Neutral citation [2021] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1287/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

28 June 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
TIM FRAZER
SIMON HOLMES

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ASDA STORES LIMITED
(2) ARGOS LIMITED AND OTHERS
(3) WM MORRISON SUPERMARKETS PLC

Claimants

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
~~**(4) MASTERCARD UK MEMBERS FORUM LIMITED**~~
(5) MASTERCARD/EUROPAY UK LMITED

Defendants

Heard remotely on 3 March 2021

JUDGMENT (AMENDMENTS AND COUNTERFACTUAL)

APPEARANCES

Jon Turner QC, Christopher Brown and Max Schaefer (instructed by Stewarts Law LLP) appeared on behalf of the Claimants.

Matthew Cook (instructed by Jones Day) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This ruling determines two applications in these proceedings which come before the Competition Appeal Tribunal ("the CAT") on remittal from the Supreme Court in somewhat unusual circumstances.

2. By a decision adopted on 19 December 2007, the European Commission held that the multilateral interchange fees ("MIFs") applicable to cross-border transactions within the European Economic Area (the "EEA") under the rules of the Mastercard scheme gave rise to a breach of Art 101(1) of the Treaty on the Functioning of the European Union ("TFEU") and did not satisfy the criteria for exemption under Art 101(3) TFEU ("the Mastercard Commission Decision"). Mastercard applied to the General Court for annulment of that decision, and several of the banks that were members of the Mastercard scheme intervened in the proceedings in support of the application. By its judgment given on 24 May 2012, the General Court dismissed that application: Case T-111/08 *Mastercard, Inc. v Commission*, EU:T:2012:260 ("*Mastercard GC*"). Mastercard and some of the intervening banks appealed that decision to the Court of Justice of the European Union (the "CJEU"). On 11 September 2014, the CJEU dismissed those appeals: Case C-382/12P *Mastercard, Inc. v Commission,* EU:C:2014:2201 ("*Mastercard CJ*").

3. A significant number of claims have been brought before the English courts and the CAT in the light of those decisions, claiming damages against Mastercard and/or Visa for breach of Art 101 TFEU and the corresponding Chapter I prohibition under s. 2 of the Competition Act 1998 ("CA 1998"), based on the level of the Mastercard and Visa MIFs.

4. The present proceedings result from claims brought against Mastercard in the Commercial Court by three well-known retail chains which concerned Mastercard's UK and EEA MIFs and, in the case brought by Argos also Mastercard's Irish MIFs. The three actions were combined for the purpose of a liability trial, which was heard by Popplewell J in June-July and September-October 2016. Popplewell J gave judgment on 30 January 2017 dismissing the claims. He held that, subject to what was called the "death spiral" argument, the various MIFs would have restricted competition in violation of Art 101(1)

(and the equivalent provisions of UK and Irish competition legislation) but that by reason of this argument there was no violation; and that in any event the various MIFs were exempt under Art 101(3) (and the UK and Irish equivalents): *Asda Stores Ltd v Mastercard Incorporated* [2017] EWHC 93 (Comm) (the "*AAM* judgment").

5. Sainsbury's brought similar claims against both Mastercard and Visa, by separate actions, concerning only the UK domestic MIFs. Both schemes pleaded in their defences that their respective MIFs did not give rise to a restriction of competition; but that if they did, then the levels of MIFs charged satisfied the criteria for exemption under Art 101(3) (and s. 9 CA 1998). Sainsbury's claim against Mastercard (the "Sainsbury's Mastercard proceedings") was transferred from the High Court to the CAT, which heard it over 23 days in January-March 2016. The CAT gave judgment on 14 July 2016, holding that the UK MIFs under the Mastercard scheme restricted competition in breach of Art 101(1) (and s. 2) and that the conditions for exemption under Art 101(3) (and s. 9) were not satisfied; and awarding substantial damages to Sainsbury's: *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2016] CAT 11 (the "*Sainsbury's Mastercard* judgment").

6. Sainsbury's claim against Visa came on for trial before Phillips J in the Commercial Court. After a trial lasting 40 days, Phillips J dismissed Sainsbury's claim in a judgment issued on 30 November 2017, holding that there was no restriction of competition and thus no breach of Art 101(1) (or s. 2): *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2017] EWHC 3047 (Comm) (the "*Sainsbury's Visa* restriction judgment"). By a further judgment, issued on 23 February 2018, Phillips J held that if, contrary to his first judgment, there was a restriction of competition, Visa's MIFs were not exempt under Art 101(3) (or s. 9): *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2018] EWHC 355 (Comm) (the "*Sainsbury's Visa* exemption judgment").

7. Appeals against the outcome in all these cases were heard together in the Court of Appeal. The Court of Appeal gave a single judgment in which it held that the MIFs at issue under both the Visa and Mastercard schemes infringed Art 101(1) and that Popplewell J had erred in his approach to exemption, but

remitted all the cases to the CAT to reconsider the issues under Art 101(3) and, insofar as it held that the exemption did not apply, the quantum of damage: *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2018] EWCA Civ 1536 (the "CA judgment"). Further appeals in all the cases went to the Supreme Court, which gave a single judgment in June 2020. The Supreme Court varied the decision and order of the Court of Appeal in certain specific respects, in particular setting aside the remittal of the present proceedings as regards exemption since that had been conclusively determined by the Court of Appeal's decision that Popplewell J should have concluded on the evidence before him that Mastercard's claim for exemption failed: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 (the "SC judgment").

8. The present proceedings therefore come before the CAT for trial on quantum. For the purpose of the quantum stage, the claimants ("AAM") object to certain parts of Mastercard's defences[1] on the basis that Mastercard is now precluded from advancing those contentions by the previous judgments in these proceedings. Accordingly, AAM apply, in effect, to strike out those parts of the defences. Mastercard opposes that application. For its part, Mastercard seeks permission to re-amend its defences to raise some further contentions. A number of those draft amendments are not opposed, and other draft amendments have been withdrawn by Mastercard following AAM's objections. This judgment therefore addresses those aspects of the existing defences and those draft amendments to which AAM object.

9. It is common ground that permission to amend should not be given to make an amendment which could then be struck out. AAM's objections to the amendments sought are essentially advanced on the same basis as their objections to the parts of Mastercard's existing defences. The applications by AAM and by Mastercard can therefore be considered together.

[1] There are separate Mastercard defences in each of the three actions. However, the same points arise under each of them. For convenience, references in this judgment will be to the defence in the WM Morrison claim.

B. PRINCIPLES

10. The objections advanced concern three distinct aspects of Mastercard's case on quantum and it will be necessary to address each of them separately. However, all those aspects concern the question of what would have happened in the marketplace had Mastercard been constrained not to impose MIFs, or to impose a zero MIF, under its scheme, i.e. the counterfactual. For each of those three aspects of the counterfactual, the objection is founded on the submission that for Mastercard to be permitted to advance that case would amount to an abuse of process and contrary to the principle that there should be finality in litigation.

11. The governing approach was set out by the Supreme Court in its judgment in these proceedings, where it allowed AAM's cross-appeal and reversed the decision of the Court of Appeal to remit the issue of whether Mastercard's MIFs were exempted under Art 101(3) for reconsideration by the CAT:

> "238. …The higher courts have in a number of respects laid down important and binding principles regarding what justice requires in the context of litigation, and these inform the proper approach to the interpretation and application of the overriding objective.
>
> 239. One such principle which is well established is that there should be finality in litigation. This is a general principle of justice which finds expression in several ways, which tend to be grouped under the portmanteau term "res judicata": see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, paras 17-26 per Lord Sumption. When a legal claim has finally been determined in litigation, a cause of action estoppel arises and it cannot be reopened. A binding issue estoppel may arise in respect of a matter, other than a legal claim, which is directly the subject of determination in proceedings. Further, parties are generally required to bring forward their whole case in one action, and attempts to revisit matters that have already been the subject of a determination (even if not formally a matter of cause of action estoppel or the subject of an issue estoppel) are liable to be barred as an abuse of process: *Henderson v Henderson* (1843) 3 Hare 100, 114-116 per Wigram V-C; *Johnson v Gore-Wood & Co* [2002] 2 AC 1, 31 per Lord Bingham of Cornhill and 58-59 per Lord Millett; *Virgin Atlantic* (above). Under this rule, first explored in *Henderson v Henderson*, a party is precluded "from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones" (*Virgin Atlantic*, para 17). As Sir Thomas Bingham MR (as he then was) explained in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260:
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> > "The rule in *Henderson v Henderson* … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided … once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res

> judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."
>
> This is a rule based on what is required to do justice between the parties as well as on wider public policy considerations. It is a rule which is firmly underwritten by and inherent in the overriding objective."

12. The claimants further drew attention to the observations of Coulson J (as he then was) in *Seele Austria GmbH Co v Tokio Marine Europe Insurance Ltd* [2009] EWHC 255 (TCC) at [107]:

> "… I accept that, where certain issues are dealt with by the court in advance of others, genuine mistakes may occur, where it would be unfair and unreasonable to prevent one party from raising an issue on the merits which, for whatever reason, has not been the subject of a clear determination before. *Tannu* and *Aldi Stores* are good recent examples of such a case. But at the same time, the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again. The Civil Procedure Rules are designed to avoid the litigation equivalent of death by a thousand cuts."

C. THE ASYMMETRIC COUNTERFACTUAL

13. In its original defence, Mastercard alleged that the claimants suffered no loss in any event, because if the Mastercard MIFs had been significantly lower or reduced to zero, then transactions would have been carried out by other payment methods instead to which those low or zero MIFs did not apply. That was both because issuers would have switched to issuing Visa or American Express ("Amex") cards instead of Mastercard cards, and because cardholders would have switched to using other cards since Visa or Amex could offer lower fees (or higher benefits) to cardholders. In other words, Mastercard's contention was based on the assumption that in this counterfactual scenario, while Mastercard was constrained in its level of MIFs, the other payment systems would have continued to operate as they did in the real world.

14. Mastercard seeks, by its application to amend, to expand on this contention to encompass, in particular, switching to payment by PayPal. The relevant paragraphs of its amended defence, showing the proposed re-amendment, are as follows:

"28. ~~In any event, it~~It is denied that the Claimant has any claim for damages either in the sum alleged or at all:

…

d. In any event, if the Masterc~~C~~ard Scheme had operated with ~~no or significantly lower interchange fees, particularly no or a lower UK MIF~~zero MIF during the claim periods, then the reduced activities of issuers would have led to a reduction in the number of transactions to which the zero ~~or lower~~ interchange fee applied, as opposed to other more expensive payment methods (e.g. cash, cheques, American Express, Paypal and Visa). The Claimant can only claim damages to the extent that its overall costs have been increased.

…

139. Further or alternatively, it is likely that some or all cardholders would have moved to either Visa or American Express directly, since if issuers were recovering a smaller percentage of their costs from acquirers, they would have to recover a larger percentage from Masterc~~C~~ard/Maestro cardholders or provide more limited benefits to cardholders, making Mastercard/Maestro cards less attractive to cardholders than Visa or American Express cards.

140. Even if cardholders did not move to Visa or American Express, it is likely that a reduction in interchange fees (and corresponding increase in cardholder costs or reduction in cardholder benefits) would have resulted in a reduction in their Masterc~~C~~ard/Maestro card usage and a higher proportion of their transactions taking place on other payment methods (including Visa, American Express, Paypal and cash). While part of this reduction in Mastercard/Maestro transactions may have been offset by an increase in transactions through other, more expensive, payment mechanisms, it is also likely to have resulted in an overall reduction in transactions, including cross-border transactions.

141. The MCI Defendants note that Visa Europe has in general offered comparable interchange fees to those offered by the Masterc~~C~~ard/Maestro Schemes throughout the claim periods ~~period in question~~ and consequently that Visa cards have in general offered cardholders similar benefits to those provided by MasterCard/Maestro cards.

142. Consequently, to the extent that issuers or cardholders moved to Visa, the Claimant would have received no or limited savings as compared to the costs which the Claimant in fact incurred as a result of accepting Masterc~~C~~ard cards.

143. ~~Since 1997,~~ Throughout the ~~period of the~~ claim periods, American Express has offered financial institutions the ability to issue American Express cards and has made payments to issuers for doing so which match or exceed those which issuers ~~have~~ received under the Masterc~~C~~ard/Maestro Schemes through interchange fees. American Express also charges merchants MSCs which are typically substantially higher than those charged by acquirers of Visa or Masterc~~C~~ard/Maestro transactions and, as a result, has been able to offer cardholders and issuers substantial additional benefits/incentives. Paypal also charges

merchants MSCs which are typically substantially higher than those charged by acquirers of Visa or Mastercard/Maestro transactions.

144. Consequently, to the extent that issuers or cardholders moved to American Express/Paypal, the Claimant would have incurred additional costs as compared to the costs which the Claimant in fact incurred as a result of accepting Mastercard/Maestro cards.

144A. Even where transactions would have taken place on cash, the Claimant would have incurred costs in processing such transactions and must give credit for the costs avoided through processing these transactions through Mastercard instead.

145. The MCI Defendants will, therefore, contend that all or a substantial proportion of the transactions which in fact took place at the Claimant on Mastercard/Maestro cards would have taken place at the same or higher cost in any event and a significant number of transactions would not have taken place at all. When account is properly taken of these matters, it is denied that the Claimant has suffered any loss."

15. AAM do not object to this plea as regards potential switching to Amex. Amex is not a four-party payment scheme comparable to Mastercard and the fees involved do not result from a collusive agreement involving issuing or acquiring banks: see the SC judgment at [17] and the *Sainsbury's Visa* restriction judgment at [42]. But they submit that Mastercard is not now entitled to rely on potential switching by issuers or cardholders to Visa, which depends on Visa not being subject to the same constraint as Mastercard, i.e. an asymmetric counterfactual. And they contend that the same objection applies, to a certain extent, as regards switching to PayPal.

16. In order to assess these submissions it is necessary to analyse the CA judgment in some detail. In doing so, we adopt and follow the approach in the CAT judgment in *Dune Shoes Ireland Ltd v Visa Europe Ltd* [2020] CAT 26 (the "*Dune* judgment").

17. The Court of Appeal identified three primary issues that arose for decision on the appeals, which they summarised at [7] as follows:

> "(i) **The article 101(1) issue**: Do the schemes' rules setting default MIFs restrict competition under article 101(1) in the acquiring market, by comparison with a counterfactual without default MIFs where the schemes' rules provide for the issuer to settle the transaction at par ("settlement at par" or "SAP") (i.e. to pay the acquirer 100% of the value of the transaction)?
>
> (ii) **The ancillary restraint death spiral issue**: Should the schemes' argument that the setting of a default MIF is objectively necessary for their survival be evaluated on the basis of a counterfactual that assumes that the rival

> scheme would be able to continue to impose (unlawful) MIFs? This issue is known as the "death spiral" issue because, if the counterfactual assumes a rival scheme that can continue to set high MIFs, the scheme under scrutiny would be likely to lose most or all of its business to the rival scheme, where issuers received high MIFs and cardholders received benefits as a result.
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> (iii) **The article 101(3) exemption issue**: If the setting of default MIFs infringes article 101(1), should it have been held that the four conditions required for the application of the exemption in article 101(3) were applicable in these cases, and if so at what level(s) were the MIFs exemptible? …"

There were also some other issues addressed by the Court of Appeal which are not material to the present case. However, as the Court of Appeal observed, the death spiral argument was considered by the CAT and Popplewell J in the context of both Art 101(1) and ancillary restraints/objective necessity: [7] at fn 4.

18. To understand the CA judgment in its context, it is appropriate to explain how each of the three first instance judgments dealt with the counterfactual against which the restrictive effects of the Visa and Mastercard schemes were to be tested.

(1) In the *Sainsbury's Mastercard* judgment, the CAT held that the starting point was a Mastercard rule that transactions would be settled at par, which was equivalent to a zero MIF, but that it was appropriate for the counterfactual to take account of the Visa MIF which would have remained close to its existing level, as a result of which issuers in the Mastercard scheme would have bilaterally agreed interchange fees with acquirers at significantly lower levels.

(2) In the *AAM* judgment, Popplewell J also held that the starting point was a rule that transactions would be settled at par and that this was equivalent to a zero MIF. He disagreed with the CAT that bilaterally agreed MIFs would emerge. He proceeded to adopt the reasoning of the Mastercard Commission Decision, *Mastercard GC* and *Mastercard CJ* that this was a restriction of competition because the MIF creates a floor for the merchant service charge ("MSC") and interferes with the ability of acquirers to compete for merchants by offering MSCs below that floor. On that basis, he would have held that the arrangement infringed

Art 101(1) but for the death spiral argument. His reasoning is helpfully summarised in the CA judgment at [46]:

> "… [Popplewell J] expressed this argument in the following stages: (i) it is legally permissible for the counterfactual to take into account competition; (ii) the proper assumption in the present case is that Visa's MIFs would have been the same in the counterfactual as they were in reality; and (iii) this would have led to the collapse of the MasterCard scheme as issuers abandoned it in pursuit of higher MIFs. With respect to the first stage, he held that it is permissible to consider competition, on the basis of CJEU jurisprudence, including [177]-[179] of the CJEU's decision; the contrary principle stated by the Court of First Instance in *Métropole Télévision (M6) v Commission* ("*Métropole*")[2] was out of line with that jurisprudence ([164]-[185]). Regarding the second stage, he held that Visa's MIFs should be assumed to be the same in the counterfactual as they actually were, and not the same as MasterCard's counterfactual MIFs, unless there was sufficient evidence that the two schemes were "materially identical", which there was not ([186]-[219]). As for the third stage, he concluded, on the basis of the evidence of MasterCard's witnesses and of both parties' experts, that the MasterCard scheme would not have survived in such circumstances ([220]-[236]). Therefore, the MIFs as set did not restrict competition by effect, and were objectively necessary as an ancillary restraint, with the consequence that they did not infringe article 101(1)."

(3) In the *Sainsbury's Visa* restriction judgment, Phillips J held that the starting point for the counterfactual was a rule that transactions were settled at par and that this was equivalent to a zero MIF. In agreement with Popplewell J, he rejected the view of the CAT that bilateral agreements would be concluded. However, he held that:

(i) he was not bound by *Mastercard CJ* to find that the MIFs restricted competition within Art 101(1), on the basis that this was a finding of fact;

(ii) the fact that Visa's MIFs imposed a floor below which the MSCs could not fall should not be regarded as a restriction of competition, since the restrictive nature of a zero MIF was not different from the restrictive nature of a higher MIF;

(iii) accordingly, there was no infringement of Art 101(1).

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[2] Case T-112/99 *Métropole Télévision (M6) v Commission*, EU:T:2001:215.

Although this conclusion did not involve any consideration of the Mastercard MIFs, Phillips J proceeded to reject the argument that the proper assumption for the counterfactual was that Mastercard's MIFs would remain unconstrained. We gratefully adopt the summary of his reasoning set out in the CA judgment at [53]-[54]:

> "53. … [Phillips J] disagreed with both the CAT and Popplewell J on that issue at [162]-[169]. He thought it difficult to conceive of circumstances in which one scheme would be unable to set any MIFs whilst the other continued to operate unconstrained. More importantly, such an assumption would mean that two unlawful schemes could each escape censure merely by virtue of the existence of the other, which could not be right.
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> 54. Though not strictly necessary, Phillips J went on to consider the ancillary restraint exemption to article 101(1). In this respect, Visa had relied solely on the 'death spiral argument', which the judge had already rejected in the context of whether the MIFs restricted competition. He considered that his reasoning equally applied in the context of ancillary restraint ([179]-[180]). He disagreed with Popplewell J that the CJEU jurisprudence made it permissible to take into account competitors in either context ([181]-[190]). Accordingly, had Phillips J reached a different conclusion on whether the MIFs amounted to a restriction of competition, he would not have regarded the restriction as objectively necessary to the operation of the Visa scheme ([191])."

19. In Part IV of its judgment, the Court of Appeal considered the scope and application of the doctrine of ancillary restraints/objective necessity before it turned to address the issues arising in the appeals. The Court summarised the doctrine as follows, at [58]:

> "a provision of an agreement which has the effect of restricting competition does not constitute an infringement if it is objectively necessary for the implementation of the "main operation" of the agreement, provided that the main operation does not itself infringe article 101(1)."

20. The Court of Appeal accepted the arguments of the merchants and the Commission (which had intervened in the appeals), relying on the judgment of the Court of First Instance in the *Métropole* case, that:

> "the consideration of objective necessity is a relatively abstract exercise concerned with whether, without the restriction in question, a main operation of the type in question would be impossible to carry out. The test, they said, is not concerned with whether the restriction is necessary for the particular operation in question to compete successfully or be commercially successful. They also said that an analysis of the pro- and anti-competitive effects of the restriction is for article 101(3) and does not form any part of the article 101(1) exercise, including as to ancillary restraint." (CA judgment at [60])

21. The Court rejected the finding of Popplewell J in the *AAM* judgment that *Métropole* was out of line with the jurisprudence of the CJEU and had been implicitly overruled in *Mastercard CJ*. In that regard, the Court examined various CJEU judgments, including *Mastercard CJ* itself.

22. Having rejected the challenge to *Métropole*, the Court of Appeal stated, at [72]-[73]:

> "It follows that the ancillary restriction must be essential to the survival of the type of main operation without regard to whether the particular operation in question needs the restriction to compete with other such operations. All questions of the effect of the absence of the restriction on the competitive position of the specific main operation and its commercial success fall outside the ancillary restraint doctrine …. Those questions of the competitive effect of the absence of the restriction are to be considered, if at all, under art 101(3). …"

23. After referring to the more recent judgment of the General Court in Case T-491/07 *Cartes Bancaires v Commission*, EU:T:2016:379, the Court of Appeal concluded, at [74]:

> "It follows, in our judgment, that Popplewell J was wrong to conclude that the issue of whether, in the absence of the restriction in question, here the default MIF, the MasterCard scheme would survive in view of the competition from Visa, was one which could be considered under the ancillary restraint doctrine under article 101(1) …."

24. The Court of Appeal addressed the first of the three primary issues, i.e. the Art 101(1) issue (para 17 above), in Part VI of its judgment. In effect, the Court upheld the view of Popplewell J, and rejected the view of Phillips J, that the correct counterfactual had been established by the *Mastercard CJ* decision as a matter of law, which was therefore binding on the English courts. However, as already indicated earlier in its judgment, the Court held that Popplewell J had been wrong then to rely on the death spiral argument to reach a different conclusion on the question of a restriction of competition:

> "161. … In our judgment, Popplewell J fell into error (particularly at [182]-[185]) in considering the death spiral argument at all in relation to the question whether the measures were a restriction of competition under article 101(1). It is common ground that the correct approach to deciding the primary article 101(1) question was set out at [111] in *Cartes Bancaires* as follows: "determining whether, in the absence of the measures in question, the competitive situation would have been different on the relevant market, that is to say whether the restrictions on competition would or would not have occurred on this market".

> 162. It is common ground that the relevant market for article 101(1) purposes is the acquiring market. That is stated in the first issue agreed between the parties under article 101(1). But the death spiral argument does not concern a comparison between the state of competition in the acquiring market with and without the "measures in question". Instead, it concerns the effects on the inter-system market and the issuing market of issuers switching to a competing scheme in order to earn MIFs in the absence of MIFs being imposed in the MasterCard scheme. It is true that the putative decline of business in the inter-system market and the issuing market affects the level of business in the acquiring market, but in our judgment that is not to the point. The first question is whether the measures in question restrict competition in the acquiring market. The second question is whether the scheme can show that the restriction is objectively necessary for a scheme of that type to survive, at which stage it is legitimate to consider both sides of the two-sided market and the inter-system market, as was common ground in argument. The third question is whether there is an exemption under article 101(3). It is not legitimate to consider the death spiral argument at the first stage; Parts IV and VII of this judgment deals with its relevance to the second stage."

25. For much the same reason, the Court of Appeal held that the CAT had been wrong in the *Sainsbury's Mastercard* judgment to take account of the factors beyond the acquiring market, and thus the effect in the counterfactual of Visa's MIFs on the Mastercard MIFs, in its initial Art 101(1) analysis of whether the MIFs amounted to a restriction by effect: CA judgment at [175].

26. After considering and rejecting various other arguments advanced on behalf of Mastercard and Visa, the Court of Appeal summarised its conclusions at [185]-[188], of which the material parts are the following:

> "185. … The correct counterfactual for schemes like the MasterCard and Visa schemes before us was identified by the CJEU's decision. It was "no default MIF" and a prohibition on *ex post* pricing (or a settlement at par rule). The relevant counterfactual has to be likely and realistic in the actual context [citing authorities], but for schemes of this kind, the CJEU has decided that that test is satisfied.
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> 186. The CJEU's decision also made clear at [195] that MasterCard's MIFs, which resulted in higher prices, limited the pressure which merchants could exert on acquiring banks, resulting in a reduction in competition between acquirers as regards the amount of the merchants' service charge. This is not a decision from which this court either can or should depart. …
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> 187. … We do not discount the possibility that some evidence might conceivably enable other schemes to distinguish different MIFs from those upon which the CJEU was adjudicating. In the present case, however, the MIFs are materially indistinguishable from the MIFs that were the subject of the CJEU's decision. In both cases, the MIFs represented the vast majority of the merchants' service charge, and the appropriate counterfactual was a "no default MIF" plus a prohibition on *ex post* pricing.

> 188. The death spiral argument is not relevant at this stage of the debate because the article 101(1) question must be asked in relation to the acquiring market."

27. In Part VII of its judgment, the Court of Appeal addressed the second of the three primary issues it had identified: i.e. the death spiral argument in the context of ancillary restraints: para 17 above. Since the way the Court of Appeal dealt with this argument is fundamental to AAM's objection to Mastercard's pleading, it is appropriate to quote the Court of Appeal's full discussion and conclusions on this issue:

> "198. On this issue, we will apply the legal principles applicable to the ancillary restraint doctrine as set out in Part IV of this judgment. On that basis, Popplewell J was wrong, as we have said, to conclude that the issue of whether, in the absence of the default MIF, the MasterCard scheme would survive in view of the competition from Visa was one which could be considered under the ancillary restraint doctrine under article 101(1). Such questions relating to the application of the so-called asymmetrical counterfactual are not for the ancillary restraint issue under article 101(1), but for the issue of exemption under article 101(3).
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> 199. We agree with the merchants that, if questions of the subjective necessity of a restriction for the survival of the particular main operation were relevant for the purposes of the ancillary restraint doctrine, it would enable failing or inefficient businesses that could not survive without a restrictive agreement or provision to avoid the effects of article 101(1), which would undermine the effectiveness of that provision of EU law and the underlying competition policy.
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> 200. The only question in relation to the potential application of the ancillary restraint doctrine in the present context is whether, without the restriction of a default MIF (which is the relevant counterfactual), this type of main operation, namely a four-party card payment scheme, could survive. The short answer to that question is in the affirmative and the contrary was not suggested by MasterCard or Visa. There are a number of such schemes in other parts of the world which operate perfectly satisfactorily without any default MIF and only a settlement at par rule.
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> 201. Even if Popplewell J had been correct in his conclusion that the decision of the Court of First Instance in *Métropole* was implicitly disapproved by the CJEU in *MasterCard*, so that it was appropriate to consider, in the context of the ancillary restraint doctrine, the competitive effects of the removal of the restriction in question on the specific main operation, we consider that his adoption of the asymmetrical counterfactual was incorrect for two related reasons.
>
> 202. First, as the CJEU's decision makes clear at [108]-[109], the counterfactual must be a realistic one. The asymmetrical counterfactual which Popplewell J accepted assumes that MasterCard would be prevented from setting default MIFs but Visa would remain unconstrained. As Phillips J said at [168(ii)] of his first judgment, addressing the mirror argument made by Visa in that case, that situation is "not merely unrealistic but seems highly improbable". As Phillips J said, the schemes are engaged in the same business, using the same model and are fierce competitors. We were not impressed in

this context by the arguments on behalf of the schemes that there have been inconsistencies in approach on the part of the Commission and other competition authorities and regulators. Whilst there have been differences in the detail, as appears from the chronological background set out at Part II of this judgment, the competition authorities and regulators have sought to constrain both schemes in a broadly similar fashion. We consider that a realistic counterfactual would assume that, if one of the schemes was unable (whether for commercial or legal reasons) to set default MIFs, the other scheme would be similarly constrained.

203. The correctness of that conclusion was not undermined by the points made by Ms Rose about what had happened historically in Hungary or even in the United Kingdom. The critical point is that the hypothesis of the asymmetrical counterfactual is that one of the schemes would be prevented from setting any default MIF but the Commission and the UK competition authorities and regulators would allow the other scheme to carry on setting its default MIFs, without any constraints being imposed. That seems to us to be completely unrealistic and improbable. Realistically there would be similar constraints on both schemes.

204. Secondly, Popplewell J accepted at [189] of his judgment that, if the AAM parties were right that the two schemes were materially identical, he would have had to assume that, in the counterfactual world, Visa's MIFs would be constrained to the same extent as MasterCard's. His essential reasoning for that conclusion at [190]-[193] of his judgment was that it should not be open to one unlawful scheme to save itself by arguing that it otherwise would face elimination by reason of competition from the other scheme, which is itself unlawful.

205. On the evidence before him, however, Popplewell J considered that the AAM parties had not established that the Visa scheme was materially identical to the MasterCard scheme he was considering. He concluded at [204] that what was material was whether and to what extent Visa's MIFs as set constituted an unlawful restriction of competition infringing article 101, which involved considering all the features of the Visa scheme which might affect the lawfulness of its MIFs, including those relevant to article 101(3) issues. He rejected the argument by the AAM parties that it was sufficient to posit material identity between the schemes only in respect of aspects relevant to the issue of restriction of competition under article 101(1), concluding that it was necessary also to show material identity which might affect the level at which a MIF was exemptible under article 101(3).

206. This conclusion suffers from the same fallacy as Popplewell J's acceptance of the argument that, for the purposes of the ancillary restraint doctrine, it is permissible to look at the competitive or commercial effect of the removal of the restriction in question on the specific main operation. It brings into the article 101(1) analysis matters which are only to be considered under article 101(3). Once it is recognised that the relevant test is only satisfied if the restriction is objectively necessary for the survival of the type of main operation in question and the subjective necessity of the restriction for the survival of the specific main operation is irrelevant, it is clear that it is only material identity in respect of matters relevant to article 101(1) that would have to be established.

207. We consider that the two schemes are materially identical for the purposes of the article 101(1) analysis. They are both four-party card payment schemes with an Honour All Cards Rule for credit and debit cards, in which default MIFs are set which are paid to issuing banks and passed on to the

> merchants as part of the merchants' service charge imposed by acquiring banks. In those circumstances, even if Popplewell J had been correct that it was appropriate to consider, in the context of the ancillary restraint doctrine, the competitive effects of the removal of the restriction in question on the specific main operation, he should have gone on to conclude that the schemes were materially identical, so that in the counterfactual world Visa's MIFs would be constrained to the same extent as MasterCard's.
>
> 208. For all these reasons, we consider that Popplewell J erred in accepting the death spiral argument and should have upheld his initial conclusion that MasterCard's MIFs were a restriction on competition under article 101(1). By parity of reasoning, Phillips J was correct to reject the death spiral argument in his first judgment."

28. In Part VIII of its judgment, the Court of Appeal addressed the Art 101(3) exemption issue (see para 17 above). Under this head, the Court considered the *AAM* and *Sainsbury's Visa* cases separately. As regards the *AAM* case, the Court held that Popplewell J was wrong on the evidence to find that the conditions of Art 101(3) were fulfilled: he should have held that Mastercard was not entitled to exemption under Art 101(3). The Court nonetheless remitted the Art 101(3) exemption issue in the *AAM* case to the CAT on the basis that the same issue was being remitted in the two *Sainsbury's* cases and that, in summary, the three cases should be decided consistently with the terms of the CA judgment: see at [365]-[366].

29. Mastercard and Visa both appealed to the Supreme Court and AAM cross-appealed against the remittal of the Art 101(3) exemption issue. The appeals by Mastercard and Visa were based on several grounds. The only ground relevant to the present applications concerned the Court of Appeal's conclusion that there was a restriction by effect on the acquiring market contrary to Art 101(1). However, as noted by the Supreme Court at [45], neither Mastercard nor Visa sought to challenge the Court of Appeal's conclusion on the death spiral argument or to submit that the Court of Appeal had been wrong to uphold Phillips J's rejection of the asymmetric counterfactual. In summary, the Supreme Court upheld the Court of Appeal's conclusion on the Art 101(1) issue and held that there was a restriction of competition in violation of that provision. As regards Art 101(3), there were several strands to the appeals but neither scheme sought to argue that, whatever the position as regards Art 101(1), the asymmetric counterfactual was applicable in the context of Art 101(3). As noted above, AAM's cross-appeal against remittal of the Art 101(3) issue was successful so the present case proceeds on the basis that, in the counterfactual,

Mastercard's rules would have required settlement at par, which equates to a zero MIF.

30. The extensive extracts from the CA judgment set out above show that it is correct, as Mr Cook for Mastercard submitted, that the Court of Appeal's discussion of the counterfactual was in the context of Art 101(1), and that the asymmetric counterfactual was relied upon for the argument that if one scheme had to operate with a zero MIF while the other was unconstrained, it could not survive – hence the characterisation of this point as a 'death spiral'. He is also correct that Mastercard now seeks to put forward an asymmetric counterfactual, not in support of an argument concerning ancillary restraints, or to argue that its scheme could not survive, but that there would be a significant diversion of card usage to Visa, which should be taken into account when it comes to quantification of damages.

31. Mr Cook rightly points out that as a matter of EU competition law (and therefore similarly under the CA 1998), the relevant counterfactual is not necessarily the same for all purposes: see *Mastercard CJ* at paras 163 and 168. However, the CJEU stated at para 108:

> "… irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic".

At the present stage of these proceedings, the issue to which the counterfactual relates is the assessment of damages, and therefore a comparison between the MSCs which the claimants in fact paid to their acquiring banks in respect of Mastercard transactions with the MSCs which they would, on the balance of probabilities, have paid if Mastercard had operated with zero MIFs. The latter is the counterfactual world which, by definition, never actually existed. It is axiomatic that the quantification is based on this counterfactual and we reject Mr Cook's submission that the statement of the CJEU at para 108 quoted above is irrelevant to the quantification stage.

32. The Court of Appeal adopted at [202] the finding of Phillips J that the Visa and Mastercard schemes "are engaged in the same business, using the same model and are fierce competitors". The Court emphasised that while there have been

differences in the detail, competition authorities and regulators have sought to regulate the two schemes in a broadly similar way. We repeat the Court's material finding, at [203]:

> "… the hypothesis of the asymmetrical counterfactual is that one of the schemes would be prevented from setting any default MIF but the Commission and the UK competition authorities and regulators would allow the other scheme to carry on setting its default MIFs, without any constraints being imposed. That seems to us to be completely unrealistic and improbable. Realistically there would be similar constraints on both schemes."

33. We also do not think it makes any difference to say that the present stage of the case concerns causation of loss. It is of course correct, as Mr Cook emphasised, that AAM are not claiming for the effect of Visa's MIFs but for the loss they suffered by reason of Mastercard's MIFs. But we do not see that this can justify calculating that loss on the basis of a counterfactual that is divorced from reality. If a counterfactual is completely unrealistic when put forward on the question of restriction, it does not become realistic just because it is put forward when the analysis moves to consideration of quantum. This does not, as Mr Cook sought to suggest, make Mastercard liable for loss caused by Visa: AAM are claiming for loss occurred only on transactions paid through Mastercard, whereas to claim for loss caused by Visa they would have to bring separate proceedings against Visa. However, if Mastercard's argument were to be accepted, so that it could contend in its defence to AAM's quantum claim in these proceedings that Mastercard transactions would have diverted to Visa, then by the same token if AAM were also to sue Visa then Visa could contend in its defence to quantum in that claim that Visa transactions would have diverted to Mastercard. The result would be that each of Mastercard and Visa could avoid liability in damages for operating an unlawful scheme, either in total or in large part, by relying on the effects of competition arising from the other's unlawful scheme. Indeed, that is precisely the position which the two schemes adopted in the separate proceedings pending against each of them brought by Sainsbury's, which have also been remitted to the CAT.

34. The position as regards PayPal, raised by Mastercard's proposed amendment, is a little more complicated. PayPal applies only to online purchases. It is a secure payment system which can operate either by direct link to the customer's bank account or by a link to the customer's credit card. Insofar as Mastercard seeks to allege that in the counterfactual there would have been switching to payment

by PayPal linked to the customer's bank account, Mr Turner QC confirmed that AAM do not object to the plea being put forward (although they will contest the argument at trial). However, insofar as there would have been switching to PayPal for payment linked to the Visa system, that is based on the asymmetric counterfactual as between Mastercard and Visa, and therefore subject to the same objection which we have upheld above.

35. Mr Cook explained that para 140 of the defence, as it is sought to be amended, covers also customers switching to other payment methods aside from switching directly or indirectly to a different card, so that instead of paying directly by Mastercard or Visa for an online purchase they would pay by PayPal even though their PayPal account was linked to that same credit card, since PayPal would be able, due to its revenue from the fees it charged merchants, to offer certain benefits to customers which, in the absence of MIF revenue, issuers of Mastercard and Visa could not offer. Mr Cook submitted that this should be considered as a realistic counterfactual as to how the market might evolve in the counterfactual world. That is in turn relevant to the damages calculation since payment through PayPal is apparently more expensive for merchants such as AAM.

36. Mr Turner observed in response that this was pure speculation. However, we are here considering only a pleading amendment and not whether the point will be made good by evidence at trial. As Mr Turner accepted, provided that it is clear that this does not rest on an asymmetric assumption regarding Mastercard and Visa MIFs, Mastercard cannot be prevented at this stage from advancing that argument. Accordingly, with the incorporation of that important proviso, we permit this amendment regarding PayPal (and the similar summary reference to PayPal in the amended para 28(d)).

37. Save in that regard, we hold that the pleas resting on the asymmetric counterfactual should be struck out and that Mastercard is not permitted to make amendments resting on that counterfactual.

38. There is a further and distinct plea within para 140, namely that a zero MIF, and the resulting decline in cardholder benefits, would have led to a decline in the

overall volume of sale transactions by AAM. That forms the subject of AAM's third objection, which we discuss separately below.

D. THE SCHEME RULES

39. As set out at para 129 of its defence, during the relevant periods for these claims the Mastercard scheme default rules contained provisions which determined:

(1) when an issuer is required to make a payment to an acquirer even in respect of a fraudulent transaction;

(2) when an issuer is required to make a payment to an acquirer even when the cardholder defaults on payment; and

(3) the timing of the issuer's payment to the acquirer.

40. Mastercard has pleaded that if it had been required to operate its scheme with the relevant MIFs set at zero, then Mastercard's rules in relation to these issues would have been materially different. As we understood it, that applies in particular as regards the fraud rule, which was clearly of benefit to merchants at the expense of issuers. The point is set out at paras 28(c), and 130-133 of the defence. (In this respect, the amendments proposed are immaterial and merely reflect the determination that the counterfactual involves a zero MIF.)

> "28(c). Furthermore, the Claimant cannot properly calculate damages on the basis that it would have enjoyed the services of exactly the same Master~~C~~card Scheme with a zero ~~(or a lower) interchange fee~~MIF. If issuers could not obtain a proper contribution from merchants for the cost of the services which they provided to them including a guarantee against fraud and cardholder default and/or immediate payment, then they would not have been willing to provide these services and the Scheme Rules would have been altered accordingly to remove or alter these services. Any claim for damages must, therefore, give credit for the value of these benefits which the Claimant would not otherwise have received.
>
> …
>
> 130. In summary, these default rules required issuers often to make payments to acquirers even in respect of fraudulent transactions, to pay acquirers even when a cardholder defaults and to make payment within a short period.

131. The EEA and UK default rules in relation to each of these issues which were in place for the claim periods ~~period of the claim~~ ~~between 1992 to date~~ were determined in the context of the EEA MIF or the UK MIF then in force which provided a contribution to the costs which issuers incurred in complying with these default rules. Had the Scheme been required to operate with a ~~substantially lower MIF, or a~~ zero MIF ~~or operated on the basis of bilaterally agreed interchange fees at the levels contended for by the Claimants at all~~ (either for the EEA or the UK), then the default rules in relation to these issues would have materially different, since acquirers/merchants could not expect to receive the benefit of services to which they were not contributing and it would not be commercially viable for issuers to provide these services to merchants without any contribution to the costs of doing so from acquirers/merchants. Furthermore, Mastercard would never have voluntarily adopted a set of default rules which placed its business at a substantial competitive disadvantage.

132. ~~The extent of any changes which would have taken place depends upon the level of interchange fee that could lawfully have been included in MasterCard's Scheme Rules, however, t~~The MCI Defendants will contend that the effect of any changes made would have been to transfer additional costs on to acquirers to an extent which would have compensated for the reduction in the interchange fee. Alternatively, the changes would have transferred additional costs to an extent which would have mitigated the reduction in the interchange fee. Any such increase in costs would have been passed on by its acquirer(s) to the Claimant through the MSC or through other charges or changes in the Merchant Service Agreement. Consequently, it is denied that the costs ultimately borne by the Claimant would have been any lower.

133. The Claimant has, therefore, received benefits as a result of the interchange fee which it would not otherwise have obtained and must give credit for the value of these benefits. The MCI Defendants will contend that, when credit is given for these benefits, the Claimant has no claim for damages."

41. At the earlier stage of these proceedings, this point about resulting changes to the Mastercard rules was advanced also to support Mastercard's case:

(1) that the positive MIFs did not give rise to a restriction of competition within Art 101(1) since without them the Mastercard rules would have had to impose alternative charges by issuers on acquirers to fund the costs to issuers of providing these benefits, or alternatively to remove these benefits, so that merchants would have been no better off in the counterfactual ("the restriction issue");

(2) that the positive MIFs were objectively necessary as part of the Mastercard scheme giving these benefits to merchants ("the objective necessity issue"); and

(3) that even if the rules for MIFs came within Art 101(1), they were exempted under Art 101(3) since they produced beneficial effects which met the conditions for exemption ("the exemption issue").

42. Thus, at para 101A(b)-(c) of its defence, as part of its contention on both the restriction issue and objective necessity, Mastercard pleaded as follows:

> "101A. In relation to the relevant counterfactual, it is denied that a "no-MIF counterfactual" or "zero MIF counterfactual" is a relevant counterfactual for the purpose of the Claimant's claim or that this demonstrates that the UK MIF was not objectively necessary for the following reasons:
>
> …
>
> (b) …it is denied that a "no MIF" or "zero MIF" counterfactual is realistic, since MasterCard would not have adopted such rules without making other corresponding changes to the MasterCard Scheme …
>
> (c) Furthermore, in relation to what would happen in a "no MIF" or "zero MIF" counterfactual, the Defendants repeat paragraphs 129 to 132 … below [see above]. As set out therein, in order to allow the Scheme to operate effectively or at all, the MCI Defendants would have made other changes to the default rules of the Scheme which would … have transferred additional costs on to acquirers to an extent which would have compensated for the reduction in interchange fees …."

43. As regards the exemption issue, Mastercard's position was set out in its responses to a Part 18 request for further information, served on 13 April 2015. At response 6/7 it stated:[3]

> "(d) While MasterCard denies that there is any such counterfactual, the likely features of such a counterfactual (if it did exist) are identified at paragraphs 132 to 149 of the […] Defence. These include:
>
> (i) Changes to the rules governing whether an acquirer is paid by the issuer for fraudulent transactions and/or for transactions in respect of which a cardholder defaults; and changes to the timing of payments by issuers to acquirers, so that roughly the same allocation of costs between acquirers and issuers remained applicable.
>
> …
>
> (k) Default Intra EEA MIFs at the rates actually set were designed and had the effect of allowing issuers to recoup part of the costs underlying the valuable services that they provide to acquirers, and ultimately

[3] This response was given in respect of the EEA MIFs but it was repeated at response 19 as regards the UK MIFs and at response 31 as regards the Irish MIFs.

> merchants, such as swift payment, the payment guarantee against fraud and the payment guarantee against cardholder default. Furthermore, they maximised the efficiency of MasterCard's scheme in the UK, by allowing the scheme to allocate the total costs of MasterCard's scheme as between acquirers and issuers (and therefore as between merchants and cardholders), in a way which would maximise demand for the Scheme from both sets of consumers. Default interchange fees only result in acquirers (and merchants if passed on in part or in full) making a partial contribution to costs which other default Scheme rules impose on issuers (such as fraud, cardholder default and interest-free period).
>
> (l) By so doing, the Intra EEA MIF enabled the fees borne by cardholders to be lower than would otherwise have been the case, increasing card ownership and usage to the benefit of merchants.
>
> (m) As a result, merchants received the following benefits and/or received these benefits on a larger volume of transactions: near instant and guaranteed payment irrespective of the solvency of any cardholder, and irrespective of whether the transaction was fraudulent or not; incremental sales arising from customers being able to buy goods without the need to have sufficient cash in their possession; and/or if buying on credit, without the need to have that cash presently available; the ability to sell goods online. …"

44. To determine AAM's objection to this plea being pursued at the quantum stage, it is necessary to consider what happened to these contentions at the earlier stage of these proceedings.

45. The question of whether a provision is a restriction of competition which infringes Art 101(1) is a binary question. It is to be judged against a counterfactual of what would have happened if the provision did not exist. As Popplewell J noted in the *AAM* judgment at [128]-[129], the Mastercard MIF rule therefore had to be considered as against possible, realistic counterfactuals. One of those counterfactuals canvassed as set out at para 101A of Mastercard's defence was a change to the scheme rules. However, at the trial before Popplewell J, Mastercard's evidence was to the effect that changing the rules of the scheme would still not have enabled it to operate without MIFs. In other words, Mastercard no longer contended that a scheme with no MIFs but with changes to the rules was a realistic counterfactual for the purpose of either the restriction of competition issue or the objective necessity issue. Hence Popplewell J stated at [218(1)]:

> "The counterfactual is of no MIF with a prohibition on ex post pricing or a zero MIF, but otherwise with all the existing features of the existing MasterCard scheme."

46. Mr Cook explained that Mastercard adopted that position because in order to succeed on either of those two issues the changes to the rules would have had to be substantial to offset the removal of the MIF income. But, since Mastercard was presenting its argument on the basis of an asymmetric counterfactual, such substantial changes to its scheme would not have enabled it to compete against Visa. We were shown the relevant sections of Mastercard's written closing submissions at the previous trial. We think it is clear from those that, at least by the end of the trial, as regards the restriction issue and the objective necessity issue, Mastercard was, as Mr Cook submitted, dismissing the prospect of such rule changes as viable in the context of the asymmetric counterfactual.

47. Having held above that the quantum trial is to proceed on the basis that Visa was subject to similar constraints to Mastercard (i.e. a symmetric counterfactual), we therefore do not see that it is inconsistent with Mastercard's previous position, still less an abuse of process, for Mastercard now to contend that in that symmetric counterfactual it would have altered its scheme rules to remove those benefits to merchants. Mastercard would not thereby be arguing that the MIFs are not anticompetitive or objectively justified, but more simply that the MIFs resulted in some benefits to merchants which they would not have received in the "no-MIF world" and for which AAM should therefore give credit in quantifying their damages. In resisting that contention, AAM will be able to rely on the evidence given by Mastercard's witnesses at the previous trial as to why changes to some of these rules had been rejected. But that is a matter for evidence and argument; it is not a reason to preclude Mastercard from pursuing this contention.

48. Turning to the exemption issue, Mastercard's case that the MIFs could be justified because of the benefits for merchants under the scheme rules (protection in the event of fraud, etc) depended on showing that without the MIF income Mastercard would not grant those benefits. To determine the present application, it is again necessary to analyse the way this argument was advanced at the liability trial and, under this issue, dealt with in the judgments. In that regard, it should be emphasised that the three particular benefits to merchants from the scheme rules summarised at para 39 above were raised as only one aspect of a range of benefits alleged by Mastercard to flow from the MIFs.

49. Mastercard's case on such benefits and the conclusion reached by the judge are set out in the following paragraphs of the *AAM* judgment:

> "308. MasterCard submitted that merchants who accept MasterCard credit and debit cards enjoy the following appreciable objective advantages, some of which apply to both credit and debit cards, others to credit cards only:
>
> (1) the avoided costs to merchants of other payment methods, namely (a) cash, (b) cheques (c) other more expensive cards, in particular Amex and Diners Club; (credit and debit cards);
>
> (2) the competitive advantage over merchants who do not accept such cards; this was referred to as "business stealing"; (credit and debit cards);
>
> (3) facilitating online spending and e-commerce; (credit and debit cards);
>
> (4) guaranteed payment; under the Scheme Rules, the issuer bears the risk of fraud (credit and debit cards), or of cardholder default at the expiry of the credit period; (credit cards only);
>
> (5) the avoided cost of providing credit (credit cards only); this is (a) the interest cost of the credit period, borne by the issuer and (b) the avoided cost of a merchant credit system for customers, whether by way of store card or other scheme;
>
> (6) increased or earlier spending (credit cards only), where the availability of credit causes a customer to make a purchase he would not otherwise have made, or would not otherwise have made then.
>
> 309. The Claimants accepted that merchants enjoyed a number of these benefits from the use of cards. However they challenged the existence or relevance of four categories, namely business stealing, online sales, guaranteed payment and increased earlier sales as a result of the availability of credit. They also disputed that any benefits to merchants were directly caused by the MIF. It is convenient to address the causation question before returning to address particular disputed merchant benefits.
>
> *Benefits caused by the MIF?*
>
> 310. MasterCard submitted that these were all benefits to merchants which were at least to some extent the result of the charging of a positive MIF, for the following reasons:
>
> (1) Payment systems are two-sided platforms with cardholders on one side and merchants on the other. The platform is two-sided because the more users there are on one side, the more attractive the platform is to the other side. The more consumers with a MasterCard payment card, the more attractive it is for retailers to accept MasterCard cards. The more retailers who accept MasterCard cards, the more attractive it is for consumers to carry MasterCard cards.
>
> (2) Schemes therefore compete amongst themselves by offering higher MIFs in order to encourage banks to issue their cards.
>
> (3) Higher MIFs allow issuers to offer lower costs or higher benefits to their cardholders. In particular, MIF revenues allow issuers to avoid annual card fees, offer lower rates of interest and fund cardholder rewards which

incentivise cardholders to hold cards and use cards more frequently. Higher MIFs therefore encourage greater use of payment cards.

(4) Greater use of payment cards increases the volume of benefits that merchants obtain as a result of accepting such cards. Insofar as a higher MIF creates more benefits for cardholders and merchants, those benefits satisfy the causation condition.

311. The Claimants objected that this was a rehash of the "system output argument" which had been advanced by MasterCard in the Commission proceedings and rejected by both the Commission and the General Court; and that it fell into the error of confusing benefits conferred by the scheme with those caused by the MIFs, it being only the latter which were relevant.

312. In my judgement these are not sound objections. MasterCard's argument that charging positive MIFs led to an increase in the use of cards and therefore an increase in the amount of the benefits enjoyed by merchants as a result of the use of cards is made good on the evidence before me. So too is its case that because cardholders received benefits from issuers which were funded by the MIF, the benefits to merchants of card use are to some extent directly caused by the MIF. That does not mean that all the benefits enjoyed by merchants are directly attributable to the level of MIFs charged by MasterCard. It does, however, mean that a MIF at some positive level is directly causative of some benefits to merchants. That is the starting point for the Article 101(3) process. There then remains to be addressed the difficult quantification exercise involved in valuing those merchant benefits which are directly attributable to the MIF. …"

50. Popplewell J proceeded to discuss each of these six alleged benefits before concluding as follows:

"*Conclusion on merchant benefits*

335. The MIF directly contributes to some extent to benefits to merchants in the form of:

(1) the avoided costs of other payment methods, namely (a) cash, (b) cheques and (c) other more expensive cards, in particular Amex and Diners Club; (credit and debit cards);

(2) the competitive advantage over merchants who do not accept such cards; (credit and debit cards);

(3) facilitating online spending and e-commerce; (credit and debit cards);

(4) guaranteed payment in the case of fraud (credit and debit cards) or default (credit cards only);

(5) the avoided cost of providing credit (credit cards only);

(6) increased and earlier spending (credit cards only)."

51. As noted above, the judge's decision on Art 101(3) exemption was overturned by the Court of Appeal. It is important, however, to consider the basis on which that was done. The Court stated that "there are a number of flaws in Popplewell

J's approach" and proceeded to explain in detail the four flaws which it identified. In summary, they were:

(1) the absence of any factual evidence that could support the finding that issuers were incentivised to increase card usage by reason of the MIF income more than they would have done anyway: CA judgment at [242]-[244];

(2) the lack of any empirical evidence showing the extent to which card usage actually increased by reason of steps taken by issuers: [245];

(3) more significantly, the failure to carry out the required balancing exercise to ascertain whether the advantages said to result from the MIF compensated for the disadvantages for competition and in particular the burden which it imposed on merchants, particularly since issuers do not pass through a material portion of their MIF income and for many transactions cardholders would always use a scheme card irrespective of whether issuers offered them incentives ["the always cards" point]: [246]-[251];

(4) the inability to establish how much MIF revenue was passed through by issuers to cardholders: [252]-[253].

52. The Court of Appeal therefore concluded as follows:

> "255. We consider that the judge should have concluded, by reference to this "always cards" point, that MasterCard could not establish, even on the basis of economic theory, that the extent of pass-through was such that the advantages thereby conferred outweighed the disadvantages to the relevant consumers. …
>
> …
>
> 257. The judge should have concluded that, in the absence of any evidence as to the actual extent of the pass-through, MasterCard had failed to establish by robust analysis and cogent evidence, or otherwise, a sufficient causal link between the default MIFs and any net benefits, so that their claim for exemption under article 101(3) failed.
>
> 258. What the judge did instead was to seek to do the best he could on the exiguous evidence available, to arrive at what was no more than a "guesstimate" of the extent of issuer pass-through, which he then used to arrive at a further guesstimate of the extent to which the default MIFs were causative of a net benefit. He did so because, having started from the erroneous assumption that increased card usage always benefited the relevant consumers,

> he considered that he had to make some quantification of the extent of the pass-through and thus of the net benefits. On the contrary, the judge should have concluded, on the basis of the evidence before him, that the first condition of article 101(3), the benefits requirement, was not satisfied so that MasterCard had not established entitlement to an exemption under article 101(3)."

53. We consider that it is clear from the CA judgment reversing Popplewell J on the exemption issue that the Court of Appeal did so on a series of broad grounds. The specific benefits now at issue did not depend on pass-through to cardholders: they were a cost to issuers; and the Court did not address the narrow question of whether the alleged link of these particular benefits to the MIFs was properly made out. The flaws which it explained, and which it held undermined the judge's conclusion, were more fundamental. Indeed, while the Court of Appeal criticised Popplewell J's analysis of the causation of various benefits on the basis that the judge did this primarily by focusing on their link to the overall card scheme and not specifically to the MIFs, and that it was founded largely on expert economic as opposed to empirical evidence, the Court noted, at [216]:

> "One exception was the fraud guarantee, in respect of which he referred to the evidence of Mr Willaert of MasterCard, although, as the judge noted, Mr Willaert accepted that MasterCard would have deployed anti-fraud technology even if MIF revenue had not been available."

54. In summary, the Court of Appeal reversed the judge on the exemption issue because he failed to apply the requirements of Art 101(3) correctly and some of the main benefits alleged which related to pass-through were not made out, with the result that the alleged benefits did not meet the test for exemption. But that is very different from saying that if issuers did not receive the MIF income, they would not continue to provide certain specific benefits to merchants, so that the value of those benefits should be brought into account when assessing the merchants' damages for breach of Art 101(1). Save for the observation quoted above, the Court of Appeal did not address the specific benefits arising under these particular scheme rules.

55. We should add that we do not think that Popplewell J found the contrary: i.e. that without the MIF income these benefits would not have been provided. Despite his reference to Mr Willaert's evidence, the judge held only that the MIF contributed "to some extent" to the provision of these benefits. In any event, it appears that Mr Willaert's evidence may have been addressing the asymmetric counterfactual. In short, the point remains open and we do not

regard it as an abuse for Mastercard to pursue it in the context of its quantum defence.

E. INCREASE IN VOLUME OF SALES

56. At the liability trial, a significant benefit which Mastercard alleged resulted from the MIFs was that they led to a greater volume of transactions overall, and therefore greater profits for merchants. This is summarised in Popplewell J's judgment at [308(6)], [310], [312] and [335(6)], quoted above. It formed an important part of Mastercard's case on the exemption issue.

57. On appeal, the Court of Appeal held that Mastercard had failed to make out its case that the income which MIFs generated for issuers had this result. We have summarised the Court of Appeal's findings at para 51 above.

58. Mastercard now wishes to advance the same argument at the quantum stage. No doubt they would now seek to do so in a different way, remedying the lack of evidence to which the Court of Appeal referred. But in our view that is to attempt to reinstate at a later stage of proceedings a contention which has been rejected by a final judgment after (in the words of the Supreme Court at [237]), "a full and fair trial of the issue"- the very point against which Coulson J warned in *Seele*.

59. Mr Cook sought to suggest that the Court of Appeal's conclusion was not relevant on the basis that it depended on a heightened evidential requirement which it applied to the exemption issue, whereas for a quantum trial the ordinary approach to evidence applied. However, the Court held, not merely that Mastercard had failed to provide cogent evidence of the extent to which MIF income was passed through to cardholders so as to incentivise card usage, but that it had failed to provide any evidence of this at all: see in particular the CA judgment at [252] and [257], where the Court states that Mastercard had failed to establish this "by robust analysis and cogent evidence, *or otherwise*" (our emphasis). We therefore do not accept Mr Cook's submission that the Court's conclusion can be dismissed or distinguished as resting on a higher evidential standard than applies to the assessment of quantum.

60. Accordingly, to permit Mastercard to run the same point again in a quantum trial when the Court of Appeal has held that it should have been rejected at the liability trial offends against the principle of finality in litigation. We therefore consider that this would be an abuse of process and strike it out.

F. CONCLUSION

61. For the reasons set out above, we hold that:

(1) Mastercard is not permitted to advance an asymmetric counterfactual as between Mastercard and Visa but can allege that there would have been switching to payment by PayPal insofar as that does not involve or depend on such an asymmetric counterfactual;

(2) Mastercard is permitted to allege that in a counterfactual with a zero MIF or a rule requiring settlement at par it would have amended the scheme rules as regards the issuer's payment obligation in the event of fraud or cardholder default and on the timing of payment to the acquirer; and

(3) Mastercard is not permitted to allege that in the counterfactual the overall volume of sales transactions would have been lower.

62. The parties should seek to agree on what parts of the existing defences are to be struck out and on what amendments are permitted to give effect to this judgment. If they are unable to agree, the CAT will rule on the permitted form of pleading.

63. This judgment is unanimous.

The Honourable Mr Justice Roth President	Tim Frazer	Simon Holmes

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 28 June 2021