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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

**MERCHANT INTERCHANGE FEE UMBRELLA
PROCEEDINGS**

TRIAL 1

A P P E A R A N C E S

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

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

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

Monday, 4 March 2024

(9.00 am)

(Proceedings delayed)

(9.04 am)

Procedural discussion

THE PRESIDENT: Mr Cook, good morning.

MR COOK: Sir, before we move on with

witnesses there is an outstanding

application -- or rather two applications --

that Mastercard has made; one to the Tribunal

and then one to Mr Justice Marcus Smith. It

was simply just to allude to those,

I appreciate both Mr Justice Marcus Smith and

the President has been away and was away last

week.

THE PRESIDENT: Away notwithstanding, if

I can assume the High Court garb first, I have

received the application that is on

a letterhead rather than an application. You

can take it by way of preview that there is an

order giving you what you want on the skids.

There will be a phone call to your

solicitors extracting an undertaking that you

issue an application in the Competition list so

that we regularise the position, but you can

1 all proceed on the basis.

2 MR COOK: Sir, I can give any undertaking
3 required as a matter of procedural --

4 THE PRESIDENT: I think it needs to be
5 reflected in the order but that communication
6 will be going out this morning, so you will get
7 an order hopefully today or at the latest
8 tomorrow. It did seem to me that in fact
9 probably an order was unnecessary given the
10 reference and the inclusion of the witness
11 statement in the Court of Appeal bundle.

12 MR COOK: We felt that was quite important
13 as well, nonetheless I think everyone, and in
14 particular Mr Hirst, even though Tesco said
15 they are happy, I think Mr Hirst in particular
16 would just like to have a piece of paper signed
17 by the judge that says it is completely clear.

18 THE PRESIDENT: I felt for the avoidance
19 of doubt, and that is how I put it in the
20 reasons it is a reasoned order, I have said
21 that it does not seem to me to be necessary but
22 for the avoidance of doubt and clarity, the
23 order is made. So you will have the permission
24 of the court, as I say, by the latest tomorrow
25 morning.

1 MR COOK: I am grateful and I think on
2 that basis it is likely Mr Hirst will then be
3 recalled tomorrow perhaps.

4 MR BEAL: I will make enquiries.
5 I understand he is available tomorrow morning
6 and we may be able to insert him after
7 Ms Riviere has given her evidence. Failing
8 that, it would have to be Wednesday afternoon
9 after the hot-tubbing but I have not yet heard
10 whether or not he is available. But we will do
11 what we can.

12 THE PRESIDENT: We will carry on talking
13 and you will presumably want -- the order will
14 need to be finalised before he is in the
15 witness box, but I will make sure that that is
16 progressed.

17 Then the other question was -- what was
18 the other outstanding matter?

19 MR COOK: No, sir, I was simply alluding
20 to the fact that an application --

21 THE PRESIDENT: That is right.

22 MR COOK: Just to mention at some point we
23 will have to deal with our application to
24 adduce Dr Niels' supplemental report.

25 THE PRESIDENT: Yes.

1 MR COOK: I may have missed in the flurry
2 of correspondence if there remains an objection
3 to that. If there does, we will need to deal
4 with that. That is not sort of time critical
5 in the sense it needs to be done today; it
6 obviously would be sensible that is clarified
7 by Wednesday morning, perhaps first thing
8 Wednesday morning.

9 THE PRESIDENT: I understand, thank you.
10 Well, we will proceed on that basis.

11 Now, witnesses. Mr Jensen is not being
12 called but his evidence is being admitted
13 without cross-examination; have I got that
14 right?

15 MR KENNELLY: That is correct, sir, yes.

16 THE PRESIDENT: Very good. Who do we go
17 on to next?

18 MR KENNELLY: Mr Butler.

19 THE PRESIDENT: Unless there is anything
20 more, I do not want to cut anyone off from
21 housekeeping, so otherwise let us move on to
22 the witness evidence.

23 MR KENNELLY: Thank you, sir. We call
24 Mr Butler.

25

1 MR CYRIL NORMAN BUTLER (affirmed)

2 THE PRESIDENT: Mr Butler, do sit down,
3 make yourself comfortable. You have water and
4 a glass there and I see there is a bundle which
5 I hope you will be taken to, but I will leave
6 that to counsel. I will only say what I say to
7 all the witness, which is most of the documents
8 will come up electronically. You do not have
9 agency over what you see, if you want to see
10 more, locate yourself within a longer document,
11 understand what there is, just ask and the
12 relevant page will be brought up. So it is
13 like leafing through the bundle except you
14 cannot do the leafing. I will hand you over to
15 Mr Kennelly who will introduce your evidence.
16 Thank you.

17 Examination-in-chief by MR KENNELLY

18 MR KENNELLY: Good morning, Mr Butler.

19 Could you please open the white file in front
20 of you behind tab 1.

21 A. Yes.

22 Q. Is that the first page of your witness
23 statement?

24 A. It is.

25 Q. Could you turn please to page

1 {RC-F4/12/18}, the page numbering at the bottom of
2 the page?

3 A. Yes.

4 Q. Is that your signature?

5 A. That is my signature.

6 Q. Are the contents of this statement true to
7 the best of your knowledge and belief?

8 A. They are.

9 MR KENNELLY: Mr Beal has some questions
10 for you.

11 A. Thank you.

12 Cross-examination by MR BEAL

13 MR BEAL: At paragraph 12 of your witness
14 statement, that is page 3, the tab that you are
15 looking at, you say bilaterals can be agreed
16 between an issuer and an acquirer. Could we
17 please look at the scheme rule that makes that
18 possible, that is {RC-J4/89.2/525}. Page 525,
19 please. We see here under rule 7.1.1.1:

20 "Unless prohibited by applicable laws or
21 regulations, a Member must submit all domestic
22 transactions made with a Card and not otherwise
23 submitted for Clearing or Settlement, to
24 VisaNet ... This includes, but is not limited
25 to, any transaction that is processed as

1 follows ..."

2 Then it has an example of through one of
3 the processor arrangements that are in place.

4 Then it says under the next bullet point:

5 "Under any domestic private agreement or
6 bilateral agreement."

7 That is the provision that allows Visa to
8 process and settle bilateral agreements; is
9 that right?

10 A. That is correct.

11 Q. What is a private agreement?

12 A. I think that is just referring to any
13 agreement between two or more parties for the
14 processing of a transaction.

15 Q. You have not cited any evidence of
16 a bilateral agreement in the United Kingdom. Are
17 you aware of any?

18 A. I am not personally aware but obviously
19 there could be, but I am not personally aware.

20 Q. Paragraph 14, please, at page 3 of your
21 statement, {RC-F4/12/3} you say:

22 "A domestic MIF is where the payment
23 card is issued and the merchant is located in the
24 same country."

25 Can I just chase down whether that

1 applies in all circumstances? So before Brexit, for
2 example, a merchant in the United Kingdom could deal
3 with an issued card in the United Kingdom but use an
4 acquirer based in the Netherlands, could they not?

5 A. Yes, because that is about the definition
6 of domestic, so when the Eurozone was in place and
7 where that was considered the domestic market, that
8 became a definition under "domestic".

9 Q. The acquirer would be able to offer the
10 cross-border interchange fee rate rather than the
11 domestic MIF; correct?

12 A. I believe so. I am not certain.
13 I believe so.

14 Q. Are you aware that the MIF rates in the
15 Netherlands, for example, were lower than the
16 United Kingdom?

17 A. I am aware that rates vary across the
18 world, so yes.

19 Q. Could we look please at {RC-J5/41.001/1}.

20 That is it.

21 We see there some interchange rates,
22 do we not, for Netherlands?

23 A. Yes.

24 Q. They are -- rather than ad valorem for
25 debit, they are cents per transaction; is that

1 right?

2 A. That is correct.

3 Q. Are you familiar with the complaint that
4 was made by Worldpay at the point at which the Visa
5 commitments came into play 2014/2015 about their
6 business being undermined by cross-border acquirers?

7 A. I am not personally aware of that, no.
8 I was not involved in anything to do with that.

9 Q. Are you aware that Worldpay moved its
10 acquiring business to a Dutch entity so that it
11 could offer cross-border acquiring rates?

12 A. I was not directly aware, no.

13 Q. Are you aware of it now?

14 A. Now you have just told me, yes.

15 Q. You have not been aware of it before that
16 point?

17 A. No.

18 Q. Do you know that Barclaycard also moved
19 its acquiring business to Ireland?

20 A. I was aware of that one, yes.

21 Q. Following Brexit, it is right, is it not,
22 that UK merchants no longer qualify for the Limited
23 Acceptance Programme?

24 A. That is correct.

25 Q. That is because the merchant and the

1 acquirer have to be in different EEA countries and
2 of course we are no longer in an EEA country?

3 A. Correct.

4 Q. If a French card is therefore issued, if
5 we look at paragraph 16 of your witness statement,
6 when we are dealing with a transaction in France
7 using a payment card issued by an American issuer,
8 an interregional MIF is applied, but of course if
9 a French issued card is now used in the UK, that too
10 generates an interregional MIF, does it not, post
11 Brexit?

12 A. I believe so. The only reason I hesitate
13 a little bit is since Brexit I have not been
14 directly involved in the European business and I am
15 not aware there are any special arrangements post
16 Brexit, but in principle post Brexit it would be
17 an international transaction.

18 Q. Could we look, please, at bundle
19 {RC-J5/51/5} and you will see at paragraph 1.10 on
20 that page:

21 "Following the UK's withdrawal from
22 the EU, the EU IFR caps on UK-EEA transactions no
23 longer applied. Mastercard and Visa decided to
24 reconsider their fees. This ... resulted in the IFs
25 for UK-EEA CNP transactions using consumer debit ...

1 increasing fivefold - from 0.2% and 0.3% to 1.15%
2 and 1.5% respectively."

3 So that increase in fees was as
4 a result of the reclassification of transactions
5 under the Visa scheme, is that right?

6 A. Yes, I guess you could argue it is not
7 reclassification, it was the classification that
8 there was post Brexit; it comes under a different
9 definition.

10 Q. Now, at paragraph 22 you refer to the
11 incorporation of Visa Europe Limited. If I call
12 that VEL apologies, it is just one more acronym to
13 add to life's joy.

14 Paragraph 22 {RC-F4/12/5}, we see you
15 say:

16 "... VEL was incorporated as an
17 independent membership association. The banks and
18 financial institutions with membership ...

19 Owned the shares ..."

20 Now, the vast majority of the members
21 of the Visa organisation from 2004 were issuing
22 banks; that is right, is it not?

23 A. We would have issuers and acquirers.

24 Q. So could I ask you please to look in
25 {RC-J4/80/63}, and can we look, please, at recital

1 (219) .

2 It says:

3 "Issuers have an interest in
4 perpetuating the MIF system even if the MIF rate
5 that maximises each member/licensee's gain may not
6 be the same."

7 It says there:

8 "European issuers benefit from the
9 reciprocal flow of Inter-Regional MIFs when cards
10 issued in the EEA are used ..."

11 In regions outside the EEA.

12 Then if we look, please, at bundle
13 {RC-J4/47.3/3}, at the bottom of the page, last
14 bullet. It says, "Today Visa Europe" -- let me get
15 the date of this for you so that it is clear,
16 I think it is 2014 from the first page, back to the
17 page we were on, bottom of page 3:

18 "Today Visa Europe operates in 37
19 countries and is focused on meeting the needs of
20 more than 3,000 European member banks ..."

21 So it is true, is it not, that the
22 majority of the members of Visa Europe were banks;
23 correct?

24 A. Correct.

25 Q. What I am putting to you is that most of

1 those would have been issuing banks?

2 A. I do not know the exact numbers, I think
3 that is a safe assumption but obviously acquirers
4 can also be banks.

5 Q. Yes, of course. Of course some acquirers
6 like Worldpay and Elavon are members of the Visa
7 scheme as well?

8 A. Indeed.

9 Q. In paragraph 26 of your statement, that is
10 back at page 6, {RC-F4/12/6} you say that Visa
11 Europe Limited did not have responsibility for
12 setting interregional MIFs. Can you see that?

13 A. Paragraph 26, did you say?

14 Q. Yes?

15 A. Yes, I can.

16 Q. That is the last sentence.

17 A. Yes.

18 Q. You are not suggesting, are you, that if
19 for example interregional MIFs were to be set to
20 a default settlement at par or a zero MIF as it is
21 sometimes known, that Visa Europe could not
22 implement that system?

23 A. Visa Europe would not implement it, so all
24 interregional MIFs are set and operated through the
25 Visa system that was not under the control of VEL.

1 Q. So if, for example, the
2 European Commission or this court found that
3 interregional MIFs payable by UK merchants were
4 unlawful, are you saying that there is nothing that
5 the Visa scheme could do about it?

6 A. The entity responsible for complying
7 without making adjustments would be Visa centre, it
8 would not be VEL.

9 Q. But Visa Inc would essentially direct,
10 would it not, that the rules would be changed and
11 accommodation would be made so that you were
12 providing a lawful system?

13 A. Yes, if there was a requirement to set an
14 interregional fee at a level by regulation or
15 otherwise then, yes, that Visa Inc would need to
16 direct for that to happen.

17 Q. Visa is capable of moving pretty quickly
18 when it needs to in order to deal with regulatory
19 hurdles, is it not?

20 A. It depends on the regulatory hurdles, some
21 are more complex than others but yes, we would be
22 responsive.

23 Q. If we could look, please, {RC-J4/19/1}.
24 This is a minute of a board meeting and essentially
25 at page 4, {RC-J4/19/4} we see that the board was

1 reaffirming the need to act promptly, prudently and
2 objectively and to change intra-regional interchange
3 reimbursement budget fees which followed from the
4 Commission's preferred methodology.

5 So what had happened was the
6 Commission had indicated that they were not happy
7 with the way that the relevant intra-regional
8 interchange fee was being calculated, as a result of
9 the warning that a statement of objections was
10 coming, the Visa board then changed that rate very
11 quickly and we see at the bottom of page 4 there was
12 a resolution for that to be changed.

13 A. I can see that, yes.

14 Q. Of course we have also seen, have we not,
15 that in due course Visa Europe Services Inc was able
16 to be transferred into an EU-based entity where it
17 was appropriate to do so?

18 A. Yes, that happened after my time of
19 involvement but I am aware of the change of that,
20 yes.

21 Q. Are you familiar with the provisions of
22 the framework agreement that require Visa Europe
23 Limited to be -- to apply its rules in accordance
24 with applicable local law?

25 A. I am.

1 Q. I went through that with Mr Knupp so in
2 the interests of sparing the tribunal's time and
3 patience, I will not repeat those questions, I am
4 simply putting down a marker, but your answer means
5 that I do not have to individually put them to you.

6 It follows, does it not, of course
7 that if a transaction bears an interchange fee that
8 is unlawful in the United Kingdom it would not be
9 a valid transaction for the Visa scheme?

10 A. Yes, that would make sense.

11 Q. Could we look please in bundle
12 {RC-J4/89.2/80}. This is about taking
13 responsibility and we see in the first paragraph it
14 says:

15 "Each member is solely responsible
16 for its issuance of Visa products and acquiring of
17 merchants to accept Visa products including
18 responsibility for settlement of transactions,
19 compliance with Visa charter documents ..."

20 I am skipping a bit. Then:

21 "Ensuring that its Visa programmes
22 comply with all applicable legal and regulatory
23 requirements."

24 So that confirms what we have just
25 said.

1 That is dealing with essentially the
2 requirement to settle transactions.

3 Can you imagine a Visa scheme which
4 did not have a requirement to settle the various
5 transactions through Visa?

6 A. Can you be precise on what you mean by
7 "settle the transactions"?

8 Q. I mean end of day batch files going from
9 the acquirer with authorised transactions leading to
10 Visa taking steps within its system to direct the
11 issuer to pay certain amounts to acquirers?

12 A. Yes, no, I understand, thank you. That is
13 correct. Yes, that -- that process happens to
14 ensure that the system operates.

15 Q. If that process did not happen, Visa would
16 not be operating a scheme, a payment scheme, would
17 it?

18 A. Correct.

19 Q. At paragraph 28, which is page 6 of your
20 statement, {RC-F4/12/6} you refer to the
21 incorporation of VESI, as I am calling it, as indeed
22 do you, in Delaware. There were some tax
23 implications, were there not, with moving VESI
24 straight into Europe at the time of the Visa Europe
25 Limited incorporation?

1 A. Yes. I am aware there were a number of
2 things considered at the time and tax was one of
3 those, but I think there were other considerations
4 as well.

5 Q. Please could we look at bundle
6 {RC-J4/22/25}. This is part of a statement of
7 objections that was issued to Visa. We see at
8 paragraph 40 there is a description of subsidiaries
9 at the bottom of that page. That says that:

10 "Visa Europe controls its wholly
11 owned subsidiary, Visa Europe Services Inc [or VESI]
12 organised under the laws of Delaware, USA and
13 incorporated on 25 June 2004 ..."

14 It is then described as an operating
15 company that employs all staff and owns all assets
16 within the Visa Europe territory and it then
17 describes some other subsidiaries.

18 So it is right, is it not, that VESI
19 was the employer of all the staff that were working
20 for Visa Europe?

21 A. I think to be precise I think VESI was the
22 employer of the majority of staff, I do not think it
23 was universal, I think there may have been
24 a handful -- but to your point, the vast majority of
25 staff were employed by VESI.

1 Q. At this stage it therefore was not Visa
2 Europe Limited that was the employer of those staff?

3 A. Correct.

4 Q. It is right, is it not, that until 2016,
5 all the regional matters in the Europe region were
6 entrusted to Visa Europe Limited?

7 A. All -- sorry, just repeat that, please?

8 Q. The regional matters in the Europe region
9 were entrusted to Visa Europe Limited until 2016 and
10 the one Visa transaction?

11 A. That is correct.

12 Q. Can we look in {RC-J4/80/42}. You have
13 just confirmed what is said at recital (137),
14 two-thirds of the way down the page and then we see
15 that there is a footnote 133 that is referred to
16 there. It says there:

17 "Visa Europe comprised several
18 companies including Visa Europe Services Inc which
19 was the operating entity employing all staff and
20 owning all assets within the Visa Europe region."

21 So whilst Visa Europe Limited was the
22 sort of the main corporate entity responsible for
23 regional matters it was nonetheless part and parcel,
24 was it not, of Visa Europe Services Inc which in
25 fact owned all the assets and employed all the

1 staff?

2 A. I think precision is important here, so
3 again VEL is the membership company and the
4 ownership company with VESI being the subsidiary
5 that was the operating entity.

6 Q. It was the subsidiary that owned all the
7 assets and employed all the staff?

8 A. Correct.

9 Q. So where you have employees who worked for
10 the generic amorphous mass that is Visa Europe in
11 setting, for example, MIFs and the rules, those
12 employees will be employed by Visa Europe
13 Services Inc?

14 A. Correct.

15 Q. Please could we look at bundle
16 {RC-J4/49/23}. This is part of some Visa Europe
17 Limited board minutes and can you see at the bottom
18 of the page there is a resolution and that
19 resolution was that:

20 "With immediate effect the
21 operational management of interchange is hereby
22 delegated by Visa Europe management as set out in
23 the advanced materials."

24 A. Mm-hm.

25 Q. What we see in this board minute of Visa

1 Europe -- let me get you the right date from page 1,
2 7 March 2014, what we see going back, if we may, to
3 24 -- sorry it was not 24, was it, 23, is the
4 resolution I just took you to. So in March 2014 the
5 board of Visa Europe Limited is delegating
6 responsibility for the operational management of
7 interchange to Visa Europe management, correct?

8 A. Yes, I see that.

9 Q. If we look, please, within this tab at
10 page 24, {RC-J4/49/24} so the next page, you will
11 see again two-thirds of the way down the page there
12 is a further resolution management is charged with
13 preparing amendments to the operating regulations
14 implementing these changes for approval by the Visa
15 Europe executive leadership team. Can you see that?

16 A. Yes, I do.

17 Q. The consequence from this if we look at
18 bundle {RC-J4/50/8}, was the formation of an
19 executive leadership team, so if we see halfway down
20 the page there is quite a long paragraph, that the
21 internal governance reforms were designed to improve
22 amongst, other things accountability, transparency
23 and speed of decision-making.

24 Then there has essentially been an
25 executive leadership team that has been set up and

1 it has a detailed set of terms of reference. Can
2 you see that?

3 A. I can see that.

4 Q. In a nutshell it is then the executive
5 leadership team, the ELT, that is responsible for
6 the management and oversight of strategy and so on,
7 correct?

8 A. Correct.

9 Q. Could we look, please, at page 10 and 11
10 of this document, so starting at page 10.
11 {RC-J4/50/10} "Matters no longer considered by the
12 Board", starting at the bottom of that page, the
13 idea was that the Visa Europe board would be freed
14 up to be able to focus on overall direction of the
15 business and then detailed implementation would be
16 delegated down to the ELT; is that fair?

17 A. Correct, yes that is fair.

18 Q. We see what they are intended to do over
19 the top of page 11, {RC-J4/50/11} it is reviewing
20 regular reports provided to the board operating
21 regulation changes delegated to the ELT and then the
22 detailed design implementation and execution of the
23 pricing policy, the policy itself is to be set by
24 the board.

25 So the day-to-day nuts and bolts

1 recommendations on pricing policy including MIFs is
2 for the ELT?

3 A. That is correct.

4 Q. The ELT were all employees of VESI;
5 correct?

6 A. I would assume. I do not want to say for
7 definite because I was aware that there are there
8 was potentially one or two employees not to be
9 employed by VESI. So I would not know for certain.

10 Q. But they were not employed by VEL?

11 A. Not that I am aware.

12 Q. Could we then, please, look at bundle
13 {RC-J4/50/24}. We see a directors committee has
14 been set up, that is a committee of the
15 board of directors of both what I am calling VEL and
16 indeed you are too and VESI; can we see that?

17 A. I see that.

18 Q. So from that point onwards you had
19 essentially coterminous membership of both VESI and
20 VEL in terms of board of directors; the same
21 directors were going to serve on both boards?

22 A. That is correct.

23 Q. We see at footnote on that page 24, right
24 at the bottom:

25 "These terms of reference shall apply

1 to the sub committee of both VESI and VEL.
2 Reference to 'the company' in these terms of
3 reference shall mean each of them."

4 So to some extent the terms were used
5 interchangeably because they were both part of Visa
6 Europe more generally; correct?

7 A. Yes, they had the terms in here applied to
8 both companies, you are correct, yes.

9 Q. When we look at the minutes, I think you
10 accept this point in your witness evidence, those
11 minutes are going to be one set prepared for VESI
12 and one prepared for VEL but they both reflect the
13 same meeting with the same people present?

14 A. I would not categorise it as the same
15 meeting, against precision is important here.
16 Again, for expediency the two meetings were held
17 together but there were VEL items and VESI items and
18 so depending on the item being discussed is whether
19 it was a VEL item or VESI item and therefore would
20 be minuted in the correct minutes for that board.

21 Q. Could we look, please, at page 26 of this
22 tab. {RC-J4/50/26} We then see a description of the
23 executive leadership team, it is the most senior
24 internal decision-making team and it is established
25 in accordance with both the articles of association

1 of Visa Europe Limited, which is an English company,
2 and the by-laws of Visa Europe Services Inc, which
3 is a Delaware corporation; correct?

4 A. Correct.

5 Q. It makes all the decisions that relate to
6 the day-to-day operation of the company. When it
7 says "the company", it is referring to both
8 companies, is it not?

9 A. That is correct.

10 Q. Could we then, please, look at clause 2.1
11 on that page and it says the ELT provides key
12 oversight of the following areas of business:
13 planning, budgets, implementation of the strategy,
14 relationship with members, operational matters etc.
15 We see at the bottom of the page, 2.2.4:

16 "Overview, implementation and
17 execution of key strategies as set by the Visa
18 Europe Board".

19 So Visa Europe Board was essentially
20 giving the direction of travel and then the detailed
21 implementation of that and the execution was for the
22 ELT?

23 A. Yes, that is correct.

24 Q. Please could we move on to page 45 in this
25 tab {RC-J4/50/45}, and at the bottom of the page

1 two-thirds of the way down there is "Notes to
2 Nominations and Compensation Committee Terms of
3 Reference". Again, the compensation committee was
4 established under the by-laws and articles of
5 association of both companies, correct?

6 A. Just one second. It does not actually
7 state here -- I am not actually sure whether it was
8 both companies or one of the companies.

9 Q. Well, I think we have just established,
10 have we not, the "articles of association", that is
11 an English company law term, so that is the English
12 company; and "by-laws" is an American corporation
13 law term, so that is Delaware.

14 A. I will just read it one more time. I see,
15 it refers to both yes, I understand, correct.

16 Q. If we then please look at page 46, which
17 is the next page {RC-J4/50/46}. It says in terms
18 then references to Visa Europe Limited and Visa
19 Europe Services Inc will together be the company.
20 Next stage, it says the company has launched V PAY.
21 Do you see that?

22 A. I see that.

23 Q. So in essence what is happening is they
24 are part of an overall company which are introducing
25 here a new product into Europe, not the UK, which

1 was the Virgin -- sorry, Visa V PAY product?

2 A. Yes.

3 Q. Next, please, page 57, {RC-J4/50/57}.

4 There is a section halfway down about the corporate
5 structure, it says:

6 "Visa Europe Limited ...is a UK-based
7 private company, limited by shares, and owned by
8 some 3,000 members, each of which holds one share
9 ..."

10 In contrast:

11 "Visa Europe Services Inc ... is a
12 Delaware-registered US Company, wholly owned by VEL
13 ... operates in the UK through a formal UK
14 establishment."

15 So it did have a permanent management
16 presence in the UK even though it was a Delaware
17 corporation; is that right?

18 A. That is right.

19 Q. Could we then, please, look at page 62
20 {RC-J4/50/62}. As I understand it, within the
21 overall ELT structure there are a series of
22 subcommittees so that the delegated power that the
23 ELT had was itself sub-delegated to other
24 committees; is that right?

25 A. Yes, ELT could delegate down any

1 responsibilities it had to other groups.

2 Q. What it says halfway down that page is:

3 "It is the responsibility of each ELT
4 member who chairs the relevant internal committees
5 to report key recommendations/decisions back to the
6 ELT."

7 One of the principal committees is
8 then the interchange management group; can you see
9 that?

10 A. I can see that.

11 Q. That was tasked with:

12 "Discussion of strategic, tactical
13 and operational topics regarding interchange
14 reimbursement fees ...and other member-to-member
15 fees."

16 So you had a dedicated subcommittee group
17 looking at interchange matters?

18 A. That is correct.

19 Q. Again that was staffed with or chaired by
20 a member of the ELT and no doubt staffed with senior
21 executives within Visa Europe?

22 A. Yes, that would be right.

23 Q. Could we please then turn to bundle
24 {RC-J4/38/6}. I mentioned directors earlier and we
25 see a resolution halfway down this page that the

1 board of directors of Visa Europe Limited and Visa
2 Europe Services Inc consist of the following 22
3 persons, all of which have joint authority to
4 represent the company.

5 So there was an identical
6 constituency of directors for each of the two
7 companies; correct?

8 A. Yes, that is correct.

9 Q. If we look at {RC-J4/39/19}, under "Visa
10 Europe Pricing", item 927 in this VEL board minute,
11 we see the board reviewed the Visa Europe pricing
12 paper. The board noted the market context etc, the
13 proposal detail. That was a paper that had been
14 produced by the ELT no doubt using the subcommittee;
15 correct?

16 A. Yes, that would have been produced by the
17 ELT and relevant employees of the company.

18 Q. We then see at the bottom of the page
19 there is a resolution in formal terms. The proposed
20 Visa Europe pricing changes including appendix 1
21 which the secretary is directed to attach the
22 minutes be and are hereby approved effective from 1
23 April for all non-processing fees and 1 October 2013
24 for all processing related fees.

25 The next resolution on the top of the

1 next page {RC-J4/39/20} was that management shall
2 prepare amendments to the operating regulations to
3 implement those changes for approval by the
4 executive management committee.

5 So there was a decision taken in
6 principle to change the pricing in accordance with
7 the recommendation from the ELT and that was then
8 implemented back by the ELT and senior management?

9 A. That is correct.

10 Q. At paragraph 31 of your witness statement,
11 page 7, {RC-F4/12/7} you say:

12 "VESI also did not have any
13 involvement in setting or implementing Visa's Rules
14 as set out in the various Operating Regulations ..."

15 Are you referring there not to the
16 changes to the operating regulations that we have
17 just looked at where there is a resolution for the
18 ELT to do exactly that, but you are referring more
19 specifically to the rules that deal with the matters
20 itemised in 31.1 to 31.4?

21 A. No, that is not quite correct. What I am
22 saying here is the responsibility for our rules and
23 our operating regulations were with VEL and per your
24 previous questions the delegation of that authority
25 within the bounds we have talked about from VEL went

1 to ELT.

2 Q. But we have seen, have we not, that ELT
3 was specifically given authority, albeit delegated
4 authority, to look at matters of implementation and
5 execution of pricing and related operational issues?

6 A. That is correct, but they are given that
7 authority by VEL.

8 Q. Now, given the very substantial overlap
9 between VESI and VEL and the co-location of the
10 board meetings, why are you surprised that VESI
11 board meetings ended up looking at interchange
12 issues?

13 A. VESI board meetings were not there to look
14 at those items; it was the VEL parts of the board
15 that dealt with those matters.

16 Q. Well, VESI would be reviewing, would it
17 not, the actions of the ELT and it was the ELT that
18 oversaw this specific subcommittee that looked at
19 these very issues?

20 A. No, it would be board directors as VEL
21 board directors reviewing those particular things.

22 Q. Could we look, please, at {RC-J4/58/19}.

23 This is part of the VESI board
24 meeting minutes and it says halfway down after the
25 redacted section:

1 "It was noted that regulation
2 continued to be a key focus area for Visa Europe
3 including ..."

4 Then 2:

5 "Progressing Visa Europe's IFR
6 strategy and implementing consumer interchange
7 rates."

8 So this is something that the VESI
9 board is reviewing to ensure that it is staying
10 ahead of the game on these issues; correct?

11 A. Yes, I assume this was in both boards,
12 this would have been in VEL as well because this is
13 about an implementation of a strategy set by VEL.

14 Q. If we look, please, at page 22,
15 {RC-J4/58/22} there is a paragraph right at the
16 bottom that says:

17 "Mark Antipof commented that in
18 response to this regulation, which is the
19 Interchange Fee Regulation a Visa Europe-wide IFR
20 programme has been mobilised and is being executed
21 with the objective remaining of maximising
22 competitiveness and commercial value creation as
23 well as attaining compliance."

24 So the implementation of changes
25 following the Interchange Fee Regulation was

1 a matter for both VESI and VEL, correct?

2 A. Yes, in this case Mark is making both
3 boards aware of the changes that are being
4 implemented.

5 Q. Could we look please at page 23,
6 {RC-J4/58/23}. At the bottom of that page again,
7 just above the resolution, it says:

8 "In order to ensure compliance with
9 the Interchange Fee Regulation, following due and
10 careful consideration it was unanimously:

11 "Resolved that intra Visa Europe EEA
12 MIF rates are set at 0.20% for ... debit and 0.30%
13 for consumer credit ..."

14 This is a resolution of the VESI
15 board setting MIF rates for a period from
16 9 December 2015.

17 Correct?

18 A. That is what this resolution says, sorry.
19 I think I pointed this out in my statement that we
20 found I think four instances where a VEL decision
21 was replicated in the VESI board and I can only
22 assume that was an error when that was done because
23 obviously these rates were set by VEL and I believe
24 this same resolution is in the VEL minutes.

25 Q. Could we then please look at the next

1 page, {RC-J4/58/24}. There is also a further
2 resolution for different MIF rates to be set with
3 domestic fallback rates and then the management is
4 meant to prepare the amendments to the operating
5 regulations to implement those changes. Are you
6 saying that was a mistake as well?

7 A. Yes, obviously I -- I did not write the
8 minutes, I was aware of the minutes at the time but
9 I am aware of these four instances where items
10 appear in the VESI minutes in addition to the VEL
11 minutes where it does not appear that they should
12 have done.

13 Q. Ordinarily you would expect errors in
14 minutes to be corrected at the next meeting;
15 correct?

16 A. Indeed.

17 Q. If we look please in bundle {RC-J4/61/6},
18 top of the page. Just to put it in context the
19 minutes of the board meeting held on 10 July 2015:

20 "... were unanimously approved as
21 amended as an accurate record of the proceedings."

22 So the next board approved the
23 minutes, having no doubt considered them carefully
24 to make sure that they did not have any errors in
25 them. That is right, is it not?

1 A. I can see what is written on it. What
2 I would say is obviously this -- we cover a wide
3 period in time coming through here and there are
4 only, as far as I can see, and what was checked only
5 four instances when this happened and to come
6 through. So my assumption it is an error, it is
7 an error that was missed and to repeat, these same
8 resolutions were in the VEL board.

9 Q. Could we look, please, at page 14 of this
10 document. {RC-J4/61/14} Halfway down the page there
11 is a reference to Huss who informed the board that
12 the following updates would be provided during the
13 meeting IFR with management providing in detail the
14 business's integrated corporate response to the
15 Interchange Fee Regulation; can you see that?

16 A. I can see that.

17 Q. The VESI board is looking at the
18 implementation of interchange fee issues; correct?

19 A. Yes, this -- again to be precise on the
20 wording this is an update, so it was normal that
21 boards would be updated on activities occurring with
22 the business and this is an example of that.

23 Q. We see the next page, page 15,
24 {RC-J4/61/15} they are addressing the impact of the
25 IFR on cross-border issues, see second paragraph

1 there with Mark Antipof again looking at the
2 implementation of the IFR on territorial
3 restrictions?

4 A. Yes, I see that.

5 Q. Then further down that page, there is
6 a paragraph that begins "accordingly". It says
7 existing group member organisations were deemed
8 eligible and converted to principal members.

9 What is this dealing with?

10 A. Just let me read this. So yes. So over
11 time, Visa has had different categories of
12 membership, there were a category of membership
13 called "group members" where in certain countries
14 the Visa business would be -- or the members would
15 represent collectively as a group for that country
16 and this is talking about when that membership group
17 was retired and the members became principal members
18 like they are in most countries that we operate in.

19 Q. On the next page, page 16, {RC-J4/61/16},
20 the second paragraph, there was a reference to
21 discontent contained in the letters from group
22 members that had been provided to directors. What
23 was the discontent about?

24 A. I do not know. I do not think I was
25 involved in this particular topic, so I -- I have no

1 recollection of that.

2 Q. Could we move on, please, to bundle
3 {RC-J4/61/23}.

4 There is a resolution at the bottom
5 of that page, it is dealing with IFR and you will
6 see that there was a resolution that cross-border
7 issuer and acquirer programme fees are retired from
8 a date for existing members and to waive those fees
9 for members who decide to begin cross-border
10 activity between 10 July and 1 October. So again it
11 was dealing with -- the VESI board was dealing with
12 scheme fees payable in the context of cross-border
13 acquiring; is that right?

14 A. Yes, I think this is another example which
15 this was in both boards, this minute.

16 Q. If we look to the next page, please,
17 page 24, {RC-J4/61/24}. There is further
18 resolutions including operating principles were
19 approved by the VESI board and that management would
20 prepare amendments to the operating regulations to
21 give effect to them.

22 So that is involved, is it not, in
23 operational pricing adjustments for the scheme?

24 A. Yes, I think as I said before, same answer
25 as before, it is another example where an item was

1 replicated into the VESI minutes from the VEL
2 minutes which I do not believe should have happened,
3 I cannot explain why that happened but I do not
4 believe it should have happened.

5 Q. Bundle {RC-J4/66/4}. These minutes have
6 been approved formally at the next meeting?

7 A. That is correct.

8 Q. At page 20, {RC-J4/66/20} please, in this
9 bundle, we see that it was the VESI board that was
10 addressing the impact of the IFR in Ireland and:

11 "Niamh Grogan presented this item
12 which related to the Irish consumer interchange
13 rate. Previously the rate ... had been set by the
14 Visa Europe Board, however on 13 October ..."

15 The cap came in for domestic credit
16 at 0.1%; can you see that?

17 A. I can see that.

18 Q. There was a resolution therefore following
19 that from the VESI board further down that page,
20 that the Irish domestic consumer MIF would have to
21 be set at 0.1%?

22 A. I can see that.

23 Q. There were then some amendments made to
24 incorporate a minimum per transaction MIF of 1 cent
25 for secure and 3 cents for non-secured transactions.

1 So essentially you were having a weighted average
2 approach to the implementation of the domestic MIF;
3 is that right?

4 A. I can see that here, yes.

5 Q. It is fair to say, I think, is it not,
6 that the VESI board were a bit annoyed with that
7 requirement?

8 A. I do not think you can conclude that from
9 these minutes.

10 Q. It would present, would it not,
11 an opportunity for potential arbitrage? We can see
12 back at page 20, the second paragraph, two members
13 of the VESI Board:

14 "Les Matheson and Fabrice Denele
15 expressed their dissatisfaction with the position
16 taken by the Irish Government."

17 A. Yes, I can see that.

18 Q. That dissatisfaction must have been, must
19 it not, that 0.1% was considered to give rise to
20 difficulties?

21 A. I cannot comment on why they were
22 dissatisfied, obviously that would be a matter for
23 them.

24 Q. We know, do we not, that Barclaycard had
25 established a sponsor establishment in Ireland for

1 cross-border acquiring purposes?

2 A. Yes.

3 Q. So that acquirer was now able to offer
4 0.1% MIF rates to its merchants?

5 A. That is correct.

6 Q. Could we look, please, at {RC-J4/68.1/16}.
7 This is part of the pricing and interchange advisory
8 group memo. Halfway down the page, it says:

9 "Background: the changing regulatory
10 environment."

11 It describes how different
12 cross-border rates are now potentially available and
13 it says situations in which the CBDIP rates, can you
14 tell me what the CBDIP rates are?

15 A. These are -- I think that -- I cannot
16 remember exactly what it says, but these are the
17 cross-border interchange rates I believe.

18 Q. For debit?

19 A. D for debit, yes.

20 Q. D for debit?

21 A. D for debit, that would be logical yes.

22 Q. Sorry, I am told it is "domestic", not
23 "debit".

24 Rates remain of benefit to merchants
25 and are therefore limited to -- sorry:

1 "Situations in which those rates
2 remain of benefit to merchants are therefore limited
3 to:

4 "UK debit depending on transaction
5 value."

6 So that is recognising, is it not,
7 that there is a risk of arbitrage, if you want to
8 call it that, between the UK and Ireland with this
9 variance in the rates?

10 A. Sorry, I missed where you were reading
11 from. Can you point me --

12 Q. Halfway down the page it says:

13 "Situations in which the CBDIP rates
14 remain of benefit to merchants are therefore limited
15 to ..."

16 First bullet, UK debit dependent on
17 transaction value?

18 A. I see those yes.

19 Q. So it is recognising, is it not, that
20 arbitrage is a risk for UK debit transactions?

21 A. Again, to be precise, I do not think this
22 note is recognising that, that you are suggesting
23 within this but the note does not say that.

24 Q. The last paragraph says:

25 "The recent draft IFR guidelines

1 published by the PSR in the UK suggest a different
2 definition of cross-border than the one used by Visa
3 Europe for many years as demonstrated below in the
4 diagrams."

5 Then they have series of diagrams
6 derived from the PSR that show the possibility for,
7 for example, the Barclaycard sponsor member in
8 Ireland to offer the Irish rate to a UK merchant?

9 A. That is correct, I see those two diagrams.

10 Q. If we look, please, at bundle
11 {RC-J4/70/2}, the second to last paragraph on that
12 page there is a paragraph that begins "However" and
13 this is a Visa UK board briefing paper. It says:

14 "... as discussed at the UK Board
15 meeting in March 2016, the interpretation of the
16 'cross-border' definition referred to by the PSR ...
17 undermines this weighted average approach, as it
18 would mean that, where any domestic interchange rate
19 was above 0.20%, merchants could be encouraged to
20 route these transactions to foreign acquirers in
21 order to obtain a rate of 0.20%. Whilst this occurs
22 to some extent today under CBDIP, it is only
23 possible for secure transactions and for registered
24 merchants, limiting the commercial impact ... a
25 widening of this 'arbitrage' opportunity, across all

1 transactions, could drive average interchange at UK
2 merchants towards 0.14% ..."

3 So it is expressing concern, is it
4 not, that the possibility of arbitrage between the
5 UK and Ireland is giving rise to what is perceived
6 to be a bad thing, which is that UK merchants are
7 paying lower interchange fees via the Merchant
8 Service Charge?

9 A. I can see that in this note, yes.

10 PROFESSOR WATERSON: Can I just interject
11 here. It says "therefore would be commercially
12 unsustainable for Visa". Could you explain
13 what that means?

14 A. Yes, I certainly -- I would start by
15 explaining I am not a UK interchange expert, so I am
16 not familiar with these particular discussions going
17 through. But obviously the basis of -- of
18 interchange the way it operates is that it provides
19 an economic balance between the issuers who are
20 issuing the cards and the merchants that are
21 acquiring the cards. So obviously it was felt here
22 by the UK board that the rates were falling to
23 a level where that balance was not in economic
24 alignment and therefore it would be difficult for
25 them to continue to operate at a sustainable

1 margins.

2 PROFESSOR WATERSON: So how is this --
3 I am still not clear how this is affecting Visa
4 because Visa does not receive or give these
5 fees?

6 A. That is correct. Yes, I am not sure why,
7 why it is written that way. Like I said, I was not
8 a participant in this board. I do not know why they
9 referred to that in that way because I would have
10 read this in the way I described it to you in terms
11 of between the issuers and the acquirers.

12 PROFESSOR WATERSON: Yes, that was
13 essentially my query, but~--

14 A. Yes.

15 PROFESSOR WATERSON: -- you are not able
16 to enlighten me.

17 A. I am looking at it like this and I could
18 not explain why it is written that way, actually.

19 PROFESSOR WATERSON: Thank you.

20 MR BEAL: If we look at {RC-J4/66/23}
21 first, there were some governance changes made
22 and I am taking you to look at the details of
23 those. We see that there is domestic
24 governance of multi-lateral member to member
25 fees post IFR and the resolution there says

1 that:

2 "The principles for an amended governance
3 framework as proposed in the advance material
4 are approved and management shall prepare
5 amendments to the operating regulations for
6 approval by the ELT."

7 Can you see that?

8 A. I can see that.

9 Q. Essentially what was being done is
10 a pricing and interchange advisory group was being
11 established and being permitted to make small
12 changes to the MIF rates itself, we see that at
13 bundle {RC-J4/68.1/5}.

14 Proposed governance of member to
15 member fees and the governance of member to member
16 fees would be split into three categories according
17 to the impact.

18 Under 1 "Strategic", that has to go
19 to ELT for approval, all matters requiring VE board
20 approval have to go via ELT first for approval.

21 "Tactical" then PIAG, that is the
22 sub group that has been established, followed by ELT
23 for ratification and that could deal with changes
24 impacting greater than 5% of the fees in the
25 domestic market changes with legal Competition Law

1 questions etc. So those are the tactical issues and
2 they have to go up to the ELT for ratification
3 having had a PIAG determination.

4 Sorry, the nod will not appear on the
5 transcript, I do apologise.

6 A. Yes, I hear.

7 Q. Finally, "Operational" where all you need
8 is SME approval. What does SME stand for?

9 A. Subject matter expert.

10 Q. So the PIAG therefore can implement, can't
11 it changes impacting less than 5% of fees in
12 a domestic market?

13 A. Yes, it says changes less than 5% fees in
14 the domestic market. Yes, correct.

15 Q. Could we then please look at
16 {RC-J4/72/18}. If we look at the resolution here,
17 the resolution from the VESI board meeting is that
18 the proposed Irish domestic business debit
19 multi-lateral interchange fees be and are hereby
20 approved.

21 The resolution to approve the
22 proposed domestic business multi-lateral interchange
23 fee was unanimously approved by the board.

24 So it is dealing, is it not with
25 setting the rate for the Irish domestic business

1 debit multi-lateral interchange reimbursement fees.

2 A. So this is -- referring to my previous
3 answer this is the fourth item that I mentioned in
4 my witness statement of where a VEL minute has been
5 replicated in a VESI minute as well. Just to
6 reiterate my previous answer, I do not know why that
7 happened, it does not make sense, it should not be
8 there and I have listed the four examples which you
9 have now been through where that has occurred.

10 Q. Paragraph 40 of your witness statement,
11 {RC-F4/12/11}. You refer to the Visa UK
12 board of directors who were typically mid-level
13 managers of certain members of Visa Europe.

14 The Visa UK board was largely made
15 up, was it not, of personnel from UK issuing banks?

16 A. I was not a member of the UK board, so
17 I do not know the exact constitution but I do not
18 think it was all issuers, I think it had acquirers
19 as well.

20 Q. Would you accept that the majority were
21 issuing banks?

22 A. I generally would not know without
23 checking. I would have to look at it.

24 Q. Could we look, please, at {RC-J4/68/1}, we
25 see Visa UK minutes and it identifies who is present

1 and then identifies the financial institution with
2 which they are associated. That is true that you
3 have apologies, for example, from an individual from
4 Worldpay and an individual from Elavon, but for the
5 most part the rest of them are well-known banking
6 ...

7 A. Yes, but some of those banks are also
8 acquirers, for example, Barclays.

9 Q. Well, in the UK the issuing banks that
10 were also acquirers were essentially Lloyds and
11 Barclays; correct?

12 A. That is correct.

13 Q. At paragraph 49, page 13 of your
14 statement, {RC-F4/12/13} you describe how all of
15 VESI became the LLC and the business of the LLC was
16 then transferred to Visa Europe Limited; is that
17 right?

18 A. I am just waiting for it to come up on the
19 screen.

20 Q. Sorry?

21 A. Paragraph 49?

22 Q. Yes, please.

23 A. Yes. That is correct. VESI changed to
24 Visa Europe Services LLC.

25 Q. So the position as it stands at present is

1 that Visa Europe Limited is now the employer of all
2 the Visa Europe employees?

3 A. That is correct and again for precision
4 the majority, the vast majority.

5 Q. Yes. Paragraph 51, {RC-F4/12/14} you
6 refer to the impact of the Visa One transaction, the
7 merger between Visa Europe with Visa Inc?

8 A. Mm-hm.

9 Q. Are you aware that the European Commission
10 did not think that operated to stop Visa members
11 continuing to operate as an association of
12 undertakings?

13 A. I am aware of that position, yes.

14 Q. Are you aware that the European Commission
15 has also decided that Visa Inc and Visa Europe had
16 agreed to maintain interregional MIFs after the
17 restructuring in 2007?

18 A. Sorry, can you repeat that.

19 Q. Yes. This deals with the impact post the
20 VEL incorporation and the separation of the European
21 business into VEL of interregional MIFs and
22 essentially there was an agreement between Visa Inc
23 and Visa Europe that Visa Europe would continue to
24 recognise interregional MIFs post 2007?

25 A. Correct, yes. Sorry, I misunderstood.

1 Yes, that is correct.

2 MR BEAL: Thank you very much. I do not
3 have any further questions.

4 MR KENNELLY: No re-examination from me,
5 sir.

6 THE PRESIDENT: We have no questions,
7 Mr Butler, thank you for your time, you are
8 released from the witness box with our thanks.
9 Thank you very much.

10 (The witness withdrew)

11 MR KENNELLY: Now, sir, we call Mr Timothy
12 Steel our next witness.

13 MR TIMOTHY JAMES STEEL (affirmed)

14 THE PRESIDENT: Mr Steel, good morning.
15 Do sit down and make yourself comfortable. You
16 should have a glass of water there if you need
17 it.

18 A. Thank you.

19 THE PRESIDENT: You will be taken to some
20 documents, some will be in the folder before
21 you, most will be on the screen. You will only
22 be shown what is called up on the screen. If
23 you want to see anything else, do say, and we
24 will make sure that it is brought up so that
25 you can locate yourself within longer

1 documents. So just say.

2 A. Okay.

3 THE PRESIDENT: I will leave you to
4 Mr Kennelly, he will ask you some questions.

5 A. Thank you, sir.

6 Examination in-chief by MR KENNELLY

7 MR KENNELLY: Morning, Mr Steel.

8 A. Good morning.

9 Q. Could you please open the white folder in
10 front of you behind tab 1?

11 A. I will just change my glasses for
12 a moment.

13 Q. Behind tab 1, please?

14 A. Yes.

15 Q. Is that the first page of your witness
16 statement, {RC-F4/13/1}.

17 A. It is, yes.

18 Q. Could you turn, please, to page 41
19 {RC-F4/13/41} the page numbers are at the bottom of
20 the page. Is that your signature?

21 A. Correct, yes.

22 Q. Are the contents of this statement true to
23 the best of your knowledge and belief?

24 A. They are indeed yes.

25 MR KENNELLY: Thank you, Mr Beal, or

1 Mr Woolfe will have some questions for you.

2 MR WOOLFE: Before I start, I am afraid
3 the first topic I am going to deal with with
4 Mr Steel involves matters that are confidential
5 to Visa and it will be very tricky to deal with
6 in open session; in fact, I would say pretty
7 much impossible. Therefore could I ask that we
8 do move into private session. I think this
9 section will take about 30 to 40 minutes.

10 THE PRESIDENT: Have you discussed this
11 with --

12 MR WOOLFE: I have not, no, I am afraid,
13 sir.

14 THE PRESIDENT: Okay.

15 MR WOOLFE: But it is the matter that Visa
16 considers "highly, highly confidential", if
17 I can flag it in that way.

18 MR KENNELLY: I am -- I appreciate
19 the Tribunal is very reluctant to do this.
20 I am happy to have a very quick discussion with
21 my learned friend to see if we can avoid that,
22 but if it is a matter I think he is referring
23 to which we regard as "most confidential" then
24 I cannot see any way that could be done, even
25 in private.

1 THE PRESIDENT: How long will it take us
2 to move to private session?

3 In that case, let us do that now. I will
4 not go into specifics, Mr Woolfe will I am sure
5 have reasons for it and it seems the prejudice
6 would not be his but Visa's, it is appropriate
7 that we heed his warning and therefore go into
8 private session, so can I ask those who are not
9 within the relevant circle of confidentiality
10 to remove themselves from the courtroom. We
11 will of course let you know when open session
12 begins and if we could end the livestream now,
13 that would be very helpful.

14 We will sit for a couple of minutes just
15 to make sure.

16 (Hearing In Private - redacted)

17 THE PRESIDENT: [So money is flowing from
18 the acquirers to the issuers.

19 A. Yes, yes.

20 THE PRESIDENT: What I am getting from
21 that is that when one looks at the overall
22 benefits arising out of the scheme as
23 a whole --

24 A. Right.

25 THE PRESIDENT: -- it is the acquirers who

1 are benefiting more than the issuers, that is
2 why they are making --

3 A. I see.

4 THE PRESIDENT: -- they are being required
5 to make a payment across to the issuers.

6 A. I see, I see the question, yes. I have
7 not thought about it in this way. I have always
8 thought about it, in my long career at Visa, as
9 being that, you know, for a transaction to happen,
10 there were two sides to the model, and without both
11 parties being happy to do a transaction, ultimately
12 it does not happen.

13 Of course in three-party schemes, as
14 I am sure you well know, like Amex, then they can
15 decide on how that balance works, but within
16 a four-party scheme, there is a flow of money called
17 interchange that addresses that balance in some way,
18 shape or form.

19 Therefore it is about the fact that
20 there are costs of revenues on the one side of
21 issuers, and costs and revenues on one side of the
22 acquirers; and that the -- if you like, the supply
23 and demand of the acquirer side, and yes, the
24 economists might explain this better than I would --
25 the supply and demand on the acquiring side is

1 stronger than that on issuing side, in terms of the
2 cardholders are less happy to pay to use the
3 transaction than the merchant might be. Therefore
4 there is more money on the acquiring side, and if
5 you want to optimise that supply and demand and have
6 the same supply and demand on the issuing side, they
7 need some flow of money to that.

8 So I suppose, thinking it through, I
9 think maybe your question, you might be saying the
10 same thing perhaps, that absent an interchange fee,
11 then there is potentially more money on the
12 acquiring side than the issuing side for
13 a transaction, not counting things like revolving
14 and other things that might affect how cards work.

15 So therefore the acquirer is probably
16 benefiting financially, but of course he cannot
17 benefit if there is no issuer to issue a card, and
18 so there has to be something that balances that
19 supply and demand on both sides. That is the way
20 I have always understood it.

21 THE PRESIDENT: When you are talking about
22 supply and demand, I mean, in most markets you
23 have supply and demand, and that results in
24 a price without one being imposed. So what
25 prevents that from happening here? If you have

1 a situation where the acquirers are incurring
2 more benefit than costs from their
3 participation in the scheme, but the figures
4 are different on the issuing bank side, so that
5 there is questions of supply and demand, why
6 can they not reach an agreement without all
7 this paraphernalia of imposing an agreement?

8 A. So I suppose -- so again, an economist
9 might be able to explain this better than I can, but
10 if you mean a bilateral agreement between an issuer
11 and an acquirer perhaps, which may be what you are
12 saying, the problem there is because they assume a
13 number of issuers and acquirers in the system, and
14 therefore it is more efficient for there to be, you
15 know -- I do not propose to find words, but it is
16 more efficient to have a simple flow to make that
17 balance on a kind of average basis.]

18 A [I mean, there are some bilateral
19 agreements in -- not in the UK, I do not believe;
20 there are some bilateral agreements elsewhere in
21 Europe, I believe, in some cases. I have not really
22 thought that through, to be honest.

23 THE PRESIDENT: Let me unpack it a little
24 bit further, because I suspect you are the best
25 witness of fact to deal with these things, but

1 of course if you do not know the answer, then
2 please do say so. In other cases it has been
3 said that the reason that bilaterals do not
4 work is because it is just too difficult. You
5 have got too many issuers, too many acquirers
6 and you cannot do it.]

7 THE PRESIDENT: [Well, is it complexity,
8 or is it the case that your expectation would
9 be that if you gave each side agency,
10 bilaterals would not be agreed, even if the
11 mechanism was there to enable them to do so?
12 Would that be an outcome that would not
13 surprise you?

14 A. I confess I have not really thought about
15 it, so I am not sure.

16 THE PRESIDENT: Well, again, let me press
17 you a little bit on this. Is it your position
18 then that the interchange fee is an involuntary
19 charge on the acquiring market?

20 A. I suppose they have no choice but to pay
21 it, whatever it is, so I guess it probably is. But
22 I have not thought about it in those terms.

23 THE PRESIDENT: Why do you think -- given
24 that the reason for the interchange fee is
25 a sense that the acquirers are obtaining more

1 value from the system than the issuers, why do
2 you think they would not want to pay?

3 A. That is interesting, actually, because
4 I -- I recall a conversation many years ago with
5 a then head of a major acquirer who did say to me
6 once, he would not want interchange to be zero
7 because there would not be the same system and that
8 would not be good for his business. So actually,
9 I think if an acquirer is wanting the optimal number
10 of transactions, then there should be interchange,
11 and I think conversations I have had with acquirers
12 in the past have suggested they shared that view.]

13 A [So two reasons for that. One is clearly
14 when it comes to consumer cards, there is
15 regulation, so, you know, by law, there need be
16 a cap. When interchange fees were uncapped
17 completely, then Visa always sought in my experience
18 to find a balancing position of interchange, one
19 that tried to equalise the supply and demand of both
20 sides of the two-sided market, and therefore Visa
21 did not want interchange to be as high as possible
22 or as low as possible; it wanted it to be the right
23 figure, if you like, whatever that right figure
24 happens to be.

25 Therefore, Visa will be concerned in

1 the case of, say, commercial cards, that if the fee
2 went above the level that would be optimal, then
3 that could harm the system, because that might shift
4 the balance too much the other way, and, therefore,
5 you know, you are getting -- you would
6 disincentivise a client involving the merchants
7 taking cards rather than issuers. So I think on
8 consumer cards, it was because of regulation, and on
9 commercial cards, it was to not have an undue
10 increase in the level of fees.

11 THE PRESIDENT: Is what you are saying
12 then that although you have mentioned the
13 forces of supply and demand, in this case, they
14 would not, left uncontrolled, reach an outcome
15 where those forces could -- where the demand
16 line and the supply line intersect, one gets
17 a price; for whatever reason, that does not
18 occur in the interchange fee, with the result
19 that one has got to be imposed by, as you say,
20 initially Visa and -- or Mastercard, and under
21 this scheme Mastercard had a ceiling on the
22 limit that is being charged by the issuing
23 banks?

24 A. I -- I do not know. Indeed, I had not
25 thought of that. I think the -- yes, I do not know.

1 THE PRESIDENT: Okay.

2 A. I do not know, to be fair.

3 THE PRESIDENT: Thank you.

4 PROFESSOR WATERSON: Could I just raise
5 a supplementary based on this recent
6 discussion. On [draft] page 84, I think it
7 was, round about line 13 -- no, hang on. Yes,
8 it would be. You say -- you are talking about
9 the balance, and you say in effect that
10 merchants are more willing to pay than
11 consumers would be, and I think we have heard
12 this previously from another witness. Is there
13 evidence on this?

14 A. So the -- the only thing I can think of,
15 going back, and if I think back to actually when
16 I joined the company and that is back in 2000, and
17 that is before there was any regulation or directive
18 in Europe, I believe there was some evidence, and
19 this might be a question more for the economists,
20 but there was some evidence from economists,
21 I think, prior to that, around the supply and demand
22 of cards.

23 What we used to do when I joined the
24 company was we conducted what we called cost
25 studies, but actually they were cost and revenue

1 studies, where -- and actually I led them for Visa
2 at the time, and they had been done previously to
3 when I joined the company, where we would ask
4 acquirers and issuers to -- for transactions, if you
5 like, so there was a costing exercise where we would
6 look at the acquiring side of the business and
7 the -- and the issuing side of the business, and
8 look at, if you like, what the relative levels of
9 income were, and the relative levels of cost were,
10 and use a formula to say: well, if that was actually
11 a three-party rather than a four-party system, how
12 would you balance that off, you know, almost trying
13 to be like an Amex in another way. So the evidence
14 was based on economic theory and based on income and
15 costs back in those days.

16 Now, unfortunately, since 2002, those
17 that were -- became cost focused only because of
18 impositions by the European Commission, but there
19 was some evidence prior to that that showed that the
20 revenues on the merchant's side were better than the
21 issuer side, and I believe that is how cards started
22 in the first place, and how that was -- how that was
23 encouraged.

24 PROFESSOR WATERSON: Right. But you do
25 not know positively of any evidence on this?

1 A. Not personally, no.

2 PROFESSOR WATERSON: No, thank you.

3 THE PRESIDENT: Is there anything arising
4 out of that?

5 MR WOOLFE: Nothing from me arising out of
6 that, sir.

7 THE PRESIDENT: Mr Kennelly, I think it is
8 appropriate you re-examine in private on
9 anything that has arisen out of the
10 cross-examination.

11 MR KENNELLY: I have no re-examination and
12 nothing arising from that either.

13 THE PRESIDENT: I am very grateful. In
14 that case, can we now move into public session.
15 Would it be sensible if we rose for two
16 minutes? No. Let us go into public session,
17 and we can let those who have been waiting
18 patiently outside back in.]

19 (Hearing in Public)

20 Further examination by MR WOOLFE

21 MR WOOLFE: So, Mr Steel, can we go to
22 paragraph 61 of your statement. That is at
23 {RC-F4/13/30}.

24 This touches upon something we were --
25 a matter of principle we were just discussing.

1 At 61 you say:

2 "Underpinning all of these..."

3 You refer to various factors that are
4 relevant to determining the level of the MIF,
5 including, I think, market conditions and
6 competition. You say {RC-F4/13/30}:

7 "Underpinning all of these factors are the
8 economics -- do the MIF levels work for all
9 participants in the system?"

10 Then paragraph 61, remainder of 61 and 62,
11 you go on to talk about the differences between
12 different types of transaction, and how this
13 can justify different MIF levels. Can we begin
14 with 62 {RC-F4/13/31}. You discuss corporate
15 cards, and the example of corporates wanting
16 functionality, fourth line, like:

17 "... the ability to download all expenses
18 for all the corporate's employees in a format
19 that matches up with the corporate's system."

20 You put that forward as a factor which
21 could lead to a different MIF rate being
22 appropriate?

23 A. Yes.

24 Q. But there is no reason for merchants to
25 pay for that type of functionality, other than that

1 you can make them pay for it, is there?

2 A. So it is possible this actually goes to --
3 actually to a point, sir, to your question earlier,
4 which is around, you know, why the interchange rate
5 is there and about -- about when I was giving the
6 answer of balancing the system, because from my work
7 on the costings side of things, over the years when
8 we did that, then the relative costs of running the
9 commercial side, the commercial cards and the
10 consumer cards were typically different, and there
11 was kind of two drivers, two main drivers of that.

12 One main driver was that with
13 consumer cards, there tend to be some degree of
14 borrowing, so often part of the cost of running the
15 card was allocated towards that lending function.
16 Therefore, you got less cost attributed to
17 transactions.

18 Secondly, that the -- that the
19 commercial cardholder, the corporate cardholder,
20 required certain things of that card, and they are
21 provided often by other people in the system such as
22 Amex. To compete with that, then the issuer has to
23 give that level of service as well and give those
24 functions, and so therefore to be able to do that,
25 they -- they require or want a higher interchange

1 rate.

2 Q. I will take the extreme example of the
3 ability to download expenses in a format. That is
4 a service that the corporate that sits behind the
5 cardholder values to some extent, so presumably they
6 would be willing to pay for it to some extent, would
7 they not?

8 A. Well, not if someone else is offering the
9 same service at a better price, which is the case
10 for three-party system. So the issue is that other
11 competitors or other types of payment might give
12 them that at a cheaper price. So therefore in this
13 situation, the four-party model, the issuer needs to
14 be able to do that at a price level that means they
15 need the interchange fees for that.

16 Q. But essentially you could have
17 a situation, could you not, where the corporate has
18 been provided with a service effectively for free,
19 that it would not actually value the amount that it
20 actually costs to provide the service?

21 A. Yes, there will be cases, I imagine, I do
22 not know, I am not involved in the pricing issues
23 and their corporates, of course. But it is quite
24 possible that they are getting the service for free
25 or cheaper than the cost of providing that service,

1 which is also true on consumers' part as well.

2 Q. If you go back to the start of
3 paragraph 61 {RC-F4/13/30}, when you say "do the MIF
4 levels work for all participants in the system", you
5 are not talking about setting some socially optimal
6 level of MIFs, are you? You mean setting a level
7 that the merchants are willing to pay and the
8 issuers are willing to receive to participate in the
9 Visa system, are you not?

10 A. I think the idea is it is socially optimal
11 because -- because the method of payment, surely on
12 the acquiring side of the merchant side who is
13 paying the fee, the idea is that what they are
14 paying should be also economically viable compared
15 to other forms of payment. There are other forms of
16 payment that may be less efficient for them also.

17 So I do not think it is about
18 imposing the fee; it is about it being optimal in
19 the same way I described earlier about consumer
20 cards. That was the idea behind it.

21 Q. In paragraph 61 {RC-F4/13/30}, you refer
22 to certain differences between, in the fourth line,
23 cross-border transactions, you say, and commercial
24 card transactions "are more complex than
25 domestic/consumer transactions respectively".

1 You refer to various differences:

2 "... different currencies, different
3 languages, different systems, and physical distance
4 ... and fraud costs tend to be higher for certain
5 types of cross-border transactions."

6 All of those factors relate to
7 cross-border transactions. They do not relate to
8 domestic commercial card transactions, do they?

9 A. So I think there is two points here. One
10 I think in terms of domestic transactions, then
11 there are differences domestically between
12 commercial and consumer. I mentioned a few of them
13 a moment ago.

14 With all different transactions,
15 there are differences in cost on both sides of the
16 equation, and they often make differences to how we
17 have, over the years, set different MIFs for
18 different types.

19 Q. This sentence here, you say "they" -- you
20 refer to consumer and commercial -- sorry,
21 domestic -- sorry, cross-border transactions and
22 commercial card transactions, you say "they often
23 involve". The things you name, none of them would
24 relate to domestic commercial card transactions, do
25 they?

1 A. So currencies, languages, systems,
2 physical distance, then that would tend to be --
3 I was giving examples here, I think -- giving
4 examples here of cross-border. But there are
5 differences in cost between commercial and consumer
6 as well, even domestically.

7 Q. There is no particular problem of fraud in
8 relation to commercial cards, is there, being higher
9 than consumer cards?

10 A. I -- I do not recall. It has been a while
11 since I have looked at the fraud numbers, so I do
12 not recall if commercial fraud was higher than
13 consumer fraud. There are risks with commercial, in
14 that typically the values are higher, and if you
15 think particularly when it comes to T&E cards where
16 people are travelling and using hotels or making
17 transactions that are often referred to as card not
18 present on the telephone or whatever, then
19 historically, I think some of those had some higher
20 risks, but I do not actually today recall what
21 differences there might be in fact.

22 Q. If commercial cards have higher MIFs than
23 consumer cards, that is not necessarily because
24 there is more complexity, is there; it is just
25 because higher MIFs can be demanded?

1 A. I would not use the word "demanded".
2 I think it goes to the point I made earlier. It is
3 about understanding both sides of the equation, both
4 sides of the two-sided market. There are higher
5 costs on the issuer side, and on the
6 acquirer/merchant side, we understand -- perhaps not
7 in your position here, but we understand the
8 willingness to pay, particularly compared to
9 competitive product and competitive forms of
10 payments. So it is about -- it has also been about
11 balancing both sides of that equation, and the
12 business decision is that -- to do that on
13 commercial cards required higher MIFs, generally.

14 Q. Turn to the cross-border transactions for
15 a moment. Can we go to {RC-J4/80}. We see
16 a letter. This is a supplementary statement of
17 objections. This is the covering letter you see,
18 sent to Visa in 2017, and this relates, I think, to
19 interregional MIFs. Do you recall that statement of
20 objections? Do you recall it happening?

21 A. When is this, sorry?

22 Q. This is dated at the top right-hand side,
23 Brussels, 4 October -- 4 August.

24 A. Oh, yes, 4 August 2017. I do have a vague
25 recollection of this at this time. I was not --

1 I do not recall being involved in detail, although
2 actually, no, let me just read this again. Sorry.

3 Q. Can we go to page --

4 A. Yes, I think I was -- I think I was aware
5 of this, yes, yes.

6 Q. If we go to page 120 {RC-J4/80/120} of
7 this document, and we have a heading at the bottom
8 of the page, 12.1.2, "Transfer of funds from
9 acquirers to issuers not objectively necessary".

10 At recital 412, the Commission are
11 saying if you had settlement at par, acquirers would
12 be relieved of the obligation to pay an interchange
13 fee, and in practice very few bilateral agreements
14 would be reached. So effectively, there would not
15 be interchange fees. Over the page --

16 A. Sorry, can I just read that. 412. Okay,
17 I have read that, thank you.

18 Q. Then over the page {RC-J4/80/121}, we have
19 got paragraphs 414 and 416. Perhaps, in the
20 interests of time, can I ask you to read 414 and
21 416. Feel free to read 415 just as you go through.
22 Just to yourself, quietly.

23 A. Thank you.

24 Q. I will ask you some questions about it.

25 (Pause).

1 Perhaps --

2 A. Sorry.

3 Q. It breaks over the page, 416, so whenever
4 you are ready.

5 A. I have read 414 and 415 if that helps.

6 Q. Just say when you are ready. (Pause)

7 A. Okay, thank you.

8 Q. So if we go -- yes, to the next page
9 {RC-J4/80/122}, and perhaps if I just ask you to
10 read to the middle of that paragraph, where it
11 refers to travellers' cheques?

12 A. Thank you. Okay, I will read that.

13 (Pause)

14 Okay, thank you.

15 Q. So you would agree, would you not, that
16 cardholders gain significant benefits from having
17 a card which manages the kinds of complexity which
18 you identify at paragraph 61 of your witness
19 statement, so currency, language, systems, physical
20 distance, cardholders gain significant benefits from
21 that, yes?

22 A. Yes, they do, yes.

23 Q. So again, there is no particular reason
24 why the merchant should pay for that, other than
25 that you are able to make them pay for it?

1 A. I would not agree with that. I agree
2 cardholders get benefits. I think it goes to two
3 points. One is, I think as I mentioned earlier, it
4 is about both the supply and demand side of both
5 sides of the market, but also competitive products
6 as well, that offer similar benefits.

7 So for individual MIFs in particular,
8 my understanding has always been that Visa has to
9 compete with other systems and other forms of
10 payment, and the MIFs help it to do that.

11 Q. Then the last thing you mention in that
12 paragraph is fraud costs. I think you mentioned
13 card not present fraud being a particular concern,
14 a few moments ago. Now, you have rules, do you not,
15 that allocate the actual costs of fraud, either by
16 letting them lie where they fall or by having
17 charge-backs, that is correct?

18 A. Yes, I am not an expert in all the rules,
19 but yes, broadly speaking, that is correct.

20 Q. So for those costs that are allocated to
21 issuers in that way, either they just happen to lie
22 with issuers to begin with and are not shifted,
23 issuers try and manage those costs, do they not?

24 A. They do. Not only manage the cost in
25 terms of -- they manage them in various ways,

1 actually, yes.

2 Q. So there is no particular reason why it is
3 efficient for issuers to receive a MIF which covers
4 those costs, is there?

5 A. I would -- I am not sure I would agree
6 with that, because particularly if you think about
7 card not present, it is a good example of card not
8 present, actually, is that in card not present
9 situations, I believe the rule, if memory serves, is
10 unless it is what is called a secure transaction, so
11 if it is a transaction that is maybe done on the
12 telephone or not on the Internet, then there can be
13 the ability for that fraud to be passed back to the
14 acquirer, but in the case -- but what issuers do
15 still is try and control fraud, investing in systems
16 which benefit both sides of the market to try and
17 reduce the risk of that happening.

18 So -- and in fact I think the
19 European Commission agreed with Visa back in 2002
20 that fraud prevention as well as fraud losses in
21 many cases were of benefit to both sides of the
22 market.

23 Q. Can we go towards the end of your
24 statement, sections G and F., in those that begin on
25 page 34 of your statement {RC-F4/13/34}. I am going

1 to try and summarise what quite a long section, but
2 I think -- I am trying to understand what you are
3 saying. There was a sort of -- Visa's cross-borders
4 domestic interchange programme which you explain at
5 paragraph 71, and as I understand it, cross-border
6 acquirers could choose between either paying
7 domestic consumer MIFs in the country of the outlet,
8 or fixed MIFs at 0.2% for debit and 0.3% for credit.
9 That is how the --

10 A. For certain transactions.

11 Q. For certain transactions?

12 A. Yes.

13 Q. This was an option that Visa's
14 cross-border domestic interchange programme offered?

15 A. Yes.

16 Q. Then there arose a conflict between that
17 and the way that the PSR in the UK interpreted what
18 was a domestic transaction under the IFR. I think
19 I get that from paragraph 84 of your statement which
20 is on page 38 {RC-F4/13/38}?

21 A. Yes, it was not so much a conflict with
22 the programme per se. The conflict there, or the
23 PSR, and their interpretation of the IFR,
24 Interchange Fee Regulation, was about what is
25 a domestic transaction.

1 Q. You explain at paragraphs 85-87, page 39
2 {RC-F4/13/39}, this gave rise to what you call an
3 arbitrage issue. In effect, if I put it in my own
4 words to try and understand it, that is because
5 under the weighted average MIF approach that was
6 permissible under the IFR for domestic
7 transactions --

8 A. That -- if allowed by the domestic
9 regulator, if memory serves, which in the UK's case
10 it was, yes.

11 Q. Under that weighted average MIF approach,
12 interchange feeds on the individual transactions
13 could be above 0.2%?

14 A. Yes.

15 Q. But the weighted average would be the
16 (inaudible)?

17 A. Yes.

18 Q. But because of Visa's cross-border
19 programme being available, which capped fees at
20 0.2%, acquirers could selectively route transactions
21 which would, under the UK approach, pay a MIF of
22 over 0.2% in a cross-border way to be capped at
23 0.2%, with the result that the average they paid
24 would be less than 0.2%. Is that, roughly speaking,
25 what the concern was?

1 or saying that the rules applying to a foreign
2 acquirer are different than the rules applying to
3 a domestic acquirer. But more importantly, you are
4 saying it is not a domestic transaction, which is
5 what caused an issue with the way the change rates
6 had been at this point in time.

7 Q. So there was -- but the issue of acquirers
8 were -- started routing their transactions to take
9 advantage of this issue?

10 A. So what it meant was that when the IFR
11 came into place, and in particular once the PSR had
12 ruled in its interpretation, which we did challenge,
13 but, you know, as you probably well know, we lost
14 that challenge, Visa lost that challenge, it meant
15 that Visa had to look at -- we had to look at the
16 interchange rates, and consider if they are still
17 appropriate domestically.

18 Q. Just to check, acquirers started routing
19 transactions to take advantage of that difference
20 between the -- is that --

21 A. Sorry -- so first of all if you go back to
22 pre-IFR, if we go back to the CBDIP point, which is
23 a credit commitments point, yes, acquirers started
24 routing transactions from abroad.

25 In fact, what happened was acquirers,

1 in order to take advantage of lower rates, if they
2 are a cross-border acquirer, they actually set
3 themselves up an acquiring arm, if they had not got
4 one already abroad, in order to do that and then
5 cross-border acquirer back in.

6 Q. So can we just go to a document which you
7 cite at paragraph 87 of your statement
8 {RC-F4/13/39}. That is {RC-J4/70}. Paragraph 87
9 {RC-F4/13/39} of your statement, you say that you
10 recommended that the Visa UK board consider setting
11 UK debit MIFs at a flat rate of 0.2% irrespective of
12 acquirer location, in the briefing paper. So this
13 was something which Mr Beal was taking Mr Butler to
14 earlier, but I think -- did you write this paper?

15 A. I imagine I did.

16 Q. You see at table 2, this implies that
17 under the -- I think under the PSR definitions, only
18 25, which I think you cite this in your statement
19 already, 25% of transactions would be counted as
20 truly domestic, so UK card, UK merchant and UK-based
21 acquirer, and 75% by volume, so by number of
22 transactions, would be cross-border acquired, in the
23 sense this is UK card, UK merchant, but an acquirer
24 established outside the UK?

25 A. Yes, I think this is -- I think if I look

1 at the heading in the table, that was at the time
2 for debit transactions, so that was a consequence
3 of -- mostly a consequence, pardon me, of domestic
4 acquirers having set themselves up abroad in order
5 to become a cross-border acquirer, and therefore by
6 virtue of what I mentioned earlier a few moments
7 ago, if the acquirer is not domestic, then it is
8 classed under the IFR as a cross-border transaction
9 in this case. So if you did that calculation, that
10 would have been the case at that point in time, yes.

11 Q. So acquirers will be quite active in doing
12 that kind of thing to obtain a lower MIF rate?

13 A. They were quite active, yes.

14 Q. Even if the differences in MIFs are quite
15 small in percentage terms, it is still worth
16 acquirers going to that effort?

17 A. So I think on -- on -- the differences on
18 debit were probably quite small. On credit, I think
19 they were a bit larger at the time from memory. But
20 then I think the difference here is about also the
21 fact that each acquirer is competing with other
22 acquirers, so that was probably also a factor.

23 Q. This does not require merchants to shop
24 around or contract with foreign banks, does it; it
25 is just a matter of the acquirer setting up an

1 overseas branch and routing transactions via that
2 branch?

3 A. So the merchant would need to contract
4 with a foreign acquirer, an acquirer abroad. In
5 practice in the UK, what happened in order for UK
6 acquirers to not risk losing their merchants to a
7 foreign acquirer, they set themselves up as
8 a foreign acquirer.

9 Q. So an EU-based branch of the same acquirer
10 they were already contracting with?

11 A. Essentially, yes.

12 Q. Okay. Then over the page on page 2
13 {RC-J4/70/2}, if we look at the bottom half of this
14 page, I think you refer to the arbitrage opportunity
15 which you identify in your witness statement.
16 I think you wrote this paper. At the bottom:

17 "A widening of this 'arbitrage'
18 opportunity, across all transactions, could drive
19 average interchange at UK merchants towards 0.14%
20 and, therefore, would be commercially unsustainable
21 for Visa."

22 Now, obviously Visa does not receive
23 the MIF. I want to suggest to you that the reason
24 why it would be commercially unsustainable is
25 because if Visa's average MIF rate goes down, your

1 issuers will want to move their card portfolios to
2 Mastercard, is that correct?

3 A. Essentially, yes.

4 Q. So Visa has a commercial interest in
5 maintaining higher MIFs?

6 A. It has a commercial incentive for the MIFs
7 to be competitive with the system, both in terms of
8 Mastercard and that the overall commercials are
9 competitive with other systems as well.

10 Q. The more issuers' card portfolios stay
11 with Visa, the higher the scheme fees that Visa can
12 charge to those issuers?

13 A. Sorry, I did not hear that clearly.

14 Q. The larger the card portfolios that
15 issuers place with Visa, the more scheme fees that
16 Visa can charge the card issuers?

17 A. Well, I would -- it depends what you mean
18 by that question. If -- the more cards with Visa,
19 then it will earn more money by virtue of the fact
20 it has a price and therefore the bigger volume would
21 give it more revenue. I am not sure that would
22 necessarily mean it could charge a higher scheme
23 price, but I am not involved in the scheme pricing,
24 so I cannot comment on that.

25 MR WOOLFE: Thank you. I have no further

1 questions for you, Mr Steel.

2 Questions by THE TRIBUNAL

3 PROFESSOR WATERSON: Can I ask a couple of
4 questions. One is you were taken to
5 paragraph 61, underpinning all of these factors
6 is the economics. This is page 30
7 {RC-F4/13/30} of your witness statement, and
8 then above, we have paragraph 60.3:

9 "Market conditions: The ... Board ...
10 received reviews of the commercial framework
11 underpinning MIF rates ... Such reviews were
12 usually in response to a particular 'trigger'
13 and looked at the level and role of each
14 individual ... in relation to specific
15 commercial considerations..."

16 So then later in that subparagraph, you
17 start -- you are talking about Ireland. So
18 when the Irish rates went very low, compared to
19 the British rates?

20 A. Yes.

21 PROFESSOR WATERSON: How did it, this
22 evidence itself, this -- were there things that
23 you observed or Visa observed in the Irish
24 market that concerned them?

25 A. So it depends what -- because there is

1 quite a lot happening in Ireland, and I am trying to
2 think back to all of that now, because there is
3 probably -- in terms of going lower, do you mean
4 when there was regulation or do you mean when Visa
5 lowered fees?

6 PROFESSOR WATERSON: When Visa lowered
7 fees in Ireland.

8 A. So -- to give an example, so I think there
9 was two issues with Ireland from memory from the
10 early days. I cannot recall the precise timing.
11 One was that particularly when it came to debit,
12 then because Visa did not have a -- it had a debit
13 product at one point, actually, because there was
14 a debit scheme called Laser, if memory serves.

15 So if there was not a debit system in
16 place already in the country, the interchange rates
17 defaulted to the cross-border rates automatically,
18 which were potentially higher than domestic rates.
19 So in order to launch in Ireland, Visa set lower
20 rates in order to compete with other systems and
21 other schemes within Ireland.

22 But it also took account of things
23 like the acquiring side of the market and the
24 merchant side of the market. So, for example, with
25 commercial cards, there was a particular issue

1 with -- commercial debit cards, that is, there was
2 a particular issue with the farming community, and
3 where they often used their cards to make very high
4 level purchases.

5 So in order to support that, Visa
6 made some -- put some lower rates in to support
7 that. (Inaudible) market conditions, I think the
8 indication earlier was sometimes about raising
9 rates, but often it was also about lowering rates in
10 order to get that balance in place for both sides of
11 the market.

12 PROFESSOR WATERSON: Right, so -- but Visa
13 was happy to develop the scheme with
14 a framework which enabled it to compete with
15 Laser --

16 A. Yes.

17 PROFESSOR WATERSON: -- despite the fact
18 that the fees were relatively low.

19 A. I recall the fees were still -- were not
20 out of kilter with the UK, for the sake of argument.
21 If memory serves, the fee was around 20 basis points
22 originally -- I forgot the exact numbers, to be
23 fair -- which were not far from the UK.

24 PROFESSOR WATERSON: You do say in your
25 statement, which we understood operated

1 Laser -- which we understood operated lower
2 interchange fee rates than Visa's -- Visa intra
3 EEA MIFs on debit card transactions.

4 A. Yes, yes. So lower than cross-border,
5 yes. So the domestic -- there was not actually
6 a domestic rate in Ireland at the time for Visa from
7 memory. There was a cross-border rate, and if no
8 domestic rate had been set, then automatically the
9 cross-border rate applied, and that was 28 cents, if
10 memory serves. So whereas UK, I think, was about
11 8p, or 7 or 8p from memory, so -- and Laser was,
12 I think, of a similar nature although we did not
13 know.

14 So if memory serves, we set actually,
15 if -- I think we generally tried to set the rates in
16 Ireland, unless there was differences to be had.
17 Often in discussing it with -- with stakeholders,
18 the feedback was the UK is a good starting point.
19 So it was not lower than the UK necessarily unless
20 there was particular examples, like the foreign one
21 I gave earlier, but it was lower than the
22 cross-border rate, and I think that is the
23 difference.

24 PROFESSOR WATERSON: Right. Okay. Yes.

25 Then the other point that I wanted to raise

1 with you is back at paragraph 32 on page 14
2 {RC-F4/13/14}. You are talking about the
3 history here, and you say that in the middle of
4 the paragraph, the -- companies' issuers tended
5 to issue prior to the IFR what they called
6 companion cards.

7 A. Yes.

8 PROFESSOR WATERSON: You said these
9 companion cards ceased after the IFR.

10 A. Yes.

11 PROFESSOR WATERSON: So how did that work?
12 Did all the issuers of the Amex card as
13 a companion decide to drop it?

14 A. So there were two reasons for that,
15 I believe. The first is that the -- so, as you
16 probably know, the Amex system is a three-party
17 system.

18 PROFESSOR WATERSON: Yes.

19 A. But they actually operated a quasi
20 four-party system for a while. I think they called
21 it a GNS model -- I forget what GNS stands for
22 now -- where they would license an Amex card that
23 could be issued by an issuer.

24 I think often Amex still did a lot of
25 the legwork of that card, but by licensing it, they

1 costs again, I am afraid.

2 A. Of course, please.

3 MR TIDSWELL: What I would like to get
4 a sense of is just the amount of information
5 that Visa would have about issuer costs,
6 because I think that is part of your
7 background.

8 A. It was, it was, although my knowledge,
9 from memory, probably stops around about 2007 to
10 2010, because -- that was until for about 10 years
11 because (a) we wanted to do it and (b) because the
12 exemption decision from the Commission and decisions
13 that were taken by some domestic regulators required
14 us to do that work, but that ceased towards -- after
15 2007, apart from, I think, one or two countries.

16 MR TIDSWELL: That is helpful in its own
17 right. Maybe we will come back to the timing
18 in a minute. If you go back to that first
19 period.

20 A. Of course.

21 MR TIDSWELL: What I would like to get
22 a sense of really is the level of detail that
23 you had and how it related, if at all, to the
24 specific costs incurred in relation to
25 particular types of transactions. So maybe if

1 we can just walk through that a little bit.

2 I think, as I understand it, you presumably
3 would have been able to get some sense of the
4 costs associated with fraud prevention for
5 an issuer.

6 A. Yes, yes.

7 MR TIDSWELL: Presumably that would be by
8 geography. You would be starting with the UK.
9 Let us just talk about the UK at this stage.

10 A. Yes. So just to give you some background
11 on how we did this, we did it using a technique that
12 you may well have come across called activity-based
13 costing.

14 One of my qualifications is I am
15 a banker and accountant, and in fact it was my job
16 to do some of this in the bank before I moved to
17 Visa. So we would take essentially the costs of
18 the -- originally issuer and acquirers, but more
19 latterly issuers only, because of the exemption
20 decision.

21 We would look at their total cost
22 base for cards, and we would reconcile that back to
23 their real numbers, their financial accounts, and
24 then get them to allocate those costs between
25 everything. So we get down to what is the cost of

1 running the card, via quite a lot of detail from how
2 to issue the card, marketing, credit risk, fraud
3 risk, prevention losses, so really quite a lot of
4 detail.

5 Then allocations between different
6 transactions types. Now, it is worth pointing out
7 they were allocations, but they were allocation on
8 the best -- on the best basis, so quite a lot of
9 detail, yes.

10 MR TIDSWELL: So, for example, as well as,
11 say, fraud prevention, there is this question
12 of costs on the interest-free period.

13 A. Yes.

14 MR TIDSWELL: When you did that,
15 presumably would you be able to net off the
16 benefit that came from the APR, so presumably,
17 you would be looking at it in isolation from
18 the benefit -- if you have a net cost.

19 A. Yes, yes, so what we would actually do is
20 a bit like almost a tree, we would allocate
21 everything down to suit two sides. So what we are
22 doing is isolating essentially what is the cost of
23 transactors, for want of a better choice of words.

24 So if there is a cost there relating
25 to the APR on the interest rate, that would be taken

1 out of the equation completely, and we would just be
2 focusing on what is the actual cost incurred for the
3 transactor. It is worth noting that as you may not
4 be aware, if you are in the UK particularly, I do
5 not know if it works the same way abroad, in the UK
6 particularly if you borrow money on your card and
7 transact, you do not get generally get a free
8 period. So there would not be a cost in that sense.

9 That is an interesting tip for
10 anybody who might want to -- maybe my issuing -- the
11 issuers might not be saying that now, but there we
12 are. So we would look purely at the actual real
13 cost incurred by the banks in that sense. That was
14 typically, although you could have a possible
15 maximum of 56 days, typically it was around 30/35
16 days as an average.

17 So if you took -- if you took today
18 what you assumed the funding cost of a bank would
19 be, which would be slightly above base rate
20 generally, and take 30 days over 365, you can work
21 out the cost of -- the free funding issuer cost, if
22 you like, which would today be in my head about 40
23 basis points, I imagine, but I would need to check
24 that on a calculator.

25 MR TIDSWELL: Yes. When you start

1 thinking about different types of transactions,
2 did you have visibility of, for example, the
3 costs associated with an interregional
4 transaction for an issuer? So did you have
5 a sense of what the actual costs for that
6 issuer would be of that type of transaction?
7 Could you go to that detail?

8 A. So we would allocate it, so we would -- we
9 had a mechanism for allocating it. If memory
10 serves, we had a methodology that was originally
11 written even before I joined Visa, and it was
12 checked by, if memory serves, Deloitte consulting in
13 early 2000s. The methodology for once we captured
14 those costs, how we would allocate it at and what --
15 particularly, what statistics you would use to
16 actually allocate costs between.

17 So you would have some things where
18 you would say, well, you would assume that you had
19 allocated that cost based on transaction numbers or
20 on value or on actual fraud. You would ask certain
21 detail from the issuers as to what costs they have
22 incurred for different things. So if they had not
23 incurred certain costs, or you could not split it
24 out easily, then you would look for data points to
25 do that allocation. So you would end up allocating

1 between domestic intra-regional and interregional
2 transactions. So yes is the simple answer, but you
3 would do it based on either factual evidence, if you
4 had it, or allocations based on the ABC principles.

5 MR TIDSWELL: In that process, what about,
6 for example, if the issuing bank charged a fee
7 to the cardholder for using that card overseas,
8 would that then be netted back out again as
9 well? Have you got that captured in the
10 process?

11 A. So there is two answers to that question.
12 The first one is prior to the exemption decision
13 that we had with the European Commission, we would
14 look at -- I think I mentioned very early today, we
15 used to call them cost studies, but actually they
16 were originally cost and revenue studies.

17 So we would look at the revenues of
18 acquirers and costs of acquirers, and the revenues
19 of issuers and the costs of issuers. So there would
20 be that netting-off principle on both sides of the
21 equation. Once we moved into the exemption decision
22 in 2002, the exemption decision was quite precise on
23 what should be in the model and what should not be
24 in the model. We captured everything to start off
25 with, but then we only took into the final modelling

1 the -- what the Commission said was allowed.

2 MR TIDSWELL: So am I right in thinking,
3 just to make sure I understand that, from that
4 point on, the decision about how you treated
5 issuer and acquirer costs was determined by the
6 Commission's framework, is that right?

7 A. Essentially, yes.

8 MR TIDSWELL: So when you came -- I know
9 you had some involvement with setting
10 interchange fees, but I do not think it was
11 really your main responsibility; is that right?

12 A. Well, it was my responsibility to take
13 stakeholder feedback and to pass recommendations to
14 the various committees or boards depending on the
15 timeframe. It was not my decision to make the
16 decision. It was my decision to present the facts
17 to a board or to -- and in some cases make
18 recommendations.

19 MR TIDSWELL: Yes.

20 A. I think it is fair to say that Visa always
21 sought to set the fee that -- in my experience, Visa
22 always sought to set the fee they thought was the
23 correct fee, but that it had to observe that there
24 can be maximums to that. The maximum was set
25 originally based on the 2002 exemption decision, and

1 then obviously further decisions after that.
2 I think it is fair to say in my experience, in most
3 cases, Visa considered the fee should be slightly
4 higher, and therefore the cap became the de facto
5 level, but not for every rate and not for every
6 circumstance.

7 MR TIDSWELL: Can I ask you just
8 a different subject, related but slightly
9 different, just paragraph 34 {RC-F4/13/15} of
10 your witness statement, if you will pull that
11 up. You are talking about the position post
12 IFR, and you say in the middle there, because
13 of the reduction in the MIF:

14 "... on almost every credit card
15 transaction, where cardholders use their credit
16 cards as a charge or deferred debit card and
17 pay off their credit card balance in full each
18 month, Issuers will actually lose money."

19 A. Yes.

20 MR TIDSWELL: Can I ask you how you know
21 that --

22 A. I think -- I would suggest it is
23 an issue -- not the best person to answer that
24 perhaps -- but I would suggest the answer to some
25 extent goes to what I was saying a few moments ago.

1 If you think even today, and if I think back to when
2 I did cost studies, now, the data will be out of
3 date, but I suspect it will not have changed
4 massively. If memory serves, when I did cost
5 studies back in around the mid-2000s, if you looked
6 at the entirety of an issuer -- in the UK, this is,
7 it was a bit cheaper abroad for different reasons
8 I am going to -- in the UK it would cost you around
9 3% to run a card.

10 But probably half of that related to
11 the borrower, to people who were borrowing money and
12 whatever else, so if you chuck that aside, you are
13 left with maybe 1.5%. Then if you said: well, okay,
14 there is 1.5% to run, like the transactor's card,
15 for want of a choice of words, which is probably
16 people like you and me perhaps; then if you then
17 look at the cost categories that the
18 European Commission accepted as being of benefit to
19 the merchants, which from memory were payment
20 guarantee, the fee from the period, and transacting,
21 and there were certain components of that, you
22 broadly have that number again. So it came out of a
23 range between about 70 basis points and 1%.

24 So historically, the cost was -- was
25 much, much higher than 20, 30 basis points. In

1 memory, fraud would be probably around 5, 10 basis
2 points, for prevention, being about 10 basis points.
3 There would be quite a few components of that that
4 would be at least 5 or 10 basis points.

5 But if you purely think a few moments
6 ago about the funding period, mathematically, if you
7 got your calculator now and took base rates, even if
8 bank uses base rate as its funding cost, usually
9 base rate plus a little bit, base rates funding
10 cost, and take 30 days over 365, that is roughly the
11 basis points. So even not counting any of the cost
12 at all, not counting the cost of the card or any
13 fraud risk and deciding who shares that cost, the
14 free funding period itself will exceed 30 basis
15 points.

16 MR TIDSWELL: So when you say where
17 cardholders use their credit cards and the
18 issuer is losing money, are you talking about
19 the issuer losing money in relation to that
20 card, or in relation to the portfolio?

21 A. So it would be that card.

22 MR TIDSWELL: Yes.

23 A. I assume they will be somehow -- they must
24 be cross-subsidising it somehow, so either people
25 involved, or from other banking relationships, or

1 other services. But in terms of my card, and the
2 cards I have got in my wallet, my issuer will be
3 losing money on my card.

4 MR TIDSWELL: Yes, thank you. That is
5 very helpful. Thank you.

6 THE PRESIDENT: We have no further
7 questions.

8 Mr Woolfe, anything arising out of that?

9 MR WOOLFE: No, sir.

10 MR KENNELLY: No re-examination either.

11 THE PRESIDENT: Thank you, Mr Steel, we
12 are very obliged to you. You are released from
13 the witness box with our thanks, so thank you
14 very much. I think, although it is 25 past, we
15 will take a second break now and resume with
16 the next witness in 10 minutes.

17 (12.25 pm)

18 (A short break)

19 (12.35 pm)

20 THE PRESIDENT: Mr Kennelly.

21 MR KENNELLY: We are calling our next
22 witness, Ms Helen Jones.

23 THE PRESIDENT: Thank you.

24 MS HELEN JONES (sworn)

25 THE PRESIDENT: Ms Jones, do sit down and

1 make yourself comfortable. I think there is
2 a glass -- yes, there is -- with some water
3 there.

4 A. Thank you.

5 THE PRESIDENT: You will have some
6 questions. Before I hand you over to
7 Mr Kennelly, you may not have heard what I said
8 to other witnesses, but documents tend to come
9 up electronically. Do ask if you want to see
10 other pages beyond those that are displayed,
11 because this is not a memory test; this is
12 an opportunity for you to give your evidence,
13 and you are entitled to see material that is in
14 the record. With that, I will hand you over to
15 Mr Kennelly.

16 Examination-in-chief by MR KENNELLY

17 MR KENNELLY: You are just going to be
18 given a white folder. Thank you very much.
19 Ms Jones, could you open, please, in that
20 folder tab 1, and behind tab 1, you should see
21 your first witness statement. Is that the
22 first page of your first statement
23 {RC-F4/14/1}?

24 A. It is.

25 Q. Could you turn, please, to page 18

1 {RC-F4/14/18}. The page numbers are at the bottom
2 of the page. Is that your signature?

3 A. It is, yes.

4 Q. Are the contents of this statement true to
5 the best of your knowledge and belief?

6 A. It is, yes.

7 Q. Could you turn please behind tab 2, to
8 your second witness statement, and is that the first
9 page of your second statement {RC-F4/18/1}?

10 A. That is correct, yes.

11 Q. Could you turn, please, to page 4
12 {RC-F4/18/4}. Is that your signature?

13 A. It is, yes.

14 Q. Are the contents of this statement true to
15 the best of your knowledge and belief?

16 A. That is correct.

17 MR KENNELLY: Thank you. Mr Beal will
18 have some questions for you.

19 Cross-examination by MR BEAL

20 MR BEAL: Ms Jones, at paragraph 11 of
21 your first statement {RC-F4/14/3}, you talk
22 about the ability to identify text on a card
23 that indicates the card is a commercial card;
24 can you see that?

25 A. Yes.

1 Q. Has that always been the case: that
2 commercial cards have been marked with
3 a "commercial" on them, or "business"?

4 A. It has always been the case that the first
5 six digits identify that it is a commercial card.

6 Q. Not for the text itself?

7 A. I am not 100% sure.

8 Q. It is a requirement now under the
9 interchange fee regulation, is it not, to put
10 distinguishing features on cards between commercial
11 cards and consumer cards?

12 A. That is correct.

13 Q. Could we look in the Visa rules
14 {RC-J4/89.2/291}. This deals with Visa business
15 issuer requirements, and it says in the first
16 paragraph there, you have to provide a welcome pack
17 and so on. What I could not see there was any
18 requirement for specific text to be issued on the
19 face of the card itself?

20 A. I am not 100% familiar with all of the
21 rules that we have, but it is definitely standard
22 practice that we use that we identify commercial
23 card on our plastics.

24 Q. Then at page 294 {RC-J4/89.2/294} of this
25 bundle, we will see that there is, for example with

1 Platinum cards, where Visa Platinum Business is
2 identified under 4.16.1 and so on. 4.16.1.4 at the
3 bottom of page 294 says that:

4 "In the CEMEA Region: The product
5 name 'Visa Platinum Business' must appear on the
6 front of the Card."

7 A. So I do not manage the CEMEA region.
8 I manage the European region. But okay.

9 Q. Are you aware of any rules specifically in
10 the rules that deals with the Europe region; in fact
11 there is some rules?

12 A. Okay.

13 Q. Go to page 296 {RC-J4/89.2/296}, please.
14 There are some rules, I should say.

15 A. Okay.

16 Q. They are about the programme though, are
17 they not, at the bottom of that page, rather than
18 about the text on the face of the card? 4.16.3.5.

19 A. Okay.

20 Q. Then over the next page {RC-J4/89.2/297},
21 4.16.3.6, in a particular part of the Europe region,
22 namely France, the platinum business user must
23 display platinum business URL and then have
24 a website.

25 A. Okay.

1 Q. Can you point me to a specific rule in the
2 product rules that imposes an obligation to bear,
3 for example, "Visa business" on a business card?

4 A. I just do not think it is practical for me
5 to know all the rules that relate to commercial --
6 it is definitely standard practice that that is
7 something we would do.

8 Q. It is right, is it not, that if somebody
9 has a business card that is linked to a contactless
10 transaction, for example, there is no way in which
11 the merchant would know whether a commercial card
12 has been presented for contactless or a consumer
13 card?

14 A. I cannot think of an example.

15 Q. But they would not know in advance of --

16 A. I am just trying to think --

17 Q. -- a terminal possibly saying that it was
18 a business card?

19 A. I am just trying to think that through
20 from a contactless to a in present card transaction.

21 I do not know the answer.

22 Q. Paragraph 18 of your witness statement,
23 your first one, please, page 5 {RC-F4/14/5}, you
24 identify four different things that you say are
25 features found with consumer cards. Can we just

1 look at those and then do a compare and contrast
2 exercise. You say employees' spending can be
3 limited. That is true also, is it not, with
4 personal credit cards? If I, as I do, have late
5 teenage children, and I want to cap the amount on
6 their credit card, I can do so with my bank?

7 A. You can to a lesser degree, yes.

8 Q. Next one is that the business can track
9 the spend of their employees and monitor their
10 location, based on their transactions. Again,
11 consumers receive printed or electronic statements
12 of their transactions, do they not?

13 A. Okay, but on a corporate transaction, on
14 a corporate card programme, you are talking about
15 hundreds, hundreds of them, employees, that you have
16 got to keep track of, hundreds of employees that you
17 have to set a record for. It is not just an
18 individual setting a card limit for a child or
19 seeing where you spent your money. This is on
20 a large-scale programme.

21 Q. We know that the bulk of the value of the
22 commercial card market is for small and medium-sized
23 enterprises; correct?

24 A. Yes.

25 Q. Corporate cards make up a small by value

1 proportion of that market, correct?

2 A. Say the question again.

3 Q. Well, corporate cards, as a distinct
4 sub sector of the commercial cards market --

5 A. Yes.

6 Q. -- is a small percentage by value of the
7 overall commercial card market?

8 A. That is correct.

9 Q. So when we are talking about commercial
10 cards, for example, that the high street solicitors'
11 firm may have, or a high street merchant may have
12 for their individual employees, that is not going to
13 involve hundreds and hundreds of employees, is it?

14 A. It is going to involve more complexity,
15 though. There is a lot more cross-border at higher
16 transaction value.

17 Q. Why would it necessarily involve more
18 cross-border transactions?

19 A. Small businesses notoriously spend more
20 cross-border than consumers.

21 Q. But if consumers go on holiday frequently,
22 they would spend quite a lot, would they not, on
23 a cross-border basis?

24 A. But small businesses make a lot more
25 purchases cross-border.

1 Q. If I have got a --

2 THE PRESIDENT: Ms Jones, just pause
3 there. Where does that information come from?
4 I mean, how do you know that? I am sure it is
5 right, but ...

6 A. Yes, it is just from experience of being
7 in the market for that long, is -- the way that
8 a small business programme operates is very
9 different to how a consumer programme operates.

10 MR BEAL: In trying to deal with the
11 differences you have identified in paragraph 18
12 {RC-F4/14/5} rather than the generic, if I can
13 put it this way, the generic business
14 environment --

15 PROFESSOR WATERSON: Could I just go back
16 on another aspect. You said obviously
17 businesses track expense of their employees;
18 that makes it more complex. But that is
19 presumably because there are a lot of cards.
20 Each employee has their own card.

21 A. That is right.

22 PROFESSOR WATERSON: So thinking about the
23 individual employee, is it any more complex
24 than the individual domestic consumer like me
25 who has the card.

1 A. I understand, I understand where you are
2 coming from. I think, and I am not trying to --
3 I am just trying to identify what the differences
4 are, and why we run small businesses different than
5 we run consumer programmes. There are a number of
6 statements here. Some relate to small business,
7 some relate to corporate card. There is a mixture
8 of the two. It is not -- each answer is not for
9 each individual player in the ecosystem.

10 So in commercial card to the very
11 high end, as you say, hundreds of employees, very
12 complex infrastructure, lots of cross-border. It
13 varies as it goes down the chain. Is small business
14 more akin to consumer? Yes, that is a true
15 statement, but there is still a variation between
16 the two.

17 MR BEAL: In relation --

18 THE PRESIDENT: I want you to expand on
19 that, though. We are just interested in the
20 mechanics of how it works, in your experience,
21 the differences arise. So why do these
22 differences exist, given, as what has been
23 said, every member of the corporate scheme will
24 have a card and will be using it for
25 transactions, just the way an individual person

1 will be using it, so where does the difference
2 lie?

3 A. Sorry, say that again?

4 THE PRESIDENT: Well, I am just interested
5 in why you see this very stark difference
6 between SMEs, large enterprises, individual
7 cardholders, given that everyone is going to be
8 having a card which is going to be operating in
9 precisely the same way, particularly in the
10 electronic world where they are recorded in
11 a manner that is no doubt susceptible to
12 a degree of control by the scheme.

13 A. Okay. So if you think about the level of
14 control needed for a consumer, an individual. They
15 get their bank statement, they pay their bank
16 statement. They can control their spend, to
17 a certain degree, they can reduce their cards, etc.

18 You move to small businesses. They
19 need much more spend management, expense management,
20 tie-ins to their accounting platforms, they need to
21 track their spend a lot better, they need to set
22 limits if they have contractors, as I said, it is
23 more cross-border, and then you go to the extreme
24 which is corporate cards, which is huge travel and
25 expense programmes, run by large enterprises like

1 Visa or Microsoft, or whoever, that have thousands
2 of employees all across the world that need managing
3 from a completely different infrastructure
4 perspective than you do right down to the consumer
5 level.

6 THE PRESIDENT: So this managing is done
7 by whom?

8 A. So the managing of a large programme will
9 be done by accounting administrators put into the
10 companies by large banks. So a large bank would put
11 accounting administrators into a company and they
12 would manage the day-to-day operations of the
13 corporate card, but then the back end would be
14 managed by a -- the FI operation centre, so the call
15 centres and the back-end supply, like the back end
16 infrastructure of that. They are not managed by the
17 individual cardholders.

18 THE PRESIDENT: So take this example of
19 an issuer employee being, as it were, embedded
20 in a corporation.

21 A. Yes, yes.

22 THE PRESIDENT: You would find that they
23 would effectively operate as, what, the
24 issuer's representative within the company to
25 make the scheme operate smoothly and would

1 interface with the issuing bank?

2 A. Yes, but you as an individual cardholder
3 would not -- you would not control the card.

4 THE PRESIDENT: No, I understand that.

5 A. Okay.

6 THE PRESIDENT: I am just interested in
7 the notion that there is a hugely different
8 cost structure. I appreciate that the control
9 is different. I mean, obviously if I am
10 an employee being given a card, then it is not
11 my card, it is not really my money. So I get
12 that. But that is not really what we are
13 talking about here.

14 A. Yes.

15 THE PRESIDENT: What we are talking about
16 is why is it that there is this, well, I am
17 reading from you, quite fundamental difference
18 not in terms of the cardholder's usage of the
19 card but the costs profile of the card. It
20 depends on whether the economic entity using
21 the card is a massive corporation, ie
22 Microsoft, or an SME or an individual.

23 A. Yes.

24 THE PRESIDENT: So I am not quite sure
25 I get the expense difference, the cost

1 difference.

2 A. So the cost difference is to the bank, to
3 the FI. So I worked at Bank of America for quite
4 a long time and I ran the operations centre for the
5 commercial business and so there was a very stark
6 comparison between the costs of our infrastructure
7 versus the costs of the consumer infrastructure and
8 the costs of the SME infrastructure was somewhere in
9 the middle and I do not know the huge details of the
10 SME infrastructure, but I do know the details of the
11 commercial infrastructure --

12 THE PRESIDENT: Right.

13 A. -- and because you are running large
14 corporate programmes you have to run a different
15 level of service, so you have to have a different
16 level of call centre operators, you have to have
17 different times you answer the phone because the
18 calls are more important. The average transaction
19 size is four times bigger.

20 The implication of a declined
21 transaction at that level, versus a declined
22 transaction at a consumer level, there is a stark
23 difference in that and so the level of complexity of
24 the back end has to be more complex, the costs of
25 the back end has to be more complex.

1 Often it has to be multilingual,
2 often it has to be 24/7, you have to answer the
3 phone way more quicker than you do with a consumer.
4 The fraud controls have to be tighter, the
5 relationship to the banks are a lot more important
6 because they are their big corporate clients and so
7 the back-end infrastructure that you have to support
8 is just more complex and therefore more complicated.

9 THE PRESIDENT: You would say that viewing
10 it as a metric of cost per card, even on that
11 basis?

12 A. I would. I would because --

13 THE PRESIDENT: Okay, no, that is my
14 question because you mentioned costs but of
15 course you would expect that the costs of
16 a million cards is going to be more than the
17 cost of a single card. But if you divided the
18 cost of the million cards by a million, you
19 would get an outcome that is higher than the
20 cost for my individual card?

21 A. I understand that, except whether the --
22 the value of the transaction that you are making at
23 the time, whether you work for a small company that
24 is starting up, that is trying to build their
25 businesses versus Microsoft is still as important

1 when you are buying a client dinner. If your card
2 is declined, that has serious implications on
3 whether you are making a small £30 consumer
4 transaction; it has a much different implication to
5 you as a client to the bank.

6 So if you are a small programme with
7 20 clients, or you are a Microsoft -- sorry, with 20
8 employees, or you are Microsoft with 20,000
9 employees when you are making that client dinner
10 transaction and your card is declined, getting
11 through to the call centre in record time, in the
12 language that you want to be spoken to in, within
13 -- this is my experience at Bank of America -- it
14 just has a bigger impact on getting that wrong than
15 it does on a consumer transaction.

16 The other point is if you do not make
17 that transaction at the time -- so if you are buying
18 a £3,000 client dinner and it gets declined, what do
19 you do? Like -- on consumer, what do you do? It is
20 a £30 transaction, you have probably got something
21 else in your wallet, you have probably got cash, you
22 can use an alternative form of payment.

23 If that happens on your commercial
24 programme and you are buying a £2,000 dinner, it is
25 very unlikely you have got an alternative form of

1 payment other than your own personal expense.

2 PROFESSOR WATERSON: But just to come to
3 more prosaic examples. Suppose you are an
4 electrical contracting business and you find
5 the need to issue, say, 10 employees with cards
6 in case they want to -- they are halfway
7 through a job, and they realise they have not
8 got something that they need from the shop. On
9 a per card basis, would you say the costs are
10 any different for that sort of business --

11 A. For sure, yes.

12 PROFESSOR WATERSON: -- than for
13 a consumer on a per card basis?

14 A. There are and I think there is a definite
15 distinction between, as you move down, small
16 business, small corporates, large corporates.

17 PROFESSOR WATERSON: Yes, I understand
18 that. I am talking about small business versus
19 consumer.

20 A. Oh, small business. Okay. Let me just
21 think.

22 The transactions that small
23 businesses are making with their small business
24 cards make their small business run and so similarly
25 but on a smaller scale to your example, if they are

1 buying -- I do not know how much chainsaws are --
2 a £4,000 chainsaw and then --

3 PROFESSOR WATERSON: The electrician
4 probably would not need it.

5 A. Okay, no, electrician, but if he was
6 buying a £4,000 electric chainsaw and he could not
7 buy that purchase, then that does have implications
8 on him as a small business owner much because he
9 might not be able to complete the job and then --
10 and therefore the infrastructure that you provide as
11 an FI at a small business level is superior to
12 a consumer.

13 It is not as extreme as the consumers
14 to large corporate example, it varies as you go down
15 the chain, but there are definitely implications for
16 those kind of purchases, yes.

17 THE PRESIDENT: How much choice does
18 an issuer offer its corporates in terms of the
19 level of service that they might seek? Is it
20 simply determined by the issuer or is there an
21 element of choice?

22 A. There is not an element of choice, not in
23 my experience anyway. That is speculative.

24 THE PRESIDENT: Okay. Suppose I am
25 a moderately large issuer. Let us pick

1 something which is beyond the SME, so I have
2 got, say, 50,000 cards that are issued and it
3 is very important, for whatever reason, that
4 the number of transaction rejections are an
5 absolute minimum because it is important to my
6 business.

7 A. Yes.

8 THE PRESIDENT: So I want to be assured
9 that first of all there will not be problems
10 and, secondly, when there are problems I will
11 get, you know, an answer within as swift as
12 possible time and I am quite prepared to pay
13 for this.

14 A. Yes.

15 THE PRESIDENT: Is that something which
16 you would recognise as a structure for these
17 sort of transactions or is it simply the issuer
18 saying: well, we need to be very sensitive to
19 the needs of our corporates and therefore we
20 will, without discussing and without offering
21 anything, we will simply provide this higher
22 level of service?

23 A. My opinion is you could not be competitive
24 if you did not provide that level of service.

25 THE PRESIDENT: Yes, but that is not my

1 question. My question is choice.

2 A. So the choice is not -- is not -- is with
3 the issuer.

4 THE PRESIDENT: Right. So the issuer
5 chooses but they will be looking at what other
6 issuers are doing in order to maintain
7 accounts.

8 But if I come and say, "I would like this
9 service", you will say, well --

10 A. No, it is --

11 THE PRESIDENT: -- "we do what we do"?

12 A. Yes.

13 THE PRESIDENT: Okay.

14 A. There may be examples of FIs providing
15 sort of a gold, silver tiered service. I do not
16 know. It is not something we did at
17 Bank of America.

18 THE PRESIDENT: I am grateful. Does it
19 follow therefore that the charges that are made
20 to corporates for cards being issued, there is
21 no variation in terms of what is charged for,
22 is there a difference in terms of what an SME
23 versus a corporate is charged for the issue of
24 a card to one of their employees?

25 A. That is a difficult question to answer

1 because the large corporate deals are negotiated
2 with the corporates on a per card basis, whereas an
3 SME card would be charged based on the cost of the
4 SME card, whereas a large corporate cardholder would
5 not know the price.

6 THE PRESIDENT: Right. Again, it is I am
7 sure my fault. You said -- it is a difficult
8 question -- because the large corporate deals
9 are negotiated on a per card basis. So does
10 that mean they pay a certain amount for each
11 one issue or how does that work?

12 A. Sorry. The large corporate programmes are
13 just negotiated with the FIs. The cardholder would
14 never know what that deal was.

15 THE PRESIDENT: Right.

16 A. Or the card --

17 THE PRESIDENT: I am not really worried
18 about what the cardholder knows. I am worried
19 about what is paid to the issuer for the
20 service being provided by whomever. So let us
21 ignore --

22 A. It would just be based on the issuer deal,
23 which --

24 THE PRESIDENT: Right, but there would be
25 a payment flowing from the large corporate to

1 the issuer for the service that is provided?

2 A. There would.

3 THE PRESIDENT: How would that typically
4 be calculated?

5 A. I -- I would not -- I do not know the
6 answer.

7 THE PRESIDENT: Okay. Moving then on to
8 the SME. How would that be done?

9 A. The cost of the card would usually be
10 included in their premium banking costs for the
11 accounts.

12 THE PRESIDENT: I see. Right. So there
13 will be charges but it will be a general
14 charge --

15 A. Usually.

16 THE PRESIDENT: -- in regards to the
17 account?

18 A. Yes.

19 THE PRESIDENT: But again is this
20 something which is informed by competition
21 between issuers to attract corporate customers
22 in whatever size to their bank?

23 A. That is right.

24 THE PRESIDENT: Okay. Thank you very
25 much.

1 MR BEAL: I am conscious of the time, so
2 if I could just ask one follow-up before the
3 short adjournment.

4 THE PRESIDENT: Of course.

5 MR BEAL: Could we go, please, to
6 {RC-J4/92/1}. This should be a schedule of the
7 MIF rates set by Visa in November 2022 and
8 under the "Commercial" tab you will see that
9 there is a Visa business debit rate.

10 A. Yes.

11 Q. Which is 0.5 for card present,
12 contactless, and 1.15 for card not present, for
13 example. Can you see that?

14 A. I can.

15 Q. Those figures are substantially higher
16 than the rates on offer for consumer debit both
17 secure and non-secure, can you see that?

18 A. I can.

19 Q. So if I am a small business -- indeed
20 I can speak from personal experience because I have
21 a professional account card issued by my issuer
22 which is almost certainly classified as a commercial
23 card. If I pay with that in a shop, the MIF is the
24 elevated rate, correct, whereas if I pay with my
25 consumer debit card on my personal account, the

1 merchant pays the lower rate?

2 A. Correct.

3 Q. There is no good justification for that
4 differential, is there?

5 A. I do not agree. I do not agree with that,
6 but...

7 MR BEAL: We will come on to it.

8 THE PRESIDENT: Why not? We are very
9 interested in the reason.

10 A. Because there is still a differentiator
11 between consumer and business debit from an FI
12 perspective. I do not set interchange, that is not
13 my job at Visa, that is not what I do. I manage our
14 commercial card programme.

15 So all of this is just opinion and
16 based on experience of being in the industry for
17 quite a long time. There is still a differential
18 between how a small business programme is managed
19 versus the consumer programme is managed.

20 THE PRESIDENT: So just to conclude that
21 thought, you, looking at these differences in
22 rates, are very comfortable that they reflect
23 the underlying costs?

24 A. I think they -- I think they reflect the
25 complexity that the FI has at the back end, yes.

1 MR BEAL: Perhaps that is a good moment to
2 break.

3 THE PRESIDENT: Ms Jones, we are not going
4 to finish your evidence this side of lunch.
5 Please enjoy your break, but do not talk about
6 the case with anyone and we will see you at
7 2 o'clock.

8 A. Thank you.

9 THE PRESIDENT: Thank you very much.

10 (1.04 pm)

11 (The short adjournment)

12 (2.00 pm)

13 THE PRESIDENT: Good afternoon, Ms Jones.
14 Mr Beal.

15 MR BEAL: Thank you, sir. Ms Jones,
16 please could you look at paragraph 20 of your
17 witness statement -- {RC-F4/14/6} of the first
18 statement. You suggest there, do you not, that
19 it is not possible for businesses to allow
20 employees to pay with a personal credit card.
21 Why can they not do that? Why can't businesses
22 let their key executives pay with a personal
23 credit card and then claim it back on expenses?

24 A. I mean, I suppose it is possible for the
25 pay to media campaigns, marketing events, etc, but

1 it would be very costly. Most people do not have
2 that there but they could allow it.

3 Q. Paragraph 21, you go through certain
4 factors you say distinguish commercial cards from
5 consumer cards. Can I track back from that: both
6 cards carry multi-lateral interchange fees; correct?

7 A. Correct.

8 Q. The way that those rates are set is by
9 either Visa UK or Visa Europe?

10 A. Correct.

11 Q. Now Visa Inc. There are no differences
12 essentially in the mechanism by which that process
13 takes place?

14 A. That is just not -- that is not my area.
15 I do not set interchange.

16 Q. It is dealt with by Mr Steel, Mr Steel
17 recognises that the process for implementing all
18 MIFs is broadly the same, regardless of whether it
19 is commercial or consumer?

20 A. Again, I cannot comment on that.

21 Q. None of the differences that you are
22 identifying here go to the process of setting the
23 MIF rate, do they?

24 A. They do not.

25 Q. Are you aware, for example, that the

1 charge-back procedure is available for commercial
2 cards as well as consumer cards?

3 A. I am aware, yes.

4 Q. Dispute resolution process applies to all
5 cards?

6 A. I am aware of that, yes.

7 Q. Paragraph 21.2 at the bottom of page 6 of
8 your statement {RC-F4/14/6}, you say commercial card
9 transactions are more important. Just pausing
10 there. It would be possible for
11 Professor Waterson's electrician, to send an
12 electrician to a hardware store to pick up a box of
13 fuses, correct, with a commercial card?

14 A. Correct.

15 Q. You might buy, I would hope, a suitably
16 expensive holiday on your personal credit card?

17 A. Correct.

18 Q. You mention a CEO being embarrassed at
19 dinner if the business card is declined. Surely
20 that CEO would simply pull out her personal credit
21 card and pay for dinner on that, would she not?

22 A. That is possible.

23 Q. In paragraph 21.3 you are dealing with
24 fraud costs. Are you aware that the Visa rules
25 permit recovery from a cardholder that is fraudulent

1 or negligent?

2 A. I am aware of that, yes.

3 Q. So the fraud risk can be borne by
4 acquirers as well, can it not?

5 A. I am not an expert when it comes to fraud
6 transactions.

7 Q. Acquirers bear the risk of charge-backs,
8 do they not, in the event that a charge-back
9 claim is successful, but the merchant has
10 disappeared, it is the acquirer that is left out of
11 pocket?

12 A. This is just not my -- I am just not
13 comfortable answering that question.

14 Q. You have given evidence about fraud costs
15 and allocation and it being very important for
16 issuers to cover their fraud costs so I am just
17 wondering if you do not feel comfortable, why we are
18 having this discussion?

19 A. Do you want to talk about fraud risks and
20 fraud costs? This was in relation to the fraud costs
21 incurred by the FI in the back-end infrastructure
22 that they needed.

23 Q. It is a very specific subset of fraud
24 costs that a financial institution, an FI, incurs
25 doing fraud screening etc; is that right?

1 A. That is right.

2 Q. So it does not cover all the other myriad
3 ways of detecting or dealing with fraud that the
4 other participants in a four-party scheme incur?

5 A. They are different, that is correct.

6 Q. We do not have any evidence from you, do
7 we, of the specific costs that issuing banks incur
8 when dealing with fraud screening?

9 A. No.

10 Q. So how are we able to assess halfway down
11 paragraph 21.3 that the costs per card of running
12 fraud screening systems is much higher than for
13 consumer cards?

14 A. Can I read my paragraph?

15 Q. Of course yes, it is halfway down 21.3.
16 It says:

17 "The costs per card of running ..."

18 A. So all I do know is that the costs of our
19 fraud back end systems at Bank of America were more
20 expensive than our consumer.

21 Q. That was on the basis, was it, that you
22 had fewer cards being issued in the corporate sphere
23 and therefore you were dividing a sum and then
24 dividing -- so you did not do a transaction per
25 card?

1 A. That was not why it was more complicated;
2 it was more complicated because of the nature of the
3 transactions. I dealt with commercial card at that
4 time and therefore the nature of the transaction of
5 commercial card just being global in nature,
6 travelling around the world, subject to more open
7 fraud and the fact that the declined cards, the
8 declined transactions for commercial card just had
9 a bigger implication than a declined transaction for
10 consumer choosing a holiday is quite an extreme
11 consumer transaction, average transaction value is
12 very different.

13 Q. Did you actually secure data which gave
14 you a cost for fraud per consumer card?

15 A. I did not.

16 Q. Did you look at the average spend per card
17 and the differences between the average spend per
18 card for consumer versus commercial cards?

19 A. I did.

20 Q. Have you determined the percentage of
21 revenue that issuers derive from commercial cards
22 for their overall card issuing process?

23 A. I did not.

24 Q. As a matter of principle the MIF revenues
25 from commercial cards per transaction are going to

1 be higher than consumer cards because the MIF is
2 higher, correct?

3 A. That is correct.

4 Q. When you talk about the consequences of
5 transaction going wrong are you simply basing that
6 on the average value per transaction being higher?

7 A. No. I am basing that based on my time at
8 Bank of America and the implications of declined
9 transactions versus consumer declined transactions.
10 It was not just based on ATV; it was based on as we
11 talked about before dealing with large corporate
12 programmes and large corporate transactions,
13 declined transactions had a bigger implication.

14 Q. In paragraph 22.3 at page 9, {RC-F4/14/9}
15 you refer to multi currency functionality. But
16 consumer cards have multi currency functionality as
17 well, do they not?

18 A. They do.

19 Q. In paragraph 23, page 10, {RC-F4/14/10}
20 you refer to certain levels of additional costs in
21 operating a commercial card programme but we do not
22 have any figures or data behind that, do we?

23 A. Can I just read this?

24 Q. Of course.

25 A. Thank you. (Pause) No, this is just

1 based on my experience at Bank of America.

2 Q. If we look, please, at {RC-J4/3/5}, you
3 will see in the third paragraph down this is in
4 a response to the European Commission's Request for
5 Information some time ago but it says:

6 "As Visa does not determine the
7 contract terms between issuers of commercial cards
8 and their customers, Visa is not in a position to
9 know exactly what further services or functions
10 issuers of commercial cards may provide which are
11 not provided for consumer cards."

12 You then identify to the best of
13 Visa's knowledge, or Visa identifies to the best of
14 its knowledge, the sorts of things they might do.
15 But again we do not actually have any individualised
16 data from an issuer saying: these are our costs, do
17 we?

18 A. This is based on my experience as
19 an issuer but not data, no.

20 Q. Paragraph 25, we come on to look at the
21 alleged competitive threat posed by Amex; can you
22 see that in paragraph 25?

23 A. Yes.

24 Q. In paragraph 26 you say they hold 10% of
25 the share in the commercial market. Could we look,

1 please, in {RC-J5/40/23}, this is showing some
2 commercial charge credit and prepaid sectors, so it
3 is commercial cards and then it is divided up by
4 sector, can you see looking at the share of total
5 purchase volume in the two bar graphs at the bottom
6 the page, from 2021 we see that Amex's share of the
7 total purchase volume across the commercial sector
8 had decreased from 11% to 10%; can you see that?

9 A. I can.

10 Q. If we then please look at page 26,
11 {RC-J5/40/26}, it was anticipated that there would
12 be -- this was post-Covid, there had been
13 a shut-down of the travel industry etc, it was
14 anticipated there would be a bounce-back for T&E
15 cards -- travel and entertainment cards -- once the
16 travel sector recovered. It is right, is it not,
17 that quite a lot of online travel agencies use
18 virtual cards which is a species of commercial card?

19 A. That is correct, yes.

20 Q. We see it is anticipating a spike in
21 recovery in this sector, it is predicting growth --
22 average growth from 2019 to 2025 that is 11, 14 and
23 9% in total in terms of purchase volume.

24 Growth rates above 28%, 30%, 26% in
25 absolute terms but that was adjusted revenue growth

1 rate that was predicted as CAGR.

2 So that shows, does it not, a likely
3 growth spurt in this particular sector of the
4 commercial card market?

5 A. So this is RBR data which -- I am not sure
6 of the date that this --

7 Q. 2021. It is at the bottom the page.

8 RBR do a periodical report, do they
9 not, of commercial cards?

10 A. I am, but in terms of their key insights,
11 that is not something that we input into that, that
12 is just their opinion.

13 Q. It is right, is it not, if we look at the
14 market shares there Amex does not feature at all in
15 the virtual card sector, virtual commercial cards?

16 A. Can you go back a page?

17 Q. If one looks -- you can look at any of the
18 previous pages, perhaps page 24, {RC-J5/40/24}, you
19 will see that whenever Amex is mentioned?

20 A. Yes.

21 Q. It is shown in green, its figures are
22 shown in green?

23 A. Yes.

24 Q. Then Mastercard is red and Visa is dark
25 blue.

1 A. Okay.

2 Q. In fact Visa is separated out for Visa
3 Electron and Visa proper, Visa debit presumably.

4 Going back, if we may, to
5 {RC-J5/40/26}, there is no green tab on the bar
6 chart, is there?

7 A. There is not.

8 Q. If we then please look at page 92 of this
9 report --

10 MR KENNELLY: I am sorry, sir, I am
11 struggling. Perhaps we go could back to that
12 page, the witness was maybe asked the question
13 on a false basis.

14 MR BEAL: 24.

15 MR KENNELLY: 26. Page 26. It is not
16 clear that there was a possibility for Amex to
17 be --

18 A. No.

19 MR KENNELLY: -- listed at -- I will let
20 Mr Beal take a look at it, he may have made
21 a mistake.

22 MR BEAL: Where it says "split of virtual
23 and plastic card purchase volume" and then
24 there is "virtual versus plastic".

25 A. But that is not Mastercard versus.

1 Q. Sorry, no, you are quite right.

2 If we look to, then, page 27
3 {RC-J5/40/27}, virtual card volume. The figures for
4 Amex from 2018 to 2019 have actually gone down. Do
5 you see that?

6 A. Yes.

7 Q. Amex being the green section of those?

8 A. Yes.

9 Q. Can you see that?

10 A. Yes.

11 Q. So it is quite right that it is wrong to
12 say that it is non-existent but it is correct to say
13 that its share of this important market has
14 decreased from 2018 to 2019?

15 A. It has.

16 Q. Could we then please look at page 92
17 {RC-J5/40/92} and on that page we are seeing in the
18 right-hand side under "Key insights" it is dealing
19 specifically with the Irish market here. You will
20 see that from the top of the page at page 92.

21 A. Okay.

22 Q. It is referring to commercial cards
23 accounting for certain volumes in Ireland, can you
24 see that?

25 A. I can.

1 Q. Can you see any reference to American
2 Express in that "Key insights" section?

3 A. I cannot see any insights into any scheme.

4 Q. Then if we look at page 95, {RC-J5/40/95},
5 we see share of purchase volume by scheme and this
6 is for the Irish commercial card market, again,
7 making the point that American Express is shown in
8 green, can you see any green in those diagrams?

9 A. No.

10 Q. So it is right, is it not, that American
11 Express has no presence in the Irish commercial
12 scheme market?

13 A. Not according to this page.

14 Q. Could we then please look at page 191.
15 {RC-J5/40/191}. So RBR does an overall analysis
16 and then a per country report and at page 191 we
17 have the per country report starting for UK. On the
18 right-hand side we have some key insights and it
19 says in 2019 approximately 4% of total UK card
20 payments and 11% of volume were spent on commercial
21 products; can you see that?

22 A. I can.

23 Q. So when we are talking about shares of
24 this particular market by volume, we are immediately
25 only dealing with 11% maximum of the total payment

1 spend on payment cards in the United Kingdom,
2 correct?

3 A. According to this, yes.

4 Q. It gives a figure after that for the split
5 between commercial cards in terms of business cards
6 in contradistinction to corporate cards, and it says
7 corporate cards account for 28%, can you see that?

8 A. I can.

9 Q. If we then look, please, within that
10 sector at page 194 {RC-J5/40/194}, we see the
11 figures for American Express and whilst American
12 Express did well in credit commercial cards in UK in
13 2019 with 46% of the market, its share of total
14 purchase volume for the UK commercial card market
15 had decreased from 16% to 15% between 2018 and 2019,
16 can you see that?

17 A. I can.

18 Q. At page 197 {RC-J5/40/197}, there is
19 a section at the bottom dealing with interchange
20 fees and it says:

21 "While consumer debit and credit
22 interchange fees are limited to 0.2% and 0.3%
23 respectively, commercial card rates in the UK tend
24 to be higher with commercial credit and charge
25 products typically carrying an interchange fee of

1 between 1.3% and 1.7%"

2 It then says Visa commercial debit
3 carries an interchange fee closer to that for
4 consumer cards and Mastercard commercial debit has
5 an interchange fee closer to 1%.

6 So there is a discrepancy, is there
7 not, between commercial and consumer MIFs in the
8 United Kingdom?

9 A. That is correct.

10 Q. In terms of the commercial card sub sector
11 of the market if we look back -- sorry, if we look
12 at {RC-J5/27/129}, this is an earlier report from
13 2018 and this is dealing with the UK scheme from
14 2016 and that in terms of market share of commercial
15 cards by value, the figure in green for American
16 Express on the right-hand side of that effectively
17 piechart, American Express's figure was about 5%.
18 Can you see that?

19 A. I can.

20 Q. So over a sustained period, American
21 Express has failed to break into the commercial card
22 market, has it not?

23 A. I would just say they do not operate
24 inasmuch as the commercial card market as the rest
25 of Visa and Mastercard.

1 Q. They do not operate because they have not
2 had the market penetration?

3 A. They are in small business.

4 Q. This covers -- I thought this covered
5 corporate cards as well, we were just looking at the
6 breakdown.

7 A. Okay.

8 Q. It was business versus corporate for some
9 of the statistics that we were looking at.

10 Now, Amex itself does not see itself
11 as threatening Visa's predominant position in the
12 market. If we look, please, at {RC-J5/30.1/6} this
13 is a response to a market review that the PSR
14 conducted and this summarises American Express's
15 response. Could you read, please, the first
16 paragraph under "American Express in the UK"?

17 A. "American Express issues" --

18 Q. No, I mean to yourself, sorry.

19 A. I thought you meant out loud.

20 Q. It was not a reading test. (Pause)

21 A. Okay.

22 Q. Then four paragraphs after that there is
23 a paragraph that finishes "American Express does not
24 compete" and I will continue reading:

25 "... and could not compete on the

1 basis of ubiquity. It has to prove its value to
2 both consumer and merchants every day and must rely
3 on a highly differentiated niche business model in
4 order to compete with Visa and Mastercard.
5 American Express cards are not a must carry
6 commodity. Nearly every American Express cardholder
7 carries and uses at least one, often more than one,
8 Visa or Mastercard product. The reverse is not
9 true. Most Visa and Mastercard cardholders do not
10 have an American Express card."

11 Just pausing there, certainly
12 American Express does not think it is about to take
13 over the world, does it?

14 A. Not according to that statement, no.

15 Q. At paragraph 28 of your statement,
16 page 11. {RC-F4/14/11}

17 A. Yes.

18 Q. We see that you refer to Amex and you say
19 it is a particularly strong competitor and you refer
20 to an implicit interchange fee. There is no
21 interchange fee charged by American Express, is
22 there?

23 A. It, it is a different model. They are
24 a three-party model so it is a very different ...

25 Q. There is nobody transferring money from an

1 American Express merchant to an American Express
2 cardholder in the Amex scheme, is there?

3 A. That is because they are also the issuer.

4 Q. So American Express charges the merchant
5 for using the American Express scheme and it charges
6 the cardholder, where appropriate, for using the
7 American Express scheme?

8 A. Correct.

9 Q. So there is no suggestion that the
10 merchant is being directed to pay a sum of revenue
11 over to anyone else?

12 A. Can you repeat the question?

13 Q. I will move on. Are you aware that
14 American Express exited from the dual issuing
15 market, the GNS programme, in January 2018?

16 A. I am not.

17 Q. Could we look, please -- I am going to
18 move on from that. There is a document I can take
19 you to but if you do not know, you do not know.

20 {RC-J5} is a separate document,
21 please, {RC-J5/44.03/20}. This is part of
22 a document that the American Express Corporation
23 filed with the SEC in the United States and it is
24 a Form 10-K annual statement.

25 Could you please look under the

1 heading "Payments regulation" the second paragraph
2 under that begins:

3 "The EU, Australia, Canada ... and
4 other jurisdictions have focused on interchange fees
5 ..."

6 This is a regulatory reporting
7 American Express has made to the SEC. Could you
8 please read that paragraph to yourself and then
9 I will just ask a quick question about it. (Pause)

10 Can I just ask you a couple of
11 questions about that paragraph. The first is to ask
12 you to note that American Express formed the view
13 that the effect of regulation on interchange fees
14 had been to impose a downward pressure on its own
15 charges to its own merchants, can you see that?

16 A. I can.

17 Q. Secondly, they had gone so far as to exit
18 the networking market in the EU and Australia as
19 a result of regulatory caps on interchange fees?

20 A. Yes.

21 Q. Would you accept that merchant acceptance
22 for American Express is much lower than for Visa and
23 Mastercard?

24 A. I would.

25 Q. You are aware that merchants see Visa and

1 Mastercard commercial cards are "must take" cards?

2 A. Sorry, say that again?

3 Q. Merchants see Visa commercial cards as
4 "must take" cards; that was the evidence we had from
5 the witnesses in this trial?

6 A. Okay.

7 Q. But they do not see American Express as
8 "must take" cards, or at least some, many of them do
9 not?

10 A. No.

11 Q. So it is right, is it not, that high level
12 of merchant charges that Amex charges would deter or
13 even preclude many merchants from switching to
14 American Express?

15 A. Potentially, yes.

16 Q. Well, if they have not got the card
17 acceptance, they have not got the volume of the
18 transactions and you are being charged more for it,
19 it is going to be a pretty commercially literate
20 merchant that says: I will take that deal, thank you
21 very much, is it not?

22 A. (Nods) Yes.

23 Q. In fact if they are already taking the
24 American Express card at the price set by the
25 current level of Merchant Service Charge for Amex,

1 they would not switch away from it, would they,
2 because they are already valuing the American
3 Express service to the extent that they are prepared
4 to pay that price for it? Do you accept that?

5 A. I think so.

6 Q. If this threat posed by American Express
7 to Visa was real, you would have expected to see
8 lots of people switching to -- as issuers, switching
9 their issued cards to American Express once the
10 interchange fee cap came in, would you not?

11 A. In EU and Australia, you mean?

12 Q. In the EU, UK, yes. If your evidence is
13 issuers really like the fees, they need the fees to
14 cover the costs, they cannot get those costs covered
15 if there is a regulatory cap on interchange fees,
16 they would all switch to Amex and start issuing Amex
17 instead which I understand to be your position. Why
18 did we not see that when the interchange fee capped
19 levels for consumer cards in 2015?

20 A. I do not -- this is the first time I
21 have seen that information, so it is hard to
22 comment.

23 Q. The reality is, is it not, that if the
24 commercial MIF rates were reduced then the Merchant
25 Service Charges charged to merchants for Visa

1 commercial cards would be reduced; correct?

2 A. They would.

3 Q. We have seen that the response from
4 American Express in a regulatory filing with an
5 authority in the United States is that they would
6 respond by reducing their own charges to their own
7 merchants so that they were not inconvenienced as
8 a competitor for Visa and Mastercard; correct?

9 A. That is correct.

10 Q. That is essentially because they need to
11 maintain parity of treatment between the two
12 different schemes because they are saying: we are
13 niche, we bring added value. But at the same time
14 they have got to maintain the marginal difference
15 between the respective benefits and costs of the two
16 schemes?

17 A. I have not seen any Amex statement on what
18 they would do in the UKI, this is just information
19 on what they did in the EU and Australia that I have
20 not seen before.

21 Q. Were you aware in Australia when the
22 interchange fees were capped, American Express's
23 Merchant Service Charges actually fell?

24 A. No. As I said, I have not seen this --
25 how they reacted to EU Australia and Canada before

1 but I do not think that completely determined how
2 they would behave in the UK.

3 Q. There is surely no real risk, is there, of
4 all issuing banks suddenly switching en masse to
5 American Express because businesses are going to
6 demand universal acceptance?

7 A. It is hard to comment on that because that
8 is a statement that we do not know would happen
9 based on that.

10 Q. You are not suggesting, are you, that
11 issuing banks would simply stop issuing cards to
12 businesses, full stop?

13 A. In some cases I think so.

14 Q. All issuing banks would stop offering any
15 form of business card to any business?

16 A. That is not what I said. I think some
17 would.

18 Q. Businesses would still need, would they
19 not, business debit cards in order to pay for
20 things?

21 A. They would.

22 Q. Banks still make money, do they not, from
23 holding corporate bank accounts, having loan
24 interest, bank charges and so on, they make revenue
25 interest that customer relationship with the large

1 corporates and the small businesses?

2 A. They do, to what degree though I do not
3 know the detail.

4 Q. Nor do I.

5 Those businesses issue debit cards to
6 those businesses as part of the routine operation of
7 a banking relationship, do they not?

8 A. That is correct.

9 Q. Paragraph 28, you have also said the
10 revenue from MIFs allows issuers to fund more
11 attractive products. But issuers do not allocate
12 that MIF revenue to any particular goal, do they,
13 they just use it as a general source of income?
14 Third line down on paragraph 28, it should be, in
15 your statement, that is {RC-F4/14/11}.

16 A. Where it says "I assume"?

17 Q. "... (ie the higher the level of
18 interchange fee available, the more attractive the
19 scheme to issuers, as the interchange fee allows
20 issuers to fund more attractive products for their
21 customers)... "

22 That is what I was asking you about.

23 A. Okay.

24 Q. You see that statement?

25 A. I cannot see it, sorry.

1 Q. Well, I have also got a problem because
2 I have got -- I seem to have a different page
3 flashing up on my follow, but halfway down that page
4 it says the main payment schemes compete for issuer
5 loyalty on price; can you see that? Or perhaps just
6 look to the physical paper copy of the one that you
7 have in front of you, the first statement,
8 paragraph 28, at page 11. {RC-F4/14/11}.

9 A. Okay.

10 Q. See, what you are saying there is the more
11 money that you give to issuers from the interchange
12 fee, the more attractive their scheme would be --
13 sorry, your scheme would be, because it allows
14 issuers to fund more attractive products for their
15 own customers; can you see that?

16 A. It is not the only reason I gave, though,
17 it was attractive product, product innovation
18 relationship, strategic -- there is a number of
19 reasons I am sure they use, we use.

20 Q. The point I was putting to you is that
21 there is no evidence to suggest that issuers take
22 that sum of money and do anything particular with
23 it, is there?

24 A. No.

25 Q. At paragraph 34 of your first statement,

1 {RC-F4/14/14} halfway down that paragraph --

2 A. Yes.

3 Q. There is a statement I think you have
4 corrected in your second witness statement. You
5 said:

6 "I think that in the time I have been
7 at Visa, we have only changed commercial interchange
8 MIFs twice and I have only been to GRIP [the setting
9 committee] once. Following the ... IFR ... in 2015,
10 Visa brought the commercial card MIF rate for small
11 business cards in line with the consumer rates."

12 I think you have accepted that is not
13 true?

14 A. That is not true. It was before I joined,
15 it was just an assumption that I had made.

16 Q. But you did I think reduce the debit rate
17 for small businesses so that it was more closely
18 aligned to consumer debit; is that right?

19 A. I was not there.

20 Q. You cannot remember?

21 A. I was not at Visa sorry, at that time.

22 Q. At paragraph 36 you suggest that without
23 MIFs being in place, issuers might simply stop
24 issuing corporate cards. Can I suggest to you that
25 that is simply wholly unrealistic?

1 A. I think in the large corporate space it is
2 realistic.

3 Q. It is realistic?

4 A. Mm-hm.

5 Q. So British Airways would stop issuing
6 corporate cards to its thousands of employees in the
7 United Kingdom?

8 A. I think issuers would struggle to issue
9 corporate cards to the likes of British Airways.

10 Q. Well, if British Airways valued the
11 service and wanted their corporate executives to
12 have a corporate card, they would be prepared to pay
13 for it, would they not?

14 A. I struggle to see how -- and this is just
15 my opinion, is I struggle to see how large FIs can
16 run large corporate programmes without interchange
17 revenue without thinking of a different revenue
18 stream that they would need to create.

19 Q. Well, we have discussed different revenue
20 streams that may exist with a large corporate, they
21 have a working banking relationship with an issuing
22 bank and may, for example, be paying quite hefty
23 interest payments to that issuing bank for loans?

24 A. They do not -- on large corporate you do
25 not attract interest rates.

1 Q. It is right, is it not, that if commercial
2 MIFs were reduced, as we have seen or even
3 abolished, Merchant Service Charges for accepting
4 Visa and Mastercard corporate cards would be lower,
5 so the Merchant Service Charge on commercial cards
6 would be lower?

7 A. Correct.

8 Q. If something is lower in price, merchants
9 are more willing to accept it, surely?

10 A. We do not have a problem with commercial
11 acceptance today.

12 Q. No, but what I am putting to you is that
13 if MIF rates decreased so that Merchant Service
14 Charges decreased, commercial cards would become
15 even more attractive to merchants and therefore you
16 would find that more and more merchants were willing
17 to accept commercial cards?

18 A. Potentially.

19 Q. In terms of virtual card holdings, take an
20 online travel agency like Booking.com -- other
21 online travel agencies are available -- why would
22 they switch to American Express if American Express
23 charges were so much higher?

24 A. I am not sure what they -- what they would
25 do.

1 Q. What I am suggesting to you is that this
2 segment of the market is simply too valuable to
3 businesses to lose; they derive value from having
4 business cards?

5 A. They do have value. However, merchants
6 having value is different to whether FIs could still
7 operate in every instance as it relates to the
8 operating costs of running commercial cards.

9 Q. Now, paragraph 43 and onwards you have --
10 sorry, 41 and onwards you have dealt with the Honour
11 All Cards Rule, it is fair to say to you that in
12 your second statement I think you have expressed
13 some doubt as to exactly what the Honour All Cards
14 Rule involves; is that fair?

15 A. I think --

16 Q. I can take you to it. It is {RC-F4/18/3},
17 in the middle of paragraph 8 there. You say I am
18 not sure about the exact details of what the HACR
19 requires in relation to accepting some but not all
20 types of commercial cards since 2015?

21 A. That is correct.

22 Q. I do not want to put you on the spot. Is
23 it correct that you are not really able to help us
24 as to exactly what the Honour All Cards Rule
25 required or did not require?

- 1 A. Before my time at Visa.
- 2 Q. Before your time at Visa, yes?
- 3 A. That is fair.
- 4 Q. What it requires now, sorry, now post IFR,
5 the Honour All Cards Rule has been regulated at EU
6 level for commercial cards; is that right?
- 7 A. That is correct.
- 8 Q. If you had not found the position very
9 clear, how is a merchant meant to understand what
10 the position is?
- 11 A. I do not really know how to answer that
12 question.
- 13 Q. Moving on to surcharging. Paragraph 46 of
14 your first witness statement dealing with
15 surcharging for commercial cards has also been
16 corrected in paragraph 9 of your second statement?
- 17 A. Yes.
- 18 Q. By reference to Mr Korn's evidence about
19 corporate surcharging from corporate card
20 surcharging by British Airways?
- 21 A. Yes.
- 22 Q. Does the fact that BA chose to surcharge
23 Visa at a higher rate than Mastercard put pressure
24 on you to change the fees that BA is charged?
- 25 A. It is not something I have ever discussed.

1 Q. You would not be happy, though, losing
2 a major merchant like British Airways, would you, if
3 they were issuing your cards? Sorry, if they were
4 perhaps in a co-branding arrangement with somebody
5 issuing your cards?

6 A. No.

7 Q. You would not want them to stop taking
8 your cards or surcharging your cards more than
9 Mastercard on a prolonged basis?

10 A. No.

11 Q. So if they did start doing that, that
12 would be some pressure that a merchant -- large
13 merchant like British Airways could bring to bear on
14 the schemes to reduce the fees payable; correct?

15 A. I mean, it is hard for me to comment on
16 that. I can give my opinion potentially, yes, but
17 it is not -- it is not my --

18 Q. It is just a common sense proposition I am
19 putting to you, you do not have to accept it.

20 A. I would be uncomfortable commenting on it.

21 MR BEAL: Thank you, I do not have any
22 further questions.

23 Questions by THE TRIBUNAL

24 PROFESSOR WATERSON: Just one thing. On
25 page 11 of your first statement at the top,

1 {RC-F4/14/11} there is a table which refers to
2 from the previous page 2019 data that you
3 gathered as business intelligence, these are
4 not hard figures, as I understand it.

5 A. Yes.

6 PROFESSOR WATERSON: But one thing that
7 was interesting to me about this is that Visa
8 has quite a small presence in corporate cards
9 and a big presence in business cards and
10 purchasing cards. Is there a reason why that
11 is?

12 A. So the business card percentage there is
13 largely debit business cards.

14 PROFESSOR WATERSON: Right.

15 A. In the corporate card space Mastercard
16 does have a highest share, it holds a hard -- it
17 holds a lot more corporate card and large market
18 than we do and purchasing cards very small, so those
19 numbers are quite -- purchasing cards relates to the
20 travel and expense card which we do have.

21 PROFESSOR WATERSON: Yes, I was -- you
22 were talking there I think about the numbers,
23 okay. I am asking what underlies these
24 numbers. Why is it that Visa is
25 a relatively -- has a relatively low

1 performance in corporate cards but a much
2 higher performance in business and purchasing
3 cards?

4 A. I can speculate again.

5 PROFESSOR WATERSON: You do not know then?

6 A. I do -- well. Historically, Visa as an
7 associate we carried a large part of the debit
8 market which included consumer debit and business
9 debit. So that has just continued. Mastercard
10 heavily went after the corporate card space and the
11 large credit space.

12 PROFESSOR WATERSON: So if Visa wanted to
13 improve its position, its market share in
14 corporate cards, how would it do it?

15 A. We are improving our position in market
16 share.

17 PROFESSOR WATERSON: Okay. How are you
18 doing it?

19 A. Through a mixture of everything that you
20 use to win a deal which is people, product
21 innovation, our products are much better, we are
22 more strategic now in this space. I think we have
23 more of a competitive edge than we did 20 years ago.

24 PROFESSOR WATERSON: That is a bit vague.
25 I mean, can you give me some examples?

1 A. Well, obviously price comes into it.

2 PROFESSOR WATERSON: Right.

3 A. Interchange does come into it.

4 PROFESSOR WATERSON: Okay. So there is
5 some bargaining about interchange in this
6 sector?

7 A. You have to be competitive in interchange
8 in this sector.

9 PROFESSOR WATERSON: Right. So previously
10 you were not competitive?

11 A. No.

12 PROFESSOR WATERSON: Right. Okay. But
13 relative to Amex, are you competitive in this
14 space?

15 A. In different ways, yes.

16 PROFESSOR WATERSON: Okay. Thank you.

17 MR TIDSWELL: Could I ask you a question,
18 please, about this issue of whether businesses
19 would be prepared to pay for commercial card
20 services pay issuers. I just wondered if you
21 are aware of whether Visa has done any study or
22 other work to analyse the willingness of
23 a business to pay for a commercial card, pay
24 an issuer for commercial card?

25 A. No, we have not done that.

1 MR TIDSWELL: Are you confident you have
2 not or you are not sure whether there has or
3 has not?

4 A. Not that I know, no.

5 MR TIDSWELL: Okay, thank you.

6 Can I ask you also about paragraph 38 of
7 your statement, we will just have to wait for
8 it to come up. Have you got it there? It is
9 a question of where you talk about main issuers
10 exiting or partnering with another scheme like
11 Amex. Can you tell me what it means to partner
12 with Amex, what did you mean by that? Because
13 as I understand it, Amex does not --

14 A. Sorry, it should not say "issuers", it
15 should say -- yes, the corporates.

16 MR TIDSWELL: Yes, so because as
17 I understand it after the withdrawal from the
18 three and a half party scheme that I think you
19 were asked about --

20 A. Yes.

21 MR TIDSWELL: You could not -- if you were
22 an issuer you have a choice, do you; it is
23 either Mastercard or Visa?

24 A. That is right.

25 MR TIDSWELL: Or some other, I do not know

1 if there are other four-party schemes, but you
2 cannot go to Amex and say I want to issue --

3 A. No, no. They are the issuer.

4 MR TIDSWELL: Yes. Thank you.

5 THE PRESIDENT: Is there anything arising
6 out of that, Mr Beal?

7 MR BEAL: No, thank you.

8 Re-examination by MR KENNELLY

9 MR KENNELLY: First, I would like to take
10 Ms Jones to a document I think she had in mind
11 when she was being cross-examined.

12 THE PRESIDENT: Yes, of course.

13 MR KENNELLY: {RC-J5/40/25}.

14 This is -- Mr Beal asked you about market
15 shares in commercial card volume in the UK. Do
16 you see the top row and the far right gives you
17 the UK?

18 A. Yes.

19 Q. Do you recognise this document?

20 A. Yes, the RBR document yes.

21 Q. What does that last column tell you about
22 the United Kingdom and market shares for Amex in
23 particular?

24 A. Amex look about -- it is hard to read the
25 document -- 10% and Mastercard and Visa 40 each.

1 Q. Thank you, Ms Jones.

2 One further question: you were asked
3 about why issuers did not switch to Amex, could
4 I ask you to go to the realtime and be shown [draft]
5 page 159, do you see the question at 10. If this
6 threat posed by I think it was Amex to Visa was
7 real, you would expect to see lots of people
8 switching to Amex as issuers switched?

9 A. Not issuers, not the word "issuers", is
10 it?

11 Q. They issue cards to Amex once the
12 interchange fee cap came in; do you see that?

13 A. Yes.

14 Q. Just to make sure you are clear, then you
15 ask EU and Australia.

16 The next question:

17 "Question:If your evidence is issuers
18 really like the fees, they need the fees to
19 cover the costs, they cannot get those costs
20 covered if there is a regulatory cap on
21 interchange fees, they would all switch to Amex
22 and start issuing Amex [cards]."

23 Do you see that?

24 A. Yes.

25 Q. Are you aware, Ms Jones -- that is a point

1 taken up by Mr Tidswell -- that when the Interchange
2 Fee Regulation came in, it applied equally to three
3 and a half party schemes such as the Amex scheme
4 where it partnered with issuers?

5 A. No, I was not aware of that.

6 MR KENNELLY: I am grateful. I have
7 nothing further.

8 THE PRESIDENT: Ms Jones, thank you very
9 much for your assistance, we are very grateful
10 to you for your time. You are relieved from
11 the witness box now. Thank you very much.

12 A. Thank you.

13 THE PRESIDENT: Thank you very much.

14 (The witness withdrew)

15 MR KENNELLY: Thank you, sir, we call our
16 next witness, Mr Korn. He is being brought in.

17 THE PRESIDENT: Of course.

18 MR RICHARD KORN (affirmed)

19 THE PRESIDENT: Mr Korn, do sit down.

20 A. Thank you.

21 THE PRESIDENT: There should be a glass
22 with some water there, should you need it.

23 A. There is, thank you very much.

24 THE PRESIDENT: Excellent. You will be
25 taken to some documents, they will appear on

1 the screen, apart from those of your witness
2 statement. If you need to see anything either
3 side of the document on screen do not hesitate
4 to ask and it will be brought up because this
5 is not a memory test and you ought to be able
6 to see documents in their context.

7 A. Thank you.

8 THE PRESIDENT: I will hand you over to
9 Mr Kennelly who will ask you some questions.

10 Examination-in-chief by MR KENNELLY

11 MR KENNELLY: Thank you, Mr Korn, could
12 you open, please, the white folder in front of
13 you behind tab 1. {RC-F4/16/1} Is this your
14 first statement?

15 A. That is my first witness statement.

16 Q. Could you turn, please, to page
17 {RC-F4/16/32} and could you confirm that that is
18 your signature?

19 A. It is my DocuSign signature, that is
20 right.

21 Q. The contents of this statement are true to
22 the best of your knowledge and belief?

23 A. Yes, that is correct.

24 Q. Could I ask you to turn now up tab 2. Is
25 this your second statement in these proceedings?

1 A. Yes, it is.

2 Q. Could you turn, please, to page 8.

3 {RC-F4/17/8}. Is that your signature?

4 A. Yes, it is.

5 Q. Are the contents of that statement true to
6 the best of your knowledge and belief?

7 A. To the best of my knowledge yes.

8 Q. Finally tab 3, Mr Korn, is this your third
9 statement in these proceedings?

10 A. Yes, that is correct.

11 Q. Could you turn, please, to page
12 {RC-F4/20/9}, is that your signature?

13 A. It is.

14 Q. Are the contents of this statement true to
15 the best of your knowledge and belief?

16 A. Yes, they are.

17 MR KENNELLY: Thank you, Mr Korn. I think
18 my friends have some questions for you.

19 Cross-examination by MR BEAL

20 MR BEAL: Mr Korn, can I just give the
21 warning I have given to a few witnesses which
22 is that some legal submissions where they have
23 strayed into your witness statement, I am not
24 proposing to go toe to toe with you on those
25 because it is not for you as a witness to give

1 legal submissions. That does not mean of
2 course that they are accepted.

3 What I would like to do on the factual
4 side is, if I may, just confirm how settlement
5 works in the United Kingdom with the Visa
6 scheme. Could we look, please, in
7 {RC-J4/67.2/279}. So these were some Visa
8 operating regulations from November 2015 and if
9 you could look, please, under clause 7.2.F,
10 regulation 7.2.F and could you read to
11 yourself, please, 7.2.F.1 and then 7.2.F.2
12 (Pause).

13 This appears to suggest that at one point
14 Visa was collecting money into a central
15 settlement fund and then distributing funds to
16 whoever they had to -- those funds had to go
17 to; is that right?

18 A. That is broadly correct as a process, that
19 is right.

20 Q. As I understand it, that process is not
21 used anymore; is that right?

22 A. Well, there is a slight difference in that
23 we are now processing everything as One Visa, so
24 this was before we became one company.

25 Q. Right, so?

1 A. Broadly the processes are the same but
2 this is not -- I have to say this is not actually my
3 area of expertise how settlement runs, it is the
4 first time I have had this addressed.

5 Q. Right. But, I mean, that looks as though
6 it is doing what it says, is it not?

7 A. Yes, I read it the same way.

8 Q. You have funds going in and going out.

9 Of course that would allow, would it
10 not, issuers to retain the interchange fee at
11 source; they would simply remit to the settlement
12 fund the sum that is the settlement figure minus the
13 interchange fee that they pocket?

14 A. The interchange fee is done by Visa; as it
15 goes through the system we apply the interchange fee
16 that is applicable to that transaction.

17 Q. Does that mean there is a separate payment
18 going back to, for example, the issuing bank for
19 each transaction?

20 A. Everything is done on a net settlement
21 basis so we will net everything off money that is
22 owed and money that should be received to get a net
23 settlement position for every single client.

24 Q. Could I ask you then to look, please, in
25 {RC-J4/89.2/563}, we see there that in the Europe

1 region this rule does not apply so that is dealing
2 with the national net settlement service, can you
3 see that?

4 A. At the top of the page?

5 Q. Yes.

6 A. Yes.

7 Q. So am I to infer from that that the
8 national net settlement system is not used in the
9 Europe region?

10 A. No, that is not correct. The national net
11 settlement service is used quite extensively in the
12 Europe region but the requirements around it are
13 documented in a different book because of the
14 separation of scheme and processing requirements of
15 the IFR.

16 Q. That is what I was coming on to, there has
17 been a decoupling of payment systems and the
18 processes as a result of the --

19 A. Rules relating to processing are contained
20 in a separate book which is the Visa Europe
21 Regulations Processing, I think it is --

22 Q. A separate entity has to carry out the
23 processing from the payment transfer; is that right?

24 A. No, it is not a separate entity, it is the
25 rules relating to it.

1 Q. I see.

2 Then clause 7.7.4.3 we see:

3 "Without prejudice to any issuers or
4 acquirer's obligation in section X, Visa will be
5 responsible on the terms and subject to the
6 conditions of this section to satisfy payment
7 obligations that have arisen in relation to
8 transactions that meet certain of the following ..."

9 My understanding was that for a large
10 volume of the transactions that Visa now settles,
11 Visa does not actually get the funds in, it simply
12 issues authorisation codes to the issuing bank and
13 the issuing bank then directly transfers the money
14 to the acquirer's -- merchant acquirer's bank
15 account?

16 A. As I mentioned at the beginning, a few
17 moments ago this is not my exact area of expertise
18 but I believe that all of the money does actually go
19 through Visa.

20 Q. Yes.

21 A. Yes, we do that, basically.

22 Q. So you are effectively clearing large
23 volumes of funds on a net settlement basis each day?

24 A. (Nods)

25 THE PRESIDENT: The answer is yes.

1 A. Yes. Sorry, yes. I beg your pardon.

2 MR BEAL: There has been a certain amount
3 of confusion about that and it may well be my
4 fault but it has been helpful to get that
5 confirmation from you, thank you.

6 Now, paragraph 12 of your witness
7 statement, page 4, that is your first witness
8 statement, so that is {RC-F4/16/4}, you mention
9 presenting various proposals to the Executive
10 Leadership Team, the ELT. Did that body
11 continue to function after the merger
12 in June 2016?

13 A. Yes, it did but its name has changed
14 a number of times.

15 Q. It became the PIAG?

16 A. No, no.

17 Q. Sorry, I have got that wrong -- the PIAG
18 used to report to the ELT; is that right?

19 A. Yes, that is correct.

20 Q. We heard from an earlier witness that the
21 PIAG was able to make small changes to the
22 interchange fees. I took Mr Butler through that,
23 I do not know if you were here for that?

24 A. No, I was not.

25 Q. I mean, it is right, is it not, that the

1 PIAG as a subcommittee was able to take certain
2 executive decisions to change interchange fees on
3 its own account?

4 A. Yes, I believe it was, yes.

5 Q. If it was less than 5% of the value of the
6 relevant transaction?

7 A. That is right, there was a sort of triage
8 system of what could be approved at what level.

9 Q. The ELT would then make proposals to the
10 Visa Europe board of directors which would then be
11 formally adopted; correct?

12 A. At that time, correct.

13 Q. Following the acquisition of Visa Europe
14 by Visa Inc, did the scheme commercial committee
15 continue to meet in Europe?

16 A. Yes, it did.

17 Q. Did the same people sit on it as had sat
18 on it previously?

19 A. More or less, yes.

20 Q. Were those people employees of Visa Europe
21 or representatives of Visa members, do you know?

22 A. On the scheme commercial committee they
23 were employees of Visa Europe.

24 Q. Do you know if the same people continued
25 to sit on the Group Reviewing Interchange and

1 Pricing committee, known as GRIP, which you deal
2 with in paragraph 14?

3 A. Sorry, just for clarity, when you say "the
4 same people", over what period are you referring?

5 Q. We are dealing with July 2018
6 until April 2019, because your witness evidence is
7 dealing with nomenclature changes in the Comitology
8 at Visa. It is very grand words for saying people
9 sat in committees making decisions; correct?

10 A. Yes.

11 Q. What I am trying to ascertain with you is
12 whether that change in nomenclature or indeed
13 governance structure actually altered who was
14 sitting on these committees day-to-day?

15 A. I believe that the GRIP was formed in
16 effect once the SCC had ceased to function as an
17 individual unit. That is my recollection.

18 Q. In paragraph 18 at page 5,
19 {RC-F4/16/5}, you describe the major restructuring of
20 Visa in 2007 and you say it then operated
21 independently at the top of page 6. {RC-F4/16/6},
22 of course it still formed part of the overall Visa
23 system, did it not?

24 A. That is correct.

25 Q. That system operated globally?

1 A. It did, that is correct.

2 Q. It had common rules that applied on
3 a global basis?

4 A. It had a number of common rules, that is
5 correct.

6 Q. Paragraph 23, page 7, {RC-F4/16/7}, you
7 say that the HACR -- Honour All Cards Rule -- is
8 important so that Visa can deliver on its brand
9 promise. If merchants made clear at the point of
10 sale which cards -- indeed which brands -- they
11 accepted, there would not be any breach of that
12 promise, would there?

13 A. We believe that if you put the Visa sign
14 in your window or on your till it shows that you
15 accept Visa cards which means that the brand promise
16 is delivered.

17 Q. But you could for example say Visa debit
18 accepted, Visa credit not?

19 A. After 2015, yes. Before then you could do
20 an element of that in the UK because debit card only
21 acceptance was permitted in the UK by our rules.

22 Q. What the merchant can never do is put
23 a sign in its window saying: "we accept the cards
24 that do not cost us very much money but not the
25 rest"?

1 A. They probably could do that if they wanted
2 to but if they put the Visa sign alongside that,
3 then I think we would ask them not to.

4 Q. If they accepted credit cards, consumer
5 credit cards, they could not say, well, we take your
6 bog standard Barclaycard but we are not going to
7 take the platinum cards that may well historically
8 at least have borne a higher interchange fee?

9 A. They could not, that is correct.

10 Q. Certainly until the IFR, nor could they
11 say "and we will not take business credit cards
12 either"?

13 A. That is correct.

14 Q. So the outcome of the HACR is that the
15 merchant has to accept high costs and low cost cards
16 within the same category -- within the same product
17 category that Visa identifies?

18 A. Prior to the IFR, that is correct.

19 Q. Even post IFR, a merchant has to accept
20 all of the cards that are issued by issuers
21 regardless of whether or not the issuer is charging
22 a different rate or is giving rise to a different
23 MIF rate?

24 A. That is not the case post the IFR, that is
25 the case for cards outside the EEA.

1 Q. That is what I was coming on to. So in
2 terms of issuers there is only going to be -- the
3 reason why this becomes IFR interregional versus
4 everything else is because you only set one rate for
5 issuers in the UK and intra-regional in the EU;
6 correct?

7 A. On consumer cards, that is correct.

8 Q. So the only point at which the ability to
9 differentiate between issuers becomes meaningful is
10 when there is a different rate for a different
11 issuer because it is an interregional transaction?
12 That is the point at which from the merchant's
13 perspective it suddenly makes a difference; correct?

14 A. It would not be a differential in issuers
15 so I would say no really to that. It would be
16 a potential differential in costs between a product
17 or a programme type.

18 Q. Say, for the sake of argument, you have
19 got a business debit card, "card not present"
20 transaction, if it is an interregional transaction
21 because the issuer is based in the United States one
22 MIF rate applies, and if it is a "card not present"
23 intra-regional because the issuer is based in
24 France, a different rate would apply historically?

25 A. Historically, that is correct.

1 Q. The Honour All Issuers Rule means that the
2 merchant must accept both of those issued cards and
3 process them regardless?

4 A. Under the current formation of the Visa
5 HACR rule, yes, that is right.

6 Q. Of course now that extends, does it not,
7 to all of those issued cards in the EEA because post
8 Brexit the UK is treated as an interregional
9 transaction for EEA issuers?

10 A. Correct.

11 Q. If, as is the position that we have heard
12 from the merchants, those are "must take" cards for
13 the merchant because they are an important source of
14 income as a payment method, then the merchant has no
15 choice but to accept all of those cards, does it
16 not?

17 A. I believe the merchant has the choice to
18 not accept Visa cards and they have the choice to
19 differentiate between product type within the UK.
20 If it is a UK merchant then they have a choice to
21 differentiate between UK cards.

22 Q. If a Visa card and a Mastercard are both
23 "must take" cards for merchants because of their
24 ubiquity, then the merchant has no commercial choice
25 but to accept those cards, does it?

1 A. If there is such a thing as a "must take"
2 card, yes.

3 MR BEAL: Sir, that is probably
4 a convenient moment to take the 10-minute break
5 for the transcriber, then I am hopeful that
6 I can be finished with this witness in
7 reasonable time so that we do get on to
8 Mr Willaert, to at least open him today and
9 have a few questions for him.

10 THE PRESIDENT: That is very helpful, Mr
11 Beal. We will rise for ten minutes.

12 Mr Korn, I am sure you will not want to,
13 but do not discuss your evidence with anyone.

14 (3.12 pm)

15 (A short break)

16 (3.25 pm)

17 THE PRESIDENT: Mr Beal.

18 MR BEAL: Mr Korn, at paragraph 32 of your
19 first witness statement, you deal with the HACR
20 in one of its early formulations. Could we
21 look at that, please, it is at {RC-J4/0.1/3}.
22 You will see at the bottom of that page, under
23 "Card types":

24 "A merchant must accept all cards properly
25 presented for payment as specified in table

1 4.1."

2 Table 4.1 is on the previous page, page 2,
3 {RC-J4/0.1/2} is that right?

4 A. I can see the table.

5 Q. What I am asking you to do is when that
6 requirement -- a merchant must accept all cards and
7 then there is a reference back to the table, that
8 means the merchant has to accept all of the cards
9 mentioned in that table, does it not?

10 A. It relates to the symbol which is
11 displayed at the merchant, so if a merchant displays
12 the merchant symbol they are required to accept all
13 cards that carry a Visa symbol or were required
14 because this is an old rule and if they display
15 Electron, they have to accept all cards with an
16 Electron symbol.

17 Q. Electron was a debit only brand
18 principally, was it not?

19 A. Yes, principally nearly all of them were
20 debit cards.

21 Q. I think there was a quote for Italy and
22 Czech Republic in 1997?

23 A. There may have been something in Latin
24 America as well but certainly Italy and
25 Czech Republic, that is right.

1 Q. V PAY was never introduced to UK or
2 Ireland, was it?

3 A. It was -- as an acceptance mark it was
4 actually, yes, in 2005 we started acceptance of
5 V PAY in the UK and Ireland but not issuance.

6 Q. Not issuance.

7 Could we then please look at -- and
8 this is confidential so I am not going to go into
9 the detail but {RC-J7.3/3/1},

10 If we could look, please, at clause
11 1.5.4.3 towards the bottom of that page, that is the
12 principal term of the HACR; is that right? But
13 there is then a carve-out for the European region
14 that we see over the page, at page 2, {RC-J7.3/3/2},
15 to reflect the requirements of the IFR, correct?

16 A. That is broadly correct. There are
17 several -- if you looked at the previous page, there
18 was something about accepting all Visa cards as
19 well. So there was a number of clauses that point
20 to the same thing.

21 Q. Of course, Visa needed to change its
22 Honour All Cards Rule, did it not, once the IFR came
23 into effect, hence the introduction of that
24 United Kingdom region section?

25 A. We changed the rules to be compliant with

1 the IFR, that is correct.

2 Q. At paragraph 41 of your first witness
3 statement, {RC-F4/16/13}, you refer to HMRC being
4 a limited acceptance merchant in the UK, HMRC used
5 to surcharge for credit card payments, did it not?

6 A. Yes, it did.

7 Q. That stopped at a certain point, I am not
8 going to go into the details but could I ask you,
9 please, to look at a confidential document,
10 {RC-F4/4/4} which is Mr Livingston's second
11 statement, paragraph 10.7. He says something, does
12 he not, about things there, can you see that?

13 A. I can see it but I have not seen this
14 before, I am not sure who Mr Livingston is.

15 Q. He is one of Visa's witnesses.

16 A. Rob Livingston?

17 Q. Yes.

18 A. I know who Rob Livingston is.

19 Q. His business address is Sheldon Square?

20 A. He is actually now based in the US, he
21 left, he went over there about two years ago,
22 I think.

23 Q. What I am going to suggest to you is that
24 when large merchants, of whom arguably HMRC is one,
25 surcharge, things can happen for them in terms of

1 they may conceivably get a better deal from issuers
2 or from other people, correct?

3 A. I will try to answer that as well as
4 I can. HMRC did surcharge previously for credit
5 card transactions. They do not surcharge now for
6 consumer card transactions as they are not allowed
7 to under the payment rules of the UK. They may
8 surcharge for commercial cards, I believe they do,
9 but I am not certain about that.

10 Q. If we look, please, in {RC-R/25/1}, this
11 has an excerpt from a website, One Accounting,
12 dealing with what HMRC were doing around 2020 and we
13 see that in the second page there, {RC-R/25/2}:

14 "There are already rules in place
15 where charges are levied for payment by corporate,
16 business and commercial credit cards. HMRC has not
17 accepted personal credit cards since January 2018
18 ..."

19 So it simply refused to accept
20 personal credit cards because it could not
21 surcharge?

22 A. Because they could not surcharge, that is
23 correct, yes.

24 Q. Then things moved on from that in the way
25 that Mr Livingston has described, is that fair?

1 A. Having not read Mr Livingston's document
2 previously, I would have to remember.

3 Q. My hands are slightly tied as well in open
4 court so let us move on.

5 Were you aware that Amazon had
6 threatened to bar Visa credit cards during the Prime
7 Visa dispute?

8 A. I was aware of that, yes, I was not
9 closely involved in the discussions.

10 Q. At paragraph 46 of your statement,
11 {RC-F4/16/15} you describe amendments that were made
12 to the HACR following Brexit. Essentially following
13 Brexit, and the restriction to the UK of the IFR,
14 you once again made the Honour All Cards Rule as
15 wide as you could, did you not?

16 A. We reintroduced it and said that the UK
17 Limited Acceptance Merchant could choose a product
18 category that was issued within the UK but was
19 required to accept all other cards, that is correct.

20 Q. So that UK merchant now has to accept all
21 the cards issued in the EEA?

22 A. If they accept Visa, yes.

23 Q. If they accept Visa.

24 Now, in your second statement, and
25 this is {RC-4/17/3} at paragraph 11 you suggest that

1 costs increase with the distance from which the card
2 is issued. Is that really right in terms of
3 interregional rates of MIFs?

4 A. It is -- you are right, it is -- it is
5 a kind of regional split, you would not pay more for
6 a card that was issued in Argentina than you would
7 for a card that was issued in Morocco, for example.

8 Q. But if it was a card issued in France or
9 Ireland, the relevant costs associated with that are
10 going to be much lower, are they not?

11 A. Those are intra-regional transactions as
12 opposed to interregional transactions.

13 Q. I thought post Brexit Visa was applying
14 interregional rates to those transactions?

15 A. We were applying a different set of rates
16 than we did before Brexit, before the transition
17 period ended.

18 Q. Well, you broadly aligned the rates for an
19 EEA issued card with the commitments that Visa had
20 given for interregional transactions?

21 A. I believe -- I presume that Tim Steel
22 addressed this earlier, but I believe that was
23 because we had to honour the commitments.

24 Q. Could I ask you to look in {RC-J5/51/76}.
25 Please could you read paragraph 5.120 of this

1 interim review report from the PSR. (Pause)

2 A. I have read it, I have not seen this
3 before, I have to comment.

4 Q. It is right, is it not, that the PSR found
5 no justification in the underlying cost changes
6 forever the sudden hike in MIF rates once Brexit
7 happened?

8 A. If I read this I would say yes, but I have
9 not read this before and I have not discussed it
10 with the PSR.

11 Q. You also mentioned brand promise in
12 paragraph 11 of your second statement. Amex surely
13 offers a brand promise, does it not, to its
14 customers?

15 A. I cannot speak on their behalf, but
16 I would assume so, yes.

17 Q. But that does not mean that all merchants
18 have to accept Amex cards, does it?

19 A. It does not mean all merchants have to
20 accept Visa cards but Visa merchant have to accept
21 Visa cards and American Express merchants I would
22 assume have to accept American Express cards.

23 Q. Paragraph 12, you show a touching concern
24 for tourists visiting this country and not having
25 their Visa cards accepted. Would it not make more

1 sense for you to reduce the interregional MIF so
2 that card acceptance abroad increases to benefit
3 tourists?

4 A. I am sorry, I am just looking at this,
5 this is from a comment that we made in 2012 to the
6 European Commission. We are generally concerned
7 about foreign card acceptance, not necessarily
8 tourists but if you travel, much as at home, and you
9 see a Visa sign that you should be able to use your
10 Visa card. It is part of the Honour All Cards Rule
11 and the brand promise.

12 Q. Merchants obviously would love foreign
13 tourists to buy their goods, it does not necessarily
14 mean that they want necessarily to pay five times
15 the price for accepting a foreign card, does it?

16 A. We have -- we took a decision quite some
17 time ago that the nature of an international
18 transaction is more expensive for an issuer in that
19 the fraud is greater and the value to a merchant is
20 greater because foreign tourists will normally spend
21 more money, make a higher transaction or buy more
22 things.

23 THE PRESIDENT: When you said you took
24 a decision some time ago that the higher
25 interchange fee was justified by the great

1 expense to issuer, was that a decision based
2 upon data or was it evidence?

3 A. I do not know enough about it to actually
4 answer that, I am not an interchange expert.

5 THE PRESIDENT: Okay. So your answer is
6 based more in, how can I put it, hope than
7 expectation that there is some rational
8 underpinning to the higher interchange rate?

9 A. I think it is a mixture of hope and
10 expectation. It is a reality that it is more
11 expensive for an issuer to manage an international
12 transaction. You can look at it based on the fraud
13 that they have on that, international fraud is much
14 higher.

15 THE PRESIDENT: Right, so that is
16 something you --

17 A. I know.

18 THE PRESIDENT: You know personally?

19 A. Yes.

20 THE PRESIDENT: Okay.

21 MR BEAL: We are going to now move on to
22 co-badging and in your first statement this is
23 dealt with at page 18 and onwards.
24 Paragraph 59, page 20, you suggest there may be
25 technical difficulties in having a co-badged

1 system. Those technical difficulties did not
2 stop the scheme co-badging with Cartes
3 Bancaires in France, did they?

4 A. No, they did not, although in fact
5 probably the origin of the Cartes Bancaires Visa
6 card technology was very, very simple in those days
7 compared to what it is now.

8 Q. So they had basic technology and see what
9 that says. This is bundle {RC-J4/89.2/221}. This
10 is chip issuer requirements. So it is perhaps more
11 modern day technology than the original CB scheme.

12 We see at the bottom of that page,
13 221, "an issuer of a chip card must do all of the
14 following" and then going over the page, please,
15 {RC-J4/89.2/222}, you will see there is a list of
16 bullets and the chip card has to be issued so that
17 a cardholder can collect the service and account to
18 be used for a transaction and in the Europe region,
19 see last bullet, in addition, "notify Visa of all
20 payment applications contained in the chip". Then:

21 "Visa reserves the right to review
22 and approve or prohibit the use of a payment
23 application on a Visa card or for Visa services."

24 So this dual functionality is clearly
25 now built into the technology, is it not?

1 A. Yes, it is in terms of the chip, yes. The
2 contact chip, I should say contactless chip, makes
3 it slightly harder.

4 Q. The requirement is to allow a cardholder
5 to insert the chip and then choose which of various
6 different services are to be used for the purposes
7 of the transaction in question?

8 A. That is the ideal way that this
9 transaction should work, yes.

10 Q. Are you aware that the European Commission
11 certainly has considered co-badging should be
12 feasible in Europe in the light of the Single
13 European Payments area?

14 A. Yes, I am.

15 Q. It is also true, is it not, that the
16 European Commission expressed some scepticism about
17 your technical objections to co-badging
18 historically?

19 A. I am not personally aware of that.

20 Q. Could we look, please, in {RC-J4/10/4},
21 could I, because this is a commercially confidential
22 document, please can I invite you to read the first
23 three paragraphs on that page. (Pause)

24 Well, let us move on.

25 A. Thank you.

1 Q. It is possible you have not seen that
2 document before. But I mean your evidence itself at
3 paragraph 64, page 22 of your first statement,
4 refers to co-badging having worked in other
5 jurisdictions, correct?

6 A. Co-badging works very much in Europe. We
7 have a lot of co-badged cards in Europe. You
8 mention an example of Cartes Bancaires earlier. The
9 Europe region with Visa is the most heavily
10 co-badged region I think in the world.

11 Q. So there are not technical restrictions on
12 co-badging in principle?

13 A. The technical challenges come more with an
14 international scheme co-badging with another
15 international scheme than with a domestic scheme
16 co-badging with an international scheme.

17 Q. What is it about the international scheme
18 that suddenly changes the parameters of the
19 technology?

20 A. Well, it is mostly to do with the numerics
21 on the card. So all Visa cards begin with a 4, all
22 Mastercard's begin with a 5, Maestro begins with
23 a 6, American Express begins with a 3. So you have
24 a 16 or perhaps 15-digit card number which is on the
25 magnetic stripe which is -- traditionally is on the

1 front of the card and you only have one per scheme,
2 so you would need to issue -- if you were doing
3 a co-badge between say Mastercard and Visa on the
4 same card, then you would effectively have to have
5 two different account numbers, two different
6 embossed account numbers, two account numbers on the
7 magnetic stripe, which is not possible, and you
8 would also have brand requirements that every scheme
9 has where their respective mark needs to be placed.

10 So with a lot of seeding of brand
11 requirements a lot of waivers, it might be possibly
12 in terms of optics but in terms of actually the
13 magnetic stripe you just could not -- it would not
14 work.

15 Q. What about the chip we just looked at, the
16 chip technology?

17 A. The chip would work -- I think I said in
18 one of my witness statements if you had a chip only
19 product, it would work. How it would work in terms
20 of the e-comms to which brand you would have
21 printed, that is something that could perhaps be
22 negotiated.

23 Q. Of course with an online purchase when you
24 type in the first four digits of your card it
25 immediately directs you to either to a Visa or

1 Mastercard product, does it not, because it knows?

2 A. When you type in the first digit,
3 actually, pretty much, the 4 or the 5.

4 Q. Of course if a merchant was able to route
5 a card based on an algorithm to a particular scheme,
6 that would bring some price competition to bear,
7 would it not?

8 A. It might. It is quite a hypothetical
9 question.

10 Q. Paragraph 64 of your witness statement
11 makes it clear that you were prepared to co-badge
12 with China UnionPay, that is a four-party scheme, is
13 it not?

14 A. I am actually not sure of the answer to
15 that, to be honest with you. I have not studied
16 China UnionPay too greatly.

17 Q. Let us take that in stages.

18 Your evidence says that you co-badge
19 with China UnionPay, are you saying you just do not
20 know whether it is a four or three-party scheme?

21 A. That is what I am saying, I probably
22 should do but I do not, I am afraid.

23 Q. Paragraph 67, you explained how Visa can
24 give permission for co-badging. Where do we find
25 the rules that contain the criteria for that

1 permission to be granted?

2 A. The best way to answer that I guess is to
3 say that we approve all card designs in Europe, any
4 mark that is on a Visa card, whether it is
5 a competing payment scheme, a non-competing payment
6 scheme or an airline or a retailer, we need to see
7 those marks to know that the issuer has got
8 permission to put those marks on the card and this
9 would follow the same process in effect.

10 Q. I suggest to you that the chances of you
11 giving permission for co-badging of a Mastercard and
12 Visa product would be very small, would they not?

13 A. We would be compelled to give it
14 a reasonable go, based on the IFR. I think we would
15 want to make sure that it worked correctly, which
16 I think would be a huge challenge given what we
17 talked about a few moments ago, but in principle we
18 would certainly allow it.

19 Q. But there is no way I have found where you
20 published the technical criteria that an issuing
21 bank could meet in order to be able to co-badge both
22 brands on the same card?

23 A. We did not feel that was our role to do
24 that.

25 Q. Paragraph 71, you refer to a relaxation of

1 the co-badging rule which applies in the European
2 Economic Area, see the top of page 25. That
3 relaxation does not therefore now apply to the
4 United Kingdom, does it?

5 A. It would apply to the United Kingdom
6 because the United Kingdom still has the IFR in
7 place.

8 Q. Well --

9 A. It is not -- it is not written there,
10 I can see that.

11 Q. Yes, we are no longer in the European
12 Economic Area.

13 A. We -- we have spent a couple of years now
14 going through our rules trying to update UK EEA and
15 this I presume is one that has been overlooked, but
16 the rule would apply -- or would not apply
17 in the UK, I should say.

18 Q. When you are talking about technical
19 objections to co-branding Visa and Mastercard, what
20 sort of technical objections are we talking about?
21 Are we talking about operation standards?

22 A. For co-badging? No, it is just to make
23 sure the cards actually work, it is not operational
24 standards so much as the fact that the card could
25 only have one scheme on its magnetic stripe and if

1 the magnetic stripe looks different from the chip,
2 there can be some challenges.

3 MR BEAL: I am sorry, sir, just striking
4 a number of questions off on the basis of the
5 answers so far given.

6 THE PRESIDENT: No, no.

7 MR BEAL: Paragraph 85 of your first
8 witness statement. You say in the fifth line
9 down:

10 "My understanding is that when surcharging
11 is used it is more to do with generating
12 revenue or recouping perceived costs."

13 Did you see the evidence given by
14 Mr Bailey of Pendragon to this Tribunal a week
15 and a half ago?

16 A. I did not see it, no.

17 Q. It is a little bit harsh, is it not, to
18 describe this as a revenue generation scheme when
19 a merchant is simply trying to pass on a cost that
20 it does not want to have to bear?

21 A. My wording here was based -- I think later
22 on in this witness statement I mentioned the fact
23 about DVLA being called out by -- possibly by the
24 government for the --

25 Q. Top of page 30, last sentence of

1 paragraph 85, and you describe DVLA making money
2 from surcharging. What the DVLA was doing was
3 recovering the very substantial costs that the Visa
4 scheme had imposed on it as a government department
5 when it accepted scheme cards, was it not?

6 A. I believe that there were a number of
7 merchants at the time that were charging more than
8 the interchange fees on top.

9 Q. Now, your third witness statement, which
10 was a late arrival, has essentially made a legal
11 submission that Mr Kennelly made in opening but
12 I want to talk to you not about the legal matters
13 but about the factual matters that you cover and
14 whether or not it is possible to distinguish between
15 a debit and a credit card.

16 So we have established that Electron
17 certainly in the UK and Ireland is a debit only
18 brand; is that right?

19 A. It was. It does not really exist
20 in the UK and Ireland anymore. In fact, it never
21 existed in Ireland as issued, there was no Visa
22 Electron issuance in Ireland at any point.

23 Q. Electron I think has been wound up this
24 year, has it not?

25 A. Apart from in a couple of countries, that

1 is absolutely correct, yes.

2 Q. Switch and Maestro were debit only brands?

3 A. They were.

4 Q. We have established with online
5 transactions you know from the card number whether
6 it is debit or credit?

7 A. You might do. I would not say necessarily
8 but it is easier with BINTables on the merchant side
9 when they are an e-commerce merchant to tell, but
10 what we discussed a few moments ago you would know
11 whether it was a Visa or Mastercard; it was not
12 whether it was debit or credit card.

13 THE PRESIDENT: You are very confident
14 with that, the Visa Mastercard, you may be in
15 a high degree of uncertainty?

16 A. Yes, as a merchant you would need the
17 assistance of your acquirer to give you a BINTable
18 which would identify whether the cards were debit or
19 credit, which some merchants would want but there
20 would be probably some kind of charge for that from
21 the merchant side.

22 MR BEAL: John Lewis needed that for many
23 years, did it not, because it only accepted
24 debit cards and it prohibited the use of credit
25 cards at its stores, correct?

1 A. Yes, that is right, but they probably
2 would have far fewer, they would have put in their
3 system -- I think I say again in the last witness
4 statement they would have put in the UK BINTables,
5 I would imagine.

6 MR BEAL: Yes.

7 THE PRESIDENT: How does that work
8 exactly, Mr Korn? These days presumably you
9 can have the data provided by the acquirer to
10 the merchant which is going to be input into
11 the card reader so that if you have got, say,
12 a debit only position, the credit cards will
13 simply be refused or is that -- how would one
14 do it these days? Then we can go back in time
15 to see how one would do it past --

16 A. I think one would do it the same way but
17 what happened in the UK, and now I am going back
18 almost immediately here, is that the merchants were
19 only accepting UK-based debit cards, so therefore
20 they would have the UK debit BINTable which covered
21 only a few ranges. So therefore it would -- you
22 would probably have -- I do not know -- maybe 80
23 entries in there.

24 If you look at this on a global basis
25 you would have millions and millions of different

1 BINS and it would change almost on a daily basis, it
2 would be very, very difficult to maintain. Within
3 Europe you have an indicator in the chip that says
4 this is a debit card because of the IFR, but you do
5 not have that globally.

6 THE PRESIDENT: So if you were
7 a merchant -- let us leave on one side the
8 rules regarding permissibility, just to
9 understand the technology a little bit, if you
10 look at it on a worldwide basis you are saying
11 that the changes are so fluid that you just
12 could not hold the line if you wanted to only
13 accept debit cards.

14 A. I think it would be possible but it would
15 be difficult. The changes are more that new
16 products come out all the time so that is the
17 update, not the product changes from debit to
18 credit.

19 THE PRESIDENT: Yes, I see.

20 A. There is a lot of new issuance coming out,
21 there are FinTechs all over the world issuing, so
22 that would need to be updated. An acquirer should
23 feasibly be able to do it if asked, if rules
24 permitted of course, but it is a big exercise.

25 THE PRESIDENT: Right. Okay, thank you.

1 MR BEAL: A merchant obviously can always
2 ask the customer debit or credit, can they not?

3 A. They could, but it is not necessarily true
4 that the customer would know.

5 Q. Your first witness statement at
6 paragraph 86 suggests that you are keen to protect
7 the rights of consumers, so surely as a scheme you
8 want to make sure that a consumer knows whether or
9 not it is going to be using a debit card or a credit
10 card?

11 A. The cardholder, you mean?

12 Q. Yes.

13 A. We would like them to use a Visa card; we
14 do not really mind if it is a debit or credit card,
15 whichever they prefer to use.

16 Q. Even if that produces more cardholder
17 charges for them because they have used a credit
18 card which bears a higher cardholder fee than
19 a debit card?

20 A. That depends on the issuer. It is not
21 necessarily the case.

22 Q. Right, so limited consumer champion; is
23 that fair?

24 A. No, I think we would still see ourselves
25 as consumer champions. There is only so much one

1 can do. You almost need to bear in mind the
2 language, so a UK merchant will say "debit card", an
3 Argentinian will not say "debit card".

4 Q. Shall we have a look at {RC-J4/98/7}.
5 I think this has received a "restricted
6 confidential" marking but I think the point I am
7 going to make is a fairly straightforward one. Is
8 it conceivable that "debito" in the bottom
9 right-hand corner means "debit" in Spanish?

10 A. It is. I picked a bad example using
11 Argentina because they do have a similar word for
12 debit, yes, but I think if I said Korea, for
13 example, which I mentioned in --

14 Q. Credito, I do not want to turn it up, it
15 is a boring point, but "credito" perhaps arguably
16 means credit. My Spanish accent I am afraid --

17 A. I think so in Spanish, yes. But not in
18 Korean again

19 Q. If we are to look, please, at
20 {RC-F4/20/6} -- I was taking you to where were in
21 your witness statement where you deal with this, but
22 I am going to end on this bombshell, it is
23 {RC-J4/100/3}. We see some writing on the card
24 there. I mean, it is plausible, is it not, that an
25 Irish merchant, for example a Dublin retailer, would

1 have spotted that that was a foreign card?

2 A. Yes, I think I say in my witness statement
3 that they are clearly not UK cards or Irish cards in
4 this case.

5 MR BEAL: Thank you, I do not have any
6 further questions.

7 Questions by THE TRIBUNAL

8 MR TIDSWELL: Can I ask you just one
9 question about paragraph 47 of your statement
10 where you talk about non-compliance. As I read
11 it, I was not sure what the consequence of
12 non-compliance was, other than you might be
13 asked to become a Limited Acceptance Merchant.
14 Just tell us what does happen if -- I think the
15 mystery shoppers or the complaints from issuers
16 comes through the compliance department, what
17 would actually happen?

18 A. As a general rule for non-compliance, not
19 necessarily about non-acceptance, we would contact
20 the -- if we have enough information -- which first
21 you often do not get enough information, if we have
22 enough information we would contact the acquirer in
23 this case and say we have had a complaint about X, Y
24 and Z, what is your view on this? They would
25 hopefully go and investigate and come back and say:

1 actually this merchant accepts all cards all the
2 time. Or: there was a misunderstanding with the
3 staff, we have educated them. Or they will come
4 back to us and say: this merchant does not, for
5 example, want to accept commercial cards we will
6 register them as a Limited Acceptance Merchant. So
7 it may well be a matter of the acquirer educating
8 the merchant trying to encourage them to accept all
9 cards and not make the mistake that led to the
10 complaint.

11 MR TIDSWELL: Thank you, that is helpful.

12 THE PRESIDENT: Mr Beal, anything arising?

13 MR BEAL: No.

14 MR KENNELLY: No re-examination.

15 THE PRESIDENT: Thank you, Mr Korn, we are
16 very grateful to you for your evidence and your
17 time, you are released from the witness box
18 with our thanks, so thank you very much.

19 A. Thank you very much.

20 (The witness withdrew)

21 THE PRESIDENT: Mr Kennelly, before you
22 call the next witness, just one, perhaps two,
23 related points regarding facts.

24 I strongly suspect that when we come to
25 write our judgment we are going to be wanting

1 to say quite a lot about how the schemes work
2 and we are anxious I think to make sure that we
3 get that right and that it is comprehensive.
4 We are very conscious that we have had a lot of
5 factual and helpful factual evidence from the
6 witnesses both in their statements and orally
7 but there are likely to be areas where we are
8 going to need help; for example the way in
9 which the settlement process worked.

10 We listened to one of Mr Korn's answers
11 which did not reflect how we understood the
12 scheme to operate. That is, I am sure, our
13 fault not his and it may reflect a difference
14 between how Mastercard and Visa schemes
15 themselves operate because settlement may very
16 well be differently done. We do not know.

17 But there are likely to be questions like
18 that and there is likely to be a temporal
19 element in that the way in which the ecosystem,
20 if I can take a word that has been used quite
21 frequently in the course of this trial, it may
22 be that the way the ecosystem has evolved is
23 something which will have some bearing on how
24 we see the interchange fee over time.

25 So we are seeing this as quite a difficult

1 area and we raise it now not because we want
2 the parties to address us on it now but because
3 it is something that I think we will want to
4 get a grip on how we deal with matters like
5 this before closing submissions begin so that
6 we can work out where we go.

7 It may be that the Tribunal has a go at
8 working out what it says the factual position
9 is and ships that out early to the parties for
10 comment and supplementation or it may be that
11 the process goes the other way but I think it
12 is something that we increasingly consider is
13 quite important and it will of course tie into
14 the evolution of things like the scheme rules.
15 So if one has scheme rules coming in at
16 a certain point in time that no doubt will
17 affect the way in which one views, if the rule
18 is significant, the ecosystem as a whole.

19 So it is very much a sort of larger follow
20 on from our initial question on Day 1, I think,
21 which was how do the monies flow, which we have
22 been nibbling at throughout the course of this
23 trial. But I think rather than have a draft
24 judgment that is circulated in X months' time
25 where both schemes hold up their hands and say,

1 "this just is not right", I would rather grasp
2 that particular nettle now and get the parties
3 to think about how this question can be
4 resolved.

5 I mean, I am sure the facts are all
6 somewhere in the record. There will be an
7 awful lot of useful material in the regulatory
8 decisions, in the courts' decisions, in the
9 witness statements and so on. But that just
10 underlines the, I think, difficulty that we are
11 likely to have which is there is a temporal
12 aspect and there is, I think, an increasing
13 sense on this side of the courtroom that we
14 need to get these facts right in order to
15 understand the economic evidence and the
16 significance of some of the factual evidence
17 that we have heard to enable us to make
18 confident decisions on the legal questions that
19 arise.

20 So that is simply a point that struck us
21 following one of Mr Korn's answers, but it is
22 a general point.

23 MR KENNELLY: Sir, may I address you on
24 that point first? Three points arising out of
25 it. First of all, we heard the tribunal's

1 indication about giving you clarity of detail
2 on the settlement process and the mechanics of
3 the settlement process and we propose to deal
4 with that in detail in our written closing.
5 That really is the best place to deal with it
6 because it flows into our analysis of the
7 factual and economic evidence which we
8 hopefully will expand when we get the economic
9 evidence in this trial.

10 The second point is if the Tribunal is
11 minded to circulate a draft judgment on the
12 facts or in some way seek clarity from the
13 parties on the facts after the trial just on
14 the facts and on the points that the Tribunal
15 has raised, again one could see how that could
16 work in order that that is clear in the
17 tribunal's mind before you go on to reach
18 conclusions on other points.

19 Finally, though, in terms of what we can
20 tell you about the Visa scheme and the Visa
21 facts, you will get a much quicker and more
22 useful document than if you seek something that
23 is agreed and we would ask the Tribunal not to
24 suggest producing some form of agreed document
25 because that would be very difficult to produce

1 quickly and ultimately the Tribunal really
2 wants answers from the schemes. We are best
3 placed to tell you how settlement takes place
4 and deal with the technical questions,
5 including the point from Mr Korn, which we can
6 address as part of our -- and which we will
7 address as part of our written closing on the
8 point of settlement.

9 MR BEAL: If I may, sir.

10 THE PRESIDENT: Yes, of course.

11 MR BEAL: I think one thing I have
12 established is that I do not know the detail of
13 how the settlements work because I made
14 a submission in opening based on what I thought
15 was the position borne of, it is fair to say,
16 acting for the Revenue in the Bookit case
17 before the Court of Justice, which had required
18 me to look at some detail with witnesses before
19 the first-tier Tribunal as to how merchant
20 acquirer works, and I simply thought, based on
21 that experience and that evidence in that case,
22 that authorisation codes were sent to the
23 issuer, the issuer sent them back as authorised
24 and then the transfer of funds went from
25 issuing bank to acquiring bank.

1 But I was conscious in opening that
2 I needed to route that analysis in the
3 underlying scheme which is what I then put to
4 Mr Livingston whose evidence I think in that
5 regard has now been opened up and so is not
6 private. He gave an answer I thought had
7 confirmed that. Subsequently I have then
8 discovered the old rule and, in fairness, I put
9 it to this witness because I was concerned that
10 I had somehow not reflected an historical
11 position with Mr Livingston and somewhat to my
12 surprise this witness gave a different answer
13 and said: No, it is still now settlement
14 funds, it is net settlement and everything
15 comes to us and then gets divvied out.

16 So I am now sitting on two inconsistent
17 statements of fact from two Visa witnesses and
18 Mr Kennelly is suggesting, might I suggest
19 somewhat opportunistically, that this is simply
20 dealt with in closing which is the day I get on
21 my feet to address you in closing or the day
22 after.

23 That gives me no clarity whatsoever with
24 which to either deal with matters with
25 Mastercard witnesses or indeed to deal with

1 matters with the experts should it prove
2 necessary to do so. So I have no desire at all
3 to seek an agreed document with Mr Kennelly but
4 I would like to know what the correct position
5 is.

6 MR KENNELLY: Okay. So may I help my
7 learned friend here and I mean no criticism of
8 him at all.

9 Part of the problem arises from the fact
10 that he was asking the question of the wrong
11 person. Mr Korn, as he tried to explain, was
12 not best placed to answer those technical
13 questions. He did his best but that was not
14 his area of expertise. There were other
15 witnesses better placed than him to answer that
16 question and I fully understand why Mr Beal
17 wants to know the answer and we can deal with
18 that narrow issue, I am sure very quickly, and
19 we can get a letter by reference to the
20 evidence of the witnesses best placed to answer
21 and to the extent that Mr Beal did not explore
22 it with the right people we can assist the
23 Tribunal and Mr Beal with appropriate
24 cross-references.

25 But I am afraid the situation he is in is

1 partly a function of how he has questioned
2 these witnesses.

3 Finally, on the other points the Tribunal
4 has been raising, questions of fraud and costs
5 and so forth, when I say we are dealing with
6 settlement in our written closing we will also
7 deal with all of those other factual questions.
8 We have taken a careful note of all the factual
9 questions the Tribunal has raised and to the
10 extent the witnesses have not answered them, we
11 will provide that detail in a detailed factual
12 background in the written closing.

13 THE PRESIDENT: Well, a number of points
14 arise out of that. First of all,
15 I deliberately did not ask about costs of the
16 process as an explanation for interchange
17 because that seems to me to be likely to be
18 evidentially highly controversial and of course
19 we are in the evidential part of the trial now
20 and I think that Mr Beal would be entitled to
21 push back quite hard, and if he did not I think
22 the Tribunal would, if there was a substantial
23 elucidation by way of justification of
24 different interchange fees in closing because
25 we would not be able to test the underlying

1 assertions and we would not, I think, properly
2 be able to reach a view as to the facts as
3 a Tribunal.

4 So irrespective -- and I am quite sure
5 Mr Beal would not be in a happy position --

6 MR BEAL: My Lord, if I may say so, there
7 was a very wise judge called
8 Mr~Justice Lightman who once said litigation by
9 ambush is to be deprecated and that is all
10 I would say.

11 THE PRESIDENT: Well, I am not really in
12 the zone of litigation by ambush. I am really
13 more in the zone of what a Tribunal must do by
14 way of reaching factual findings and I think we
15 will have to be very careful when it comes to
16 questions of cost. What I would strongly
17 suggest is that we would be interested in
18 points that you can make on costs arising out
19 of the record.

20 MR KENNELLY: Of course and that is all
21 I have in mind, sir.

22 THE PRESIDENT: No, that is fine.

23 MR KENNELLY: That is all I have in mind.

24 THE PRESIDENT: But beyond that, I think
25 we would be sailing into waters that I, for

1 one, would prefer not to venture.

2 So those facts I think we can leave on one
3 side.

4 The question of the scheme operation,
5 however, is in my judgment something which we
6 can unpack in greater leisure and I do not
7 think it is a particular problem in having
8 an articulation of how the scheme works so that
9 we can properly set it out in the course of our
10 judgment.

11 What I am wondering -- and certainly we
12 are not going to force the parties to agree
13 a statement, that would be folly. I mean, we
14 have been asking questions of the witnesses,
15 inviting them to answer for both Visa and
16 Mastercard, but to tell us whether there is
17 a material difference. Now, that already shows
18 that we may be asking for trouble in seeking
19 a harmonised response because it is entirely
20 possible that the schemes operate in materially
21 different ways on material parts of the scheme
22 themselves; it would not be very surprising
23 that one can achieve the same outcome in
24 different ways and it may be, I do not know,
25 the settlement is one such thing.

1 But it does seem to me that we need at
2 least some idea of what is going on before
3 closings begin and what I am wondering is
4 whether it is going to be possible for each
5 scheme, separately, to do what an intellectual
6 property lawyer would describe as a product and
7 process description; that is to say an
8 articulation of how their scheme operates if
9 necessary over time, in other words, we have
10 described the ecosystem or rather, no, we have
11 not described the ecosystem, we have had
12 reference to the ecosystem many, many times.
13 What I am thinking is we need a rather more
14 granular description of the ecosystem and we
15 would like it, if it is possible, to be done
16 sooner rather than later.

17 I am not saying it need be the final word,
18 but I do think it does need to start setting
19 out in a single place the questions that we
20 have been nibbling at so that we can locate the
21 evidence of the witnesses in that document.

22 So I have something in mind that is
23 absolutely not controversial but that is at
24 least a foundation for us to be able to move
25 into the controversial areas and I think it

1 would be very helpful to have a first cut as
2 soon as possible, even if it requires further
3 work later on and it would enable Mr Beal for
4 instance to say: Well, are you sure this is
5 right because it is not how I have understood
6 matters? The Tribunal could say the same
7 thing. I am sure it will be right and it will
8 be a way of flushing out our misunderstanding,
9 but that is probably important to be done
10 before the record is finally closed when you
11 sit down having finished closing.

12 MR KENNELLY: My Lord, I think
13 I understand exactly what the Tribunal wants
14 and ideally it would be by reference to the
15 rules. It is more likely to be uncontroversial
16 if it is based squarely on what the rules say
17 about the various issues in these proceedings
18 and again, and this may be difficult, but again
19 ideally as the rules developed over the
20 claim period, in our case from 2011 to the
21 present day.

22 So when we understand the ecosystem for
23 the purpose of these proceedings we understand
24 that to mean the interchange fees and rules
25 which are the subject of these proceedings.

1 You do not want everything, you want it focused
2 on the matters in issue except, except in
3 relation to the mechanics of settlement and the
4 particular protections fraud and so forth
5 within the scheme which have been raised by
6 the Tribunal in the course of your questions
7 which I think has been described as part of the
8 ecosystem also.

9 THE PRESIDENT: Yes. I mean, it may range
10 a little more widely than that. You are
11 absolutely right, the rules between the parties
12 in a sense constitute the bedrock of what is
13 going on, but I am very conscious that when we
14 are looking at the evolution of the rules
15 obviously we are focusing on the interchange
16 fee as being the central point.

17 Aspects of technology are likely to colour
18 how we see both how the rules operate and how
19 we see them in Competition Law terms. One
20 anticipates that the manner in which the
21 ecosystem operated at the technical level will
22 have been rather different, even if the rules
23 were very similar, when one had one of these
24 voucher things where one runs over the voucher
25 with a shoebox as they used to call them.

1 MR KENNELLY: That was before the
2 claim period, sir.

3 THE PRESIDENT: No, no, I of
4 course understand that. But the fact is if the
5 rules are, as it were, based upon that sort of
6 technology one then moves on to different forms
7 of technology and different levels of ubiquity
8 because of the technology and the rules have
9 not kept up, then that is something which
10 I think is relevant.

11 So if one looks -- one can simply take
12 post and pre-Covid. One has heard a great deal
13 of evidence about how transactions are much
14 less money-based now than they were then and
15 that has been a trend, but Covid was a big jolt
16 there. Now, it does seem to me that in the
17 past one had to ask the merchant as a favour to
18 take the card over cash. That position has
19 precisely inverted and that of course colours
20 the very question that we are tasked to answer,
21 which is the justification for payments made by
22 acquirers as the horizontal line in an "A" over
23 to the issuing banks.

24 Now, I am not saying that is relevant to
25 the answer but it is something I think we are

1 going to want to know about in order to
2 understand all of the questions that we are
3 looking at.

4 So, yes, I think it is the rules but
5 I think there is a technological aspect to it
6 and there may very well also be an aspect to do
7 with the metrics of the scheme, for instance
8 how many transactions we are talking about at
9 any given time over time because that again
10 colours the context in which we are operating.
11 So I think we are looking for something quite
12 high level obviously with interchange fees at
13 its heart but with a sense of providing just
14 that; context.

15 MR KENNELLY: We are obviously anxious to
16 help you. I am a little concerned in two
17 respects and it may be we need some assistance
18 from the Tribunal. The first is that I said
19 that we would confine our description of the
20 ecosystem and the evolution of it by reference
21 to the issues in this Trial 1 which is
22 concerned with infringement --

23 THE PRESIDENT: Yes.

24 MR KENNELLY: -- and we would not get into
25 the matters that concern 101(3). Some of the

1 points the Tribunal has raised just now stray
2 into the 101(3) area and it becomes then harder
3 for us to draw a clear line around what is
4 required or would be of use to you.

5 So it may be that the Tribunal give us
6 a clearer steer as to what you need rather than
7 us produce some vast piece of work which
8 ultimately is of little use to you, it may be
9 more useful if you gave us perhaps questions or
10 a clear steer as to what you require and then
11 we would be anxious to do it and do it as
12 quickly as possible otherwise we could be
13 working in the dark and I can see the job being
14 quite a big one even at a high level.

15 THE PRESIDENT: That is fair. Well, look,
16 why do we not proceed in an iterative way. You
17 are obviously right that the rules and as they
18 change over time are going to be critical as
19 the skeleton on which everything else is built.
20 You know that we are interested and you also
21 know that Mr Beal is concerned about the
22 question of settlement, so that can I think
23 certainly be incorporated in your description
24 of the rules.

25 Equally, there will be other matters which

1 we have raised which might conveniently be
2 slotted in, but if you use that as a starting
3 point --

4 MR KENNELLY: Yes.

5 THE PRESIDENT: -- produce that and we are
6 very interested in short rather than long, that
7 is absolutely right, we do not need long
8 quotations from the laws. We probably need
9 a cross-reference to them rather than vast
10 amounts of paper. We can then point out areas
11 where we would like them to be supplemented and
12 that way we can give you a clearer sense of
13 what will help you to help us.

14 MR KENNELLY: Thank you. I may let my
15 learned friends take over at this stage while I
16 just check how much of what I have promised is
17 even feasible.

18 THE PRESIDENT: Yes. Of course,
19 Ms Tolaney, Mr Cook, do you have anything to
20 add?

21 MS TOLANEY: Nothing to add at the moment,
22 sir.

23 THE PRESIDENT: Mr Beal, in a sense you
24 are an outsider to this.

25 MR BEAL: Yes, it is nothing to do with

1 me. I do not want to get it wrong again, that
2 is all I would say.

3 THE PRESIDENT: It is not a process that
4 you have any problem with.

5 MR BEAL: No, not at all. If I may say so
6 it is very helpful.

7 THE PRESIDENT: Well, I am slightly
8 kicking myself because I think this probably
9 should have been floated by us earlier and
10 I apologise for that. But we will I think
11 proceed, Mr Kennelly, unless you have been told
12 it is a terrible idea --

13 MR KENNELLY: No, not at all.

14 THE PRESIDENT: -- we will proceed in that
15 way.

16 MR KENNELLY: That concludes our factual
17 evidence, sir. Those are the Visa witnesses.

18 THE PRESIDENT: We are grateful. I think
19 the parties will get a much clearer idea of
20 what we are worried about when we have had the
21 session with the experts in the hot-tub. We
22 will obviously be wanting to understand the
23 economics of how the schemes work and that will
24 I think unplug the facts that underlie the
25 economics and any factual misconceptions or

1 interests will I think become a little clearer
2 then.

3 MR KENNELLY: Sorry, sir. On the hot-tub,
4 the Tribunal -- I may be misremembering -- did
5 suggest giving us a list of topics for the
6 hot-tub or there was the suggestion that we
7 would have some topics in advance.

8 THE PRESIDENT: Yes.

9 MR KENNELLY: Is that still the tribunal's
10 intention?

11 THE PRESIDENT: We appreciate time is
12 slipping by and we have not yet done that. But
13 we will give that some thought after court this
14 evening because, yes, we do not want to give
15 the parties a blank sheet of paper but there
16 will be a very broad-brush indication rather
17 than more than that but we will try and do
18 that.

19 MR KENNELLY: I am obliged.

20 PROFESSOR WATERSON: On that point in
21 particular, you will remember that last week we
22 had some very useful evidence from Mr Knupp,
23 but unfortunately a lot of it was written into
24 the private record --

25 MR KENNELLY: Yes.

1 PROFESSOR WATERSON: -- which was not, to
2 my mind anyway, part of something particularly
3 private, but given his expertise it would be
4 very useful to raise some of those issues with
5 the people in the hot-tub.

6 MR KENNELLY: Of course, I made the same
7 point to you Professor Waterson.

8 THE PRESIDENT: I think we dealt with
9 that, did we not?

10 MR KENNELLY: We did and we made sure that
11 those parts of the transcript were in private
12 have been moved into the public part so that
13 you can put them to the experts and use them
14 for all other purposes.

15 PROFESSOR WATERSON: Okay. If I look on
16 Opus, I will see that, will I?

17 MR KENNELLY: It should be -- is it done?
18 If it has not been done, we will get it done
19 very quickly.

20 PROFESSOR WATERSON: Thank you.

21 THE PRESIDENT: Yes. Do you need
22 a direction from us in that regard?

23 MR KENNELLY: No. That is just for us to
24 get on with if it has not already been done.

25 THE PRESIDENT: Good.

1 Thank you very much. Ms Tolaney?

2 MS TOLANEY: Sir, I do not suggest that we
3 swear in Mr Willaert now, not least because we
4 are sitting at 9 am with another witness, Ms
5 Riviere. So it would be unfair to swear
6 somebody in for five minutes and then wait.

7 THE PRESIDENT: I agree. We are not doing
8 too badly on the timetable, are we?

9 MS TOLANEY: I do not know. That is
10 rather a question for Mr Beal, I think.

11 THE PRESIDENT: We have caught up.

12 MR BEAL: Yes. My predictions of witness
13 length and cross-examination have been
14 notoriously inaccurate. The reality is we have
15 five to get through tomorrow. I am confident
16 that we will be done tomorrow but it may
17 require a little bit of flex perhaps over the
18 short adjournment depending on how the
19 witnesses in the morning go.

20 THE PRESIDENT: Very good. We are
21 starting at 9 o'clock so we have an extra hour
22 and a half there.

23 MR BEAL: Yes, a long day.

24 THE PRESIDENT: We will have to have two
25 morning breaks for obvious reasons but we will

1 obviously be as flexible as we can in terms of
2 ensuring that we conclude the factual record.

3 MR BEAL: I will review obviously
4 overnight and I may be able to trim down.
5 Ms Fitzpatrick will be dealing with one of the
6 witnesses but I have spoken to her about
7 estimated length and I think between us we
8 should be done by 4.30 tomorrow afternoon.

9 THE PRESIDENT: That is very helpful but
10 keep us posted during the course of the day and
11 we will do what we can to assist.

12 MR BEAL: Thank you.

13 THE PRESIDENT: We appreciate the
14 parameters are quite tight.

15 In that case we will adjourn until
16 9 o'clock tomorrow morning. Thank you very
17 much.

18 (4.26 pm)

19 (The hearing was adjourned until
20 9 o'clock,
21 Tuesday, 5 March 2024)

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