend prayed in aid of his submission, which is against the experts, at {Day1/35:1}, the decision of the CAT in *Dune* at paragraph 50 where the Tribunal held that it was a matter for trial whether *Mastercard*'s bilateral counterfactual would in fact have the same outcome as the final position reached in relation to the CAT's bilateral counterfactual. Of course it is now clear that interchange fees would be agreed at the IFR caps under the bilateral counterfactual, so the argument made by my learned friend that something has been left open by the CAT has fallen away.

The short point is -- and I think Mr Kennelly made this point -- if the two counterfactuals are available as a matter of law, then as far as the Tribunal is concerned they are clearly the correct counterfactuals on the evidence, both as a matter of the factual witness and the agreed expert statement, and it is clear that they result in outcomes that are not materially different from the outcomes in the actual world.

So those are the key points for the Tribunal to have in mind.

Can I very briefly deal with the four arguments advanced by the claimants against the counterfactuals and none of them, we suggest, have merit and I will explain why.

The first argument made by the claimants is that it is not necessary or permissible to look at counterfactuals at all because essentially they say that it is not necessary to consider what would happen in the absence of the measure if there is an object infringement and that is the point they make in their written opening at paragraph 186.

Now, Mr Kennelly has addressed this and I am not going to repeat his submissions, I adopt them, but I would flag that it is rather telling that the claimants are not very keen for the Tribunal to look at the counterfactual and the point is that it is precisely because the counterfactual may -- and we say on the evidence does -- have materially the same outcome that in a nutshell there is no object infringement here, but in any case as a matter of law they are wrong.

The claimants' second argument is that the bilaterals counterfactual somehow involves a collective agreement. Now, this point is put in different ways in different places by the claimants through their evidence and in submissions. In their written opening, the claimants say that the bilaterals counterfactual must crucially depend on a default rule, so that in default of genuine agreement, the issuer's choice of MIF is to be preferred. That is 187(1) of their written opening. That reflects the same point made by Dr Frankel in his first report at paragraphs 86 to 89.

Now, that is clearly wrong. The bilaterals counterfactual involves no default settlement rules at all and certainly not a default rule preferring the issuer's choice of interchange fee and in fact that is an example of why one has to analyse the two counterfactuals separately, the UIFM and the bilaterals counterfactual, and not conflate them because they are different in that respect.

The second way it is put by the claimants is through Mr Dryden's first report at paragraph 7.29 where he argues that the bilaterals counterfactual is an agreement to operate a scheme.

That is wrong for the reasons given at paragraph 50 of our written submissions.

Then thirdly, on his feet my learned friend suggested that bilaterals involve collectively setting a MIF and that was {Day1/36:25} to {Day 1/36:11} and what he said was that the transactions entered into by acquirers and issuers are somehow sham transactions because acquirers do not have a choice but to agree.

Now, the answer to that point, and indeed all the points, however put, is the same, which is there is neither a collective agreement nor a default rule. I have already explained the essence of the bilaterals counterfactual being that it involves having no rules on settlement at all, and the interchange fee for any particular pair of banks is not determined by collective agreement but by independent bilateral negotiation between those two scheme participants. There therefore can be no collective process of setting interchange fees. There is no MIF, there is a bilaterally agreed interchange fee, and that is obvious from everything I have said to you, but it was also recognised by the CAT in the *Dune* decision at paragraph 41. If we could just turn that up, which is {RC-J5/44/19}. It is paragraph 41, please.

(Pause)

If we could then please go to page 20 in the same case {RC-J5/44/21} my learned friend took the Tribunal to paragraphs 47 and 48 of *Dune* and you may recollect -- if we go on please to 47 and 48 -- that his submission was that the CAT and the Court of Appeal had not determined whether the bilaterals counterfactual amounted to a restriction of competition and Mr Kennelly reminded the Tribunal that the Court of Appeal held, in paragraph 48, that the CAT had not made an error in allowing the schemes to proceed with their pleaded counterfactuals, so as a matter of law the arguments raised by the claimants in this case, *Dune*, were rejected. It was a summary judgment application so the Court of Appeal left open that the claimants might succeed at trial on the evidence, but not because of their legal arguments, and in this case before this Tribunal it is clear on the evidence that bilateral agreements between issuers and acquirers would not involve collusion or collective agreement.

Similarly, my learned friend's argument that because of the importance of accepting *Mastercard I*t is effectively the scheme that is tying the acquirers' hands to accept whatever offer is put forward by the issuer, which was his submission, is likewise not sustainable. *Mastercard* would not be doing anything in the counterfactual because it would have no settlement rules at all and essentially what this comes down to, as I think Mr Kennelly said in a different context, is that the claimants are really saying that they do not like the outcome that arises from the free flow of the market, but that does not alter the fact that the outcome would be the result of independent bilateral negotiation and not through the imposition of *Mastercard* through the scheme.

My learned friend's argument also ignores the fact that the caps in the IFR are very low and we say that at paragraph 53.2 of our written opening, and they are demonstrably very low, yet many of the claimants have voluntarily agreed to pay higher fees to competing payment providers such as Amex, PayPal, Klarna, Clearpay and because of the low level of the caps, even if it was necessary to exclude the HACR from the counterfactual -- I will come back to that address that -- issuers would in fact have sufficient bargaining position to negotiate interchange fees at the very low levels of the caps and that would be the product of the bilateral agreement freely negotiated between the issuer and the acquirer.

The claimants' third argument against the bilaterals counterfactual is that *Mastercard*'s or *Visa*'s intentions render the counterfactuals impermissible and this point is made at paragraph 188.1 of the claimants' written openings.

Now, my learned friend did not actively pursue this in oral submissions because in fact it is the same competitive vice argument which was rejected by the Tribunal and the Court of Appeal as a matter of both law and logic and the reference to the *Dune* Court of Appeal decision is paragraphs 39 to 41 and that is

{RC-J5/46/17}.

If we go down, please, to paragraph 39.

(Pause)

Then over the page, please, {RC-J5/46/18}, thank you.

(Pause)

If you could please read 40 and 41.

(Pause)

So it is clear that the Court of Appeal's analysis is that counterfactuals are used to test whether a measure restricts competition and one has to leave open that there is no material difference between the outcomes in the two worlds, otherwise one is not genuinely testing the effect of the measure.

Now, the claimants' attempt to get round that fundamental objection by supplementing their competitive vice approach with Mr Dryden's "but for" test, so what they say is the schemes would not have adopted the counterfactual but for its effect in producing positive IFs, and that is Mr Dryden's evidence in his first report at paragraphs 7.32 to 7.36. Obviously we will test that when we come to cross-examine Mr Dryden, but just by way of a nutshell, his approach is fundamentally flawed because he fails to analyse what would have happened in the counterfactual and seeks instead to subjectively analyse why a defendant would have adopted a particular measure, or in the case of the bilaterals counterfactual, the absence of any measures and there is simply no support in the authority for the approach he has taken and we set that out at paragraph 50 of our written submissions.

Notably, my learned friend did not take you to any authorities either and what we say is that in light of the Court of Appeal decision in *Dune*, at paragraph 39 which you have seen, it is clear that a counterfactual must reflect what would be likely to have happened if the measures at issue had not existed.

The question is not why *Mastercard* would have preferred to have no settlement rules, but whether the likelihood is that they would have done so.

MR TIDSWELL: When you talk about the MIFs at issue, really you are talking about the collusion, are you not?

MS TOLANEY: That is right.

MR TIDSWELL: That is the point. So when Mr Beal talks about the level of the MSC or the MIF inherent in the MSC, you are saying you cannot get to that point, you have firstly got to establish that in this counterfactual where there is collusion that would rule out.

MS TOLANEY: That is right, so that is fatal.

MR TIDSWELL: You do not even get --

MS TOLANEY: You do not even get to it because it is fatal and that is why, with respect, Mr Beal conflated the two counterfactuals because that is the problem he cannot overcome on the bilaterals.

MR TIDSWELL: And do you say that the observation made by the Tribunal in *Dune* prevents us from reaching a conclusion in this trial that there is collusion in relation to the --

MS TOLANEY: I do.

MR TIDSWELL: But the Tribunal did not hear evidence on that point, did it? I mean all it was told was in submission what the construct of the bilateral arrangement was. If it were apparent from the evidence that was given by *Mastercard* witnesses, for example, if they admitted that it was really a scheme to create collusion, then that would be different, would it not?

MS TOLANEY: Well, it would, except the reason I say you are bound by it is because the whole essence of the bilaterals counterfactual is that there is not an agreement so it would be hard to see how you could ever have evidence saying that there was because then it is not the counterfactual that we are proposing, if I put it that way.

MR TIDSWELL: If we are talking about collusion, collusion does not require an agreement, so there could be circumstances in which -- and I am not suggesting that is the case, we will obviously see how the evidence turns out, but you can imagine circumstances in which everybody understands what is going on -- there are plenty of cases like that, are there not, where everyone understands what is going on and the prices are set by reference to that understanding without there being a formal agreement.

MS TOLANEY: I accept it is hypothetically -- I do not even know whether it is possible, but it is a hypothesis, if I can put it that way.

MR TIDSWELL: Yes.

MS TOLANEY: It is not the evidence before the Tribunal.

MR TIDSWELL: No.

MS TOLANEY: It is hard to see how it could be the evidence before the Tribunal given the nature of what is being put forward as the process because it is properly to be analysed as a bilateral negotiation and therefore analysing it as some form of collusive process would be running counter to the whole essence of the counterfactual posited which is why the Court of Appeal described it in those terms.

If the question is could the factual evidence change the position, of course factual evidence could change the position and the Court of Appeal, as you say, sir, looked at the question as a matter of law. Here though, as I say, and I think it is obvious from the Court of Appeal decision it is hard to see how the factual evidence could consistently change the position when describing this counterfactual.

MR TIDSWELL: Yes, I understand. Maybe I have misread it, but I actually read the Tribunal's decision to be more direct --

MS TOLANEY: That is right.

MR TIDSWELL: -- in saying that because it is a bilateral arrangement therefore there can be no infringing agreement.

MS TOLANEY: That is right.

MR TIDSWELL: And I do read that as almost being slightly circular reasoning because it is implicit, as you say, in the concept of a purely bilateral arrangement there is no collusion. I did not read the Court of Appeal to actually get into that issue expressly, obviously it approves the outcome.

MS TOLANEY: They -- and they approve the Tribunal's --

MR TIDSWELL: Reasoning, yes.

MS TOLANEY: -- reasoning on that point so that is how one gets there. The point was previously would *Mastercard* have adopted it, was the question, not what it was.

MR TIDSWELL: Yes.

MS TOLANEY: And, as I say, it seems to be now agreed between the experts that post the IFR, assuming it is available as a counterfactual, that is what would have happened.

MR TIDSWELL: Yes.

THE PRESIDENT: What you are saying, Ms Tolaney, is that you are putting forward as a counterfactual a very particular counterfactual and that it would be unhelpful for us to embroider what is after all a hypothetical exercise with certain assumptions which you are not putting forward, in other words --

MS TOLANEY: Exactly.

THE PRESIDENT: -- the notion of collusion is not just the counterfactual that you are putting forward. If we listened to all the evidence and were to come to a view that the counterfactual you are putting forward was just not realistic because, let us say, collusion was inevitable -- I am speaking entirely hypothetically here -- then the answer would be pick another counterfactual.

MS TOLANEY: Exactly.

THE PRESIDENT: Do not hypothesise collusion which of course one could not because one is seeking a lawful not an unlawful counterfactual against which to assess alleged infringements.

MS TOLANEY: That is right and what you might be saying, sir, in that regard is the bilaterals counterfactual is not truly what was described, but as presented it is quite clear that it involves no element of collusion or agreement.

THE PRESIDENT: Yes. It may be that it is just not a good counterfactual and that is a question.

MS TOLANEY: That is right.

THE PRESIDENT: We are not being invited, I can see why, to, as I say, incorporate features into a counterfactual which you are not putting forward.

MS TOLANEY: That is right, exactly. And in particular not only do you have the background as a matter of law and logic, you have also got all the experts agreeing as to what it is essentially if it were available as a counterfactual.

The fourth argument made by my learned friend is that bilaterals are not workable in practice because it would lead to a large number of individual agreements. I think this was a new argument that emerged orally. It is Day 2 of the transcript, page 75. {Day2/75:1}

Now, there was a reference to merchants negotiating bilaterals or ringing up issuers every time there is a transaction, I think in my learned friend's submissions, and that is just not the way it would work.

It is clear from the evidence that settlement terms would be agreed bilaterally between issuers and acquirers, without merchants having any direct involvement, and Dr Niels has explained that the bilaterals counterfactual is feasible in practice for the reasons he gives in his first report, at paragraphs 3.20 to 3.26, and what he essentially says is that *Mastercard*'s witness evidence makes clear that the bilateral agreements would have been preferable to operating with a zero MIF in the post IFR period and he refers to the evidence of Ms de Crozals and Mr Willaert, and Ms de Crozals' evidence referred to by Dr Niels is that the lack of default rules would lead to some uncertainty and higher costs arising from a large number of bilateral agreements required in a large market and that is less attractive than default rules, but -- and this is the key question -- it is more attractive than settlement at par and that is the consistent evidence that *Mastercard*'s witnesses give and the reason for that is that if *Mastercard*'s scheme did not provide a competitive source of revenue for issuers, then card issuers would switch to schemes that did, such as Amex, and Mr Willaert's evidence is clear at paragraphs 25.1 to 25.2 of his statement.

That is all I had to say on the bilaterals counterfactual, so I was briefly going to pick up on the Honour All Cards Rule --

THE PRESIDENT: Yes.

MS TOLANEY: -- and Mr Kennelly has obviously addressed the Tribunal on this.

Can I just clear away one point that applies to *Mastercard*, which is that my learned friend wrongly suggested that *Mastercard* accepted in its written opening that the bilaterals counterfactual is not viable without the Honour All Cards Rule and that was at {Day2/58:8-12}. That is absolutely not right. We address what would happen in the bilaterals counterfactual in the absence of the HACR at paragraph 53 of our written opening.

The point made in paragraph 52 of our opening is that you obviously have to ask whether it is realistic that the schemes would have operated without that rule and we say that is just not realistic, but if we are wrong about that and the Tribunal finds that the schemes could have operated without the Honour All Cards Rule, then we say that, even without that rule, in the bilaterals counterfactual interchange fees would have still been agreed at the level of the caps in the IFR and that is expressly stated in Dr Niels' second report, at paragraph 3.23.

Now, as the Tribunal has already heard from Mr Kennelly, the Honour All Cards Rule has two aspects to it: the Honour All Products aspect and the Honour All Issuers aspect, the latter being that merchants are required to accept cards without discriminating between issuers, and it is on that second aspect the claimants particularly focus on their post-IFR case and you see that at paragraph 188 of their written opening.

The argument advanced by the claimants is that this aspect of the rule is anti-competitive because it allows each issuer to have the bargaining power of issuers as a whole and essentially rejecting a deal by one issuer would mean rejecting all those not participating in the scheme. That is the claimants' argument.

Now, we of course say that the Honour All Cards Rule is not restrictive of competition under issue 9, which Mr Kennelly is going to come on to, and if we are right about that then this whole case is dead because it is fatal to the claimants' case, and of course on that the Honour All Cards Rule was of course approved in the *Negative Clearance* decision at paragraphs 66 to 69, and the Honour All Issuers aspect was approved more recently in the IFR at recital 37.

We say the reality here is that the claimants' case will fail on that ground, but even if you get to this stage of the analysis, which is that it would be right to exclude the Honour All Cards Rule from the counterfactual, the claimants then need to overcome another hurdle, which is to show that, absent that rule, interchange fees agreed between issuers and acquirers in the bilaterals counterfactual would have been appreciably lower than the caps in the IFR. That is their target if they get to this stage and on this factual question the claimants' experts argue that without the Honour All Cards Rule merchants could threaten not to accept the cards of certain issuers and acquirers could then use that threat in a negotiation with issuers to lower the fees. So it is suggested, essentially, that each issuer could effectively have been taken out of the pack and so the argument goes.

Now, there are two fatal problems with that line of argument. The first is that in order for the hypothesis to be realistic there would have to be some evidence before the Tribunal that merchants were willing and credibly able to make those threats of non-acceptance of certain issuers' cards, in order to reduce the interchange fees by a very small amount and the claimants have put forward witness statements from 11 representatives, but there is no suggestion in any one of those statements that this is what would have happened and, in fact, the evidence is to the contrary.

The claimants' evidence in fact highlights what they say is the "must take" nature of the *Mastercard* and *Visa* cards and, by way of example, you have the evidence of Mr Jenkins at paragraph 21.

A number of the claimants also emphasise the importance to customers of being able to pay by their preferred method and we address that in our written submissions at paragraph 193, so, for example, Mr Jenkins at paragraph 29 of his statement notes that it would "... not be good for the business if the business discriminated against types of cards."

All of that is fairly unsurprising. A merchant clearly does not want to turn away a customer at a till because the customer chose the wrong issuing bank and customers are not typically singled out in this way. Merchants are intelligent enough to realise that rejecting payment is not a good business strategy and, in any case, the claimants' evidence is that merchants find it difficult, if not impossible, to distinguish between the different scheme cards at the point of sale, particularly with automated tills and contactless payment, and you get that from Mr Steeley's statement at paragraph 41, and when one thinks about that, it is not really clear how they would even go about it.

So given all of those points, it is not surprising that none of the witnesses suggest that they would have embarked on what seems to be an almost impossible process and a merchant would not want to reject the payment of a customer.

PROFESSOR WATERSON: Can I just bring this back to what Ryanair used to do, which is they would list cards and they would have different -- you know, they would clearly have a card, which almost no one had, that would attract zero fees, but then there would be other cards, so Ryanair there is -- at that stage anyway, when it was doing this, it is distinguishing between cards, including between different debit cards, so -- and it did not collapse.

MS TOLANEY: No, but there is no evidence here that anyone, or from any one of the claimants' witnesses, that generally merchants at say a shop point with a contactless payment would in fact stop their customers paying. At the point of payment the customer would presumably only find out then that their *Mastercard* or *Visa* was unacceptable and the transaction would be rejected and when one thinks about the attractiveness of that -- because this is on the hypothesis that this would somehow be more attractive than the counterfactual we are positing -- no merchant would want to persuade -- to try and persuade a customer not to pay.

There is no evidence an acquirer would persuade an issuer that this was a credible threat and the idea that merchants would really have refused to accept specific cards, or this would have been a credible threat to the extent of lowering the fee negotiation, lower than the already low caps, we suggest is not credible.

I am not saying, in answer to the professor's point, that it is completely impossible, but the Tribunal has to assess here: (a) what is realistic and (b) what the evidence says.

PROFESSOR WATERSON: But is this a point to do with the scale? Because many merchants do not accept Amex cards and very few accept Diners cards, so they are distinguishing there.

MS TOLANEY: But if one imagines this on the scale of *Mastercard* and *Visa* transactions, one has to weigh up the cost-benefit analysis here of saying, well, you are going to take those steps on an ordinary day-to-day transaction to get a very small reduction and it is -- and the threat of that, the threat of that is going to lead to a negotiation where issuers can be taken out of the pack because issuers would be persuaded that such and such an individual merchant would not actually accept the *Mastercard* or *Visa*.

It is not -- we would suggest it is not realistic and that is why the claimants' own witnesses not only have not put it forward as being something they would do, but their evidence on "must take" is absolutely to the contrary.

Mr Cook is rightly saying that you can, as a matter of practicality as well, distinguish Amex from *Mastercard*, but it is less easy to do that in the group of other cards with *Mastercard*, but, as I say, in a sense it does not really arise because there is no evidence to suggest this actually could ever have been put forward by the claimants themselves. It is a legal argument, but it is unsupported by and indeed contradicted by their own evidence.

The second point is that Dr Niels explains why, even without the Honour All Cards Rule, it is likely that issuers would have had a sufficiently strong bargaining position to negotiate interchange fees up to the level of the caps and the reason for that is the benefit to an acquirer of being able to offer merchants universal acceptance and merchants being able to make the same promise to their customers, which is the opposite of what we have been discussing. It is actually much more attractive for an acquirer to be able to make that promise to its customer rather than the opposite and Mr Holt explains in his reply report that the competitiveness of the acquirer's offering to merchants would be reduced substantially by a gap in its acceptance network. That is in Mr Holt's second report at paragraphs 189 to 196.

That benefit outweighs any saving the acquirer is likely to make by insisting on a lower MIF than the cap of the IFR, which itself is very low. We are talking about something between 0% and 0.2% or 0.3%, which means that the threat is also not very credible because sophisticated banks would be aware that acquirers are much better off accepting fees of 0.2% or 0.3% than walking away from an issuer.

PROFESSOR WATERSON: So this is a question of degree rather than absolute.

MS TOLANEY: Well, it is a question of reality, sir, with respect, because -- I mean everything is a degree when it comes to fees and levels. It is a question of reality. Is this a fight that acquirers and issuers are going to have when it is against the acquirers' own interests and they do not get much benefit from it?

PROFESSOR WATERSON: That is the point that I was just making about the level of it.

MS TOLANEY: Yes. Well, I think you were making the point about frequency as well.

PROFESSOR WATERSON: Yes.

MS TOLANEY: So there were two points. The first was frequency and volume of transactions --

PROFESSOR WATERSON: Yes.

MS TOLANEY: -- and that was the first point, where Amex may be in a slightly different category and obviously life may have moved on as well from the time with Ryanair, but the second aspect is degree, which in reality the cost-benefit analysis here does not point to acquirers really threatening to walk away from an issuer over a very marginal saving, when in fact they are better served by being able to serve their own customers in an appropriate way and they would realise that.

Indeed, what we would say, again on both points, is that the commercial incentive of the merchant faced with potential interchange fees at the level of the caps is to accept rather than decline cards, so that is -- taking both your volume and scale points, we get to the same point, which is do they want to take the transactions or do they want to refuse them and the reality here is that the claimants' own evidence presents what is fairly logical, which is that they would much rather accept cards than decline them so as not to lose the transaction, and so the reality is that we would say, for all those reasons, when you unpick the argument -- and I accept the professor is right to say that, as a matter of analysis and logic, one can see the points, but on the reality of the evidence and the reality of life, they do not get anywhere, so the two points are that we do not even really get to this argument because of issue 9, but, if we did, the outcome is frankly that, with or without the Honour All Cards Rule, the position remains that the fees would be at the level of the caps.

That is all I had to say on issue 3, so it is a good moment to stop. I am coming back on issues 4 and 5.

THE PRESIDENT: Thank you, Ms Tolaney. We will resume then at 2 o'clock. Thank you very much.

(1.03 pm)

(The luncheon adjournment)

(2.02 pm)

THE PRESIDENT: Ms Tolaney, good afternoon.

MS TOLANEY: Good afternoon. Turning, then, to issues 4 and 5. I am conscious that there is some confidential material and I will just refer to submissions when that is --

THE PRESIDENT: Let us proceed in that way. If you want us to read something, let us know. We will try and restrain ourselves from mentioning in open court anything that we should not, but do slap us down if we do.

MS TOLANEY: Thank you very much. Our written submissions address these issues at sections E and F and so you have that to hand it is {RC-A/2/30} and before I come on to the detail, may I start with one important point to address at the outset which arises from the claimants' written opening, which is that the thrust of the claimants' submissions is that any positive MIF is in effect per se unlawful and you see that theme running through much of the expert evidence as well as the submission and what they essentially do is group together all positive MIFs and ask the Tribunal not to focus on the characteristics of the specific transactions to which the specific MIF applies, or the services provided by the issuers in relation to the relevant cards, or the characteristics of the customers, or the competitive landscape on both sides of the two-sided platform, and you can see that in the claimants' submissions, for example at paragraphs 177 to 185, and we say as a starting point that is a flawed approach because it is flawed as a matter of law, it is inconsistent with the approach taken by the Supreme Court in the *Sainsbury's* litigation, and the approach of this Tribunal and the Court of Appeal in *Dune* and we say as a matter of a starting point those cases establish that one has to look at the specifics. In particular you can see that from the *Dune* Court of Appeal analysis in relation to inter-regional MIFs at paragraphs 50 to 59, where the Court of Appeal makes plain that it is a matter for evidence and factual assessment whether the essential factual basis in the *Sainsbury's* Supreme Court decision at paragraph 93 is satisfied, so one has to actually engage with the detail and the facts.

The second point is, just standing back, the approach of the claimants in this regard is flawed as a matter of logic because you cannot really determine whether a MIF is likely to or will have effects on competition as a matter of fact, without taking into account specific characteristics of the MIFs and of the transactions to which the MIFs apply, so just with that point then in mind I will turn to the detail of our submissions and issues 4 and 5, as you will appreciate, raise a number of overlapping points and what I am going to do is try and deal with the overlap as much as I can and then pick up on commercial cards and issue 5 without repeating, if I may.

There are four essential points that go to both issues 4 and 5. First of all, one needs to consider the key differences between consumer domestic transactions on the one hand, and inter-regional or commercial card transactions on the other and those differences are important and they inform necessarily the analysis as the courts have recognised in the cases I have mentioned.

Secondly, in light of those and other differences the next question is whether the essential factual basis of the *Mastercard* CJ applies. The key issue here is what would have happened in the counterfactual where the default inter-regional or commercial card MIF was zero and in particular, and the essential issue for this Tribunal will be, to what extent would issuers and cardholders have switched to alternative payment methods and the consequent effects on this on costs to merchants of accepting inter-regional transactions or commercial transactions which can be described as the market-wide MSC as distinct from the *Mastercard* only Merchant Service Charge.

The third issue is whether inter-regional or commercial card MIFs have the object of restricting competition and Mr Kennelly's submissions have covered most of the ground on that and I will not be saying much more on that.

Then the fourth issue is whether either type of MIF is objectively necessary and I will go through each topic.

In relation to inter-regional MIFs, the Tribunal will also need to consider the claimants' reliance on the *Mastercard* Commitments Decision of 29 April 2019 and their case that the decision means that inter-regional MIFs are in excess of -- in excess of the commitments given by *Mastercard* are deemed to be unlawful. We suggest that the decision means no such thing and I will develop that at the relevant point.

I am going to address the points on behalf of *Mastercard* but obviously I will cover generic ground and Mr Kennelly will follow up with any *Visa* specific points.

So can I start with section E of our written submissions in which we address inter-regional MIFs and there are four points by way of background. First of all, as the Tribunal is aware, inter-regional MIFs apply to transactions where a card issued in one geographical area is used at a merchant in another and for the claimants in these proceedings that would be UK and Irish transactions by customers using cards issued outside the EEA.

Secondly, as the Tribunal is also aware, the

Commission, as I have just mentioned, issued a Commitments Decision on 29 April 2019, by which it accepted the commitments given by *Mastercard I*n relation to inter-regional MIFs and Mr Beal took you to that decision and I will address you shortly about the effect of it, but those commitments are set out in paragraph 66.3 of our written opening submissions, which for the screen is {RC-A/2/30}.

So you can see the difference for the commitments for the card present transactions and the card not present transactions.

(Pause)

Then if we, go please, to {RC-J5/31/13}, this is the Commitments Decision and it is 47 where you see that summarised and if we could go, please, to page 22 in the same document {RC-J5/31/22}, recital 105, you will see the conclusion please on the second sentence of that paragraph states in terms that the Commitments Decision should not conclude whether or not there has been or is still an infringement.

(Pause)

The third background point is that as those commitments reflect, inter-regional MIFs have tended to be higher than consumer domestic MIFs and if we go please to {RC-H3/2/96}, so you see here in the first expert report of Dr Niels, at figure 4.4, more detail is provided on the level of inter-regional MIFs charged by *Mastercard* and we summarise the higher cost to the issuer in paragraph 75.5 of our written opening, which is at {RC-A/2/34}.

(Pause)

The fourth point by way of background, as you know, is that *Dune* and others applied for summary judgment in respect of inter-regional MIFs and that application was dismissed.

So if I can turn first to address whether inter-regional MIFs had the effect of restricting competition in the relevant period and start by engaging with the claimants' first point, that the factual basis of the CJEU's decision cannot be distinguished, which we say is plainly wrong, and we address this in paragraphs 72 to 74 of our opening, which is at {RC-A/2/33}.

Now, the Tribunal, as I know, is very familiar with the Supreme Court decision in *Sainsbury's* and what the Supreme Court said about the essential factual basis of *Mastercard* CJ and Mr Kennelly addressed you last week on the six essential facts as identified by the Supreme Court in paragraph 93 of the judgment and can I just remind you of those, it is {RC-J5/36/29}, and you are looking at paragraph 93. In relation to inter-regional MIFs we are particularly concerned with essential fact number 6, whether the Merchant Service Charge would be lower in the counterfactual, and our case is that essential fact 6 is not made out because the Merchant Service Charges actually paid by merchants on inter-regional transactions would not have been lower in the counterfactual.

Now, the starting point for the analysis in relation to that is that there are crucial differences between domestic and inter-regional transactions which have to be taken into account in considering both the counterfactual and objective necessity and it is important to say at the outset that it appears to be common ground that these factual differences exist. The dispute between myself and Mr Beal relates instead to the significance of the differences to the issue in this trial.

The differences that we have identified are set out at paragraph 75 of our written opening submissions and that is at {RC-A/2/34} and I wanted to highlight five points with the benefit of that page being open.

First of all, inter-regional transactions are much less prevalent than domestic transactions and we set out in paragraph 75.2 of our written opening in 2012, inter-regional transactions made up 3% of transactions by volume in the EEA and 5% by value and there are more recent figures set out in paragraph 75.2(b) which is supported by the evidence referred to in that paragraph.

Secondly, the transactions are concerned -- sorry, are concentrated in certain specific sectors such as travel, entertainment, car rental and hospitality and the Tribunal can see the different proportions across sectors in Dr Niels' report at {RC-H3/2/95}. This concentration is important because it means that competing payment products do not need to reach the same level of general acceptance as *Mastercard* or *Visa* to be effective competitors. One is looking at certain sectors and I think, Professor, you made a reference last week to Amex having much lower levels of acceptance than *Mastercard* and *Visa* and that was certainly true at one time but during the claim period, Amex had a very competitive level of acceptance in the UK and I will give two references for your note, we do not need to turn them up, but {RC-J3/49.02/16} refers to Amex having around 75% of *Mastercard*'s acceptance from about 2010 and {RC-J3/123/12} which is from 2022 refers to Amex being accepted at 80 million locations worldwide compared to 100 million for *Mastercard* and *Visa*.

The third point is that card not present transactions make up a much higher proportion of inter-regional transactions and that is quite significant and the Tribunal can see the precise division in Dr Niels' report again and that is at {RC-H3/2/93}. If we also look at {RC-A/2/34}, please, back to our written opening, you can see figures in paragraph 75(4).

The fourth difference is that issuers face higher costs in respect of inter-regional transactions because of higher fraud levels, higher levels of charge-back and the costs of funds during the interest-free period and we deal with this at paragraph 75(5) of our written submissions, which is on screen.

PROFESSOR WATERSON: This is customer fraud?

MS TOLANEY: That is right.

PROFESSOR WATERSON: There is presumably also merchant fraud?

MS TOLANEY: Yes, that is right. There will be different types of fraud.

PROFESSOR WATERSON: And merchant fraud would fall on the acquirers?

MS TOLANEY: Can I come back to you on that? I want to be sure before I give that answer.

PROFESSOR WATERSON: Yes.

MS TOLANEY: Then the fifth point is that inter-regional transactions have a higher average value as compared to domestic transactions and we deal with that in 75(6) of our written opening, and in 2012 the average transaction value for inter-regional transactions was just over EUR 80 compared to roughly just under EUR 50 for domestic transactions, and the more recent figures are in 75(6) of our written submissions.

Now, none of these differences are disputed by the claimants, as I have said. The thrust of the claimants' case is that the differences do not matter for the issues at trial and we say that is just not realistic. One can see that these are significant differences that have significant implications for the economic analysis and inform the analysis on whether inter-regional MIFs restrict competition by effect and whether they are objectively necessary, and *Mastercard*'s approach is consistent with the approach taken by the courts too -- which has been to identify the essential factual basis, to identify the specific measure at hand, and differences between factual situations are inevitably going to feature, we would suggest, in the factual analysis.

Can I turn then to counterfactual switching which, as I said, against that background is going to be the key issue for the Tribunal and we deal with that in our written openings at paragraphs 82 to 88, and the real dispute is what would have happened in a counterfactual world where default inter-regional MIFs were zero and we suggest there would have been switching.

There are four key points. First of all, Mr Dryden opines that when considering switching in the counterfactual the question is limited to whether *Mastercard* and *Visa* Merchant Service Charges specifically would have been lower in the counterfactual.

Now, we suggest that is flawed because it is based on his own interpretation of the Supreme Court's approach in the *Sainsbury's* litigation, which is plainly outside his expertise and you can see that, for your note, in Mr Dryden's first report at paragraph 4.51. The section is titled "The correct interpretation of the Supreme Court's sixth fact" and that is {RC-H2/1/36}.

Now, we suggest that he cannot reinterpret the Supreme Court's decision, it is clear what it says, and in any case, as we say in our openings at paragraphs 82(2), the applicable case is given in the CJEU's decision of *Cartes Bancaires* which was approved in *Dune* and it is clear that the assessment of the counterfactual is aimed as determining whether in the absence of the measure in question the competitive situation would have been different in the relevant market. The assessment is not limited to a comparison of the prices most directly affected by the measure at issue in the real world and the counterfactual, rather and fairly obviously, the test focuses on the difference in the situation in the market. So here the market price is experienced by merchants in the factual and counterfactual, not only the charges charged under the scheme, so there is no reason to limit the analysis. Instead you have to look at the market-wide position.

Now, the submission made by my learned friend is not supported by the experts to this extent, that there is agreement between the experts that Amex forms part of the relevant markets and should be taken into account. Although my learned friend tried to suggest that this was not the case, I will show you what the experts say, but the reference where my learned friend tried to say this was {Day 2/45:12}. But if we go to the joint expert statement at page 4, so it is {RC-H5/1/4}, the third bullet, please and if you look at "While Amex is vertically integrated ..."

(Pause)

So contrary to the suggestion that Amex should not strictly be considered, which my learned friend made in opening, in the acquiring market, the experts recognise that but nonetheless accept that Amex is part of the market and, more significantly, the experts accept that nothing turns on the precise boundaries of the market, if you look at the second bullet point.

So the commercial reality is that issuers and cardholders can switch to Amex, which is something to take into account in the counterfactual.

Secondly, it is necessary to consider the extent to which issuers would switch away from *Mastercard* and *Visa* cards for inter-regional functionality if the default inter-regional MIF was zero. Now, my learned friend suggested in his oral submissions that it is not clear how issuers can switch to Amex when it is a three-party scheme and Amex does not allow anyone to issue the card. That was {Day2/80:20-24}.

My learned friend seemed to be referring to the fact that Amex withdrew its 3.5 party model, also known as its Global Network Services, and that model allows financial institutions to issue Amex cards from Europe after the IFR, so now it only operates in Europe on a proprietary basis, i.e. its traditional three-party model, and that happened because Amex's GNS model was subject to the same interchange fee caps as *Mastercard* and *Visa* and Amex had always offered better interchange fees than *Mastercard* and *Visa*, in order to persuade issuers to switch with the same interchange fees and Amex could not compete using its GNS model.

But that is irrelevant for present purposes since in relation to inter-regional transactions at UK and Irish merchants, the relevant issuers are those outside Europe where the IFR caps do not apply. So Amex's GNS model is addressed in our evidence by Ms Sarmiento at paragraph 60 and she explains that in some national markets where the Amex 3.5 model exists there would be significant issuer switching to Amex and in other markets where Amex does not offer that model, Amex's market share would have increased as a result of cardholder switching.

The key point is that there is no sense in focusing on prices that would not in fact be paid by merchants in the counterfactual because of switching and *Mastercard*'s evidence for your note is summarised at paragraph 83 of our written opening submissions which is at {RC-A/2/38}.

(Pause)

If we go over the page, please. {RC-A/2/39}

(Pause)

So you will see from that summary that *Mastercard*'s position is that if *Mastercard*'s inter-regional MIFs had been zero, at least a substantial proportion of cardholders and issuers would have diverted to alternative payment methods and I have already explained that issuers face higher costs in relation to inter-regional transactions and it stands to reason that they would be seeking to recover those costs through inter-regional MIFs.

In the absence of that income from *Mastercard* payment cards, there is a clear commercial rationale for issuers to switch to alternatives that could still offer them interchange fee revenues. They are sophisticated players that would be expected to respond quickly and strongly to changes in revenue and indeed that is borne out by *Mastercard*'s experience with Maestro and separately *Visa*'s experience in Hungary, where in both cases an uncompetitive interchange fee led to substantial losses in market share. For your note, that is addressed by Dr Niels in his first report at 2.47 to 2.48.

Now, the claimants' experts argue that non-European issuers would nonetheless continue to offer inter-regional functionality and they make broadly two points. First of all, they argue that inter-regional functionality is not a stand-alone product and that there would be strong cardholder demand for that functionality which would drive issuers to continue to offer it and they put their case, as we summarise, in our opening at paragraph 84(1).

Now, there is no factual evidence in support of that contention and I highlight that for the Tribunal, and in any case the claimants' experts do not grapple with the consequence that unless the issuers are able to recover their costs of inter-regional transactions through MIFs, it is inevitable there will be an impact on the extent and cost of inter-regional functionality. That just is not grappled with.

Secondly, Dr Frankel contends that issuers could fund inter-regional functionality through other sources of income, so, for example, by increasing cardholder fees. That is in his first report at paragraph 208.

Now, this is at best a purely theoretical option because again there is no evidence to show that fees at a level which would be tolerated by customers would fill the gap and why would a cardholder use a card with fees if there was an alternative with lower fees or no fees? Which is why you would expect cardholders who are expecting to use their cards for inter-regional transactions to switch to different payment methods if their *Mastercard* and *Visa* cards became unattractive.

Again, no evidence has been adduced by the claimants to show that cardholder fees could be raised high enough to make up for MIFs without resulting in widespread switching. All that we have is Dr Frankel relying on the fact that there was limited issuer switching following the *Mastercard*'s Commitments Decision in 2019 -- that is in his first report at paragraph 225 -- but that does not assist the claimants since the commitments did not significantly alter the level of inter-regional MIFs for card not present transactions, which, as I have mentioned, constitute a large proportion of the inter-regional transactions.

Even for card present transactions, MIFs were still permitted, albeit at lower levels, so the impact of the 2019 Commitments Decision on issuer revenue will have been very limited, which is again another point.

The third key point in relation to cardholder switching is the extent to which consumer cardholders would have switched to different payment methods where default inter-regional MIFs were zero and I have adverted to this in passing, but it merits specific consideration and we address it in our written opening at paragraph 86 and that is {RC-A/2/40}.

Dr Niels' analysis at paragraphs 4.54 and following of his first report takes into account all alternative payment methods, whereas the other experts only consider cardholder switching to Amex and in his analysis Dr Niels has used a consumer survey commissioned by

Mastercard In 2015 to assess the extent to which non-European cardholders would have switched to alternative payment methods and he has assessed the extent to which there would be cardholder switching in four hypothetical scenarios. If we could just turn this up please, it is at {RC-H3/2/120}.

You have there on the first page the first three scenarios, so the first is *Mastercard* or *Visa* not being available at all for inter-regional payments; scenario 2, cardholders paying a 1% increase in the transaction fee for *Mastercard*/*Visa* purchases in Europe; scenario 3, cardholders not receiving any reward programme points, cashback or other benefits when using *Mastercard*/*Visa* cards in Europe. Then over the page, please, {RC-H3/2/121}, scenario 4, cardholders facing a higher decline rate for *Mastercard* and *Visa* transactions.

Now, on the basis of that survey, Dr Niels' analysis indicates that merchant transaction costs, with only limited exceptions, would have increased in each of those four scenarios and you see that in figures 4.7 and 4.8. If we can -- I think they are {RC-H3/2/123}. Thank you. If we go on to 4.8, please, as well {RC-H3/2/125}.

Now, Mr Dryden criticises the study but accepts that he has no basis to provide an alternative, or better estimate of cardholder switching. That is in his second report at D.19. The reality, we suggest, is that Dr Niels' conclusions are actually likely to be conservative for three reasons: first, because merchant costs of other payment methods may be even higher; secondly, because issuers may adopt a combination of the strategies referred to in the scenarios, other than in relation to scenario 1; and thirdly that the costs that he calculates do not take account of issuer switching.

So you have some very clear material there on the fact that there would have been higher costs.

The fourth key point on switching is that the claimants' experts argue that in a counterfactual with zero inter-regional MIFs Amex would have reduced its Merchant Service Charge in order to increase merchant acceptance and we address this in our written opening at paragraph 87 which is on {RC-A/2/42}.

The claimants say that this would tend to make it less likely that switching away from the schemes would result in an increase to the merchants' overall transaction costs.

Now, this argument is hopeless because the evidence does not indicate that Amex would have significantly decreased its prices in the counterfactual rather than leaving them as they are, or even them increasing them for some products, and the idea that Amex would reduce its prices fails to take into account the interactions between the issuing and acquiring markets.

Merchants would of course have favoured lower prices from Amex, but Amex itself would not, nor would the cardholders who would incur higher costs and receive fewer benefits if lower transaction charges were paid by merchants. It is also important to consider what pushes cardholders away from the schemes.

In the counterfactual, cardholders are likely to have switched to Amex as a result of the measures that issuers and schemes would take to compensate issuers for the loss of the inter-regional MIF revenue. Amex's market share would have increased as a result of the switching driven by issuers and cardholders, not because of any change in its attractiveness to merchants, and the point is that as a result of the switching by both issuers and cardholders, Amex would become more attractive to merchants, making it even less likely that merchants would be able to push for lower fees.

Now, Dr Frankel's case is that we can tell Amex would have reduced its fees in the zero MIF counterfactual because Amex in fact reduced its fees in two situations. Firstly, post IFR; and secondly, when *Mastercard* and *Visa*'s rates fell in Australia.

We have addressed why he is wrong about that in paragraph 87 of our written opening which is {RC-A/2/42}. There are two points.

The first is to be clear about what we are considering, we are looking at a counterfactual in the claim period, so from 2007 onwards, generally speaking, when inter-regional were zero and considering the extent to which there would have been switching to Amex in that counterfactual. In relation to the comparison Dr Frankel seeks to draw in the post IFR period, he argues that Amex reduced its Merchant Service Charges but, as Dr Niels explains in his second report at paragraph 4.62, Amex's 3.5 party business, its Global Network Services, were subject to the caps in the UK because its market share exceeded 3%.

That limited Amex's overall bargaining power because it no longer had the ability to offer issuers higher interchange fees than *Mastercard* and *Visa*, and so Amex could no longer offer issuers higher revenues to persuade them to switch and that removed the principal way for Amex to increase its cardholders, which in turn limited Amex's ability to maintain a high level of merchant fees and there would have been no such restriction on Amex's fees and its bargaining power in the counterfactual, that is the difference.

The second thing that is relied on is what Amex did in Australia and we say the situation was different because Australian interchange fee regulation has specific features which make it not a relevant benchmark for counterfactual analysis and Dr Niels explains this at paragraphs 4.63 to 4.66, the key point being that under those Australian regulations, *Mastercard* and *Visa* remained able to and did set MIFs for some cards above the regulated level because the caps related to the weighted average MIFs.

Because *Mastercard* and *Visa* could set MIFs for some cards above the regulated level, they were able to compete effectively with Amex for affluent cardholders which are Amex's target demographic. This prevented Amex from increasing its market share, in turn limiting its negotiating power and its ability to maintain its charges.

Now, the experiences are quite different. Regulation in the different Australian market therefore does not provide much insight into the counterfactual in the UK and Ireland. Mr Holt in particular highlights several important reasons why experience in Australia is unlikely to be informative and that is in his reply report at paragraphs 3.10 to 3.14.

In any case and separately, Dr Niels has conducted a sensitivity analysis which shows that even if Amex's Merchant Service Charges were to fall quite substantially in the counterfactual, merchants would still have faced an overall higher cost and that is in Dr Niels' second report at paragraph 4.78 and the simple reason is that there is a large delta between scheme Merchant Service Charges and the cost of other payment methods, including Amex, so reducing the gap between the two does not change the outcome of the switching analysis.

Can I then turn to restriction of competition by object, which we address in paragraphs 89 and 90 of our opening and that is in {RC-A/2/43}. Mr Dryden accepts that inter-regional MIFs do not have the object of restricting competition, which is a fairly bad start for the claimants. That is in the joint expert statement at page 8. Can we just look at that please, it is {RC-H5/1/8}. You see it under the heading "Restriction By Object". So it is common ground between Dr Niels, Mr Holt and Mr Dryden, and we say it is the correct answer applying the familiar test for object infringements.

Only Dr Frankel suggests the contrary and this is in his first report at paragraph 117 and notably his reasoning is not specific to inter-regional MIFs. It is also driven by his view that all positive MIFs are by definition a collusive device and Mr Kennelly has addressed you on why Dr Frankel is wrong about this and we have addressed this in our written submissions at paragraph 56 to 58. So I do not propose to say anything further orally, but we say it is not analytically sustainable.

Can I then turn to objective necessity which we address at paragraphs 91 to 93 of our written opening. That is at {RC-A/2/44}.

The applicable legal test for considering whether a measure is objectively necessary was discussed in the Court of Appeal decision in *Sainsbury's* and is summarised in paragraph 91 of our written opening and, as we say, at paragraph 72 of the Court of Appeal's judgment the Court of Appeal held that in order for a restriction to be objectively necessary, it:

"... must be essential to the survival of the type of main operation [emphasis] without regard to whether the particular operation in question needs the restriction to compete with other such operations."

In terms of what is meant by "other such operations", the discussion of the Court of Appeal at paragraphs 204 to 207 of that decision make it clear that such operations should be materially identical to the undertaking in question and Amex and other payment methods are not materially identical because they are not four-party payment schemes.

I explained earlier when addressing counterfactual switching why inter-regional MIFs are required by *Mastercard I*n order to provide inter-regional functionality and why it would not be viable for *Mastercard* to provide such functionality in the absence of inter-regional MIFs.

Now, the claimants say it is not enough to show that an operation would be less profitable. That is in their written opening at paragraph 213(2).

We accept that but that is not a hurdle and we do not take that as our target. We do not say it would be less profitable to offer inter-regional card services without MIFs.

Our case, based on the evidence before the Tribunal, is that it would not be commercially viable and if we are right about that, objective necessity is made out even on the test as the claimants prefer to phrase it.

Then there is just one short legal point before I move on from this topic, which concerns the availability of objective necessity in a case where a measure is found to be an object infringement. As the Tribunal knows, our submission is that this issue does not arise because these are not object infringements, but my learned friends cite the *International Skating Union* case for the proposition that -- and I am quoting -- "Objective necessity is not available to save an agreement which has been found to have the object of restricting competition". That is paragraph 81 of the claimants' written opening. The point is repeated at paragraph 208 and the case was also discussed orally on {Day1/115:1} onwards.

Now, in each case the claimants cite paragraphs 113 to 114 of the judgment in *ISU* and can we just turn up that case. It is at {RC-Q3/62} and if we could please go to page 19 {RC-Q3/62/19}, so my learned friend relied on paragraphs 113 and 114. In fact, if the Tribunal could please read from 111 to 114 and just while you are reading 111, my learned friend suggested the case law referred to concerned the doctrine of ancillary restraint but you can see from paragraph 111 that is not right.

(Pause)

So the position is that the CJEU is not talking here about objective necessity, as you can see. It is dealing with a different doctrine, objective justification, which applies in certain professional and sporting contexts and this is a sporting rules case and in 111 you will have seen the references to *Wouters* and the line of case law on professional services and you will have noted that the words "objective necessity" and "ancillary restraint" do not feature.

It is clear from paragraph 112 that the effect of the *Wouters* doctrine is that certain sporting and professional measures, even if restrictive of competition, fall entirely outside the scope of Article 101. That is not on the basis of objective necessity in the *Metropole* sense, but on the basis that the measure produces some legitimate objective, for example anti-doping, which does not go beyond -- and does not go beyond what is required to achieve that objective and does not eliminate competition and what has happened recently is in cases including this one, the doctrine seems to have receded in importance because, as we see in 113 to 114, it cannot be used for object infringements and that is important potentially if you want to defend prima facie restrictive measures in a system of sporting rules, but has no effect on the law that applies in a purely commercial context where the more permissive approach in *Wouters* never applied.

Now, if the point is persisted with, we have got a lot of textbook extracts to show that the *Wouters* doctrine is not the same thing as objective necessity but the point seems to be fairly plain on the face of the case relied on by my learned friends so I will leave it here for opening and see how it is developed, if at all.

Then the final issue in relation to inter-regional MIFs arises out of the 2019 *Mastercard* Commitments Decision, which we address in our openings at paragraphs 94 to 98 and that is on the electronic version {RC-A/2/46} and the -- sorry, page 45 in fact {RC-A/2/45}. The claimants contend that the Commitments Decision leads to what they term an inevitable inference about the maximum level of inter-regional fees that would not infringe Article 101.

Now, that is not a tenable contention. We address the point in the references I have given to you and I will address it briefly orally. The short point, as you have already heard, is that commitments are not admissions and do not give rise to deemed illegality, by inference or otherwise. The commitment decision made no finding about the level of lawful inter-regional fees and in the usual way the commitments were given by *Mastercard* expressly on the basis that they should not be treated as amounting to an admission that inter-regional MIF levels set out in the commitments were the right levels. So reading in an admission would not be justified on the facts and would be wrong as a matter of principle and policy.

Can I turn then to commercial card MIFs briefly because I have covered a lot of ground. As I have already noted, largely the same issues arise under issue 5 in relation to commercial card MIFs but the evidence is of course different and our written submissions address commercial card MIFs at section F, which is {RC-A/2/47}. So just to give an outline of my submissions, I will address first of all some points by way of background; secondly, address the restriction by effect case; thirdly, address whether commercial card MIFs have the object of restricting competition; and finally, whether they are objectively necessary. So a similar structure to inter-regional.

There are three points by way of background. The first, as the Tribunal will be aware, commercial cards cover a range of different cards and are typically cards issued to businesses to use by their employees for business-related expenses and Dr Niels in his first report, at paragraph 5.4, sets out the four main types of commercial cards, which are business cards, corporate cards, fuel cards and purchasing cards.

The second point by way of background is that the IFR expressly excluded commercial cards from ambit by

Article 1.3(a) of the IFR and that is important and just for your note that is {RC-Q1/14/10}.

The impact assessment conducted by the Commission in 2013, prior to the introduction of the IFR, explains that commercial cards should be excluded from the scope of the IFR because they have very limited market shares in the EU and they cater for specific market segments, not the average consumer.

The third background point to make is that again *Dune* applied for summary judgment in respect of commercial card MIFs and that was dismissed by the Tribunal and those claimants notably did not appeal that decision and that was in -- for your reference, it is the *Dune* CAT decision at paragraphs 77 to 82, which was not appealed, as recorded in the *Dune* Court of Appeal decision, paragraph 18.

So turning, then, to restriction of competition by effect, the starting point is obviously again to look at whether the essential factual basis of *Mastercard* CJ applies to commercial card MIFs and it is again necessary to ask whether the Merchant Service Charge would be lower in the counterfactual and there are three key points for the Tribunal.

The first is the material differences that exist between consumer and commercial cards are highly relevant. Secondly, the expert evidence relevant to the floor issue and pass-through by acquirers should be taken into account. Thirdly, in a counterfactual where the relevant MIF is zero, there are issuer and cardholder switching issues, switching to alternative payment methods and I will address those topics.

So starting with the differences between consumer and commercial cards, those are covered in our opening at paragraph 108 to 111 and that is at {RC-A/2/49}. There are six fundamental differences which we outline in our written submissions at paragraph 108.

First of all, commercial cards are held by customers who are on average substantially more sophisticated than consumers. They tend to be large corporates or businesses and are likely to be alert to the costs of different payment methods, a fact which is important to have in mind when considering the extent of cardholder switching.

Secondly, commercial cards tend to be charge cards, so the balance has to be paid off in full every month for those cards. Even for cards which are credit cards, in formal terms, balances are generally paid off every month. That has the result that issuers generate little revenue from interest on balances, rendering the MIF income even more significant.

Issuers do not have an additional revenue stream that is available to them in relation to consumer cards where extended credit is more common.

The third key point is that average transaction values are higher for commercial cards than for consumer cards, even though these transactions represent a relative minority of transactions overall. I will not refer to the specific figures in open court, but the Tribunal can see them in our written opening at paragraph 108.3 which is on page 50 of the document that is open. {RC-A/2/50}

The fourth point is that commercial card products are more sophisticated than consumer cards, requiring more complex features such as tools for tracking, controlling costs and monitoring employee compliance with the corporate customers' spending policy and that obviously drives up issuers' costs of providing the card and associated services.

Fifthly, commercial cards tend to carry higher risk for issuers because credit limits on these cards tend to be higher than consumer cards, which also increases the issuers' costs.

Sixthly, the competitive landscape for the schemes is different for the consumer cards market and, most notably, Amex plays a much greater role in the commercial cards market but there are also other differences explored in the evidence and these factual differences provide the backdrop to the different regulatory landscape, and the IFR does not regulate commercial cards, for good reason.

Now, we suggest that the substantial differences between consumer and commercial cards are plainly relevant to the economic assessment and for our purposes in the trial whether commercial cards restrict competition by object or effect and the claimants' answer again is to say the factual differences do not matter, rather than to dispute the differences at all.

Acquiring contracts are addressed in paragraphs 112 to 113 of our written submissions {RC-A/2/51} and again the key issue is switching and that is the crucial stage of the analysis for the Tribunal: what would have happened in the counterfactual and in turn to the market-wide Merchant Service Charge and we address this at paragraphs 115 to 121 of our written opening.

Again, it is important to consider the extent to which market-wide merchant fees would have been different in a counterfactual where *Mastercard* commercial card MIFs were zero. One does not limit the enquiry again to changes in just the level of *Mastercard* and *Visa*'s Merchant Service Charge and the key issue in the counterfactual is switching by both issuers and cardholders.

As regards issuer switching it is important to note that issuers generate significant revenue from interchange fees and the figures are at 116.1 of our written opening {RC-A/2/52}.

Those revenues go towards funding the product features associated with commercial cards, which I have already mentioned, and the evidence is that without those revenues, it would not have been financially viable for issuers to continue to offer commercial card products with the same level of functionality. That evidence is summarised on the same page that is open, paragraph 116 of our written opening {RC-A/2/52}, and the reality is that it would be difficult to differentiate the commercial card offering from other types of payments, for example electronic funds transfers, and importantly, issuers do not have any ready means to replace the lost revenues with other sources of income because, as I have said, revenue from interest is very limited as the balance is paid off before the end of the interest-free period typically.

It would also not be realistic for issuers to increase cardholder fees given the greater bargaining power of commercial customers and their ability and willingness to take business elsewhere.

As regards cardholder switching, issuers face strong competition from Amex for this type of cardholder and, again, we address this in our written submissions at 116.5 {RC-A/2/52} and that summarises the evidence on this point. Amex already has a significant presence in commercial cards -- in the commercial cards market, which it could leverage, and given how commercial cards work, where a corporate customer may require many cards for its employees, Amex could and likely would look to acquire a small number of high value customers which translate to a large number of cards and a fast route to a much larger market share and commercial customers are likely to switch more readily and quickly when it is commercially advantageous for them to do so, and they typically chase cardholder benefits as well as product features.

Amex has a large acceptance network which makes it very attractive for commercial customers, as well as a good acceptance network in important sectors for commercial cards, such as travel and hospitality.

Now, the claimants do not grapple properly with these points and their experts do not, we suggest, properly engage with them and we address this at paragraph 118 of our written opening which is

{RC-A/2/53}.

In essence, what Mr Dryden and Dr Frankel say is that commercial cards could be funded through other means, but that argument is not supported by -- and in fact we would suggest runs contrary to the available factual evidence. The claimants also argue that Amex would reduce its MSCs in a zero commercial card MIF counterfactual but we do not accept that. We have made various points in relation to the inter-regional MIFs in this context, but ultimately the force of the argument for both inter-regional cards and for commercial cards depends on the Tribunal's assessment of the evidence and we suggest the evidence is clear that this would not be the case.

Dr Niels estimates that as a result of the matters addressed in his report and the factual evidence, there would be significant switching by both issuers and cardholders in the counterfactual, leading to higher costs from merchants, and that is Dr Niels' first report at 5.67.

So for all of those reasons, commercial card MIFs do not fall within the essential factual basis identified by the Supreme Court and do not restrict competition by effect.

That then leaves restriction of competition by object and we address this at paragraph 122 of our written opening which is on page 54 of the document that is open {RC-A/2/54}.

Now, again Dr Niels, Mr Dryden and Mr Holt agree that commercial card MIFs do not have the object of restricting competition and that is in the joint statement at page 12, so again not a promising start for the claimants' case. It is only Dr Frankel who takes a different perspective and again his analysis is not specifically directed to these MIFs or the relevant factual context and the reference to his report is Dr Frankel's first report at paragraphs 273 to 277 and again, it is all premised on the idea that all MIFs are collusive. We suggest the approach is neither balanced nor accurate and therefore cannot be accepted for the reasons we set out in our written submissions.

Then the final point on this topic is objective necessity, which we address at paragraphs 123 to 126 of our written submissions and the points that I have made about counterfactual switching are salient. Without commercial card MIFs it would not have been viable for issuers to continue to offer competitive commercial card functionality within the *Mastercard* scheme and notably the claimants' experts do not provide, we suggest, any compelling evidence, or even argument, to counter the analysis of Dr Niels' and Mr Holt's, as to the likely scale of switching and its consequence for market outcomes.

Mr Dryden relies on the Commission decision in *Mastercard I* as somehow answering this evidential problem and that is in his first report at paragraph 960, but we have addressed this in paragraph 125 of our written opening. It does not assist the claimants, for all the reasons we give there, and the Tribunal has available to it the evidence and analysis in this case that it needs to evaluate the competing arguments on commercial card MIFs in the UK and Irish markets and we suggest it can and should do so, and therefore it does not help to look back at what the Commission said in 2007 when it was addressing a different time period, the EU as a whole and, crucially, where the Commission concluded it was not in a position to take any decision on commercial cards, so we suggest it is really something that the Tribunal should now grapple with as best it can.

Those are my submissions. I am conscious I owe the professor an answer, but I will let Mr Kennelly continue and I will just take instructions so I get the right answer.

PROFESSOR WATERSON: Could I ask another question?

MS TOLANEY: You may. I may need time to consider that too, professor.

PROFESSOR WATERSON: When it comes to intra-regional certainly and quite possibly inter-regional, there will usually be a difference between the currency in which the person is paying, the consumer is paying, and the currency of the object which they are buying and so my question is, well, someone is going to make a turn on that, who is it? Is it the acquiring company, or the issuing company, or both?

MS TOLANEY: I will come back to that one as well, so again~--

PROFESSOR WATERSON: I thought you might.

MS TOLANEY: I have my instinctive answers but no doubt someone from behind me will tell me I have it wrong so I will avoid that.

THE PRESIDENT: Thank you very much, Ms Tolaney.

Mr Kennelly.

MR KENNELLY: Again, given the shorthand writer's break -- this may be a little early.

THE PRESIDENT: Yes, if it is convenient to you --

Opening submissions by MR KENNELLY (continued)

MR KENNELLY: I will carry on. That is a signal to continue.

So on the cross-border acquiring rules you have seen the claimants' case. My learned friend Mr Beal said that they maintain that both the old CBA rule -- and for *Visa* the new CBA rule -- are in breach of Article 101.

I have already explained that at all material times both the old CBA rule, which is the abbreviation, and the new CBA rule were applied in accordance with binding legal requirements under Commission Commitments Decisions. I will return to that briefly.

Then I will deal with the substance of the claimants' case that the rules prevented cross-border acquirers from accessing the potentially lower domestic MIFs in their home countries and in the case of the old CBA rule, accessing the potentially lower EEA MIF.

Finally, I will make the point that even if, which is denied, the CBA rules did restrict competition, they cannot give rise to any independent basis of liability for *Visa*, a point which Mr Dryden addresses in his report on behalf of the claimants.

So dealing with the first of those points and the status of the Commitments Decisions that required *Visa* to apply these challenged rules, to be clear the debit -- and I will return to the text of these decisions -- the Debit Commitments Decision required *Visa*, from 8 December 2010, to maintain the requirement under the old CBA rule that registered domestic MIFs be applied to cross-border acquirer transactions and the credit Commitments Decision -- this is even clearer -- required *Visa* -- ordered *Visa* -- from 15 January 2015 to implement the new cross-border acquiring rule.

You have my two points on those.

First, *Visa* maintained and implemented these rules under compulsion, following the *CIF* line of authority it cannot be liable for a breach of Article 101 in those circumstances.

My second point, relying on Article 16 of Regulation 1/2003, pre-Brexit, a national court could not have relieved *Visa* of that obligation to implement those cross-border acquiring rules and so for those two reasons *Visa* cannot be liable for the cross-border acquiring rules that it was required to maintain and implement and, as I said earlier, that is obviously appropriate in circumstances of the legal certainty principle. What was *Visa* to do after the Commitments Decisions in 2010 and 2014?

On the claimants' case -- and my learned friend did not address this -- is it their case that *Visa* was expected to breach the commitment and incur those heavy penalties which the Commission would have imposed on it, or comply with the commitment and face damages claims arising from that compliance?

Now, if I am wrong about that, I turn to the substance of the claimants' case and of the experts only one, Professor Frankel, contends that the cross-border acquiring rules restricted competition and he says they restricted competition by object as well as effect. Mr Dryden, Mr Holt and Dr Niels all agree that there is no restriction by object. Mr Holt and Dr Niels contend positively that the cross-border acquiring rules do not restrict competition. Mr Dryden contends that no restriction of competition by the cross-border acquiring rules has been demonstrated. That is his formulation. The outcome is the same. The claimants have not made their case, in Mr Dryden's view, that the cross-border acquiring rules breach Article 101.

Just turning to the rules themselves, we see them in the context of the Commitments Decisions. Looking first at the old CBA rule, the Tribunal will recall -- there is no need to go back to it -- in the 2001 Negative Clearance decision the Commission said there was nothing anti-competitive about applying the same domestic rules to all acquirers who compete for merchant business within a given domestic market. That was the Commission's position then, but I would ask you to pull up the Debit Commitments Decision to see how it developed. That is in {RC-J5/14.8/6}. You see the Commission's concern as expressed here.

The Commission there refers to its Statement of Objections and their concern was that the MIFs -- sorry, first of all it begins with the standard formulation that the MIFs themselves are restrictive of competition because they inflate the base on which acquirers set the MSCs, but in relation to cross-border acquiring, we need to skip ahead a little until about six lines from the bottom and we see there the Commission saying and -- having referred to the Honour All Cards Rule and the non-discrimination rule, the Commission says:

"... the application of different MIFs to cross-border as opposed to domestic acquirers."

That is a further concern on their part and that is expanded in footnote 8 where the Commission said in the 2010 Commitments Decision, recording their own Statement of Objections:

"Cross-border acquiring is the activity undertaken by acquirers aiming at recruiting merchants for acceptance residing in a different EEA country than the one where the acquirer is established. *Visa* Europe's rules prescribe the application of the intra-regional MIF to cross-border acquired transactions even if they constitute domestic transactions, unless ..."

This was the Commission's concern:

"... domestic transactions have been registered with *Visa* Europe. In the Statement of Objections, the voluntary registration of domestic MIFs with *Visa* Europe was considered as increasing the anti-competitive effect of the intra-regional MIFs since it puts cross-border acquirers at a disadvantage vis-à-vis their domestic competitors in case the unregistered domestic MIFs are lower than the intra-regional MIFs."

The Commission was concerned to ensure that the cross-border acquirers should get the benefit of the lower domestic MIFs, so they could compete more effectively in these national markets. The concern, as you can see here, was that when the acquirers offered their services in a Member State other than their own, they could not access the domestic MIFs unless they were registered and because registration was voluntary, domestic acquirers could -- the Commission thought -- evade competition with the cross-border acquirers simply by failing to register the lower domestic MIF. That was the advantage which voluntary registration seemed to create for domestic acquirers and the Commission wanted to level the playing field, it thought, by ensuring that the cross-border and domestic acquirers were subject to the same domestic MIFs for the same domestic transactions.

If you go on to page 8 {RC-J5/14.8/8} we see the commitment which the Commission agreed and which was imposed on *Visa* to make that good, at the top of page 8(b), the promise was:

"To continue to ..."

"To continue to" because at this stage *Visa* had made it obligatory:

"To continue to require *Visa* Europe members to register all MIF rates and apply them to cross-border issued and cross-border acquired transactions."

So there was to be the same domestic MIF available to cross-border acquirers.

If you go on to page 13, please, in the same Debit Commitments Decision {RC-J5/14.8/13}, paragraph 49, the Commission in the SO:

"... was concerned that certain rules on cross-border acquiring reinforced the restrictive effect of the MIFs. The Commission's concern that certain cross-border acquirers could be foreclosed in competition with the local acquirers ..."

Why?:

"... due to different MIF rates applicable to the two groups ..."

And this has, however:

"... been removed by the mandatory registration and application of domestic MIFs agreed by local acquirers."

The key was that the cross-border acquirers were paying the same domestic MIF as the domestic acquirers to avoid competition law distortions and so *Visa* was required to ensure that the cross-border acquirers pay the domestic MIF for domestic transactions and that was the basis for the imposition on *Visa*, but the Commission subsequently changed its mind and we see their new position -- and the best way to see it, if I may ask the Tribunal to turn it up, is actually in *Visa*'s response to the Commission. There we see the new concern and the response to it. That is in {RC-J4/41}. This is the response to the SSO {RC-J4/41/25}, paragraph 86. We see the Commission's concern -- this is an extract from the SSO and in the italicised section we see paragraph 483 of the SSO. Does the Tribunal have that? Yes.

THE PRESIDENT: Yes.

MR KENNELLY: "... cross-border acquirers shall apply as a default either the country specific MIFs (or intra-regional MIFs) or the registered domestic MIFs. In this situation, *Visa* members in the country of transaction and cross-border acquirers may deviate from domestic MIFs or country specific MIFs ..."

How can the domestic -- how can the members deviate? They can do it:

"... by concluding bilateral agreements (with lower or no interchange fees involved)."

So it is recognising there is this option to conclude bilateral agreements:

"For cross-border acquirers this means, in practice, that they often have to apply the (higher) country specific (or intra-regional MIFs) or registered domestic MIFs. This may put cross-border acquirers at a disadvantage for whom, with no similar strong links to the domestic issuing community, it is difficult or impossible to replicate such bilateral agreements."

It is an odd -- in view of what the Tribunal knows, that is an odd passage. It seems to be said here by the Commission that both cross-border acquirers and domestic acquirers can agree bilaterally lower interchange fees than the registered domestic MIFs, but there is a competitive advantage for the domestic acquirers in entering into these bilateral agreements because they have strong links to the domestic issuing community. That makes it easier for them.

Page 26, over the page, {RC-J4/41/26} we see *Visa*'s response. *Visa* responded with consternation. This seems an extraordinary thing to raise, a concern like this, *Visa* said it did not arise in practice and at (c) *Visa* said:

"Even if any of the matters referred to ..."

In that paragraph I just read:

"... were true (and they are not) the Commission presents no evidence to support what amounts to mere assertion concerning the effects of bilateral agreements."

And then going down to 89:

"... the assertion that banks 'often' enter into bilateral agreements providing for low interchange deliberately to undercut potential competition from cross-border acquirers is hardly credible ..."

There is no evidence to support it, it is not clear why it would be in the banks' economic interests to enter into these agreements. In fact there is an increasing trend towards issuer only or acquirer only members in *Visa* Europe's system which it can be expected will each act in what they view as their respective economic interests.

Going ahead to page 28, please, {RC-J4/41/28} paragraph 94, responding again to part of the passage that I read to you earlier from the Commission's SO, this now addresses the arguments which my learned friend has reprised, that the cross-border acquiring rule artificially partitions national markets and *Visa* responded -- and I adopt this and repeat it -- according to the old cross-border acquiring rule, there were many ways in which a cross-border acquirer could cross a border and offer his services in a different market within the EEA. He could join any relevant domestic national organisation or group member, apply the local rules, the cross-border acquirer could apply domestic rules registered voluntarily under the cross-border acquirer programme. Where there are no local rules the cross-border acquirer could enter and default to the cross-border MIF rate applicable or reach bilateral agreements, and we will come to see how much cross-border acquiring there was and how it grew during the claim period.

In 95:

"In no case did *Visa* Europe specify the MSCs that any acquirer must charge customers in any territory."

96:

"Cross-border acquirers ... had various routes open to them to acquire in other Member States."

97, since the Debit Commitments Decision:

"... *Visa* Europe is now obliged to require the application of registered domestic MIFs to cross-border acquired transactions."

It says here, and I rely on this:

"*Visa* Europe took that step only when required to do so by the Commission [and] that ... is currently enforced as a provision of the Commission's Commitments Decision."

Going on then, please, to page 32 {RC-J4/41/32} the same document, I take you to this because again it will save me repeating the point. This is a point we make again and the experts support it, as to the efficiency involved in expecting both cross-border and domestic acquirers to pay the same MIF since the MIF is set by reference to the local conditions and we see that at paragraph 110 to 112 and in fact if the Tribunal could read those three paragraphs to yourselves I would be obliged.

(Pause)

But notwithstanding those points, the Commission insisted and the credit Commitments Decision was entered into. Please turn that up next. It is in {RC-J5/20/31}. It records at page 31, paragraph 6.1, the obligation on *Visa* Europe to modify its rules so as to allow cross-border acquirers to offer either the domestic immediate debit MIF or the domestic credit MIF applicable in the location of the merchant outlet or an immediate debit MIF of 0.2 and a credit MIF of 0.3 for domestic consumer cross-border acquired transactions.

So this allowed cross-border acquirers to choose between the domestic MIF of the place of the merchant and a new option of 0.2 or 0.3 for debit or credit respectively, so the cross-border acquirer was given that choice and it was implemented in the *Visa* rules as obliged to do under these commitments. The rules changed again in the IFR and the schemes complied with those requirements.

Now, the defendants' simple case is that effective competition between domestic and cross-border acquirers involves acquirers being subject to the same MIFs in respect of the same transactions and when cross-border and domestic acquirers compete on that basis, there is a level playing field and the most efficient and highest quality acquirer is the most likely to win business. For those reasons, we said the old CBA rule enhanced rather than restricted competition in the acquirer market and Mr Holt and Dr Niels will speak to that in evidence, but by contrast, allowing cross-border acquirers to access preferential rates to their domestic competitors simply by virtue of their geographic location, that skews competition. It skews competition in their favour for reasons that have nothing to do with the quality of their service or the efficiency of their operation and in fact, as you will see, what happened when the new cross-border acquiring rule was implemented was that domestic UK Acquirers simply relocated to other EEA states, their changed their legal form and offered the same services from lower MIF countries like the Netherlands. They were not true new entrants. It was a legal re-entering.

That is the main answer to the Commission's case on object and effect and after the break I will come back to some of the expert evidence on this, just to give you the highlights before we develop more substantively in cross-examination. So if this is a convenient moment for the Tribunal, I propose to stop at this stage.

THE PRESIDENT: Ten minutes. Thank you very much.

(3.30 pm)

(Short Break)

(3.46 pm)

MR KENNELLY: Thank you. We were going to Mr Holt's first report in these -- well, it is his eighth -- Holt 8. I have been referring to Holt 1 and Holt 2 and Holt 8 and Holt 9 interchangeably, I hope the Tribunal understand when I do that.

THE PRESIDENT: We understand his history.

MR KENNELLY: I am grateful. Holt 8 is in {RC-H4/3/193} and I ask the Tribunal to go to this because this is -- we are in a curious situation. The claimants rely on their new cross-border acquiring rule to show what they say was anti-competitive with the old cross-border acquiring rule and at the same time they say the new cross-border acquiring rule was a breach of Article 101. My learned friends will no doubt deal with that in due course, but for the moment we are addressing, through Mr Holt, what distortions were in fact created by the new cross-border acquiring rule that was imposed on *Visa*, which took away in fact the competition which had formerly been there under the old cross-border acquiring rule.

So paragraph 622 we see Mr Holt's first point that I have just made to you that:

"... the primary way merchants took advantage of the new CBA rule was not by switching to genuine cross-border acquirers whose core operations were based outside the UK ... but rather by taking benefit of their existing UK acquirers officially setting up additional branches in another European country."

And if you go, please, to paragraph 625 -- the detail of course of this will be explored in cross-examination, but at paragraph 625 {RC-H4/3/194} you see the scale of the effect in the figure below -- this is all confidential so I shall not refer to numbers -- which plots acquirer market share of *Visa* transactions by volume for 2015, that was the first year of the new cross-border acquiring rule and the previous two years and we see the split between the acquirers' UK based entity and those based in the other EEA Member States. If you look at the third column you see the 2015 column, that tells you what changed following the new cross-border acquiring rule.

In the key below -- sometimes these colours -- I found some of these colours quite hard to distinguish but it could be just my terrible eyesight.

THE PRESIDENT: Yes.

MR KENNELLY: But the lighter blue in that third column at the bottom is WorldPay Netherlands and you can see how much switching there was from WorldPay -- how much volume switched from WorldPay UK, dark blue, to WorldPay Netherlands from 2014 to 2015 and Barclays, Barclays Ireland is pink and Barclays UK is red, and you can see from 2014 to 2015 how much switching there was from that red block to the pink block but my core point is that the incumbents remained the same in substance.

If you read paragraph 627 to yourselves, please -- it is confidential -- you see what Mr Holt says about this {RC-H4/3/195}. Just 627.

Then 631, at the bottom of that same page, there is a further market distortion because there is obviously arbitraging going on, but there is a more complex arbitrage based on how debit transactions were treated under the MIFs which benefited larger merchants much more than smaller merchants. Its complexity could only be taken advantage of by larger merchants and if the Tribunal reads paragraph 631, please, and 632 {RC-H4/3/196}, you see the point that Mr Holt is making there.

(Pause)

Then the top -- just the first part, the first sentence of 635, the point I just made, that:

"Smaller merchants are unlikely to take advantage of [these] acquiring opportunities ..."

The reasons will be developed in cross-examination and the evidence given there, but the Tribunal has the core point. This arbitrage was a function of a regulatory imposition, it was not a reflection of better efficiencies or anything pro-competitive that arose from the market.

As for the claim that the old CBA rule prevented cross-border acquiring, please go to page 198 {RC-H4/3/198} and paragraph 637, again confidential, I shall not read it. If the Tribunal could read, please, paragraph 637 and this is about the development of cross-border acquiring before the new CBA rule.

(Pause).

And paragraph 638 over the page {RC-H4/3/199}, this is to answer my learned friend's submission that the old CBA was artificially compartmentalising Member States and inhibiting cross-border acquiring and there is an interesting figure 7.5 on that same page showing how much -- well, the growth in cross-border acquiring transaction value year on year and it compares the growth in cross-border acquiring with total transaction value growth and you can compare the two and see what they demonstrate about in those early years, 2011 and 2012, how much -- looking at the percentages on the left-hand axis, how much cross-border acquiring was in fact taking place.

Ultimately though -- this is the point I made when I opened on this issue -- the CBA rules are really irrelevant to the claimants' claims and you see why at paragraph 650 of Mr Holt's report. He puts it better than I can. I would ask the Tribunal to read paragraphs 650 to 652 on this question of the materiality of the complaint that the claimants have raised, paragraphs 650 to 652, please, and really only the first sentence of 652 if you can get that far {RC-H4/3/202}.

(Pause)

I will return to that when we come to look at

Mr Dryden but really the claimants' case, as I said, is based on what Dr Frankel says and so I would ask you to look briefly at his evidence {RC-H1/1/125}, paragraph 297. He says:

"If acquirers had been permitted to compete across national borders ..."

Well, they were, we say:

"... (and apply the MIFs set by their own country's banks operating through the schemes) all along ..."

Notwithstanding what the Commission had required of the schemes:

"... an acquirer's ability to search a merchant outside the acquirer's home territory, or equivalently, the merchant's ability to seek acquiring services from an acquirer in any country, would be expected to have led to a broader geographic market ..."

And this:

"... lower average MIFs as transaction volume shifted to low MIF regions and banks in high MIF regions responded by reducing their local MIFs."

So the transaction volume shifting to low MIF regions we have seen in its own way in the evidence that I took you to, whether there is evidence of banks in high MIF regions then responding by reducing the local MIFs, we will examine, but if that were to happen, of course, it begs the question --

PROFESSOR WATERSON: Could I ask: is what we are talking about here any different from firms moving their operations between countries in order to pay lower corporate tax rates? Ireland might present an example.

MR KENNELLY: Indeed, the 12.5%, but there -- it is -- there may be no great difference with the lower tax, the tax arbitrage, I will have to come back to that, but there is a difference between this and moving to a country with lower labour costs, or moving to a country with more efficient production facilities, because these lower MIFs which the acquirers could obtain were a pure function of the regulatory regime and the MIFs that were being set were set by the schemes over which the acquirers had no control.

This is addressed actually -- and perhaps your question, Professor Waterson, is addressed by Mr Dryden because the -- as to whether or not there is a distortion of competition one has to ask what happens if the schemes respond by simply equalising all of the MIFs to stop this happening because one has to ask if there is a restriction it has to be by reference to a counterfactual. What happens in the counterfactual? Well, either the acquirers all shift to the place with the lowest MIF, which is a matter of legal form and can be easily done, or the schemes equalise the MIFs in the counterfactual, in which case there is no restriction by comparing one with the other, and Mr Dryden addresses this in {RC-H2/1} this is in Mr Dryden's first report, {RC-H2/1/112}.

It is concerned with competitive distortions. There may be regulatory distortions, that may be why the Irish tax rate is identified as a potential State aid and that has different implications, but Mr Dryden's point is one upon which we rely. Mr Dryden very fairly identifies the key reason why there is no restriction under the cross-border acquiring rules because in the counterfactual there is no greater competition between the acquirers and you see that at paragraph 11.30. His framework for assessing the effects of the cross-border rules differs substantially from the Commission's. 11.31, he now explains why he does not consider that the cross-border acquiring rules restrict competition whilst also explaining what this depends on and how thus a different conclusion may be reached -- may be reached. Then it all turns on the counterfactual.

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 would most likely result in either ... most or all acquiring activity moving to the lowest MIF country; or ... the schemes setting uniform MIFs for most or all countries."

11.34:

"Another possibility is that the counterfactual should be a uniform MIF across countries, such that the location of the merchant and acquirer is irrelevant."

And he has already noted that:

"The first counterfactual would likely produce a similar outcome (as regards MIFs) to this one but the mechanism is different: in the first counterfactual uniform MIFs arise as an outcome ... in the second counterfactual they arise by construction."

If you go to 11.36 {RC-H2/1/113} on the critical question of whether there is a restriction of competition, Mr Dryden says:

"The effect of either counterfactual would be to move from a situation where the schemes can effectively set different MIFs according to the merchant location to one where the schemes (directly or in effect) set uniform MIFs across countries.

"The counterfactual thus deprives the schemes of the opportunity to price discriminate (where the 'prices' at ... are the MIFs).

"The concern with price discrimination may either be that it causes downstream competitive disadvantage, with deleterious effects on the downstream market, or ... is exploitive.

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

I will move on now, if I may, to the allegation that the cross-border acquiring rule artificially segments markets and here again Mr Dryden addresses it, page 116 {RC-H2/1/116}, paragraph 11.58:

"I conclude that:

"(a) the cross-border rules do not segment an EEA-wide market into national markets.

"(b) the cross-border rules do not prevent competition from cross-border acquirers.

"(c) to some extent, the old and new [rule] may prevent a distortion of competition by preventing the imposition of different costs on acquirers processing the same transactions."

And if you go please to paragraph 11.60 {RC-H2/1/117} this is on the market partitioning concerns stressed by my learned friend Mr Beal:

"The cross-border rules do not segment an EEA-wide market into national markets. In both the factual and counterfactual, acquirers located in one country are free to compete to supply merchants located in a different country."

11.61:

"The cross-border rules also do not prevent cross-border acquirers from competing to supply acquiring services to merchants in a different country, for the same reason. The rules simply require that these cross-border acquirers pay the same MIF as domestic acquirers (or, under the new cross-border rules, can choose to pay the cross-border rates). There is no difference compared to the counterfactual, as in that counterfactual a cross-border acquirer would also pay the same MIF as a domestic acquirer (given that MIFs would be uniform across countries)."

11.62:

"My analysis shows that the cross-border rules should not be conflated with other forms of conduct whereby a company seeks to protect itself from more efficient competitors (for example by preventing imports from lower cost foreign suppliers)."

This is to Professor Waterson's point:

"MIFs are a cost in the acquiring market that the participants (the acquirers) do not control. It does not make sense to say that an acquirer in a country with lower domestic MIFs has a 'cost advantage' over an acquirer in a country with higher domestic MIFs, or that cross-border rules deny merchants the benefits of that cost advantage. MIF costs are not intrinsic to any competitive advantage an acquirer has, they are simply determined by the schemes, and would be determined differently in the absence of the cross-border rules."

Finally, does this part of the claimants' case have any independent role? I would ask the Tribunal now to go to page 103 of this report -- sorry, of the tab {RC-H2/1/103}, paragraph 10.5. Could you please read paragraph 10.5 as to whether the claim regarding the rules has any life independent of the claim regarding the MIFs.

(Pause)

On this point Mr Holt also responds. In view of the time I will simply give you the reference before I move on to the next topic. That is Holt 9, page 122, paragraphs 451 and 452.

Those are my short submissions on the cross-border acquiring rules. I will move on if -- sorry, Ms Tolaney needs to address you on the *Mastercard* rule, the CAR, and I will hand over to her then.

Opening submissions by MS TOLANEY (continued)

MS TOLANEY: I am just going to pick up some *Mastercard* specific points. Our submissions are at section G of our written opening and there are two key dates for *Mastercard*'s Central Acquiring Rule. The first key date is the implementation of the IFR on 9 December 2015 and that is key because the *Mastercard* rules on the cross-border acquiring rule changed on that date. Prior to 9 December 2015, *Mastercard*'s CAR provided that if the central acquirer had agreed a bilateral interchange fee with the issuer, the agreed interchange fee would apply and absent such bilateral agreement the domestic MIF in the country of the merchant, namely at the point of sale, would apply to domestic transactions.

From 9 December 2015 *Mastercard*'s CAR was amended so that the applicable default MIF for centrally acquired transactions was the lower of the intra EEA MIF and the domestic MIF applicable at the point of sale and the reasons for the change was that the definitions in the IFR treated these centrally acquired transactions as cross-border transactions but *Mastercard* wanted to ensure that central acquirers were able to access lower domestic MIFs where local legislation had reduced these below the IFR caps, so *Mastercard*'s philosophy was that these are domestic transactions and so the domestic MIF at the point of sale should apply. So that is how it operated. The claimants do not appear to be disputing that.

The second key date from *Mastercard*'s perspective is 27 February 2014 when the Commission accepted the commitments given by *Visa* to make changes to *Visa*'s rule, with effect from 1 January 2015 in the second Commitments Decision that you have seen. In the *Mastercard II* decision dated 22 January 2019, the Commission held that *Mastercard*'s pre-IFR CAR rule restricted competition by object, but only in the period between 27 February 2014 and 8 December 2015, so that is from the date of the second *Visa* Commitments Decision to the day before the IFR caps came into play and *Mastercard* modified its CAR at that time.

So *Mastercard* accepts for that very specific period between February 2014 and early December 2015 there was an infringement of Article 101(1), but nothing beyond that and that is important because the claimants place a lot of weight on the *Mastercard II* decision, but do not appear to grapple directly with the specific duration of it and they argue that the CAR infringed Article 101 by object and effect, essentially because they say central acquirers could not choose to pay interchange fees on centrally acquired transactions at the rate applicable in their country of establishment, namely the domestic MIF, for a country other than the country of the transaction, or the point of sale. So that is the ambit of the dispute.

Mr Kennelly has obviously addressed you at length on why *Visa*'s cross-border rule did not restrict competition and we adopt those submissions for *Mastercard*.

There are, however, four specific points that I need to pick up on briefly for *Mastercard*. First, I just need to show you the IFR provision on the CAR and the *Mastercard II* decision. Secondly, I need to address you on why the CAR did not restrict competition in the periods not covered by the *Mastercard II* decision. Thirdly, I will show you a little more on the *Mastercard* II decision to show you its effect. Fourthly, I will address why the CARs pre-February 2014 and post December 2015 were objectively necessary.

So turning to the first point, Mr Kennelly has taken you through the *Visa Negative Clearance* decision and the debit and credit commitment decisions and they are important background to bear in mind when considering *Mastercard*'s equivalent rule.

The IFR is at {RC-Q1/14}, if we could turn that up, please, and if we could look at recital 15, please, {RC-Q1/14/3}. This provides in relation to cross-border acquiring that the IFR applies to cross-border acquired transactions, if you could please just read that.

(Pause)

So the recital makes it clear that merchants choosing an acquirer outside of their own Member State should be facilitated by the imposition of the same maximum level of the MIF for domestic and cross-border acquired transactions and it should be possible to provide necessary legal clarity and prevent distortions of competition between payment card schemes, so in other words the logic of the regulation is that the same caps as apply to domestically acquired domestic transactions should apply to centrally acquired domestic transactions. The goal is a level playing field and there is nothing to support the idea that the scheme rules should give central acquirers an arbitrary advantage over domestic acquirers, or that regulatory gaming or arbitrage is a desirable outcome.

In light of this regulation, after the IFR was implemented on 9 December 2015 *Mastercard* amended its CAR so that the applicable default MIF for a centrally acquired domestic transaction was to be the lower of the default intra-EEA MIF and the domestic MIF applicable in the country of the merchant, so that ensured that where a country decided to set a cap on domestic MIFs which was below the IFR caps, central acquirers received the benefit of that reduced local cap on domestic transactions in that country and you can see how *Visa* and *Mastercard*'s rules changed over time at {RC-F3/1/17}.

If we could then go to *Mastercard II*, please, which is at {RC-J5/30/22} and if you read 88 you can see duration of the infringement.

(Pause)

So the Commission expressly concludes that its finding of infringement relates only to that specific period of 27 February 2014 to 8 December 2015.

MR TIDSWELL: So the starting date is connected to the *Visa* --

MS TOLANEY: That's right, exactly.

MR TIDSWELL: That's the second (inaudible).

MS TOLANEY: Exactly. And that is in recognition as well that the second Commitments Decision, the change to *Mastercard*'s CAR after the IFR came into force and one has to recognise that.

MR TIDSWELL: Yes.

MS TOLANEY: *Mastercard* obviously accepts the binding effect of that decision for the period that it was very carefully limited to and we say that it was delineated to that period for specific reasons, not by accident as Mr Tidswell has picked up.

I now turn to the second topic, which is whether the CAR restricts competition by effect and in light of the *Mastercard II* decision we have to look at the pre and post periods.

For the pre-period, the analysis is much the same as Mr Kennelly has submitted, so I do not repeat *Visa*'s submissions.

For the period after 9 December 2015, the caps imposed by the regulation unsurprisingly change the position. I have shown you that *Mastercard*'s CAR changed in this period through the table. In the counterfactual put forward by *Mastercard*, *Mastercard* would have increased the MIFs across all European countries to a level equivalent to at least those in the UK. That would mean that domestic MIFs across all EEA countries would have converged towards the level of the caps which were in fact the same as the MIFs actually set in most EEA countries. So in the counterfactual there would be a higher domestic MIF in the country of the transaction or the point of sale, with the MIFs converging at the level of the caps and a further impact of the IFR is that the hold-up problem would not arise in the counterfactual in the post IFR period, for the same reasons we submit under issue 3, so that means that issuers and acquirers are able to and would likely have agreed the applicable interchange fees bilaterally and done so at the level of the caps.

The upshot is that there is no scope for the CAR to have any substantial effect on the MIFs or on competition between acquirers and for those reasons we suggest the CAR plainly did not have the effect of restricting competition.

I then turn to the effect of *Mastercard II* because the claimants rely on it in periods not actually covered by the decision and we address this in section G6, and essentially, the claimants say that the factual basis of the decision applies in the pre and post *Mastercard II* periods, and our response is that is plainly not correct because market conditions were different in those periods because *Visa* was lawfully operating its old cross-border rule and its new cross-border rule in line with the debit and credit Commitments Decisions.

Mr Kennelly has already addressed you on that, but the short point is that one has to bear in mind what the context was when you look at the various periods and what was happening in the market.

The claimants suggest in paragraph 87 of their opening that it is an abuse of process for *Mastercard* to resile from the findings of *Mastercard II*. My learned friend took you to the decision of the Court of Appeal in *Volvo* at {Day 1/122-124} of the transcript. That decision has no application here. There is no abuse of process because the Commission's decision is limited to a particular duration and we accept it is binding for that duration.

To the extent that the claimants wish to go beyond it, then it is clearly not abusive. They have to establish by analogy or application that the reasoning prevails, not simply that the decision somehow binds us when it plainly does not.

In any case, as I said, the essential factual basis is different for the periods not covered by *Mastercard II*. In the period before 27 February 2014, market conditions were different to the subsequent period covered by the *Mastercard II* decision. Before 27 February 2014, as Mr Kennelly has shown the Tribunal, *Visa* was operating its old cross-border acquiring rule lawfully. In contrast, in the subsequent period covered by *Mastercard II*, *Visa* had changed its rule, or notified issuers and acquirers that it would be amending its rule, so that central acquirers could pay the IFR capped MIFs, so consequently there was no longer a commercial need for *Mastercard* to have higher MIFs, particularly since the capped MIFs were going to be introduced shortly, and that explains why the Commission concluded *Mastercard*'s CAR was not objectively necessary.

In the later period, so post the IFR, 8 December 2015, the Commission expressly recognised that an amendment to *Mastercard*'s CAR meant it was not in breach of Article 101(1) and in this period *Visa* was again operating its cross-border acquiring rule lawfully and if *Mastercard* had not been able to provide a similar offering to issuers, it could not have competed effectively with *Visa*.

Now, notably, Mr Dryden, one of the claimants' experts, does not support the claimants in their reliance on the *Mastercard II* decision in the post IFR period. He agrees that the IFR coming into effect is a relevant change to the factual basis of the period covered by *Mastercard II* because it reduced the variation of consumer card MIFs across the EEA. So we would suggest, both on the facts and in light of that concession, there is no room to suggest that the essential factual basis for *Mastercard II* applies to the subsequent period from 9 December 2015.

MR TIDSWELL: Just on the first period, just so I understand what you are saying about that, because I think Mr Kennelly would say that *Visa* cannot have committed an infringement because it was doing what it was told by virtue of the commitments. That obviously does not apply to *Mastercard*, but so -- but you are saying that because that is what *Visa* was doing --

MS TOLANEY: Exactly.

MR TIDSWELL: -- *Mastercard* had no choice but to --

MS TOLANEY: In order to compete --

MR TIDSWELL: -- in order to compete.

MS TOLANEY: -- it had to provide, as we put it, a viable offering, so when one judges what was happening, you look at the market and see that there was a necessity, objective necessity because of *Visa*'s position.

MR TIDSWELL: Is that expressed in the decision, the *Mastercard* decision? Does it talk about the rationale for that, starting at 27 February?

MS TOLANEY: I will double-check that. I do not think it puts it in quite those terms but Mr Cook can just check that as I carry on and I will come back to it.

Then going to objective necessity, we address this in paragraph 186 to 189 and there are two points on the legal principles. The first point is the same as under issue 4, the availability of objective necessity in a case where the measures have been found to be an object infringement. Second there is the question of whether the Tribunal can take into account that *Visa* was operating its cross-border rules lawfully in assessing whether *Mastercard*'s CAR was objectively necessary, so similar to the point we were just on.

On the first point I have already addressed you and it is exactly the same.

On the second, our position in a nutshell is that you have to take the *Visa* debit and credit Commitments Decision into account and the claimants' answer to this, at paragraph 222 of their openings, is that doing so would be incorrect in law because they say it runs counter to the reasoning in the Court of Appeal decision in *Sainsbury's*, in which they say the asymmetric treatment of *Visa* and *Mastercard Is* not remotely realistic.

Now, we do not really follow that logic because that is exactly our point, that you actually have to take into account what *Visa* was doing when you are considering *Mastercard*'s conduct, otherwise it is an asymmetric counterfactual. We discuss the relevant paragraphs in paragraph 186 of our written opening where we make those points. I do not have anything to add to that. {RC-A/2/76}

Now, the claimants' experts contest that approach and what they say is essentially that in the Court of Appeal in *Sainsbury's* it was suggested that it was possible for a four-party scheme to operate without the need for a default MIF but that was in a counterfactual in which neither *Mastercard* nor *Visa* were setting positive MIFs and it does not address what would have happened if *Mastercard* tried to compete with *Visa* in a counterfactual in which *Visa* was lawfully operating its CAR, so it is not obviously directly analogous.

Dr Frankel suggests that in circumstances where *Visa* was operating its rule and *Mastercard* was not, merchants would not have steered against *Visa*, but that is not at all credible. All the evidence before the Tribunal shows that *Mastercard* -- that merchants are not incentivised to steer and we will come on to that.

In any case, Dr Frankel only considers the acquiring side of the market without taking into account the issuing side and merchants cannot steer in favour of CARs that are forced out of the market on the issuer cardholder side.

So those are our submissions on the CAR. I think coming back to Mr Tidswell on his point, as we understand it, and we will double-check this, the *Mastercard II* decision just concerned that period and therefore one does not get into the rationale before and after, but it is our rationale which we say is logical on the face of it because otherwise you would not have picked that start date essentially, so it has to be the logic of it.

Just as I have five minutes, may I come back to the questions that I promised I would, to Professor Waterson?

THE PRESIDENT: Yes, of course.

MS TOLANEY: And then I have answered, which I said I would.

So there were two questions. The first was about fraud and it is a bit more complicated, that is why I did not want to simply just jump with one or the other. In general, under *Mastercard*'s default scheme rules, issuers have to pay for fraudulent transactions, so if a stolen card is used before it is cancelled, and that is a cost which the issuer will bear in the first instance.

The interchange fee provides obviously a contribution to costs of this kind, which is why payment of the full price, namely settlement at par, is not the obvious starting point. I think Mr Tidswell may have said that this morning and it is one response to that.

One obvious issue is that sometimes the transaction in question is not a legitimate transaction and someone has to bear that cost. However, if the merchant commits the fraud, so take for example double charging, the issuer is not obliged to pay, or can charge back the transaction, so the acquirer can then refuse to pay the merchant; or if the acquirer has already paid, which often happens, the acquirer can seek to recover that fraudulent charge from the merchant, so it just -- it really depends on the nature of it and who has paid.

PROFESSOR WATERSON: Yes, but my -- the example -- and this accords to some extent with what you say, but supposing I purport to be selling tickets for a concert to happen in six months' time, but I am a fraudulent merchant and so I do not have any tickets for that concert, but I -- but I have been accepted by the acquirer, then when people find out that there is not a concert they will ask presumably for their money back and so are you saying that the acquirer then has to pay that?

MS TOLANEY: Well, the acquirer probably has paid, but will then be trying to --

PROFESSOR WATERSON: No, it has to pay back the consumer.

MS TOLANEY: The acquirer will be trying to recover it from the merchant.

PROFESSOR WATERSON: Yes. The merchant meanwhile has disappeared.

MS TOLANEY: I agree, so that is where the acquirer will be bearing the loss in that scenario. Sometimes the issuer does. So it just varies on the scenario, but yes.

PROFESSOR WATERSON: Yes. My point really was that actually different sorts of costs are borne by different sides. It is not that the issuer always bears the cost.

MS TOLANEY: It is not that the issuer always bears the cost, although in many scenarios it does.

The second question was about the different currency and again this is nuanced as well because it depends on whether the transaction is billed to the issuer in the foreign currency or the home currency of the cardholder. Some merchants will price in the home currency of the cardholder and it is now common, even for cardholder present transactions, for merchants to offer the cardholder paying in local or their own currency. Where the cardholder chooses to pay in their home currency, the merchant generally offers an unfavourable exchange rate and the merchant makes a profit. If the cardholder chooses to pay in the local currency, the currency is generally done by *Mastercard* at a more favourable rate than merchants and there will be a profit, but much smaller, for the issuer and some issuers then also charge a foreign currency transaction fee, so again it depends on the facts of it.

PROFESSOR WATERSON: Thank you.

Housekeeping

MR BEAL: I am sorry to interrupt, but may I just deal with two matters of witness evidence.

I anticipate that my learned friends are going to go into tomorrow with their opening --

THE PRESIDENT: I think --

MR KENNELLY: -- and that squeezes time for the witnesses. There is a witness tomorrow, who is Mr Buxton, who will not be available in the afternoon. That is the first point.

THE PRESIDENT: Right.

MR BEAL: The second point is I thought you were going to receive some news today about a witness on Wednesday.

MR KENNELLY: I will deal with it now.

MR BEAL: I will sit down.

MR KENNELLY: I was biding my time, waiting my turn.

First of all, thank you for the time in the morning. I shall be about 20 minutes. I think Ms Tolaney will be about 10, a bit more. We should still be fine to finish by lunch based on the cross-examination that we have for the two witnesses.

For Wednesday we will not need to cross-examine Mr Ryan because there has been a settlement with bet365, so if the claimants -- that is the point Mr Beal was prompting me to make. We have settled with them, both

Mastercard and *Visa*, and so we understand that Mr Ryan will not be attending for cross-examination on Wednesday.

THE PRESIDENT: So unlike the other witnesses, his statement is withdrawn because you would have wanted to cross-examine him but settlement has made that --

MR KENNELLY: That is my understanding, but if that is incorrect, I am sure I can clarify that.

MR BEAL: Well, his witness statement is in the bundle and it was evidence and the settlement has only been reached today, so I do not know how much of a material difference it will make. Can I take a view on that overnight and then come back to you?

THE PRESIDENT: The position I think is this: so far as the witnesses where it has been indicated that there is no --

MR BEAL: Of course, that is taken --

THE PRESIDENT: They go in, we take them at face value, we give them their full weight.

As far as a statement which we have read, but which is one where there might have been cross-examination desired, then of course the absence of that witness then does go to weight and we -- but we are not going to be silly about this. We are interested in more data rather than less.

MR BEAL: It will go to weight, I appreciate that entirely. The only issue is would it be inadmissible for me to continue to rely upon that witness evidence but to acknowledge it will be given less weight because it has not been cross-examined, but against the background context of him not being cross-examined because his company has reached a compromise settlement with the schemes.

MR KENNELLY: May I assist there because I have no objection to what Mr Beal suggests, that seems like a perfectly appropriate approach and in fact there are parts of Mr Ryan's evidence that I rely upon.

THE PRESIDENT: Mr Kennelly, that is very helpful. I think the technical position might be rather harder, but we would much rather have the material in, read it, consider it in that way and, if you are all ad idem on this, then we do not need to get into choppy waters about what happens when there has been settlement, so that is very helpful.

MR BEAL: Thank you very much.

MR KENNELLY: It is not worth pursuing my submissions any more today, I think, given the time.

THE PRESIDENT: No, I think you might be pulled down by those behind you. It is 4.32.

We will resume then at 10.30 tomorrow morning.

Thank you all very much.

(4.33 pm)

(The hearing adjourned until 10.30 am on Tuesday, 20 February 2024)