Neutral citation: [2021] CAT 35

IN THE COMPETITION APPEAL TRIBUNAL

Cases Nos: 1306-1325/5/7/19 (T)
1349-1350/5/7/20 (T)
1383-1384/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 November 2021

Before:
THE HONOURABLE MR JUSTICE ROTH
(Chairman)
TIM FRAZER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

DUNE GROUP LIMITED AND OTHERS

Claimants

- and –

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED

Defendants

AND BETWEEN

DUNE SHOES IRELAND LIMITED AND OTHERS

Claimants

- and –

(1) VISA EUROPE LIMITED
(2) VISA EUROPE SERVICES LLC
(3) VISA UK LIMITED

Defendants

Heard remotely on 12-14 May 2021

JUDGMENT: APPLICATION FOR SUMMARY JUDGMENT

APPEARANCES

Ms Kassie Smith QC, Mr David Wingfield and Ms Fiona Banks (instructed by Humphries Kerstetter LLP) appeared on behalf Claimants.

Mr Matthew Cook QC and Mr Hugo Leith (instructed by Jones Day) appeared on behalf of the Mastercard Parties.

Mr Laurence Rabinowitz QC, Mr Brian Kennelly QC, Mr Daniel Piccinin, Mr Jason Pobjoy and Ms Isabel Buchanan and (instructed by Milbank LLP and Linklaters LLP) appeared on behalf of the Visa Parties.

A. INTRODUCTION

1. This judgment is given in eight sets of proceedings before the Competition Appeal Tribunal (the "CAT"). Four of those proceedings are brought against four companies associated with the Mastercard payment cards scheme and the other four proceedings are brought by the same respective Claimants (save for a few exceptions) against three companies associated with the Visa payment cards scheme. The Defendants will be referred to compendiously as "Mastercard" and "Visa", save where it is necessary to distinguish between them, and the actions will be referred to as the "Mastercard actions" and the "Visa actions". Each set of proceedings has a substantial number of Claimants and there are altogether over 680 Claimants. They are all merchants (across a wide variety of commercial sectors) or local authorities that accepted payment by Visa and Mastercard credit and debit cards (and for the purpose of this judgment will be referred to collectively as "merchants").

2. The substantive allegations in the four Mastercard actions are identical and the substantive allegations in the four Visa actions are identical, save that a minority of the Claimants in two of the Mastercard actions and the corresponding two Visa actions are foreign companies registered in and operating outside the UK and Ireland, specifically in Italy (and, in a small number of cases, Malta and Gibraltar); those actions will be referred to by reference to the lead Claimant as the Westover and Alan Howard actions.[1] Moreover, the allegations in the Mastercard actions are very similar to the allegations in the Visa actions, save as regards the roles of the various Visa and Mastercard defendants in their respective schemes. All the actions are being case managed together.

3. There are in substance two applications before the Tribunal. The Claimants seek summary judgment on part of their claims in all the actions. Visa seeks permission to amend its Defences in three of the four Visa actions.[2] It is common ground that the principles applicable to the amendment applications

[1] There are also a few claimants registered in Malta and Gibraltar in the parallel claims referred to as the Dune actions: see further para 17 below.
[2] In the fourth set of proceedings against Visa (the Alan Howard action), by orders made on 23 March 2021 and 3 August 2021, the Defendants are not required to serve a Defence until after the present judgment.

and the summary judgment applications are the same, in that permission to amend should not be granted if the new issue raised by the amendment stands no real prospect of success and could therefore be the subject of a successful summary judgment application by the opposing party.

B. BACKGROUND

4. In describing the background, we adopt passages from our earlier judgments in some of these actions: [2020] CAT 26 and [2021] CAT 12.

(1) The Visa and Mastercard schemes

5. Both Visa and Mastercard are what are known as open four-party payment schemes for credit and debit cards. The four parties for any transaction are the issuing bank or financial institution (the "issuer") which issues the card to a cardholder; the cardholder; the merchant to whom the cardholder presents their card when making a purchase; and the bank or financial institution to which the merchant transmits details of the purchase transaction and from which it receives payment (the "acquirer"). The operation of these schemes was summarised as follows by the Supreme Court in its judgment in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24, a case which we discuss further below, at [10]:

> "(i) Issuers and acquirers join the Visa and/or Mastercard schemes, and agree to abide by the rules of the schemes.
>
> (ii) A cardholder contracts with an issuer, which agrees to provide the cardholder with a Visa or Mastercard debit or credit card, and agrees the terms on which they may use the card to buy goods or services from merchants.
>
> (iii) Those terms may include a fee payable by the cardholder to the issuer for the use of the card, the interest rate applicable to the provision of credit, and incentives or rewards payable by the issuer to the cardholder for holding or using the card (such as airmiles, cashback on transactions, or travel insurance).
>
> (iv) Merchants who wish to accept payment cards under the scheme contract with an acquirer, which agrees to provide services to the merchant enabling the acceptance of the cards, in consideration of a fee, known as the merchant service charge ("the MSC"). The acquirer receives payment from the issuer to settle a transaction entered into between cardholder and merchant, and passes the payment on to the merchant, less the MSC.
>
> (v) The MSC is negotiated between the acquirer and the merchant. Typically, it is set at a level that reflects the size and bargaining power of the merchant, the level of the acquirer's costs (including scheme fees payable to Visa and Mastercard, and any interchange fees payable by the acquirer to issuers), and the acquirer's margin.

> (vi) The scheme rules require that, whenever a cardholder uses a payment card to make a purchase from a merchant, the cardholder's issuer must make a payment to the merchant's acquirer to settle the transaction.
>
> (vii) The Visa and Mastercard scheme rules make provision for the terms on which issuers and acquirers (who are members of the scheme) are to deal with each other, in the absence of any different bilateral agreement made between them. These terms include issuers and acquirers settling transactions at the face value of the transaction ("settlement at par" or, as it is sometimes referred to, "prohibition on *ex post* pricing") and also provide for the payment of an interchange fee on each transaction.
>
> (viii) Under both the Visa and Mastercard schemes, the default interchange fee (ie the MIF) which is payable by the acquirer to the issuer on each transaction is expressed either as a percentage of the value of the transaction, or as a flat figure in pence for each transaction. Different MIFs apply to different types of transaction (such as contactless payments, or payments made where the card[holder] is not present, including internet payments). Different MIFs also apply to transactions depending on whether the issuer and acquirer are based in the same state/region or different states/regions.
>
> (ix) Under the Visa and Mastercard schemes, issuers and acquirers are not required to contract on the basis of the MIF. Under the rules, they are free to enter into bilateral agreements with different terms. In practice, however, issuers and acquirers do contract on the basis of the MIF, as both trial judges below found…."

6. Visa and Mastercard do not themselves issue cards, make arrangements with merchants or process the payments. Rather, they license eligible banks to act as issuers and/or acquirers, in specified territories, and set the rules of their respective scheme to which the licensee banks all subscribe.

7. These actions concern various categories of MIF. In particular, different MIFs are set for consumer cards and for commercial or business cards (which in turn have various sub-categories). Furthermore, for both consumer cards and commercial cards, there are separate relevant categories based on the place of the issuer and the merchant, as follows:

   (a) domestic MIFs, which apply where both the issuing bank and the merchant to which the card is presented are in the same country;

   (b) intra-EEA MIFs, which apply where the issuing bank and the merchant are in different EEA Member States; and

   (c) inter-regional MIFs, which apply where the issuing bank is in a different region of the world from the merchant where the card is presented (e.g. North America and the EEA).

In all these categories, the country of the issuing bank will generally correspond to the country of the cardholder. In the UK, Ireland and Italy, there were domestic MIFs over the period of the claims.

(2) The EU Mastercard proceedings

8. By decision adopted on 19 December 2007, the European Commission held that Mastercard's EEA MIFs had, from 22 May 1992 until the date of the decision, been in 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 "by in effect setting a minimum price merchants must pay" to their acquirers for accepting Mastercard cards by means of the intra-EEA MIF for consumer cards ("the Commission Decision"). The Commission investigation had covered commercial cards, the position of which is discussed in parts of the Commission Decision. However, they are not part of the finding of infringement and the Decision states that the Commission "has not yet finalised its investigation of possible efficiencies in that regard": recital (760). The Commission Decision expressly does not cover domestic MIFs: recital (118).

9. Mastercard applied to the General Court for annulment of the Commission Decision. By its judgment given on 24 May 2012, the General Court dismissed that application: Case T-111/08 *Mastercard 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 ("CJEU"). On 11 September 2014, the CJEU dismissed those appeals: Case C-382/12P *Mastercard v Commission*, EU:2014:2201 ("*Mastercard CJ*").

10. In its Decision, the Commission determined (recitals (278)-(282)) that such four-party payment card systems involve three different product markets:

(a) the inter-systems market, in which various card systems compete;

(b) the issuing market, in which issuers compete for the business of cardholders; and

(c) the acquiring market, in which acquirers compete for the merchants' business.

This analysis was upheld by the General Court: *Mastercard GC* at para 173; and it was not challenged further in the appeal to the CJEU. Both EU Courts upheld the approach of the Commission in using the acquiring market as the relevant market for the purpose of analysing the competitive effect of the MIFs: see *Mastercard CJ* at para 178.

(3) The previous English proceedings

11. The present proceedings are among a significant number of claims that have been brought by merchants against Mastercard and Visa seeking damages based on the levels of the MIFs which, in light of the EU Mastercard proceedings, are alleged to have been unlawful and to have affected directly the level of the MSCs charged to the merchant claimants. Virtually all those claims have been made under both EU competition law and domestic UK competition law. Since UK competition law under the Competition Act 1998 ("CA 1998") is for these purposes materially the same as EU competition law, we refer for the sake of simplicity only to the relevant provisions of EU competition law.

12. Three of those proceedings went to trial in 2016-2017, one before the CAT and two before the Commercial Court:

(a) Sainsbury's brought a claim against Mastercard in respect of the UK MIFs as regards consumer cards for the period 19 December 2006 onwards. Following a liability and quantum trial, by a judgment issued on 14 July 2016, the CAT held that Mastercard was in breach of Art 101(1) and failed to satisfy the criteria for exemption under Art 101(3); and the CAT awarded substantial damages: *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11 ("the *Sainsbury's Mastercard* judgment");

(b) Proceedings brought by Asda and Morrisons against Mastercard in respect of the UK MIFs and EEA MIFs as regards consumer cards were combined with proceedings brought by Argos against Mastercard in

respect of the UK, Irish and EEA MIFs, again with regard to consumer cards. Following a liability trial in the Commercial Court in June-October 2016, by a judgment issued on 30 January 2017 Popplewell J (as he then was) held that Mastercard would have infringed Art 101(1) but for what became known as the 'death spiral' argument: see para 28 below. He also held that, if he were wrong on Art 101(1), he would find that the arrangements were exempt under Art 101(3): *Asda Stores Ltd v Mastercard Inc* [2017] EWHC 93 (Comm) ("the *AAM* judgment").

(c) Proceedings were brought by Sainsbury's against Visa in respect of its UK MIFs, again as regards consumer cards. Following a liability trial in the Commercial Court in November 2016-March 2017, Phillips J (as he then was) gave two judgments. By the first judgment delivered on 30 November 2017, Phillips J dismissed the claim, holding that the relevant MIFs did not restrict competition in the acquiring market, although he differed from Popplewell J in rejecting the 'death spiral' argument: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2017] EWHC 3047 (Comm) ("the *Sainsbury's Visa* judgment"). At the request of the parties, Philips J gave a further judgment on 23 February 2018, which was strictly *obiter*, finding that if the Visa MIFs did restrict competition, Visa had not established that they satisfied the criteria for exemption under Art 101(3): *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2018] EWHC 355 (Comm) ("the *Visa exemption* judgment").

13. There were appeals against all these judgments, which were heard together. The Court of Appeal determined the appeals in a single judgment handed down on 4 July 2018, which overturned all of the judgments below: [2018] EWCA Civ 1536 ("the CA judgment"). In summary, the Court of Appeal held that in each of the three cases the agreements were restrictive of competition under Art 101(1) TFEU and:

(a) allowed the appeal of Mastercard against the *Sainsbury's Mastercard* judgment insofar as the CAT had found (i) that the correct counterfactual comprised bilateral interchange fees, and (ii) that the criteria for

exemption under Art 101(3) were not satisfied, since that was also based on a counterfactual of bilateral agreements. The case was remitted to the CAT for reconsideration of the Art 101(3) exemption issue and (if, on that basis, the agreements were found not to be exempt) for assessment of the quantum of damages;

(b) allowed the appeal of the AAM parties against the *AAM* judgment on the Art 101(1) issue and on the ancillary restraints 'death spiral' issue. Although the Court of Appeal found that Popplewell J should have held that Mastercard's claim for exemption failed, it nonetheless held that it was appropriate for the Art 101(3) exemption issue to be reconsidered and it remitted the case to the CAT for that issue to be reconsidered alongside the other two remitted cases;

(c) allowed the appeal of Sainsbury's against the *Sainsbury's Visa* judgment on the Art 101(1) issue and set aside Phillips J's conclusion in the *Visa exemption* judgment. It remitted the case to the CAT for reconsideration of the Art 101(3) exemption issue and (if, on that basis, the agreements were found not to be exempt) for assessment of the quantum of damages.

14. Visa and Mastercard appealed to the Supreme Court and the AAM parties cross-appealed against the remittal of the Art 101(3) issue in their case. The Supreme Court delivered its judgment from which we have quoted above on 17 June 2020: [2020] UKSC 24 ("the Supreme Court judgment"). In summary, the Supreme Court allowed the AAM parties' cross appeal and varied the Court of Appeal's order accordingly, but otherwise dismissed the appeals of Visa and Mastercard.

15. It will be necessary to refer to the CA judgment and the Supreme Court judgment in more detail below to determine the scope of those decisions.

C. THE PRESENT PROCEEDINGS

(1) The claims

16. The claims in the present proceedings allege infringements of both Art 101 TFEU and the corresponding Chapter I prohibition under the CA 1998 and an abuse of a dominant position contrary to Art 102 TFEU and the corresponding Chapter II prohibition under the CA 1998. However, by order of 2 February 2021 in the first six proceedings, all issues save the issues concerning whether the MIFs infringe Art 101 TFEU/ the Chapter I prohibition were stayed, pending the resolution of those issues.[3] Again, for simplicity we henceforth refer only to the EU competition law provisions.

17. The claims expressly cover UK and Irish domestic MIFs, EEA MIFs and inter-regional MIFs and also, in the Westover and Alan Howard actions, Italian domestic MIFs. In each case, the claims cover transactions with consumer cards and transactions with commercial/business cards (i.e. consumer card MIFs and commercial card MIFs). As noted above, a small number of the Claimants in several of the proceedings are registered in Malta and Gibraltar, but it appears that they principally carry out online operations with UK customers and that their transactions are subject to UK MIFs. No separate argument was advanced or evidence presented regarding domestic MIFs in Malta or Gibraltar.

18. The period covered by each of the present claims is in general from six years before the filing or amendment (as applicable) of the respective claim forms to date. All the proceedings were issued in the High Court before being transferred to the CAT. The first claim forms for claims that are now consolidated in the Dune actions were issued in November 2016. The last two proceedings to be issued were the Alan Howard actions, where the claim forms were issued in December 2020.

19. Accordingly, the present proceedings cover a wider range of MIFs and different, although overlapping, periods compared to the previous English proceedings.

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[3] The remaining two sets of proceedings (the Alan Howard actions against Visa and against Mastercard) were transferred to the CAT after the other claims and no further steps are required in those proceedings pending the present judgment: see fn 2 above.

20. As noted at the outset, the allegation of anti-competitive infringement in the Particulars of Claim in each of the various proceedings is to all intents and purposes identical. For convenience, the quotations and references in this judgment are taken from the pleadings in the two Dune actions. The Claimants allege that the Visa and Mastercard scheme rules distort competition on the respective Visa and Mastercard acquiring markets as follows:[4]

> "a. The [Visa/Mastercard] Rules require an Interchange Fee plus [Visa/Mastercard] Acquirer Fees to be paid by Acquirers to Issuers and the various MIFs fix a minimum level of the Interchange Fee rate for all Acquirers. This inflates the base on which Acquirers set charges to merchants with that base being common for all Acquirers. The MSC will typically reflect the costs of the relevant MIF with the result that the MIF fixes a minimum price floor for the MSC, which leads to a restriction of price competition between Acquirers and/or a distortion of competition in the [Visa/Mastercard] Acquiring Market, by artificially raising prices, to the detriment of merchants such as the Claimants. In particular, the MIF as a minimum price floor for the MSC:
>
> > i. is immunised from competitive bargaining. Acquirers have no incentive to compete over that part of the price which is a known common cost which Acquirers know they can pass on in full and do so;
> >
> > ii. is non-negotiable, merchants having no ability to negotiate it down."

21. The relevant allegation of infringement of Art 101(1) is then set out as follows:[5]

> "The aforesaid agreements and/or concerted practices and/or decisions had and continue to have the object and/or effect of preventing, restricting or distorting competition in the relevant product and geographic markets as follows:
>
> a. The obligation to pay an Interchange Fee in respect of each transaction facilitated by the [Visa/Mastercard] Platform, alternatively, the obligation to pay the applicable MIF, either alone or in combination with the Anti-Steering Rules, or in the further alternative, the Anti-Steering Rules alone restrict competition on the Platform Issuer Market and the Issuing Market by foreclosing the aforementioned Markets and/or creating a barrier to entry and/or expansion for other undertakings seeking to compete on those Markets. Moreover, the anticompetitive effects extend beyond the aforementioned Markets so as to foreclose and/or exclude other lower cost payment methods, such as those provided by inter-bank payment schemes or cash. The Claimants repeat and rely upon the matters set out in paragraph [67/68] above.
>
> b. … the obligation to pay an Interchange Fee in respect of each transaction facilitated by the [Visa/Mastercard] Platform, alternatively, the obligation to pay the applicable MIF, either alone or in combination with the Anti-Steering Rules; or in the further alternative the Anti-Steering Rules alone restricts competition on the [Visa/Mastercard] Acquiring Market and/or between payment platforms. In the absence of the aforementioned obligations and Rules

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[4] Re-amended Particulars of Claim in the Dune Visa action, para 68; Re-amended Particulars of Claim in the Dune Mastercard action, para 69.

[5] Re-amended Particulars of Claim in the Dune Visa action, para 80; Re-amended Particulars of Claim in the Dune Mastercard action, para 81.

there would be competition, alternatively more effective competition, between Acquirers and/or other payment platforms for merchants' business. The Claimants repeat and rely upon the matters set out in paragraph [68/69] above."

22. The allegation under sub-paragraph (a) concerning a restriction on the platform issuer market and the issuing market was not the basis of the Commission Decision or the Supreme Court judgment. It is also not the basis on which the Claimants advance their application for summary judgment.

(2) The Applications

23. The Claimants seek summary judgment under rule 43(1) of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules") in respect of their claims that throughout the relevant claim periods the rules of the Mastercard and Visa payment schemes in respect of commercial and consumer domestic MIFs, EEA MIFs and inter-regional MIFs infringed Art 101(1) TFEU. The actions would then proceed to consider whether the conditions for exemption in Art 101(3) TFEU were satisfied.

24. Visa seeks permission to amend its Defences served in the proceedings against it to add a contention as to the appropriate counterfactual which should apply in respect of the period after 9 December 2015.

25. As we have observed, the principles to be applied here to determine the summary judgment applications and the Visa amendment applications are the same. It was common ground that they are summarised in the oft-quoted judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], which has been approved on several occasions by the Court of Appeal and which is expressed in terms of applications by defendants but applies equally, mutatis mutandis, to applications by claimants:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman;*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

26. In essence, the Claimants submit that the Art 101(1) infringement issue has been resolved by the CA and Supreme Court judgments, applying *Mastercard CJ*, since the essential factual basis of the present claims is materially indistinct from the basis of the three previous English cases determined by those appellate judgments.

27. Both Visa and Mastercard dispute this as regards consumer MIFs in the period after 9 December 2015 when the maximum caps on interchange fees introduced by Reg. (EU) 2015/751, the Interchange Fee Regulation ("IFR"), came into effect. They further submit that the position is very different as regards the inter-regional MIFs, commercial card MIFs and non-UK/Irish domestic MIFs (in particular, the Italian MIFs). Some additional arguments are raised by way of defence only by Visa.

28. Visa (but not Mastercard) had earlier sought a reference to the CJEU under Art 267 TFEU of the question as to whether the Visa MIFs infringed Art 101(1) should be determined according to a counterfactual in which Mastercard remains free to compete by setting its own MIFs independently at higher positive rates. This proposition came to be known in the various proceedings as the 'asymmetric counterfactual'. It was the foundation of the 'death spiral' argument accepted by Popplewell J in the *AAM* judgment (where the same argument was advanced by Mastercard): i.e. that the Mastercard MIF was objectively justified or an ancillary restraint since if Mastercard reduced its MIFs to zero, issuers would move their business to the rival card scheme of Visa that was operating with higher, positive MIFs and the Mastercard scheme would collapse. Phillips J rejected the asymmetric counterfactual argument as completely unrealistic in the *Sainsbury's Visa* judgment, and the Court of Appeal held that he was right to do so and reversed the finding of Popplewell J in that regard. Visa's argument in the present proceedings for a reference was founded on a subsequent judgment of the CJEU in Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt*, EU:C:2020:265 (*"Budapest Bank"*), which it submitted showed that the approach of the CA judgment to the asymmetric counterfactual was wrong. We rejected that contention and refused the application for a reference: *Dune Shoes Ireland Ltd v Visa Europe Ltd* [2020] CAT 26 ("the Reference Judgment").

29. The applications before us raise the following issues:

    (a) Is Visa's defence based on an asymmetric counterfactual a ground for refusing summary judgment?

(b) Does the coming into force of the caps set by the IFR materially change the position as regards consumer cards so as to give the Defendants an arguable defence for the period after 9 December 2015 to date?

(c) Do the Defendants have an arguable defence as regards the inter-regional MIFs?

(d) Do the Defendants have an arguable defence as regards commercial MIFs?

(e) Do the Defendants have an arguable defence as regards the Italian domestic MIFs?

(f) Does Visa have an arguable defence to the claims for the period after 21 June 2016 when the First Visa Defendant, Visa Europe Ltd ("Visa Europe") was acquired by Visa Inc.?

(g) Does Visa have an arguable defence to the claims in respect of the inter-regional MIFs on the basis that those MIFs were not set by any of the Visa Defendants?

D. VISA DEFENCE: THE ASYMMETRIC COUNTERFACTUAL

30. Mastercard does not dispute that it infringed Art 101(1) insofar as concerns domestic UK and Irish MIFs and EEA MIFs for consumer cards prior to the IFR (without prejudice to its position on exemption under Art 101(3)). By contrast, Visa disputes liability under Art 101(1) on the basis that it can rely on an asymmetric counterfactual: see e.g. para 42A(c) of its Defence in the Dune action.

31. Since this Tribunal, with the same composition, rejected this argument in the Reference Judgment, Visa did not advance further submissions on this issue but merely cross-referred to its submissions in support of its previous application for a reference. Counsel's skeleton argument states that if summary judgment is given on this issue, Visa will pursue it on appeal.

32. Unsurprisingly, for the reasons fully set out in the Reference Judgment, we consider that Visa has no realistic prospect of success on this issue, and that the *Budapest Bank* case is not inconsistent with the reasoning in the CA judgment, or indeed with the Supreme Court judgment. We do not prolong this judgment by repeating all those reasons but simply incorporate them by reference.

33. Visa's contention regarding the asymmetric counterfactual was fully argued on its application for a reference and rejected in a considered judgment of the Tribunal in these proceedings (other than in the Alan Howard action). We there held that the CAT is bound by the Supreme Court judgment to find that *Mastercard CJ* is binding as a determination that the Visa scheme constitutes a restriction of competition by effect contrary to Art 101(1), subject to any further judgments of the EU Courts: Reference Judgment at [38]. (We should add that this holding was not intended to apply post-IFR or to MIFs other than UK/Irish domestic MIFs and EEA MIFs for consumer cards: the Claimants do not suggest the contrary and we heard no argument at that stage regarding the IFR or other MIFs.) We further held that *Budapest Bank*, properly analysed, does not cast any doubt on the reasoning and decision of the Court of Appeal regarding the asymmetric counterfactual. Those findings were the basis on which the Tribunal rejected the application for a reference

34. If Visa had sought to advance substantive argument on this issue before the Tribunal again, we would have expected that the Claimants would have raised a powerful issue estoppel objection since we had already determined precisely this point. Although not quite the way it was put in its submissions, we think that Visa is seeking to raise the matter only to found a basis for what would in effect be an appeal against the findings on the asymmetric counterfactual in the Reference Judgment. There was no appeal against the Reference Judgment itself (and of course, after 31 December 2020 it was no longer possible for an English court to make a reference to the CJEU) but by its solicitors' letter to the Tribunal of 8 January 2021 Visa "reserved the right to appeal to the Court of Appeal on this issue in the context of these proceedings". Accordingly, in these unusual circumstances we do not think it appropriate to dismiss the asymmetric counterfactual argument on the independent ground of issue estoppel, which indeed was not raised by the Claimants.

E. THE POST-IFR PERIOD

35. The IFR was adopted on 29 April 2015. It applies a cap to the MIF for debit cards of 0.2% of the value of the transaction (Art 3) and for credit cards of 0.3% of the value of the transaction (Art 4). Those caps apply also to what are known as 'three and a half' party schemes like Amex: Art 1(5). However, they do not apply to commercial cards: Art 1(3)(a). The caps came into effect on 9 December 2015: Art 18(2).

36. Both Visa and Mastercard submitted that the entry into force of the IFR was, in effect, a game-changer as regards the anti-competitive effect of consumer MIFs under Art 101(1). That is because of the basis on which it was found in the EU proceedings and the CA and Supreme Court judgments that the MIFs restricted competition. Like any finding of a restriction of competition by effect, that depends on a comparison of the competitive position under the measure in question with the position in the counterfactual. As stated by the General Court in Case T-491/07 *Groupement des Cartes Bancaires v Commission,* EU:T:2016:379 at para 111 (and quoted in the CA judgment at [126]):

> "the analysis of the competitive situation in the absence of the measures in question aims to determine whether the measures restrict the competition that would have existed in their absence. This concerns, in particular, 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."

37. In *Mastercard GC,* the General Court upheld the finding in the Commission Decision that the relevant counterfactual was a rule prohibiting *ex post* pricing (i.e. a rule prohibiting issuing and acquiring banks from determining the interchange fee after a card purchase had been made and the transaction was submitted to the banks for payment) which is the equivalent of no default MIF (or a zero MIF) with settlement at par: see the summary at *Mastercard CJ*, para 11. The General Court's determination that this was the correct counterfactual was in turn upheld by the CJEU (although it criticised some of the General Court's reasoning) in *Mastercard CJ*: para 173.

38. Before the Supreme Court, it was common ground that this was the appropriate counterfactual: Supreme Court judgment at [42]. The Supreme Court held that

the English courts were bound by the decision in *Mastercard CJ* that there was an anti-competitive restriction in breach of Art 101(1) where the factual findings on which that decision is based are materially indistinguishable. The Supreme Court stated at [93]:

> "In our judgment, the essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals. Those facts include that: (i) the MIF is determined by a collective agreement between undertakings; (ii) it has the effect of setting a minimum price floor for the MSC; (iii) the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition; (iv) the counterfactual is no default MIF with settlement at par (that is, a prohibition on *ex post* pricing); (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower."

39. The reason why the counterfactual is not a situation with a series of bilaterally agreed interchange fees but involves a prohibition on *ex post* pricing or a no default MIF with settlement at par is to preclude what is referred to as the 'hold-up' problem. Fundamental to both the Mastercard and Visa schemes is the "Honour all cards" rule: i.e. that every participating merchant must accept all valid Mastercard or Visa cards irrespective of the issuer, and therefore that acquirers must pay the merchants and accept all transactions from all issuers under the relevant scheme. The way this potentially leads to the hold-up problem is explained in the report of Dr Niels, filed for the present applications:

> "2.8 The hold-up problem arises as follows where there is no default MIF and no regulatory cap or other equivalent external mechanism limiting the pricing freedom of issuers. In such a situation, all transaction settlements between an acquirer and an issuer within the scheme would require a bilateral agreement between the two banks on their terms of dealing, including in relation to interchange. The problem with such bilateral negotiation in a four-party card scheme is that each acquirer has to accept transactions on cards issued by each issuer, with the result that an acquirer effectively has no choice but to settle the payment with the issuer in question, since the transaction was made by one of that issuer's cardholders and the acquirer needs to process the payment to provide the funds to the merchant. This provides the issuer with all the bargaining power. In economic theory, this has been described in various contexts as the hold-up, 'hold-out' or 'Cournot complements' problem.
>
> 2.9 In the context of a four-party scheme, each issuer has an incentive to use this bargaining power to obtain higher interchange fees than its competitors, so it can offer its customers a better product and make higher profits. Issuers will also be negotiating with acquirers without visibility of the interchange fees being negotiated by competing issuers, potentially encouraging issuers to push for higher rates, so they are not left at a competitive disadvantage.

> 2.10 Therefore, 'Pure Bilaterals' without any form of pricing control would lead to higher interchange fees. From an economic perspective, it is not clear whether the hold-up problem would ultimately result in the scheme's collapse, or in an equilibrium with higher interchange fees and lower card acceptance and usage…."
>
> (Footnotes omitted).

See also the Commission Decision at recitals (553)-(554); and *Mastercard CJ* at paras 171-173.

40. Both Visa and Mastercard contend that the introduction of regulatory caps under the IFR means that the hold-up problem is addressed. It is no longer possible for issuers to demand interchange fees higher than the IFR caps. Accordingly, in those circumstances, they submit that a no default MIF with settlement at par (or a prohibition on *ex post* pricing) is not necessarily the counterfactual. They argue that the counterfactual would be very different. In that respect, Visa and Mastercard seek to put forward different counterfactuals:

    (a) Visa seeks to argue (by its amendment) that it would have provided that, in the absence of bilateral agreements, domestic consumer and EEA transactions should settle at par unless the issuer had previously stipulated that it was only willing to settle on the basis of the addition (or subtraction) of an interchange fee that the issuer itself had chosen unilaterally. Visa states that its rules would have required issuers to notify Visa of any such interchange fees and to publish them. This was referred to as the "Unilateral Interchange Fee Model" or "UIFM counterfactual".

    (b) Mastercard argues that it would have set no default settlement rules of any kind, so that issuers and acquirers would have to negotiate their terms of dealing bilaterally. This was referred to as the "Bilaterals counterfactual".

41. We think it is clear that the Bilaterals counterfactual would not involve any restriction of competition since under that scenario the interchange fee is not determined by a collective arrangement. Insofar as Ms Smith QC sought to argue on behalf of the Claimants that the UIFM counterfactual was a restriction of competition because it depended on a common scheme rule, we do not accept

that submission. The restriction arising from the current rule is that it provides for a commonly determined default level of positive MIF that applies as between all issuers and acquirers. A rule that enables each issuer independently to determine the level of its interchange fee is not restrictive of competition.

42. Visa argues that under its UIFM counterfactual, issuers would have unilaterally adopted the maximum permissible interchange fee, i.e. the level of the IFR caps. Mastercard submits that under its Bilaterals counterfactual, the process of competition would similarly have led to bilaterally agreed interchange fees for consumer transactions at the levels of the IFR caps. If so, Visa's consumer MIFs and Mastercard's consumer MIFs, respectively, did not have the effect, post-IFR, of restricting competition in the acquiring market.

43. Each of Visa and Mastercard have supported its contentions that this is the arrangement it would have adopted with evidence from senior executives, and Visa further points out that the UIFM was the arrangement it adopted in New Zealand since 2009 following intervention by the New Zealand Commerce Commission.

44. We should emphasise that we are not on the present applications deciding whether either of these counterfactuals are correct, or whether in those counterfactual situations the interchange fees would indeed have risen to the levels capped under the IFR. The question at this stage is whether those counterfactuals are arguable in terms of the summary judgment test. In the light of the respective evidence from Visa and Mastercard (which has not been challenged for the purpose of these applications), we accept that they are arguable as a matter of fact. However, the Claimants submit that Visa and Mastercard are precluded from advancing them by reason of the CA judgment and the Supreme Court judgment on the basis that those decisions determined the applicable counterfactual as a matter of law, or alternatively that we are not entitled to take account of the IFR for this purpose.

45. The Commission Decision, and therefore the appeals that led to *Mastercard GC* and *Mastercard CJ*, was obviously addressing a situation pre-IFR where there were no regulatory caps. That is the situation in which the European

proceedings determined that the counterfactual involved a rule which required a prohibition on *ex post* pricing, equivalent to a zero MIF and settlement at par.

46. Although the three sets of English proceedings concerned domestic MIFs as well as the EEA MIFs, in the *AAM* proceedings, Popplewell J held that the only realistic counterfactual to a positive MIF was a zero MIF or no MIF with a prohibition on *ex post* pricing: *AAM* judgment at [155]. He rejected a pure bilaterals counterfactual because of the hold-up problem: [131]. In the *Sainsbury's Visa* proceedings, it was common ground that the appropriate counterfactual was a zero MIF with a prohibition on *ex post* pricing: *Sainsbury's Visa* judgment at [98]-[100]. In the *Sainsbury's Mastercard* proceedings, while the CAT held that in the counterfactual there would have been a series of bilateral agreements, that conclusion was also based on a situation where there was no default MIF and *ex post* pricing was impermissible under the Mastercard rules: *Sainsbury's Mastercard* judgment at [148]-[152]. Both Popplewell J and Phillips J found that the CAT's view as to the emergence of bilateral agreements was unrealistic and the CAT's decision in that regard was overruled by the Court of Appeal. The CA judgment stated at [180]:

> "The CJEU's decision plainly approved a counterfactual in the same factual circumstances as the MasterCard scheme of "no default MIF and a prohibition on *ex post* pricing".

The Court stated further, in a passage which the Claimants emphasised, at [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 …, but for schemes of this kind, the CJEU has decided that that test is satisfied."

As noted above, before the Supreme Court, it was common ground that this was the appropriate counterfactual.

47. In none of the previous English proceedings were the implications of the IFR for the counterfactual considered. The finding as to the counterfactual reflected the hold-up problem and the Court of Appeal expressly acknowledged at [180] that in different factual circumstances from that prevailing in the EU proceedings, the counterfactual might be different.

48. The IFR was not taken into account in the *Sainsbury's Mastercard* proceedings because Sainsbury's did not appear to seek damages for the period after 9 December 2015 when the IFR came into effect: *Sainsbury's Mastercard* judgment at [17(4)(iii))]; and the CAT in any event considered that MIFs at the level of the IFR caps would be exemptible: [430(1)]. By contrast, in both the *AAM* and *Sainsbury's Visa* proceedings, the claim periods, which started in 2006/07, continued beyond 9 December 2015. However, no argument based on the IFR was run by the Defendants in either of those proceedings. As both Mr Rabinowitz QC and Mr Cook QC pointed out, the post-IFR periods in those cases were relatively short in terms of the entire periods of the claims, and the parties did not therefore give this particular matter attention. Since the arguments which Visa and Mastercard now wish to advance were not raised, still less addressed, in either the *AAM* or *Sainsbury's Visa* proceedings, the judgments in those cases are not authority on this point. And as Mr Rabinowitz and Mr Cook emphasised, and by contrast with the asymmetric counterfactual discussed above, since those proceedings involved different claimants, there can be no question of any issue estoppel or abuse of process in Visa and Mastercard seeking to run this argument as against the present Claimants.

49. We accept that since the CA judgment was addressing the counterfactuals in the three cases under appeal, it should not be read as excluding, as a matter of law, the possibility of a different counterfactual in circumstances which were materially different from the circumstances addressed in those three first instance judgments. The statements about the correct counterfactual in the CA judgment, quoted above, were based on the decisions in *Mastercard GC* and *Mastercard CJ.* Those EU judgments were delivered before the adoption of the IFR. And as the CJEU emphasised in *Mastercard CJ* at 165, referring to its previous case-law:

> "… when appraising the effects of coordination between undertakings in the light of Article [101 TFEU], it is necessary to take into consideration the actual context in which the relevant coordination arrangements are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question …."

Accordingly, we do not consider that the previous MIF judgments, whether at European or domestic level, are authority precluding Visa and Mastercard from advancing a case for different counterfactuals in the period post-IFR.

50. We should add that we do not accept Ms Smith's distinct objection to Mastercard's Bilaterals counterfactual, i.e. that it is necessarily inconsistent with the Court of Appeal's rejection of the CAT's finding that the counterfactual involved a series of bilateral agreements. First, the Court of Appeal's decision was based on its finding that the CAT's conclusion was unsupported by the evidence. As the CA judgment states, at [181]:

> "We emphasise that we are not holding that no amount of evidence could have made it appropriate to find that, even in a "no default MIF and a prohibition on *ex post* pricing" counterfactual, bilateral interchange fees would have been agreed. It might have been possible to show that the economic background to the MasterCard scheme in question was so different to that being considered by the Commission, the General Court and the CJEU that a different outcome would have occurred in a similar counterfactual world. The evidence relied upon by the CAT in [182]-[197], however, comes nowhere near to achieving that objective."

Secondly, as we have observed, the CAT's conclusion was based on there being no default MIF with settlement at par, and it was in that situation that the CAT found that bilateral agreements would emerge. Mastercard seeks to distinguish its Bilaterals counterfactual on the basis that there would be no default settlement rule at all. Whether that is, in reality, a meaningful distinction, or whether in circumstances under the IFR the same analysis elaborated by Phillips J in the *Sainsbury's Visa* judgment at [106]-[129] would apply, is in our view a matter for trial. As Phillips J noted at [129], there was no evidence before the court to support such a counterfactual in those proceedings. Having regard to the witness statement of Ms de Crozals from Mastercard and the expert report of Dr Niels, we cannot, at this interim stage, feel satisfied that Mastercard could not adduce such evidence in the present case.

51. Ms Smith submitted that if there had not previously been the sustained restriction of competition caused by Visa and Mastercard's positive MIFs, there would have been no need for the IFR and it would never have been introduced. On that basis, she argued that it was wrong to have regard to it for the purpose of the counterfactual since a counterfactual represents the hypothetical world without the restriction of competition. We accept that Ms Smith may well be

correct as regards the reason for the IFR. But we regard the legal consequence which she seeks to draw as misconceived. The restrictions under the Visa and Mastercard rules continued over many years, and the counterfactual against which the anti-competitive effect is to be assessed may not only change over such a period but must realistically reflect all the surrounding circumstances: see para 49 above. Ms Smith submitted that:

> "You can't rely on the regulatory response to one restriction in order to justify another restriction which has exactly the same effect."

However, that mis-states the issue. The question whether the other restriction does have the same effect *on competition* arises in a market subject to the "regulatory response". Therefore, whatever the *reason* for the IFR, the question whether the MIF default rules in the period post-IFR actually had the effect of restricting competition must be addressed against the reality of the then prevailing situation, which includes the IFR.

52. Ms Smith also sought to rely on recital (14) to the IFR which states:

> "The application of this Regulation should be without prejudice to the application of Union and national competition rules."

But that means only that the IFR does not prevent claimants arguing that the arrangements setting MIFs post-IFR violate competition law. Visa and Mastercard do not seek to suggest otherwise. It does not mean that the impact of the IFR is to be left out of account in the determination of whether such arrangements have an anti-competitive effect.

53. Having concluded that Visa and Mastercard are entitled to advance their proposed counterfactuals, the question whether the Claimants are entitled to summary judgment as regards domestic and EEA consumer MIFs post 9 December 2015 is not difficult to resolve. As the Supreme Court judgment makes clear at [93], part of the "essential factual basis" on which the CJEU determined that the Mastercard EEA MIFs restricted competition, which was mirrored in the three English proceedings, was that the counterfactual is no default MIF with settlement at par (that is, a prohibition on *ex post* pricing); and that in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower: see para 38 above. The Supreme Court's additional reasoning as to why it should follow *Mastercard CJ* even if

it were not bound to do so, rests on the same two factors: Supreme Court judgment at [103]. Neither of those related factors apply under the Visa and Mastercard counterfactuals. It follows that the basis of the Claimants' application for summary judgment post-IFR cannot be sustained and that both Visa and Mastercard have a reasonably arguable defence as regards domestic and EEA consumer MIFs for the period post 9 December 2015.

F. INTER-REGIONAL MIFS, COMMERCIAL CARDS AND ITALIAN DOMESTIC MIFS

54. These MIFs were not the subject of any of the prior decisions. Both Visa and Mastercard submit that each of them differ substantially from UK/Irish domestic and EEA consumer MIFs in ways that are material to the analysis of restriction of competition. They contend that they have distinct defences to the allegation that those MIFs, even if set by collusive arrangements, had an appreciable effect on competition, which defences are strongly arguable and therefore, sufficient to preclude summary judgment. In support of those contentions, both Visa and Mastercard have filed expert economist's reports:

    (a) in the case of Visa, by Mr Derek Holt;

    (b) in the case of Mastercard, by Dr Gunnar Niels.

55. The Claimants have not filed any expert evidence in response, contending that the points made in those reports are irrelevant in the light of the CA and Supreme Court judgments. The Claimants submit that, properly understood, those judgments determine that any collusive arrangement to set a MIF which has an effect on the MSC charged by acquirers to merchants restricts or distorts competition and violates Art 101(1). They point out that both sets of Defendants have accepted that the level of MIF paid by acquirers is "likely to affect" or "may impact on" the level of the MSC agreed between acquirers and merchants: Visa Re-Amended Defence, para 21; Mastercard Re-Amended Defence, para 35(e). And they draw attention to Mr Holt's statement in footnote 12 to his report that he is "not suggesting that acquirers would not have taken account of inter-regional MIFs or commercial card MIFs when setting their MSCs". The Claimants argue that whereas the actual *level* of MIF (unless it is *de minimis*)

and the *degree* to which it is passed on in the MSC are relevant to the measure of damages, they are not relevant to the prior question of whether there is a restriction or distortion of competition.

56. To assess the parties' competing arguments, and before turning to address the three different categories of MIF, it is necessary to consider the proper interpretation of the European and domestic appellate judgments. The basis of the European decisions, which the English courts then followed, is discussed and explained in the Supreme Court judgment at [74]-[79]. At [74], the Supreme Court emphasised the importance of recital (459) of the Commission Decision:

> "In the absence of MasterCard's MIF, the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into account the acquirer's individual marginal cost and his mark up."

57. The Supreme Court judgment continues as follows:

> "75. The Commission was here focusing on the process by which merchants bargain with acquirers over the MSC. It was contrasting the position where that charge is negotiated by reference to a minimum price floor set by the MIF and one where it is negotiated by reference only to the acquirer's individual marginal cost and his mark up - ie between a situation in which the charge is only partly determined by competition and one in which it is fully determined by competition. In the latter situation the merchants have the ability to force down the charge to the acquirer's individual marginal cost and his mark up and to negotiate on that basis. This is the "pressure" which is referred to in recital 460 of the decision. This is made clear by the reference in the first sentence of recital 460 to "that" pressure - ie the pressure referred to in recital 459.
>
> 76. It is correct that the Commission went on in recital 460 to describe the competitive process involved if there were bilateral negotiations over interchange fees, but the ultimate point it was here making is that that process would be transient and that "acquiring banks would eventually end up setting their MSCs merely by taking into account their own marginal cost plus a certain mark up". The transient nature of such a competitive process shows that the existence of such a process cannot have been integral to the Commission's decision that there was a restriction on competition. This is further borne out by footnote 517 in which the Commission stated that in the counterfactual "banks may or may not enter into bilateral agreements on interchange fees", thereby making it clear that such agreements were not essential to its reasoning.
>
> 77. *Mastercard GC* is properly to be interpreted in a similar way. In para 143 the General Court rejected the zero MIF argument and held that since the MIF sets a minimum price floor for the MSC (which is not determined by competition) "it necessarily follows that the MIF has effects restrictive of competition". This is the context in which the "pressure" referred to in the next sentence falls to be considered. The consequence of the minimum price floor set by the MIF is that such pressure is limited to only part of the MSC - ie that

> relating to the acquirer's individual marginal cost and mark up (in the present case about 10% of the MSC).
>
> 78. A similar analysis applies to *Mastercard CJ*. The "pressure" which the Court of Justice referred to at para 195 is the same as that referred to in para 143 of *Mastercard GC*, which the Court of Justice was endorsing."

58. The Supreme Court proceeded to reject Visa and Mastercard's reliance on the *Budapest Bank* case, holding that case to be clearly distinguishable, and observed at [90]:

> "…, in the present case[s] there has been an examination by all courts of the effects of the MIF on competition in the actual and counterfactual markets, including whether it operates as a price floor. The issue is whether the effects as found are materially the same so that the same legal conclusion is to be drawn as in *Mastercard CJ*."

59. The Supreme Court reiterated that the findings on which *Mastercard CJ* is based were not distinguishable from the facts found or accepted in the cases before it, and summarised those findings at [93] which we have already quoted but repeat here for convenience:

> "In our judgment, the essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals. Those facts include that: (i) the MIF is determined by a collective agreement between undertakings; (ii) it has the effect of setting a minimum price floor for the MSC; (iii) the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition; (iv) the counterfactual is no default MIF with settlement at par (that is, a prohibition on ex post pricing); (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower."

For present purposes, findings (ii) and (vi) are particularly relevant.

60. The Supreme Court then explained why it would have come to the same conclusion as regards a restriction on competition even if it were not bound by *Mastercard CJ,* in reasoning which it expressly acknowledged was largely the same as that of the European decisions and the CA judgment:

> "99. On the facts as found, the effect of the collective agreement to set the MIF is to fix a minimum price floor for the MSC. In the words of Mr Dryden, AAM's expert economist, it sets a "reservation price".
>
> 100. That minimum price is non-negotiable. It is immunised from competitive bargaining. Acquirers have no incentive to compete over that part of the price. It is a known common cost which acquirers know they can pass on in full and do so. Merchants have no ability to negotiate it down.

> 101. Whilst it is correct that higher prices resulting from a MIF do not in themselves mean there is a restriction on competition, it is different where such higher prices result from a collective agreement and are non-negotiable.
>
> 102. Whilst it is also correct that settlement at par sets a floor, it is a floor which reflects the value of the transaction. Unlike the MIF, it involves no charge resulting from a collective agreement, still less a positive financial charge.
>
> 103. There is a clear contrast in terms of competition between the real world in which the MIF sets a minimum or reservation price for the MSC and the counterfactual world in which there is no MIF but settlement at par. In the former a significant portion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement made. In the latter the whole of the MSC is open to competitive bargaining. In other words, instead of the MSC being to a large extent determined by a collective agreement it is fully determined by competition and is significantly lower."

(1) Inter-regional MIFs

61. Since the argument regarding commercial cards was conducted separately, we focus here, as we understood did the parties, on inter-regional MIFs for consumer cards.

62. It was not disputed that inter-regional MIFs have been significantly higher than the domestic and EEA MIFs. On 29 April 2019, the Commission issued decisions under Art 9 of Reg 1/2003 which made binding for a period of 5½ years the commitments given by Visa and Mastercard to cap those MIFs (for consumer card transactions): Case AT.39398 - *Visa MIF* and Case AT.40049 – *Mastercard II* (together, the "Commitment Decisions"). By the Commitment Decisions, Visa and Mastercard respectively agreed to cap those MIFs within the EEA at levels that are the same as the caps under the IFR for in-person transactions but at significantly higher levels for transactions where the card-holder is not present (e.g. online purchases). Therefore, although since the Commitment Decisions the MIFs for in-person transactions involving an inter-regional MIF would appear no longer to be higher than the MIFs charged at the IFR level, that is not the case for transactions where the cardholder is not present. And in any event, the period post the Commitment Decisions represents a relatively small part of the periods covered by these claims.

63. Inter-regional transactions constitute only a relatively minor part of merchant transactions compared to domestic and intra-EEA transactions. Visa and Mastercard argue that the inter-regional MIFs do not in fact constitute a floor

for the MSC. Mr Holt notes that the average MIF for inter-regional transactions was significantly above the typical MSC for debit and credit cards in the UK.[6] He proceeds to state, at para 36 of his report:

> "The possibility that MIFs exceeded average MSCs is in stark contrast with the findings from the Commission's analysis in the Mastercard case (that the relationship is the other way around in the majority of cases). Provided that this relationship is relevant to the applicability of the Supreme Court's second fact, a more detailed analysis may therefore be required. In particular, the Tribunal may need to compare the relative level of inter-regional MIFs and MSCs and the impact of one on the other to determine whether inter-regional MIFs truly limit the ability of merchants to exert downward pressure on MSCs by reducing the possibility of prices dropping below a certain threshold."[7]

64. Dr Niels makes a very similar point, expressed as follows:

> "3.7 The small volumes of inter-regional transactions call into question whether Inter-regional MIFs would constitute a price floor. It is likely that in many situations (particularly in sectors with few inter-regional transactions, and in the absence of 'MIF plus plus' contracts[37] between the acquirer and a given claimant) acquirers will not have set separate MSCs for inter-regional transactions, and the MSCs would be set with reference primarily to domestic [MIFs][[8]] and the acquirer's own costs and margins. In such a circumstance there would be no price floor effect from the Inter-regional MIFs.
>
> 3.8 Even to the extent that acquirers had some regard for Inter-regional MIFs in determining their MSCs in the absence of 'MIF plus plus' contracts, the Inter-regional MIFs are unlikely to represent a price floor in the same sense as domestic MIFs. Domestic MIFs create a level below which MSCs (both overall, and those for domestic transactions) do not fall. By contrast, MSCs for any given acquirer are likely to be lower, on average, than Inter-regional MIFs in respect of transactions overall. As a result, for Claimants who do not have a 'MIF plus plus' contractual agreement with their acquirer, the MSC paid for inter-regional transactions may also be lower than the Inter-regional MIFs. Although this would mean that acquirers incurred a small loss on each inter-regional transaction, inter-regional transactions may be a peripheral consideration when evaluating customer level profitability.
>
> Footnote 37 - I.e where the MSC for any transaction is set to the sum of the interchange fee, scheme fee and a fixed acquirer margin."

65. Ms Smith acknowledged that the MSC charged to a merchant will often be a 'blended' MSC that takes account of the fact that a minority of the card transactions will be subject to an inter-regional MIF, and that the MSC may therefore be lower than the inter-regional MIF considered in isolation. But she

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[6] This observation, at para 35 of Mr Holt's report, is based on data prior to the Commitment Decisions. The position thereafter is unclear.

[7] The final phrase is adopted from *Mastercard GC* at para 143, quoted in *Mastercard CJ*: see para 66 below.

[8] The report says "MSCs" but that appears to be a typographical error.

contended that this in itself does not matter: the key point, in her submission, is that the MSC was nonetheless higher than it would be if the inter-regional MIF was at zero. For that submission she relied on the following passage in *Mastercard GC*:

> "163 It is apparent from this analysis that the Commission could legitimately conclude, in recital 435 to the contested decision, that "the [MIF of the MasterCard payment organisation] sets a floor to MSCs for both small and large merchants". The validity of that conclusion is, moreover, reinforced by the statements of merchants mentioned in paragraph 146 above.
>
> 164 The various examples of MSCs that are lower than the MIF do not invalidate that conclusion. As the Commission correctly pointed out in recital 450 to the contested decision, the fact that an acquiring bank is prepared to "absorb" a portion of the MIF does not prevent the MIF from affecting the price of the MSC. First, that applies only in regard to a proportion of merchants: those with particularly significant negotiating power. Secondly, the view may legitimately be taken that, even in the case of those merchants, the price charged would still be lower if there were no MIF, since the acquiring banks would then be in a position to offer larger reductions.
>
> 165 Lastly, as regards the argument relating to the situation in Spain, it must be noted that it is in fact clear from the documents provided by the intervener in the annex to its statement in intervention that the MSCs charged were equivalent to, or even lower than, the MIF. However, such an argument cannot in itself demonstrate that the Commission's conclusion regarding the effect of the MIF on the MSC is wrong…, even in such a case, the banks could reasonably be expected to be in a position to offer lower MSCs in the absence of a MIF."

66. Ms Smith said that this passage was effectively upheld in *Mastercard CJ* at para 193. We think that paragraph is important and therefore set it out:

> "In particular, while the General Court clearly explained in paragraph 143 of the judgment under appeal that the MIF had restrictive effects in that they:
>
> > "[limit] the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold", in contrast with "an acquiring market operating without them,"
>
> the General Court did not merely presume that the MIF set a floor for the MSC but, on the contrary, proceeded to carry out a detailed examination in paragraphs 157 to 165 of the judgment under appeal in order to determine whether that was in fact the case."

67. However, in the first place it seems clear that the position regarding the inter-regional MIF does not fall within finding (ii) in the Supreme Court judgment at [93], which is mirrored in the reference at [103] to the MIF setting a minimum or reservation price for the MSC. Since those findings are set out as summarising the "essential factual basis" of *Mastercard CJ* that bind the

English courts, we doubt that we are bound by aspects of the European judgments that go further. But even if we are, the General Court's reference at para 163 to "this analysis" is to the factual analysis set out in the Commission Decision which the General Court summarised in the previous paragraphs of its judgment. The CJEU, at para 193, emphasised that the effect on the MSC was not merely assumed as a matter of theory but based on examination of the facts.

68. Given that the inter-regional MIFs affect only a minority of transactions with any merchant, and differing proportions as between different merchants and different sectors of commerce, the question of the extent to which those MIFs affect the MSCs which acquirers agree with those merchants is not in our view self-evident. As Mr Cook emphasised, for an infringement of Art 101(1) 'by effect', the effect on competition must be appreciable. The position is manifestly different from domestic and EEA MIFs which apply to the large majority of transactions and therefore can fairly be regarded as appreciably affecting the MSC, even if it is below those MIFs. We note that the Court of Appeal stated at [174]:

> "Plainly, the reasoning of the CJEU to which we have referred does not mean that any very small default MIF would automatically be a restriction on competition. The factual premise, however, of the MasterCard scheme that the Commission was considering and of the schemes that we are considering was that the default MIFs made up a large percentage (some 90%) of the merchants' service charge. In these circumstances, the fact that the CAT may have been correct to say that not every default MIF, however small, would automatically be a restriction on competition violating article 101(1) does not deprive the CJEU's decision of binding effect where the facts of these cases are materially indistinguishable."

69. We think the same reasoning applies to a MIF which is not small in itself but which affects only a small proportion of the MSC. And the CA judgment further states at [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 …."

70. We should emphasise that we are <u>not</u> saying that the inter-regional MIFs did not, and do not, restrict competition within Art 101(1). Indeed, we do not understand either Mr Holt or Dr Niels to have arrived at that conclusion: their

view is that this requires further information and analysis. We recognise that, in the Commitment Decisions, the Commission states:[9]

> "[The inter-regional MIFs] determine a significant component of the price charged to merchants for acquiring services through the MSC, therefore limiting the acquirers' scope for reducing and differentiating their MSCs, and acquirers pass them on to merchants."

But that is only a preliminary conclusion which is not binding on the Tribunal, and we do not consider that, of itself, it provides sufficient basis to dismiss the contrary contentions and qualifications raised by the expert evidence.

71. Accordingly, in our judgment, we are not bound by either the European or domestic appellate judgments to find that the inter-regional MIFs infringe Art 101(1), and on the evidence before us this is a matter for examination at trial and not capable of summary determination.

72. That is sufficient to determine these applications as regards the inter-regional MIFs. We therefore do not need to consider Visa and Mastercard's further arguments based on the different competitive conditions which they say apply on the inter-regional market, including a much greater market share held by Amex and the implications of the significantly higher risk of customer fraud.

(2) Commercial cards

73. The Commission Decision examined the position regarding MIFs for commercial cards: see e.g. at recitals (621)-(625) and Annex 1. Its conclusion that the Mastercard MIF gave rise to a restriction of competition and was not objectively necessary, at recitals (664)-(665), applies to all Mastercard intra-EEA MIFs, not just consumer MIFs. However, in its discussion of the remedy, the Commission expressly excluded commercial MIFs on the ground that it "had not yet finalised its investigation of possible efficiencies in that regard." The operative part of the Decision accordingly applies only to consumer cards: see Art 1.

[9] *Visa MIF*, recital (35); *Mastercard II*, recital (34).

74. The Claimants accept that the findings in the Commission Decision as regards commercial cards are therefore not binding on the Tribunal: see *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7. However, we do not accept the submissions of counsel for Visa and Mastercard that those findings are therefore irrelevant. They were the considered views of the Commission and we are entitled to take them into account. In doing so, we bear in mind that since any findings regarding commercial cards were not necessary or relevant to the operative part of the Decision, they could not be challenged in the appeal to the General Court.

75. As Dr Niels points out, commercial cards constitute a category encompassing several distinct types of card, including general business cards, corporate cards issued to large companies (and primarily used for travel and entertainment expenses), and fuel cards. See also the definition in the glossary in the Commission Decision, p. 10. Most are charge cards not credit cards, so that the balance is fully paid off each month and the issuer therefore does not derive income from interest on the outstanding balance. Since the customers of the issuers are generally not individual cardholders (save for small businesses) but rather companies as the customers for the issue of cards to their employees, the choice of issuer is made by the company not the cardholder.

76. At least on the issuing side, commercial cards therefore appear to constitute a distinct sub-market, or series of sub-markets, separate from consumer cards. Both Visa and Mastercard have a much smaller share of that market than for consumer cards, and Amex is much more prominent (as are specialist cards in the fuel card sector). Mr Holt quotes data from Visa that in 2019, commercial cards accounted for only 2.3% of its transaction volume, 8.6% of transaction value and 15.1% of total MIFs. Amex operates a different scheme model and is not constrained by competition law in its ability to demand high acceptance fees from merchants.

77. Some of the arguments by Visa and Mastercard on commercial cards mirrored their arguments on the inter-regional MIFs. In particular, they similarly submitted that the relative insignificance of commercial card transactions means that it is unlikely that the commercial card MIFs establish a price floor for the

MSC or indeed account for more than a very minor part of the MSC charged. For the same reasons as set out above in the context of inter-regional MIFs, we consider that this is well arguable. Even if we were to follow the approach urged by the Claimants, asking whether the commercial MIFs distort the bargaining process between merchants and acquirers regarding the MSC by preventing the full extent of the MSC from being negotiable, we think that commercial MIFs may have negligible impact, at least for those merchants who make relatively few commercial card transactions. We can see that the position might well be different, for example, for merchants in the travel industry, such as airlines, and hotels more oriented towards business travellers. But that only underlines the need for further and deeper inquiry. This is not a matter that can be determined by summary judgment.

78. Moreover, since we are holding that the UK/Irish and EEA consumer MIFs pre-IFR came within Art 101(1), we think that the counterfactual against which the effect of the commercial MIFs fall to be assessed is a situation where those domestic and intra-EEA consumer MIFs were at zero. That seems to us to reinforce the uncertainty of the effect of commercial MIFs on the ability of merchants to negotiate the MSC.

79. Moreover, from the time when the IFR came into effect, the scheme rules of both Visa and Mastercard changed to permit merchants selectively to decline commercial cards or impose a surcharge on commercial card transactions. That was a significant development, and on the evidence an appreciable number of merchants did impose a surcharge for credit card transactions made with commercial cards: see Mr Holt's report at para 49. The 'Honour all cards' rule was one of the foundations of the analysis which led to the finding that the MIFs had an anti-competitive effect. These changes gave merchants appreciably greater bargaining power with acquirers over the MSC as they could steer commercial customers to other means of payment. Whether in that changed environment, which of course was not examined in any of the previous decisions at either European or domestic level, the commercial MIFs were necessarily a component of the MSC is a matter that requires investigation, at least for the post IFR period.

80. Mastercard also argued, supported by Dr Niels' evidence, that, for commercial cards, the MIF may be an ancillary restraint, on the basis that if issuers of those cards could not generate the MIF income from acquirers, they would either reduce the benefits to their customers or levy issuing fees, which would cause sophisticated commercial customers to switch to Amex or other more attractive three-party schemes. On that basis, it was submitted that in the long-term Mastercard would not be able to continue to operate a four-party scheme.

81. Ms Smith submitted that this is not a correct application of the ancillary restraints doctrine. The doctrine is encapsulated by the CA judgment at [72]:

> "… 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 …."

And then, dismissing the argument that Mastercard needed to retain consumer MIFs to avoid cardholders switching to Visa and thereby bringing down the scheme (the so-called 'death spiral' argument), the Court of Appeal stated at [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."

82. We are not satisfied that this precludes application of the ancillary restraints doctrine to commercial cards. If the particular feature of commercial cards is that a large majority are charge cards so that issuers' card revenue is much more dependent on the MIF, we think it is arguable that a positive MIF is necessary for a four-party scheme to survive for commercial cards. However, we note that the Commission had expressly rejected an ancillary restraints argument for commercial cards: Commission Decision, recital (625). We therefore would not base our decision on this point alone.

(3) Italian MIFs

83. It is common ground that, at least for the purpose of these applications, the relevant market is the acquiring market. The Commission Decision held that

this is national in scope: recital (329). That was not challenged in the appeal to the General Court and although the Claimants in their pleading put forward the alternative that the relevant geographic markets extend to the territory of the EEA, both Visa and Mastercard admit by their respective Defences that the geographic markets are national.

84. Visa and Mastercard point to several respects in which the Italian domestic market differs from the UK. In particular, it is said (and the Claimants have not challenged this evidence) that in Italy:

(a) There is a distinct, domestic debit card scheme, PagoBancomat. There is no such domestic scheme in the UK.

(b) The majority of credit cards are issued under the CartaSi (now Nexi Payments) credit card brand, which are co-badged with Mastercard or Visa for transactions at merchants that do not have an acquiring contract with CartaSi. Because of its large share of both the issuing and acquiring markets, the majority of CartaSi transactions are 'on us' (i.e. where CartaSi is both issuer and acquirer) and therefore do not involve a MIF.

(c) There has been a much lower prevalence of card usage than in the UK and cash has accounted for the majority of in-person transactions.[10]

(d) There are more pre-paid cards in issue than credit cards. A number of those cards have features which are said to make them substitutable for debit cards.

85. Commenting on the Italian domestic situation, Mr Holt states:

> "… it may mean that Italian merchants are able to decline Visa and Mastercard cards as most consumers also hold a domestic debit card that they could use instead. This may mean that Italian merchants are able to restrain the level of MIFs to such an extent that there is no restriction of competition."

And Dr Niels considers that the differing competing options for issuers and the significantly different preferences of consumers in Italy mean that it would be

[10] This was the case prior to the Covid-19 pandemic. It is unclear whether this has now changed.

necessary to examine detailed evidence to determine whether the four-party international scheme of Visa and Mastercard's business model could continue to operate in Italy for consumer cards without a MIF, and thus whether the MIF was objectively justified.

86. The Commission Decision and subsequent European Court judgments concerned the intra-EEA MIF, not the various domestic MIFs. The analysis of those judgments was held to apply to the UK MIFs by the Court of Appeal and Supreme Court on the basis that there was no material difference as regards the crucial factual findings. Ms Smith sought to dismiss the contentions of the Defendants as regards Italy on the basis that they concerned inter-scheme competition or the issuing market, whereas the relevant question concerns competition in the acquiring market. However, Mr Holt's point, as set out above, concerned the bargaining power of the merchants, and therefore directly addressed the acquiring market. Dr Niels' point again concerned objective justification, for which the operation of a four-party scheme may be looked at in the round.

87. We fully recognise that the Court of Appeal stated, at [157]:

> "It would be remarkable if the same scheme rule requiring the payment of MIFs in default of the agreement of bilateral interchange fees were held to be in breach of article 101(1) in one Member State, but not in breach of it in another Member State, whatever the factual or expert evidence might have been as to what might have happened in the postulated counterfactual. We say this because factual and expert evidence as to what will happen in a counterfactual position (i.e. in the absence of a particular agreement) is not hard-edged. It is, by its very nature, a kind of informed speculation, as we have seen very clearly from [180]-[181] of the CAT's decision and from parts of the evidence we were shown in argument. Even the factual witnesses are only expressing their opinion as to what might or might not happen in a given postulated, but unreal, situation."

88. We acknowledge that the Italian Claimants might very well succeed on this point. However, the competitive environment in Italy is not a matter of speculation but of fact. Those facts were of course not before the Court of Appeal. Whether the differences between those features and the UK are material when determining the counterfactual and assessing competition on the respective acquiring markets is no doubt a matter of assessment and evaluation, but we do not think it can be determined in the abstract on a summary judgment application. Making every allowance for the tentative way in which Mr Holt

and Dr Niels' reports are expressed, and the obvious interest of Visa and Mastercard to raise potential objections and sow doubt, in our judgment their contentions are reasonably arguable and cannot be dismissed as fanciful.

89. Our conclusion regarding Italian MIFs rests on the specific evidence placed before the Tribunal regarding the competitive conditions in Italy, and no evidence was adduced regarding either Malta or Gibraltar. Insofar as the Malta or Gibraltar domestic MIFs are relevant to any of these actions, we see no basis to distinguish those foreign MIFs. Although Mr Cotter in his witness statement for Mastercard says that each relevant national market has to be examined in detail before any conclusion can be drawn, it is not sufficient to resist summary judgment simply on the speculative basis that something might turn up which affords a defence. Accordingly, our finding of an arguable defence as regards foreign domestic MIFs applies only to the Italian MIFs; the domestic MIFs of Gibraltar and Malta are subject to the same conclusions as we have reached regarding the UK, Irish and EEA MIFs.

G. THE ACQUISTION OF VISA EUROPE LTD BY VISA INC.

90. It is common ground that the Visa Europe is and was at all material times responsible for the rules and operating procedures of the Visa scheme in Europe. On 21 June 2016, Visa Europe was acquired by Visa Inc.. Prior to that acquisition, it was an association of over 3,000 European banks by whom it was owned. While Visa therefore admits that the setting of the Visa MIFs before Visa Europe was acquired by Visa Inc. were decisions of an association of undertakings, Visa contends that this was no longer the case after 21 June 2016. Visa contends that there was therefore no infringement of Art 101(1) in any respect after that date.

91. This contention is raised in Visa's original defences and does not form part of its applications to amend. In light of our conclusions above that Visa has an arguable defence as regards the EEA and UK and Irish domestic consumer MIFs post 9 December 2015, and an arguable defence generally as regards the inter-regional MIFs, the MIFs for commercial cards and Italian domestic MIFs, this point does not require decision on the Claimants' summary judgment applications. However, as it was fully argued, we should address it.

92. The Claimants' claim against Visa under Art 101(1) is pleaded as follows:

> "… the Visa Rules, including the obligation to pay an Interchange Fee in respect of each transaction facilitated by the Visa Platform was at all material times set, imposed, implemented and/or maintained by an agreement and/or concerted practice between undertakings and/or a decision between [sic] an association of undertakings."

93. We accept that it is well arguable, on the basis of the facts set out in Visa's evidence and summarised in its skeleton argument, that since 21 June 2016 Visa Europe has no longer been an association of undertakings. Further, we acknowledge that decisions as to the level of MIFs thereafter have been taken by Visa Inc.. But that does not dispose of the Claimants' pleaded alternative bases of claim that the implementation and maintenance of the rules and MIFs constituted an agreement between undertakings or a concerted practice.

94. The concepts of agreement or concerted practice for the purpose of Art 101(1) are terms of art which overlap. As summarised in *Bellamy & Child, European Union Law of Competition* (8th edn, 2018) at 2.038-2.039:

> "Agreements and concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to collusive behaviour for this purpose. …. The case law has established a distinction between independent unilateral conduct, which falls outside Article 101, and coordination and collusion, which is caught by the prohibition. A precise characterisation of the nature of the undertakings' cooperation is not liable to alter the legal analysis to be caried out under Article 101 TFEU…."

Further, in Cases 48/69 etc, *ICI v Commission*, EU:C:1972:70, the CJEU explained at para 64, in a formulation repeated many times since:

> "… the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."

95. The Visa scheme rules and MIFs imposed thereunder are binding under the agreement between each issuer or acquirer with Visa. It is fundamental to the operation of the Visa scheme that every issuer and acquirer knows that every other issuer and acquirer in the scheme is bound by the same rules. Hence when (in the absence of a bilaterally agreed interchange fee) an issuer deducts the MIF from the payment for a transaction presented for processing by the acquirer, the two do not engage in separate negotiation of the MIF: they deal with one another

on the basis that they are both committed to accept that level of MIF by virtue of their common membership of the Visa scheme.

96. In the *Sainsbury's Mastercard* judgment, the CAT analysed the effect of the Mastercard scheme for the purpose of Art 101(1). The CAT stated:

> "93. … The MasterCard Scheme Rules are absolutely clear: although not obliged to use the Interchange System, if they do so, Issuing Banks and Acquiring Banks are obliged "to net settle in accordance with [MasterCard's] settlement Standards". As part of such a net settlement process, Issuing Banks are entitled to be paid the appropriate Interchange Fee, which applies unless there is a bilateral agreement. It is obvious that the agreement by which a party becomes licensee of the MasterCard Scheme involves the creation of rights and obligations between licensees *inter se* in particular as regards the payment of the Interchange Fee.
>
> 94. Although Acquiring Bank licensees and Issuing Bank licensees have the freedom to negotiate bilateral Interchange Fees, where no bilateral agreement is sought or made, licensees positively agree to be bound by the MIF stated by MasterCard. It is on this basis that the Issuing Bank is permitted to deduct from the money it takes from its customer (the Cardholder) and passes to the Acquiring Bank the amount of the UK MIF. This is certainly "acquiescence" in the MasterCard Scheme Rules: indeed, we would go further – there is, in our view, positive agreement on the part of all parties (MasterCard and the licensees) that MasterCard would set the default UK MIF which, absent bilateral agreement, the Acquiring Bank licensees would be obliged to pay and Issuing Bank licensees entitled to receive." (Footnotes omitted).

We note that the CAT in that case did not then find it necessary to consider whether the Mastercard scheme also constituted a concerted practice or a decision by an association of undertakings: see at [96].

97. Similarly, in the *AAM* judgment, Popplewell J stated at [34]:

> "The MIF is set as a default MIF in the Scheme Rules, which comprise part of the contractual terms between MasterCard and each issuer and acquirer. The payment of the MIF is made pursuant to the terms of the agreements between MasterCard and its licensees. Moreover the payment of the MIF at the levels set by MasterCard was a concerted practice. This was not in issue in anything other than a formal sense: the Claimants were also alleging that MasterCard constituted an association of undertakings; in the course of the trial it was agreed between the parties that the Claimants would not pursue such an allegation in return for MasterCard's undertaking that it would advance no argument against the proposition that there was a relevant agreement or concerted practice. This was not a formal concession, but MasterCard's position was plainly realistic: the setting of the MIF was pursuant to an agreement between undertakings and was a concerted practice."

98. We see no basis to distinguish the Mastercard scheme from the Visa scheme as regards the above analysis. (In the *Sainsbury's Visa* judgment, Phillips J did

not separately analyse the position since it was conceded in that case that the Visa MIFs were set by the decision of an association of undertakings: see at [5]. The judge therefore did not have to consider the alternative concepts of agreement and concerted practice.)

99. We should add that although this aspect was not in issue before the Supreme Court, we note that in its judgment the Court recorded without disapproval the fact that "the setting of the UK MIF was pursuant to an agreement between undertakings within the meaning of Article 101(1)", referring expressly to these passages in the three first instance judgments: Supreme Court judgment at [42]. We think it is clear from that reference that the Court is there using the term "agreement" to refer compendiously to the three concepts of agreement, decision by an association of undertakings and concerted practice set out in Art 101(1). The same applies to the use of the term "agreement" in the first of the several factors set out in the Supreme Court judgment at [93].

100. Mr Rabinowitz's argument to the contrary sought to emphasise that the contractual arrangements entered into by both issuers and acquirers were with Visa and not with each other. He submitted that a series of vertical agreements do not amount to a horizontal agreement or a concerted practice any more than the charging by an airport of its landing fees to all the various airlines using the airport amounts to a concerted practice between the airlines. However, the airport analogy misses the point: there is no transaction as between the various airlines and they do not charge each other anything. Any credit card purchase leads to a transaction as between the acquirer and the issuer, and the MIF is the fee that the issuer charges the acquirer. Under the Visa scheme, on each issuer or acquirer becoming a licensee it is committed, respectively, to charge acquirers or pay issuers (in default of a bilateral agreement) the MIF set by Visa. Moreover, it is fundamental that "agreement" for the purpose of Art 101(1) does not require a legally binding agreement: a mutual understanding that inhibits a freedom to determine conduct independently will suffice. "Concerted practice", as explained above, is a still looser concept but reflects the same approach. And it was that agreement or concerted practice which gave rise to the common MIF, which then restricted competition on the acquiring market in the way that the Supreme Court judgment explains.

101. Visa provided no effective answer to the analyses in the *Sainsbury's Mastercard* and *AAM* judgments. Although not binding on us, we see no basis on which to depart from them. In our judgment, although set by Visa Inc. after 21 June 2016, the Visa scheme MIFs constituted an agreement between undertakings or a concerted practice for the purpose of Art 101(1) and the acquisition of Visa Europe by Visa Inc. does not give rise to an arguable defence to the claims.

102. We should add that we do not base our conclusion on the Commission's *Visa MIF* decision, to which Ms Smith referred. As noted above, that is a decision under Art 9 of Reg 1/2003 making binding various commitments offered by Visa. Although in that decision the Commission states its provisional view that Visa was an association of undertakings (after the Visa Europe acquisition as well as before), this was only a preliminary conclusion, which Visa disputed, and in light of the commitments offered the Commission did not take a firm decision on that matter: see at para 33.

103. For completeness, we should say that we did not derive any assistance from the Commission's press release of 30 April 2021, to which Mr Rabinowitz referred, announcing the Commission's preliminary view that Apple was abusing a dominant position in the music streaming market by mandating the use by app developers of its in-app purchase system. Both in fact and law that is far removed from the circumstances of the present cases.

H. VISA AND INTER-REGIONAL MIFS

104. Visa states that its inter-regional MIFs were set at all material times by Visa Inc., which is not a defendant to the proceedings. On that basis, Visa contends that, aside from its argument discussed above that after the acquisition of Visa Europe by Visa Inc. there was no longer any infringement of Art 101(1), the Visa Defendants cannot in any event be liable in respect of the inter-regional MIFs.

105. Further, Mr Kennelly QC, who conducted this part of the argument on behalf of Visa, pointed out that for the inter-regional MIFs which apply to transactions with merchants in Europe such as the Claimants, although the acquirer will be a European bank (generally in the same country as the merchant) the issuer will

be a bank based outside Europe. While the acquirers' agreements to abide by the Visa scheme rules will be with Visa Europe, the issuers' agreements will not be with Visa Europe but with Visa Inc.. On that basis, he submitted, Visa Europe cannot "deliver the counterfactual" since it cannot require the relevant issuers for the purpose of the inter-regional MIF to accept settlement at par.

106. We accept, as was not disputed by the Claimants for summary judgment purposes, that the level of inter-regional MIFs was set by Visa Inc. without the involvement of any of the Visa Defendants to these proceedings. However, it is common ground that the agreement to abide by that level of MIF arises under the Visa scheme rules. For the acquirers in Europe, their obligation to abide by the rules is a contractual obligation which they enter into with Visa Europe. As Visa stated in its response to the Claimants' request for further information, served on 4 December 2019:

> "The Visa Europe Arrangements (for which the First Defendant is at least partly responsible) have at all material times required, consistently with Visa's "Global Rules" as set by Visa Inc., that Acquirer members of the Visa Platform in Europe pay Inter-regional MIFs when a Visa payment card issued outside of Europe is used to pay merchants for goods/services."

Therefore, it is pursuant to those arrangements that the European acquirers have to pay overseas issuers (by way of deduction from the reimbursement for a Visa transaction which they receive from the issuers) the inter-regional MIF set by Visa Inc..

107. It is true that Visa Europe is not responsible for requiring overseas issuers to charge the inter-regional MIF, nor does it set that MIF. But that, in our view, does not materially alter the analysis of the arrangements as giving rise to an agreement or concerted practice for the purpose of Art 101(1). As Mr Lomas observed in the course of argument, what matters is not who sets the level of the MIF but whether you have agreed to abide by it. The European acquirers have all agreed with Visa Europe that they will pay overseas issuers the inter-regional MIF set by Visa Inc.. Not only does this therefore in effect lead to common agreements between European acquirers and overseas issuers (to adopt the CAT's analysis in the *Sainsbury's Mastercard* judgment), but it amounts to a concerted practice between those acquirers and Visa Europe (to adopt Popplewell J's analysis in the *AAM* judgment). No European acquirer could effectively negotiate independently for a lower interchange fee with an overseas

issuer, since the issuer knows that in default of agreement the acquirer is obliged to accept the inter-regional MIF.

108. Whether that collusive arrangement appreciably affects competition on the acquiring market is of course a different question, as discussed above. But we do not consider that the role of Visa Inc. as regards the inter-regional MIF in itself gives rise to an arguable defence to these claims.

I. CONCLUSION

109. For the reasons set out above, we conclude that:

(a) Summary judgment should be granted against Visa and (without objection) Mastercard as regards UK and Irish domestic and intra-EEA MIFs (and insofar as relevant, the Gibraltar and Malta domestic MIFs) to 8 December 2015, i.e. the period before the IFR came into force;

(b) Visa should be granted permission to amend its Defence to plead the post-IFR counterfactual referred to as the "UIFM";

(c) Summary judgment should be refused as regards the period after 9 December 2015 and as regards the inter-regional consumer MIFs, the MIFs for commercial cards and the Italian domestic MIFs; and

(d) Visa has no real prospect of success in defending the claims based on the acquisition of Visa Europe by Visa Inc. or on the basis that the inter-regional MIF was set by Visa Inc..

110. This judgment is unanimous.

The Hon Mr Justice Roth
Chairman

Tim Frazer

Paul Lomas

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

Date: 26 November 2021