Neutral citation [2025] CAT 37

Case Nos: 1517/11/7/22 (UM)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 June 2025

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chair)
BEN TIDSWELL
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS
(1) THE STEPHENSON HARWOOD CLAIMANTS
(2) THE SCOTT+SCOTT CLAIMANTS

Claimants

\- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS
(1) VISA
(2) MASTERCARD

Defendants

Heard at Salisbury Square House on 14, 15, 19, 20, 21, 22, 26 February, 4, 5, 6, 7, 8, 11, 12, 13, 14, 18, 22, 26, 27 and 28 March 2024

JUDGMENT

APPEARANCES

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

Mr Brian Kennelly, KC, Mr Jason Pobjoy, Ms Isabel Buchanan and Ms Ava Mayer (instructed by Linklaters LLP and Milbank LLP) appeared on behalf of the Visa Defendants.

Ms Sonia Tolaney, KC, Mr Matthew Cook, KC, Mr Owain Draper and Ms Veena Srirangam (instructed by Jones Day) appeared on behalf of the Mastercard Defendants.

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MR JUSTICE MARCUS SMITH:

A. INTRODUCTION

(1) The Schemes, the Scheme Defendants and the Multilateral Interchange Fee

1. This Judgment determines various issues between a number of claimants and two corporate groups of defendants, who are referred to as **Mastercard** and **Visa**.[1] Mastercard and Visa operate payment systems that are, these days at least, both ubiquitous and near universal, under the brands Mastercard and Visa. These payment systems are collectively and interchangeably referred to as the **Schemes**. Where it is necessary to differentiate between them – and, on the whole, it will not be – they are referred to as the **Mastercard Scheme** and the **Visa Scheme** respectively.

2. The issues before the Tribunal relate to what is known as the **Multilateral Interchange Fee** or **MIF**, which is a fee charged on transactions effected through the Schemes, set as a "default" value by the Scheme operators, Mastercard and Visa, but not received by them. The Multilateral Interchange Fee is a fee imposed in each case by the Schemes' rules (the **Scheme Rules**) on participants in the Scheme in default of agreement. In other words, Scheme participants can agree, amongst themselves, a different interchange fee, which would displace the Multilateral Interchange Fee that would otherwise apply. Such an agreed interchange fee is referred to as a **Bilateral Interchange Fee**. Bilateral Interchange Fees are theoretical and not a real feature of the markets that are described in this Judgment.

(2) The key actors in the Schemes

3. The claimants to these proceedings are many. They comprise **Merchants** who participate in (generally speaking) both Schemes and who accept payment through the Schemes. Merchants do not sign up to the Scheme Rules but are

[1] Annex 1 hereto contains a list of terms that are used throughout this Judgment. Such defined terms are **bolded** on first use in this Judgment. Annex 1 identifies where these terms are first used in the Judgment.

affected by them through their contractual relations with **Acquirers**. Acquirers are contractually bound by the Scheme Rules and provide the infrastructure and services to Merchants to enable them to accept payment when proffered by a **Customer** who will also (by definition) be a **Cardholder**. Payment through the Schemes is generally done through the presentation of a card. Although technology is increasingly rendering such card-based modes of payment redundant, reference will continue to be made to **Cards** and payment by Card as a convenient shorthand, even if the term is becoming dated.[2] Cardholders who offer to pay by Card through the Schemes are referred to as **Customer/Cardholders**, so as to differentiate them from Customers of Merchants who choose to pay in a different way.

4. To be absolutely clear, the terms "Cards" and "Cardholder" refer only to Mastercard and Visa Cards issued under the Mastercard and Visa Scheme Rules. There are other card schemes on offer (for instance: American Express or **Amex**) which are obviously relevant to be considered. But the references in this Judgment to "Schemes" and to "Cards" and to "Cardholders" does not extend to these products.

5. A Merchant will contract with one or more Acquirers for the processing of Card payments. The contract between the two is generally referred to as the **Merchant Services Agreement**, and the charge levied by the Acquirer to the Merchant per transaction as the **Merchant Service Charge**. The Merchant Service Charge comprises a number of elements. One element will generally be the Multilateral Interchange Fee.

6. Cards for payment purposes are issued to Cardholders by entities known as **Issuers**. Issuers are generally, although not always, banks, who provide a range of services to Cardholders, in addition to issuing the Card(s) that may be used by the Cardholder as a Customer when buying from a Merchant. There will be a contract or contracts between Issuers and Cardholders referred to herein as the

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[2] Thus, face-to-face transactions are these days often intermediated through the use of a mobile device, like a telephone or watch. Payment is not achieved by the presentation of a physical Card. Even more to the point, non-face-to-face transactions ("Cardholder not present" transactions) have dramatically increased with the internet economy. Use of the term "Cards" embraces all these transactions without differentiation.

Issuer/Cardholder Agreement. Like Acquirers, Issuers subscribe to the Scheme Rules. Like Merchants, Cardholders will be affected by the Scheme Rules even though the Cardholder does not personally subscribe to them.

(3) The Merchant Claimants

7. In these proceedings, there were circa 2,100 claimants before the Tribunal. They are referred to as the **Merchant Claimants**. That number has steadily declined over the course of these proceedings, due to settlements between various Merchants and one or both of Mastercard and/or Visa. The figure in this paragraph states the number of Merchant Claimants participating in these proceedings as at the start of the trial.

8. It will immediately be apparent that the volume of Merchant Claimants render these no ordinary proceedings. Although of course the Merchant Claimants have a clear common interest in that they all contend that the Multilateral Interchange Fee that they paid (at least partially, if not in whole[3]) infringed competition law and so they seek damages, there are nevertheless material differences between the various Merchant Claimants. These are <u>not</u> collective proceedings, but individual claims. Trying these individual claims sequentially (perhaps by way of "test" or "sample" cases) was considered by the Tribunal, and rejected by it.[4] One of the major reasons for doing so was the importance of consistency, recognised by the growing practice of locating similar United Kingdom competition claims under one roof at this Tribunal.[5] Once similar cases have been localised in this jurisdiction, the burden is on this Tribunal to try them fairly, efficiently and consistently.[6] Accordingly, the decision was made, at an

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[3] In this introduction, it is necessary to qualify this statement because of the **Acquirer Pass-on Point**, which is a contention advanced by the Schemes that in some cases not all of the Multilateral Interchange Fee will have been passed on to the Merchant by the Acquirer. If this is right, then clearly the Merchant's claim must be reduced accordingly.

[4] See the Tribunal's ruling at [2022] CAT 14 (the **Tribunal's Interchange Case Management Ruling**).

[5] See the Tribunal's Interchange Case Management Ruling at [16] to [18].

[6] Whilst consistency might properly be seen as an aspect of fairness, it bears separate mention here. The first three civil actions for damages in regard to the Multilateral Interchange Fee heard in England and Wales were individual actions resulting in indefensibly different outcomes. Such inconsistency in relation to cases that are materially the same, even if no question of *res judicata* or issue estoppel arises, are an affront to the rule of law, because like cases should be tried and disposed of alike.

early stage, to try all of the cases at once, splitting them not by case, but by issue.[7]

(4) Trial 1 scope

9. This is the first of three trials, referred to as **Trial 1**. The issues for determination at Trial 1 relate to whether the Multilateral Interchange Fee applicable in the UK and Ireland infringes Article 101 of the Treaty on the Functioning of the European Union (**Article 101 TFEU**) and/or the Chapter I prohibition in the Competition Act 1998 (the **Chapter I prohibition**) and, if so, to what extent. Because there is generally no material difference between these provisions, reference will be made only to Article 101 TFEU, which should be taken as including reference to the Chapter I prohibition save where the context otherwise requires or the contrary is stated.

10. Trial 1 was thus concerned with the question of overcharge, namely the extent to which – if there was an infringement at all – that infringement was in fact causative of any loss.[8] There is a well-established framework and process (the **Framework**) for determining this question under EU and English law:

    (1) It is necessary, first, to identify the relevant agreement or provision that is said to constitute a restriction on competition. That, in itself, may or may not be controversial. Questions may arise as to the precise nature of the restriction, including (for instance) its function in a market and whether it is in fact enforced or paid regard to.

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[7] See the Tribunal's Interchange Case Management Ruling at [25]*ff*.

[8] The allocation of issues to trials was done by way of a **List of Issues**. The Trial 1 issues as stated in the List of Issues are not set out verbatim in this Judgment. The List of Issues was a very helpful case management tool for the parties and for the Tribunal, ensuring that everyone knew what fell within Trial 1 and what did not. However, the formulation of those issues was not intended to be (and, in any event, could not properly be) a fetter on the way in which the Tribunal, pursuant to its judicial function, resolved the issues before it. To be absolutely clear, the List of Issues was not settled by the Tribunal and itself contained multiple formulations where the parties themselves could not agree on formulation. Where appropriate, during the course of this Judgment, the findings made will be related back to specific issues, but the Judgment does not slavishly seek to follow the List of Issues where it is considered that the List of Issues does not properly capture the true issue before the Tribunal.

(2) Having identified the relevant agreement or provision said to constitute a restriction on competition (the **Provision in Question**), it is necessary to identify and "define" the market in which the effect of that agreement or provision is to be gauged (**Market Definition**). In this case, Market Definition has an anterior stage because (as was common ground) multiple different markets are before us, and it is necessary, before any Market Definition is possible, to work out which markets matter (and so have to be defined) and which do not (and so do not have to be defined).

(3) Having identified the Provision in Question and the relevant market (or markets), a theory of harm needs to be articulated and determined upon. The essential usefulness of a theory of harm is that it enables there to be a focus on the evidence that supports the allegedly harmful effects of the Provision in Question. Without a **Theory of Harm**, it is very difficult, if not impossible, to focus the inquiry.

(4) The allegedly harmful effect of the Provision in Question is then assessed by reference to what the position would have been in the absence of the Provision in Question.[9] This counterfactual hypothesis or **Counterfactual** imagines what the market (as framed by the Market Definition and the Theory of Harm) would have been like absent the Provision in Question. In this way, by comparing the actual case or the real-world case with the counterfactual case, one can determine whether the Provision in Question is indeed restrictive of competition.

No framework of analysis can be applied unthinkingly or without regard to the specific circumstances of the given case, and the Framework is neither monolithic nor immutable. In this case, the contentions between the parties require very careful framing at all stages of the Framework: Market Definition; Theory of Harm; and relevant Counterfactual.

[9] This puts matters too simply: a Counterfactual may involve simply "assuming away" the Provision in Question. However, that is not the only permissible form of Counterfactual. A Counterfactual may, perfectly properly, assume a non-infringing variant of the Provision in Question. In this case, the Counterfactual articulated by the Merchant Claimants assumed away the Provision in Question, whereas the Counterfactuals articulated by the Schemes postulated a non-infringing variant of the Provision in Question.

11. It is important to stress that Trial 1 was only concerned with Article 101(1) TFEU infringement, whether by object or by effect. Trial 1 was not concerned with exemptability under Article 101(3) TFEU, still less with issues of quantification of loss, including (but not limited to) pass-on. These limits to Trial 1 must be stressed because there was, in the evidence led and in the contentions advanced by the Schemes, significant confusion between what was in issue before us and what was not. The Merchant Claimants referred to this as a "recycling" of old and previously dismissed arguments as well as an impermissible elision between an inquiry as to infringement under Article 101(1) TFEU and an inquiry as to exemptability under Article 101(3) TFEU. No comment is made as to the appropriateness of this characterisation of the Schemes' contentions at this stage: but the untangling of what is material before the Tribunal and what is immaterial before the Tribunal is a matter that receives detailed consideration in Section G.

(5) Merchant Claimants

12. There were a number of claimants who did not participate in Trial 1 because (for example) they had the benefit of regulatory decisions determinative of the question of liability.[10] Such claimants did not participate in Trial 1, but will be affected, and have been given the opportunity of participating in, Trial 2. Such parties have participated in the many case management conferences leading up to Trial, so that they have been kept fully apprised of the litigation and the manner in which the Tribunal is trying it, including (for the avoidance of any doubt) Trial 1.

13. The Merchant Claimants and their legal teams made considerable efforts to make this process work. At Trial 1 itself, the burden of presenting the Merchant Claimants' case fell on a single legal team, led by Mr Beal, KC, instructed by (remarkably, given the number of claimants) only two firms of solicitors. In this Judgment reference will be made, without differentiation, to the **Merchant Claimants**. That label has a beguiling simplicity to it, and masks the significant

[10] See the Tribunal's Interchange Case Management Ruling at [3].

efforts of multiple legal teams working together with the Tribunal and the Scheme Defendants to make this Trial 1 (and the subsequent trials) possible.

(6) The Scheme Defendants

14. The burden of defending multiple claims of this sort was similarly onerous on the Defendants' representatives. At all times, the Tribunal has recognised that the Schemes need to have every opportunity to take every point that they are advised properly to take, even if such points only apply in relation to a limited number of cases or apply differently to different parties. Although this is a matter of greater moment in the issues for **Trial 2**, one of the main reasons for the intense case management of these proceedings has been to ensure that whilst efficiency has been maximised, that has not been at the expense of fairness, and particularly not to the detriment of the rights of the defence.

15. The respective teams of Mastercard (lead by Ms Tolaney, KC) and Visa (lead by Mr Kennelly, KC) worked hard to make this process work, and (as with the Merchant Claimants) it is appropriate to record the Tribunal's gratitude. The order of referencing Mastercard and Visa is purely alphabetical. There was a high degree of commonality of position between the Schemes, and the cooperation between the Schemes *inter se* and between the Schemes and the Merchant Claimants made the Tribunal's task significantly easier. But there were differences in emphasis between the Schemes, which cannot be overlooked. Thus, by way of example, each Scheme put forward as their primary position a different "counterfactual", whilst being careful not to criticise the counterfactual advanced by the other Scheme. Although it is theoretically possible for different outcomes to pertain according to Scheme, given the similarity between the Schemes, it is highly likely that a point taken by Mastercard would also apply to Visa, and *vice versa*. The aim has been to seek consistency of outcome where fairness requires this, so that like cases are treated alike, provided the overarching objective of procedural fairness is achieved, such that every party leaves the courtroom having properly been heard.

B. STRUCTURE OF THIS JUDGMENT

16. The Tribunal's disposition of the matters arising for determination in Trial is set out at paragraph 353. This Judgment sets out the reasons for the outcome and for the disposition of the Trial 1 issues of the Chair. The other panel members (Mr Tidswell and Professor Waterson) state their reasons for concurring in paragraph 353 in two separate concurring Judgments that follow this one. This Judgment is structured as follows:

(1) Section C describes payment schemes – in particular the "four party" schemes promulgated and operated by Mastercard and Visa – in general terms. These are the Mastercard and Visa Schemes referred to at [1]. This is a necessary prelude to consideration of the Framework; the operation of the Schemes and their context is stated neutrally, leaving the resolution of the (many) controversies between the parties to later sections.

(2) Section D describes the many prior decisions (a term broadly conceived to embrace the decisions of competition regulators and authorities as well as courts, both first instance and appellate) regarding Multilateral Interchange Fees. Section D not only identifies these decisions but also states the conclusions reached as to their legal and factual significance in the context of the issues arising for determination in this Judgment.

(3) Section E describes the evidence adduced before the Tribunal during the course of Trial 1.

(4) Sections F to I deal with the various elements of the Framework: Market Definition and the Provision in Question (Section F); Theory of Harm (Section G); the parties' Counterfactuals (Section H); and infringement (Section I).

(5) Section J, which substantially builds on the anterior sections of the Judgment, deals with the question of infringement (both by object and by effect).

(6) Section K deals with a divergence of approach between the Tribunal's members. Although there is unanimity as to disposition (see Section O), that unanimity comes through different reasoning in this Judgment, and the two Concurring Judgments of Mr Tidswell (Section M) and Professor Waterson (Section N), essentially in relation to Issues 4 and 5 in the List of Issues.

(7) Section L deals with two discrete points that require determination, but which cannot really be woven into the main fabric of this Judgment. They are briefly dealt with in this last section.

C. PAYMENT SCHEMES

(1) The Schemes

17. Trial 1 and this Judgment concern two, four-party, payment card schemes, one operated by Mastercard and one operated by Visa. Although there are differences between the Schemes, the Schemes can be seen as operating identically in virtually all material respects. Had this not been the case, Trial 1 could not have been structured as it was with both Mastercard and Visa participating in the same trial. Indeed, the regulatory history (described in Section D) would have been very different: there would have been separate and distinct streams of decision-making for each Scheme which (as will be seen) there were not.

(2) Description of the Schemes in the Sainsbury's SC Decision

18. The parties agreed that the operation of the Schemes was accurately described by the Supreme Court in the **Sainsbury's SC Decision** at [6]*ff*.[11] The relevant paragraphs are set out below. These statements are factual (i.e., at most they constitute findings of fact) and constitute some of literally thousands of findings

[11] *Sainsbury's Supermarkets Ltd v. Mastercard Inc*, [2020] UKSC 24 at [6]*ff*, referred to as the **Sainsbury's SC Decision**. As to the general acceptance of this description, see, for instance, the written opening and closing submissions of the parties: **Merchant Claimants' Written Closing** at [45]; Visa Written Opening [19]; Mastercard Written Opening [3(2)].

made by courts, regulators and authorities over the course of many years.[12] All of the parties relied on selections from this prior record and made submissions as to the extent to which these were "binding".[13] It will be necessary to explore what "bindingness" actually means, which I do in Section D. For present purposes the description in Sainsbury's SC Decision constitutes a sound and uncontroversial starting point:

> "**[4]** The appellants, Visa and Mastercard, operate payment card schemes. They facilitate electronic funds transfers throughout the world, most commonly through branded credit and debit cards.
>
> **[5]** *[...]*
>
> **[6]** Visa and Mastercard each operate open four-party payment card schemes ("the Visa scheme" and "the Mastercard scheme"), under which:
>
> > (i) *Issuers* (who are generally banks and other financial institutions) issue debit and/or credit cards to their *cardholder* customers; and
> >
> > (ii) *Acquirers* (also generally banks or other financial institutions) provide payment services to *merchants*.
>
> **[7]** These are the four parties to which the term "open four-party payment card scheme" refers. In addition, the scheme operator (Visa or Mastercard in these cases) sets the rules of the scheme and allows institutions to join the scheme as issuers and/or acquirers.
>
> **[8]** Visa and Mastercard do not themselves issue cards or sign up merchants to accept payment instructions. Instead, they accept as licensees all eligible financial institutions, these licensees being licensed to act, in specified territories, as issuers or acquirers or both.
>
> **[9]** The operation of the Visa and Mastercard schemes can be represented by the following diagram:"

Pausing there, the diagram at [9] of the Sainsbury's SC Decision is reproduced at Annex 2 (the **Sainsbury's SC Diagram**). Continuing:

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[12] These are described in Section D.

[13] Thus, Section C of the Merchant Claimants' Written Closing is devoted to this history and runs to some 30 pages. The Merchant Claimants (Merchant Claimants' Written Closing at [5(5)] contended that such factual findings were binding (emphasis added)):

> "The facts of this case are therefore materially indistinguishable from the essential factual basis of previous decisions in which MIFs have been held to infringe Article 101(1) TFEU by effect, including in particular the decision of the [CJEU] in Mastercard CJEU as explained by the Supreme Court in Sainsbury's SC at [93]. **Those decisions are binding in the [Merchant] Claimants' favour, both as a straightforward matter of authority and pursuant to section 60/60A of the Competition Act 1998**…"

"**[10]** In summary, the Visa and Mastercard schemes operate as follows:

(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 (i.e., 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 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.[14]

(a) Popplewell J stated in [the **Asda First Instance Decision**[15]] at [9] in relation to the Mastercard scheme:

> "Interchange fees can in theory be agreed bilaterally between issuers and acquirers. In practice this is not how the interchange fee is determined. Under the Scheme Rules (Rule 8.3), Mastercard sets the interchange fees which are to apply compulsorily in default of bilateral agreements. These are the multilateral interchange fees or "MIFs". In practice there are no material bilateral agreements, and so the MIF always applies. This is not surprising: in a putative bilateral negotiation between an issuer and an acquirer the issuer has no incentive to accept less than the default MIF and the acquirer no incentive to offer more."[16]

(b) Phillips J stated in the **Sainsbury's v. Visa First Instance Decision**[17] at [102] in relation to the Visa scheme:

> "Although a MIF is, in theory, only a default provision applying in the absence of agreement, it was common ground that no bilateral agreements as to Interchange Fees are in fact made in the UK market.[18] [Footnote added] The reason for that result is also common ground and is obvious: Issuers have no need or incentive to agree a lower fee than the MIF and Acquirers have no need or incentive to agree a higher fee. Both sides of the negotiation will have the certainty that transactions will, in the absence of agreement, proceed on the basis of settlement at par plus an Interchange Fee set at the level of the MIF, so neither has a reason to depart from that position and certainly no incentive to incur the significant costs of entering negotiations with multiple counterparties in the (probably forlorn) hope of persuading one or more of them to agree a position which deviated from the default. As all Acquirers are

[14] There is no reference to the decision of the Tribunal in *Sainsbury's Supermarkets Ltd v. Mastercard Inc*, [2016] CAT 11 (**Sainsbury's CAT Decision**). A similar finding was made but the Tribunal attached less weight to the extent to which these arrangements were set in stone and could not be departed from. The Scheme Rules contain an express right to agree an interchange fee bilaterally (Bilateral Interchange Fees) but this was regarded by all courts except the Tribunal as unworkable and impossible realistically to anticipate for purposes of a counterfactual analysis where the multilateral interchange fee is alleged to be, in some way, a competition law infringing provision. This is a question that it will be necessary to re-visit when considering Mastercard's counterfactual in this case.

[15] The term for the decision of Popplewell J in *Asda Stores Ltd v. Mastercard Inc*, [2017] EWHC 93 (Comm).

[16] In this scenario – where the MIF operates as a default – it is obvious that what Popplewell J said must be right. Popplewell J's analysis preserves the MIF as a default. A counterfactual analysis <u>removing the MIF as a default</u> would likely have a different outcome, not considered by Popplewell J. The analysis thus only holds good whilst the allegedly anti-competitive provision under review continues to operate. Whether that is the appropriate counterfactual analysis is an entirely different question.

[17] The term for the decision in *Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC*, [2017] EWHC 3047 (Comm).

[18] As a statement of fact, this is unexceptionable. If, however, it is read across as some kind of counterfactual model, it is flawed, because it continues to embed the allegedly anti-competitive provision that the proceedings are actually testing for.

in the same position, Merchants have no ability to negotiate with them as to the MIF element of the MSC, which is passed on in full. Witnesses called by each of the Merchants (12 in total) gave evidence that their respective Acquirers refused to negotiate the MIF element of their charge, treating it as a pass-through cost set by the Scheme."

(x) For most of the claim period, the MIF typically accounted for some 90% of the MSC. Acquirers pass on all of the MIF, [19] **[Footnote added]** and the scheme fee, to merchants through the MSC, with negotiation between acquirers and merchants in respect of the MSC being limited to the level of the acquirers margin.

[11] In the present proceedings, the MIFs at issue flow from the acquirer to the issuer. In other words, they involve a deduction from the payment that the issuer makes to the acquirer to settle the transaction. This is sometimes referred to as a "positive MIF". However, this is not universally the case for schemes of this kind. In principle, interchange fees could flow in the opposite direction (i.e. be added to the payment made by the issuer to the acquirer). There are some four party payment schemes which operate on that basis. This is sometimes referred to as a "negative MIF". Other schemes operate on the basis that, in the absence of a bilateral agreement between the issuer and the acquirer, the issuer must settle the transaction at par without the deduction of an interchange fee.

[12] It was common ground that a rule specifying the terms on which the transaction is to be settled between the issuer and the acquirer, at least in default of bilateral agreement, is necessary in order for a four-party payment card scheme to operate.

[13] It was also common ground that a rule providing for positive MIFs is not necessary for the operation of a four-party payment card scheme.

[14] Visa and Mastercard do not receive any part of the MIF or the acquiring bank fee. Their remuneration comes from the scheme fees paid by issuers and acquirers. The lawfulness of those scheme fees is not the subject of these proceedings.

[15] Four-party payment schemes, such as the Visa and Mastercard schemes, operate in what is described by economists as a "two-sided market":

(i) On one side of the market, issuers compete with each other for the business of customers to whom they will issue cards ("the issuing market").

(ii) On the other side of the market, acquirers compete with each other for the business of merchants to whom they seek to offer acquiring services ("the acquiring market").

[16] These proceedings concern the effect of MIFs on competition in the acquiring market.

[19] Where there is a "blended" rate, this need not necessarily be the case. This is stressed because pass-on is not a matter for Trial 1, but is live in Trial 2.

[17] Four-party payment card schemes are not the only type of payment card scheme. There are also three-party payment card schemes, including those operated in the UK by American Express and Diners Club. In the original form of that type of scheme, the scheme operator (i.e., American Express or Diners Club) acts as both acquirer and issuer and clears payments itself.

[18] One of the scheme rules that both the Visa and Mastercard schemes also operate is an "Honour All Cards Rules" ("HACR"). This requires a merchant, having agreed with an acquirer to accept Visa or Mastercard branded payment cards, to accept all such cards, regardless of which issuer issued the cards. Merchants can choose to accept only certain categories of card (for example, only debit cards), in which case they would be obliged to accept all Visa or Mastercard branded cards in that category. The lawfulness of the HACR is not in dispute in these proceedings."

(3) Ecosystems

19. There is a tendency to describe complex systems – particularly when they involve technology – as "ecosystems". Provided it is clear what is actually being referred to and considered, there is no harm in the term; and it was a term prevalent in these proceedings. It is important to be clear about what is meant by this term. It was explored in the evidence of Mr Livingston on Day 6:[20]

(1) Mr Livingston was shown a diagram in all material respects similar to the Sainsbury's SC Diagram and asked a number of questions in relation to it.[21] Although, of course, there are many other participants in the "ecosystem", the Sainsbury's SC Diagram represents a helpful, if simplified, diagram, for use in the further exploration of the issues:[22]

(i) The diagram shows the two markets operating off the "platforms" run by (respectively) Mastercard and Visa as part of their Schemes.

(ii) This platform provides services to two markets and explains the reference in the Sainsbury's SC Decision to a "two-sided market".[23] The nature of two-sided markets generally, and the markets here in issue, are more specifically considered below.

[20] The witnesses are described in Section E: Mr Livingston was one of Visa's witnesses of fact.
[21] The diagram in fact shown was at [11] of the Merchant Claimants' Written Opening: Day 6, p.56.
[22] Day 6, p.57.
[23] Sainsbury's SC Decision at [15].

For present purposes, it is sufficient to refer to the **Platform** (as it is represented in the Sainsbury's SC Diagram) and to the two markets operating off it as (respectively) the **Issuing Market** and the **Acquiring Market**. The left hand side of the diagram represents the Issuing Market and the right hand side the Acquiring Market.

(2) The Sainsbury's SC Diagram (and indeed most diagrams seeking to represent the ecosystem) have the Cardholder identified as being in contractual relations with the Issuer on the Issuing Market side of the diagram. On the Acquiring Market side, the representation of the market stops at the Merchant. The Customer is not present, and there is no representation of the Customer or the Customer/Cardholder. This was raised with Mr Livingston:[24]

Q (Chair)	So, first question is, recognising that we do not have every player, this diagram does lack one rather important additional person, which is the customer who is buying from a merchant?
A (Mr Livingston)	That is the cardholder in this diagram.
Q (Chair)	That is right: but should there not be a separate box for the cardholder under the [merchant] representation?
A (Mr Livingston)	Yes, so in other versions of this diagram…there is a line between the cardholder and the merchant that shows the flow of goods. So in this construct, that is the missing piece to it.
Q (Chair)	That is helpful. Because what we find – let me put this to you – is that we have the same person operating on both sides of this two-sided market, namely at the top end we have the scheme, which is providing services to card issuers on the one side and card acquirers on the other side and at the other end we have the cardholder, which is interacting not just with the card issuer but also with the merchant.
A (Mr Livingston)	That is right.

[24] Day 6, pp.57 to 58.

Q (Chair)	That is, when you are talking about a specific transaction, the same person?
A (Mr Livingston)	Yes, that is right.

(3) The two-sided market in this case might be described as being in the form of a letter "A", with the Platform at the apex and the markets feeding off the Platform represented by the two legs of the "A", the Multilateral Interchange Fee represented by the crossbar of the "A".

(4) The point is that whilst the left hand leg – representing the Issuing Market – does include the Cardholder at the foot of the leg, the right-hand leg – representing the **Acquiring Market** – does not separately represent the Cardholder *qua* Customer.

(5) The Tribunal provided the parties with a diagram setting out this representation, which is at Annex 3 hereto (the **Tribunal Diagram**). The Merchant Claimants – at [45] of the Merchant Claimants' Written Closing – provided a yet further version, which is at Annex 4 hereto (the **Merchant Claimants Diagram**).[25]

(6) Stepping back and considering these diagrams, it is important to note that the "A" is better described as an "θ", a loop with a Multilateral Interchange Fee crossbar. At the apex of the loop sits the Platform, but at its base (joining the two legs of the "A") sits the Customer/Cardholder. Where there is a Card purchase, the Cardholder is in contractual relations with the Issuer (i.e. the Issuer/Cardholder Agreement) and is the same person as the Customer contracting with the Merchant when purchasing. Mr Livingston – who understood the Schemes extremely well – agreed with this analysis, as already seen.

[25] The record contains many other diagrams, for instance a diagram at [23] of the **Mastercard Written Closing**. These do not differ in material respects (in terms of adding anything) from the three diagrams already referred to.

20. Although the relationships that arise in the ecosystem are now clear, it is appropriate to summarise the relationships at the end of each leg of the "A", beginning with the Customer – Merchant relationship:

(1) The agreement will be for the sale and purchase of goods as between the Customer and the Merchant and will contain many terms (as to the nature and quality of the goods or services provided) which are of no interest for the purposes of this Judgment and where payment (provided it is made) may often be incidental or collateral in terms of the individual transaction.

(2) The Customer – provided they have taken steps to make options available to them – will have a choice as to how to pay to discharge their payment obligation. Thus, the Customer has the (diminishing) option of cash, the (practically extinct) option of a cheque and a variety of card payment options, essentially dependent on how many cards the customer can obtain from issuing banks. Those cards may be from Mastercard and/or Visa (i.e., they may be "Cards") or they may emanate from another provider. The cards may be debit or credit.[26] Of course, the crucial step of obtaining a card or cards must be undertaken by the customer <u>before</u> transacting with the merchant: a card cannot generally be obtained at the point of purchase. Equally, the Merchant will have choices about what payment forms they accept and what payment forms they are not prepared to accept.

21. Turning to the Cardholder – Issuer relationship, the dynamic is completely different. Although the Cardholder/Customer is one and the same person as the purchaser from the Merchant, what causes a Customer to seek to obtain a single card or multiple cards will be informed by different factors than what will cause a Customer to use a Card for payment in a specific transaction with a given Merchant. Not only is the relationship between Cardholder and Issuer one capable of embracing many sales and purchases (the Cardholder may use a

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[26] The "charge" card – where the balance must be paid off at the end of the month – is grouped together with "credit" cards, where the balance can be rolled over on payment of a minimum amount and interest.

given Card thousands of times or not at all), but the choice as to how many Cards the customer may have will be informed by factors going beyond simply which Merchant will accept which card (although that is obviously a factor).

(4) Evolution of ecosystems

22. At the time of the hearing – and indeed for many years prior to the hearing – the Mastercard and Visa Schemes each presented as pervasive, common and frequently used payment systems. The coronavirus pandemic caused an increased move away from cash; and Scheme payments through contactless operation (whether through Cards or mobile devices based on Card operating systems) render payments through the Schemes of even small transactions not merely possible but quicker and more convenient than cash. These developments are on-going, and some of these developments post-date the periods of these claims. Nevertheless, for all the periods over which the Merchant Claimants were claiming, the Schemes were well-established, pervasive, common and frequently used, with an upward trend in these characteristics over time.

23. In short, the Schemes are mature, and neither Mastercard nor Visa sought to contend otherwise. But it must not be forgotten that the networks needed a viable Scheme to be developed and, until mature, the development of such schemes was at a higher risk of failure. The risk of failure reduces over time as the network expands, but it is important not to lose sight of the fragility of networks and two-sided markets (that rely on networks) at their inception.

24. Two particular points of evolutionary development need to be highlighted. The first – already adverted to – is technical development. Technical development facilitates use of Cards by all, but particularly by Merchants and Customers.[27] The second is functional development or division of labour. Division of labour is a fundamental driver of efficiency in markets, and it is no surprise that such

[27] One gets a flavour of the environment in the early days from the (few) decisions in this area, e.g. *Re Charge Card Services*, [1987] 1 Ch 150 (Millett J), [1989] Ch 497 (Court of Appeal). The paper driven nature of the process, with "vouchers" in triplicate are things of the distant past. But the new digital processes build on the structures of the old.

division has occurred here. Whereas at the beginning of the Schemes' development, banks featured on both sides of the two-sided market, as participants in both the Issuing Market and the Acquiring Market, there is now a specialisation, with different participants operating as Acquirers in the Acquiring Market and as Issuers in the Issuing Market. There is some overlap between participants in the UK and the Republic of Ireland, but it is not great.

(5) The individual transaction

25. When a transaction between a Merchant and a Customer/Cardholder occurs, the Customer/Cardholder receives the goods or services in question and payment can be made for those goods or services using a Card issued under the Schemes. Payment by Card triggers a flow of funds between the parties. This is well-represented in the Merchant Claimants' Diagram, which shows the transactional complexity in the "acquisition" of the payment in the case of a single transaction. A <u>single</u> sale/purchase between the Customer/Cardholder and the Merchant provokes a multitude of other effects, which are aggregated with other, similar, transactions taking place at the same time. Thus, referring to the Merchant Claimants' Diagram at Annex 4, one sees a chain of bilateral transactions between:

 (1) *Customer/Cardholder and Merchant*. Goods or services purchased from the latter are paid for by the former. This transaction will most often be a "one-off". In other words, there will not necessarily be an "umbrella agreement" governing multiple transactions between the Customer/Cardholder and the Merchant.[28] The Customer/Cardholder will generally have considerable flexibility – freedom of choice – in determining which Merchant to buy from. The freedom of choice is not generally shared by the Merchant, who will be keen to sell their products to as many people as possible.

[28] If *A* buys a book from bookseller *B*, *A* gets the book and pays for it, in a single and isolated transaction. Of course, the transaction need not be single or isolated: if *A* subscribes to a service that is continuous (e.g. a film subscription) then payments (if made by Card) will be governed by an "umbrella agreement".

(2) *Cardholder and Issuer.* The Cardholder will receive their Card from an Issuer participating in the Scheme. These are services provided by the Issuer to the Cardholder, which services will largely be defined by the Scheme (even though the Cardholder is not directly involved in the Scheme) and to the extent necessary included in the terms of the Issuer/Cardholder Agreement. In return, the Cardholder will become subject to many obligations, which may not necessarily be easy to detach from the general banking services that may (or may not) be provided by the Issuer to the Cardholder. This agreement will be an "umbrella agreement", governing all transactions involving a particular Card or Cards. The Cardholder may – if they are naïve – think they do not pay for these services because there may be no fee for the provision of the Card.[29]

(3) *Merchant/Acquirer.* There will be an agreement between the Merchant and the Acquirer pursuant to which the Acquirer provides to the Merchant the services necessary to "acquire" payment of the transaction, which is referred to as the Merchant Services Agreement. Pursuant to this agreement, the (increasingly sophisticated) hardware and software enabling the Card to be identified and the transaction processed will be provided. The Merchant will pay for these services by way of a Merchant Service Charge. Broadly speaking, the following types of Merchant Services Agreement exist:[30]

> "There are three different types of MSA. An MSA which breaks out the three separate components of the MSC – ie the MIF, scheme fees and acquirer net revenue – is called Interchange Plus Plus ("IC++"). An MSA which separates out the MIF but rolls up the scheme fees and the acquirer net revenue into a single figure is called Interchange Plus ("IC+"). Some older MSAs do not separate out any of the three components ("Blended MSAs")."

[29] There may, particularly with "premier" cards, be an annual fee, in which case the services provided by the Issuer will not be free or perceived to be free even by the naïve Cardholder. But even where there is no such card-specific fee, the Card related services provided by the Issuer are charged for and paid for. The Merchant Claimants' Written Closing enumerates a number of ways in which Card related services are paid for: see Section E(15).

[30] Quoting from the Merchant Claimants' Written Closing at [72], but the point is not contentious.

These three elements – interchange fee, scheme fee and acquirer net revenue – need to be explored in a little greater detail both here and below:

(i) The interchange fee is the charge that sits at the heart of this Judgment and litigation. It will be considered throughout.

(ii) The **Scheme Fee** is the fee that the Acquirer must pay to the Scheme in order to participate in it. As with the Cardholder, the Merchant sits outside the Scheme ecosystem but may be involved in paying some of the costs associated with the Scheme. The Merchant will on some level, depending on the terms of the Merchant Services Agreement, appreciate this.

(iii) The acquirer net revenue is simply the Merchant Service Charge less the interchange fee and the Scheme Fee. It is a residual amount.

(4) *Acquirer and Scheme*. The Acquirer participates in the Scheme by way of a contract obliging it to abide by the Scheme Rules which are extensive. Aspects of the Scheme Rules will be explored. Pursuant to those rules, the Acquirer pays Scheme Fees to the operator of the Scheme.

(5) *Issuer and Scheme*. Similarly, the Issuer participates in the Scheme by way of a contract obliging it to abide by the (same) Scheme Rules. Pursuant to those rules, the Issuer pays Scheme Fees to the operator of the Scheme.

26. The Scheme Rules thus constitute the essential part of the network that binds together the Schemes, the Issuers and the Acquirers. The network created by the Scheme Rules extends beyond the rules themselves, to affect relations between (i) Acquirers, Merchants and Customers and (ii) Issuers and Cardholders.

(6) Settlement

27. The Schemes' essential purpose is to ensure that in the aggregate the many millions of purchase transactions effected using the Schemes are paid for: put simply, money from the accounts of many, many Cardholders needs to migrate appropriately to the accounts of many, many Merchants. This will involve processes of aggregation and disaggregation of transactions, as well as extractions of value, as when it comes to deducting charges like Scheme Fees.

28. At the end of Day 1 of the trial (14 February 2024), the Tribunal requested the Schemes to provide short notes explaining how clearing and settlement worked within their respective Systems. These were provided on 14 March 2024 (Visa) and 16 March 2024 (Mastercard).[31] It is unnecessary to describe the process of settlement in the case of each Scheme (and there are issues of confidentiality which should not be breached unless necessary for a transparent Judgment). The fact is that the precise processes of settlement do not matter. What matters is that:

    (1) Robust and effective settlement systems exist in the case of each Scheme, for settlement is fundamental to the purpose of the Schemes. The Merchant Claimants' Written Closing rightly notes:

    > "The primary purpose of any payment card scheme is to clear and settle payments made by payment cards, so as to enable functional payment to be obtained by a merchant in return for the supply of goods or services. It is no exaggeration to say that, without a requirement to clear and settle a payment in discharge of a cardholder's contractual obligation to pay the merchant, there is no payment scheme *[…]*"

    (2) Neither the Merchant nor the Customer/Cardholder is involved in the settlement process. The Customer pays the Merchant the agreed price and that sum of money will (at some point) leave the Customer/Cardholder's account with their Issuer. The Merchant will receive the agreed price, less any deductions, from the Acquirer. To this extent, the settlement process is entirely separate from both Merchant

[31] See the Merchant Claimants' Written Closing at [62].

and Customer/Cardholder: both simply see the end result, payment according to the terms of the Scheme in question.

(7) The Scheme Rules

(a) Generally

29. The Scheme Rules are long and complex. Not only do they regulate the ecosystem, they also pervade (in the manner already described) the legal relations between Acquirer and Customer/Cardholder and Issuer and Cardholder. Thus, for instance, the rule that a transaction involving payment by Card should not be on any more disadvantageous terms than if the same transaction were paid for in cash is a Scheme Rule:[32] but it is only effective if imposed, by the Acquirer, on the Merchant, through the Merchant Services Agreement.

30. There are a number of specific Scheme Rules which need to be considered. Apart from the rules regarding the interchange fee, which is considered separately, these are considered below.

(b) The Settlement Rule

31. The Scheme Rules require that a valid transaction made on a Scheme Card must be settled between the Issuer and the Acquirer.[33] This is referred to as the **Settlement Rule**.[34] The effect of the Settlement Rule is shortly stated, but that belies both the complexity underlying the settlement process and the fundamental importance of settlement to the operation of the Schemes.

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[32] The **No Surcharging Rule** was prohibited by EU Consumer Rights Directive 2011 (regulation 25). This was transposed into UK law by The Consumer Rights (Payment Surcharges) Regulations 2012 (regulation 4). This came into effect 6 April 2013 in UK (and 13 June 2014 in Ireland). The earliest Merchant claim in the Umbrella Proceedings at the time of Trial 1 taking place was circa 2007. The effect of this rule on Merchant conduct was not something on which much evidence was led but price differentiation between modes of payment does not appear extensive.

[33] Further details are set out in (i) the Merchant Claimants' Written Closing at Section B(7)(a), (ii) the Mastercard Written Closing at [235] to [239] and (iii) the **Visa Written Closing** at [71] to [77(4)]. The detail is immaterial, and the general point (but not its significance) common ground.

[34] The nomenclature is mine and I am seeking to state the essential purpose of the rule as it operates in both Schemes. Precise wording and terminology of course differed between the Scheme Rules (both over time and as between the Mastercard Scheme and the Visa Scheme), but nothing turns on this.

(c) The Honour All Cards Rule

32. By the **Honour All Cards Rule**, the Scheme Rules oblige all Merchants to accept without differentiation any Card within a particular Card-type issued by that Scheme. The Honour All Cards Rule no longer applies to all Cards, and has changed over time in the case of each Scheme, variously applying to <u>all</u> Cards issued by a Scheme to only applying within certain categories of Card and/or only to categories of Card accepted by the Merchant in question.[35] The Honour All Cards Rule thus now incorporates a degree of flexibility or freedom of choice to the Merchant, but the fundamental purpose of the rule remains unchanged, which is to prevent the discrimination between Cards or Card types, so that a Merchant may not accept one particular Card and yet refuse another Card of the same type or kind.

(d) No Surcharging Rule

33. By the No Surcharging Rule, the Scheme Rules prohibit the Merchants from adding surcharges to transactions effected by Card unless the local law expressly requires surcharging to be permitted.[36] The point is to ensure that – to the Customer/Cardholder – there is no perceived disadvantage in paying by Card rather than (say) by cash.

(e) Co-Badging

34. The Schemes Rules at times contain restrictions on the issuing of Cards with a functionality joined to the functionality provided by another competing card scheme.[37] These are referred to these as **Co-Badging Rules**.

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[35] Further details are set out in (i) the Merchant Claimants' Written Closing at Section B(7)(d), (ii) the Mastercard Written Closing at [529] to [536] and (iii) the Visa Written Closing at [29] to [31]. The detail is immaterial, and the general point (but not its significance) common ground.
[36] Further details are set out in (i) the Merchant Claimants' Written Closing at Section B(7)(f), (ii) the Mastercard Written Closing at [564] to [565] and (iii) the Visa Written Closing at [556] to [569]. The detail is immaterial, and the general point (but not its significance) common ground.
[37] Further details are set out in (i) the Merchant Claimants' Written Closing at Section B(7)(g), (ii) the Mastercard Written Closing at [588] to [589] and (iii) the Visa Written Closing at [570] to [572]. The detail is immaterial, and the general point (but not its significance) common ground.

(8) The Multilateral Interchange Fee

(a) An unusual fee

35. The Multilateral Interchange Fee sits as the "cross-bar" of the "A" that has been described. It is an odd feature of the ecosystem because it cuts across the normal chain of transactions by which payment is made by a Cardholder for goods supplied or services rendered by a Merchant to that Cardholder when acting as Customer. Apart from the Scheme Rules – to which Issuers and Acquirers both subscribe, by definition – there is no direct contractual nexus between Acquirers and Issuers obliging this payment to be made. Indeed, as its name demonstrates, it is a payment that is unilaterally set by the Schemes and applies unless there is contrary agreement in the form of a Bilateral Interchange Fee.

36. The Multilateral Interchange Fee is thus a <u>default</u>, operating only where no Bilateral Interchange Fee is agreed between an individual Issuer and an individual Acquirer. There is thus a theoretical freedom for the parties to agree something different.

37. Even in two-sided markets, the direct nexus in terms of cash-flow between the two markets is unusual. It was uncontroversial before us that whilst interchange fees could operate in either direction (i.e., with net payments moving from Issuers to Acquirers or *vice versa*), so far as the Multilateral Interchange Fees in these proceedings were concerned, the flow was essentially one way,[38] namely from Acquirers to Issuers. Although, viewed on a per transaction basis, the Multilateral Interchange Fee is small, even *de minimis*, once aggregated the monies moving from the Acquiring Market to the Issuing Market are very substantial indeed.[39]

38. Two-sided markets typically involve two different products sold from the same Platform. In other words, the Platform is a seller in two different markets, servicing two different groups of buyers purchasing different products. It will

[38] ATM transactions were identified as a possible exception.
[39] The figures are confidential, but they amount to £100s of millions. See Mastercard Written Closing at [38(1)].

be necessary, in due course, to define the Acquiring Market in this case and (to a lesser extent) the Issuing Market. What is noteworthy is that there will generally be distinct sales and purchases of distinct products between the two markets operating off the single Platform, and that (as a result) the purchasers in the two markets will be different. Although there almost always will be "network effect" between the two markets, the interchange fee is unusual in that it represents a direct intervention in the pricing structures of both the Acquiring and Issuing Markets, whereby monies flow not only between the Buyers and the Sellers in Market (1)[40] and (separately) the Buyers and Sellers in Market (2),[41] but also (and additionally) between the Buyers in Markets (1) and (2).[42]

39. The fact that the money flows created by the Schemes cut across the normal transactional flows and pricing structures in two-sided markets is unusual, but it is a big step to say (and it was not asserted) that this is anti-competitive. Indeed, the converse may be the case – the unusual can often be innovative and pro-competitive.

(b) The Multilateral Interchange Fee as a default

40. The Multilateral Interchange Fee is a default fee that applies in the absence of contrary bilateral agreement. The Scheme Rules require that a valid transaction made on a Scheme Card must be settled between Issuer and Acquirer (the Settlement Rule) and that settlement of a transaction gives rise to payment of an interchange fee, either as bilaterally agreed between Issuer and Acquirer or, in the absence of any Bilateral Interchange Fee, at a default rate set by the Scheme operator. These default rates are published by the Scheme operators from time-to-time and communicated to Scheme participants when there is a change.[43] These specific rates of Multilateral Interchange Fees are referred to as **Default MIFs**. The general rule permitting Default MIFs to be imposed is referred to as the **Default Interchange Fee Rule**.

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[40] I.e. between the Scheme and each Issuer.
[41] I.e. between the Scheme and each Acquirer.
[42] I.e. between Acquirers and Issuers.
[43] Further details are set out in (i) the Merchant Claimants' Written Closing at Section B(7)(b), (ii) the Mastercard Written Closing at [44] to [45] and (iii) the Visa Written Closing at [46] to [47]. The detail is immaterial, and the general point (but not its significance) common ground.

(c) The range of interchange fees: different types of Default MIF

41. There are many interchange fees, differentiating according to criteria that will be described. The rates varied over time.[44] The different interchange fees were broadly as follows:[45]

(1) *Consumer Card Default MIF*. This refers to the level of Multilateral Interchange Fee due on a transaction made by a consumer on their Card.

(2) *Commercial Card Default MIF*. This refers to the level of Multilateral Interchange Fee due on a transaction made on a commercial Card – typically a Card given by a business to an employee so that the employee can purchase goods and/or services on the business' behalf.[46]

(3) *Default MIFs varying according to type of Card*. Different levels of Multilateral Interchange Fee may be due depending on whether the Card used is a debit card, credit card or prepaid card. The details of the defaults are not material.

(4) *Domestic, intra- and inter-regional Default MIFs*. The Schemes have each categorised the world into six different regions. The composition of those regions has varied over time. Again, the details are immaterial, but the broad picture does need to be understood:

(i) A domestic Default MIF refers to the level of a Multilateral Interchange Fee due on a domestic Card transaction within a single EEA Member State and (since Brexit) the UK. The domestic Default MIF is intended to apply where a Card issued in a given country is presented by a Customer/Cardholder to a

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[44] See Merchant Claimants' Written Closing at [49].
[45] See Merchant Claimants' Written Closing at B(3).
[46] There are various types of commercial card, and the MIFs might vary between them. As the Merchant Claimants' Written Closing notes, at [49(2)(b)], "[s]uch cards exist on a spectrum. As was accepted by the Schemes, a small business using a business debit card is in largely the same position to a consumer using a consumer debit card".

Merchant in the same country, i.e. the Issuer[47] and the Merchant are in the same country.

(ii) An intra-regional Default MIF refers to the level of MIF due on a cross-border Card transaction within a single geographical region, i.e. when a Card issued in one country is presented to a Merchant in another country, but within the same region.

(iii) An inter-regional Default MIF refers to the level of Multilateral Interchange Fee due on a cross- or trans-regional transaction, where a Card issued in one region is used in another, different, region.

42. The Multilateral Interchange Fee for a single transaction can be categorised in several different ways. In other words, the Default MIFs duplicate or overlap. For example, the Multilateral Interchange Fee due on a single payment made by a Cardholder on their commercial credit card while in a different region to the region in which the Card was issued can, simultaneously, be an inter-regional Default MIF, a commercial card Default MIF and a credit card Default MIF. However, only one Multilateral Interchange Fee will ultimately apply to the transaction.[48]

43. It is important to note that the Schemes sought to prevent Acquirers from arbitraging amongst different Default MIFs, so as to select for themselves (or their customer Merchants) the lowest. Both Schemes had rules preventing or inhibiting this.[49]

(9) The Interchange Fee Regulation

44. The **Interchange Fee Regulation** or **IFR** is a legislative measure of the EU controlling various aspects of the Multilateral Interchange Fee, including its rate. It acts as a constraint on the Schemes' operations and assumes considerable

[47] The Default MIF operates by reference to Issuer location, not Cardholder location.
[48] See Merchant Claimants' Written Closing at [51].
[49] Merchant Claimants' Written Closing at Section B(7)(c).

importance in the context of the counterfactuals articulated by the Schemes in the course of this litigation.

45. The broad effects of the Interchange Fee Regulation are stated in the Visa Written Closing:[50]

> "The [Interchange Fee Regulation] prohibits Mastercard and Visa from setting an interchange fee above 0.2% of the value of each transaction for consumer debit cards (Article 3(1)) and above 0.3% for consumer credit cards (Article 4). These caps apply to intra-EEA [Multilateral Interchange Fees] and domestic [Multilateral Interchange Fees]. The caps do not apply to inter-regional or commercial card transactions."

46. Visa cites a number of recitals from the Interchange Fee Regulation,[51] concluding with the following point:

> "None of the recitals to the Interchange Fee Regulation suggests that the payment schemes were breaching competition law. As the recitals make clear, the rationale for the caps on [Multilateral Interchange Fees] was not any restriction on competition by the scheme operators, but particular features of the payment scheme market. These features meant that competition between payment card schemes would not necessarily have the usual effect of competition, namely to drive down prices. Based on that fact, and concerned to reduce the levels of [Multilateral Interchange Fees] and "merchant discounts" set by four- and three-party schemes, the EU legislature adopted the [Interchange Fee Regulation] pursuant to EU internal market powers, not competition law powers. The objective of the caps on [Multilateral Interchange Fees] is to set [Multilateral Interchange Fees] at an "economically efficient" level."

47. If any inference were to be drawn from the enactment of the Interchange Fee Regulation, then it would be that the markets operating off the Schemes were not functioning properly and that (for that reason) legislative intervention was required. It would not be right to draw this, or any other, inference regarding competition law infringement or non-infringement from the terms of the Interchange Fee Regulation or the fact of its enactment.

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[50] Visa Written Closing at [160].
[51] Visa Written Closing at [161] to [168] refers to Recitals (6), (9), (10), (12), (13), (15), (20) and (37).

D. PRIOR DECISIONS REGARDING MULTILATERAL INTERCHANGE FEES

(1) Introduction

48. The Merchant Claimants' Written Closing places a great deal of weight on the decisions of prior courts, regulators and authorities. Mastercard and Visa played an essentially defensive game here, contending that this history or **Prior Record** should not fetter the Tribunal's consideration. This did not prevent the Schemes nonetheless highlighting aspects in the Prior Record that favoured their case.

49. The Merchant Claimants' Written Closing states:[52]

> "This history shows that, from 2002 onwards, the Commission, the European courts, and the UK courts have consistently held that:
>
> (1) setting the MIF is price coordination which is determined by a collective agreement between undertakings;
>
> (2) the MIF has the effect of establishing a minimum price floor for the MSC;
>
> (3) the non-negotiable MIF element of the MSC is set by collective agreement and/or coordinated conduct rather than set competitively through fee negotiation between the relevant contractual counterparties;
>
> (4) the appropriate counterfactual is no default MIF with settlement at par, which might also be accompanied by a prohibition on ex post pricing to the extent necessary;
>
> (5) the counterfactual is one where there would ultimately be no bilaterally agreed interchange fees;
>
> (6) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower; and
>
> (7) any arguments about benefits conferred by the Schemes were for Article 101(3) and not Article 101(1)."

50. Even the contention that these were the consistent findings to be derived from the Prior Record is controversial. It is quite clear that a number of these propositions were explicitly being gainsaid by Mastercard and Visa in their

[52] At [106]. The Merchant Claimants' Written Closing considers the binding effect and precedent value of Commission commitment decisions in greater detail at Section G(6).

defences to the Merchant Claimants' claims. In particular, the propositions set out at [49(4)-(7)] were contentious before us.[53]

51. The problem, therefore, is what this Tribunal is to do with these propositions, assuming (for the present in the Merchant Claimants' favour) that these propositions accurately and fairly reflect the Prior Record. The suggestion made by the Merchant Claimants that these propositions are in some way "binding" on the Tribunal has already been referred to. If that is right, then the question is begged as to why this Tribunal, in this case, and other courts and Tribunals in earlier cases, even permitted contrary evidence to be adduced before them. If findings or holdings in the Prior Record on questions of fact not law are binding on courts in England and Wales, then rather than admitting evidence on these points so as to decide them afresh, courts and tribunals in our position ought to be parsing the Prior Record with a view to establishing precisely what has (in the past) been found so that such a finding can consistently be maintained in the future.[54]

52. So far as I am aware, no-one has to date contended for so extreme a proposition, not even the Merchant Claimants. But it is equally clear that factual findings – including findings of fact involving economic analysis – do have some element of "stickiness" or "bindingness" attaching to them, such that courts and tribunals in our position cannot simply decide these matters *de novo* and without reference to this Prior Record.

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[53] There might be more common ground in regard to propositions (1), (2) and (3), but no finding is made in this regard.

[54] This Judgment is not concerned with whether the outcomes of decisions in the Prior Record <u>are</u> formally binding. To that extent, the issue is open-and-shut, as made clear in the Tribunal's Interchange Case Management Ruling at [3]:

> "Some of the MIFs which are the subject of the present proceedings have been the subject of regulatory decisions which are determinative of the question of liability (for example, the European Commission's decision of 19 December 2007, concerning Mastercard's MIFs set in the EEA, which has been the subject of unsuccessful appeals to the General Court ((Case T-111/08) *Mastercard Inc v. European Commission*, [2012] 5 CMLR 5) and the Court of Justice of the European Union ((Case C-382/12 P) *Mastercard Inc v. European Commission*, [2014] 5 CMLR 23)) […]"

These determined issues (the **Determined Issues**) are not before the Tribunal in Trial 1 or any other trial: the Tribunal has no jurisdiction to revisit these matters and does not do so.

(2) The Prior Record

53. The Prior Record is set out in Annex 5. As the references make clear, the content of Annex 5 is derived largely from the Merchant Claimants' Written Closing. Annex 5 contains all kinds of decisions, from the Commission to the OFT to this Tribunal to the High Court to the General Court (and, on appeal, to the English Court of Appeal and UK Supreme Court, as well as the CJEU). It includes commitments decisions, for example.[55]

(3) "Bindingness": the law

54. Section 60 of the Competition Act 1998, which is no longer in force,[56] provides:

> "(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission."

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[55] Of course, specific arguments can be made in relation to the bindingness of specific elements of the Prior Record. For instance, it was suggested that commitments made by the Schemes in regard to Intra- and Inter-regional Default MIF so bound the Tribunal that it could not (as a matter of law) issue a decision contrary to a commitment decision. That is not the law: commitment decisions address the action to be taken by the addressee of the decision, and are binding to that extent. But they are not binding as regards the existence or otherwise of any infringement. That is trite: otherwise an undertaking could, by carefully framed commitments it was prepared to undertake, constrain non-parties to that decision in regard to infringements such non-parties, as claimants in a future action, might choose to assert. Such a proposition only has to be stated to be dismissed. However, that does not mean to say that a commitment decision, as part of the Prior Record, is not to be taken into account in the manner considered in the following paragraphs.

[56] It was repealed by the Competition (Amendment, etc)(EU Exit) Regulations 2019, SI 2019/93 as from IP Completion Day, which was 31 December 2020.

Section 60A restates these provisions, albeit significantly softened, with effect from IP Completion Day.

55. Section 60 was relied upon in both the **Sainsbury's CA Decision**[57] and the Sainsbury's SC Decision when determining the correct counterfactual to use in cases such as this.[58] In the Sainsbury's CA Decision:

(1) The Court of Appeal noted that questions of law could be subject to the EU concept of "direct effect".[59] Questions of fact, on the other hand, were not generally binding, citing with approval Lord Bingham's speech in *Crehan* at [11]:[60]

> "[EU] law prohibits the making by national courts of decisions which contradict decisions of [EU] institutions on the same subject matter between the same parties, and strongly discourages the making by national courts of decisions which may be inconsistent with decisions which may yet be made by [EU] institutions on the same subject matter between the same parties. But it does not, as the analysis of the relevant authorities by…Lord Hoffmann shows, go to the length of requiring national courts to accept the factual basis of a decision reached by [an EU] institution when considering an issue arising between different parties in respect of a different subject matter."

(2) This is a matter of basic justice. Whereas propositions of law (whether legislative or derived from the courts in the form of the common law) are universal, applying equally to those falling within their scope, propositions of fact bind only the parties to the proceedings in which those factual questions were determined, either by virtue of the judgment debt arising out of those proceedings or by virtue of the doctrines of *res judicata* and issue estoppel. Identity of parties is fundamental to the doctrines of *res judicata* and issue estoppel: strangers to prior proceedings are not bound by them.

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[57] *Sainsbury's Supermarkets Ltd v. Mastercard Incorporated*, [2018] EWCA 1536 (Civ).

[58] The counterfactual question is not being determined at this point: the relevant law, on which the parties differently relied, is being laid out in order to determine these very questions in due course. To this extent, the Merchant Claimants understandably relied upon these cases, and (equally understandably) Mastercard and Visa sought to distinguish them.

[59] [2018] EWCA 1536 (Civ) at [130]. Post the UK's exit from the EU, that is a much harder proposition, but it is unnecessary to consider this.

[60] *Crehan v. Inntrepreneur Pub Co*, [2006] UKHL 38. See [131] of the Sainsbury's CA Decision.

(3) The Court of Appeal then went on to consider the **Mastercard I Decision** in all its instances (Commission, General Court and CJEU),[61] taking the view that "[l]ooking at the Commission's decision as a whole, it can readily be seen that the Commission was dealing with the same factual situation as in these cases in relation to both Visa and Mastercard:[62] a default [Multilateral Interchange Fee] set by the scheme in the absence of any bilateral interchange fees being agreed between issuers and acquirers". The Court of Appeal considered that the same points were being put before it as had been put before the General Court,[63] and that on appeal the same counterfactual was in play at all instances, concluding (on this point):[64]

> "In our judgment, the proper analysis of the CJEU's decision on these points is that it endorsed the counterfactual adopted by the General Court <u>as a matter of law</u>. It rejected the arguments (i) that the "no default MIF" and prohibition on *ex post* pricing counterfactual was inappropriate, (ii) that there was no basis for saying that the MIF set a floor on the merchants' service charge…, and (iii) that the imposition of the MIFs did not restrict competition between acquirers because the merchants could still compete in relation to the parts of the merchants' service charge that were unaffected by the MIF."

(4) Reading the judgment as a whole, the Court of Appeal was not saying that counterfactuals were legal and not factual questions. Having (rightly) noted that these are factual questions,[65] the Court of Appeal is unlikely to have contradicted itself. What the court was saying was that neither the General Court nor the CJEU found an impugnable legal error in the Commission's approach.[66] Nevertheless, the Court of Appeal concluded, based upon the Mastercard I Decision (in all its instances), that the correct counterfactual was as it had described.

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[61] At [132]. The Mastercard I Decision is the decision of the European Commission of 19 December 2007 in COMP/34.579 MasterCard; COMP/36.518 EuroCommerce; COMP/38.580 Commercial Cards.
[62] Visa was not, however, the addressee of these decisions.
[63] At [141], [144].
[64] At [156], emphasis added.
[65] See [55(1)] in this Judgment.
[66] That these are questions of fact, not law, was expressly accepted by the Court of Appeal at [181], when rejecting the "bilaterals" counterfactual approach taken by the Tribunal in the Sainsbury's CAT Decision. That approach was rejected not because it was wrong in law, but because it was (in the view of the Court of Appeal) insufficiently supported by the evidence: see, additionally, [182] to [184].

56. It is unsurprising that the Merchant Claimants are contending that the approach of the Court of Appeal – which was affirmed by the Supreme Court – is not merely compelling in terms of how I analyse the counterfactual case in Trial 1 but legally binding on this Tribunal. The decision of the Supreme Court is helpfully summarised in the Merchant Claimants' Written Closing:[67]

> "**[179]** In the Supreme Court, it was "common ground that a rule providing for positive MIFs is not necessary for the operation of a four-party payment card scheme": [13].
>
> **[180]** Having set out the remaining facts at [14] to [18], the legislative framework [19] to [21], and the regulatory and procedural history [22] to [39], the Supreme Court turned to the issues in the appeal. Only the first issue is relevant to Trial 1, namely whether it was correct that "there was a restriction of competition in the acquiring market contrary to Article 101(1) TFEU and equivalent national legislation": [40(i)]. This was referred to as the "restriction issue". It gave rise to two separate questions: (i) whether the Supreme Court was bound by the [Mastercard I Decision] on the restriction issue; and (ii) if not, whether that decision ought in any event to be followed [48].
>
> **[181]** Having summarised the Mastercard I Decision and the judgments in Mastercard GCEU and Mastercard CJEU at [49] to [67], the Supreme Court recorded the card schemes' submissions at [68] to [72]. Their core argument was that the UK courts were not bound by the Mastercard I Decision or the EU judgments because those decisions were based on the Commission's factual determination on the evidence before it that the competitive pressure which could be brought to bear on acquirers by merchants is greater in the counterfactual because of the possibility of bilateral negotiations of interchange fees and the uncertainty that that would create. This was said to be different to the evidence before and the factual findings made by two High Court judgments in those proceedings. This was alleged to justify a departure from the CJEU authority, on the basis of *Crehan v. Inntrepreneur Pub Co*, [2006] UKHL 38 at [11] *per* Lord Bingham and at [43] to [69] per Lord Hoffmann.
>
> **[182]** The Supreme Court unanimously rejected that submission. The "ultimate point" that the Commission was making…was that any process of bilateral negotiation "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": [76]. In this 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": [75]. The EU Courts' decisions fell to be interpreted in a similar way: "The consequences of the minimum price floor set by the MIF is that such pressure is limited to only part of the MSC – i.e. that relating to the acquirer's individual marginal cost and mark up (in the present case about 10% of the MSC)": [77] to [78].
>
> **[183]** It followed that Mastercard CJEU could not be factually distinguished from the claims before the Supreme Court (and despite the fact that claims related to the UK domestic MIF and Irish domestic MIF, as well as the intra-

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[67] Emphasis as in original.

EEA MIF). It was binding on UK courts pursuant to section 60 of the Competition Act 1998. The Supreme Court neatly distilled the essential factual basis of the Mastercard CJEU judgment in the following terms:

> "[92] Whether Mastercard CJ is binding depends upon whether the findings upon which that decision is based are materially distinguishable from those made of accepted in the present appeals. <u>We have rejected Visa and Mastercard's arguments that it can be distinguished in the manner suggested by them and that their case is made out or supported by *Budapest Bank*.</u>
>
> [93] <u>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.</u> 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 unilaterally agreed interchange fees; and (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower."

[184] The essential factual basis of Mastercard CJEU summarised by the Supreme Court is Sainsbury's SC at [93] and which was "mirrored" in those proceedings, is also mirrored in the instant claims.

[185] The Supreme Court's conclusion that it was bound by Mastercard CJEU was sufficient to dispose of the appeal. However the Supreme Court also went on to hold that, even if it was not so bound, it would have agreed with the analysis *[…]*"

57. The substantive analysis of liability and counterfactuals will be addressed in due course. At present the concern is with an anterior point, namely the extent to which the Prior Record affects or influences or determines what would otherwise be questions of fact to be determined on the evidence adduced before this Tribunal. The issue is the <u>bindingness</u> or <u>stickiness</u> of the Prior Record. The problem is that the Merchant Claimants' submissions, as set out, prove too much and are on their face unsustainable (at least when read literally) in light of a summary judgment application made in these proceedings by the Merchant Claimants:

(1) The point repeatedly made by the Merchant Claimants[68] is that there is no difference between the Multilateral Interchange Fees in the present

[68] See, for instance, Merchant Claimants' Written Closing at [184] and [186], but the point runs through the entirety of the submissions made. In regard to both the Sainsbury's CA Decision and the Sainsbury's

case and the decision in regard to the (formally different) Multilateral Interchange Fees before the Supreme Court in the Sainsbury's SC Decision. What the Supreme Court has said about one set of Default MIFs also applies, to similar effect, to other (formally different) Default MIFs because they are simply immaterial variants on a single theme, the Multilateral Interchange Fee. Once the proper counterfactual has been determined for one Default MIF, it has been determined for all the rest, even if these were not before the court making that determination.

(2) The Merchant Claimants' ability to make this point was fatally damaged by an application made by them seeking summary judgment against the Schemes in regard to the question of infringement (the **SJ Application**). The SJ Application came before the Tribunal and on appeal to the Court of Appeal.[69] It failed.[70] Thus, at [48], the Court of Appeal held:

> "*[...]* I do not accept that the CAT ought to have found that the counterfactuals proposed by Visa and Mastercard would involve collusive/collective arrangements. I would not myself exclude the possibility of the claimants succeeding in establishing at trial that one or both of the suggested counterfactuals would involve such arrangements. It is impossible, however, to arrive at such a conclusion now, on a summary basis."

At [49], the following conclusion was stated:

SC Decision, the point is made that neither court differentiated between Default MIFs. As regards the Court of Appeal, the Merchant Claimants' Written Closing states at [159] (underlining added, but emphasis otherwise as in the original):

> "…the Court of Appeal concluded that: "The correct counterfactual to test the restrictive effects of 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)": [343]. <u>In so stating, the Court plainly realised that it's reasoning applied more widely than the categories and level of MIF in issue before it. It condemned the Visa and Mastercard schemes in their entirety.</u> The Court reiterated that it did not "discount the possibility that some evidence might conceivably enable **other schemes** to distinguish different MIFs from those upon which the CJEU was adjudicating": [344] (emphasis added). But this was a reference to "other schemes", i.e. four party payment schemes run by other card payment system operators…"

As regards the Supreme Court, the Merchant Claimants' Written Closing was to similar effect at [183]:

> "It followed that Mastercard CJEU could not be factually distinguished from the claims before the Supreme Court (and despite the fact that claims related to the UK domestic MIF and Irish domestic MIF, as well as the intra -EEA MIF)."

[69] *Dune Group Limited v. Visa Europe Ltd*, [2021] CAT 35 (**Dune CAT**) and [2022] EWCA Civ 1278 (**Dune CA**).

[70] The history is set out in Dune CA at [16]*ff.*

> "Overall, I have not been persuaded that the CAT's decision to refuse judgment in respect of UK, Irish and intra-EEA consumer MIFs can be faulted. Of course, it may in the end transpire that the arrival of the IFR did not change the appropriate counterfactual or that, even if it did, it can be seen using the alternative counterfactual(s) that the rules providing for those MIFs remained restrictive of competition. As things stand, however, it seems to me that Visa and Mastercard have real prospects of success on these points. I consider, therefore, that the CAT was right to refuse summary judgment so far as the UK, Irish and intra-EEA MIFs are concerned *[…]*"

On other points, a similar approach was taken: namely that on these questions of fact, there was an arguable dispute of fact in respect of which the Schemes had a real prospect of success.[71]

(3) The contention that the Prior Record is formally binding on the Tribunal is obviously unsustainable. The outcome of the SJ Application means that such a contention was simply not open to the Merchant Claimants. The decision of the Court of Appeal in Dune CA effectively spiked Mr Beal KC's guns on this point. The point articulated before us – that the Sainsbury's CA and SC Decisions did not differentiate between Default MIFs in their findings of fact – is not how the SJ Application was argued, when the Merchant Claimants were differently represented. But the Court of Appeal's holdings in Dune CA are sufficient to prevent the Merchant Claimants from succeeding simply by "reading across" from the Sainsbury's CA and SC Decisions, as they have *sub silentio* sought to do. That course was not, in light of the Dune CA decision, open to the Merchant Claimants.

(4) On the other hand, the Sainsbury's SC Decision (and the Sainsbury's CA Decision) make some very clear findings of fact which appear to be directly pertinent to the matters before the Tribunal. A critical paragraph in the Sainsbury's SC Decision is [93], which sets out what are later referred to in this judgment as the **Six Facts**:

[71] See, for instance, [56] ("…the claimants have not filed any evidence to confirm that this is the case…") and [75]. The filing of evidence of fact in a summary judgment application by the applicant is almost always fatal to the application, because it opens the prospect of a factual dispute which only a trial can resolve. The absence of evidence is not surprising. What is of interest is that notwithstanding the Sainsbury's SC Decision, the summary judgment application failed.

> "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."

Findings of fact of this Tribunal were overturned in favour of these factual findings emerging from the Prior Record as found by the Court of Appeal and the Supreme Court. As the Merchant Claimants have stressed, these findings of fact are Default MIF indifferent and it would be an imprudent Tribunal (particularly one, differently constituted, that had already been overruled on the point once) not to pay the highest regard to these factual findings of the United Kingdom's highest court. Yet the inevitable implication of the Schemes' arguments and – much more particularly – the outcome of the SJ Application and the Dune CA decision is that I cannot simply adopt these findings of fact as my own.

(5) The question, therefore, arises as to the interplay between the Sainsbury's SC Decision, the Dune CA decision and the factual arguments made before us at this trial. Given that (amongst other things) the counterfactuals advanced by the Schemes sit uneasily (to put it mildly: they are obviously on the face of it completely inconsistent with what the Supreme Court has found) with the Sainsburys' SC Decision, it is necessary to pay due regard to what is an obviously binding decision on us. Put another way, the logical consequence of the Merchant Claimants' points on the Sainsbury's CA and SC Decisions is that certain findings of fact, found in proceedings where there is no *res judicata* nor issue estoppel even arguably arising, nevertheless affect strangers to those proceedings, and it is necessary to be clear as to the

extent to which these decisions do or do not affect the weighing of questions of fact arising in Trial 1.[72]

(4) Non-bindingness unpacked

58. The conventional position regarding anterior findings of fact was stated by Lord Bingham in *Crehan* and by Popplewell J in the Asda First Instance Decision. The first case, *Crehan*, has relevantly been quoted at [55(1)]. In the latter case, Asda, Popplewell J accepted the bindingness of EU decisions to the extent that they were on precisely the same facts (i.e. the same interchange fee for the same period),[73] and stated (as regards the significance of these decisions on other aspects):[74]

> "In relation to all other aspects of the present claims, whilst the court will have regard to, and may be assisted by, the *Mastercard* Commission Decision, the court is not bound by it. It will afford the Decision such weight as it deserves, bearing in mind the similarities or differences in the evidence and subject-matter, and recognising the expertise of the Commission."

[72] It must be noted that the true strangers to these proceedings are the Merchant Claimants themselves. As Annex 5 shows, both Mastercard and Visa were, at different times, fully involved in the Prior Record. The implications of this are considered in due course, but even this participation by Mastercard and Visa in the Prior Record does not bring them within the scope of the doctrines of *res judicata* or issue estoppel, and no-one contended that it did.

[73] [2017] EWHC 93 (Comm) at [82(1)]. That, of course, is uncontentious: see fn 10 in this Judgment, quoting [3] of the Tribunal's Interchange Case Management Ruling.

[74] At [82(2)]. Popplewell J rejected an argument of "read across": (at [84]*ff*). The Judge's reasons for rejecting this argument are telling, and it is useful to set these out:

> "[84] Mr Lowenstein, QC urged me to approach the issues by starting with the *Mastercard* Commission Decision, and applying it to the EEA MIFs for the majority of the claim period (which were not the subject of the Decision), and to the UK and Irish MIFs for the claim period, unless I could identify material differences which justified drawing a distinction. This process was characterised as "read across". This suggested approach reflected the way the claims had been framed in the Statements of Case, with the Claimants relying on the Mastercard Commission Decision and Mastercard identifying respects which made its application to the current dispute inappropriate. This in turn infected the framing of the Phase 1 issues and some of the issues on which the experts were asked to express their views.
>
> [85] I do not consider that this is a helpful way to address the issues which I have to decide, for a number of reasons. First, I am not bound by the Commission's findings of fact and although it is sometimes possible to discern the evidence before the Commission which informed its conclusions, that is by no means generally the case. There is a logical flaw in the suggestion that this court should follow another tribunal's findings of fact unless it can identify a specific and material difference in evidence when this court is not in a position to identify the extent of the evidence before that tribunal. There was, for example, a lively debate on whether…the Commission had considered UK MIFs. It remains unclear what aspect of this evidence the Commission took into account or how, without an understanding of which it is impossible to assess the validity of any "read across".

59. In light of Sainsbury's SC, this is an incorrect statement of the law in cases such as the present. It is equally clear that this Tribunal erred in the **Sainsbury's CAT Decision** in failing to attach the correct level of "bindingness" to the Prior Record.

60. As regards the significance of the Sainsbury's CAT Decision itself, Popplewell J adopted an approach which (in non-competition cases) is clear-cut and which represents an exceptionally clear articulation of the "conventional" approach in non-competition cases:

> "**[92]** In the course of its detailed judgment, the CAT had to consider and resolve many of the same issues as those I have to decide, both of fact and law. Insofar as it made findings of law, I am not bound by its decision, but I naturally accord it considerable respect, coming from a body chaired by a judge of coordinate jurisdiction and which has very considerable competition law experience. However I have had the benefit of argument from a different legal team on the Claimants' side, and of argument on both sides addressed specifically to the reasoning expressed in the CAT Judgment. This has inevitably resulted in different formulations and refinements of the legal arguments from those which were presented to the CAT, and in one instance an important authority being brought to my attention which was not before the CAT.
>
> **[93]** There is also, of course, a very substantial overlap between the factual issues decided by the CAT and those I have to decide. Here too I am not bound by the findings, although the parties agreed I should take them into account and give them such weight as I thought appropriate. It is important to keep in mind in this context that the evidence before me was not the same as that before the CAT in important respects. For example, the CAT Bilaterals counterfactual, which is at the heart of the CAT's conclusion, was a construct of the Tribunal itself; it had not been addressed in the witness statements or experts reports of either party and had not been put to factual witnesses. By contrast the parties put before me detailed factual and expert evidence on the point, tailored specifically to the findings and reasoning in the CAT Judgment, which was all to the effect that such bilaterals were unrealistic. Moreover there was no identity between expert evidence in the two trials: Dr Niels gave evidence for MasterCard in both cases but different experts gave evidence on behalf of the respective claimants. They were not expressing the same views. For example, in the CAT proceedings Sainsbury's and its expert accepted that a MIF at some positive level was lawful; whereas the Claimants before me and their expert contended that any MIF above zero was unlawful. Nor was there anything like identity in the factual evidence put before the CAT and this court, either documentary or oral. The CAT had documentary material which was not in evidence before me and vice versa. The CAT heard from four Sainsbury's witnesses whose evidence I did not have; whereas I heard from a variety of Claimants' witnesses whose evidence was not before the CAT. Some MasterCard witnesses were common to both sets of proceedings but some were not. The experience of having arguments and evidence tested in the Sainsbury's proceedings inevitably led to fuller or more focused evidence before me on some points, both factual and expert; for example Dr Niels had

> the opportunity to consider over time, and address in writing, points which he had faced in cross-examination in the CAT without forewarning. Even where the evidence was materially similar, I must make my own assessment of the witnesses and the other evidence before me; it would be an abdication of judicial responsibility simply to accept findings of fact made by the CAT.
>
> **[94]** Accordingly my approach to the CAT Judgment has been to use its reasoning on issues of both fact and law as a cross check for my own provisional conclusions, paying particular attention to the evidence on which findings of fact are based and how closely such evidence matches that before me."

61. Why are competition cases different? The reason is that the <u>same</u> infringement (whether collusive or an abuse of dominance) gives rise to <u>multiple</u> distinct claims, which are factually identical in terms of the substantive cause of action, but differ in terms of causation, loss and damage. The problem that this gives rise to is how to try such causes of action without producing inconsistent results. Trying them in sequence as "conventional" claims fails, as the Sainsbury's CAT Decision, the Asda First Instance Decision and the Sainsbury's v. Visa First Instance Decision demonstrate. The response to those dramatically inconsistent decisions has been (i) the articulation of the law in Sainsbury's SC and (ii) the advisory directive of the Court of Appeal that similar claims be "warehoused" in the Tribunal.[75]

62. Notwithstanding the binding statement of the law in Sainsbury's SC, the parties presented divergent submissions as to the implications of that decision. Thus, by way of example:

    (1) The Merchant Claimants noted that "[i]n opening it became apparent that there is a difference of view between the parties as to the binding effect and precedent value of Commission commitment decisions".[76]

    (2) The Merchant Claimants contended for a low level of "precedent" value, based on the fact that "[a] commitments decision has the effect of making formally binding commitments, proposed by undertakings, to meet the competition concerns identified by the Commission in its

[75] See [17] of the Tribunal's Interchange Case Management Ruling, citing [356] to [357] of the Sainsbury's CA Decision.

[76] Merchant Claimant Written Closing at [353]. The dispute between the parties on the question of "bindingness" was, as has been described, far broader than this narrow point.

preliminary assessment. It does not certify that the previous practice which gave rise to the concern complies with Article 101".[77] Still less "does a commitments decision "legalise" the subsequent market behaviour of the undertaking".[78] That being said, these decisions have to be taken into account and accorded some weight.[79]

(3) The Schemes' position (as regards commitments decisions) was – by the time of closing – rather closer to the Merchant Claimants' position. They were chiefly concerned to rebut the contention that this Tribunal is barred from finding that conduct underlying the subject of a commitment decision is nevertheless compliant with competition law.[80] The Merchant Claimants were not going so far – the parties' ultimate positions are formally (if not in emphasis) not very far apart. The problem faced is that all of the parties are saying that commitments decisions ought to have some "weight", or "bindingness", or "stickiness", but neither side has provided us with any juridical basis upon which the Prior Record can be evaluated and given proper weight.

(4) The same is true of statements of objections and other aspects of the Prior Record set out in Annex 5. From time-to-time, the Merchant Claimants relied not on the decisions of the Commission but on clearly less determinative documents, like statements of objections.[81] The Merchant Claimants' submissions imply that these are documents that the Tribunal should consider and attach weight to, but (again) without articulating why. For their part, the Schemes make clear that the weight to be attached to such documents, if any, is slight:[82]

> "A [statement of objections] thus records allegations made by the Commission, to which the undertaking is given an opportunity to respond. Contrary to the assertion repeatedly made by the Claimants' leading counsel during the course of the trial, a [statement of objections] is fundamentally not a decision of the Commission. It cannot be treated as representing any

[77] Merchant Claimants' Written Closing at [354(1)].
[78] Merchant Claimants' Written Closing at [354(2)].
[79] Merchant Claimants' Written Closing at [354(3)-(5)].
[80] Visa Written Closing at [190].
[81] See, for example, the Merchant Claimants' Written Closing at Sections C(7), C(10), C(15) and C(16).
[82] Visa Written Closing at [181].

concluded view of the Commission, still less as a rejection of arguments advanced by the investigated undertaking."

63. Like the Merchant Claimants, the Schemes did not attempt to articulate a coherent theory of bindingness so as to enable the Tribunal to give appropriate weight to the Prior Record. With this introduction, the correct approach to this issue is now considered.

(5) Analysis

64. Although referred to in passing by the parties,[83] the juridical basis for the "bindingness" of the Prior Record is stated in the decision of the Court of Appeal in *AB Volvo v. Ryder Ltd*.[84] Beyond *res judicata* and issue estoppel, the flexible doctrine of abuse of process acts to prevent collateral attack on prior decisions of courts and (although to a less articulated extent) to other bodies, like competition authorities and regulators.[85]

65. Claims can be struck out if they involve a collateral attack on prior decisions of courts. The jurisdiction has a long history, and has been articulated (in a non-competition context) in the House of Lords decision in *Hunter v. Chief Constable of the West Midlands*[86] and the Court of Appeal decision in *Allsop v. Banner Jones Ltd*.[87] As to this principle:

(1) Judicial decisions are intended to be final and not subject to collateral challenge. A party aggrieved by a judicial decision should appeal it, but is otherwise bound.

(2) It is this principle of finality that gives rise to *res judicata* and, more narrowly, issue estoppel. The principle of finality is not without its exceptions. Without being exhaustive, the two most well-known exceptions are where a judgment has been obtained by fraud or where

[83] See, for instance, Merchant Claimants' Written Closing at [111].
[84] [2020] EWCA Civ 1475.
[85] That is the clear *ratio* of the Sainsbury's CA and the SC Decisions.
[86] [1982] AC 529.
[87] [2021] EWCA Civ 7.

new facts have come to light after the event that fundamentally change the complexion of the case.

(3) The difference between *res judicata* estoppel (using that term, now, to embrace also issue estoppel) and the abuse of process jurisdiction is that whereas estoppel constrains in a hard-edged way the parties to the original litigation from re-litigating matters subsequently, the doctrine of collateral attack is both wider and much more flexible in its application:[88]

> "Collateral challenges to prior decisions *ex hypothesi* do not give rise to *res judicata* estoppel. For the purposes of this judgment, a collateral challenge is one where – no matter how similar the issue in question – the parties to the later dispute are different from the parties to the earlier dispute that is the subject of the collateral challenge. As a matter of principle, collateral challenges should not give rise to an estoppel because – even though a dispute or issue has been determined by an anterior final judicial decision – that decision was binding only as between *A* and *B*, whereas the later claim arises between *A* and *C*. In short, whereas *B* could allege that *A* is estopped from bringing a later claim as against *B*, *C* can make no such assertion, because *C* was not a party to the anterior decision. Generally speaking, where no *res judicata* estoppel arises, *A* is permitted to bring a claim without being fettered by what has been decided previously. There is, in these circumstances, no need for *A* to rely on exceptions like that articulated in *Phosphate Sewage*, because there is, in fact, no limit arising out of the doctrines of *res judicata* estoppel to prevent *A* from proceeding with his or her claim. As Lowry CJ noted in *Shaw v. Sloan*, [1982] NI 393 at 397, "[t]he entire corpus of authority in issue estoppel is based on the theory that it is not an abuse of process to relitigate a point where any of the…requirements of the doctrine is missing"."

66. The courts retain a general jurisdiction to control abuses arising out of proceedings that come before them. The question that was addressed in *AB Volvo* was the extent to which this flexible and wide-ranging jurisdiction applied in the context of competition law and, in particular, to decisions other than final decisions of an English court. *AB Volvo* concerned the extent to which a party to a settlement decision could resile from findings in that decision in subsequent litigation involving that party and a third party, a stranger to the settlement decision. As Rose LJ made clear, the entirety of such decisions was "binding" under the collateral attack doctrine.[89]

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[88] See *Allsop v. Banner Jones Ltd* at [27].
[89] At [93] to [97] (*per* Rose LJ) and [143] (*per* Vos MR).

67. It is this doctrine that underlies the reasoning in the Sainsbury's CA and SC Decisions. Furthermore, this is entirely in line with the requirements of sections 60 and 60A of the 1998 Act. The flexibility of the doctrine is its great virtue. In the present case, the following factors are of importance:

(1) Both Mastercard and Visa have, over decades, been proactively involved in defending themselves, and the interchange fee that they are responsible for, from regulatory scrutiny and control. During the course of these proceedings – more particularly, but not exclusively, described in Annex 5 – positive assertions have been made by both Mastercard and Visa, which have been considered and determined by courts and authorities and regulators.

(2) It is the nature of competition law infringements that they generate multiple claims against specific target or defendant undertakings, who are the addressees of regulatory decisions and the defendants in court litigation. The history of interchange fees is extreme in the volume and extent of anterior scrutiny, but many competition cases will involve some form of repeat scrutiny.

(3) The need for consistency between similar cases is obvious and tribunals should have due regard to the relevant prior record as regards the competition law infringement before them in order to police and control the points that those involved in the anterior proceedings can be permitted to take in later proceedings. This approach does not have the inflexibility of *res judicata* estoppel. The parties in the later case will not be the same as the parties in the anterior case. However, the court or tribunal charged with determining the later case should have regard to the anterior proceedings and should seek to achieve consistency of outcome without prejudicing the fundamental duty to do justice between the parties in the instant case.

(4) Thus, it may at times be appropriate to adopt a strict "read across" approach, as described by Popplewell J.[90] However, the anterior record may be so "gappy" or lacking in detail or relate to different circumstances[91] as to make such an approach inadvisable or unfair. In such cases, a lighter touch will be required. On the other hand, the anterior record may be so clear and unequivocal as to amount in effect, if not in law, to an estoppel. The later tribunal needs to be alive to the nuances, and tread carefully.

(5) The doctrine is limited to the protagonists who participated in the prior, antecedent proceedings. For the purposes of Trial 1, there can be no question of the Merchant Claimants being in any way fettered in the points they may or may not take. They are claimants uninvolved in the anterior proceedings comprising the Prior Record. On the other hand, Mastercard and Visa have been fully involved in the anterior proceedings comprising the Prior Record. Although some of that anterior history is directed specifically against one rather than the other, it would be invidious to distinguish between the two, because the Schemes are so similar. Consistency of outcome matters here also. But it will (again) be necessary to tread carefully where the anterior record is directed against Mastercard but not Visa or *vice versa*.

(6) Similarly, it is inappropriate to parse the Prior Record too rigidly: as described, that history involves decisions of many different shapes and sizes, ranging from statements of objections (to which little weight can be attached) to decisions of the Supreme Court (which stand at the other end of the spectrum). Furthermore, the Prior Record spans not years, but decades, and it is obvious that the factual position underlying the Prior Record has changed over time.

68. By way of completeness, two further points need to be made:

[90] See [58] at fn 74.
[91] For instance, where the interchange fees are different or where the relevant frames are different.

(1) The collateral attack doctrine appears to underlie the decision of the Court of Appeal in *Ashmore v. British Coal Corporation*.[92] This decision, considered in the context of these proceedings,[93] exceptionally involved striking out an uninvolved claimant bringing proceedings raising the same issues as had already been determined in test case litigation not involving that particular claimant. The claimant's case in reality involved a collateral attack on the anterior test cases. *Ashmore* represents the very extreme end of the collateral attack doctrine and it is raised to make it clear that it has no application to the Merchant Claimants in this case. The Prior Record is only relevant to Mastercard and Visa.

(2) The experts retained by Mastercard and Visa (but <u>not</u>, for reasons already given, the experts retained by the Merchant Claimants) were <u>obliged</u> to consider the anterior record when giving their opinions.[94] There are hard limits to the points that such experts can properly take in litigation of this sort. The factual and expert evidence that was received during the course of Trial 1 is described below. One of the experts, Dr Gunnar Niels (of Oxera Consulting LLP) came for particularly harsh criticism from the Merchant Claimants. It was said of him that "[h]e failed to accept (or occasionally to realise) that the arguments that he made in previous cases had been rejected by the courts or tribunals hearing those proceedings"[95] and that "[h]is expert reports did not set out and address the full range of economic views on the Trial 1 issues. In particular, Dr Niels relied on passages from the *Visa 1 Decision* without mentioning the large number of subsequent Commission decisions that had moved on from that position".[96] The weight to be accorded to the expert evidence will be considered in due course: but in light of the points set out in the preceding paragraphs the following statements are appropriately made:

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92 [1990] 2 QB 338.
93 See [21] to [24] of the Tribunal's Interchange Case Management Ruling.
94 Of course, the Merchant Claimants' experts unsurprisingly did look at the Prior Record. The point is that the obligation on the experts was <u>asymmetric</u> given the identity of the parties calling them.
95 Merchant Claimants' Written Closing at [309(3)].
96 Merchant Claimants' Written Closing at [309(5)].

(i) In cases like the present, where there is a significant anterior history, it is improper for an expert to disregard that history and to fail to take it fully into account in their expert report when acting for a party involved in that anterior history – as both Mastercard and Visa were. (An expert instructed by a non-involved party would be well-advised to consider the anterior history: but that will be for that expert's judgement.)

(ii) This duty – and it as a duty on the expert – will involve a careful exercise of judgement so far as the expert economist is concerned. Such experts attend court and give evidence of their expert opinions, and they must do so without fear or favour. It may very well be that such an expert <u>disagrees</u> with the anterior record, as clearly Dr Niels does and did. But an expert in this position is obliged to give due weight to the prevailing view as expressed by anterior decision-makers and to regard that anterior record as expressing the orthodox view (*herrschende Meinung*, as German lawyers would put it) with which the expert may, of course, disagree, but with which they <u>must</u> engage.

(iii) This is said without being personally critical of the experts called by Mastercard and Visa. The treatment of the anterior record in competition cases is one on which none of the parties were particularly clear in their submissions, and it is to be inferred that the Scheme experts were insufficiently guided in this regard by those retaining them. Accordingly, although this point goes very much to the weight that can be accorded to the Schemes' expert evidence, no criticism of the Schemes' experts themselves is intended. They at all times were seeking to assist the Tribunal to the best of their ability.

(6) Conclusions

69. Although the findings of fact made by the Supreme Court in the Sainsbury's SC Decision – in particular those at [93], quoted at [57(4)] – are clear and clearly

applicable to Multilateral Interchange Fees generally and so do not differentiate between different Default MIFs, it is not an abuse of process on the part of the Schemes nor inconsistent with the findings made by the Supreme Court for the Schemes to advance contentions in tension with, or contradicting, these findings of fact. The contention in the Merchant Claimants' Written Closing at [111] and [112] that "[i]t is an abuse of process for Mastercard to seek to resile from the findings in the Mastercard I Decision or the Mastercard II CAR Decision" is rejected.[97] With one exception,[98] it was open to the Schemes to take the points they have taken. Those points will be determined on the merits, based upon the evidence received by the Tribunal, taking account of the Prior Record.

70. The limited extent of this conclusion must be noted. The points articulated by the Schemes in regard to infringement need to be determined on the merits, on the basis of the evidence before us, including (to be clear) the Prior Record. With one exception, the defences of the Schemes do not constitute any kind of collateral attack or abuse of process.[99]

E. THE EVIDENCE

(1) Documentary evidence

71. The Prior Record and Annex 5 have already been described. To the extent other documents are material to this Judgment, they are referenced in the text but not listed here.

(2) The Claimants' factual evidence

72. The Claimants called a number of Merchants, who gave evidence as to how they accepted payments in the course of their business. Their evidence is described in tabular form below:

Witness	Company	Witness statement	Date of giving evidence	Evaluation of oral evidence

[97] The **Mastercard II CAR Decision** is the decision of the European Commission of 22 January 2019 in Case AT.40049.
[98] Considered below at [168(2)].
[99] *Ibid.*

Mr Neil Bailey	Pendragon plc	**Bailey 1**	Day 4 (20 Feb 2024)	Mr Bailey was a careful and honest witness, doing his best to assist the Tribunal.
Mr Paul Jenkins	Caprice Holdings	**Jenkins 1**	Not applicable.	Mr Jenkins was not required for cross-examination, and his evidence was admitted without him being called.[100]
Ms Geraldine Burke	Vodafone Ireland Ltd	**Burke 1**	Not applicable.	Ms Burke was not required for cross-examination, and her evidence was admitted without her being called.[101]
Mr James Percival	Hilton Worldwide Manage Ltd	**Percival 1**	Not applicable.	Mr Percival was not required for cross-examination, and his evidence was admitted without him being called.[102]
Ms Leanne Lipscombe	See Tickets	**Lipscombe 1**	Not applicable.	Ms Lipscombe was not required for cross-examination, and her evidence was admitted without her being called.[103]
Mr Mark Buxton	Jet2	**Buxton 1**	Day 4 (20 Feb 2024)	Mr Buxton was a careful and honest witness, doing his best to assist the Tribunal.
Mr Mark Hirst	Dr Martens plc	**Hirst 1**	Day 5 (21 Feb 2024) Day 10 (6 Mar 2024)	Subject to one major qualification, Mr Hirst was an honest witness, doing his best to assist the Tribunal. The qualification arises out of evidence given in previous interchange proceedings, in respect of which Mr Hirst was recalled. These exchanges regarding this prior evidence showed that Mr Hirst had something of an ”axe to grind” as regards interchange fees in general and Mastercard and Visa in particular. He clearly had strong views on interchange fees and

[100] The Tribunal was notified that the Defendants had decided not to cross-examine this witness by a letter from Linklaters dated 16 February 2024.
[101] The Tribunal was notified that the Defendants had decided not to cross-examine this witness by a letter from Linklaters dated 16 February 2024.
[102] The Tribunal was notified that the Defendants had decided not to cross-examine this witness by a letter from Linklaters dated 16 February 2024.
[103] The Tribunal was notified that the Defendants had decided not to cross-examine this witness by a letter from Linklaters dated 16 February 2024.

				as a result was more adversarial, combative and even truculent than he ought to have been. There were occasions where he resisted agreeing points which were obvious from the documents.
Mr Neil Harrison	InterContinental Hotel Group	**Harrison 1**	Day 5 (21 Feb 2024)	Mr Harrison was a careful and honest witness, doing his best to assist the Tribunal.
Mr Paul Ryan	Bet365	**Ryan 1**	Not applicable.	Mr Ryan was not called because a settlement was reached between Bet365 and the Defendants.[104] The parties agreed that his evidence should be admitted, but that the fact that he had not been cross-examined would go to the weight the Tribunal could attach to his evidence.
Ms Sue Copling	Ageas	**Copling 1**	Day 5 (21 Feb 2024)	Mrs Copling was a careful and honest witness, doing her best to assist the Tribunal.
Mr Oliver Steeley	M&S	**Steeley 1**	Day 5 (21 Feb 2024)	Mr Steeley was a careful and honest witness, doing his best to assist the Tribunal. He was, for instance, able to describe with precision and succinctness the sophisticated analysis which M&S employ to analyse the relative costs of payments systems and the corresponding customer behaviour associated with different forms of payment.
Ms Tammy Tams	Coventry University	**Tams 1**	Not applicable.	Ms Tams was not required for cross-examination, and her evidence was admitted without her being called.[105]

73. Additionally, there was evidence from Mr Simon Jensen, a New Zealand lawyer specialising in financial sector regulation and payment and clearing systems. He gave evidence on matters relating to these claims, but from a perspective of how

[104] This was notified to the Tribunal on 19 February 2024.
[105] The Tribunal was notified that the Defendants had decided not to cross-examine this witness by a letter from Linklaters dated 16 February 2024.

things worked in New Zealand. He was not required to attend for cross examination and gave a single witness statement (**Jensen 1**) which was admitted. His evidence was more akin to expert evidence, albeit that Mr Jensen did not give evidence as an expert but as a witness of fact. Without intending any criticism of Mr Jensen, less weight is attached to his evidence than to that of the experts, because his evidence was not accompanied by the usual expert declarations.

(3) Defendants' factual evidence

(a) Visa

74. Visa called the following witnesses of fact:

(1) *Mr Robert Livingston.* Mr Livingston is the Senior Vice President, Chief Financial Officer of Visa Europe Ltd. In these proceedings, he gave a single witness statement (**Livingston 1**). He also gave evidence in the SJ Application: **Livingston SJ Application (1)** and **Livingston SJ Application (2)**. He gave evidence on Day 6 (22 February 2024). He was a cautious witness, who was careful to delimit the extent of his actual knowledge. At times, he appeared not to have followed this (sensible) approach in his witness statements, such that he had made wider assertions than he could defend in the witness box. He had a tendency to make general assertions which he could not support by reference to the granular detail of scheme operation. Mr Livingston was a straightforward and clear witness, doing his best to assist the court. He was not – and could not be expected to be – objective about the merits of the Visa Scheme; and that is understandable. Once he hit his stride in the witness box, he was a formidable and authoritative witness.

(2) *Mr Mark Nicol.* Mr Nicol is the Head of Strategic Market Initiatives for the UK & Ireland at Visa Europe Ltd. In these proceedings, he gave a single witness statement (**Nicol 1**). He gave evidence on Day 6 (22 February 2024). Mr Nicol was a cautious and somewhat nervous witness, who gave evidence without very much authority but with

transparent honesty. He was somewhat at a disadvantage in addressing Visa's counterfactual when cross-examined upon it. That was because he had to consider the counterfactual in the abstract, not having been provided with the granular changes to the Scheme Rules envisaged by Visa necessary for the counterfactual to work. This rendered Mr Nicol's assistance to the Tribunal of less worth than it otherwise might have been and is certainly not something for which Mr Nicol can in any way be blamed.

(3) *Mr Craig Petersen.* Mr Petersen is Vice President of Global Interchange at Visa. In these proceedings, he gave a single witness statement (**Petersen 1**). He also gave evidence in the SJ Application (**Petersen SJ Application (1)**). He gave evidence on Day 6 (22 February 2024). Although his evidence tended to get obscured in the detail, he was a straightforward witness, doing his best to assist the Tribunal. He was, properly, defensive of the Visa Scheme.

(4) *Ms Gillean Dooney*. Ms Dooney was called by Visa but is a Managing Director and Head of Product and Proposition in Barclays' Everyday Money Management division. In these proceedings, she gave a single witness statement (**Dooney 1**). She gave evidence on Day 7 (26 February 2024). She was a clear but conservative witness, very keen to get her evidence absolutely right. This made her a little more hesitant than she need have been, but within her knowledge (which she was careful to delimit) she spoke with authority.

(5) *Ms Geraldine Stone.* Ms Stone is Visa's Senior Vice President, Chief Counsel for Visa Asia Pacific and Central Europe, Middle East and Africa Regions. In these proceedings, she gave a single witness statement (**Stone 1**). She also gave evidence in the SJ Application (**Stone SJ Application (1)**). She gave evidence on Day 7 (26 February 2024). She was a nervous but completely straightforward and clear witness, doing her best to assist the Tribunal. She gave short and to the point answers.

(6) *Mr William Knupp.* Mr Knupp is the Senior Vice President for Global Interchange and Pricing at Visa Inc. In these proceedings, he gave two witness statements (**Knupp 1** and **Knupp 2**). He gave evidence on Day 7 (26 February 2024). He was an articulate and knowledgeable witness, a little reluctant to accept propositions put to him in cross-examination when a quicker concession might have been appropriate.

(7) *Mr Hugh Stokes.* Mr Stokes is presently a consultant to Visa, but previously was Executive Director, Competition Law at Visa Europe Ltd. In these proceedings, he gave two witness statements (**Stokes 1** and **Stokes 2**). He gave evidence (remotely[106]) on Day 7 (26 February 2024). Unfortunately – and through nobody's fault – the visual feed was impaired when he gave evidence, with pixelation and some latency. He was, notwithstanding these difficulties, which were not of his making, a clear and helpful witness.

(8) *Mr Norman Butler.* Mr Butler is the Managing Director of Visa Payments Ltd. In these proceedings, he gave a single witness statement (**Butler 1**). He gave evidence on Day 8 (4 March 2024). He was a careful and considered witness, doing best to assist the Tribunal.

(9) *Mr Timothy Steel.* Mr Steel was Executive Director of Payment Economics at Visa Europe Ltd. He has left Visa's employment but continues to assist Visa as a consultant. In these proceedings, he gave a single witness statement (**Steel 1**). He gave evidence on Day 8 (4 March 2024). He was an open, well-informed witness, including in regard to Visa's counterfactual case, which was not addressed in his witness statement, but where his memory proved to be good.

(10) *Ms Helen Jones.* Ms Jones is Executive Director of Visa Business Solutions at Visa Europe Ltd. In these proceedings, she gave two witness statements (**Jones 1** and **Jones 2**). She gave evidence on Day 8 (4 March

[106] The reasons for this do not matter, but were sufficient to outweigh the advantages of Mr Stokes attending in person. The arrangement was with the consent of all concerned.

2024). In giving evidence, Ms Jones was seeking to assist the Tribunal, but she was something of a prisoner of the status quo and found it difficult to address "counterfactual" questions. This made her a little more tendentious than might otherwise have been the case, and often her evidence descended into assertion, without overt factual backing.

(11) *Mr Richard Korn.* Mr Korn is the Head of Scheme Operations at Visa Europe Ltd. In these proceedings, he gave three witness statements (**Korn 1**, **Korn 2** and **Korn 3**). He gave evidence on Day 8 (4 March 2024). Mr Korn was a quiet-spoken witness, careful to differentiate between topics on which he could speak with authority and those where he felt he could not. He was a careful witness, and a quietly impressive one.

(b) Mastercard

75. Mastercard called the following witnesses of fact:

(1) *Ms Ruth Riviere.* Ms Riviere is Mastercard's Country Manager for New Zealand and the Pacific Islands. In these proceedings, she gave a single witness statement (**Riviere 1**), Although she did not refer to Jensen 1 in Riviere 1, her evidence traversed the same ground. She gave evidence (remotely, via video-link from New Zealand) on Day 9 (5 March 2024). There was, unfortunately, a high degree of latency in the transmission, but the quality of the remote link was otherwise good. She gave evidence clearly and well and did her best to assist the Tribunal.

(2) *Mr Bart Willaert.* Mr Willaert is the Executive Vice President, Open Banking International Markets at Mastercard. In these proceedings, he gave a single witness statement (**Willaert 1**), but Mr Willaert had given evidence in a number of previous interchange fee cases, and identified the statements he had previously given, including in cases in which the Chair sat.[107] All his witness evidence has been considered. He gave

[107] Willaert 1/[12]*ff*.

evidence on Day 9 (5 March 2024). Mr Willaert was an articulate and very competent witness, steeped in the Mastercard Scheme.

(3) *Ms Deborah Suttle.* Ms Suttle is Senior Vice President, Mastercard Direct Services at Mastercard Europe SA. In these proceedings, she gave a single witness statement (**Suttle 1**). She gave evidence on Day 9 (5 March 2024). Ms Suttle was an impressive witness, authoritative within her area of expertise, clear and articulate. She was equally good at making clear the limits of her knowledge.

(4) *Ms Kelly Devine.* Ms Devine is Mastercard's Divisional President, UK and Ireland. In these proceedings, she gave a single witness statement (**Devine 1**). She gave evidence on Day 9 (5 March 2024). As a witness, she was articulate and knowledgeable within her area of expertise – a very impressive witness.

(5) *Ms Lyda Sarmiento.* Ms Sarmiento is the Senior Vice President, Pricing and Interchange, International Markets for Mastercard. In these proceedings, she gave a single witness statement (**Sarmiento 1**). She gave evidence on Day 9 (5 March 2024). Ms Sarmiento was a somewhat inflexible witness on points where the evidence did not justify this. For instance, she could not defend changes to the Default MIFs resulting from the UK's exit from the EU, which resulted in different defaults applying for purely technical reasons. Ultimately, she was not a very helpful witness, and her evidence is discounted accordingly.

(4) The expert evidence

76. Evidence was received from four expert economists:

(1) *Mr Neil Dryden.* Mr Dryden is an economist employed at Compass Lexecon (a trading name of FTI Consulting LLP). He was instructed by the Merchant Claimants as an expert. He gave two reports for the purposes of these proceedings: **Dryden 1** and **Dryden 2**.

(2) *Dr Alan Frankel.* Dr Frankel is the Founder and Chair of Coherent Economics LLC. He was instructed by the Merchant Claimants as an expert. He gave two reports for the purposes of these proceedings: **Frankel 1** and **Frankel 2**.

(3) *Dr Gunnar Niels.* Dr Niels is a partner in Oxera Consulting LLP. He was instructed by the Mastercard Defendants as an expert. He gave three reports for the purposes of these proceedings: **Niels 1**, **Niels 2** and **Niels 3**.

(4) *Mr Derek Holt.* Mr Holt is a managing director in the Financial Advisory Services Practice at AlixPartners UK LLP. He was instructed by the Visa Defendants as an expert. He gave a number of reports in the course of these proceedings, four of which were relied upon in this trial: **Holt 1**, **Holt 3**, **Holt 8**, **Holt 9** (including the Addendum to Holt 9) and **Holt's Reply Report to Dr Frankel's Third Report**.[108]

The experts also submitted a **Joint Expert Statement**.[109]

77. The experts gave evidence initially concurrently (i.e. by "hot tub") on Day 10 (6 March 2024). Thereafter they were tendered for cross-examination. Mr Dryden gave evidence on Days 11, 12 and 13 (7, 8 and 11 March 2024). Dr Frankel gave evidence on Days 13 and 14 (11 and 12 March 2024). Dr Niels gave evidence on Days 15 and 16 (13 and 14 March 2024). Mr Holt gave evidence on Days 16 and 17 (14 and 18 March 2024).

78. The parties were quite critical of each other's experts. The criticisms made of Dr Niels have already been referenced. They have been rejected as *ad hominem* criticisms, but there was an objective foundation to criticisms in the failure of the Scheme experts to address the implications of the Prior Record. This criticism applies to the Scheme experts because (i) Mastercard and Visa participated fully in the Prior Record in circumstances where (ii) the conclusions

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[108] It is evident from the numbering that Mr Holt submitted a number of other reports during these proceedings. They are not referred to because they are immaterial.
[109] Joint Expert Statement following the main reports and reply reports (Trial 1), 1 February 2024.

expressed in that Prior Record did not, on the whole, favour the Schemes' contentions. These were, therefore, issues that did not affect the evidence of the Merchant Claimants' experts, who tended to agree with the Prior Record (in very broad-brush terms) in circumstances where, even if they disagreed, the Merchant Claimants were at liberty to articulate inconsistent cases. The result is that greater weight attaches to the Merchant Claimants' experts' evidence than to that of the Schemes' experts. The failure to properly engage with the *herrschende Meinung* represented by the Prior Record is a serious one that goes directly to weight.

79. Giving expert economic evidence in competition cases is not without its challenges. A general problem is the perception that expert economists present too much as advocates, and not as experts. This perception is incorrect: the experts before us were doing their best to assist the Tribunal and to do so in accordance with their duties as experts. But the job is a difficult one, and the perception of partisanship arises out of a failure to navigate three difficulties:

(1) As described, there is the general failure of economic experts to consider the prior record that exists in most competition cases, to give it the respect it deserves, and to locate the expert's views in relation to that prior record. Here, as Annex 5 demonstrates, the Prior Record is voluminous. It was not sufficiently addressed – indeed, some of the experts clearly took the view that it was not their job to do so.

(2) The Tribunal has, on a number of occasions,[110] noted that expert economists are expert only in economics, and their views on the operation of the systems that they are considering through the lens of economic expertise (whether these are undersea cables, bus networks, supermarkets or Schemes) must be based on fact in relation to which they are not expert and cannot appropriately give evidence.

[110] Sainsbury's CAT Decision at [36] to [41]; BritNed, see [229] at fn 272 below.

(3) The real value of economic evidence is articulation of general rules of economics, and the application of these to specific facts which (as facts) cannot emanate from the economist.

F. MARKET DEFINITION

(1) Scope of the question

80. The essential purpose of market definition was restated in *BGL Holdings Ltd v. The Competition and Markets Authority* (**BGL**),[111] in particular at [107] to [113]. In this case, where the allegation concerns anti-competitive agreements between undertakings, market definition matters – indeed, is of critical importance – in enabling the Theories of Harm and Counterfactual scenarios advanced by the parties to be evaluated. In this, it bears stressing that "the process of market definition therefore is, or should be, outcome neutral. It is intended to identify the relevant context in which the anti-competitive effects of the agreement or provision that is said to constitute a restriction on competition can be assessed. It should not be skewed so as to pre-determine the outcome. In particular, the process should not have regard to negative (or, indeed, positive) effects. Naturally, these effects are the very essence of why alleged infringements are looked into, and condemned or justified. But before that can be done, their context must be determined, and that is the point of market definition in the context of the Chapter I prohibition."[112] The same is true of theories of harm: the point is not to determine the existence of the infringement, but to define the relevant evidence needed to be considered and to focus the inquiry, differentiating between the relevant and irrelevant; and (particularly important in this case) to differentiate between what is relevant to establish infringement under Article 101(1) TFEU and justification of an infringement under Article 101(3) TFEU. This distinction is of particular importance in this case, because Trial 1 is dealing only with Article 101(1) TFEU issues: Article 101(3) TFEU issues are for later determination.

[111] [2022] CAT 36.
[112] BGL at [112]. See also, on the importance of "outcome neutrality", [114(1)].

(2) Process

81. The starting point in defining a market is to ascertain the **Focal Product**. There was no agreement between the parties as to this.[113] The Focal Product is not, necessarily, the product of a single supplying undertaking. It is perfectly possible for multiple different undertakings to sell the Focal Product.[114] Here – for reasons given below – both Schemes will have been selling the same Focal Product, unsurprisingly given the similarity between the two Schemes.[115]

82. Having identified – and the exercise is clearly context sensitive[116] – the Focal Product, it is then necessary to consider what substitutes exist for that Focal Product. Substitutability of the Focal Product lies at the heart of Market Definition,[117] and (as will be seen) at the heart of the issues in Trial 1. The conventional way of doing so is by way of a small but significant non-transitory increase in price (the **SSNIP** test) or the Hypothetical Monopolist test.[118] However, as *Hydrocortisone* shows,[119] these tests cannot always be used in the environment of particular markets,[120] and SSNIP tests were not undertaken by the experts before us, for reasons that are considered below.

(3) Two-sided markets and market definition

83. Two-sided markets present an additional complexity:

    (1) All markets have at least two sides (put simply, a buying side and a selling side). These are <u>not</u> two-sided markets. The term <u>two-sided</u>

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[113] The Schemes appear to have regarded the Focal Product as Cards issued under (respectively) the Mastercard Scheme and the Visa Scheme, whereas the Merchant Claimants appear to have regarded the Focal Product as Cards generally. This difference informs variants of the "death spiral" arguments that underlay some of the Schemes' submissions.
[114] *Allergan plc v. The Competition and Markets Authority* (**Hydrocortisone**), [2023] CAT 56 at [185(3)(i)].
[115] It is good practice to define the focal product narrowly: *Hydrocortisone* at [185(4)]. The starting point ought, therefore, to be as per the Schemes' position, but the assessment must be iteratively conducted.
[116] It is almost certainly the case that "focal product" definition will vary according as to whether the case is (i) merger, (ii) an anti-competitive agreement between undertakings, (iii) cartel or (iv) monopoly. Here I am dealing with (ii).
[117] *Hydrocortisone* at [185(2)], [185(3)].
[118] *Hydrocortisone* at [185(7)].
[119] See [81] at fn 114.
[120] *Hydrocortisone* at [187], [219], [241]*ff*.

market is so entrenched that it cannot be abandoned, but it is not, for this reason, a helpful term.

(2) The essence of a two-sided market is the existence of two distinct markets (i.e. for the sale and purchase of distinct products) operating off the same Platform.[121] The free newspaper remains the best example, because although it is technologically simple, it captures the economic complexities:[122]

(i) The newspaper is the "platform" off which two markets exist: a market for reading material and a market for advertising space. The seller of the newspaper by way of the same product provides (sells) services to those wanting advertising space and services to those wanting reading material.

(ii) These are two different markets, with two different focal products (advertising space and reading material). These markets must be defined separately, for what is a substitutable product for a reader (a book; a magazine one has to pay for?) is completely different to what is a substitutable product for the advertiser (substitutes might be billboards, television, advertising in paid for magazines and newspapers).

(iii) The two-sided market arising out of the free newspaper Platform is complex because the price of the newspaper (one market) is affected by the advertising revenues received (the other market), and the advertising revenues received are affected by the number of people reading the newspaper (which will be affected by price). So there is a complex interaction between two markets, which is the hallmark of the two-sided market phenomenon.[123]

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[121] The Merchant Claimants' Written Closing puts the point clearly at [47]: "…it is clear that the Schemes are not a two-sided service, i.e. there is not a single product on offer across a nexus of two markets…". That is exactly what BGL holds.
[122] BGL at [117].
[123] BGL at [117].

> This interaction inevitably makes the analysis of markets – and particularly counterfactuals in those markets – difficult.[124]

(4) Market Definition in the case of the Schemes

(a) The markets operating off the Platform

84. The Platform in issue is the Scheme. Two markets operate off the Platform, represented by the two legs of the "A" described above, the Acquiring Market and the Issuing Market. The Merchant Claimants' Written Closing described these markets, and their relationship, in the following terms:[125]

> (1) In one market, issuers compete with each other to issue cards to customers (the "issuing market"), whether as part of a broader retail banking service (typically for debit cards) or as a standalone product (more characteristically for credit cards). In this market, a seller (the issuer) is selling a product (payment cards) to a buyer (the cardholder/customer).
>
> (2) In another market, acquirers compete with each other to "acquire" merchants. The acquirer provides the services and technology to merchants through which they can accept payment cards, such as, for instance, point-of-sale ("POS") card payment machines (the "acquiring market"). This is separate to the issuing market: a different seller (the acquirer) is selling a different product (card acquiring services) to a different buyer (the merchant).
>
> (3) The link between the two markets is that a payment card will have greater value to a cardholder if it is accepted by a greater number of merchants. At the same time, the value to a merchant of accepting a particular type of payment card is dependent on the extent to which consumers have and use those cards and the degree to which consumers hold, and would use, cards belonging to another scheme. Merchants will generally wish to accept a payment instrument readily available to a customer.

85. In the present case, the concern is with the Acquiring Market because the Merchants claim that the Multilateral Interchange Fee charged to them by Acquirers infringes competition law. The Issuing Market is only indirectly relevant, to the extent that (i) there are network effects between the Issuing Market and the Acquiring Market which (ii) can properly be taken into account when considering the question of infringement of Article 101 TFEU. This

[124] BGL at [120].
[125] At [47].

Judgment is not concerned with whether an infringement can be justified under Article 101(3) TFEU. Accordingly, the contention that markets going beyond the Acquiring Market fall for consideration is (for these reasons, which are expanded upon below) rejected.[126]

(b) Chains of consumers

86. Both the Issuing and the Acquiring Markets involve chains of consumers of the Schemes' services:

(1) In the case of the Issuer Market, that chain comprises:

Scheme	---	**Card Issuer**	---	**Cardholder**
(supplier)		(intermediate consumer)		(ultimate consumer)

(2) In the case of the Acquirer Market, that chain comprises:

Scheme	--	**Acquirer**	--	**Merchant**	--	**Cardholder Customer**
(supplier)		(intermediate consumer)		(intermediate consumer)		(ultimate consumer)

87. The point about identifying the ultimate consumer in each case is that it is the ultimate consumer's demand that informs the demand higher up the chain. Put another way, if Customer/Cardholders chose not to use Cards, but to pay by cash, and resist Card use altogether, the demand for the Scheme from Acquirers will collapse, because Merchants would have no desire for their services. In short, as an intermediate consumer, a Merchant values the product not for itself but because it enables the Merchant to provide a better service to their

[126] The parties were very far apart on this question in closing. The Mastercard Written Closing at [117] contends: "Accordingly, Issue 1 should be answered as follows: The relevant product markets for the purpose of the competition law analysis are the **issuing**, **acquiring** and the **intersystem markets**. Account should also be taken of competing payment products". By contrast, the Merchant Claimants' Written Closing contended at [363]: "The correct analysis is that the focal product in issue is acquiring services. The case concerns the anti-competitive effect on the MIF, which is a cost component paid by acquirers which artificially raises the MSC. The relevant market consistently identified by the Commission and by the courts…is the market for acquiring services".

Customers and so earn a better profit for themselves by offering means of payment that the Customer wants to use. This interrelationship is often referred to as "derived demand", which describes the case where demand for a good derives from demand for another good. When considering questions of market definition, it is necessary to bear in mind all levels of consumer, not merely the Acquirer or the Merchant, but the Customer/Cardholder also. The contention that the Merchant's demand for services from Acquirers was derived from the demand of Customer/Cardholders was a central point advanced by the Merchant Claimants in support of their case on market definition which is considered further below.

(c) The Focal Product

88. The Focal Product in the Acquiring Market is the provision of a payment acceptance service to Customers, whereby the proffering of a Card results in the Customer/Cardholder successfully being able to tender payment for goods or services in a variety of contexts, but where the counterparty being paid is the Merchant. This definition of focal product is sufficiently wide to describe the product at every stage of the chain: it is as true for the Customer, as it is for the Merchant, as it is for the Acquirer, as it is for the Scheme. It is referred to as the **Payment Acceptance Service**.

89. The Focal Product embraces Cards offered by both Schemes. There is nothing, in terms of product offering, to differentiate Mastercard from Visa Cards, as is clear from the fact that it has been possible (in Section [18]) to describe the operation of the Schemes generically without the need specifically to refer to, or differentiate between, Mastercard or Visa. The products are, to all intents and purposes, identical and they rank as near-perfect substitutes.

(d) Attributes of the Focal Product

90. In this case, the Focal Product has the following attributes:

(1) *Ubiquity of acceptance.* In the relevant geographic product areas (the UK and Ireland) Mastercard and Visa have achieved high levels of

acceptance of their Cards by Merchants. The Merchant Claimants went further and contended for "universality",[127] which the Schemes did not particularly dispute. "Universality" sets the bar too high and fails to take account of the fact that – even now – Mastercard and Visa are innovatively seeking new transactions for which their Cards can be used. For example, taxis used to be, until recently, a bastion for the use of cash. No longer. The Schemes are encroaching on cash in even very minor transactions, but that is a relatively recent phenomenon. There was if not universality of acceptance then what is termed in this Judgment "ubiquity": the Cards represent a payment service that is so desired by Customers (Customer/Cardholders) of Merchants, that Merchants will place themselves in a commercially detrimental position by not accepting payment by Card. That does not mean to say that it will in some cases be – weighing all the factors into account – better for a given Merchant to decline to accept Cards. The point is that there would have to be some cogent reasons for a Merchant to disdain from offering this service to Customers.

(2) *Cardholder indifference as to Scheme.* The Schemes are near-perfect substitutes. That implies a high level of Cardholder indifference as to whether they hold a Mastercard or a Visa Card or both. Put another way, there is a high level of Cardholder indifference as to which Scheme they "belong" to. This is for a variety of reasons, the main one being that the Schemes provide services that are nearly identical. In short, there is, at the Scheme level, no product differentiation. Product differentiation may occur at the Issuer level, as where one Issuer may try to make their offering more attractive to potential Cardholders than other Issuers. The Issuer has a three-way choice: to offer (i) Mastercard Cards, (ii) Visa Cards or (iii) both. Potential Cardholders will select by reference to Issuer and not by reference to Scheme. In those (rare) cases where the Cardholder feels strongly about the Scheme, they can, by multi-homing, achieve precisely the choice available to Issuers, i.e. to hold (i) one or more Mastercard Cards, (ii) one or more Visa Cards or (iii) a mixture of

[127] See Merchant Claimants' Written Closing at [241].

Mastercard and Visa Cards. The reasons for multi-homing will be less to do with Scheme, and more with other advantages of holding many Cards.[128]

(3) *Merchants need to offer acceptance of payment by way of both Schemes.* It is now necessary to consider the position of Merchants:

(i) Merchants can be confident – and at all material times could be confident – that many of their Customers would wish to pay by Card for the goods and services offered by them (the Merchants) for sale.

(ii) Merchants could also be confident that a failure to offer acceptance of payment through Scheme Cards would lose them business. In other words, there would be a significant class of Customer who would decline to transact unless they could pay by Scheme Card.

(iii) That is not to say that Merchants would not want to facilitate other means of payment – cash or American Express, for example. Payment is an area where the Customer is king, and this is demonstrated by the "branding" requirements for Merchants, which serve to demonstrate their willingness to accept certain cards (e.g. Mastercard, Visa, American Express, etc).

(iv) Merchants could not, however, be confident that they would not lose customers if they only offered acceptance of payment by one Scheme Card (Mastercard but not Visa or *vice* versa) and not both. In other words, the fact that the Mastercard and Visa Schemes are near substitutes in no way assists the Merchant.[129]

[128] Some will be good reasons, and some bad. A bad reason would be creation of additional credit. A good reason would be to have different Cards for different purposes (e.g. business and private uses).
[129] This is unusual in competition: normally, a near-perfect substitute will imply a high elasticity of demand. Here, the Merchant Claimants contended that the very reverse was the case. Although this was

That is a consequence of Cardholder indifference as to Scheme. Whilst a Merchant can predict, with a high degree of confidence, that many Customers will (i) be Cardholders and (ii) will want to pay by Card, the Merchant will not be able to predict how many Customers seeking to transact will have two Cards rather than just one, nor what proportion of Customers hold Mastercard Cards or Visa Cards. Put another way, no Merchant can safely assume that the vast majority of their Customers will be Mastercard Cardholders rather than Visa Cardholders.

(v) As a result, to paraphrase and accept the submissions made by the Merchant Claimants,[130] Merchants operate on the basis that many of their Customers will want to pay by Card, and that the Card that is proffered will equally likely be either Mastercard or Visa. If the Merchant refuses the proffered Card, the customer may offer an alternative but may simply decline to transact – resulting in a lost sale. For the Merchant (but <u>not</u> the Customer/Cardholder, who has freedom of choice[131]) Mastercard and Visa cards are "must take" Cards. It would be a <u>brave</u> Merchant who declined to accept <u>all</u> Cards, but a "business case" might be made out in a specific instance. It would be a <u>foolish</u> Merchant who selectively offered acceptance of payment of only one of Mastercard or Visa.[132]

(4) *Customers do not suffer any cost in transacting by Card*. The effect of the No Surcharging Rule and the Honour All Cards Rule is that when a Customer elects to purchase a good or service from a Merchant, the

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never accepted in terms by the Schemes, the Schemes did little to dispute the point. Rather, the Schemes elected to fight the question of substitutability in the context of Issues 4 and 5. The validity of this argument is considered later in this Judgment, when Issues 4 and 5 are dealt with.

[130] Merchant Claimants' Written Closing at [243(6) and (7)].

[131] It may be that the manner of transacting during and after Covid – where many Merchants <u>refuse</u> cash – is removing Customer choice, and driving Customers to rely more on ubiquitous card like the Scheme Cards. This was not addressed, and it makes no difference to the analysis of the Merchant's position that Cardholder choice is lessened by the increasing dis-use of cash.

[132] Although the position is more nuanced, I anticipate that the same is true as regards distinct Card types. In other words, notwithstanding the relaxation of the Honour All Cards Rule, Merchants will not want to lose sales by declining to accept payment by reference to certain Card types.

Cardholder will pay the same price when paying by Card as when paying by other means. The Merchant may not discriminate against the Customer/Cardholder. It may be that sophisticated Customers understand that Merchants bear a cost (the Merchant Service Charge) for the service that they offer (Card acceptance), but that will not affect the Customer/Cardholder's choice of payment mechanism when transacting with the Merchant.[133] At the point of sale there is no downside in terms of the price paid by the Customer arising from the Customer paying by Card. It may be that the Cardholder has committed themselves – by the terms of the Issuer/Cardholder Agreement they entered into – to certain payment obligations,[134] but that is a pre-commitment which (if anything) will promulgate the use of the Card and not derogate from it.

(5) *The Default MIF applicable to the transaction is irrelevant.* The Default MIF that is implicated in a particular transaction is wholly immaterial. The Customer/Cardholder will not care – they pay the same price whatever the Default MIF. The Merchant <u>will</u> care, but will be unable to avoid the charge and will be unable to select which Default MIF applies.

(e) Differentiating between Default MIF types is an error when defining the market

91. The point that the Prior Record does not differentiate between different Default MIFs is one that is repeatedly made by the Merchant Claimants. Thus, to quote from various points in the Merchant Claimants' Written Closing:

> "The Schemes contend that the MIF for inter-regional transactions is in some way materially different from the MIF for other transactions, such as intra-EEA and domestic transactions. But the inter-regional MIF is just a different MIF

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[133] It is, perhaps, possible to envisage a Customer ideologically opposed to Cards. But such a person would not have a Card in the first place, and could never be a Cardholder.

[134] This agreement will deal with the extent of credit granted to the Cardholder, and cost of that credit. There will also be "rewards" for the use of the Card accruing to the Cardholder. These are all matters going to the Issuing Market, not the Acquiring Market, as will be described.

rate on the same card (which could be consumer or commercial). The anti-competitive restriction in issue is the MIF setting process.[135]

A central pillar of the Schemes' defences to these claims is that the distinctions between different categories of MIF are in some way relevant to the legal and economic analysis. In reality, save for the level of MIF due on the transaction, legally and economically there is no material distinction between each of the different categories of MIF. The object and effect of the MIF within the four party payment card scheme is the same in each case. It operates as a restriction on the freely negotiated price which an acquirer would otherwise pay for clearing and settling transactions with the issuer. It inevitably constitutes a reserve "price" below which an MSC will not be set. It is a price which merchants are not able to negotiate, or even constrain. It is the MIF acting as a floor to the MSC paid by merchants which is anti-competitive and in breach of Article 101(1), regardless of what specific figure it is set at or how it is categorised by the Schemes."[136]

This is an issue that will be returned to when Issues 4 and 5 come to be considered. Issues 4 and 5 concern transactions involving specific Default MIFs (namely the inter-regional and commercial card Default MIFs). The question of whether it is appropriate to differentiate between charges that neither Customer/Cardholder nor Merchant can affect – even if they know which charges apply – is a matter considered when Issues 4 and 5 in the List of Issues fall to be determined in Section I.

92. The point made by the Merchant Claimants is that because Multilateral Interchange Fees are similarly set <u>whatever</u> the applicable Default MIF, differentiating between different Default MIFs is both legally and economically irrelevant.

93. So far as Market Definition is concerned, this contention is clearly correct. At this stage the concern is only with Market Definition: the framing of Counterfactuals and questions of infringement will be dealt with in due course, and must be answered in light of the correct Market Definition. For the purposes of Market Definition the fact that different Default MIFs will apply to Card transactions taking place in the relevant geographic areas (the United Kingdom and the Republic ofIreland) in the Acquiring Market is an immaterial fact to Market Definition that it would be wrong to take into account. That is not <u>just</u>

[135] At [18]. See also [20], where the same point is made as regards the MIF for commercial Card transactions.
[136] At [52].

because whatever the applicable Default MIF, they all fall to be classified as Multilateral Interchange Fees, set in and operating in exactly the same way. More to the point, the applicable Default MIF, indeed, the fact that a Multilateral Interchange Fee is implicated in the transaction at all, is not a relevant attribute of the Focal Product because it neither informs consumer choice nor affects questions of substitutability. The ultimate consumer – the Customer/Cardholder – will neither know nor care about the implied cost of the Multilateral Interchange Fee, whereas the Merchant may care very much, but has no agency or choice in avoiding the cost. This is also the position of the Acquirer.[137]

94. None of this is controversial although it was certainly not common ground before us in Trial 1. The approach described has been that of courts and regulators over the years. Although individual processes and proceedings may have concerned specific Default MIF types, the analysis disclosed by the Prior Record has not been based on differentiating between Default MIF types.[138] The extent to which this aspect of Market Definition affects later stages in the analysis is a matter for later consideration.

(f) Substitutability: identification of a problem

95. For the reasons given, the Focal Product comprises all Cards issued by either Scheme. The Focal Product question cannot be left without considering one further point, which is related to the fact that the Multilateral Interchange Fee does not affect the price of the product purchased by the Customer/Cardholder from the Merchant:[139]

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[137] Nothing at this stage is said about pass-on, which is the subject-matter of Trial 2. To the extent that they are able to pass-on, both Acquirers and Merchants do have agency. In the case of Acquirers, the passing-on may be easy to trace if it represents a distinct cost-line in the Merchant Services Agreement. In the case of the Merchant, the position is much more complex, because if there is pass-on by reference to an increased price to Customers, that increase will occur across the board to all Customers, whether they are Cardholders or not.
[138] This point appears to be resisted by the Schemes – see for instance Mastercard Written Closing at [128] – but not at the stage of Market Definition. The point being made by the Schemes is that it is wrong to say that all Default MIFs, simply because they are Multilateral Interchange Fees, have the effect of restricting competition within the meaning of Article 101(1) TFEU and the Chapter 1 prohibition. This point will be considered in due course. For the present, if the Schemes were contending that Market Definition needs to factor in different Default MIFs, that contention is wrong for the reasons here given.
[139] Nothing in this paragraph is intended to trespass on issues that are or may be the subject of Trial 2, specifically whether interchange fees indirectly affected prices of products sold by Merchants generally.

(1) Take a case of where the Focal Product is one manufactured by multiple undertakings – say, aspirin for the treatment of headaches, a generic product identically produced by many. It is obvious that if aspirin manufacturer *A* were obliged to apply a SSNIP, demand would shift to manufacturers *B*, *C* and *D*, such that *A*'s price increase would not be economically worthwhile.

(2) This differentiation between Focal Products is not merely pointless but analytically distracting. Because, *ex hypothesi*, the Focal Products are the same, the SSNIP test will be met, but will not say anything useful about substitutability as between the Focal Product and <u>other products</u>. The competition lawyer is interested to understand wider questions of substitutability: for instance, if the SSNIP is applied to all generic aspirin products (whether produced by *A*, *B*, *C* or *D*), will demand for those products shift away from aspirin to (say) paracetamol or Nurofen such that a SSNIP is not an economically sensible course for the hypothetical monopolist. In short, one applies a SSNIP to a single Focal Product amongst several as a cross-check to ensure that the Focal Product has properly been defined. Assuming it <u>has</u> properly been defined, the SSNIP test will be answered in the affirmative. If it is not, then the definition of the Focal Product needs to be revisited.

(3) In this case, shifts of demand between Schemes are nothing to the point. The area of interest is products that are substitutable for the Cards issued by <u>both</u> the Schemes. The question of substitutability is hard to test for in this case, without actually doing violence to the nature of the Focal Product itself. One could impose a SSNIP on the price paid by the Customer/Cardholder when paying by Card, but that would involve abandoning the non-discrimination rule which is a material part of the Schemes' offering. If Mastercard were forced to charge Customer/Cardholders in respect of every transaction, but Visa were not, there would be a somewhat decisive shift away from Mastercard to Visa. This exercise tells us nothing about substitutability and merely confirms

the definition of Focal Product that has been articulated.[140] The problem is that the SSNIP test, applied *intra*-Schemes, is not really a SSNIP because it involves a very material adjustment to the Scheme Rules, such that Mastercard's and/or Visa's offering is rendered materially different.

(4) Yet unless product differentiation occurs at the Customer/Cardholder level, substitutability cannot be tested for, and the trap on the Merchant continues to spring. Applying a SSNIP – whether to the Multilateral Interchange Fee generally, to one or more Default MIFs or even to the Scheme Fees themselves – will not change a Merchant's approach to offering to accept Cards in payment unless the increase is truly extreme, in which case the SSNIP is not a SSNIP. The fact is that if the SSNIP is passed on and not retained by the Merchant, it will be passed on to all the Merchant's Customers, whether they pay by Card or not, without differentiation, because that is what both the Mastercard and Visa Scheme Rules require.

96. Thus, the Focal Product inquiry contains hidden difficulties. They are unpacked because precisely the same difficulties arise when considering the substitutability of other payment products for the Payment Acceptance Service provided by the Cards in the Acquiring Market. These are difficulties that underlie the process of Market Definition in this case, and it is important that they be recognised.

(g) Potential substitutes

97. The Visa Written Closing submissions set out in Section IV a number of "other payment methods and payment schemes".[141] Five alternatives to the Visa Scheme are set out, and they will be considered in due course. The introductory paragraphs to Section IV read as follows:

> "**[140]** The fundamental purpose of any payment scheme is to facilitate a transfer of value from a cardholder to a merchant, and to securely settle a

[140] This is no more than a variant on the intellectually untenable and, in competition law, simply wrong, "death spiral".
[141] See also, and to similar effect, Mastercard Written Closing at [46]*ff* and [113]*ff*.

transfer of value between them. Merchants in the UK and Ireland accept a wide variety of payment methods, many of which involve the merchant selling for less than the face value of the purchase price, and customers incurring no direct costs for the use of the payment mechanism.

[141] Merchants are willing to settle at less than par where the benefits of the payment method outweigh the costs of that method, e.g. because its use encourages or facilitates frictionless cardholder purchases, or allocates credit or fraud risk to a third party.

[142] Cardholders are generally unwilling to pay for the use of a given payment mechanism, and will switch to a lower cost or higher reward issuer where possible.

[143] For those reasons, the payment methods which are widely accepted by merchants in the UK and Ireland often cost merchants more to accept than they cost cardholders to use."

98. There is much in these paragraphs that is uncontentious on the purely factual level. However, this content – accepting it to be true and accurate – is irrelevant special pleading for a number of reasons:

(1) It is nothing to the point to say that the Cards and the Schemes provide value for money when compared to other payment schemes. Competition law does not seek to evaluate the relative benefits of different market offerings. The market does that, through competition.

(2) Competition law is concerned with infringements, here with whether Article 101 TFEU has been infringed.

(3) In order to ascertain whether there has or has not been an infringement, it is necessary to understand the market and define it. Market Definition turns on substitutability, not relative product advantage. The fact that the Focal Product may be <u>better</u> than its substitutes is no defence to an allegation of competition law infringement under Article 101(1) TFEU. It is perfectly possible to have an infringement of Article 101(1) TFEU – whether "by object" or "by effect" – where the Focal Product is objectively better than its substitutes.[142]

[142] This is a fundamental aspect of competition law. It is concerned not with value for money nor whether the Focal Product represents a "good deal" for the consumer (at whatever level) but with whether the Provision in Question is or is not infringing.

99. Turning to the various alternatives or substitutes articulated by Visa in the Visa Written Closing submissions:

(1) *The Mastercard Scheme*.[143] For the reasons given, this is not a substitute for the Visa Scheme. Both payment systems comprise the same Focal Product in the Acquiring Market.[144] Market Definition is concerned with understanding substitutes for the Focal Product, the payment services offered by both Schemes.

(2) *American Express*.[145] The Visa Written Closing describes the American Express Scheme (uncontroversially) as follows:

> "**[145]** In contrast to a four-party scheme, under a traditional three-party scheme the operator issues cards and settles transactions with merchants. The operator thus assumes the role that issuers and acquirers undertake separately in a four party scheme.
>
> **[146]** Since there are no issuers or acquirers separate from the scheme operator, no default MIF is payable in a three party scheme. However, there is nonetheless an "implicit interchange fee" from the merchant to the cardholder side of the scheme. Where an Amex cardholder enters into a transaction with a merchant, American Express (Amex) transfers the transaction amount, less a fee (a "merchant discount rate" or "MDR") to the merchant. Amex recovers the full transaction cost from the cardholder. In other words, in place of a MIF, an MDR is payable by merchants, and then passed to cardholders in the form of rewards for using the card […] The cardholder rewards funded in this way encourage cardholders to hold and use Amex payment cards, and encourage merchants to accept Amex as a method of payment so that this spending takes place with them rather than their competitors.
>
> **[147]** As with a four party scheme, Amex aims to set the fee charged in the merchant side at a level not so high as to discourage acceptance by merchants, but high enough to fund attractive rewards and increase cardholder participation.
>
> **[148]** The fees charged by Amex to merchants are considerably higher than those paid by merchants under the Visa scheme (up to around three times the level of Visa's commercial card MIFs). Amex uses the higher rates it charges to merchants to fund rewards for cardholders (eg loyalty points or cashback).
>
> **[149]** Whilst that has significant consequences for the nature of competition between Amex and Visa, it does not alter the fundamental economic analysis. Both Amex and Visa are faced with exactly the same

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143 Visa Written Closing at [144].
144 See [81].
145 Visa Written Closing at [145] to [151].

> conflicting interests between the cardholder and merchant sides of the market, and need to design a scheme that will balance those incentives effectively[…]
>
> **[150]** As Mr Knupp explained:[146]
>
>> "American Express is one of our big competitors. They have chosen a higher merchant rate and better benefits to cardholders but that means that historically they have had less merchants accept them, right, that is their trade-off with the equilibrium. Visa, and I guess Mastercard, have chosen a slightly lower rate and we then have broader acceptance as a result of it. So different networks can try and choose equilibriums and then the market will typically tell you when you have the balance wrong[…]"
>
> **[151]** The distinction between four-party and three-party payment schemes is not always as binary as described above. Amex has from time to time operated a "three-and-a-half party scheme" known as the Amex Global Network Services […] programme in different jurisdictions around the world. Under this programme, Amex continues to act as the sole acquirer for all Amex GNS cards but licences other financial institutions (such as Lloyds and Barclaycard) to issue Amex cards alongside Amex itself. Amex pays to these third-party issuers a part of the MDR it receives from merchants. As a result of regulation, especially the IFR, the Amex GNS programme ceased to operate in the UK and Ireland."

As a description of the Amex "ecosystem" this is unexceptionable and uncontentious. The more important question is to locate the relevance of this information:

(i) The concern is to identify substitutes for the Payment Acceptance Service provided by Cards in the Acquirer Market. The question is whether Amex cards are a substitute and so part of the Acquirer Market.

(ii) The answer to this question does <u>not</u> turn on the mechanics of how Amex provides its services, although understanding these mechanics is important background material.

(iii) Equally, the fact that the Schemes provide or may provide better value to merchants[147] is not relevant to the question of substitutability or (for that matter) infringement of Article 101

[146] Day 7/pp.105 to 106.
[147] Which is the point made at [148] of the Visa Written Closing.

TFEU. It is perfectly possible for an extremely good and efficiently provided product to infringe competition law. This is beneficial because extremely good and efficiently provided products tend to accrue market power. It is the function of competition law to act as a control over undue market power. In short, the suggestion that Visa (and inferentially Mastercard) provide a <u>better</u> service or product than (say) Amex even if true is substantially irrelevant to the question of substitutability and Market Definition and similarly irrelevant to the question of infringement.

(3) *Digital wallets*.[148] It is again helpful to refer to the Visa Written Closing:

> "**[152]** Digital wallets are applications via mobile devices or online which securely store a user's payment credentials and use those payment credentials to facilitate electronic payments. Some of the most popular digital wallets which are used by consumers globally and accepted by merchants in the UK and Ireland are PayPal, Google Wallet, Apple Pay, Amazon Pay, Alipay and WeChat Pay[149] […]
>
> **[153]** PayPal is the leading digital wallet globally. It allows consumers to fund transactions via payment cards (such as Visa- or Mastercard-branded cards), a bank account, or funds stored with PayPal. PayPal charges consumers no fees when making a purchase, but charges UK merchants fees ranging from 1.2% to 2.9% plus fixed fees per transaction, plus an additional 1.99% for inter-regional transactions. These fees are different for Irish merchants, for whom they range from 0.9% to 3.4%, plus a fixed fee, and plus 2.0% for inter-regional transactions."

The facts as stated in these paragraphs are again uncontentious. However, it is important to articulate the following distinction:

(i) Some of the payment systems described are not self-standing payment systems, but merely constitute an additional layer of service over what remains a Card transaction. Thus, where a Cardholder uses Google Wallet or Apple Pay to pay for a cup of coffee in a coffee shop, using their mobile phone or watch to do so, this remains a Card transaction where the Card is embedded

[148] Visa Written Closing at [152] to [153].
[149] See, further, Holt 8 at [108].

as the means of payment in the Google Wallet or Apple Pay software.

(ii) On the other hand, where (for example) PayPal enables a customer to pay in a transaction with a merchant without using a Card (e.g., accessing funds in a bank account without using a Card or using funds stored with PayPal) then the question of whether this is a substitute does arise.

In short, the question of substitutability only arises in the second case (where the product <u>may</u> be a substitute), but not in the first, which is merely a variant on the use of the focal product itself.

(4) *Buy Now, Pay Later*.[150] The Visa Written Closing states:

> "**[154]** Buy Now Pay Later […] schemes enable short term consumer financing, typically for [cardholder not present] transactions, enabling consumers to spread the cost of a transaction over a series of instalments, with the repayment period typically not exceeding 12 months.
>
> **[155]** On [Buy Now, Pay Later] transactions, the [Buy Now, Pay Later] provider assumes the credit risk, the merchant receives the transaction value from the [Buy Now, Pay Later] provider, and the consumer subsequently repays the [Buy Now, Pay Later] provider. The merchant pays a fee to the [Buy Now, Pay Later] provider for the use of this service. Such fees typically exceed 2% of the transaction value. Mr Holt notes that [Buy Now, Pay Later] has grown rapidly over recent years…[151]
>
> **[156]** Klarna is the leading [Buy Now, Pay Later] provider globally and is used by more than 90 million consumers worldwide. Klarna charges high fees to merchants per transaction, ranging from 0.99% to 1.99% plus fixed fees, with fees varying according to the location of the consumer and the type of payment. For "pay over time" domestic UK transactions using Klarna, merchants pay 4.99% + £0.20. For "pay later" transactions, merchants pay 2.90% + £0.20 […] By contrast, customers receive generous credit terms and protections."

Buy Now, Pay Later schemes cannot even arguably constitute a substitute for the Focal Product in the Acquiring Market. The fact is that the transaction is <u>financed</u> by the Buy Now, Pay Later provider without affecting the manner in which the customer pays, which may be by Card

[150] Visa Written Closing at [154] to [156].
[151] Holt 8 at [111].

or otherwise. It may well be the case that Buy Now, Pay Later providers are competitors of credit cards (including Cards issued through the Schemes) and provide a substitute product <u>in the Issuing Market</u>. That, however, is a market that is not of concern for present purposes.[152]

(5) *Cash.*[153] The Visa Written Closing says this about the costs of cash settlement to Merchants:[154]

> "Accepting payment by cash can also give rise to costs for merchants. Merchants need to count, sort and secure cash, which can involve expenses such as bank fees for cash deposits, costs associated with cash transportation, and the need for security measures. Dealing with cash exposes merchants to the risk of theft, fraud and counterfeit currency. Implementing security measures to safeguard against these risks, such as installing surveillance systems or hiring security personnel, can entail additional expenses. Cash transactions often require more manual processing compared to electronic payments, which can slow down checkout lines and decrease overall efficiency."

This helpfully articulates the problems cash settlement can give rise to.

(h) Substitutability: general points

100. In light of this, the question is what substitutes exist for the Focal Product, having defined the Focal Product as Payment Acceptance Services provided through Scheme Cards. The standard test for market definition is the hypothetical monopolist or SSNIP test, which is applied to understand the demand elasticity of the consumer, the essential question being this:

> *"If a SSNIP is applied to the Focal Product, will sufficient demand move away from the Focal Product to substitutes so as to render the price increase detrimental to the hypothetical monopolist's interest in maximising profit?"*

101. In this case, there are at least two, and perhaps three, levels of relevant consumers, as the figure at [86] shows. The question of substitutability needs to be considered at each level, but bearing in mind that demand will be linked as between these levels.

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[152] This is the conclusion of the Payment Services Regulator: see the Merchant Claimants' Written Closing at [55(6)].
[153] Visa Written Closing at [157].
[154] Visa Written Closing at [157].

102. None of the parties before us formally conducted a SSNIP test, for reasons that are understandable given the market conditions in which Customer/Cardholders, Merchants and Acquirers operate. Nevertheless, it is worth using the language and mindset of the SSNIP test as a thought experiment to ensure that what is really in issue – and what the SSNIP test goes to – is properly in mind.[155] This, of course, is the question of substitutability; and hypothetical changes in price remain the best way of assessing elasticity of demand, the sensitivity of demand to price and the availability of substitutes for the Focal Product which is the key driver of demand for the Focal Product itself. The starting point for the analysis is to consider the price that is the relevant measure for demand elasticity. In this case, the relevant price is:

(1) As regards Acquirers, the Scheme Fee; and

(2) As regards the Merchants, the Merchant Service Charge.

For reasons already given, the price to be increased for the Customer/Cardholder is problematic: it ought to be the price of the good or service purchased but doing so distorts the nature of the Schemes in a manner that fails properly to test for substitutability. The Schemes sell themselves *as a better form of cash* and that is why the Scheme Rules placed (whilst they lawfully could) such importance on ensuring that there was no surcharging.[156] Clearly, the application of the SSNIP test – or the use of an alternative – so far as the Cardholder is concerned will have to be considered with some care.

103. It would be wrong (again for reasons that are obvious) to apply the SSNIP to either the Multilateral Interchange Fee generally or to specific Default MIFs that comprise elements of the overall Multilateral Interchange Fee. That is because

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[155] The SSNIP is of course no more than an analytical tool, to enable a decision-maker properly to frame the evidence. In most markets price is a significant determiner of demand. These markets are no exception, but the manner in which value is extracted from suppliers and the price paid is by no means straightforward. Thus, the price for the Payment Acceptance Service that is central to the issues for determination in Trial 1 is not paid by the consumer because of the Scheme Rules. A Customer paying cash pays the same as a Customer paying by Card. The price is paid by the Merchant, which bears part of the economic cost of the Scheme through the interchange fees levied pursuant to the Scheme.

[156] The prohibition on this rule has been described, but (at least so far as the larger Merchants were concerned) appears to have made no difference. Smaller Merchants do apply surcharges for particular cards, in particular Amex.

the SSNIP is applied to the price paid by the consumer, and neither the Multilateral Interchange Fee nor any specific Default MIF represents any kind of price.

104. The price paid by consumers at each level of the Acquiring Market is best ascertained by reference to the Merchant Claimants Diagram set out at Annex 3. The Acquirer pays a Scheme Fee to the Scheme operator. A SSNIP applied to the Scheme Fee would have no material effect on Acquirers participating in the Schemes. The provision of payment services is the Acquirers' business and Acquirers will want to provide a range of payment services, acquiring payment from as many cards as possible. This can be seen from the standardisation of equipment used (one machine will serve to acquire transactions using Mastercard Cards, Visa Cards and Amex cards and no doubt others). Moreover, the cost that is the Scheme Fee tends (uncontroversially) to be passed on to the Merchants via the Merchant Service Charge, and so an Acquirer will not in fact be economically impacted by the SSNIP at all. That reflects the fact that demand of Merchants (in the aggregate) for Acquirer services (again, in the aggregate) is highly inelastic.

105. This fact makes the application of the SSNIP at the Merchant level relatively easy. The reason that a rational Merchant will consider it important to offer acceptance of payment by way of Card has already been described. As noted, it would be irrational for any Merchant to offer acceptance of Mastercard Cards without also accepting Visa Cards (and *vice versa*). The decision to decline to accept Cards at all is a little easier to justify, but not by very much. The fact is that Cards are ubiquitous and Customers like using them for their obvious convenience and transactional security, leaving altogether on one side any advantages Cardholders may derive from their participation in the Issuing Market. A Merchant choosing not to accept Cards would almost certainly lose more in revenue and profit than they would gain in savings, and the difference between these two metrics is sufficiently great that a SSNIP applied to the Merchant Service Charge would make little or no difference to Merchant demand. Although the Merchant Claimants did not purport to apply a SSNIP, their submission was that Merchants were economically forced to offer to accept payment by Card. The Schemes could not gainsay this. However, because of the

importance of the point, it is necessary to probe the Merchant Claimants' case as fully as it is possible to do. In essence, the Merchant Claimants' case that Merchants were *de facto* bound to accept payment by Card *for as long as Cardholders want to pay by Card*, is accepted. The demand of the Merchants for Payment Acceptance Services is hugely contingent on the demand of Customer/Cardholders.

106. Turning, then, to the Cardholder: of course, it is the basic objective of the Schemes to promulgate their Cards both in competition with each other and in competition with other forms of payment. For reasons already stated, competition between the Schemes is fierce: because the Cards they offer are both Focal Products, any detrimental change to the offering of (for example) Mastercard would significantly benefit Visa, and *vice versa*. One would expect – and this is borne out by the evidence – the Schemes to track each other closely, for exactly this reason. The Schemes will be concerned independently to ensure that they retain their ultimate customers – the Customer/Cardholder – and one way of doing so (in the Acquiring Market) is to ensure that the Payment Acceptance Service is as good as it can be and, in any event, better than that of competitor products:

(1) It is not possible without undue distortion (which makes the test valueless) to apply a SSNIP to the price charged by a Merchant to a Customer/Cardholder, because that inevitably involves treating the Customer/Cardholder differently from Customers who are not Cardholders, which involves a distortion to the Schemes going well beyond the mere imposition of a SSNIP. It is therefore necessary to consider a different test.[157]

(2) Generally speaking, the markets sitting off a single Platform are considered separately, notwithstanding the network effects that will subsist between them. Certainly, in order to avoid incoherence and

[157] This is an issue in other markets also, notably the pharmaceutical market. See, *Hydrocortisone* at [241]. Also, Phenytoin Judgment, [2024] CAT 65 at [295].

incorrect outcomes, these markets need to be defined entirely separately.[158]

(3) This case, however, is unusual, in that not only is the seller in the Issuing and Acquiring Markets the same (i.e. the Scheme operator), which is the norm in two-sided markets, so too is the Customer/Cardholder, which is unusual. This means that there is not merely a nexus between price in the two markets – which is again the norm in two-sided markets – but (which is unusual) the prices in the two markets are paid by the same person, the Customer/Cardholder. That is because the Customer/Cardholder is the ultimate consumer in both the Issuing and the Acquiring Markets.

(4) The Merchant Claimants' Written Closing notes:[159]

> "Issuers have multiple alternative revenue streams which they are capable of calibrating differently in order to maintain a competitive and/or attractive card offer…In her evidence Ms Dooney […] acknowledged that issuing banks have multiple alternative revenue streams, including:
>
> (a) Interest on credit cards, held by 20% of debit card customers.
>
> (b) Interest on business and corporate cards.
>
> (c) Standard card fees (with premium cards carrying a high APR): Ms Dooney was shown an extract from a 2021 RBR Report which displayed Barclays APRs ranging between 19.9% and 34.9%.
>
> (d) Cash withdrawal fees charged on credit cards.
>
> (e) Foreign transaction fees.
>
> (f) Fees for using ATMs abroad,
>
> (g) The margin attached to currency conversion from overseas use of debit cards.
>
> (h) Revenue from utilising customers' non-interest bearing deposits for investment purposes.
>
> (i) Money from business account charges."

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[158] BGL at [120(6)]

[159] At [270].

Obviously, one person's revenue stream is the price paid by another person. It is clear that Cardholders pay, in various ways, for the Cards issued to them, but that these costs fall unevenly across Cardholders depending on the type of Card they hold, the type of transactions they engage in, whether they rely on debit or credit Cards and whether (as credit Card holders) they are revolvers or transactors.[160]

(5) In order to consider the extent to which a SSNIP would drive Customer/Cardholders away from using their Cards to purchase products from Merchants to other forms of payment, a SSNIP could be applied to every transaction effected by a Cardholder using their Card in a manner that is overt. Looking again at the Merchant Claimants Diagram at Annex 4:

(i) The diagram hypothesises a purchase by the Customer/Cardholder from the Merchant of a product priced at £100. Money in this amount is (at some point) taken out of the Customer/Cardholder's account with the Issuer, as represented in the diagram.

(ii) The Merchant, of course, does not receive £100. The diagram postulates a Multilateral Interchange Fee of £1 and other elements of the Merchant Service Charge of £0.50, resulting in a payment to the Merchant not of £100 but £98.50.

(iii) It is assumed that there is a charge to the Cardholder of 1% (here: £1) for use of the Card on every transaction. The result would be that the Cardholder – agreeing to pay the Merchant £100 – would in fact be charged £101. It does not matter, for sake of this thought experiment, who receives this additional £1, because the purpose of the experiment is to consider what the Cardholder would do in these circumstances.

[160] I.e. whether they pay off their balance at the end of each month (transactors) or maintain a debt on which they pay interest (revolvers).

(6) A SSNIP is generally put at 5% to 10% of the price of the focal product. Here, however, the focal product is not the product supplied by the Merchant to the Customer/Cardholder, but the price of the use of the Card, which is around 1%. Accordingly, this SSNIP is too high, and this is borne in mind when considering this thought experiment. But, in order to make sense, the SSNIP does need to be tangible to the Cardholder, and so a SSNIP that is approaching 100% of the price for the service is defensible. Nevertheless, this point (in and of itself) strongly suggests that Customer/Cardholder demand for Cards is highly inelastic, and that whereas there might be switching between and away from Issuers it is highly unlikely that (viewed in the aggregate) there will be switching away from Scheme Cards. Again, given the importance of the point, it is necessary to probe a little more carefully.

(i) Substitutability: analysis

(i) Approach

107. The question to be answered is:

"What substitutes exist in the Acquiring Market for the Payment Acceptance Service provided by Cards?"

Those potential substitutes are: (i) cash; and (ii) other cards, notably Amex. Before turning to consider these substitutes, it is important to reiterate one point and make another (new) point.

108. The point that merits reiteration is to note that it is *substitutability* that is the question under consideration:

"If an adverse increase in the cost of the Payment Acceptance Service to consumers (at whatever level) or some similar degradation of service (what may, loosely, be called a SSNIP) is hypothesised, to what extent will there be a shift to substitute products (cash or card) such as to render the SSNIP (or equivalent) economically detrimental to the hypothetical monopolist?"

The question of what would happen if a SSNIP were applied to some Focal Products but not others (for instance, Mastercard Cards only, Visa Cards only, a particular Card-type issued by both Mastercard and Visa, like commercial Cards) is <u>not</u> a question the Tribunal should or have to address. A SSNIP applied selectively (i.e. not to all transactions using Cards) might very well cause significant shifts in demand patterns, but which are entirely irrelevant for the purposes of analysis. Thus:

(1) If a SSNIP were applied only to Visa Cards and not to Mastercard Cards (or *vice versa*) then there would be a significant shift away from the Scheme whose Cards costs more to the Cardholder. Since this involves differentiating between what is a single Focal Product, this outcome is an obvious one.

(2) Equally, and for the same reason, if there was a differentiation between the Cards of different Issuers, there would be a move away to the lower charging Issuer. It is harder to say how great such a shift would be, because of the other factors tying a Cardholder to a particular Issuer. Whilst this serves to underline the very different factors in play in the Acquiring Market, these are matters not relevant to the inquiry.

(3) Again, and also for the same reason, if the Payment Acceptance Service was made materially more expensive for certain types of Card (e.g., commercial Cards) consumers are likely to move away from the service to a substitute that offers exactly the same service: in terms of Payment Acceptance Services there is no difference between a commercial Card and other types of Card.

(4) Yet again if a particular Default MIF were to be adjusted, this, on the findings made, would make <u>no</u> difference to the demand for Payment Acceptance Services. The Customer/Cardholder would not even feel the difference; and the Merchant might appreciate a higher cost, but be unable to move away to another product because of continued Customer/Cardholder demand for Payment Acceptance Services.

This point needs to be stressed because a recurrent theme of the Schemes' cases was to focus on the wrong substitutability question, and to look at *intra*-Focal

Product Substitutability. The most glaring example of this is the point described at [99(1)], but this erroneous approach to Market Definition was pervasive and significantly informed the arguments in relation to Issues 4 and 5.

109. The second point is that the evidence in regard to Market Definition and substitutability was somewhat inadequate. This is not a criticism of any party. It is intrinsic in competition cases that the wide-ranging, market-wide, investigations that parties to these proceedings are required to undertake involves a need for material that is simply not available or only available at disproportionate expense. Thus:

(1) There was no evidence before the Tribunal from Acquirers. The Merchant Claimants' Written Closing notes that "[i]n the run up to Trial 1, Visa said it would obtain disclosure from acquirers, given its established relationships with those entities. Yet that ran into the sand, and none was forthcoming".[161] There is no hint of any criticism of Visa (or Mastercard) here, and any criticism would be unfounded. Securing a universe of reliable and relevant data in cases such as this is a formidably difficult undertaking, and the Tribunal must do the best it can with the evidence before it and its own economic expertise.

(2) The absence of Acquirer evidence was made good by the work of the UK's Payment Services Regulator (the **PSR**). The PSR is a statutory body established by the Financial Services (Banking Reform) Act 2013. It is the regulator for retail payment services in the UK and (the details do not matter) it was extremely helpful in the course of these proceedings (broadly conceived) in terms of the information it provided. Some of the most important of this information is in the form of published reports which consider the Acquiring Market. As a public body with public responsibilities, significant weight can be placed on this material as independent, impartial and reliable evidence of the relevant background facts. In particular, reference will be made to the

[161] Merchant Claimants' Written Closings at [53].

PSR's final report dated November 2021 entitled *Market Review into card-acquiring services* (the **PSR 2021 Final Report**).

(3) Of course, the Tribunal heard evidence going well beyond that emanating out of the PSR, as described in Section E. Without in any way qualifying the assessment of this evidence as articulated in Section E, it must be said that viewed in the aggregate it suffered greatly from the difficulties in trying competition cases that have been articulated in this paragraph. The evidence was to this extent unsatisfactory and of limited weight. By way of example:

(i) There was a great deal of argument about what might be done by Issuers, Cardholders, Amex and other payment service providers in hypothetical cases. It was, for example, suggested to us that Amex might reverse its decision to exit its "three-and-a-half party scheme" (sometimes known as the Amex Global Network Services) in the UK, following implementation of the Interchange Fee Regulation. The only evidence of that was speculation by the Schemes' factual and expert witnesses, which seemed inconsistent with Amex's own regulatory filings and other public pronouncements.

(ii) Similarly, evidence was received from only one representative of an Issuer, Ms Dooney. She was, as described,[162] a careful and helpful witness, rightly concerned to speak only to what she could. But a great deal of the Schemes' factual and expert witness evidence about Issuer costs, incentives and likely actions were speculation not rooted in fact. In this regard, whilst the Tribunal is prepared to extend a degree of speculative latitude to witnesses of fact embedded in the industry in which they work, the same latitude most certainly does <u>not</u> extend to expert

[162] At [74(4)].

economists, who are just that – expert economists, not industry experts.[163]

(ii) The PSR 2021 Final Report

110. The PSR 2021 Final Report deals specifically with Payment Acceptance Services and is accordingly on point for the purposes here under consideration.[164]

111. Whilst there are many small players amongst both Acquirers and Merchants, the vast majority of Card transactions are handled by a relatively small number of Acquirers and Merchants. Acquirers and Merchants are not lacking in market power.[165] By way of example, the PSR 2021 Final Report states:[166]

> "Large merchants, with annual card turnover above £10 million. This segment is dominated by a very small number of the largest merchants, with annual card turnover above £50 million, who are responsible for around 76% of the overall value of card transactions."

112. Notwithstanding the fact that many of the Acquirer and Merchant participants are economically significant, and very much the losers in terms of the flow of funds (by way of the Multilateral Interchange Fee) from the Acquiring Market to the Issuing Market,[167] it has proved impossible to change the interchange fee regime that has been described to the advantage of the Aquiring Market. Indeed, only an enormous Merchant like Amazon has been able to negotiate a "special deal".[168] As regards the rest of the Acquiring Market, it has taken the Interchange Fee Regulation to impose a cap.[169] That says a great deal about the embedded nature of the Multilateral Interchange Fee and the (extremely limited) market power of Acquirers and Merchants. Limited market power is a synonym

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[163] Sainsbury's CAT at [36] to [41].
[164] PSR 2021 Final Report, [1.6].
[165] See the PSR 2021 Final Report, [1.15] and [1.13]. See also [55(9)] of the Merchant Claimants' Written Closing.
[166] At [1.13] second bullet.
[167] Although the precise amounts do not matter, and are confidential, were are talking about £100s of millions. The PSR estimates that in 2018 the Interchange Fee Regulation saved the Acquiring Market some £600 million: Merchant Claimants' Written Closing at [55(2)].
[168] See the evidence of Mr Knupp at Day 7, p101 regarding a threat by Amazon not to take Visa credit cards on Amazon Prime in order to negotiate a better deal.
[169] See [55(2)] of the Merchant Claimants' Written Closing, summarising the PSR's findings in this regard.

for an absence of substitutes. It is substitutability that gives consumers market power.

113. Nevertheless, as regards card transactions in the UK, the position of the Cards is one of dominance in this market:[170]

> "Our market review focusses on the supply of card-acquiring services in relation to Mastercard and Visa, which are both examples of four-party card payment systems. Together, transactions involving Mastercard and Visa cards accounted for around 98% of all card payments at UK outlets in 2018, both by volume and value."

114. Over time, the PSR found that Scheme Fees have changed over the period 2014 to 2018, in that they "increased significantly over the period…a substantial proportion of these increases are not explained by changes in the volume, value or mix of transactions".[171]

115. Cash is freely available as a means of payment and is universal. There is no per transaction cost in terms of use. But, these days – and for many years – Customers choose not to use cash, but to use cards instead. The PSR finds:[172]

> "3.2 Card use is high in the UK and has been growing strongly in recent years. The number of debit card payments in the UK more than doubled between 2010 and 2020, while the number of credit card payments increased by around a third.
>
> 3.3 Causes of recent growth in card payments include:
>
> - Rapid growth in the adoption of contactless card payments and new ways of paying by card
> - Changing shopping preferences (debit cards are the most popular payment method for consumer online shopping, which is also increasing)
> - Increasing levels of card acceptance among businesses (particularly among smaller businesses)
>
> 3.4 At the same time, the use of cash has declined. In 2017, the value of payments made using debit cards exceeded the amount spent using cash for the first time.

[170] PSR 2021 Final Report, [3.13].
[171] PSR 2021 Final Report, [1.16]. The fact that this is a finding relating to Scheme Fees and not the interchange fee is nothing to the point. This is a SSNIP, which resulted in no move away from the cards by Acquirers or Merchants. As noted, the vast majority of card transactions involve Scheme Cards.
[172] PSR 2021 Final Report.

[...]

3.6 In recent years, new ways of paying and accepting payments by card have emerged. For example, consumers can now initiate a card payment in a shop using a smartphone or a device with contactless payment functionality (such as a smartwatch). These devices work in conjunction with digital wallets, such as Apple Pay and Google Pay, which securely store card details in different ways and can also be used online. Merchants also accept payments using card readers that connect to their smartphone or tablet, rather than requiring a [point of sale] terminal.

3.7 Surveys show the majority of businesses in the UK accept card payments. In some sectors, cards are the most frequently used payment method. In 2020, credit and debit cards accounted for 80%, 73% and 73% of spontaneous payments in the travel, retail and entertainment sectors respectively. In other sectors, card payments are much less prevalent. Most consumers pay utility bills and make monthly mortgage payments by direct debit.

3.8 Other payment methods have also grown over recent years, though to a much lesser extent than card payments."

116. The PSR 2021 Final Report finds as follows in terms of substitutes for Cards and the Payment Acceptance Service they offer:[173]

> "Most small and medium sized merchants also accept other payment methods in addition to cards. However, as we noted in [3.10], cards are an important payment method. We have not seen any evidence of reasonable substitutes for Mastercard and Visa cards for merchants, which would exert a competitive constraint on the supply of card -acquiring services for these cards. The merchant survey of small and medium-sized merchants we commissioned found that around 90% did not take steps to influence their customers' choice of payment method in the last year, and many merchants said card payments were their preferred choice of payment method. Moreover, merchants want to accept the payment methods their customers want to use; as such, they will have a strong incentive to continue accepting cards, as it is the most frequently used payment method in the UK. While there are a range of ongoing developments (including regulatory and technological developments) that may change the payment methods available to merchants, they have not made any significant impact to date in retail payments."

(iii) <u>The Oxera switching survey</u>

117. Dr Niels placed reliance on a report by Oxera produced and deployed by Mastercard in the course of the Mastercard II CAR Decision proceedings (the **Oxera 2016 Report**).[174] He did so in support of Mastercard's case that the

[173] At [3.34].
[174] Niels 1 at Section 4C.5.

Counterfactual advanced by the Merchant Claimants (which is described with the other Counterfactuals in Section H and which predicted no Multilateral Interchange Fees being paid by the Acquiring Market to the Issuing Market) would not in fact result in the lower Merchant Service Charge that the Merchant Claimants contended would arise. Dr Niels summarised the position as follows:

> "4.45 In this section, I consider whether, in a counterfactual with a zero MIF on Mastercard's inter-regional transactions, even if the reduction in the inter-regional MIF were fully passed on by acquirers to merchants, the overall cost borne by merchants in relation to those transactions would have been lower than in the factual.
>
> 4.55 For this assessment it is not sufficient to compare the level of the MSCs associated with Mastercard's inter-regional transactions in the factual and in the counterfactual. This is because such a comparison implicitly assumes: (i) that the volume of Mastercard's inter-regional transactions would have remained the same in the counterfactual; and (ii) that no other features of the Mastercard scheme would have changed. However, for the reasons explained in Section 4C.4, this is unlikely to be the case.
>
> 4.56 As noted above, Mastercard could not have continued to offer its inter-regional payment services to issuers without inter-regional MIFs and, as such, Mastercard's inter-regional transactions would have taken place with alternative payment methods (or not taken place at all). In such a case, a direct comparison of Mastercard's factual and counterfactual MSCs would not be possible (ie, in the counterfactual there would be no relevant MSC).
>
> 4.57 Furthermore, even if only some of the factual Mastercard inter-regional transactions had taken place with other payment methods in the counterfactual, the costs that merchants would have incurred in relation to those transactions would not have depended on the MSCs, but on the costs of processing the alternative payment methods chosen by the cardholders.
>
> 4.58 Therefore, in order to assess whether merchants' overall costs would have been lower in the counterfactual, it is necessary to take into account the extent to which issuers and cardholders would have switched to alternative payment methods, and what the associated costs for merchants would have been.
>
> 4.59 I develop my assessment by building on an analysis carried out by Oxera in 2016, in the context of the Mastercard II proceedings. In that context, the following four hypothetical scenarios were considered regarding the measures that issuers and the schemes might have adopted in the absence of inter-regional MIFs.
>
> - Scenario 1 – Mastercard or Visa not being available at all for inter-regional payments.
> - Scenario 2 – cardholders paying a 1% increase in the transaction fee for Mastercard/Visa purchases in Europe.

- Scenario 3 – cardholders not receiving any reward programme points, cashback or other benefits when using Mastercard/Visa cards in Europe.

- Scenario 4 – cardholders facing a higher decline rate for Mastercard/Visa transactions.

4.60 Under each of these scenarios, the extent to which non-European cardholders (specifically, those from the USA, Russia and Australia) would have switched to alternative payment methods for their transactions in Europe was assessed via a consumer survey. Oxera then estimated the merchant costs associated with each alternative payment method, and assessed the cost savings associated with Mastercard's inter-regional MIF.

4.61 I consider all four scenarios listed above. Scenario 1 allows me to assess what merchant's costs would have been in the counterfactual described by Ms Sarmiento and Mr Knupp, where, in the absence of inter-regional MIFs, Mastercard and Visa would not have offered their inter-regional payment services.

4.62 Moreover, each of the other three scenarios captures one of the potential measures that, based on the witness evidence provided by Ms Sarmiento and Mr Knupp, Mastercard's (and Visa's) issuers would be likely to have adopted in a zero-inter-regional MIF counterfactual. Exploring these three scenarios allows me to assess what cardholders are likely to have done (and what the effect on costs would be for merchants in the UK/Ireland) even if Mastercard and Visa had continued to offer their inter-regional payment services, and even if issuers had not switched away from issuing Mastercard and Visa cards."

118. These portions of Dr Niels' report have been set out at some length, because they demonstrate the confused and impermissible approach adopted by the Schemes to the question of infringement. The approach described by Dr Niels – and these passages are used only as a clear example – wrongly conflates stages of the Framework which need to be kept separate. Thus, for instance, Dr Niels conflates Market Definition (i.e. what are substitutes for the Focal Product?) with Counterfactual,[175] when no Counterfactual can properly be understood or applied without the market first having been defined.

119. Here, the suggestion made by Dr Niels that an increase in price would have resulted in significant switching away from the Focal Product is what is being addressed, which is Dr Niels' "Scenario 2". In effect, Dr Niels is postulating

[175] In doing so, Dr Niels also articulates a counterfactual that <u>no-one</u> was contending for, namely a partial abandonment of only certain Default MIFs.

precisely the sort of SSNIP identified at [82]. Like the SSNIP in this Judgment, 1% is far too high to be a proper SSNIP, but (for reasons already given) adopting a SSNIP that would be tangible to consumers is justifiable, provided it is borne in mind that the SSNIP is <u>far higher</u> than it ought to be. Unfortunately, Niels 1 does not consider or state a view as to what would happen if a SSNIP were indeed applied. Rather, Niels 1 persists in conflating substitutability and increased costs to Merchants without addressing the question of substitutability as a standalone anterior question that <u>must</u> be addressed and resolved.[176] Thus, Dr Niels baldly asserts:[177]

> "I rely on the 2015 consumer survey results to determine the extent of cardholder switching to each of the following alternative payments methods: (i) using or applying for an alternative card, in particular Amex; (ii) using cash; and (iii) using PayPal."

120. Dr Niels does not independently defend the 2015 consumer survey: he merely "relies" on it. It will readily be appreciated that the conclusions Dr Niels draws from the survey are significantly in tension with the findings of the PSR. If it was a straightforward conflict of evidence between the 2015 consumer survey and the work of the PSR, then the latter is to be preferred. However, when examined, the 2015 consumer survey in fact addresses a different and irrelevant point and can, therefore, be discounted for reasons other than weight:

(1) As Dr Niels makes clear (albeit in a footnote), the 2015 consumer survey does not consider substitutability in regard to the Focal Product:[178]

> "The survey was conducted by Artemis Strategy Group and commissioned by Mastercard, in October 2015. Respondents were selected from among Mastercard and/or Visa cardholders from the USA, Russia and Australia, in order to understand their behaviour and preferences when travelling to Europe."

(2) The Focal Product in this case is the Payment Acceptance Service offered by the Schemes in the Acquiring Market.[179] That Payment Acceptance Service is offered to all Cardholders proffering Cards in

[176] The analysis is at Niels 1, [4.63]*ff*.
[177] Niels 1, [4.63], first bullet.
[178] Niels 1, fn 145.
[179] See [88].

payment for transactions with Merchants, in circumstances where Merchants have a very limited ability to refuse a Card that has been proffered because of the Scheme Rules described.[180]

(3) The Cardholder, of course, does have a choice as to whether or not to use a Card in payment, or some other form of payment. What is being tested for is the extent to which, if a SSNIP is applied to the Cardholders' costs of transacting, whether there will be such a shift away from Cards to those substitutes as to render the increase in price uneconomic to the rational, profit-maximising, hypothetical monopolist.

(4) The 2015 Survey does not test for substitutability in this way. What it does is apply a SSNIP to <u>specific transactions</u> constituting only a small proportion of the transactions that Merchants will in fact process in the relevant geographic area, imposed by reference to the costs to Cardholders whose transactions are classified (for purposes of Default MIFs) as inter-regional interchange fees.

(5) Since an increase in the Default MIF for inter-regional (or any other) Cardholder transactions will not be perceived by the Cardholder,[181] it will be necessary to assume a cost imposed upon these Cardholders (Americans, Russians and Australians) that will presumably be felt by them in their (foreign) bank accounts. Not only is this the wrong question – the question of interest is the substitutability across all Cardholders transacting in the United Kingdom and Ireland – there is also no understanding as to how switching would work amongst this narrow and unrepresentative sample of Cardholders. Self-evidently, when considering substitutability in a market geographically limited to transactions taking place in the United Kingdom and Ireland, the focus must be on the use of Cards in that geographic region and not a limited set of Cards that have been issued elsewhere and no doubt for the most part are used elsewhere.

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[180] At [32].
[181] For reasons given at [91] to [94].

(iv) Conclusions

121. There are no substitutes for the Focal Product in the Acquiring Market. More specifically:

(1) To recap, the Focal Product is the Cards issued by both Schemes to Cardholders operating in the Acquiring Market, using those Cards to access the Payment Acceptance Service offered by the Schemes in that Market. It was common ground that the relevant geographic market for such Card use was the United Kingdom and Ireland.

(2) A number of the possible substitutes put forward by the Schemes – Paypal, digital wallets, Buy Now Pay Later[182] – are not actually substitutes for Payment Acceptance Services at all. They may be substitutes in the Issuing Market (for example, as a substitute for the credit offered by Issuers through Cards) but that is an entirely irrelevant issue for the purposes of Trial 1.

(3) The only remotely plausible substitutes are (i) other cards, specifically Amex and (ii) cash. As the findings of the PSR demonstrate, neither are substitutes for the Payment Acceptance Service offered by the Schemes. It is easy to understand why.

(4) Cardholders will persist in using Cards because of their sheer payment convenience over the alternatives and not (for example) because of the benefits that accrue to the Cardholder as a result of having or using a Card. The benefits deriving to Cardholders in the Issuing Market are incidental to the use of Cards as a form of payment in the Acquiring Market. Whilst these benefits may inform inter-Issuer competition, they do not inform competition between Cards and non-Card forms of payment. Put another way, if all benefits of Card use apart from payment convenience were removed, would there be a flight to cash or to other cards?

[182] See Visa Written Closings at [152] to [156]. See Mastercard Written Closings at [46] to [50].

(5) That contention must be rejected as inconsistent with and contradicted by the evidence before the Tribunal. The convenience and security of a ubiquitous, efficient and quick payment system is something that Cardholders would be prepared to pay for. A SSNIP of the sort described (high though it is) would not materially affect demand for Payment Acceptance Services, and that is so <u>even assuming</u> (as regards cash) what is still legally the case, namely that Merchants are obliged to transact in cash if tendered.[183]

(6) For large transactions and for card not present transactions, cash is a very poor alternative to Card (and card) payments. The obvious alternative to cash – assuming a move away from Cards – would be to use services like PayPal and effect payment by prepayment or payment direct from the Customer's bank account, without using the Card. PayPal is an alternative to such transactions, as is direct debit,[184] and would not be at a cost to the Customer (like cash). But it is not used as a means of payment in the sort of transactions where Cards are typically used. It is not a plausible substitute for the Payment Acceptance Service provided by Cards.

(7) Other card schemes are of course also an alternative to cash, but they are not a substitute for the Payment Acceptance Service offered by Cards issued through the Schemes. These cards are, in terms of acceptance by Merchants, both less ubiquitous (and so may not be available in the case of some Merchants, who will not accept them) and more expensive to the Cardholder than Cards would be, even with the SSNIP.

122. As a cross-check – because the SSNIP hypothesised is high – another way of testing for the non-substitutability of Cards is to hypothesize a charge increase to the Merchant's costs that is sufficiently high to engender a SSNIP in the prices offered <u>generally</u> by that Merchant to all Customers. Such a general

[183] As noted, there is now a tendency on Merchants to decline cash transactions in favour of Card payments: this is not taken into account, because the legal position is unquestionably different.
[184] Not a form of payment explored by the Schemes at all, although (as the PSR found) a common means of paying utility bills and the like. Paypal is much more suitable to be analogised to direct debit payments than Card payments (whatever the Card).

increase in price would result in Customers generally (i.e. not just Customer/Cardholders) shifting away from the Merchant to other (non-Card offering) Merchants. Of course, this is not a SSNIP at all – the increase being postulated is vastly too great to be a SSNIP – but it does show the embedded nature of Cards in our society and underlines the correctness of the conclusion reached which is – taking all factors into consideration – the correct product Market Definition is limited to the Cards issued by Mastercard and Visa as used by Customer/Cardholders in the United Kingdom and Ireland. In short, the only products in the Acquiring Market are the Focal Products.[185]

(5) Conclusions

123. The contention of the Merchant Claimants has been tested as robustly as the limited evidence before the Tribunal permits. The conclusion is that the submission of the Merchant Claimants that the price of the Payment Acceptance Services offered by the Schemes to consumers in the Acquiring Market (specifically, Acquirers, Merchants and Cardholder/Customers) is not subject to constraint by these consumers, who are price takers in this regard is correct.[186]

124. More specifically, the conclusions on Market Definition and so substitutability are as follows:[187]

(1) Although it is accepted that there are three markets present in this case – the Acquiring Market, the Issuing Market and what may be termed the **Scheme Market**, where the Visa Scheme competes against the Mastercard Scheme and *vice versa*[188]– the only relevant market that

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[185] The Schemes appeared to contend that they were not the same focal product, but to be treated as substitutes for each other. See, for instance, Mastercard Written Closing at [97] to [98] and Visa Written Closing at [144]. That contention is rejected for reasons given. Failure to see the Schemes as the same product results in meretricious "death spiral" arguments when it comes to counterfactuals, because one is lead (erroneously) to apply the counterfactual asymmetrically to two materially identical products. In such a case, there will obviously be a move away from one product to the other (materially identical) product. In short, the "death spiral" is a clever, but utterly misguided, forensic red-herring.

[186] The point underlies virtually the entirety of the Merchant Claimants' Written Closing, but see in particular Section E(7) (the level of the MIF is not subject to constraints from Acquirers) and Section E(8) (the level of the MIF is not subject to constraints from Merchants).

[187] Issue 1 in the List of Issues.

[188] It may be that other schemes could be included in the Scheme Market. But this does not need to be considered further, since the Scheme Market is not a relevant market for present purposes.

needs to be defined is the Acquiring Market. That is because the product under examination is the provision of payment services in that market (and no other).

(2) The Schemes contended for three relevant product markets – Issuing, Acquiring and Scheme.[189] This contention is rejected. For the purposes of assessing substitutability, the relevant product market is the market in which the alleged infringing provision operates. That product market is in the Acquiring Market only.[190]

(3) The fact that the Multilateral Interchange Fee operates also (as inevitably it does) in the Issuing Market (and, for what it is worth, the Scheme Market) is irrelevant. Ordinarily, the Issuing Market (and the Scheme Market) would be completely irrelevant:

(i) In the case of the Issuing Market, that is not completely the case because the Issuing Market operates off the same Platform as the Acquiring Market which is under consideration. The fact that this is a two-sided market means that to a limited extent the interplay or network effects between the two markets do matter, although they are not relevant to market definition. These network effects and their relevance are matters that are considered in the next Section.

(ii) The Scheme Market is entirely irrelevant: both Schemes represent the Focal Product in the Acquiring Market and – moreover – represent the only products in that market.

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[189] See, e.g., Mastercard Written Closing at [5(1)], [41]ff, [114(3)] and [117].

[190] Mastercard noted (Mastercard Written Closing at [113]), that "Issue 1 is concerned with market definition. This was an issue predominantly for the experts, and the experts broadly agreed on how the relevant markets should be defined and considered for the purposes of Trial 1. It is common ground that the relevant product markets are national in scope". This substantially papers over the very real differences between the experts, which concerned the question of substitutability. Whilst the experts were in agreement that there were three markets (Issuing, Acquiring and Scheme) and broadly in agreement as to how these markets operated (hence Section C's ability to state the relevant facts of Scheme operation uncontroversially), the parties were in substantial dispute on the question of substitutability, which is the whole point of Market Definition.

(4) The relevant geographic markets were uncontroversially the UK and Ireland. Generally speaking, it is not necessary to differentiate between the two, because they operate in identical ways.

(5) The Focal Product in the Acquiring Market is the Payment Acceptance Service offered by <u>both</u> Schemes without differentiating between the two. Put another way, the Payment Acceptance Service offered by Mastercard is the same as the Payment Acceptance Service offered by Visa and *vice versa*.

(6) There are no substitutes for the Focal Product as defined.

G. MATERIALITY: THEORY OF HARM AND FRAMING THE EVIDENCE

(1) A difference of approach

125. The Framework for analysis is set out at [10]. The Provision in Question – the allegedly anti-competitive restriction on competition – has been identified as the Default Interchange Fee Rule,[191] and its context and operation within the Scheme's ecosystem articulated.[192] Market Definition has been considered,[193] and conclusions have been reached in relation to:

(1) The identity of the Focal Product, which is the Payment Acceptance Service offered by <u>both</u> Mastercard and Visa in the Acquiring Market.[194] In other words – and this is important – the <u>same</u> Focal Product is offered without differentiation by Mastercard and Visa.

(2) The substitutes for the Focal Product in the Acquiring Market. I find that there are no substitutes for the Focal Product in this Market.[195]

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[191] See the Framework at [10(1)] and the consideration at [40].
[192] See the Framework at [10(1)] and the consideration at [19].
[193] See the Framework at [10(2)].
[194] See [89].
[195] See [124(2)], [124[5] and [124(6)]].

126. Given these conclusions and given the findings by the Supreme Court in the Sainsbury's SC Decision, the Theory of Harm[196] is straightforward to state: it is that the operation of the Default Interchange Fee Rule created an impermissible "floor" to the Merchant Service Charge payable by Merchants to Acquirers. [197]

127. In these circumstances, one might think that the analysis in this Judgment could straightforwardly progress to a consideration of the applicable Counterfactual,[198] of which there were three candidates before the Tribunal: one advanced by the Merchant Claimants (and opposed by the Schemes), one advanced by Mastercard (supported by Visa and opposed by the Merchant Claimants) and one advanced by Visa (supported by Mastercard and again opposed by the Merchant Claimants). These various Counterfactuals are considered in Section H. But before they can be considered, it is necessary to deal with the question of materiality articulated at [11].

128. The intractability of the issue – and the need to resolve it – is clear from the evidence of Dr Niels in Niels 1, which is set out at [117]. Dr Niels' evidence is a good example of the Schemes' <u>general</u> approach. The Schemes' contention was that the Theory of Harm was essentially wrong or misconceived because it made no difference: even if (which the Schemes disputed) the correct Counterfactual was a world with no Default Interchange Fee Rule and no Default MIFs, the average Merchant Service Charge paid by Merchants to Acquirers would be the same as what was presently paid in the real world. Taking the Theory of Harm as the description of the difference between the real world (where an alleged infringement was taking place) and the counterfactual world (where the alleged infringement was not taking place), there was <u>no difference between the two</u>. In consequence, the Default MIFs actually imposed by the Schemes in the real world (the alleged infringement) did not have the effect of restricting competition. They had, according to the Schemes, no effect

[196] See the Framework at [10(3)].
[197] This is the Theory of Harm articulated at [93] of the Sainsbury's SC Decision, which is set out at [56], which was the Merchant Claimants' Theory of Harm in these proceedings.
[198] See the Framework at [10(4)].

at all. There could, therefore, be no infringement of Article 101(1) TFEU by effect.[199]

129. Given that there are infinite causes of causes and consequences of consequences, it is obvious that this approach enables the deployment of all kinds of contingencies and possibilities to suggest that the Theory of Harm simply would not arise. It has already been noted that many of these contingencies and possibilities were actually speculative and not rooted in evidence.[200] The following points or variants on them faded in and out of view over the course of Trial 1, but their consistent direction of travel was an attack on the Theory of Harm. Thus, it was suggested that the abrogation of the Multilateral Interchange Fee would have adverse consequences in terms of the level of the Merchant Service Charge because:

(1) Benefits to Cardholders in the Issuing Market, funded by the interchange fee, would be lost or at least reduced if there was no interchange fee. As a result, there might be switching away from Cards to (for example) Amex, with higher benefits but with higher charges to Merchants, resulting in a higher effective Merchant Service Charge.

(2) Because of the higher risks and transaction costs to Issuers attaching to intra-regional and inter-regional transactions, unless there was reimbursement of these costs through an interchange fee, Card functionality might be reduced so as to prevent such transactions being honoured to the detriment of Customer/Cardholders and Merchants. Again, there might be "switching" from particular users (Dr Niels, it will be recalled, relied upon a switching to Amex by cardholders from the USA, Russia and Australia) with the result (again) that there would (in the counterfactual world) be a higher effecting Merchant Service Charge.

[199] It will readily be appreciated why the question of a by object infringement was such a "hot" topic between the parties, because these points are simply irrelevant to such an inquiry. The question of infringement will be considered in Section I once the various elements of the Framework have been parsed.
[200] See [109(3)(ii)].

130. The adverse cost consequences to Merchants of the removal of the Default Interchange Fee Rule can be framed in many different ways. That is because the Schemes contended that whilst the "floor" within the Merchant Service Charge that was the Multilateral Interchange Fee might be removed, it would be replaced by costs resulting from various chains of events in reaction to that removal involving Issuers, Cardholders and Schemes which would merely serve to replace one costs "floor" with another.

131. As noted at [118], the approach of the Schemes (as exemplified by the evidence of Dr Niels: but it is stressed that this was a common theme) was both confused and impermissible in terms of the approach that must be taken when considering whether there has been a <u>by effect</u> infringement of Article 101(1) TFEU in circumstances where the <u>quantification</u> of loss arising out of any infringement is not before the Tribunal and (assuming an infringement is found) lies for later determination. There are, in short, various "bright lines" which render the Schemes' contentions as to an "alternative floor" both irrelevant and impermissible for purposes of Trial 1. The following paragraphs address the various reasons why this is the case by way of a "clearing of the decks" so that the Counterfactuals advanced by the parties can properly be considered, and the question of anti-competitive effect coherently addressed.

(2) Confusion arising out of reliance upon the Scheme Market

132. Competition between Schemes is entirely irrelevant for the purposes of Trial 1. The existence of a Scheme Market is obvious, but also irrelevant, because the definition of Focal Product, the Payment Acceptance Service, is the output of <u>both</u> the Mastercard Scheme and the Visa Scheme. Thus, substitutability in the Scheme Market is both a given and irrelevant. Any arguments along the lines of the "death spiral" that found traction before Popplewell J in the Asda First Instance Decision have, for this reason, been laid to rest by the Sainsbury's CA and SC Decisions.

(3) Confusion arising out of a failure properly to address substitutability

133. Market Definition enables substitutes for the Focal Product to be identified. In this case, there are no substitutes. That does not mean that the application of a SSNIP to the price of the Focal Product will not result in some shifting of demand. It is simply that those shifts in demand (whatever they may be) are insufficient to render the application of a SSNIP uneconomic. As the Merchant Claimants consistently contended and as I find, the level of all Default MIFs is not subject to demand constraints from (i) Acquirers, (ii) Merchants and/or (iii) Customer/Cardholders.

134. Dr Niels in his analysis[201] confused Market Definition and substitutability for the quantification of costs (and so loss) to Merchants in the event that an infringement of Article 101(1) TFEU is established. It is unnecessary, in Trial 1, to go so far as to say that the switching of US, Russian and Australian Cardholders is in all circumstances irrelevant. But this switching is not relevant to questions of liability arising in Trial 1. If anything, the point is relevant to quantification of loss in the event that an infringement of Article 101 TFEU is established.

135. Out of deference to the points run by the Schemes, this distinction between liability and quantification is expanded upon at [141].

(4) Confusion arising out of two-sided markets

136. BGL at [31] says:

> "It is necessary to be very clear that the Framework does not consider pro-competitive effects. Unlike in the United States, where pro- and anti-competitive effects are considered at the same stage and "balanced", the framework focusses only on infringements. It is, of course, possible to justify an infringement on grounds of competition: see section 9 of the Competition Act 1998 and Article 101(3) TFEU."

137. Article 101(3) TFEU questions are not before us in Trial 1. BGL was a case where the CMA had found a "by effect" infringement of the Chapter I

[201] See the paragraphs quoted at [117].

prohibition/Article 101(1) TFEU in a two-sided market. However, the approach that a regulator must take in considering whether there has been an infringement will be no different from the approach that must be taken when faced with the same question. At [120], the Tribunal in BGL stated:[202]

> "(11) The complexities of a two-sided market should not distort the process whereby – after defining the market – the regulator will consider whether a finding of anti-competitive conduct and infringement of the Chapter I Prohibition is justified. Once the market has been defined, the context for consideration of infringement has been laid out, and the regulator may be confronted by: (i) multiple adverse or non-beneficial effects; and/or (ii) one or more positive or beneficial effects. As to these:
>
> (i) In the former case – multiple adverse or non-beneficial effects – the anti-competitive effect of each needs to be considered. That simply means multiple, no doubt very much related, strands of investigation.
>
> (ii) In the latter case – one or more positive or beneficial effects – the competition authority will have less interest in investigating these, but they can and should be deployed in defending an alleged competition law infringement. Unlike the United States, competition law in this jurisdiction does not in the same process "balance" positive and negative anti-competitive effects. The position in the United States is described by Whish and Bailey in the following terms:
>
> > "Section 1 of the US Sherman Act 1890 characterises some agreements as *per se* illegal, whereas others are subject to so-called rule of reason analysis: application of the rule of reason requires a balancing of the pro- and anti-competitive effects of an agreement. Where there is a *per se* infringement it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that has, by law, been found to be restrictive of competition. There is an obvious analogy between an agreement that is *per se* illegal under the Sherman Act and one that is restrictive of competition by object under [the Chapter I prohibition]. However, there is an important

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[202] To similar effect is the general court's decision in Case T-112/99, *Metropole Television v. Commission*, EU:T:2001 at [74], quoted at [318] of the Merchant Claimants' Written Closing:

> "Article [101] TFEU expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro- and anti-competitive aspects of a restriction may be weighed…Article [101(3)] TFEU would lose much of its effectiveness if such an examination had to be carried out already under [Article 101(1) TFEU]."

This is true of all markets, but particularly so in the case of two-sided markets.

> > difference between section 1 of the Sherman Act and [section 2 of the Competition Act 1998] in that, even if an agreement has as its object the restriction of competition, that is to say it infringes [section 2] *per se*, the parties can still attempt to justify it under [section 9 of the Competition Act 1998]. This possibility does not exist in US law, since there is no equivalent of [section 9] in that system."
>
> Whish and Bailey were here considering "by object" infringements, but the analysis of the differences between the US and EU (and, by analogy, the UK) systems also holds good as regards "by effect" infringements. The UK regime does not permit the "balancing" of pro- and anti-competitive effects at all. If a "by effect" infringement of the Chapter I Prohibition is established, then there is an infringement, unless the provisions of section 9 of the Competition Act 1998 are engaged. In substance, this might be regarded as a distinction without a difference, but in terms of process and analysis it is hugely significant. A regulator is perfectly entitled to find a "by effect" infringement on the basis of an infringement of the Chapter I prohibition, and bears the burden of proof in this regard; on the other hand, where a section 9 defence is invoked, the burden of proof falls on the person asserting the benefit."

138. The submissions of the Merchant Claimants in this regard are correct and it is necessary to consider the effects of the counterfactual scenarios in this way. The boundary between Article 101(1) TFEU and 101(3) TFEU was correctly described in Section G(2) of the Merchant Claimants' Written Closing. In particular, at [321], the Merchant Claimants noted:

> "If the Schemes are permitted to bring the analysis of countervailing benefits (whether in terms of welfare / efficiency or offsetting benefits of increased competition between payment systems) which properly form part of Article 101(3) into Article 101(1) and to invite the Tribunal to conduct some form of "Article 101(3)-lite" enquiry, the result would be to allow them to evade the specific conditions laid out in Article 101(3). This point was well captured in an exchange with Dr Niels on Day 16 in connection with his argument that implementing settlement at par could lead to a growth in Amex transactions and thus a rise in market wide payment costs. In discussing whether this properly fell to be considered in Article 101(1) or 101(3), Mr Tidswell commented that given that Article 101(3) required the court to look at both costs and benefits for "the merchant pool as a whole as to whether or not they are actually competitively better off with the restriction in place", it was "logically quite odd" to carry out a partial analysis of merchant costs and benefits within Article 101(1) as that meant that "you are never getting past 101(1) because you are playing into it, into that analysis, a partial merchant benefit analysis."

The following points follow from this, by way of emphasis and clarification in cases where two-sided markets are in issue:

(1) Because of the balancing approach taken in the United States, there is an inclination to approach the question of market definition broadly, so as to embrace all markets operating off a single platform, and so as to take into account the beneficial network effects that arise from the interplay between the markets.[203] The approach to market definition informed by Article 101 TFEU looks more narrowly to a defined focal product in a given market, here payment services to Customer/Cardholders and Merchants in the Acquiring Market.

(2) The operation of the Issuing Market and its interplay with the Acquiring Market (to take this particular case) is of only secondary relevance. Consideration of the effects of the abrogation of the Default Interchange Fee Rule in the Issuing Market is, for this reason, not before the Tribunal in Trial 1. That reflects not only the correct approach but also the evidence that was lead before us in Trial 1. Clearly, the evidence that will need to be considered when Article 101(3) TFEU comes to be determined will be more wide-ranging.[204]

(3) The operation of the Issuing Market and the network effects as between the Issuing Market and the Acquiring Market are of secondary relevance, but they are <u>not</u> altogether irrelevant. For instance, had it been the Schemes' contention that the network effects between the two markets was such that the Issuing Market could not function without the Multilateral Interchange Fee because of its effects in the Acquiring Market, that is something I would have wanted to consider. But no such contention was ever advanced by the Schemes. The Schemes only went so far as to articulate certain benefits of the Multilateral Interchange Fee in the Issuing Market and the extent to which those benefits can justify

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[203] In other words, to revert to the free newspaper example cited above, when considering advertiser rates one might consider also the benefit of free newspapers to readers, and how this expands the number of persons an advertisement reaches. This approach is controversial even in the United States, as the dissents in *Ohio v. American Express* demonstrate: see BGL at [120(11)(iii)].

[204] A point made by the Merchant Claimants in their Written Closing at [321].

what would otherwise be an infringement of Article 101(1) TFEU are for later trial.

(5) Confusion between liability under Article 101(1) TFEU and quantification of loss <u>if</u> there is liability

139. In English law, competition law infringements are vindicated as statutory torts. To establish a claim (i) an infringement of competition law must be shown, as well as (ii) actionable harm or damage caused by that infringement. Trial 1 is intended to determine whether there has been an infringement of Article 101(1) TFEU, but (since the question of exemptability under Article 101(3) TFEU remains live for later trial) cannot finally determine whether there has been an infringement.

140. Subject to this qualification concerning Article 101(3) TFEU, the existence of actionable harm or damage <u>does</u> fall within the scope of Trial 1, but the <u>quantification</u> of that harm is firmly outside the scope of Trial 1. A great deal of the evidence adduced by the Schemes, when properly understood and contextualised, actually goes to the question of quantification and not to the question of liability.

141. The principles of liability and quantification and the difference between the two are well-known and well-understood by all litigants in this Tribunal. But it is important that these are stated in order for the point made in [140] to be understood: these principles inform the analysis of much of the true nature of the Schemes' evidence:

(1) Damage is by no means always a prerequisite for a complete cause of action. It is not necessary to show loss or damage to bring an action for breach of contract, but it is necessary for an action in the tort of negligence or (as here) for breach of statutory duty. Where loss or damage <u>is</u> one of the elements of the cause of action, it is referred to as "actionable damage".

(2) The elements of a cause of action must be proved, by the claimant, on the balance of probabilities. The court adopts an "all or nothing" approach in such cases, including as to actionable damage. As Lord Reid stated in *Davies v. Taylor*:[205]

> "When the question is whether a certain thing is or is not true – whether a certain event did or did not happen – then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen."

(3) In an effects case, where it is alleged that there has been an infringement of Article 101(1) TFEU <u>by effect</u>, then it will be a rare case (if ever) for actionable damage not also to exist.[206] In Article 101 TFEU cases, actionable damage can be defined in the following way:[207]

> "When seeking to articulate what constitutes actionable harm, it is necessary to have regard to the object and scope of the statutory duty imposed. In this case, the object and scope of the provision is the preservation and protection of competition from collusive efforts to undermine it. This purpose must inform the "gist" or actual damage that a claimant must show when bringing a private action for damages. More specifically:
>
> (1) Cartel cases[[208]] do not, by definition, involve a single actor. Cartel cases involve two or more actors, by agreement or concerted practice, acting with the object or effect of preventing, restricting or distorting competition. It is not possible, in cartel cases, to identify the act of a single person that can be tested as being the cause of a claimant's harm. It is the collective failure to compete that is the wrong at which Article 101 TFEU is aimed.
>
> (2) In this, Article 101 TFEU is different even from abuse of a dominant position under Article 102 TFEU, which is directed towards the unilateral conduct of dominant firms which act in an abusive manner. In such a case, assuming the abuse has been identified and proved, it is possible, applying the approach of Stuart-Smith LJ in *Allied Maples Group Ltd v. Simmons &*

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[205] [1974] AC 207 at 213.

[206] Para 13, Part 4, Schedule 8A of the Competition Act 1998 (as inserted by Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017/385) provides that for the period from 2017 onwards: "For the purposes of competition proceedings, it is to be presumed, unless the contrary is proved, that a cartel causes loss or damage."

[207] *BritNed Development Ltd v. ABB*, [2018] EWHC 2616 (Ch) at [427], affirmed without comment on this point on appeal.

[208] The term "cartel cases" include cases of agreements that are alleged to have anti-competitive effects. In many cases, one person's "cartel" is another's commercially legitimate agreement. The reach of Article 101 TFEU is wide, and agreements that infringe can be described as "anti-competitive" or "cartels". The latter term is more precise."

Simmons, [1995] 1 WLR 1602, 1609-1610, to ascertain what loss the abuse has caused.

(3) What the collusive misconduct of cartelists does is prevent, restrict or distort competition. To require a claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the "gist" damage, is that the unlawful conduct of the defendant has, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. In other words, that the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers *properly* participating in a tender process. I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it."

This wide conception of actionable damage derives from Article 101 TFEU itself, where it is uncontroversial that a restriction by effect can extend to potential effects on the market.[209]

(4) Establishing liability under Article 101 TFEU – including as to actionable damage – says nothing about quantification of loss and damage. In cases of tort, including breach of statutory duty, the court must, so far as damages are able to do so, place the claimant in the position they would have been in had the breach of duty not occurred. That assessment is not done on a balance of probabilities, but involves an assessment of the many probabilities and contingencies, often accompanied by sound imagination and the application of a "broad axe" or "broad brush". It is not part of this Judgment to articulate the principles according to which the process of quantification of harm is to be undertaken in this or any other case. The question is raised because much of the evidence adduced by the Schemes went not to liability but to quantum. Thus, for instance, <u>if</u> the consequence of non-charging of Multilateral Interchange Fees by the Schemes is that there are countervailing upward and downward pressures on the Merchant Service Charge, then there is a strong argument for saying (subject

[209] Whish & Bailey, *Competition Law*, 11th ed (2024) at 140.

always to causation and remoteness) that a claimant can only recover the net amount.[210] Dr Niels' switching US, Russian and Australian Cardholders, generating a higher Merchant Service Charge by reason of Amex's higher charges would appear to be (without in any way committing a future Tribunal) matters going to quantum. They are certainly not matters going to liability or to the existence of a "by effect" infringement under Article 101(1) TFEU.

H. COUNTERFACTUALS

(1) Introductory points

(a) The nature of counterfactuals

142. Counterfactuals are common in the law, particularly in the context of damages, where the very method of assessment requires a counterfactual evaluation. The role of a counterfactual in competition law is to enable the effects of an allegedly anti-competitive provision to be evaluated. Here, the allegedly anti-competitive provision is the provision allowing the Schemes to set default interchange fees. It is the significance of the absence of this provision that needs to be considered. The Merchant Claimants put it this way: "holding all relevant factors equal save for eliminating the agreement which gives rise to the anti-competitive restriction".[211] In this case, the counterfactual must eliminate either the Default Interchange Fee *in toto* (which was the approach of the Merchant Claimants) or else sufficiently rewrite it so as to remove the anti-competitive issue (which was the approach of the Schemes). As a matter of principle, either approach works, and neither one is to be preferred over the other.

[210] Suppose a Merchant Service Charge of £1 comprises 90p Multilateral Interchange Fee and 10p Acquirer costs and profit, but that (absent the Multilateral Interchange Fee) there would be additional costs of 70p. Assuming that competition drives Acquirer charges down, the claimant's damages will have to take account the additional costs of 70p as well as the saving of 90p, and might be at the net figure of 20p.
[211] Merchant Claimants' Written Closing, [5(1)].

(b) Counterfactuals are not findings of fact, but must be evidentially rooted

143. Self-evidently, counterfactuals do not involve a court or tribunal making findings of fact in the traditional sense.[212] However, counterfactual findings do need:

(1) To be consistent with the market as defined and consistent with the nature of the focal product as found to exist.

(2) To be realistic in all other respects.

(3) To properly reflect the economic evidence articulated before the Tribunal.

(4) To appropriately respect the Prior Record:

(i) The significance of this has been explained. It is only necessary to stress that the Prior Record is (i) extremely important in this case, given its nature, but (ii) not absolutely binding nor to be slavishly followed.

(ii) The significance of the Prior Record is rooted in the abuse of process/collateral attack doctrine and, at its most extreme, can result in certain points effectively being "struck out" as unarguable given the Prior Record. But the doctrine is not "all or nothing" and it is certainly the case that a point articulated by a party may not be struck out because of the Prior Record, but may be accorded significantly less weight.

(iii) In this case (other cases may be different) the temporal extent of the Prior Record and the detail of the examination afforded to the Multilateral Interchange Fee means that consistency with that

[212] *Hydrocortisone*, at [186].

record is (again in this case) of great significance. The weightier the antecedent record, the greater the importance attaching to consistency. In cases such as this, where there has been comprehensive consideration of the allegedly offending provision in prior decisions, consistency is important, provided that the fairness of the individual trial (given that these are factual questions) is not undermined.

(c) Over-engineering

144. Generally speaking, counterfactuals simply proceed in evaluating what would be the case if the offending provision was <u>absent</u>. That is the course to be preferred, because, like Occam's razor, it avoids over-complication. The Merchant Claimants contended that the counterfactuals advanced by the Schemes were not "proper" counterfactuals because:[213]

> "[…] they purport not only to exclude from the counterfactual the putatively restrictive terms (i.e. the MIF, and the Anti-Steering Rules) but selectively to exclude other terms (such as Mastercard's settlement rules) and to rewrite the way in which the Schemes operate. This is contrary to basic principles as to how the Article 101(1) counterfactual analysis is to be conducted."

145. It would be wrong to go so far as to say that proposing different ways in which the Schemes could work, involving the addition of terms, as well as the subtraction of the offending provision, cannot properly be undertaken: see [142]. If and to the extent that was the Merchant Claimants' contention, it is to be rejected. However, the extent to which a counterfactual is over-complex or involves the making of too many positive assumptions <u>is</u> a relevant factor, and if this is what the Merchant Claimants were saying, then this is indeed a relevant consideration. Whether the Schemes' counterfactuals are to be tarred with that brush is an altogether different question.

(d) Specific factors relating to the counterfactuals in these proceedings

146. The counterfactuals, in this case, involve two specific considerations.

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[213] Merchant Claimants' Written Closing at [11].

147. First, both of the counterfactual cases advanced by the Schemes relied upon the Interchange Fee Regulation. Indeed, it would not be exaggerating to say that the Interchange Fee Regulation lay at the heart of both the Mastercard and the Visa counterfactuals. This was for two reasons:

(1) First, the Interchange Fee Regulation was relied upon to distinguish the Prior Record. Essentially, the contention was that the post-Interchange Fee Regulation world was so different from the regime previously applying that questions of consistency or "bindingness" of the Prior Record could be relegated to the "back seat" and regarded as either totally irrelevant or else of marginal significance.[214]

(2) Secondly, the Interchange Fee Regulation – which imposes a "cap" on certain Default MIFs – is integral to the operation of the counterfactuals, particularly the counterfactual advanced by Visa. The extent to which a counterfactual can deploy a legislatively imposed "ceiling" is one which was highly contentious between the parties. Thus, the Merchant Claimants contended that:[215]

> "*[…]* both of these counterfactuals fail *in limine* as a matter of law because they expressly rely on the existence of the IFR in the counterfactual."

In the case of both the Mastercard and the Visa counterfactuals, these counterfactuals could not operate where the Interchange Fee Regulation did not bite.[216]

148. Secondly, there is the question of the extent to which the counterfactuals need to factor in or take into account not merely the need to deal with the removal of or adjustment to the Default Interchange Fee Rule, but also specific Default MIFs. The reasons for disregarding as immaterial the Default MIFs when defining the market have already been stated.[217] No-one contended that specific

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[214] The Merchant Claimants contended for a hard-edged application of the Prior Record to the counterfactual cases articulated by the Schemes. See, further, Merchant Claimants' Written Closing at [31].
[215] Merchant Claimants' Written Closing at [12].
[216] See, for example, the exchanges with Ms Tolaney, KC at Day 20/pp.170*ff*.
[217] See [93].

Default MIFs were relevant to the framing of counterfactuals, save to the extent that only some Default MIFs are actually regulated by the Interchange Fee Regulation. To the extent that Default MIFs were not regulated by the Interchange Fee Regulation, the Scheme counterfactuals obviously are insufficient. Apart from this, however, the counterfactuals contended for by the Schemes do not need to differentiate between different cases and work as well with a single default as with multiple Default MIFs.

(2) The counterfactuals articulated by the parties

(a) Introduction

149. Three counterfactuals were put forward by the parties:

(1) The **No-MIFs Counterfactual**, advanced by the Merchant Claimants.

(2) The **Pure Bilaterals Counterfactual**, advanced by Mastercard and supported, in the alternative, by Visa.

(3) The **Unilateral Interchange Fee Counterfactual**, advanced by Visa and supported, in the alternative, by Mastercard.

150. There was only limited common ground between the parties. Mastercard and Visa contended that the Claimants' counterfactual should be rejected, and each preferred their counterfactual over that advanced by the other Scheme. The Claimants for their part contended that the Schemes' counterfactuals were untenable.

151. The nature of these three counterfactuals is described before considering in greater detail which is to be preferred. It is important to note that only one counterfactual can be chosen and that the choice of counterfactual makes a very real difference to the questions of infringement that follow. Indeed, the counterfactual – at least in this case – significantly affects the question of infringement.

152. Before proceeding to the description of the three counterfactuals in play, it is necessary to articulate with precision the mischief that the counterfactual is intended to avoid. In short, what is the anti-competitive conduct that needs to be removed by the counterfactual in order to understand whether there is an anti-competitive effect?

(b) The counterfactual objective

153. For the Merchant Claimants, the counterfactual objective is shortly stated. It is the removal of the Default Interchange Fee Rule, without any replacement rule. It is, therefore, unnecessary to specify what <u>parts</u> of the Default Interchange Fee Rule are pernicious and unnecessary to consider whether the counterfactual proposed "fits the bill". It obviously does, because the counterfactual contended for removes the allegedly offensive provision.

154. That is not so in the case of the counterfactuals proposed by the Schemes. Both the Pure Bilaterals Counterfactual and the Unilateral Interchange Fee Counterfactual involved <u>replacing</u> the Default Interchange Fee Rule <u>with something else</u>. In principle, that is not a problem, although this does risk over-complexity. In order to determine the adequacy of the counterfactual in such cases, it is necessary to be absolutely clear what "mischief" needs to be removed.

155. In this, the answer is provided by the Prior Record and in particular by the Sainsbury's SC Decision at [93], as cited above at [57(4)] (itself referring to the Prior Record, of which the Sainsbury's SC Decision became a part).

156. It is obvious from this why the Merchant Claimants relied so heavily on the Sainsbury's SC Decision. Indeed, proposition (iv) articulates and endorses the identical counterfactual advanced before us by the Merchant Claimants (the No-MIFs Counterfactual). Obviously, whether proposition (iv) holds good in the present case in circumstances where the Schemes are contending for a <u>different</u> counterfactual needs to be considered, and it would be wrong to pre-determine that question, which is considered afresh in this Judgment. However, this paragraph not merely articulates what the Supreme Court considered the

appropriate counterfactual to be in the case before them (i.e. proposition (iv)), but also sets out the essential infringing conduct the effects of which need to be measured.

157. That essential infringing conduct is as follows:

(1) The Multilateral Interchange Fee– and to be clear, each and every specific Default MIF imposed pursuant to the Default Interchange Fee Rule – is determined by collective agreement.[218]

(2) The Multilateral Interchange Fee and each and every Default MIF is imposed on Acquirers and Merchants without enabling the Acquirers or the Merchants to negotiate a different Multilateral Interchange Fee (i.e. there is a prevention of competition).[219]

(3) As a result, a non-negotiable "floor" is created in the structure of the Merchant Service Charge, which inhibits competition.[220]

158. These findings cannot (properly) be gainsaid in these proceedings and they define the "mischief" that any counterfactual must resolve in order to be fit for purpose. This is an important conclusion, and it is important, therefore, that it be justified:

(1) In the first place, these findings represent the independently arrived at conclusions of this Judgment, having heard the evidence as to the operation of the Schemes. In particular, the findings are absolutely consistent with the Market Definition found in this Judgment.[221]

[218] I.e. Supreme Court proposition (i).
[219] I.e. Supreme Court proposition (iii) and to an extent (vi). Proposition (vi) articulates a negative effect, suggesting that the Merchant Service Charge would be lower. At this point, nothing is said about this, but the point that is bindingly made is that there is a constraint on negotiation. Indeed, the Acquirers and the Merchants are actually constrained even from negotiating a higher Multilateral Interchange Fee. That, as shall be seen, is a question of practicality closely related to the difficulty in agreeing Bilateral Interchange Fees, a point that lies at the heart of the Pure Bilaterals Counterfactual advanced by Mastercard.
[220] I.e. Supreme Court propositions (ii) and (iii).
[221] See, in particular, Sections C and F.

(2) Secondly, the weight to be attached to these findings, which arise out of the Prior Record, is enormous. The question does not arise, because these are findings of fact independently made, but neither Scheme can properly contend against the propositions; to do so would likely be an abuse of process.

159. The abuse of process question does not arise, for the Schemes were careful to accept, and not push against, the findings in the Sainsbury's SC Decision. They resist the finding as to the appropriate counterfactual. For the present, whilst proposition (iv) ought to be accorded great weight, the counterfactuals advanced by the Schemes do not when considered as a whole constitute an illegitimate collateral attack on the Prior Record. In essence that is because of the material difference made by the Interchange Fee Regulation: see [45] to [46].

(c) The No-MIFs Counterfactual

160. According to the Merchant Claimants, the counterfactual in the present case involves:[222]

> "*[...]* removing only (i) the requirement by default to apply the MIF set by the Schemes; and (ii) the Anti-Steering Rules that support the MIF. Since the MIF inevitably feeds into the calculation of the MSC it follows that in a world without the MIF, and all else being equal, the MSC would be lower. That is sufficient to establish an actual or potential anti-competitive effect for Article 101(1) purposes."

161. This counterfactual is best expressed as a counterfactual where there is no Default Interchange Fee Rule. In other words, unless individual Issuers or Acquirers positively <u>want</u> to agree a payment flow between themselves, over and above the Settlement Rule and the obligation to pay Scheme Fees, they may do so: but they do not have to do so.

162. The No-MIFs Counterfactual is often referred to as involving "settlement at par". Indeed, that is the terminology used in the Sainsbury's SC Decision and (with some frequency) by the Schemes.[223] Although this is no doubt a

[222] Merchant Claimants' Written Closing, [5(2)].
[223] See, e.g. Mastercard Written Closing at [134].

convenient shorthand, it is (if used without reference to the facts and matters articulated at [125]) capable of being misleading:

(1) Settlement at par might be thought to refer to non-discrimination in price as between a purchase from a Merchant by a Customer/Cardholder and a Customer who is <u>not</u> a Cardholder. In other words, not only does the Customer/Cardholder pay the same amount as the Customer paying without the use of a Card, but also the Merchant receives the same amount of money in both scenarios. That is not the effect of the No-MIFs Counterfactual, which only presupposes the non-deduction of the Multilateral Interchange Fee during the course of settlement.

(2) Settlement at par involves the Merchant receiving 100% of the price paid by the Customer/Cardholder. The effect of the Multilateral Interchange Fee is to cause the Merchant to receive <u>less</u> than 100%, as the Merchant Claimants Diagram (Annex 4) shows. <u>But</u> the No-MIFs Counterfactual does <u>not</u> result in settlement at par, for the Merchant is obliged to pay Scheme Fees and these are (and in the counterfactual continue to be) deducted during the settlement process, meaning that the Merchant still does not settle at par. No-one – certainly not the Merchant Claimants – was suggesting that the obligation to pay Scheme Fees and to have these deducted during the course of settlement was illegitimate, and it is important for us to stress that.

"Settlement at par" is not a feature of the No-MIFs Counterfactual. The term will be avoided so far as possible.

(d) The Pure Bilaterals Counterfactual

163. The Pure Bilaterals Counterfactual is summarised by Mastercard as follows:[224]

> "*[...]* in the Bilaterals Counterfactual, Mastercard would have had no scheme rules in relation to settlement. Thus, issuers and acquirers would have been left

[224] Mastercard Written Closing at [149].

to negotiate their terms of settlement including any applicable interchange fee, through bilateral negotiations."

164. What the counterfactual does is remove the Default Interchange Fee Rule, but keep in place the requirement that there be an interchange fee as between an Issuer and an Acquirer. That means a Bilateral Interchange Fee. The Pure Bilaterals Counterfactual thus addresses the mischief of an imposed fee or "floor" by abjuring any kind of default rate. There is no Multilateral Interchange Fee and no Default Interchange Fee Rule. There are no Default MIFs. The key difference between the No-MIFs Counterfactual and the Pure Bilaterals Counterfactual is that whereas the No MIFs Counterfactual does away with the interchange fees altogether (Issuers and Acquirers can participate in the Schemes without having agreed an interchange fee and without there being one in place at all), the Pure Bilaterals Counterfactual requires that there be a negotiated interchange fee before either the Acquirer or the Issuer can participate in the Scheme: [225]

> "However, the Illustrative Scheme Rules do not require this. They simply provide that processing through Mastercard's independent processing business would only be available for transactions between an issuer and acquirer pair that do have a bilateral agreement in place (i.e. agreed terms based on which the processor can calculate the sums due). If an issuer and acquirer have not yet reached or do not reach a bilateral agreement, they would have to clear and settle their transactions directly (or through a third party processor). As explained below…, both peer-to-peer settlement and third party processing have always been possible under the Mastercard scheme and have been commonly used in different European countries and time periods (including in the UK prior to the 2000s)."

165. The critical question is how this Bilateral Interchange Fee will come to be agreed without a rate imposed in default of agreement.

(e) The Unilateral Interchange Fee Counterfactual

166. The Unilateral Interchange Fee Counterfactual involves:[226]

[225] Mastercard Written Closing at [156], emphasis added.
[226] Mastercard Written Closing at [166].

(1) Issuers and Acquirers agreeing the applicable interchange fee through bilateral negotiations. In other words, a Bilateral Interchange Fee is the primary objective.

(2) Absent bilateral agreement, the Scheme Rules would allow Issuers unilaterally to determine the applicable interchange fee rates, subject to the caps determined in the Interchange Fee Regulation. Such rates would have to be notified or stipulated in advance, and would be published by the Issuer. Thus, the counterfactual creates a default, albeit one that is not laid down by the Scheme operator.

(3) If the Issuer does <u>not</u> notify an interchange fee rate, then the transaction will settle without an interchange fee being subtracted during the process of settlement.

(f) Approach

167. The various counterfactuals are considered in the following order. First, the Pure Bilaterals Counterfactual articulated by Mastercard, but supported by Visa is considered. Secondly, the Unilateral Interchange Fee Counterfactual advanced by Visa and supported by Mastercard is considered. Thirdly, and finally, the Merchant Claimant's counterfactual, the No-MIF Counterfactual, is considered.

(3) The Pure Bilaterals Counterfactual

(a) Introduction

168. The Pure Bilaterals Counterfactual is described at [163] to [164]. The Pure Bilaterals Counterfactual is not a possible or viable counterfactual in this case, for the following reasons:

(1) The Pure Bilaterals Counterfactual either contains a disguised Default Interchange Fee Rule (and so does not cure the mischief of that rule) or it is so destructive of the Scheme as a whole as to be completely unrealistic.

(2) In the face of Mastercard's opposition, this Tribunal (in the Sainsbury's CAT Decision) found for a counterfactual based upon Bilateral Interchange Fee agreements between all Issuers and all Acquirers. In the Asda First Instance Decision and on appeal in the Sainsbury's CA Decision, it was Mastercard's case that bilaterals would not be capable of agreement. That argument was accepted by both Popplewell J, the Court of Appeal and the Supreme Court. It is not open to Mastercard to mount what is a collateral attack on findings made by other Tribunals as part of the Prior Record in circumstances where Mastercard has in substance reversed its position and is now contending for something which it previously was resisting. This is an abuse of process and the counterfactual should be rejected for this reason alone.

(3) The Pure Bilaterals Counterfactual is dependent upon the Interchange Fee Regulation, which only applies to some Default MIFs, not all of them. If (as is Mastercard's case) the "cap" imposed by the Interchange Fee Regulation is necessary for the counterfactual to work, then the fact that the Interchange Fee Regulation leaves some Default MIFs "uncapped" is fatal to the counterfactual.

These three points are considered in turn below.

(b) The Pure Bilaterals Counterfactual destroys the settlement process

169. Settlement between participants in the Schemes is the fundamental purpose of the Schemes. Without settlement, Merchants do not get paid. In order for Merchants to be paid there must be an established and reliable money flow from Cardholder to Merchant that operates <u>every time</u> a Card is used in a transaction. That is so – it must be stressed – whoever issues the Card, as a consequence of the Honour All Cards Rule. In other words, settlement is <u>Issuer indifferent</u>. The point being made is that the Schemes operate as a network under the Scheme Rules, whereby each Issuer issues Cards that are accepted by Merchants contracting with an Acquirer Scheme member. The Scheme Rules form an "umbrella" under which all Card transactions operate according to the same rules.

170. By putting in place a conditionality to settlement – the pre-condition that there be a Bilateral Interchange Fee separately agreed between Issuer and Acquirer – the Scheme system is either rendered unworkable or so damaged as to be rendered sufficiently unreliable so as to end up unworkable. The Pure Bilaterals Counterfactual imagines the Schemes out of existence.

171. Mastercard's case was that the Schemes would function as normal <u>except</u> that the Default Interchange Fee Rule would be removed and replaced by a voluntary process whereby a Bilateral Interchange Fee could (but would not necessarily) be agreed between an Issuer and an Acquirer. It was the thesis of Mastercard that agreement between Issuer and Acquirer would be facilitated by the ceiling on interchange fees imposed by the Interchange Fee Regulation. The significance of the Interchange Fee Regulation is dealt with later: the point that needs to be underlined is that should Issuer and Acquirer not agree, there will be no default in lieu of agreement.

172. These points were put to Ms Tolaney KC in the course of her oral closing submissions in the afternoon of Day 20:[227]

(1) Referring to the Tribunal Diagram (Annex 3), it was common ground that the contractual structure forming the legs of the "A" would remain in place in the counterfactual case,[228] but that the crossbar representing the Default Interchange Fee Rule would be changed so as to eliminate the default but require in place an agreement between each Issuer and Acquirer of the interchange fee payable in any given transaction.[229]

(2) The inability of one or more Acquirers to fail to agree Bilateral Interchange Fees with one or more Issuers (and *vice versa*) is thus the key feature of the counterfactual. It replaces the non-negotiated default with what must be (for there to be a competition-law compliant

[227] See Day 20/pp.141ff. The Tribunal had made clear in the morning that it had significant issues with the Pure Bilaterals Counterfactual and provided (admittedly on short notice) a note setting some of these concerns: Day 20/pp.1 to 2.
[228] Day 20/pp.141 to 142.
[229] Day 20/pp.142 to 144.

counterfactual) a free negotiation between counterparty Acquirers and Issuers.

(3) Mastercard contended that agreement between Issuers and Acquirers would be likely, particularly because the Interchange Fee Regulation would prevent Issuers from rapaciously demanding too high an interchange fee.[230] In other words, the Interchange Fee Regulation prevented "hold up".[231] The relevance of "hold up" in this case is difficult to understand. Since the counterfactual is based upon the premise of free negotiation, it must allow the case where there is non-agreement between an Issuer and an Acquirer. It must be robust enough to deal with the case where one or more Issuers cannot agree with one or more Acquirers. Otherwise, the counterfactual contains a variant of the very rule that needs to be removed from the counterfactual world, namely the Default Interchange Fee Rule. It is not open to Mastercard to contend that agreement will be inevitable, because that is removing the essence of the counterfactual, and simply putting in place a de facto default value in place of the "freely negotiated" Bilateral Interchange Fee.

173. It may be that there are so many Issuers in the Issuing Market and so many Acquirers in the Acquiring Market that bilateral agreements between all of them is simply not possible. It will be recalled that in the Sainsbury's CAT Decision, bilaterals between all Issuers and all Acquirers were postulated as part of the Tribunal's counterfactual, which Mastercard then contended was not realistic with which submission both Popplewell J and the Court of Appeal agreed. This will be considered in due course: for the present I proceed on the basis that there is no reason of practicality why all Issuers cannot agree with all Acquirers. However, the fundamental point remains that even if practically possible, the essence of the Pure Bilaterals Counterfactual is that every Issuer and every Acquirer is free not to agree a Bilateral Interchange Fee, albeit that the

[230] See, for example, Day 20/pp.148 to 152.
[231] This is a term derived from FRAND cases where a patent holder is incentivised to withhold agreement to a licence because they hold the bargaining advantage.

consequence of this is that transactions involving the non-agreeing Acquirer/Issuer cannot be settled through the Scheme.

174. This fatally undermines the Scheme, which is predicated upon settlement operating unimpaired between each participating Issuer and each participating Acquirer/Merchant. Suppose a simplified Scheme where there are only 10 Issuers and only 10 Acquirers, with each Acquirer only having 10 subscribing Merchants. One Issuer and one Acquirer decline to agree Bilateral Interchange Fees.[232] What happens when a Cardholder using a Card that has been issued under the Scheme presents it (in the usual way) to a Merchant participating in the Scheme through an agreement with an Acquirer in circumstances where one participant in the chain has failed to agree a Bilateral Interchange Fee? <u>Either</u> the Scheme needs to have in place a monitoring system to ensure that transactions that should not settle because there is no bilaterally agreed interchange fee do not settle (which would mean revising rules like the Honour All Cards Rule) or the transaction settles <u>without</u> an interchange fee having been agreed (in which case one has a clear incentive on Acquirers <u>not</u> to agree any Bilateral Interchange Fee, because the transaction will settle "at par" to use that unwelcome expression).

175. The point was put to Ms Tolaney, KC, who had no answer to it:[233]

Q (Chair)	…I think Mr Beal's point – and he will, I am sure, correct me in reply if I am wrong – is that in order for the system to work you actually do have to have each acquirer entering into a bilateral with each issuer. And if that is the position, then one is looking remarkably much closer to a kind of collusive arrangement than a true bilateral. So I am attaching considerable importance to your answer that I, a single acquirer, am able to say I am going to contract with that Issuing Bank, but no-one else. Have I got that right?
A (Ms Tolaney, KC)	Well, I think the Honour All Issuers Rule would prevent that approach.

[232] There is an ambiguity here: the Issuer could decline to agree any Bilateral Interchange Fee with any Acquirer (i.e. not agree with all 10) and *vice versa* with the Acquirer (not agreeing with any of the 10 Issuers) or there could be non-agreement between a single Acquirer and a single Issuer. The ambiguity does not matter, because it simply affects the scale of the problem, not the problem of non-agreement itself.

[233] Day 20/pp.165*ff*.

Q (Chair) Ah, right. So what are you saying then?

A (Ms Tolaney, KC) We are saying that the vast majority of the transactions…

Q (Chair) No: I mean, what you are saying, I think, is that the Honour All Issuers Rule, which would be a Scheme Rule – am I right?

A (Ms Tolaney, KC) That is right.

Q (Chair) That would oblige me, a single Acquirer, to accept a Card even if it was presented by a Cardholder whose Issuing Bank I was not in contractual relations with? Is that right?

A (Ms Tolaney, KC) Yes.

Q (Chair) I see. So how does that work, given that we have agreed that the only way you can have settlement and clearance is if there is a bilateral and ex hypothesi there would not be?

A (Ms Tolaney, KC) Because the reality of the situation, sir, is – that is what I am trying to work through…

Q (Chair) Right.

A (Ms Tolaney, KC) …is that everybody would want to be able to have the relationship and the transactions and so – and there are only – that is why the figures are important.

Q (Chair) Okay.

A (Mr Tolaney, KC) Because the position is that there are not very many domestically, as I have said to you, and the reality is that they would all wish to have a piece of the action and it would be quite straightforward to do so and the idea that because everybody makes their own agreements and you have still got the point about what terms, that there is some form of collective agreement does not work, and my learned friend and I need to really address that, cannot even identify what the collective agreement is because there is not one. Really, he has to fall back on the point that: oh, this is terribly impractical, and that is why I am honing in on that because it is not.

Q (Chair) Sure, but just to be clear. If I, a single Acquirer, sweep up most transactions by volume by entering into

	agreements with eight out of ten [Issuers][234] but I leave two on one side, because we just have not done a deal, those transactions – let us suppose one has a Cardholder coming into my shop or rather a Merchant shop, contracting with the Acquirer in circumstances where there is no bilateral between that Acquirer and that Issuer. What happens to the transaction? How does it unspool? We have a situation where I am 80%, 90%, 99% covered, but how does it work in the case of the transaction where there is no bilateral? What happens?
A (Ms Tolaney, KC)	That is where the [Interchange Fee Regulation] guarantees the levels that have to be settled.
Q (Chair)	But why is there any deduction permitted at all?
A (Ms Tolaney)	Because if the Cardholder has presented the Card to the Merchant and it is authorised […] the processes of clearing and settlement will follow, but the [Interchange Fee Regulation] guarantees the levels of deductions.
Q (Chair)	Yes, but I have two questions there. First of all, how does one get on to clearing without having agreed the deduction? Are you saying actually the [Interchange Fee Regulation] is a default even absent a bilateral agreement?
A (Ms Tolaney, KC)	De facto yes, which is why…
Q (Chair)	De jure, what is the position? De facto – I mean, the contracts and clearers are going to require a degree of specificity. They are not going to say: well, we do not know the answer. They will want an answer. So what do they plug into their systems by way of deduction when there is no bilateral specifying what the deduction should be?
A (Ms Tolaney, KC)	Well, what is obliged by law.
Q (Chair)	Why is it not nil?
A (Ms Tolaney, KC)	Because the [Interchange Fee Regulation] has set the level of the caps.
Q (Chair)	No, the [Interchange Fee Regulation] has set the level of the cap, but that does not mean to say that it has to be at the cap. Why is it not nil?

[234] The transcript refers to "Mr Cook", Mastercard's other leading counsel, who was used as the hypothetical Issuer(s) in the course of this exchange.

A (Ms Tolaney, KC)	I think what we understand is the [Interchange Fee Regulation], we can get a better…
Q (Chair)	Because the [Interchange Fee Regulation] is setting a ceiling, it is not setting a floor, as I understand it.
A (Ms Tolaney, KC)	Well, it is setting the maximum deduction, you are right.
Q (Chair)	What it is doing is it is constraining the rapacious [Issuer] from extracting more than what the [Interchange Fee Regulation] allows. We discussed earlier that the bilateral could say anything below the [Interchange Fee Regulation] and indeed in the case of the spectacularly ill-advised [Issuer] it could have the payment go the other way. All of that would have to be sorted out through the netting off and clearing systems that we are talking about. But you would need to have the agreement, and that I understand. […] My concern is what happens when you do not have an agreement, even if you try to cover most of the market off?
A (Ms Tolaney, KC)	I think that is why I returned to the fact the evidence before the Tribunal is that there would be an agreement, so you are talking about very limited cases.
Q (Chair)	Okay.
A (Ms Tolaney, KC)	Very limited, if any. Then the second point is one would assume in those cases they would be sorted out because the Issuer and the Acquiring Market would not just be left and not dealing with those transactions and the [Interchange Fee Regulation] would provide the maximum or ceiling levels. So it is quite clear where it would come out. But I think one has to go, I mean obviously we are talking about hypotheticals here at the moment. But that is what we are saying is that the evidence from Mastercard's witnesses is two-fold, which is (1) that Mastercard would have adopted the bilateral scheme and (2) that agreements would have been entered into in advance because that is the way the sophisticated parties would have managed this between them. I think the working assumption would be that everybody would want to have organised themselves in advance, but certainly would not renege on transactions if you like or allow them to be left in abeyance, if in the very unlikely scenario you are positing, it would be resolved and because of – and I think the reason why the [Interchange

	Fee Regulation] caps are so significant […] is because they give so little room for negotiation that it is not, without them you could see that you could have a stand off, but because we are talking about such small room for negotiation, the working market expectation is that is where it would come out.
Q (Chair)	Okay. That has been very helpful.

176. It is necessary to set out this exchange at length because it shows the unarguability of the Pure Bilaterals Counterfactual.[235] To recap:

(1) The essence of the counterfactual is that it removes the essentially infringing conduct of an interchange fee being <u>imposed</u> (the Default Interchange Fee Rule) replacing it with what purports to be (and what must be, in order to constitute a proper counterfactual) a freely negotiated Bilateral Interchange Fee. A freely negotiated interchange fee avoids the infringing conduct set out at [157].

(2) The inevitable consequence of a free negotiation is that the parties may not be able to come to terms. That is the essence of competition: an Acquirer must be able to negotiate for what is in the Acquirer's best interests, which might very well be an interchange fee set at zero (i.e. no fee at all) or even an interchange fee resulting in a payment from the Issuer to the Acquirer.

(3) Markets only work if there is a prospect of no transaction: each party must be free to walk away, rather than having a deal imposed. That, of course, is the mischief of the default. It stops the parties (here: the Acquiring Market) from walking away from the interchange fee. The only way the Acquiring Market can do so is to walk away from the Scheme as a whole.

(4) The problem with the Pure Bilaterals Counterfactual is that it cannot cope with non-agreement on the interchange fee. Because agreement on

[235] The point is also addressed in Mastercard Written Closing at [234]*ff*, but to no further effect.

a Bilateral Interchange Fee is required for participation in the Scheme (which is not a necessary requirement at all, merely one inherent in the counterfactual), non-agreement creates problems when Cardholders present issued Cards to Merchants whose Acquirer has not entered into Bilateral Interchange Fee agreements with that Issuer of the Card. Yet the Merchant will not know in advance of transacting (i) who has issued the Card or (ii) whether the Acquirer has agreed an interchange fee rate with that Issuer. Since the Schemes depend upon a universality of acceptance, clearly free negotiation where an agreement is a pre-condition to Scheme participation is a non-starter.

(5) That is why Ms Tolaney, KC placed such emphasis of the cap imposed by the Interchange Fee Regulation and on the *de facto* assertion that Acquirers and Issuers would not be so foolish as to decline to agree the interchange fee at the Interchange Fee Regulation cap. In short, the Pure Bilaterals Counterfactual rapidly collapses into the Unilateral Interchange Fee Counterfactual promulgated by Visa.

177. The Pure Bilaterals Counterfactual fails on its own terms. It is either unworkable or it is in reality only a sham form of free negotiation, with a default Multilateral Interchange Fee de facto imposed at the Interchange Fee Regulation ceiling. The Interchange Fee Regulation is important because it prevents "hold out" by Issuers: this gives the lie to free negotiation. It is obviously and necessarily Mastercard's position that without the Interchange Fee Regulation, the prices demanded by Issuers would be so high that no agreement with Acquirers would be possible. Mastercard are right in this assessment because of Customer demand for payment by Card. As has been described, Merchants need to offer the Payment Acceptance Service described as their demand drives the demand of Merchants, which in turn informs that of Acquirers. Because Acquirers are typically able to pass on the cost that is the interchange fee, as long they can do so, they will be indifferent as to interchange fee level, provided the level is equally high to all Acquirers – otherwise business will be lost through inter-Acquirer competition.

178. The Pure Bilaterals Counterfactual is not simply unrealistic, but a counterfactual that fails to resolve the mischief identified at [155] above. It is not a tenable counterfactual and must be rejected for this reason alone. The counterfactual is actually a denial of the Scheme itself.

(c) The Pure Bilaterals Counterfactual is an abuse of process

179. The predicate of some form of bilateral agreement between each participant in the Issuing Market and each participant in the Acquiring Market was the counterfactual adopted by the Tribunal in the Sainsbury's CAT Decision. It was Mastercard's position then that this was a counterfactual that was so unrealistic as to be wrong to adopt and that is a contention that found favour in other courts. In particular, the Tribunal's judgment was overturned for this reason by the Court of Appeal.

180. It is not open, now, to Mastercard to reverse course and adopt contentions that are the complete opposite of what it has previously contended on exactly the same point.

181. It might be said (indeed, this was Mastercard's submission) that the bilaterals counterfactual adopted by the Tribunal then is different in terms from the terms of the Pure Bilaterals Counterfactual contended for by Mastercard.[236] This is an assumption that can readily be adopted (albeit without deciding the point) because it makes no difference. The contention is nothing to the real point, which is this:

Is it possible, as a matter of realistic practicality, for bilateral agreements to be reached on interchange fees between the members of the Issuing Market (all Issuers) and the Members of the Acquiring Market (all Acquirers)?

182. Mastercard has contended that it is not, and that contention has been accepted in a number of courts before which Mastercard has appeared to make that very point. Mastercard's present contention is a collateral attack on the Prior Record,

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[236] This was Mastercard's position: Mastercard Written Closing at [158] to [160].

and it is an abuse of process for Mastercard to adopt this course now. The nature of the abuse can be demonstrated by a single example. Mr Willaert and Dr Niels gave evidence before the Tribunal in the Sainsbury's CAT Decision (where the contention was that bilaterals were not possible) and gave evidence before the Tribunal in this case that bilaterals were possible.

183. The Pure Bilaterals Counterfactual is an improper collateral attack on the Prior Record that is so serious as to amount to an abuse of process. Mastercard contended before us that bilaterals were possible and adduced evidence to this effect. But that was in direct contradiction of factual contentions previously advanced by Mastercard, which this Tribunal rejected, but which higher courts accepted thereby overruling the Tribunal on a very material point in its reasoning. Mastercard cannot now say that the Tribunal was correct in its assessment of the counterfactual plausibility of bilateral agreements. For these reasons, the evidence adduced by Mastercard on this point is not referenced. This point was not open to Mastercard. The position of Visa might be different. Visa did not positively advocate for the Pure Bilaterals Counterfactual, but merely did not argue against it.

(d) The Pure Bilaterals Counterfactual requires a "universal cap" provided by the Interchange Fee Regulation, which is not (on its terms) universal

184. This point arises out of the fact that all of the counterfactuals propounded by the parties are – and of necessity have to be – Default MIF neutral. They cannot apply to transactions involving one type of Default MIF, but not to transactions involving another type of Default MIF. That is because a Merchant will accept Cards in transactions involving all kinds of Default MIFs, and the Schemes are designed so as not to differentiate between the circumstances of different Cardholders or their Cards.

185. To provide a concrete example, the Interchange Fee Regulation does not apply to commercial Cards, to which the Commercial Card Default MIF applies. A Merchant will be free under the Scheme Rules to accept payment by way of commercial card and – depending upon the precise terms of the Honour All

Cards Rule may be obliged to do so. Yet, on the assumptions of the Pure Bilaterals Counterfactual, there will be no applicable interchange fee, because bilateral agreement will not be possible. A Default Interchange Fee Rule will therefore have to be imposed (fracturing the counterfactual) or no interchange fee will be agreed, resulting in either settlement "at par" (the Merchant Claimants' counterfactual) or a fracturing of the settlement process and the breaching of the Settlement Rule (as currently written).

186. The Pure Bilaterals Counterfactual is too reliant on the Interchange Fee Regulation and is unrealistic for this reason also.

(e) Conclusion

187. The Pure Bilaterals Counterfactual must be rejected as a counterfactual for these reasons. That rejection is not on the basis that the Pure Bilaterals Counterfactual is "worse", on a comparative basis, than the others advanced. It is rejected because it fails on its own terms. Put brutally, if this was a one-horse race, the Pure Bilaterals Counterfactual would come last and I would decline to use it.

(4) The Unilateral Interchange Fee Counterfactual

(a) Introduction

188. This counterfactual was described at [166]. It avoids a number of the problems that arise with the Pure Bilaterals Counterfactual. In particular, the existence of a default means that the scheme is capable of existing, is workable and does not involve a re-treading of arguments that are abusive. It will readily be apparent that this counterfactual avoids the problem of a Bilateral Interchange Fee agreement operating as a necessary pre-condition to transactions being settled pursuant to the Settlement Rule.

189. That being said, the Unilateral Interchange Fee Counterfactual is dependent on the universal application of the Interchange Fee Regulation – which of course is <u>not</u> universal – and so fails for the same reason as the Pure Bilaterals

Counterfactual.[237] The Unilateral Interchange Fee Counterfactual fails as a realistic counterfactual for the following (additional) reasons, which are summarised below and then considered in greater detail:

(1) Because the Unilateral Interchange Fee Counterfactual contains a default interchange fee, it fails to address the mischief identified by the Supreme Court and is not fit for purpose.

(2) The counterfactual default in the Unilateral Interchange Fee Counterfactual is arguably worse than the actual position under the Default Interchange Fee Rule.

(3) The Unilateral Interchange Fee Counterfactual is itself co-ordinated conduct.

(b) The Unilateral Interchange Fee Counterfactual does not address the "mischief"

190. As described,[238] the mischief that these counterfactuals <u>must</u> address in order to be capable of adoption as a proper counterfactual is the elimination of the Default Interchange Fee Rule. The imposition of a <u>different</u> default, such that interchange fees are not freely negotiated, does not meet the requirements specified by the Supreme Court in the Sainsbury's SC Decision. As is obvious from the description of the Unilateral Interchange Fee Counterfactual, all it does is replace one default with another.

191. Mastercard and Visa sought to justify the Schemes and the Default Interchange Fee Rule within the Scheme Rules by emphasising the benefits of a Scheme-set-default. The Merchant Claimants referred to this as the role of Mastercard and Visa as "benign dictators".[239] In particular:

> "**[247]** The Defendants' witnesses justified the Schemes' setting of interchange fees on the basis of an alleged need for the Schemes to strike a "balance" between, on the one hand, the alleged "benefits" accruing to

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[237] See [185] to [186].
[238] See [155] to [157].
[239] Merchant Claimants' Written Closing at Section E(5).

merchants from accepting card payments, and, on the other hand, the interests of issuing banks who allegedly "create" those "benefits". The reality that sits behind the euphemism of "balance" is that the Schemes' purpose in setting interchange fees is to reallocate revenue from the merchants who cannot afford to refuse payment via the Schemes' cards […] to the issuers upon whom the Schemes rely to issue their cards.

[248] That intention to make merchants pay issuers, in turn, requires that the Schemes suppress competition that would otherwise happen between acquirers for merchants' business, with the result that ordinary conditions of competition (and bilateral contractual negotiations) are interfered with, and the MIF serves as a fixed price floor under the MSC. Note in this regard that Ms Stone (V) straightforwardly admitted that the New Zealand Commerce Commission described the MIF as "a form of price fixing"."

192. These paragraphs accurately identify the mischief articulated and found by the Supreme Court and to which the Tribunal (and the parties) are bound. For present purposes, it can be assumed, for the sake of argument, that the Schemes do act as "benign dictators". The point is that it is <u>dictatorship</u> – the default – that the Supreme Court objected to, as displacing competition, and a counterfactual that preserves such a default, albeit in a different form, is not a counterfactual that is fit for purpose.

193. In short, a counterfactual that relies upon a default in lieu of agreement in a competitive market fails to remove the infringing problem, which is the <u>default</u> in the Default Interchange Fee Rule. It does not matter <u>how</u> the default is calculated – it is the existence of the default itself that is the problem.

(c) On the Schemes' own case, the Unilateral Interchange Fee Counterfactual makes matters worse, not better

194. The Unilateral Interchange Fee Counterfactual involves moving the "benign dictator" role away from the Schemes (where at least there can be said to be a balancing role, benignity) to parties (namely the Issuers) whose interest it is to push the interchange fee up.[240] In the real world scenario, it is the Schemes that set the Multilateral Interchange Fee and define and set the Default MIFs, the trend of the interchange fee is <u>upward</u>, with the Acquiring Market paying ever

[240] Of course, this power to push fees up is not completely unconstrained. At some point fees would be so high that some merchants would cease to offer a Card facility (which is what makes the "Cellophane Fallacy" possible). Unconstrained market power is not a necessary requirement for a competition law infringement.

more to the Issuing Market. Replacing the Schemes' benign dictatorship with an Issuer driven price is not going to reverse this trend, but exacerbate it. The only effect of the Unilateral Interchange Fee Counterfactual is to remove control of the interchange fee away from the Schemes towards Issuing Banks, who will negotiate (as they should) in their own interests and without any neutrality or benignity (should such exist).

195. In other words, the counterfactual case is worse than the actual. It is for this reason that the Unilateral Interchange Fee Counterfactual is so dependent on the Interchange Fee Regulation. It is necessary to have some constraint on the Issuing Market and the virtue of the Interchange Fee Regulation is that it removes the Schemes from the setting of the default. It is not, however, enough to remove the Schemes from the setting of a default. It is the default that must be removed. This, the Unilateral Interchange Fee Counterfactual fails to achieve. The possibility of bilateral negotiations actually achieving agreement between Issuers and Acquirers is a sham. From the consideration of the Pure Bilaterals Counterfactual it is obvious that absent a default, bilaterals fail. But it is the presence of a default, however framed, that is pernicious. All the Unilateral Interchange Fee Counterfactual does is replace an arguably benign dictatorship for a rapacious one controlled only by the limited ambit of the Interchange Fee Regulation.

(d) The Unilateral Interchange Fee Counterfactual is itself co-ordinated conduct

196. For the reasons given, the Unilateral Interchange Fee Counterfactual is not a proper counterfactual even if it does not involve anti-competitive conduct. The Merchant Claimants, however, contended that the counterfactual did, nonetheless, involve anti-competitive conduct:[241]

> "…the [counterfactual] also constitutes anti-competitive conduct. It is impermissible as a counterfactual. Properly analysed, it still amounts to the coordinated setting of the MIF and to the coordinated setting of a substantial part of the MSC. It merely involves replacing one Scheme rule with another

[241] Merchant Claimants' Written Closing at [14(1)].

Scheme rule which, in practice, sets a level for the MIF which all issuers will charge in practice. That would be both its object and its intended effect."

197. This characterisation is correct:

(1) The Pure Bilaterals Counterfactual fails for want of a default. Although the Unilateral Interchange Fee Counterfactual contains provisions enabling Bilateral Interchange Fees to be agreed, that is by a different default rule to that in the real world.

(2) The key question is what happens when there is no agreement. That is something that <u>must</u> be accommodated within the Scheme Rules. Yet the moment the Scheme Rules impose a default, that is co-ordinated conduct and it is completely irrelevant from where the default derives.

(3) In the case of the Unilateral Interchange Fee Counterfactual, the only reason the counterfactual works is because of the "default" contained in the Interchange Fee Regulation. That in no way remedies the mischief identified by the Supreme Court. The point is put by Mastercard:[242]

> In the [Pure Bilaterals Counterfactual] or the [Unilateral Interchange Fee Counterfactual], competitive forces would have resulted in interchange fees being set at the IFR caps, the same as in the real world. Consequently, the post-IFR MIFs do not restrict competition.

This is specious. The point is that in the real world, the operation of the (allegedly unlawful) Default Interchange Fee Rule is to force Multilateral Interchange Fees up to the Interchange Fee Regulation ceiling <u>unless</u> the Schemes choose to set a lower level. Even that lower level, if set, infringes competition law, because it is an imposed and not a competed for outcome. In practice, of course, the Schemes will set at the Interchange Fee Regulation limit. All that the Unilateral Interchange Fee Counterfactual does is ensure that the default is not what the Schemes say it is pursuant to the Default Interchange Fee Rule, but what the Regulation says it is. It may very well be that the rates are the same

[242] Mastercard Written Closing at [136].

in the real world as in the counterfactual world, but that is because <u>both</u> are anti-competitive forms of collusion.

(e) Conclusion

198. The Unilateral Interchange Fee Counterfactual is rejected for these reasons. As with the Pure Bilaterals Counterfactual, it is not rejected because it is "worse", on a comparative basis, than the others advanced. It is rejected on its own terms.

199. Evidence was led by Visa in private session regarding "Project Toshigami" in support of the Unilateral Interchange Fee Counterfactual. It is unnecessary to consider "Project Toshigami" further. That project (which is not described further) does not assist in resolving the issues with Visa's counterfactual. Given the confidentiality concerns that Visa rightly had, it is unnecessary to say any more.

(5) The significance of Multilateral Interchange Fees unconstrained by the Interchange Fee Regulation

200. Both of the counterfactuals advanced by the Schemes only work where the Interchange Fee Regulation applies. But the Interchange Fee Regulation does not apply to all Default MIFs. Yet – unless violence is done to the operation of the Schemes in terms of rejecting payment by Cards issued by the Schemes where the Interchange Fee Regulation does not apply – Multilateral Interchange Fees will be unconstrained and will simply spiral upwards.

201. In short, both of the Schemes' counterfactuals contain an uncontrolled element in terms of the level of some of the Default MIFs. Since the counterfactual needs to be capable of dealing with all transactions using the Schemes, this is a self-standing problem for both counterfactuals advanced by Mastercard and by Visa. Either:

    (1) A zero Multilateral Interchange Fee ought to be the counterfactual assumption in these cases; or

(2) It must be shown that uncontrolled levels of some Default MIFs will not have any anti-competitive effects. In other words, the level of these Default MIFs will be immaterial to the general operation of the Schemes, in that the level of the Multilateral Interchange Fee will not be materially different from the maximum level dictated by the Interchange Fee Regulation.

202. Both of these cases indicate against the Schemes' counterfactuals being realistic or appropriate. The first option suggests that the No-MIF Counterfactual is actually the realistic one; the second option depends upon how many transactions are unconstrained by the Interchange Fee Regulation and how high the rate goes. Whilst it would be possible to obtain data in regard to the former, the latter issue means that it cannot be assured that the average Multilateral Interchange Fee rate across all transactions would not be materially higher than the maximum permitted under the Interchange Fee Regulation.

(6) The No-MIFs Counterfactual

(a) Introduction

203. This is the counterfactual that was explicitly endorsed by the Supreme Court in the Sainsbury's SC Decision.[243] The Merchant Claimants contended that the No-MIFs Counterfactual should be – indeed, had to be – adopted by us in preference to the Scheme's counterfactuals. As is clear from the foregoing, the contention that the Tribunal should simply adopt without more the No-MIFs Counterfactual is not one that has been accepted. The Schemes' counterfactuals have been considered on their merits first and – for the reasons given – neither the Pure Bilaterals Counterfactual nor the Unilateral Interchange Fee Counterfactual represents even an arguable counterfactual. There is, therefore, no need to consider whether – if these counterfactuals were viable – they ought nevertheless to be rejected because of the Supreme Court's decision. It is only necessary to say that the Tribunal would have attached significant weight to the

[243] See [156]. Proposition (iv) holds that the proper counterfactual is a no default MIF with settlement at par.

Prior Record and to the fact that the Supreme Court's decision appears to be on all fours with the present case.

204. The presence of the Interchange Fee Regulation in this case, when it was not present for consideration in the Prior Record, does not constitute so material a difference between the Prior Record and this case so as to permit arguments about abuse of process or collateral attack to be avoided. The Interchange Fee Regulation does not constitute a significant change from the pre-Interchange Fee Regulation period. All that the Interchange Fee Regulation does is constrain what is alleged to be anti-competitive conduct. In other words, absent the Interchange Fee Regulation, the position would be <u>worse</u>. But that does not mean to say that the Interchange Fee Regulation <u>cures</u> the complained of conduct: it simply ameliorates it.

205. Had the conclusion been that either the Pure Bilaterals Counterfactual or the Unilateral Interchange Fee Counterfactual had been arguable, then the Schemes would have had their work cut out to show these counterfactuals were to be preferred over the No-MIFs Counterfactual. This is for the following reasons:

(1) The Prior Record needs to be respected, and it weight strongly in favour of the No-MIFs Counterfactual.[244]

(2) The No-MIFs Counterfactual is most closely aligned to what a counterfactual should be, i.e. simple and predicated on the absence of the allegedly infringing provision. Whilst counterfactuals can be more recondite and complex, that is only desirable where there is reason for the complexity. A counterfactual that simply involves the deletion of the offending provision (namely the Default Interchange Fee Rule) has clear virtues.

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[244] The Schemes contended that the Prior Record could safely be disregarded or distinguished. See, e.g. Mastercard Written Closing [178] to [179], [183], [184]. These contentions do not need to be considered further, because the counterfactuals advanced by the Schemes fail *in limine*. Had they not done so, then clearly some form of balancing of factors would have had to have taken place. But without a viable alternative, that is not a process that can be embarked upon.

(3) No-one, least of all the Schemes, suggested that the No-MIFs Counterfactual would result in the Schemes becoming unworkable. In other words, the Default Interchange Fee Rule is not an essential requirement for the operation of the Schemes provided there is no obligation, as a pre-condition to participation in the Schemes themselves, to have an interchange fee at all. It is worth expanding upon this point:

(i) Some form of default is required where an interchange fee is predicated. The absence of a default is why the Pure Bilaterals Counterfactual fails; and the presence of a default is why the Unilateral Interchange Fee Counterfactual is no more than a continuation of infringing conduct by other means.

(ii) The point is that the interchange fee is an unnecessary "fifth wheel" in a Scheme that works perfectly well without any interchange fee at all.

It has already been noted that the Multilateral Interchange Fee is an unusual link between two markets that ought to be operating independently.[245] Whilst, sometimes, the unusual is a sign of innovation and consumer benefit, in this case it is quite clear that not only is the Multilateral Interchange Fee unnecessary to the Schemes' operation, it is actually distortive of the price system in the two markets that it infects, namely the Acquiring Market and the Issuing Market. This third point is one that it is necessary to expand upon in order to demonstrate why not only is the No-MIF Counterfactual the only counterfactual available to us, that is not (just) because the alternatives have failed, but because there is good reason for this counterfactual to be adopted in its own right.

[245] See [35] to [39].

(b) There is no objective justification for the Multilateral Interchange Fee

206. The Schemes contended that the purpose of the interchange fee in general, and the Multilateral Interchange Fee in particular, was to appropriately "balance" the interests of Issuers against those of Acquirers.[246] The same point is made by Mastercard in the Mastercard Written Closing:

> **"[31]** …the Claimants' argument that costs should "lie where they fall" ignores the fact that the incidence of costs for different participants of the scheme will largely depend on where they are allocated either by the scheme rules or by a bilateral agreement.
>
> **[32]** If the scheme rules require the issuer to pay for transactions even when they are fraudulent, the costs will fall on the issuer; but the scheme could equally well provide that issuers are only required to pay for legitimate transactions by their cardholders, which would leave the costs of fraud to fall on acquirers (and merchants). The same is true of the costs of cardholder default and the funding cost between the date of the transaction and the date of payment by the cardholder.
>
> **[33]** There is, consequently, nothing inevitable about where any particular cost falls. An allocation that makes commercial sense in circumstances where there is a contribution from the other side of the market (whether through an interchange fee or scheme fees) is unlikely to make commercial sense without that contribution.
>
> *[…]*
>
> **[38]** Given the higher costs which are allocated to issuers under Mastercard's scheme rules and in any event, interchange fees represent a very important revenue stream for issuers. Interchange fees seek to redress the imbalance in costs and revenues between the issuing and the acquiring side and to increase the overall success of the card scheme."

207. The Schemes' point is that the interchange fee provides some form of non-market adjustment mechanism for costs that a competitive market could not cope with or provide for. Put this way, it is obvious that the existence of a non-market (i.e. demand and supply insensitive) cost adjustment mechanism requires the most cogent justification. That justification in no way exists.

208. There is no correlation between the interchange fee and the costs that it is supposed to discharge or compensate for. The point made by the Merchant Claimants that the Schemes acted, in setting the Multilateral Interchange Fee,

[246] See [191].

as "benign dictators" has already been referenced. That emphasises the absence of a cost-based rationale for the Default MIFs that were set by the Schemes. The interchange fee represents an arbitrary money flow from one set of market participants (consumers in the Acquiring Market, the Acquirers) to another set of market participants in a different market (consumers in the Issuing Market, the Issuers). Although the Schemes sought to contend that the Default MIFs bore some relationship to the underlying transactional costs of the Issuers, this was an argument that was made in the abstract,[247] and was gainsaid by the evidence received:

(1) There was no particular correlation between the level of the Multilateral Interchange Fee and the Issuer costs that the Multilateral Interchange Fee was supposed to discharge. Ms Dooney was asked about this:[248]

Q (Chair)	But you do not, as part of an organisation, precisely link costs with revenues. I mean, you will work out a budget and see where your money is coming from and where your costs are going, but there is no absolute correlation?
A (Ms Dooney)	There is no one-to-one relationship, so we do not say for interchange we absolutely will use it for these three lines of cost.
Q (Chair)	That is very helpful. I mean, that was my next question: there is no ring-fencing of interchange to any particular cost, it just goes into a general pool of revenue, and you apply that revenue to discharge certain costs?
A (Ms Dooney)	That is correct.

(2) Thus, the various different levels of Default MIF applying to different transaction types lent a wholly unmerited and spurious sense that there was some kind of objective correlation between the level of the Default MIF set by the Schemes and "riskiness" or costs associated with these transaction types. In reality, the number of different Default MIFs

[247] See, for instance, the Mastercard Written Closing at [43] to [45], and [48] to [49].
[248] Day 7, at pp. 62-63.

invented by the Schemes, and their level, were both arbitrary.[249] This is consistent with the Commission's Decision in Mastercard I:

> **[615]** MasterCard argues that "amendments to remedy the setting of interchange fees to zero" would not necessarily mean lower costs for acquirers and, therefore, lower MSCs for merchants. This is because "the Scheme would have to make the necessary amendments to its existing rules in view of achieving a balance that closely reflects the allocation that used to be realised through the interchange fee. These amendments […] would not necessarily mean lower costs for acquirers, and, therefore, lower MSCs for merchants.
>
> **[616]** MasterCard's claim that in the absence of the MIF a collective re-allocation of costs in the scheme would have to occur and would have similar effects on merchant fees to the present situation, must be rejected. Contrary to MasterCard's assertion, the allocation of fraud and default costs between issuers and acquirers as well as the timing of settlements in its system are not intrinsically linked to the level of its MIF.

(3) It would be wrong to go so far as to say that the Multilateral Interchange Fees were set in a completely arbitrary fashion. That would be to reject the Schemes' role as "benign dictators". The point is that the Multilateral Interchange Fee is <u>not</u> responsive to market forces in either the Acquiring or the Issuing Markets, and in fact distorts <u>both</u> those markets:

(i) Disregarding the Multilateral Interchange Fee – in other words, assuming it out of existence – Issuers <u>might</u> be faced with costs that rendered their participation in the Scheme unattractive. For instance, it might be the case that the Scheme Rules allocated fraud costs unfairly on the participants in the Issuing Market. Assuming some of these "unfair" fraud costs were unavoidably borne by the Issuing Market,[250] the demand to participate in the Scheme might change because Issuers might not want to pass the costs on to Cardholders, and would want an adjustment to the Scheme Fees payable to the Scheme. It is immediately apparent that this opens up competition: Issuers will be incentivised to

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[249] One of Mr Beal KC's repeated lines of questioning was that whereas the economic relations between the Republic of Ireland and Northern Ireland did not change post-Brexit, the Default MIFs <u>did</u>. No-one could justify these changes by reference to objective factors.

[250] In other words, there is an unavoidable level of fraud cost irrespective of what the Issuer does to prevent fraud. However, there will almost certainly be some Issuers who are better than others at avoiding fraud.

keep fraud levels low, and will seek to bargain with the Schemes in regard to the framing of the Scheme Rules and/or the level of the Scheme Fee.

(ii) It is impossible to predict what the outcome of this process might be. But that is the point: market mechanisms, if operating competitively, will reach their own solution. The point is that the arbitrary shifting of cost from one market to another by way of the Default Interchange Fee Rule distorts the competitive processes that would otherwise operate in the Issuing Market.

(iii) The same is true in the Acquiring Market. Because the Multilateral Interchange Fee constitutes an unavoidable floor to the Merchant Service Charge, Acquirers cannot effectively compete amongst themselves because the Multilateral Interchange Fee is so large a part of the Merchant Service Charge.[251] What is more, Acquirers cannot negotiate with Schemes as to the level of Scheme Fee they pay – or otherwise vary the Scheme Rules – because they too (like Issuers) are locked into a default charge that precludes differentiation.

(iv) The same is also true of the Scheme Market. Obviously, there is a high level of competition between the Schemes, because their products are so similar. That competition is attenuated on the Acquiring Market side because of the need for Acquirers and Merchants to accept both Mastercard and Visa Cards. There is nevertheless an absence of competition amongst the Schemes in terms of Scheme Rules and Scheme Fees that is generated by the distortions created by the Multilateral Interchange Fee.

(4) The witnesses called by both Mastercard and Visa told the Tribunal that the level of the Multilateral Interchange Fee was driven not by market

[251] That does not mean to say that Acquirers will not compete for Merchant business. They will. But their ability to compete on price is severely constrained.

forces in the Acquiring Market or (separately) by market forces in the Issuing Market, but by the Schemes' perception of the relationship between these two markets. Thus, Mr Knupp (for Visa) said:[252]

> "We do issuer cost studies from time-to-time in multiple markets where we try to understand what issuers' costs are and what their acquisition costs – let us just stick with credit cards right now, what their acquisition costs are, what their rewards costs are, what the risk in fraud costs are, what their customer service cost is, so it is a pretty extensive study to give us a sense of what those costs were. It differs by market, right, it differs by issuer size, so we do that. But I will just say for the record so we do have a lot of good information on that, but it is not meant to be purely a cost-based model. We do want to know what costs are but that is not what we use to drive interchange as the sole – as the sole sort of – it is not like the only factor that drives what we do for interchange."

Take two Issuers operating (for the sake of argument) in circumstances where every Card transaction in which they are involved attracts the same Default MIF, but one Issuer is more efficient than the other in terms of avoiding fraud costs and/or providing cheaper customer service. Both will receive the same Default MIF, with the effect that the inefficient Issuer is protected from their inefficiency at the expense of the Acquiring Market.

Mr Willaert (Mastercard) made exactly the same point:[253]

> So what we typically do is we regularly would review a MIF in a certain country to make sure that the balance is right, but also to make sure we meet new requirements. So that is – first of all typically what the process includes is we are looking at the issuers' costs and then external costs conducted for that. That is the basis, that is one input, and so over time as costs change you would have different inputs into that process. But it is not the only input into the process. If there are new technology evolutions, for instance, chip and pin at some point was a new technology for allowing more secure payments, contactless, e-commerce transactions will come into the mix as well, and then you will adjust the rate structures, the level, but also the rate structures to include that. Clearly, competitive position is also an important element. If our competition increases or, for instance, Amex launches a new product or Visa would launch a new product, you take that into account so that you are overall in balance, that you can have a good issuing outcome but also that you can have merchant acceptance then you develop that.

[252] Day 7, at p.143.
[253] Day 9, at p.113.

(5) The Multilateral Interchange Fee is antipathetic to competition in both the Issuing and the Acquiring Markets. Take the introduction of what was once new technology like chip and pin, which will have involved roll-out costs in both the Issuing and Acquiring Markets (the Cards require chips, and the point of sale terminals need to read them and allow PIN entry). The costs in each market would – absent the interchange fee – be evaluated by Issuers and Acquirers separately and in light of the benefits they each got out of the Scheme. It might be that Scheme Rule changes or adjustments to the Scheme Fees might have to follow: this potential for adjustment in light of new developments in each Market is skewed by the interchange fee because it involves a Scheme determined transfer from Acquirers (as a whole, and not differentiating between them) to Issuers (as a whole, and not differentiating between them).

(6) Mr Dryden sought to defend the Multilateral Interchange Fee in the following terms:[254]

> Then, coming very quickly to the justifications, Sir, that you suggested, the first one is that the IF should be somehow commensurate with discharged issuer costs or some proportion of them. In my submission that is not an economic way of thinking about the problem because it is not dealing with this externality. It is in fact a problem that it is in fact a way of thinking that is fundamentally undermined by a kind of endogeneity problem, which is the amount of the issuer costs is itself a function of how high the MIF is. So, in other words, the MIF is flowing across to the issuing side and then the issuers' costs reflect the fact that they are competing away to a large extent the MIF in the services that they provide.

This analysis only works if Issuer costs are true externalities that cannot be compensated for or reflected in the market price for participation of Issuers in the Scheme. An "externality" represents a cost or a benefit which is not recognised in the prices charged in an economy or (here) ecosystem. No-one on the Scheme side contended that Issuer costs were an externality in the Issuing Market, such that (i) they could not be recovered either by way of the prices between Scheme and Issuers or (ii) by way of the prices charged between Issuers and Cardholders. If Issuer

[254] Day 10, at p.71.

costs were a true externality, then the Schemes would fail absent an interchange fee. No-one suggested that this was the case.

(c) Implications

209. The Multilateral Interchange Fee is thus a non-competitive adjustment to Issuers' costs at the expense of Acquirers (and therefore Merchants, subject always to pass on) which unless closely justified represents an unavoidable distortion of the price mechanism in <u>both</u> the Acquiring and Issuing Markets. More specifically:

(1) The Issuing Market receives a subvention to its costs which can only distort (i) what the Cardholders are charged and (ii) what Scheme Fees Issuers are prepared to pay to the Scheme. Indeed, as the Merchant Claimants submitted, the Multilateral Interchange Fee actually creates an "arms race" <u>between</u> Issuers, resulting in demands for ever-higher interchange fees.

(2) The Acquiring Market has imposed upon it a non-negotiable cost, which distorts the Merchant Service Charge, by importing a price floor that requires the closest of justifications, which are not disclosed on the evidence adduced. This point has sufficiently been explored in the Prior Record for us not to have to repeat the analysis, which appears clearly from the Sainsbury's SC Decision.

210. One of the problems with this arrangement is that competition between Issuers in the Issuing Market creates upward pressure on the Multilateral Interchange Fee.[255] Issuers obviously compete in many ways. One area, however, where it is hard for them to differentiate themselves is in relation to the benefits a Card offers to the Cardholder. The Payment Acceptance Service – that is at the heart of the Schemes – is a standard product: the whole point of the Schemes is to ensure that all Cards are accepted, whoever their Issuer. Thus, the very nature of the Schemes means that it is hard for Issuers to differentiate themselves. The

[255] See the Merchant Claimants' Written Closing at Sections E(10) to E(14).

Settlement Rule, the Honour All Cards Rule and the No Surcharging Rule all serve to render Cards essentially fungible (in terms of <u>who</u> issues them) when it comes to payment.

211. Issuers therefore differentiate themselves in regard to the <u>non-payment</u> attributes of their offering – terms of credit, subscription costs to have particular Cards, rewards. These **Non-Payment Card Attributes** tend to be financed by the Multilateral Interchange Fee which causes Issuers to compete by demanding higher Multilateral Interchange Fees to fund greater Non-Payment Card Attributes, without properly competing as to price <u>in the Issuing Market</u>. To be clear, it is not suggested that the Multilateral Interchange Fee will spiral upwards without limit. What is suggested is that competition between Issuers in regard to Non-Payment Card Attributes results in an upward pressure on the Multilateral Interchange Fee which affects the Default MIFs set by the Schemes.

(d) The "unpleaded" counterfactual

212. During the course of the hearing, the Schemes suggested the existence of a further counterfactual – christened the **Scheme Fee Counterfactual**, which was variously relied upon and criticised.[256] No such counterfactual is in issue. No such counterfactual has been considered in the pleadings, the factual evidence or the expert evidence and it would be improper for the Tribunal to reach a conclusion in regard to a counterfactual that no party could fairly address. The Tribunal has not done so.

213. The Scheme Fee Counterfactual is no more that an attempt to articulate the way in which the market would operate if the Default Interchange Fee Rule were abrogated. When the Tribunal raised the question, it was in order to understand the operation of the market in the No-MIFs Counterfactual, which understanding has been set out in the foregoing paragraphs. To label the Tribunal's probing as the generation of a new, otherwise unarticulated, counterfactual, is no more than a forensic "red-herring".

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[256] See e.g. Mastercard Written Closing at [137] to [138], [147], [171] to [177] and [269]*ff*.

214. It is not enough to identify certain costs that arise out of the Schemes and say – as the Schemes do – that the interchange fee must discharge those costs. That is a *non sequitur*. Every intermediate consumer in every market needs to acquire factors of production in order to produce the good or service that they on-sell. Every factor of production has a cost. What every intermediate consumer does is (with their profit maximising hat on) assess whether the price being paid for a given factor of production (here: the Scheme) is worth it. This is the point of the Tribunal's questions underlying the "unpleaded" further counterfactual. Participation in the Scheme on the part of both Issuers and Acquirers implies benefits and costs. The costs include, but are not limited to, the Scheme Fee. If the other costs (e.g. paying for fraud) exceed the benefit to the Issuer from participation in the Scheme, then the *Scheme Fee* needs to be adjusted, which will occur through the forces of demand and supply. That is the very point of the price mechanism, and there is no reason why (absent the Multilateral Interchange Fee, which distorts the process) it cannot work in these markets. There is no reason why the prices for participating in the Scheme paid by Issuers and Acquirers cannot adjust through market forces to take account of these costs arising out of Scheme participation.

(7) Conclusions

215. There were three counterfactuals before the Tribunal. For the reasons given above, the counterfactuals articulated by the Schemes are (i) not workable or realistic, (ii) not rationally arguable and (iii) (in the case of the Pure Bilaterals Counterfactual) an abuse of process.

216. On the other hand, the No-MIFs Counterfactual (i) is that endorsed by the Supreme Court in the Sainsbury's SC Decision, (ii) applies in circumstances where there is no material difference between this case, and where (iii) the No-MIFs Counterfactual (viewed purely on its merits) is realistic and addresses the "mischief" alleged.

I. INTER-REGIONAL DEFAULT MIFS AND COMMERCIAL CARD DEFAULT MIFS

(1) A hitherto undetermined question

217. The Merchant Claimants contended that the infringing nature of the inter-regional Default MIFs and the commercial card Default MIFs fell to be treated in exactly the same way as the Multilateral Interchange Fees that were before the Supreme Court in the Sainsbury's SC Decision, because the same reasoning and theory of harm applied without differentiation to all Multilateral Interchange Fees. The Merchant Claimants could not go so far as to contend that this outcome was binding on the Tribunal, because their application for summary judgment failed in the Dune CAT and Dune CA Decisions. The furthest that the Merchant Claimants could go in Trial 1 was to say that what was true of the Multilateral Interchange Fees before the Supreme Court was also true, by a parity of reasoning, for all Default MIFs, including the inter-regional Default MIFs and the commercial card Default MIFs.

218. By contrast, the Schemes contended that these particular Default MIFs were materially different from other Default MIFs and that it was an open question as to whether these particular Default MIFs were anti-competitive by effect within Article 101(1) TFEU. In particular, the Schemes contended that the effect of the counterfactual contended for by the Merchant Claimants – where there were no Multilateral Interchange Fees at all – would cause the Merchant Service Charge to rise in the counterfactual (by reason of switching of Customer/Cardholders to other cards with higher Merchant costs) such that, even in the Merchant Claimants' counterfactual world, although the "floor" to the Merchant Service Charge would have been removed, Merchant costs as represented by the Merchant Service Charge in the Merchant Claimants' counterfactual world would nevertheless sit at a sufficiently similar level such that there would be no material effective difference between the "real" world and the "counterfactual" world in terms of the level of the Merchant Service

Charge. For this reason, there could be no infringement "by effect" of Article 101(1) TFEU so far as these particular Default MIFs were concerned.[257]

(2) Outcome

219. It was open to the Schemes to make this argument because of the failure, on the part of the Merchant Claimants, to obtain summary judgment in the Dune CAT and Dune CA Decisions. The Merchant Claimants could not, as a result, contend that the established Theory of Harm as found by the Supreme Court could simply be "read across" so as to determine the outcome of Trial 1 so far as these Default MIFs are concerned. These issues are open before the Tribunal and must be determined.

220. That being said, the issues in relation to the inter-regional Default MIFs and the commercial card Default MIFs are substantially informed and resolved by the analysis and findings in the foregoing Sections of this Judgment. As a result of that analysis and those findings, the contention of the Schemes is wrong and to be rejected. The reasons for reaching this conclusion are stated in the following paragraphs.

(3) Inconsistent with the Focal Product found

221. As has been described, the relevant market for the purposes of Trial 1 is the Acquiring Market and not the Issuing Market.[258] Within that market, the Focal Product is the Payment Acceptance Service in the United Kingdom and Ireland offered by the Schemes, via Acquirers, to Merchants and to Customer/Cardholders.[259]

222. The Focal Product, so defined, leaves no room for differentiation either between types of Card (i.e. differentiating commercial Cards from other Card types) or types of transaction (i.e. differentiating inter-regional Default MIFs from other

[257] This is the substance of Issues 4 and 5 in the List of Issues.
[258] At [124(2)].
[259] See [88].

Default MIFs). The Focal Product is acceptance of payment, by a Merchant, through a Scheme Card (without differentiating between Schemes[260]).

223. In order for the Schemes' contentions to be right, the Focal Product would have to be differently defined. That is not considered to be an arguable proposition:

(1) Any other definition of Focal Product would be inconsistent with the manner in which the Acquiring Market operates. The proposition can be tested at all levels of the market – Acquirer, Merchant, and Customer/Cardholder:

(i) *Acquirers*. There is no rational reason for Acquirers to differentiate between Cards or transaction type. Proceeding on the basis (but without formally deciding) that Acquirers pass on the interchange fee they pay to Merchants, Acquirers will be indifferent to the different Default MIFs and their different levels. Even if the Scheme Rules permitted them to do so – and the Scheme Rules do not – Acquirers would not refuse a transaction because it carried with it an obligation to pay an inter-regional Default MIF or a commercial card default MIF. These costs may pass to the Merchants who contract with them via the Merchant Services Agreement.[261] No commercially sane Acquirer would refuse to provide a Payment Acceptance Service in respect of such transactions even if this was a legally available option.

(ii) *Merchants.* As is to an extent required by the Scheme Rules, but more importantly because of the commercial imperatives that drive Merchants, Merchants will be inclined to accept Cards without differentiation between Card type because they will not want to lose a sale. Merchants will not differentiate (even if permitted to do so) between Card type or transaction type, even

[260] For the reasons I have given, the Focal Product is the Payment Acceptance Service offered indifferently by Mastercard and by Visa: see [89].
[261] See [5].

if (as is the case here) the applicable Default MIFs are higher than average in the particular case and even if (as may be the case) the Merchant knows this.[262] The alternative course, for a Merchant, would (as has been described) be to abandon Card acceptance altogether and revert either to cash or to Amex. Both are not substitutes for the Payment Acceptance Service, as has been described. Indeed, resorting to Amex would actually result in Merchants bearing higher costs. The Schemes are right in their assertions that their charges are lower than those of Amex: a Merchant would not shift away from Cards in the manner suggested by the Schemes.

(iii) *Cardholders.* Payment by Card (whatever the Card type and whatever the transaction type) obliges the Merchant not to discriminate.[263] So far as the Customer/Cardholder is concerned there is <u>no difference</u> in terms of the Payment Acceptance Service triggered by the proffering of a Card – whatever the Card type and whatever classification of the transaction in terms of applicable Default MIF. It may be that there are differences between Card type on the side of the Issuing Market: but that is not a matter directly in issue in the present case.[264]

(2) It is not possible to frame a plausible different Focal Product to the one found in this Judgment.[265]

(i) The definition of the Focal Product should be as narrow as possible. It is wise to start unduly narrowly and reiterate the process in order to reach the correct result.[266] The suggestion that the Cards of each Scheme comprise distinct Focal Products has

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[262] See [91].
[263] See [32].
[264] As described, this is a two-sided market, comprising the Scheme Market (which is wholly irrelevant for present purposes: [124(3)(ii)]), the Issuing Market (which is relevant to a limited extent: [85]) and the Acquiring Market, which is the market under consideration.
[265] See [90(2)].
[266] See [81] and fn 114.

been rejected because the Payment Acceptance Services offered by each Scheme are so similar that they are near perfect substitutes.[267] Any narrower definition will result in uneconomic substitution away from the Focal Product and a meaningless process of Market Definition and the identification of substitutes.

(ii) This reasoning pertains also if the Focal Product were to be defined by reference to specific Card transactions, namely transactions attracting inter-regional Default MIFs or commercial card Default MIFs. It is theoretically possible to narrow the Focal Product to Payment Acceptance Services involving payment by particular Card type or transaction type, e.g. the Focal Product is the Payment Acceptance Service when using a commercial card or the Payment Acceptance Service when using a Card internationally (i.e. a foreign-issued Card used in the United Kingdom or Ireland).

(iii) The problem is that this creates a distinction without a difference, in that the Payment Acceptance Service is exactly the same in these differently defined Focal Products. Apply a SSNIP or equivalent[268] to a hypothetical monopolist offering these, narrower, Focal Products and there will be a massive (and for the hypothetical monopolist uneconomic) shift away from the Focal Product. Why should a Cardholder/Customer not seek a non-commercial Card or a domestically issued Card when the Payment Acceptance Service offered by these other Cards is exactly the same.

224. In conclusion, defining the Focal Product any more narrowly than Payment Acceptance Services offered through all Cards issued through both the Mastercard and Visa Scheme is inconsistent with the nature of the product and

[267] See [132]. The "death spiral" arguments gain traction when viewing the Mastercard Payment Acceptance Services as a separate Focal Product to the Visa Payment Acceptance Services, because substitutability is high.

[268] As described (see [82] and [106(1)]), traditional SSNIPs do not really work as a test for substitutability in this market, but the term is a useful shorthand for the process of testing for elasticity of demand.

the Acquiring Market within which it sits. It is accordingly not right to contend that in some way Article 101 TFEU can be made to apply to a narrower transaction type of the sort contended for by the Schemes.

(4) Inconsistent with conclusions on substitutability

225. For the reasons given, there are no substitutes for the Focal Product as it has been defined.[269] It follows that the factual contentions of the Schemes as to the effects of the No-MIFs Counterfactual will not arise because there is, on the application of a SSNIP, not going to be a move away from the Payment Acceptance Services offered by the Schemes sufficient to render the price increase not worthwhile. Put the other way round, although the Schemes do not themselves receive the Multilateral Interchange Fee, they are (in their role as "benevolent dictators") actively directing money flows out of the Acquiring Market and into the Issuing Market.[270] The conclusion is that the Schemes can raise the levels of the Multilateral Interchange Fees generally and materially and that this will be economically beneficial to the Issuing Market or whoever the intended beneficiary of the hypothetical monopolist might be.[271] This conclusion is indirectly supported by the findings of the PSR as described above. It is consistent with the findings of the Supreme Court in the Sainsbury's SC Decision. The specific Default MIFs here at issue constitute so small a portion of the total transactions undertaken in the relevant geographic markets that it is fanciful to suggest that a different outcome ought to pertain.

(5) Improper conflation of the operation of the Issuing Market with the Acquiring Market and Article 101(1) TFEU with Article 101(3) TFEU

226. There is, as described, no difference as between Card-type or transaction-type <u>in the Acquiring Market</u> so far as question of Focal Product or substitutability for the Focal Product are concerned. Matters are different in the Issuing Market. Commercial cards are used by Issuing Banks to compete with other Issuing

[269] See [121].
[270] See [35] to [39].
[271] Normally, it is the hypothetical monopolist who benefits directly. Here it is not. However, that distinction is not material.

Banks in the Issuing Market. They provide additional services, for which they charge. Equally, assuming that the Scheme Rules permit this, Issuing Banks could choose to differentiate themselves by offering Cards only capable of domestic use (in the United Kingdom and Ireland) at lower cost.

227. In fact, the Issuing Market already appears to do this: a Cardholder does not have to have a commercial card, and can forgo any additional costs by opting for a different Card type. Equally, a Cardholder already pays more for transnational transactions and there is no reason why Issuing Banks cannot increase their effective charges in this regard.[272]

228. It is the Acquiring Market that matters, not the competition dynamics in the Issuing Market. The extent to which the No-MIFs Counterfactual results in changes in the costs and market dynamics of the Issuing Market is not relevant at the Article 101(1) TFEU stage, but only at the Article 101(3) TFEU stage, which is a matter for later consideration.

(6) Confusion of different counterfactuals

229. The Counterfactuals in this case exist so as to determine anti-competitive effect. Infringement by effect is considered in the next Section but given the approach laid down in *BritNed*[273], the question at issue is clear. If – as the Merchant Claimants contend – the counterfactual world will involve an increasing of competition between Acquirers in regard to the level of the Merchant Service Charge because of the removal of the Multilateral Interchange Fee element within that Merchant Service Charge, then the anti-competitive effect is established even if the Merchant Service Charge remains the same because any beneficial competitive effects through the absence of the Multilateral Interchange Fee are 100% offset by increased costs arising by reason of that very counterfactual scenario.

[272] For instance, by increasing the spread at which foreign currency is converted.
[273] BritNed Development Limited v ABB AB and ABB Ltd **(BritNed)** [2018] EWHC 2616 (Ch) at [13] to [18].

230. The existence of such extreme adverse economic effects of the No-MIFs Counterfactual does not arise for the reasons already given. But even if they were present, they are relevant to quantum not to liability. Assuming an infringement of Article 101 TFEU is found, it will be necessary to consider quantum of loss. That involves not merely questions of pass-on (the subject matter of Trial 2) but also (assuming no pass-on) precisely what losses flow to Merchants from the infringement under consideration. That involves a separate, altogether different, "quantum" counterfactual. The purpose of tortious damages is to put the claimant in the position they would have been in had the tort not been committed. That involves an altogether different counterfactual assessment which may require taking into account the sort of switching on which the Schemes placed so much reliance.

231. The findings made in this Judgment about substitutability have been directed to the question of anti-competitive effect within the sense of Article 101 TFEU. The extent of that effect in monetary terms or terms of financial loss will be the subject of an altogether separate assessment, which can form no part of this Judgment, and which it would be wrong to anticipate. It may be that when considering what losses would flow to Merchants <u>as a result of an infringement found</u>, that those losses are ameliorated by the switching of some Customer/Cardholders as a result of consequences in the Issuing Market of Multilateral Interchange Fees disappearing. Infringement Counterfactuals do not test for this, quantum counterfactuals do, and a claimant will only be entitled to recover their true loss (assessed, admittedly, by way of a broad brush) which is calculated as the difference between the level of the Merchant Service Charge <u>as paid</u> and the level of the Merchant Service Charge <u>as it would have been assuming the tort had not been committed</u>.

(7) Gaming of competition law

232. There is no clear rationale for the levels of the Multilateral Interchange Fee in terms of relationship between the Multilateral Interchange Fee and Issuer cost, whether the Multilateral Interchange Fee is considered generally or whether specific Default MIFs are (as here) in issue. The thesis of the Merchant Claimants advanced by Mr Beal, KC (although the Merchants' case does not

depend on it) was that the Multilateral Interchange Fee involved the Acquiring Market funding competition for Cardholders in the Issuing Market. Issuing Banks demand ever more Multilateral Interchange Fees so that they can compete amongst themselves for Cardholder business. This is a contention borne out of the following facts which have been found: (i) the flow of Multilateral Interchange Fees is from the Acquiring Market to the Issuing Market; (ii) although the Multilateral Interchange Fees are purportedly intended to discharge the costs of participants in the Issuing Market, there is no "earmarking" or indeed correlation between the Multilateral Interchange Fee and Issuer costs; (iii) Issuers compete for Cardholders by offering rewards in various ways, which have to be paid for. It is no great leap to suggest that there is a link between a charge in one market (i.e. the Multilateral Interchange Fee paid by the Acquiring Market) and the Cardholder rewards offered in the Issuing Market. There is, of course, no direct correlation between the Multilateral Interchange Fees received by Issuers and their expenditure on anything: there is no evidence to show the direct discharge by the Multilateral Interchange Fee of <u>any</u> Issuer cost.[274]

233. If – contrary to the approach here articulated – it were necessary in the future to consider the unlawfulness of Multilateral Interchange Fees on a Default MIF by Default MIF basis because only that way can anti-competitive effects be established within Article 101(1) TFEU, then it is plain that the number of Default MIFs will not only increase in number and type, but also will vary in terms of scope and nature. If these changes were capable of objective justification, then there might be more to the Schemes' arguments. But there is not.

234. The Merchant Claimants stressed that the reasoning in the Prior Record does not differentiate between different Default MIFs. That is for very good reason: it is not actually possible to draw a distinction between charges that are only different in monetary amount, but are otherwise indistinguishable.

[274] See Merchant Written Closing at [259(1) to (6)] regarding lack of factual witness or documentary evidence establishing a link between the calibration of MIFs and Issuer costs. This point undermines the suggestion advanced by the Schemes that there was a link between Multilateral Interchange Fees and Issuer costs in issuing Cards.

J. INFRINGEMENT

(1) Is infringement actually an issue?

235. Trial 1 turned on a battle between counterfactuals. Once this question is resolved the allegations of infringement become much more hard-edged and clearer to determine. The starting point is that the findings in the Sainsbury's SC Decision cannot be gainsaid.[275] Notwithstanding these findings, the counterfactuals advanced by the Schemes have been considered <u>on their merits</u>. Having considered their merits, they have been rejected for the reasons stated. The question as to how the Prior Record might have been reconciled to a (hypothetical) finding that one or other of the Scheme counterfactuals should be preferred over that found in the Sainsbury's SC Decision does not arise.

236. Most of the questions regarding Article 101 TFEU infringement have been determined by a combination of the findings of the Supreme Court in the Sainsbury's SC Decision and the findings in this Judgment. These findings make the questions that remain both factually and legally straightforward to resolve. The questions that remain are:

(1) Is the Default Interchange Fee Rule a restriction on competition by object?

(2) Is the Default Interchange Fee Rule a restriction on competition by effect?

237. Before proceeding to answer these questions, for the reasons given in Section I the question is <u>not</u> whether specific Default MIFs infringe, but whether the Default Interchange Fee Rule (under which the specific Default MIFs are promulgated) infringes. Although the removal of the Default Interchange Fee Rule has been described as "settlement at par", this is a term best avoided.[276] There are many reasons why a Merchant might receive <u>less</u> than 100% of the price paid by the Customer/Cardholder. Various fees (e.g. the Scheme Fee and

[275] See [155] to [158].
[276] See [162].

the other elements of the Merchant Service Charge) will be deducted, and such deductions are not before this Tribunal, and no view is expressed in relation to them at all. The point is that the Merchant should not receive less than 100% of what the Customer/Cardholder pays by reason of the imposition of the Multilateral Interchange Fee.

238. It is both pointless and analytically wrong to differentiate between Default MIFs:

(1) It is pointless because – as the Merchant Claimants have repeatedly said and as has been repeatedly noted in this Judgment – the analysis is exactly the same whatever the Default MIF. Default MIFs differ only in quantum, not in their essence, and the rule that constitutes the infringement of Article 101 TFEU is the Default Interchange Fee Rule under which multiple and varied individual Default MIFs are promulgated.

(2) It is analytically wrong because no counterfactual put forward by any party operates on the basis of differentiation between Default MIFs. That is because the Cardholder/Customer does not know or care what the Default MIF is; and the Merchant, who may know and will care, is in no position to refuse a transaction at a higher Default MIF because (i) this is commercially detrimental, and (ii) most likely contrary to the Scheme Rules.

The special pleading in regard to specific Default MIFs and their justification is wrong in law and fact.

(2) Infringement by object

(a) Preliminary points

239. There has, to date, been no finding in the Prior Record of an infringement by object in regard to the Default Interchange Fee Rule. The Prior Record shows

distinct evolution over the decades, and later courts and tribunals, in a very Newtonian sense, stand on the shoulders of giants.[277]

240. The Tribunal is obliged to make use of the Prior Record. The Prior Record shows that the "by object" infringement has been pressed rather less than it has been in the course of this Trial 1.[278] Here, the Merchant Claimants contended as their primary case that this was an infringement by object, and the Tribunal is obliged to determine that question. To be clear, for reasons given, the Merchant Claimants (unlike Mastercard and Visa) are in no way constrained by the Prior Record in the contentions they make.

241. In actual fact the Prior Record does not act as a constraint in this regard: there has been <u>no finding</u> on by object infringement, rather than an unequivocal and legally sound positive finding that there has been no infringement by object. Take, for instance, this Tribunal's decision in Sainsbury's CAT, which (at [102]) concluded that there was no by object restriction. The first reason given for reaching that conclusion is now open to serious question as to its correctness. At [102(1)], the Tribunal noted:

> "…although it is fair to say that the UK MIF is an agreement fixing a price, and that such provisions might be said to have a presumptive anti-competitive effect, it must be borne in mind that the UK MIF is a <u>default</u> provision. Under the MasterCard Scheme Rules, it was at all times open to Issuing and Acquiring Banks to agree a different Interchange Fee. That, in our judgement, has a diluting effect on the extent to which anti-competitive consequences can be presumed. Of course, we appreciate that the ability on the part of Issuing and Acquiring Banks to depart from the UK MIF by way of bilateral agreement may have been more illusory than real. But that is not a matter on which we can reach a conclusion without considering the effects of the UK MIF."

242. This passage has dated badly in light of the subsequent decisions of the Court of Appeal and Supreme Court. It is an abuse of process for Mastercard to contend for a counterfactual based upon bilaterally agreed interchange fees[279] and the notion that the Multilateral Interchange Fee was "only" a "default" is no longer tenable.

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[277] As Newton said to Hooke in 1675: "If I have seen further, it is by standing on the shoulders of giants".
[278] See, for example, [97]*ff* in the Sainsbury's CAT Decision.
[279] See [168(2)].

(b) By object infringements

243. The essential criterion for discerning a restriction on competition "by object" is that the agreement by its very nature reveals a sufficient degree of harm to competition so as to obviate any need for an effects based examination. The test "a sufficient degree of harm to competition" is not particularly defined. By object infringements focus upon those types of agreement that can be said to be – by their very nature – likely to be anti-competitive. Their anti-competitive effect can be presumed. In this, it may be said that object restrictions bear a passing similarity to per se illegal agreements under the US Sherman Act 1890. In the case of a per se infringement, it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that is by law regarded as restrictive of competition, independent of its effects.

244. Given that a finding of object restriction obviates the need for a consideration of the anti-competitive effects of an agreement, there is a symbiosis between restriction by object and restriction by effect. Restriction by object should not be used as a means of avoiding a difficult investigation of anti-competitive effects. In short, the harm to competition that might be expected in the case of an object restriction needs to be clear-cut and pronounced without an examination of the effects.

(c) A by object infringement in this case?

245. In this case, given (i) the findings of the Supreme Court in the Sainsbury's SC Decision (which I follow but which represent independently derived conclusions stated in this Judgment), (ii) the findings made in regard to market definition and the applicable counterfactual, it is obvious that this is a case of by object infringement within Article 101(1) TFEU:

(1) This is not a case of a default price which market participants can opt out of. This is a case where the Multilateral Interchange Fee is <u>imposed</u> on the consumers (the Acquirers and the Merchants) in the Acquiring Market without these consumers having any choice in the matter.

(2) The market elasticity of demand is such that the default price can be increased effectively at will by the Schemes, who do so without reference to any objectively justifiable criteria.[280] Such criteria might include the discharge of specific and specifically quantifiable costs in the Issuing Market or in ameliorating negative network effects arising between the Issuing and the Acquiring Markets so as to prejudice the operation of both. No such objectively justifiable criteria exist in this case.

(3) The Multilateral Interchange Fee thus creates a "floor" below which the Merchant Service Charge cannot fall, even in an otherwise competitive market such as the Acquiring Market. Acquirers cannot reduce the floor and can only compete on price at the margins.

(4) There is no purpose to the Multilateral Interchange Fee imposed by way of the Default Interchange Fee Rule that cannot be achieved through free market interaction between the Scheme and Issuers (in the Issuing Market) and between the Scheme and Acquirers (in the Acquiring Market). The Multilateral Interchange Fee short-circuits the competitive process and distorts it.

(5) It is the very purpose of the Multilateral Interchange Fee to do this. It acts as an illegitimate and indefensible "baked in" network effect in the Schemes' ecosystem that undercuts and does not promote competition.

246. One question that remains is whether the introduction of the Interchange Fee Regulation can affect this conclusion. The Interchange Fee Regulation formed an intrinsic part of the Pure Bilaterals Counterfactual and the Unilateral Interchange Fee Counterfactual advanced by the Schemes. The Regulation operates as an independent constraint on the Schemes' ability to set levels of interchange fees at rates above those permitted by the Regulation. The existence

[280] Obviously, it is not being said that the price can be infinitely raised. That is the "cellophane fallacy" that has been known for many years. Obviously, even a price that is imposed pursuant to market power can reach a point where a SSNIP will render the seller's price increase unprofitable. But that is not the test. The point is that price increases below this limit can be imposed without competitive constraints, not that the price can be infinitely high.

of an independent constraint cannot alter the nature of the Default Interchange Fee Rule, which – if properly characterised as a by object infringement before the entry into force of the Interchange Fee Regulation – is no less so after its coming into force. To draw upon a loose analogy, a contract term struck down as "unfair" by the Unfair Contract Terms Act does not cease to be unfair because it has been so struck down.

247. It might be said that the Interchange Fee Regulation in controlling, rather than abolishing, interchange fees provides a legitimisation of interchange fees. That is specious. The Regulation is not informed by competition law considerations, which continue to apply in similar terms irrespective of the entry into force of the Interchange Fee Regulation. The Interchange Fee Regulation operates as a constraint on anticompetitive conduct rendering the infringement monetarily less extreme: but it does not have a "laundering" effect, rendering that which is a by object infringement without the Regulation something different after the Regulation is in force.

(3) By effect infringements

248. Once the proper counterfactual has been established, the anticompetitive effects of the Default Interchange Fee Rule are again obvious:

(1) Both the Pure Bilaterals Counterfactual and the Unilateral Interchange Fee Counterfactual seek to avoid the conclusion that the Default Interchange Fee Rule has an anti-competitive effect by saying the "real world" Multilateral Interchange Fee would be exactly the same as the "counterfactual world" Multilateral Interchange Fee. Both would sit at the "ceiling" imposed by the Interchange Fee Regulation.

(2) Even if the Schemes' counterfactuals were arguable, it is to be doubted whether this would have been sufficient to avoid a conclusion that the Default Interchange Fee Rule results in an anti-competitive effect. This is for two reasons:

(i) The Interchange Fee Regulation does not apply to all Default MIFs. Where the Regulation does not apply, the upward spiral of the Multilateral Interchange Fee would continue to be unconstrained.

(ii) The fact that the Regulation's "ceiling" is deployed in and of itself shows an anti-competitive effect. If, in the Schemes' counterfactual worlds, the Default Interchange Fee Rule resulted in Multilateral Interchange Fees operating at levels <u>under</u> the ceiling, then there might be debate about anti-competitive effect. But where the "ceiling" is operating as a constraint in all cases, it is obvious that the counterfactual is achieving nothing in terms of creating a competitive setting for the default to be avoided and interchange fees to be genuinely, bilaterally, agreed.

(3) Given the counterfactual determined upon, the position is even clearer. There would be no Multilateral Interchange Fee <u>at all</u>, and so almost certainly no Bilateral Interchange Fees, for there would be no purpose in agreeing to them. The "floor" in the Merchant Service Charge would be removed, with the result that the entirety of the Merchant Service Charge would be opened up to competition.

(4) Variants on a theme

249. The Scheme Rules are important both in enabling the Schemes to function – without the bedrock of the Scheme Rules, they could not – and in promulgating what have been found to be rules infringing of competition law, namely the Default Interchange Fee Rule.

250. The conclusion regarding infringement has been based on the most straightforward of counterfactuals – the absence of the Default Interchange Fee Rule. No other rule changes to the Schemes Rules are required, in the case of this counterfactual. For the reasons already given, the more complex counterfactuals articulated by the Schemes fail on their own terms. But they are also counter-intuitive in that they overcomplicate what is intended to be a

relatively straightforward means of assessing anti-competitive effect and – to an extent – anti-competitive object. These counterfactuals have not been rejected on this basis, but on their own terms. That has made the choice of counterfactual inevitable; and it has not been necessary to choose between counterfactuals. There has only been one choice: that is the counterfactual found in Sainsbury's CA and SC Decisions.

251. The adoption of the No-MIFs Counterfactual renders it unnecessary to consider the variants on this theme that were advanced by the Merchant Claimants. In various alternative cases, the Merchant Claimants contended that <u>in addition</u> to the Default Interchange Fee Rule, a number of other Scheme Rules were, in combination with that rule, also anti-competitive. The Merchant Claimants' primary case was always that the Default Interchange Fee Rule was anti-competitive. These other points were advanced as, in some way, reinforcing the Merchant Claimants' primary case. As to this:

(1) These are not points that need to be decided, and it would not be appropriate to do so. That is not least because these variants actually obscure what is otherwise a very clear case.

(2) The Merchant Claimants contended (by way of example) that the Honour All Cards Rule and the No Surcharging Rule were both, in conjunction with the Default Interchange Fee Rule, anti-competitive and reinforcing of the Merchant Claimants' primary case.[281] However, postulating a counterfactual in which there is not only no Default Interchange Fee Rule but also (for example) no Honour All Cards Rule and/or No Surcharging Rule actually weakens the Merchant Claimants' case:

(i) The extent to which Merchants are committed to the Schemes depends quite fundamentally upon the attitude of the Cardholder/Customer, the ultimate consumer in the Acquiring Market.

[281] See, for example, Merchant Claimants' Written Closing at Sections E(28) and E(29).

(ii) The Schemes can operate perfectly well without Multilateral Interchange Fees and the Default Interchange Fee Rule, and the absence of such fees makes no difference to the perception of the Cardholder/Customer when purchasing products from a Merchant. That is in substantial part because of these other rules. A counterfactual in which these rules were absent would affect Customer/Cardholders' attitude to the essential service provided by the Schemes, the Payment Acceptance Service.

(iii) What is plainly anti-competitive when the counterfactual is simply the No-MIFs Counterfactual becomes less (and not more) clear-cut when the counterfactual becomes more complex. Since it is the conclusion of this Judgment that the Merchant Claimant's primary case succeeds, it would be counterproductive to consider weaker variants, where the outcome might very well be different.

K. A DIVERGENCE OF APPROACH

252. As is clear from the Concurring Judgment of Mr Tidswell, we differ in terms of the analytical approach that is to be taken in regard to Issue 4 and Issue 5. Mr Tidswell, for reasons set out in his Concurring Judgment, considers that there is no need to engage in any assessment of market definition or Focal Product (at least as regards Issues 4 and 5) because this was an area on which the experts were largely agreed: see [273(1)]. I am not satisfied that the issues of market definition, substitutability or Focal Product <u>were</u> common ground between the parties and have therefore treated these matters as contentious and so determined them.[282] If I am wrong, then whilst I have wasted a great deal of ink, I remain in fundamental agreement with the substantive findings Mr Tidswell makes. Essentially, Mr Tidswell considers that Issues 4 and 5 can be resolved by the correct application of the borderline between Article 101(1) TFEU and

[282] I do not consider that the experts were agreed on these points. It is absolutely clear that the parties did not consider the questions of market definition, substitutability or Focal Product to be agreed or even "largely agreed". I have set out the disagreements in the Judgment, and gather together the relevant references here: (i) [85] fn 125 sets out the differences between the parties as to the relevant market; (ii) the identity of the Focal Product and its substitutes were both contentious: see [99], [107], [132], [133].

Article 101(3) TFEU. I agree with Mr Tidswell's assessment (see [136] and [226] to [228]), but I do not consider that this assessment alone is sufficient to determine Issues 4 and 5. But as a partial answer, I agree.

253. Although there are a few minor, but still material, points of difference between us, which I briefly advert to in [256], I reject the Schemes' contention on Issues 4 and 5 that the relevant counterfactual is the absence of the Default Interchange Fee Rule on the basis of the reasoning set out above. The Schemes seek to side-step this point by impliedly postulating a counterfactual that entails the <u>presence</u> of the Default Interchange Fee Rule, but the <u>absence</u> of certain specific Default MIFs. As a result, Issues 4 and 5 (on the Scheme's case) involve consideration of a counterfactual world involving a different Focal Product to that defined in [88], which was:

"The provision of a payment acceptance service to Customers"

This Focal Product is offered to all Customers holding a Card, and no distinction is drawn between transactions involving different Defaults MIFs. I have set out my reasoning in support of this conclusion in detail Section I: for those reasons, I reject the Scheme's contentions in regard to Issues 4 and 5, and accept the contention of the Merchant Claimants that the relevant counterfactual for purposes of Article 101 TFEU is the No-MIFs Counterfactual, which is the case whether one is considering Default MIFs generally or the specific Default MIFs arising in the cases of Issues 4 and 5.

254. The Schemes' contentions in regard to Issues 4 and 5 are inconsistent with the holding in Sainsbury's SC. The three decisions on appeal to the Supreme Court were – it is true – limited to specific Default-MIF types. That was because of the way in which those cases were pleaded, and this was itself a function of the Prior Record, and the manner in which the EU approached interchange fees over time – initially, with a degree of wary benevolence, and then with increasing concern at their anti-competitive effects. But the fact that these cases were limited to different types of Default MIF does not mean that the Supreme Court's analysis was in any way dependent on the types of Default MIF that were before it. I accept, of course, that the Supreme Court's approach was open

to challenge and contrary argument by the Schemes, given the decision in Dune CA. We have given full latitude to those arguments. But Dune CA cannot and does not go further than holding that the point was arguable at trial and open to the Schemes to take (which they did). That argument has now been heard, and the conclusion of this Judgment is that the analysis of the Supreme Court is based upon the No-MIFs Counterfactual and that the analysis is Default-MIF indifferent, which was the Merchant Claimants' central point in this litigation, and with which I agree.

255. I agree with Mr Tidswell's evaluation of the factual material before us. Whilst I consider that the approach taken by Mr Tidswell to Issues 4 and 5 is right but insufficient to determine those issues, I am in complete agreement with the findings of fact set out in Annex 6.

256. I can deal briefly with the remaining points of difference between myself and Mr Tidswell:

(1) I am in agreement with Mr Tidswell's analysis of *Groupe Canal+*.[283] I consider that my analysis of the Prior Record, specifically the fact that the Prior Record cannot prevent the Merchant Claimants from advancing the claims that they elect to bring, including allegations of "by object" infringement, answers this point. But I agree with Mr Tidswell's narrower way of putting the point.

(2) I have stated my position regarding Issues 4 and 5 already, and do not repeat this. It is only necessary to repeat that to the extent that Mr Tidswell considers that this matter was not before the Tribunal because it was common ground, I disagree. It is true that amongst the experts there was a broad consensus that the Issuing Market was a second-order question when compared to the Acquiring Market (although even here there was no agreement, and the point is "live" in the List of Issues), but I did not discern any further expert consensus than that. In any event, it is for the Tribunal to be informed by the expert evidence, not to be ruled

[283] See [265]*ff*.

by it, particularly when the parties are at variance on the significance of that evidence.

(3) At [273(2)], there is a suggestion that I am determining matters in a manner not argued by the parties. My concern to understand the operation of the market was evident throughout the hearing (specifically, in the diagram at Annex 3, that was regularly under consideration during the trial) and I have simply used variants of the SSNIP test as a thought-experiment to test my thinking. Because this matter is likely to go on to appeal, I should state in terms that this Judgment is based solely on the evidence and argument adduced by the parties in the course of Trial 1.

(4) Mr Tidswell and I are agreed that the Default Interchange Fee Rule prior to the coming into force of the Interchange Fee Regulation was a "by object" infringement. For the reasons I have given, I do not consider that the operation of the Interchange Fee Regulation changes this conclusion, and here Mr Tidswell and Professor Waterson differ, for the reasons they give.

L. TWO TAIL-END POINTS

(a) The points arising

257. Two specific matters fall to be determined which are separate from the Article 101 TFEU issues so far considered. They are considered below.

(b) The "Visa Inc" point

258. Visa make the point that "(i) inter-regional MIFs have at all relevant times been set by Visa Inc.; and (ii) a number of Claimants in these proceedings have not sued Visa Inc.".[284] The significance of the point is stated to be as follows:

> **"[209]** This is highly material to the determination of Issue 4, which concerns the lawfulness of inter-regional MIFs. The question as to whether inter-regional MIFs are restrictive of competition by effect must be assessed by

[284] Visa Closing at [208].

asking what would have happened without the inter-regional MIFs. For those claims where the Claimants have only sued [Visa Europe Limited], the Claimants will need to prove as a matter of fact what [Visa Europe Limited] could and would have done in the counterfactual. That counterfactual has to be "realistic". In the context of domestic consumer MIFs before the IFR, the realistic and likely counterfactual was that described by the Supreme Court in *Sainsbury's*: [settlement at par]. The same counterfactual is not realistic where Visa Inc is not a defendant. That is because [Visa Europe Limited] has no power to compel issuers from another region to accept [settlement at par], or stipulate that overseas issuers must settle at par, with no deduction for interchange fees. That can only be done by Visa Inc, and, in many of the claims, the Claimants have chosen not to sue Visa Inc.

[210] The argument was addressed by the Court of Appeal in *Dune CA*:

"I have been persuaded that there is room for argument that (a) so far as inter-regional MIFs are concerned, a no-default MIF with settlement at par counterfactual is not appropriate because neither Visa Europe nor the other defendants could have achieved that, (b) no alternative counterfactual has been proposed by the claimants and (c) there is no evidence as to what would have been likely to happen if Visa Europe had removed the provision for default inter-regional MIFs but (because it had no power to) had not imposed settlement at par."

[211] The Court of Appeal was right for all the reasons that it gave. There is nothing in the evidence before this Tribunal that is capable of altering those conclusions."

259. As to this contention:

(1) The significance of the decision in *Dune* is limited. All that the Court of Appeal was saying – all that it could say – was that this point was sufficiently arguable so as to enable Visa to avoid summary judgment.[285]

(2) Similarly, it is right to say that the question of the ambit of the Supreme Court's counterfactual was an open question before us. The argument of the Claimants that the Supreme Court's decision in *Sainsbury's* applied to all MIFs was rejected in *Dune*. However, having heard the evidence, this Judgment holds that the Supreme Court's analysis holds good in relation to *all* MIFs, because the anti-competitive aspect of the interchange fee regime is *not* in relation to specific Default MIFs, but in relation to the Default Interchange Fee Rule generally. This holding is

[285] See Dune CA [75] and [76].

consistent with the Supreme Court's decision but represents an extension of it.

(3) It is significant, in this regard, that the Supreme Court's analysis was "MIF-indifferent": it did not depend on the nature of the Default MIF, although it only determined the issues before the Supreme Court, which were MIF-specific. But it does not follow that the Supreme Court's analysis is not completely valid to all MIFs, and this is the conclusion of this Judgment.

(4) It follows that it does not matter who sets the MIF. As the analysis of the counterfactuals demonstrates, even if the Default MIF is set by a third party, uncontrolled by the Scheme, the Default MIF remains anti-competitive.

(5) It also follows that the differentiation between different MIF types is a "red-herring": the mischief lies not in the level of the Default MIF, nor in the fact that its level may be driven by reference to different factors. The mischief is the Default Interchange Fee Rule, irrespective of the specific Default MIF in question. That was an open question in the Supreme Court, and was held to be arguable in *Dune*. But the argument has now been determined, and the point is a bad one.

(c) The M&S limitation point

260. This issue – issue 2.6 in the List of Issues – is described in Mastercard Written Closing/[118]-[127]. In opening, the Claimants contended that Mastercard was liable in respect of certain interchange fees said to have applied under the UK Maestro debit scheme up to July 2009.[286] The point only applies to M&S, the sole claimant with a claim period extending back so far. Although the point is academic, because M&S have settled their claims, I would have rejected the claim for the following reasons, which ought to be stated.

[286] Mastercard Written Closing/[118].

261. The problem is that the facts as they pertained to Maestro in the pre-August 2009 period appear to be materially different to those considered in the Judgment. The Mastercard Written Closing states as follows:[287]

> "It is unclear from their solicitors' letter dated 19 February 2024 to what extent the Claimants assert liability in respect of the period up to July 2009 and, if so, on what basis Mastercard is alleged to be liable in relation to UK Maestro debit. In any event, there is no tenable claim in relation to UK Maestro debit in that period, for four reasons."

262. The four reasons – set out in detail at [122] to [126] – are that:

(1) In the period up to August 2009, interchange fees within the UK Maestro debit scheme were agreed bilaterally. Although there was provision for a fall-back interchange fee, that only applied pending arbitration between the relevant Issuer and Acquirer to arrive at a bilateral interchange fee. So far as Mastercard was aware, that arbitration process had never been used.

(2) The fall-back interchange fee was not set by Mastercard, but by S2 Card Services Ltd. Mastercard did not control the setting of the default in the case of disagreement.

(3) The case had not been pleaded by the Claimants, and the question of non-MIF interchange fees did not arise on the pleadings.

263. The fact that the default rate was not set by Mastercard but by S2 does not signify. What that does signify is that this was a case where there was no Default Interchange Fee Rule as set out here, but bilaterally negotiated interchange fees. It follows that the analysis in this Judgment is simply wide of the mark, and there is no proper basis for deciding this point against Mastercard. This is not a technical pleading point: it is much more substantial than that. There is simply no evidential basis on which this aspect of the claim can be upheld.

[287] At [121].

<u>MR BEN TIDSWELL</u>:

M. CONCURRING JUDGMENT

(1) Introduction

264. The Tribunal is unanimous in its answers to most of the questions before us. However, there are differences between us in relation to the route by which various outcomes are reached and, in some cases, as to the outcome itself. In this concurring judgment, I address the following points:

(1) The approach to previous decisions of courts and administrative authorities.

(2) The relevance and use of market definition.

(3) The assessment of whether the Default Interchange Fee Rule as it relates to all or any of the MIFs in question in these proceedings amounts to a "by object" infringement[288].

(4) The correct legal approach to the counterfactual for Issues 4 and 5.

(5) The argument about Visa Inc.'s role in relation to Inter-regional MIFs (issues 2.2.1 and 2.2.2).

(6) The assessment of the evidence on effects in the counterfactual for Issues 4 and 5.

(2) The approach to previous decisions

265. Mr Justice Marcus Smith approaches this question by asking a question about the "bindingness" of what is described as the Prior Record. To the extent that

[288] It should be noted that this concurring judgment assumes throughout that the relevant provision which is alleged to offend Article 101(1) is the rule in the respective Mastercard and Visa Schemes which is described generically by Mr Justice Marcus Smith in his judgment as the Default Interchange Fee Rule. The counterfactual questions that arise concern the competitive impact of that rule in relation to particular types of MIF, depending on their individual circumstances.

this analysis finds that the Schemes are not constrained by the Prior Record in asserting that a different counterfactual should apply in relation to Issues 3, 4 and 5, I agree with Mr Justice Marcus Smith. That is plainly the consequence of the arguments by the Schemes that there are different factual contexts which apply to the assessment of the post-IFR MIFs and the assessment of the commercial Card and inter-regional MIFs. It is also consistent with the decisions of the Tribunal and the Court of Appeal in respect of the *Dune CAT* and *CA Decisions*.

266. There is one further issue of "bindingness" which Mr Justice Marcus Smith does not directly address. That is the question of whether the findings of the Commission in the Mastercard and Visa Inter-regional Commitments decisions, and in particular the finding of a "by object" infringement, are binding on the Tribunal as a result of EU case law about the proper approach of national courts to such decisions.

267. The Merchants rely on the decisions of the CJEU in *Groupe Canal+* for the proposition that a national court cannot issue a negative decision finding that there has been no infringement of Article 101(1) TFEU which runs counter to a commitments decision in which the Commission has indicated an intention to adopt an infringement decision. [289]

268. That is not a correct statement of the law. The Merchants rely for the proposition on [112] and [113] of *Group Canal+*, which read as follows:

> "**[112]** Indeed, in accordance with the case-law of the Court of Justice (judgment of 14 December 2000, Masterfoods and HB, C-344/98, EU:C:2000:689, paragraph 51 and the case-law cited), which is now codified in the second sentence of Article 16(1) of Regulation No 1/2003, the coherent application of the competition rules and the general principle of legal certainty require national courts, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, to avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Article 101(1), Article 102 and Article 101(3) TFEU.
>
> **[113]** Since decisions based on Article 9(1) of Regulation No 1/2003 are, as is apparent from the wording of that provision, taken 'where the Commission

[289] Case C-132/19 *Groupe Canal + SA v European Commission* [2020] EU:C:2020:1007 ('Groupe Canal+').

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

269. These passages concern an argument by a third party (Groupe Canal+) to the effect that it was entitled to bring civil proceedings to enforce contractual rights against the commitment giver (Paramount), notwithstanding that success by *Groupe Canal*+ would require Paramount to breach the commitments given. That is clear from the following paragraph in the judgment:

> "**[114]** Therefore, the General Court also erred in law by holding, in essence, in paragraphs 100, 102 and 104 of the judgment under appeal, that a national court could, where appropriate, declare that clauses such as the relevant clauses do not infringe Article 101(1) TFEU and uphold an action brought by an undertaking for the enforcement of its contractual rights adversely affected by commitments made binding by the Commission or uphold an action for damages."

270. Commitments decisions are final and binding as to the action which an undertaking must take following the making of the decision, but they are not binding as to the existence or nature of any infringement[290]. That explains why, in *Groupe Canal+*, it was held that a national court could not make a decision which would require an entity to breach its commitments. A decision in an action to enforce a contract in the circumstances of that case would obviously do that and should not be permitted.

271. That is an entirely different matter from preventing a national court, properly seized of the infringement allegation and in possession of the relevant evidence, from determining whether or not an infringement has occurred simply because the Commission, on the basis of a preliminary view, has accepted commitments. Nothing in *Groupe Canal+* justifies that outcome.

[290] See Recital (13) of Regulation 1/2003: *"Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case"* and Case C-547/16 *Gasorba SL v Repsol Commercial de Productos Petroliferos* [2017] EU:C:2017:891 at [30]

272. The correct position is therefore that the Mastercard and Visa Inter-regional Commitments decisions are not binding on the Tribunal.

(3) The relevance and use of market definition

273. Mr Justice Marcus Smith has conducted an extensive analysis of the market definition, including in particular the question of substitutability and the identification of the Focal Product. To the extent that this analysis finds that the relevant market is the Acquiring Market, I agree with it. Beyond that, however, and with the greatest respect, I do not agree with Mr Justice Marcus Smith's approach. This is for the following reasons:

(1) The parties' experts largely agreed on market definition. The Joint Expert Statement dealt with the question of market definition as follows:

> "Issue 1: Market definition
>
> Areas of agreement
>
> • The market definition framework in Mastercard – comprising separate issuing, system and acquiring markets – is workable for analysing the present case.
>
> • At least on each expert's preferred approach to analysing the subsequent issues, nothing turns on the boundaries of those markets (including in relation to the disagreement below).
>
> • While Amex is vertically integrated, it should either be considered (i) as part of the acquiring market or (ii) (and in any event) its direct effect via the system market should be taken account in subsequent analysis where relevant (although the experts disagree on the need for the former and, on the latter, disagree in what further parts of the analysis Amex is relevant to).
>
> Areas of disagreement
>
> • Whether the system market includes other non-card payment methods such as cash, cheques and online payment systems."

(2) None of the parties approach the question of market definition in the way it is approached by Mr Justice Marcus Smith. In particular, there has been no attempt by any party to analyse a Focal Product using a SSNIP test. The parties did not produce evidence directed to this question.

(4) The assessment of whether the Default Interchange Fee Rule as it relates to all or any of the MIFs in question in these proceedings amounts to a "by object" infringement

274. Two issues arise for consideration here:

(1) The correct test for identifying "by object" infringements, and in particular the place of a counterfactual assessment in that exercise.

(2) Whether, properly analysed, the implementation of the Default Interchange Fee Rule in relation to any or all of the post-IFR MIFs, commercial Card MIFs or inter-regional MIFs can be said to be a "by object" infringement. For reasons that will become clear in due course, it will be necessary to differentiate between commercial Card MIFs; inter-regional MIFs before and after the Commission Commitments decisions in 2019 concerning inter-regional MIFs (together the *"*IR Commitments Decisions*"*) [291]; and post-IFR MIFs.

(a) The role of the counterfactual in identifying "by object" infringements

275. It is common ground that, if a measure is determined to have an anti-competitive object, then it is not necessary to go on to the second stage contemplated by Article 101(1) TFEU and examine its effect on competition.

276. The legal test for assessment of whether a measure is a "by object" infringement is well established. The key question is to determine whether the provision presents a sufficient degree of harm for competition. In determining this question, it is necessary to consider the content of the relevant provision, the objective aim it pursues and the legal and economic context of which it is a part.[292]

[291] The Mastercard decision by the European Commission to accept and make binding commitments from Mastercard in relation to inter-regional MIFs dated 29 April 2019 (the "Mastercard Inter-regional Commitments Decision) and the Visa MIF decision by the European Commission to accept and make binding commitments from Visa in relation to inter-regional MIFs dated 29 April 2019 (the "Visa Inter-regional Commitments Decision").

[292] Case C-67/13 P *Groupement des Cartes Bancaires v Commission* [2014] EU:C:2014:2204 ("Cartes Bancaires") at [53].

277. The Merchants argue that there is no place for a counterfactual analysis in a "by object" assessment. The Schemes submit that a counterfactual analysis is not required but may be useful in complex cases and should be considered in this case.

278. Both sides focused on the decision in Case C-591/16 P 13 *Lundbeck v Commission* [2021] EU:C:2021:243, where the CJEU held as follows:

> "**[139]** In the second place, as regards the third part of the first ground of appeal directed against [472] and [473] of the judgment under appeal, by which the General Court held, in essence, that it was not necessary to examine the "counterfactual scenario" in order to characterise conduct as a "restriction by object", it should be noted that that examination allows the effects of a concerted practice with regard to art.101 TFEU to be assessed when the analysis of that practice does not reveal a sufficient degree of harm to competition to enable it to be characterised as a "restriction by object" (Generics (UK) (C-307/18) at [115] and [118] and the case law cited).
>
> **[140]** Consequently, unless the clear distinction between the concept of "restriction by object" and the concept of "restriction by effect" arising from the wording itself of art.101(1) TFEU (Generics (UK) (C-307/18) at [63]) is to be held not to exist, an examination of the "counterfactual scenario", the purpose of which is to make apparent the effects of a given concerted practice, cannot be required in order to characterise a concerted practice as a "restriction by object".
>
> **[141]** Therefore, and as the General Court rightly held in [472] of the judgment under appeal, in order to characterise such a practice as a "restriction by object" it was only necessary to establish that that practice revealed a sufficient degree of harm to competition, in view of the content of the provisions involved in that practice, the objectives that that practice is intended to achieve and the economic and legal context of which it formed part; the Commission was not required, however, to examine the effects thereof."

279. The Schemes argue that the requirement to consider the "economic and legal context" can, and should in this case, permit a counterfactual analysis. This argument is supplemented by the observation that once the analysis becomes sufficiently complex then it will be increasingly plain that a "by effects" analysis is more appropriate.

280. In my view, these arguments blur the clear distinction between the "by object" and "by effects" analyses. In particular, the reference to "counterfactuals" is potentially confusing and unhelpful language to introduce into the "by object" assessment. It may well be the case that it is helpful to imagine a market without certain conduct in order to form a view about the capacity for the conduct to

cause harm to competition. It is for example implicit in the consideration of the impact of price fixing that the market without fixed prices would operate more competitively.

281. That is not however a counterfactual in the way that the Schemes seek to deploy the word. They are seeking to go beyond an understanding of the competitive dynamics of a market (the economic and legal context) and the potency of the scrutinised conduct. Instead, they attempt to bring into consideration the extent to which the conduct actually causes harm. That is an "effects" analysis.

282. In this case, an analysis of the economic and legal context can be carried out without any need to assess the extent of harm actually caused by the MIFs.

(b) Are commercial Card MIFs and inter-regional MIFs "by object" infringements

283. I agree with Mr Justice Marcus Smith that:

(1) The commercial Card MIFs are properly characterised as "by object" infringements.

(2) The inter-regional MIFs are properly characterised as "by object" infringements until the Commitments Decisions in relation to inter-regional MIFs came into force.[293]

284. The main argument of the Schemes is that the MIFs are necessary to achieve efficient card usage by way of providing an appropriate balancing of costs across both sides of a two-sided market. In other words, that there is a pro-competitive benefit from the MIFs, which is said to be a legitimate objective.

285. In principle, an otherwise apparently anti-competitive measure which is likely to cause sufficient harm to justify a "by object" infringement can avoid that outcome if the measure can be shown to have a legitimate objective.[294]

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[293] These were legally binding on Visa from 29 April 2019 and on Mastercard from 23 September 2019.
[294] See e.g. Case C-307/18 *Generics (UK) Ltd v CMA* EU:C:2020:52 at [85] – [89].

286. In support of their arguments that the commercial Card and inter-regional MIFs have a legitimate purpose, the Schemes relied on two cases decided by the CJEU to support their arguments that there was no "by object" infringement.

287. The first is *Cartes Bancaires*. This case involved an arrangement between issuing and acquiring banks in France, which had as its purpose a balancing payment between institutions in the linked, but separate, issuing and acquiring markets. There was no MIF in this case – it involved an altogether different mechanism to achieve its objective of a given ratio between issuing and acquisition activities[295]. Given that conclusion, the CJEU found that the measure could not be characterised as a "by object" restriction[296].

288. Accordingly, this decision does not materially assist the Schemes. It relates to a different economic and legal context, and it simply reinforces the importance of the analysis in each case of that context in order to answer the relevant question.

289. The second case relied on by the Schemes is Case C-228/18, *Gazdasagi Versenyhivatal v Budapest Bank* EU:C:2020:265 ("*Budapest Bank*"). However, that case too involved a different economic and legal context. The measure in question was an agreement between a group of banks to set a uniform amount for MIFs as between the Visa and Mastercard schemes. The agreement therefore affected competition between the Visa and Mastercard schemes (the inter-system market) as well as the separate acquiring market[297].

290. There were a number of complexities which arose from the particular agreement which are not present in this case. For example, at [74] the Court discussed the possibility that neutralising Multilateral Interchange Fee competition between the Visa and Mastercard schemes might intensify competition in other respects. It is therefore wrong for the Schemes to argue that this case establishes anything other than the need to consider the particular economic and legal context in each case.

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[295] See *Cartes Bancaires* at [86].
[296] Ibid at [87].
[297] See *Budapest Bank* at [57].

291. The relevant economic and legal context in this case is set out in [208] to [211] and [245] of Mr Justice Marcus Smith's judgment. It discloses that, at least as far as commercial Card MIFs and inter-regional MIFs are concerned:

(1) These MIFs distort competition in the same way as the MIFs considered in the Sainsbury's SC Decision.

(2) The "balancing" argument put forward by the Schemes is fatally undermined by the lack of any correlation between the costs incurred by Issuers and the setting of the MIFs, and therefore the amounts paid by Acquirers.

(3) It is not necessary for the MIFs to exist in order for there to be market interactions between Acquirers, Issuers and other participants in the overall card schemes (including Merchants and Cardholders).

(4) Contrary to the arguments of the Schemes, there is no objectively legitimate purpose for the imposition of the MIFs.

292. While the Schemes assert that there is a legitimate aim, and indeed a pro-competitive purpose, behind the commercial Card MIFs and inter-regional MIFs, the evidence[298] establishes that there is in fact no correlation between the level at which these MIFs are set (absent regulation) and any benefits which might accrue to Merchants or Customers.

293. Instead, objectively assessed, the fixing of prices for Multilateral Interchange Fees have the purpose of serving the commercial interests of enhancing revenue to Issuers at a maximal level, thereby increasing the value of the Schemes to Mastercard and Visa respectively. This is done at the expense of competition between Acquirers for the provision of services to Merchants.

[298] See Annex 6 for a detailed discussion of the evidence in relation to this point.

294. There is therefore objectively no basis on which the Schemes can say that these MIFs serve a legitimate purpose that might require an effects analysis before an infringement can be found.

(c) Are Post-IFR MIFs and inter-regional MIFs after the Commitments decisions "by object" infringements

295. I have not reached the same conclusion in relation to the post-IFR MIFs, which means that I depart from the conclusions reached by Mr Justice Marcus Smith at this juncture. That is because of the consequence of the IFR itself on the economic and legal context.

296. The IFR rules on Multilateral Interchange Fee caps came into effect from 9 December 2015. The IFR remains in full force and effect in Ireland. It was retained in the UK as retained EU law following Brexit.

297. Articles 3 and 4 of the IFR set a maximum weighted average rate cap of 0.2% on domestic and cross-border debit MIFs, and a maximum ad valorem rate cap of 0.3% on domestic and cross-border credit MIFs. Member States may impose lower caps for domestic transactions, but the UK has not done so. Ireland has imposed a lower debit card interchange fee of 0.1%. It is uncontroversial that both Mastercard and Visa have had to reduce the levels of their debit and credit UK and Irish domestic MIFs to comply with these caps.

298. Recital 14 of the IFR states that "*The application of this Regulation should be without prejudice to the application of Union and national competition rules*". It does not therefore operate as an exemption decision for competition law purposes. None of the parties suggested that it operated so as to prevent a finding of infringement simply as a consequence of the compliance by Visa and Mastercard with its terms.

299. However, the Schemes did argue that compliance by them with the IFR meant that post-IFR MIFs should not be considered to be "by object" infringements. This is because the IFR recognises that "*Card-based payment transactions instead of payments in cash could therefore be beneficial for merchants and*

consumers, provided that the fees for the use of the payment card schemes are set at an economically efficient level, whilst contributing to fair competition, innovation and market entry of new operators"[299].

300. In addition, recital 20 of the IFR provides:

> "(20) The caps in this Regulation are based on the so-called 'Merchant Indifference Test' developed in economic literature, which identifies the fee level a merchant would be willing to pay if the merchant were to compare the cost of the customer's use of a payment card with those of non-card (cash) payments (taking into account the fee for service paid to acquiring banks, i.e. the merchant service charge and the interchange fee). It thereby stimulates the use of efficient payment instruments through the promotion of those cards that provide higher transactional benefits, while at the same time preventing disproportionate merchant fees, which would impose hidden costs on other consumers. Excessive merchant fees might otherwise arise due to the collective interchange fee arrangements, as merchants are reluctant to turn down costly payment instruments for fear of losing business. Experience has shown that those levels are proportionate, as they do not call into question the operation of international card schemes and payment service providers. They also provide benefits for merchants and consumers and provide legal certainty."

301. In my view, the IFR caps are an important difference between the economic and legal context which applies to post-IFR MIFs and that which applies to commercial Card and inter-regional MIFs, as previously discussed. While the evidence in relation to the latter discloses no basis for an objectively legitimate basis for imposing such charges, it seems to me that MIFs which are set pursuant to the IFR might have such a basis.

302. That is because the IFR caps have apparently been set by reference to a level which might promote fair competition, including efficiency, innovation and market entry, so that MIFs which are set by reference to those caps might objectively be said to have a legitimate purpose and therefore should be subject to an "effects" analysis, rather than being determined to be "by object" restrictions.

303. I do not therefore reach the conclusion that the post-IFR MIFs amount to "by object" infringements. I do however agree with Mr Justice Marcus Smith that the counterfactual for the subsequent effects analysis for these MIFs is the same

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[299] See IFR at recital (9).

for those MIFs considered in the Sainsbury's SC Decision, for the reasons he gives in section H of his judgment. The post-IFR MIFs do therefore infringe Article 101(1) TFEU on that basis.

304. The position is the same for the inter-regional MIFs once the Commitments Decisions relating to inter-regional MIFs were in force. That is because the Commitments Decisions set out in detail the work the Commission did to establish the level of MIF at which there would be direct and tangible benefits to merchants and consumers such that the Commission's competition concerns were addressed. See for example the Visa Inter-Regional Commitments Decision at section 7.2 and in particular recital 86 which provides as follows[300]:

> "(86) For each type of inter-regional transaction (that is CP and CNP, debit and credit), the MIF caps proposed by Visa do not clearly appear to be in excess of the requirements of the MIT. In the light of the elements set out in recitals (80) to (84), the evidence on the file indicates that for inter-regional CP transactions, a per transaction MIF of 0.2% for debit cards and of 0.3% for credit cards could make merchants, taken together, indifferent between accepting a cash payment and a card payment. For inter-regional CNP transactions, the evidence on the file indicates that a per transaction MIF of 1.15% for debit cards and of 1.5% for credit cards could make merchants, taken together, indifferent between accepting a non-SEPA bank transfer or an e-money transfer and a card payment."

305. I do not therefore reach the conclusion that the inter-regional MIFs set by the Schemes following the entry into the Commitments Decisions amount to "by object" infringements. As noted below, in any event I conclude that, at all times, the inter-regional MIFs infringe Article 101(1) TFEU once considered on an effects basis.

(5) The correct legal approach to the counterfactual for Issues 4 and 5

306. Mr Justice Marcus Smith analyses the question of the proper counterfactual for Issues 4 and 5 through the lens of market definition and the identification of a Focal Product. I prefer to approach the question as one of law and the correct application of Article 101(1) TFEU, in light of the interaction between Article 101(1) and Article 101(3) TFEU.

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300 The Mastercard Inter-regional Commitments Decision contains a similar recital at (85).

307. The starting point is the common ground between the parties that Article 101 TFEU may give rise to a number of different stages of analysis:

(1) Whether there is a restriction or distortion of competition by object under Article 101(1) TFEU (discussed above).

(2) Whether there is a restriction or distortion of competition by effect under Article 101(1) TFEU (as described further below).

(3) Whether the otherwise offending measure is objectively necessary for the implementation of the "main operation" of the agreement, provided that the main operation does not breach Article 101(1) TFEU (discussed in section H(6) of Mr Justice Marcus Smith's judgment).

(4) Under Article 101(3) TFEU, whether the agreement is exempt, despite the restriction or distortion of competition, because it meets certain conditions in the course of achieving certain efficiency gains (this issue is not the subject of this judgment and will be dealt with in a future trial).

308. It is well established in European law that there is no "rule of reason" which applies in relation to Article 101(1) TFEU, so as to require assessment of the pro and anticompetitive effects of an agreement in order to determine whether it is caught by the prohibition in that article. In *Metropole Television v Commission*,[301] the General Court[302] said:[303]

> "**[74]** Article 85 of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, Case 161/84 Pronuptia [1986] ECR 353, paragraph 24, and Case T-17/93 Matra Hachette v Commission [1994] ECR II-595, paragraph 48, and European Night Services and Others v Commission, cited in paragraph 34 above, paragraph 136). Article 85(3) of the Treaty would lose much of its

301 [2001] EU:T:2001:215 GCEU.
302 At that time known as the Court of First Instance.
303 It will be noted that the following paragraphs refer to Article 85, which is the prior version of Article 101.

effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.

[75] It is true that in a number of judgments the Court of Justice and the Court of First Instance have favoured a more flexible interpretation of the prohibition laid down in Article 85(1) of the Treaty (see, in particular, Société technique minière and Oude Luttikhuis and Others, cited in paragraph 70 above, Nungesser and Eisele v Commission and Coditei and Others, cited in paragraph 68 above, Pronuptia, cited in paragraph 74 above, and European Night Services and Others v Commission, cited in paragraph 34 above, as well as the judgment in Case C-250/92 DLG [1994] ECR I-5641, paragraphs 31 to 35).

[76] Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) of the Treaty. In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (see, in particular, European Night Services and Others v Commission, cited in paragraph 34 above, paragraph 136, Oude Luttikhuis, cited in paragraph 70 above, paragraph 10, and VGB and Others v Commission, cited in paragraph 70 above, paragraph 140, as well as the judgment in Case C-234/89 Delimitis [19911 ECR I-935, paragraph 31).

[77] That interpretation, while observing the substantive scheme of Article 85 of the Treaty and, in particular, preserving the effectiveness of Article 85(3), makes it possible to prevent the prohibition in Article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties. It must, however, be emphasised that such an approach does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) of the Treaty applies."

309. That reasoning makes it clear that the balancing of pro and anti-competitive effects is an exercise to be carried out in relation to Article 101(3), not 101(1) TFEU. However, as I understand it, the Schemes say they are not arguing that pro and anti-competitive effects should be considered at the Article 101(1) TFEU stage. They submit that they are merely relying on case law to the effect that, in determining whether there is any adverse effect of a restrictive provision, the counterfactual must properly take into account the economic context of the relevant market, which means properly assessing the effect of the wider competitive situation which might exist in the counterfactual absent the offending measure. They rely on a number of authorities to that effect.

310. In *Cartes Bancaires*, the CJEU said the following about the counterfactual:

> "**[110]** The examination required under article 81, paragraph 1, EC consists essentially in considering the impact of the agreement on the current and potential competition and the competitive situation in the absence of agreement, these two aspects being intrinsically linked [ruling of 2 May 2006, 02 (Germany)/Commission, T-328/03, EU:T:2006:116, point 71].
>
> **[111]** In this case, 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."

311. Mastercard submits that this passage shows the need to consider the competitive market in the counterfactual. Given that the measure in question in these proceedings (the MIF) is a cost, it is said by Mastercard to be necessary to consider what the level of that cost would be in the counterfactual, including where differences arise from competitive conditions that might change as a result of the removal of the MIF.

312. This, it is said, is consistent with other CJEU authority to the effect that account must be taken of the competitive conditions in the relevant market. Mastercard cited:

(1) *Delimitis*[304], in which the Court of Justice explained that, in assessing whether an agreement has restrictive effects on the market, "account must be taken of the conditions under which competitive forces operate on the relevant market."

(2) The focus on prices in the Mastercard GC Decision and the Mastercard CJEU Decision,[305] where the inquiry was into whether "by comparison with an acquiring market operating without them, the MIF limits the pressure which merchants can exert on acquiring banks when

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[304] Case C-234/89 *Delimitis v Henninger Brau AG* EU:C:1991:91 at [22]

[305] Case T-111/08 Mastercard Inc. & Others v European Commission ECLI:EU:T:2012:260 (**Mastercard GC Decision**); Case T-111/08 Mastercard Inc. & Others v European Commission ECLI:EU:C:2014:2201 (**Mastercard CJEU Decision**).

negotiating the MSC by reducing the possibility of prices dropping below a certain threshold".

(3) The Commission's guidelines[306] on Article 101(1) TFEU, which require an analysis of:[307]

> "The actual context […] in which the undertakings concerned operate, the nature of the goods and services affected, and the real conditions of the functioning and the structure of the market or markets in question."

and[308]

> "[the] actual context of the cooperation may include factors such as the presence of sufficient possibilities for customers to switch supplier; the likelihood that competitors increase supply if prices increase; whether the market characteristics are conducive to coordination; whether the activities covered by the cooperation account for a high proportion of the parties' variable costs in the relevant market; etc. It may also be relevant to assess whether the parties combine their activities covered by the cooperation to a significant extent."

313. Visa focused its submissions on the analysis in the Sainsbury's SC Decision of fact (vi) in the Six Facts on which that decision is based. This is that *"in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower"*[309]. Visa submits that this must refer to Merchant Service Charges in a market wide context, not just in relation to Visa and Mastercard transactions. Visa says that:

(1) The Supreme Court was considering competition in the acquiring market and asking itself the question "whether in the absence of the MIF the prices acquirers charge to merchants at large would be lower. This is the case, because the price each individual bank could charge to merchants would be fully determined by competition rather than to a large extent by a collective decision among (or on behalf of) banks"[310].

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[306] Guidelines on the applicability of Article 101 of the Treaty of Functioning of the European Union to horizontal cooperation agreements.
[307] Guidelines at [32(b)].
[308] Guidelines at fn 39.
[309] Sainsbury's SC Decision at [93].
[310] Sainsbury's SC Decision at [52]

(2) This necessarily requires consideration of the market wide Merchant Service Charges paid to Acquirers on average, which in turn requires consideration of the possibility that MIFs might not fall.

(3) The Tribunal should not draw a different inference from the lack of discussion in the Sainsbury's SC Decision or *Mastercard I* of switching to Amex, because that would not be a realistic outcome in the context of consumer and EEA MIFs (unlike with inter-regional or commercial Card MIFs).

(4) As cited by Mastercard and recorded above, the Visa argument is consistent with the focus in the Mastercard GC Decision and the Mastercard CJEU Decision on the acquiring market as a whole.

314. These arguments were said to be supported by economic principle, as advanced by Mr Holt and Dr Niels. For example, Mr Holt said this in oral evidence:[311]

> "[…] I am not doing a merchant indifference test. I am not doing a 101(3) efficiencies test at all. What I am doing is saying: in the counterfactual, what are the competitive implications of the change in the competitive environment? One of those is that there be a direct impact on the relative economics of Visa versus Amex, rather, and that that seems to me economically to be a directly relevant economic issue to think about when talking about the change in the MIFs."

315. It is necessary, in order to make this point, for the Schemes to argue that the relevant market to make this assessment is the entire acquiring market, potentially involving not only Amex, but also other payment providers, including buy now pay later payment services. There is, as can be seen from the Joint Expert Statement, a measure of agreement between the experts about Amex but some disagreement about other payment methods. However, I consider it to be a matter of law, not market definition, as to whether the consequences of switching by Amex should be taken into account, as discussed further below.

[311] Day 17, p110, line 25 to p111, line 9.

316. I agree with the Merchant Claimants that there is a clear distinction between Article 101(1) and 101(3) TFEU, with the overall scheme of the provisions being that Article 101(1) TFEU should determine whether a measure restricts competition, without inquiring into the wider pro or anti-competitive effects, which are taken into account later in the analysis under Article 101(3).

317. The comparison under Article 101(1) TFEU, between the actual and the counterfactual in which the measure in question (the Default Interchange Fee Rule and therefore the MIF) is absent, is designed to determine whether the Default Interchange Fee Rule, as it implements the MIF, is liable to have an appreciable adverse impact on the parameters of competition, and in particular the prices paid by Merchants to Acquirers. If an analysis of the competitive position, absent the relevant measure, shows that competition would be no better, it follows that the measure is not restrictive of competition.[312]

318. The critical question is therefore whether, in the absence of a MIF charged by the Schemes, the potential for merchants to suffer higher prices charged by other players on the market (e.g. Amex) as a result of a Cardholder switching to those other players is:

(1) part of the analysis of the competitive position under Article 101(1) TFEU; or

(2) part of the assessment of pro or anti-competitive effects to be taken into account under Article 101(3) TFEU.

319. In my judgment, the correct position is option (2) and the potential for switching and consequent higher merchant costs is an issue for consideration under Article 101(3) TFEU only. My reasons are as follows.

320. The import of the Schemes' argument is that an analysis of pro-competitive effects could, if sufficiently significant, not only justify the restrictive measure in its entirety but also establish that there was no, or no material, competitive

[312] *Carte Bancaires*, as approved in Dune CA at [39].

effect on competition absent the restriction. In other words, there is the potential for a conceptual overlap between the assessment of an appreciable effect on competition and the assessment of pro-competitive effects under Article 101(1) and Article 101(3) TFEU respectively. What *Metropole* (and, as I consider below, the other authorities cited to us) show is the need to distinguish clearly between those two concepts. In my judgment, the distinction is to be found in the proper understanding of the role of the counterfactual.

321. The purpose of the counterfactual exercise in an effects case is to determine whether a restrictive provision has a competition consequence. That is because only restrictions that have either the object or effect of perceptibly restricting competition fall within Article 101 TFEU[313].

322. The counterfactual exercise therefore considers the actual world with and without the restriction and seeks to determine whether, in the absence of the restriction, competition would be appreciably different. The Schemes focus in their arguments on "competition" in the wider sense of the word: the competition that takes place in the relevant market including as between the Schemes and other payment methods.

323. That is in my view the wrong focus. In relation to MIFs (as clearly articulated in the Sainsbury's SC Decision) the competition in question is that which occurs between Acquirers for contracts with Merchants. The focus in the Sainsbury's SC Decision (as it was for the CJEU and the Commission in *Mastercard* I) was on the way that the MIF set a floor on the Merchant Service Charge and therefore affected the ability of merchants to negotiate all aspects of the Merchant Service Charge in their contracts with Acquirers for Visa and Mastercard Card transactions.

324. There is no reason why the removal of inter-regional MIFs or commercial Card MIFs should have an effect on contracts which Merchants have with their Acquirers for Visa and Mastercard transactions which is different from the effect of removing other MIFs. The Schemes did not suggest this was the case:

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[313] Case C-226/11 *Expedia* EU:C:2012:795 [16]-[17]

instead, they argued that the economic impact on the Merchant would be different because of switching to Amex.

325. Amex operates as its own Acquirer, and so it does not directly participate in the competition relevant for this case.[314] The assertion that the removal of the restriction might, through the degradation of the Schemes' offerings, allow Amex a stronger position in the acquiring market does not therefore address the relevant counterfactual question. It tells us nothing about whether there might be a different competitive position as between Merchants and Acquirers who offer acquiring services for Visa and Mastercard Cards (but not for Amex). The same would apply to any other payment system which is not offered to Merchants by the same Acquirers as offer Visa and Mastercard acquiring services.

326. In short, the Schemes are aiming at the wrong target. The correct question for the Article 101(1) TFEU counterfactual is whether the competition that exists between Acquirers for Merchant contracts might be different without inter-regional MIFs and commercial Card MIFs, not whether merchants might be overall worse off because of some other consequence in the market of the removal of those MIFs. The answer to that correct question is clear. There is no relevant difference between inter-regional MIFs and commercial Card MIFs on the one hand and domestic and EEA consumer MIFs on the other hand. The removal of any of them will allow a greater degree of competition between Acquirers for Merchant contracts, so the default MIF restrictions for all of them do have an appreciable effect on competition.

327. It might be necessary in an Article 101(1) TFEU analysis to inquire into various aspects of competition in the relevant market in order properly to understand the effect of the removal of the restriction. That does not mean it is necessary or appropriate (at this stage of the analysis) to embark on an exercise of imagining all consequential changes which might occur in the relevant market once the provision is removed. To take that further step would be to depart from the

[314] Amex does use some payment providers through which terminals are provided to merchants to make payments, but Amex remains the Acquirer. See for example Dryden 1 at 3.12 and Niels 1 at 2.14.

correct counterfactual (the state of the relevant competition without the restriction) and to move into a different counterfactual (being one in which consequential aspects in the relevant market are considered). That is not the correct approach.

328. The reason for this is obvious. The counterfactual exercise is designed to determine the potential for harm of the restrictive provision. The fact that other market forces may have consequences for the market in the absence of the restriction is not the relevant question – at this stage. It is however a question which Article 101(3) TFEU is designed to test. As a matter of principle, therefore, these considerations should be excluded from the Article 101(1) TFEU analysis.

329. To proceed otherwise would cause a number of difficulties:

(1) There is nothing in the case law, as far as I am aware, which describes how the assessment of pro and anti-competitive effects should be analysed at the Article 101(1) TFEU stage. This creates the difficulty that the test is uncertain – indeed, it is difficult to see why it should be constrained to switching (the Schemes' case) rather than taking into account all market features that might exist if the MIFs were removed, with an assessment of the overall competitive outcome.

(2) For example, we heard evidence from Mr Steeley of M&S to the effect that payment methods had different overall value to M&S, taking into account both the payment method cost and relative benefits that accrued depending on the underlying consumer behaviour[315]. The Schemes' approach excludes those benefits – illogically in my view.

(3) The Schemes assert that this is not correct, because the different levels of benefits referred to by Mr Steeley arose from the different demographics of the Cardholders using certain payment methods. The Schemes say the counterfactual must assume that the transactions

[315] Day 5, pp33 to 40.

(involving the same Cardholders, merely using different cards) would take place, which would imply the same level of benefits to merchants.

(4) However, this only serves to illustrate the complex factual enquiry that might be necessary (on the Schemes' case) to draw a line between what might be an Article 101(1) TFEU question and what might be an Article 101(3) TFEU question.

(5) It is by no means obvious that the removal of the MIF will lead, through the chain of logic advanced by the Schemes, to the outcome they assert. They do not submit that merchant costs arise directly from the removal of the MIF; instead, they argue for a chain of events involving Issuer, Cardholder and payment provider responses to removal of the MIF.

(6) That requires an analysis of more than just the effect on the MSCs that merchants pay Acquirers for Mastercard and Visa transactions. That in turn requires an assessment of the likely actions of other players in the wider acquiring market, as well as some aspects of the issuing market (what Issuers' incentives would be in relation to Cardholder benefits and other incentives to use cards, and what Cardholders might do as a result).

(7) By way of example, the argument put forward by the Schemes involves several steps, all of which involve complex factual enquiry:

(i) How Issuers might respond to reduced MIFs and in particular the extent to which they might (a) reduce benefits to Cardholders and/or charge for those benefits, or (b) change their operating model to the detriment of Merchants.

(ii) How Cardholders might respond to any change in position from Issuers in relation to benefits and charges.

(iii) How that might impact the proportion of Cardholders (or Issuers) switching to alternative payment providers, such as Amex.

(iv) What the competitive position of those other payment providers might be, especially in relation to pricing, given all of the above.

(8) There would accordingly be a need for a wide ranging investigation into consequential aspects at the Article 101(1) TFEU stage, which would create uncertainty about the application of that provision and therefore the status of restrictions in agreements. Some of this emerged in the trial, with disputes between the experts about likely patterns of switching. They are complex issues, and the experts have struggled to reach conclusive findings. That suggests that the competitive assessment which is required under Article 101(1) TFEU is a much narrower one than the Schemes assert.

(9) If the Schemes were correct, there would inevitably be an overlap between the exercises required under Article 101(1) and 101(3) TFEU. At best there would be considerable confusion about the two different analyses and the relationship between the tests to be applied. That is particularly so given the uncertainty about what the test under Article 101(1) TFEU would be – there is clarity about the test (and specific conditions) applying under Article 101(3) TFEU. At worst, Article 101(3) TFEU would become redundant: it seems quite possible that the test under Article 101(1) TFEU might be broader than that under Article 101(3) TFEU, which seems an odd result indeed, and largely to remove any need for or application of Article 101(3) TFEU.

(10) All of that suggests that the competitive assessment which is required under Article 101(1) TFEU is a much narrower one than the Schemes assert.

330. None of the authorities cited by the Schemes support a different conclusion. On the contrary, they support my conclusion that the Schemes are impermissibly seeking to broaden the inquiry under Article 101(1) TFEU to include matters properly to be considered under Article 101(3) TFEU.

331. As already noted, in *Carte Bancaires*, the Commission had found that a group of French banks had reached an agreement to restrict competition and curb new entrants in the bank issuing market. The provisions which the Commission objected to were tariffs linked to issuing and acquiring activity which were imposed on members of the group (including new members). The provisions sought to achieve a certain balance between member banks in relation to issuing and acquiring activities. The Commission held they were a restriction of competition under Article 101(1) TFEU.

332. The banks appealed the decision and one of their arguments was that the Commission had not properly taken into account, in its Article 101(1) TFEU analysis, certain aspects of the competitive situation that would have emerged if the tariffs had not been imposed. These arguments had been put in the context of ancillary restraints in the proceedings before the Commission but were recast as considerations for the counterfactual in determining the effect of the restrictive provisions, which the Commission had not properly taken into account.

333. In that context, in the passage immediately prior to that relied on by Mastercard, the Court said:

> "**[108]** According to established case law, to determine whether an agreement must be deemed to be prohibited due to the resulting distortions of the competitive process, it is necessary to examine the process of competition in the actual context in which it would occur in the absence of the disputed agreement (see rulings of 6 April 2006, General Motors/Commission, C-551/03 P, EU:C:2006:229, point 72 and cited case law, and of 11 September 2014, MasterCard e.a./Commission, C-382/12 P, EU:C:2014:2201, point 161 and cited case law).
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> **[109]** This method of analysis, particularly with regard to consideration of the competitive situation that would exist in the absence of agreement, does not amount to carrying out a review of the pro- and anti-competitive effects of the agreement and to applying in this way a rule of reason, which the Judge of the European Union did not concede that it had its place in the context of article 81, paragraph 1, EC [see ruling of 2 May 2006, 02 (Germany)/Commission, T-328/03, EU:T:2006:116, point 69 and cited case law]."

334. The Court went on to hold (in [114] to [116]) that the Commission had correctly identified that, in the absence of the tariffs, new entrants would not be subject to the surcharge which those tariffs effectively imposed. Just as that was the

correct counterfactual analysis in that case, so (contrary to the Schemes' case) it is the correct approach to consider the impact on the competitive relationship between Acquirers and Merchants in the absence of the inter-regional MIFs and commercial Card MIFs, without further considering consequential competitive outcomes in the same or related markets. Those were for consideration at the Article 101(3) TFEU stage, as the Court held later in the judgment:

> "**[124]** Finally, by claiming that the Commission should have taken account of the fact that, in the absence of the measures in question, the competitive situation of the CB system on the payment systems market risked being weakened, the applicant argues, in substance, that it should have taken into account the fact that the measures aimed at strengthening the competitive position of the CB system in relation to its competitors on the payment systems market. It should be considered that the applicant blames the Commission for not having proceeded to a review of the pro- and anti-competitive effects of the measures in question during its analysis of the situation in the absence of the measures in question under article 81, paragraph 1, EC.
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> **[125]** However, it should be recalled that, according to the case law cited in point 109 above, consideration of the competitive situation that would have existed in the absence of agreement does not amount to carrying out a review of the pro- and anti-competitive effects of the agreement.
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> **[126]** The question of knowing whether the restrictive effects of the measures on the issuing market would be counterbalanced by the alleged restrictive effects on competition on the payment systems market that would occur in their absence stems from the analysis under article 81, paragraph 3, EC. In this regard, in recital 368 of the contested decision, the Commission deemed that the Group's argument relating to the indispensability of the measures for the survival of the CB system would be examined within the context of article 81, paragraph. 3, EC."

335. *Delimitis* concerned beer tie agreements for public houses in Germany. The issue before the CJEU was the effect which a tie agreement, taken in aggregate with similar agreements, had on competition in the beer distribution market, including in particular the ability of new competitors to enter that market in the face of a network of exclusive dealing contracts. That required (as is apparent from the remainder of [22] of the judgment, quoted in [312] above) an inquiry into the number and size of producers on the market, the degree of saturation, brand loyalty and so on. It is difficult to see how that discussion assists the Schemes. The competition assessment in that case centred on foreclosure of the beer distribution market by other beer distributors and so the wider conditions relevant to that necessarily had to be considered.

336. It is also clear that neither the General Court nor the CJEU in the *Mastercard* proceedings intended to suggest that the wider economic position of merchants should be considered in the Article 101(1) TFEU counterfactual. The General Court[316] specifically considered such an argument at [181] and [182]:

> "**[181]** In the second place, with regard to the criticism concerning the failure to take the two-sided nature of the market into consideration, it must be pointed out that, in that context, the applicants highlight the economic advantages that flow from the MIF. Thus, in essence, the applicants state that the MIF enables the operation of the MasterCard system to be optimised by financing expenditure intended to encourage cardholder acceptance and use. They deduce from this that it is not in the interest of banks to set the MIF at an excessive rate, and, moreover, that merchants benefit from the MIF. The applicants also complain that the Commission overlooked the impact of its decision on cardholders, by focusing exclusively on merchants alone. In that regard, a number of interveners add that in a system operating without the MIF they would be compelled to limit the advantages conferred on cardholders, or even to reduce their activity.
>
> **[182]** Such criticisms have no relevance in the context of a plea relating to infringement of Article 81(1) EC, in that they entail a weighing-up of the restrictive effects of the MIF on competition, legitimately established by the Commission, with any economic advantages that may ensue. However, it is only within the specific framework of Article 81(3) EC that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, Van den Bergh Foods v Commission, cited in paragraph 101 above, paragraph 107 and the case-law cited)."

337. The CJEU endorsed this conclusion at [180] and [181] of its judgment.[317]

338. None of this is at all surprising. There is an obvious logic to an approach of removing the restriction (in this case, the inter-regional MIF or the commercial Card MIF) from the counterfactual scenario, and considering the immediate consequences of that on the critical area of focus (in this case, the price charged by Acquirers to Merchants by way of the Merchant Service Charge for acquiring Mastercard and Visa cards). To begin to consider what other competitive consequences might emerge in the relevant market beyond that focus introduces a whole range of speculation and uncertainty, without any obvious framework for assessment, so as to make the whole exercise unworkable.

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[316] Mastercard GC Decision.
[317] Mastercard CJEU Decision.

339. Turning to the Sainsbury's SC Decision, and the argument that fact (vi) can only be assessed in a market wide context that included merchant costs in the counterfactual, I make the following observations:

(1) The parties have to some extent approached the Six Facts as the framework for assessing whether or not the inter-regional and commercial Card MIFs are restrictions. This is understandable and to an extent justified, as it is the obvious reference point for that exercise. However, there is a danger of treating the wording of the Six Facts, as articulated in the Sainsbury's SC Decision at [93], as tablets of stone, which are pored over in great detail for meaning and nuance.

(2) There is, therefore, a comparison by the Schemes between fact (iii)[318] and fact (vi)[319], with the assertion that they must mean something different in order to have justified separate articulation. I do not consider that helpful. The Six Facts are a summary of an extensive factual analysis, originally carried out by the Commission and as summarised and adopted by *Mastercard CJ* and the Sainsbury's SC Decision in turn in order to dispose of appeals of the Commission's findings. They are not to be approached as if they were a piece of statutory drafting.

(3) Instead, as is plain from the Six Facts themselves, they illustrate why it is a reasonable conclusion that consumer and EEA MIFs restrict competition, because it is obvious that in the counterfactual world (in which there are no MIFs) there will be a better competitive position for merchants seeking to negotiate Merchant Service Charges with their Acquirers. That is simply because a price setting collective agreement insulates a downstream price from competitive forces whereas the entire fixed price, and therefore the insulating effect, would be removed in the counterfactual.

[318] *"The non-negotiable MIF element of the MSC is set by collective agreement rather than by competition".*
[319] *"In the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower".*

(4) Subject to one further observation, I do not consider that the Sainsbury's SC Decision assists any further with the question of what should or should not be included in the Article 101(1) TFEU analysis, not least because there was no discussion, and no need for a discussion, about that in the case. It simply didn't arise on the facts.

(5) My further observation is that it does now seem somewhat surprising for the Schemes to argue that inter-regional MIFs and commercial Card MIFs are inherently different from consumer and EEA MIFs, given there is no obvious reason why the analysis should be approached in a different way. It seems unarguable (and no-one has seriously tried to argue otherwise) that removal of inter-regional MIFs and commercial Card MIFs would also remove a hitherto non-negotiable element of the Merchant Service Charge.

(6) The only differentiating point the Schemes are making is that there might be a chain of events in which Issuers reduce benefits to Cardholders, Cardholders switch to alternative providers and those alternative providers might continue to charge high prices to Merchants.

(7) For the reasons given above, I do not consider that to be a proper subject for consideration in the Article 101(1) TFEU analysis and I do not understand the Sainsbury's SC Decision to say anything to the contrary.

340. Finally, it should be noted that in *Metropole* itself the argument advanced by the applicants in relation to the "rule of reason" argument was that the offending provisions (non-compete and exclusivity clauses) had the effect of introducing more competition into the market by allowing a further operator to enter[320]. In other words, the argument which was held by the Court to fall within Article 101(3), not Article 101(1) TFEU, was in essence the same as the Schemes are running in this case. That is that an apparently anti-competitive restriction should not be treated as an infringement because, in its absence, there would be

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[320] See *Metropole* at [69].

less competition in the market generally. That argument should fail here as it did in that case.

(6) Visa Inc.'s role in relation to Inter-regional MIFs

341. I agree with Mr Justice Marcus Smith about the answer to this point, which is that it makes no difference to the correct counterfactual analysis that Visa Inc. sets Inter-regional MIFs, although I prefer to approach it in a different way.

342. As I understand the point, Visa argues that, in those cases where the Merchant Claimant has not sued Visa Inc, it is necessary to consider a different counterfactual from that adopted in the Sainsbury's SC Decision, which was settlement at par. It is not entirely clear to me what Visa says is the correct counterfactual, but as best I can ascertain the position is as follows:

(1) No Visa entity based in Europe would have the power to force Issuers outside Europe to settle at par (that is, to require no interchange fee from Acquirers accepting transactions in Europe).

(2) As a consequence, those Issuers might continue to charge an interchange fee even without the imposition of the inter-regional MIF, which leads to a different counterfactual than the one which underpins the Sainsbury's SC Decision.

343. Those propositions seem to me to be entirely unrealistic and potentially unlawful in themselves, and therefore not a proper basis for a counterfactual:

(1) To the extent that Visa is arguing that Visa Inc. would not comply with local legal requirements by either continuing to set an inter-regional MIF on a collusive basis or otherwise acting in a way that Visa Europe entities would not be permitted by law to do, that is not only inconsistent with the factual material before us[321], but would also appear to include an abusive and therefore unlawful element in the counterfactual.

[321] Summarised at [371] of the Merchants Claimants' written closings.

(2) To the extent that Visa is arguing that Issuers would be left to their own devices to levy interchange fees for inter-regional transactions, this is directly contrary to the logic in the *Mastercard I* and *Sainsbury's* proceedings which found that the appropriate counterfactual was settlement at par. That was because of the "hold up" problem, in which there would be no limit on the fees which Issuers could charge. As with the consumer cards analysed in those proceedings, it would be entirely unrealistic to expect Visa Inc. to permit that to happen, rather than imposing a rule requiring settlement at par.

344. I therefore agree with Mr Justice Marcus Smith that the involvement of Visa Inc. in setting the inter-regional MIFs makes no difference to the appropriate counterfactuals, even in those proceedings where Visa Inc. is not a party.

(7) The assessment of the evidence on effects in the counterfactual for Issues 4 and 5

345. A considerable amount of time was spent in the trial of this matter on evidence which is only relevant if the Schemes are correct in their argument about the correct approach to the counterfactual. I have decided that the Schemes are in fact wrong (and Mr Justice Marcus Smith has reached the same conclusion, though for different reasons).

346. If I should turn out to be wrong on that issue, however, I would still conclude that the Schemes fail in their arguments on Issues 4 and 5 (the commercial Card MIFs and the inter-regional MIFs). That is because, in my view, the evidence does not support their contentions that merchants in the counterfactual would pay prices which were the same or higher than the actual Merchant Service Charges paid by Merchants.

347. On the contrary, in my judgment the evidence before the Tribunal clearly established that the commercial Card MIFs and the inter-regional MIFs both have an adverse effect on competition, by fixing a floor on Merchant Service Charges which is higher than would apply in any reasonable counterfactual.

348. I am therefore satisfied that the same analysis that applies to the counterfactual in relation to consumer MIFs also applies to commercial Card and inter-regional transactions, namely, that commercial Card MIFs and inter-regional MIFs do have the effect of restricting competition.

349. I have set out in greater detail in Annex 6 my assessment of the factual and expert evidence presented to the Tribunal, including my detailed factual findings.

PROFESSOR MICHAEL WATERSON:

N. CONCURRING JUDGMENT

350. As an economist, I prefer to express no view on the details of the legal approach taken by Mr Justice Marcus Smith in his Judgment or by Mr Tidswell in his Concurring Judgment. The main difference between them is how the question of substitutability or market reaction is to be addressed, in particular the extent to which market definition influences the outcome. The questions of fact – and in particular the economic analysis of those facts – relevant to these analyses are in essence the same, and I agree with both Judgments regarding the outcome.

351. The only area of irreconcilable divergence lies in the question of whether post-IFR MIFs and inter-regional MIFs in the period subsequent to the entry into force of the related Commitments Decisions constitute by object infringements, where Mr Justice Marcus Smith concludes that they do, and Mr Tidswell concludes that they do not. The difference between Mr Justice Marcus Smith and Mr Tidswell in relation to post-IFR MIFs is essentially whether the IFR effectively neutralises what would otherwise be a "by object" infringement. Mr Justice Marcus Smith expresses the view that a regulatory overlay cannot affect a competition law analysis of a "by object" infringement (since the undesirable object remains, and is only constrained by regulation), whereas Mr Tidswell considers that the regulatory environment needs to be taken into account in the "by object" analysis. On this point, I agree with Mr Tidswell for the reasons that he gives, forming a majority on this point.

352. In relation to inter-regional MIFs in the period subsequent to the entry into force of the related Commitments Decisions, Mr Justice Marcus Smith determines that those Commitments Decisions in the Prior Record have no effect on the view that inter-regional MIFs constitute a "by object" infringement. Following a review of the evidence, Mr Tidswell considers those Commitment Decisions to establish the level of MIF which potentially has objectively legitimate aims for merchants and consumers, thereby precluding a finding of "by object" infringement. On this point, I agree with Mr Tidswell for the reasons that he gives, forming a majority on this point.

MR JUSTICE MARCUS SMITH, MR BEN TIDSWELL AND PROFESSOR MICHAEL WATERSON:

O. DISPOSITION

353. For the reasons set out in the foregoing Judgments, we unanimously find that the Default Interchange Fee Rule infringes Article 101(1) TFEU. In particular, in respect of its application in the UK and Ireland acquiring markets to:

1. Commercial Card transactions, we find infringement by object.
2. Pre-Interchange Fee Regulation domestic UK and Irish consumer transactions and/or EEA consumer transactions from the date of the earliest claim until 9 December 2015, we find that the infringement is by object;
3. Post-Interchange Fee Regulation domestic UK and Irish consumer transactions and/or EEA consumer transactions for the period after 9 December 2015 until the date of this Judgment, we find infringement is by object or effect, with the majority finding infringement by effect only;
4. Inter-regional transactions, the infringement is by object until entry into force on 29 April 2019 of the Mastercard Interregional Commitments Decision and the Visa Interregional Commitments Decision and by object or effect thereafter; with the majority finding infringement by effect only.

354. The Schemes are (subject to findings made on posterior issues in later trials) liable for breach of statutory duty (including "gist" damages having been found in the period until 2017) for damages to be assessed.

Mr Justice Marcus Smith Chair	Ben Tidswell	Michael Waterson

Charles Dhanowa CBE, KC (Hon) Registrar	Date: 27 June 2025

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(Judgment at [1], footnote 1)

Term/Abbreviation	First reference in Judgment
Acquirer	[3]
Acquirer Pass-on Point	[8] at fn 3
Acquiring Market	[19(1)(ii)]
Amex	[4]
Article 101 TFEU	[9]
Asda First Instance Decision	[18] in quotation
Bailey 1	[72] in table
Bilateral Interchange Fee	[2]
BGL	[80]
Burke 1	[72] in table
Butler 1	[74(8)]
Buxton 1	[72] in table
Cardholder	[3]
Cards	[3]
Chapter I prohibition	[9]
Co-Badging Rules	[34]
Copling 1	[72] in table
Counterfactual	[10(4)]
Customer	[3]
Customer/Cardholder	[3]
Default Interchange Fee Rule	[40]
Default MIFs	[40]
Determined Issues	[51] at fn 54
Devine 1	[75(4)]

Dooney 1	[74(4)]
Dryden 1	[76(1)]
Dryden 2	[76(1)]
Dune CA	[57(2)] at fn 69
Dune CAT	[57(2)] at fn 69
Focal Product	[81]
Framework	[10]
Frankel 1	[76(2)]
Frankel 2	[76(2)]
GNS	Annex 4 [24(4]
Harrison 1	[72] in table
Holt 1	[76(4)]
Holt 3	[76(4)]
Holt 8	[76(4)]
Holt 9	[76(4)]
Holt's Reply Report to Dr Frankel's Third Report	[76(4)]
Honour All Cards Rule	[32]
Hirst 1	[72] in table
Hydrocortisone	[81] at fn 114
Interchange Fee Regulation / IFR	[44]
Issuer	[6]
Issuer/Cardholder Agreement	[6]
Issuing Market	[19(1)(ii)]
Jenkins 1	[72] in table
Jensen 1	[73]
Joint Expert Statement	[76]
Jones 1	[74(10)]
Jones 2	[74(10)]
Knupp 1	[74(6)]
Knupp 2	[74(6)]

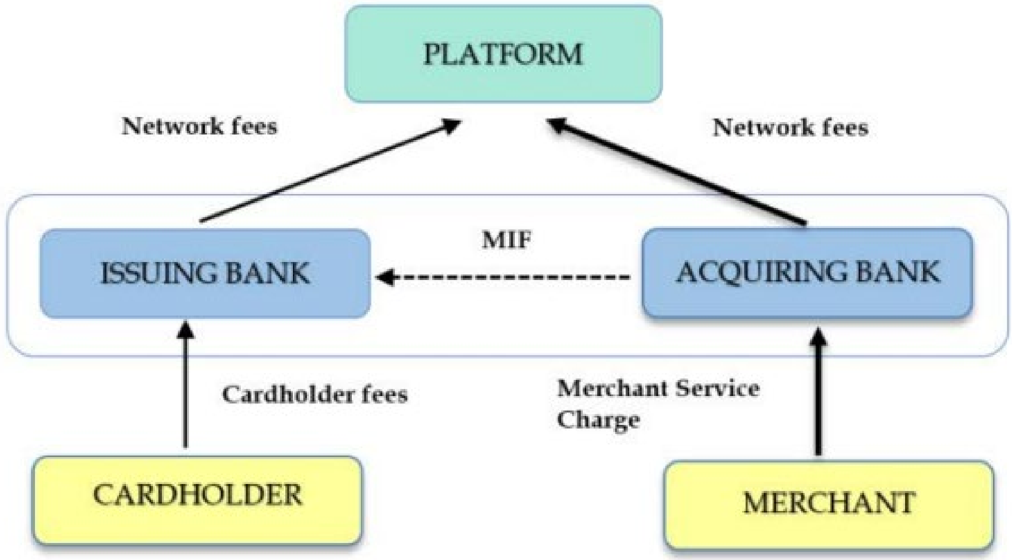
Korn 1	[74(11)]
Korn 2	[74(11)]
Korn 3	[74(11)]
Lipscombe 1	[72] in table
List of Issues	[10] at fn 8
Livingston 1	[74(1)]
Livingston SJ Application (1)	[74(1)]
Livingston SJ Application (2)	[74(1)]
Market Definition	[10(2)]
Mastercard	[1]
Mastercard CJEU Decision	[312(2)]
Mastercard GC Decision	[312(2)]
Mastercard I Decision	[55(3)]
Mastercard II CAR Decision	[69] at fn 97
Mastercard Inter-regional Commitments Decision	[274(2)] at fn 290
Mastercard Scheme	[1]
Mastercard Written Closing	[19(5)] at fn 25
Merchant Claimants	[7]
Merchant Claimants Diagram	[19(5)] and Annex 4
Merchant Claimants' Written Closing	[18] at fn 11
Merchant Service Charge	[5]
Merchant Services Agreement	[5]
Merchants	[3]
Multilateral Interchange Fee / MIF	[2]
Nicol 1	[74(2)]
Niels 1	[76(3)]
Niels 2	[76(3)]
Niels 3	[76(3)]
No-MIFs Counterfactual	[149(1)]
No Surcharging Rule	[29] at fn 32

Non-Payment Card Attributes	[211]
Oxera 2016 Report	[117]
Payment Acceptance Service	[88]
Petersen 1	[74(3)]
Petersen SJ Application (1)	[74(3)]
Percival 1	[72] in table
Platform	[19(1)(ii)]
Prior Record	[48]
Provision in Question	[10(2)]
PSR	[109(2)]
PSR 2021 Final Report	[109(2)]
Pure Bilaterals Counterfactual	[149(2)]
Riviere 1	[75(1)]
Ryan 1	[72] in table
Sainsbury's CAT Decision	[18] at fn 14
Sainsbury's CA Decision	[55]
Sainsbury's SC Decision	[18]
Sainsbury's SC Diagram	[18] in quotation and Annex 2
Sainsbury's v. Visa First Instance Decision	[18] in quotation
Sarmiento 1	[75(5)]
Scheme Fee Counterfactual	[212]
Schemes	[1]
Scheme Fee	[25(3)(ii)]
Scheme Market	[124(1)]
Scheme Rules	[2]
Settlement Rule	[31]
Six Facts	[57(4)]
SJ Application	[57(2)]
SSNIP	[82]
Steel 1	[74(9)]

Steeley 1	[72] in table
Stokes 1	[74(7)]
Stokes 2	[74(7)]
Stone 1	[74(5)]
Stone SJ Application (1)	[74(5)]
Suttle 1	[75(3)]
Tams 1	[72] in table
Theory of Harm	[10(3)]
Trial 1	[9]
Tribunal Diagram	[19(5)] and Annex 3
Tribunal's Interchange Case Management Ruling	[8] at fn 4
Unilateral Interchange Fee Counterfactual	[149(3)]
Visa	[1]
Visa Inter-regional Commitments Decision	[274(2)] at fn 290
Visa Scheme	[1]
Visa Written Closing	[31] at fn 33
Willaert 1	[75(2)]

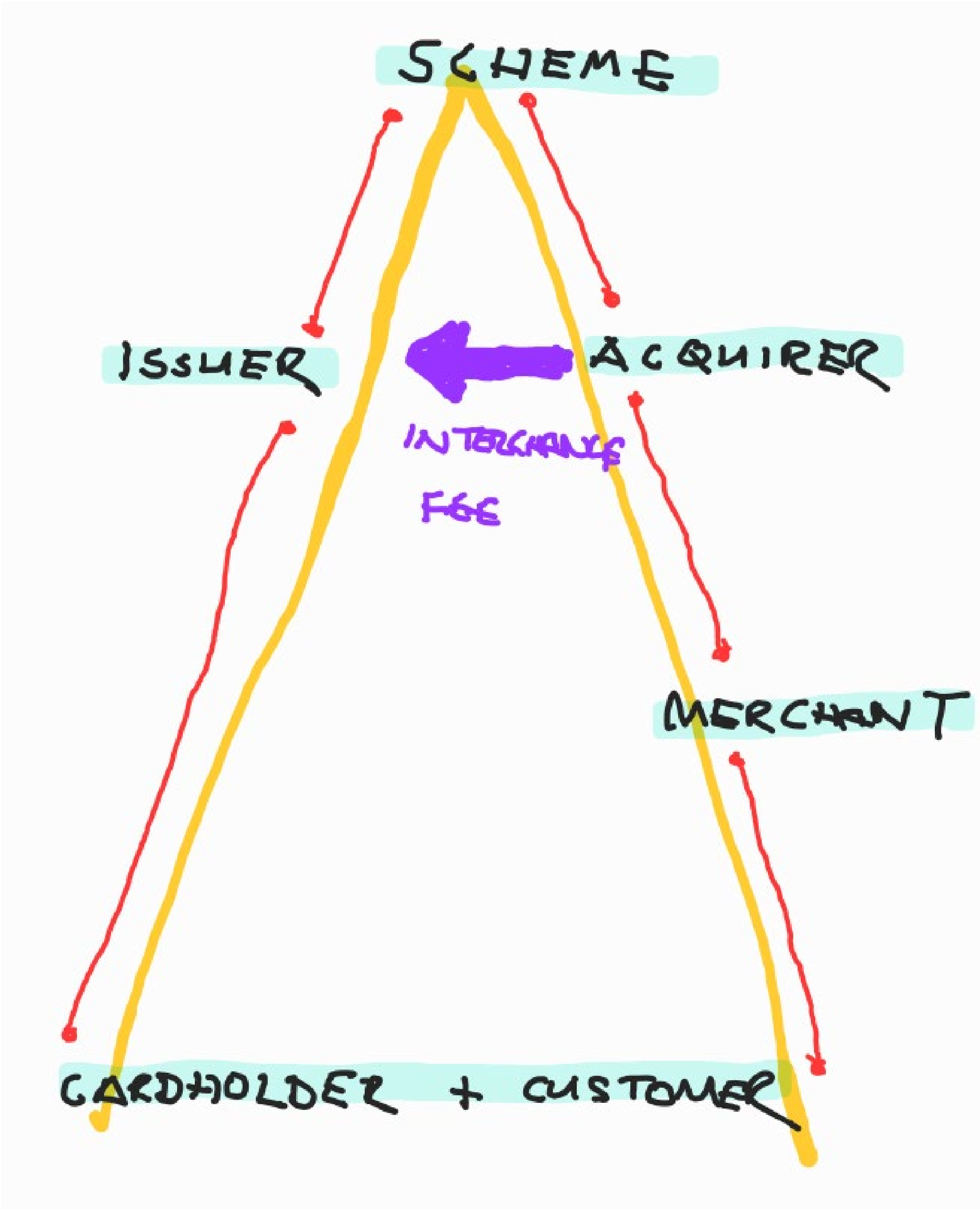
ANNEX 2

THE SAINSBURY'S SC DIAGRAM



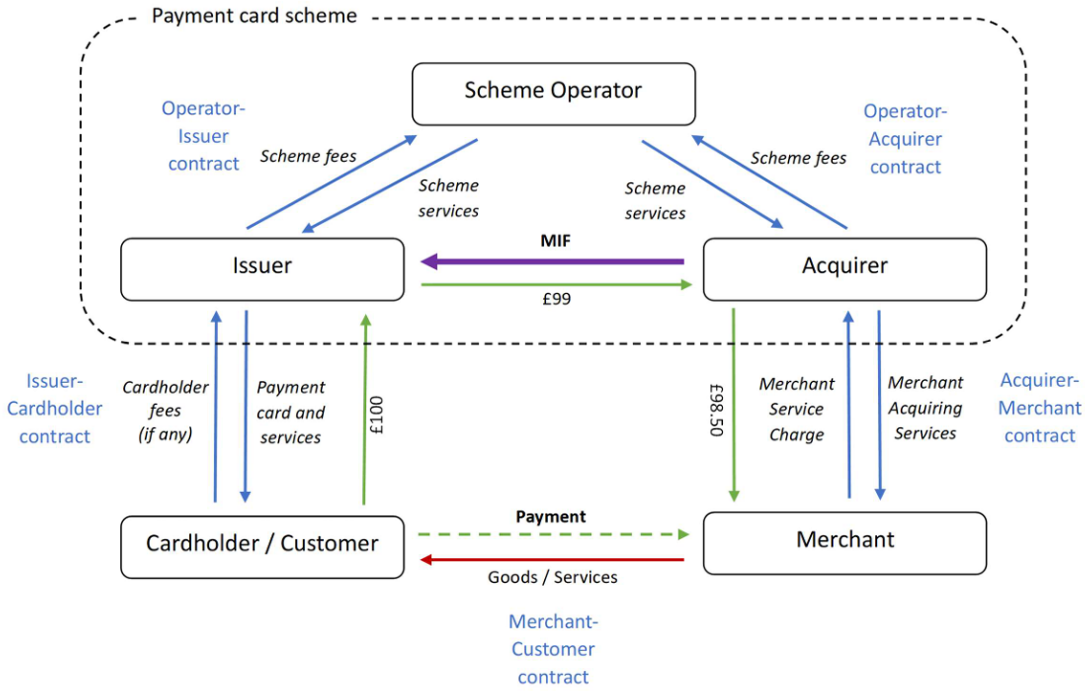
ANNEX 3

THE TRIBUNAL DIAGRAM



ANNEX 4

MERCHANT CLAIMANTS DIAGRAM



ANNEX 5

THE "RECORD": A LIST OF THE PRIOR INTERCHANGE FEE DECISIONS

(Judgment at [53])

31 Jan 1977	The **Ibanco Notification**	A notification to the Commission by Ibanco Ltd regarding the setting and operation of a MIF within the then EEC. The Commission apparently issued a "comfort letter" to Visa in 1985.[322]
4 Dec 1992	The **Visa 1 Decision**	The British Retail Consortium filed a complaint against Visa with the Commission on this date. On 23 May 1997, Eurocommerce (an organisation of European retailers) also filed a complaint. On 11 Aug 2001, the Commission decided that there were no grounds to take action against Visa in respect of the various scheme rules at that time. However, the Visa 1 Decision did not explicitly cover the interchange fee issue.[323]
24 Jul 2002	The **Visa 2 Decision**	By this Decision, the Commission concluded that Visa's intra-EEA MIFs for consumer cards were restrictive of competition for the purposes of Article 101(1) TFEU.[324] An exemption was granted on the basis of various modifications to the rules that Visa agreed to make. The exemption was granted until 31 Dec 2007.[325]
6 Sep 2005	The **OFT 2005 Mastercard Decision**	On 6 Sep 2005, the OFT decided that Mastercard's UK domestic MIFs restricted competition under Article 81(1) EC (now Article 101(1) TFEU) and the equivalent UK national provisions.[326] The Decision was challenged in the courts, and the OFT withdrew its decision on procedural grounds, as confirmed by this Tribunal on 10 July 2006.[327]
19 Dec 2007	The **Mastercard I Decision**	This was an investigation by the Commission, resulting in a Decision on this date that Mastercard's MIFs for

[322] Merchant Claimants' Written Closing at [113] to [114].
[323] Merchant Claimants' Written Closing at [115] to [116]. The Merchant Claimants' Written Closing notes (at [117]) that the Commission has since acknowledged expressly that its thinking has developed since the Visa 1 Decision.
[324] Merchant Claimants' Written Closing at [118] to [120].
[325] Merchant Claimants' Written Closing at [120].
[326] Merchant Claimants' Written Closing at [122].
[327] Merchant Claimants' Written Closing at [125].

		intra-EEA and SEPA transactions were in breach of Article 81(1) EC and could not be exempted under Article 81(3) EC.[328] Mastercard applied to annul this Decision.[329] That application failed,[330] and Mastercard appealed to the CJEU,[331] which appeal was dismissed (Mastercard CJEU).[332]
8 Dec 2010	The **Visa Debit Commitments Decision**	In March 2008, the Commission opened a new investigation into Visa's intra-EEA MIFs.[333] In April 2010, Visa offered certain commitments concerning its intra-EEA debit MIF and certain domestic debit MIF rates, which (after discussion and amendment) were accepted and adopted in a Decision of this date.[334]
26 Feb 2014	The **Visa Credit Commitments Decision**	On this date, the Commission accepted commitments made by Visa that it would cap its intra-EEA credit card MIF.[335]
14 July 2016	The **Sainsbury's CAT Decision**, [2016] CAT 11	The judgment in *Sainsbury's v. Mastercard*, [2016] CAT 11 upheld Sainsbury's claim against Mastercard, awarding damages in the amount of £68.5m. The Tribunal found that there had been a restriction of competition and the UK domestic MIFs were not freely negotiated between Acquirers and Issuers. The counterfactual adopted by the Tribunal involved bilaterally negotiated interchange fees, which would have been lower than the MIFs actually set. The MIFs were not objectively necessary and did not satisfy the conditions for exemption in Article 101(3) TFEU.[336]
30 Jan 2017	The **Asda First Instance Decision**, [2017] EWHC 93 (Comm)	On 30 Jan 2017, Popplewell J handed down a decision which found that although there was a restriction on competition, the counterfactual that should pertain was affected by the existence of a "death spiral" such that if Mastercard lowered the levels of its MIFs but Visa did not, Issuers would switch to issuing Visa cards only, and the Mastercard scheme would collapse.[337] As a result, the claims were dismissed

[328] Merchant Claimants' Written Closing at [126] to [127].
[329] Merchant Claimants' Written Closing at [128].
[330] Merchant Claimants' Written Closing at [135].
[331] Merchant Claimants' Written Closing at [136].
[332] Merchant Claimants' Written Closing at [143], [145].
[333] Merchant Claimants' Written Closing at [129].
[334] Merchant Claimants' Written Closing at [131] to [132].
[335] Merchant Claimants' Written Closing at [141].
[336] Merchant Claimants' Written Closing at [147(1)].
[337] Merchant Claimants' Written Closing at [147(2)].

		on the ground that Article 101(1) TFEU was not infringed.[338]
30 Nov 2017	The **Sainsbury's v. Visa First Instance Decision**	Phillips J found no restriction of competition and dismissed the claim.[339]
5 July 2018	The **Sainsbury's CA Decision**, [2018] EWCA 1536 (Civ)	The three first instance decisions were consolidated before the Court of Appeal, even though they concerned different categories of MIF and/or different Schemes.[340] The Court of Appeal held that it was bound to follow the decision in Mastercard CJEU;[341] rejected the "death spiral" argument;[342] and concluded that the Tribunal's bilateral counterfactual was not adequately supported by the evidence.[343] The counterfactual decided by the Court of Appeal was that there was no MIF at all.[344]
22 Jan 2019	The **Mastercard II Decision**	On this date, the Commission decided that the Mastercard CAR had infringed Article 101 TFEU.[345] The Merchant Claimants' Written Closing says this about the "bindingness" of the Decision:[346] "The [Decision] is a settlement decision. Mastercard acknowledged the infringement and agreed to pay a fine…All of its recitals are binding in their entirety on this Tribunal (in respect of Mastercard at least), for the duration of the infringement therein: *AB Volvo v. Ryder* at [93] – [97] and [143]."
29 Apr 2019	The **Mastercard Inter-regional Commitments Decision** The **Visa Inter-regional Commitments Decision**	On this date, the Commission accepted commitments concerning Mastercard's inter-regional MIFs.[347] A similar Decision was made in the case of Visa.[348]
17 June 2020	The **Sainsbury's SC Decision**	This was the appeal from the **Sainsbury's CA Decision**, which appeal was dismissed.[349]

338 Merchant Claimants' Written Closing at [147(4)].
339 Merchant Claimants' Written Closing at [147(5)].
340 Merchant Claimants' Written Closing at [149].
341 Merchant Claimants' Written Closing at [154].
342 Merchant Claimants' Written Closing at [155].
343 Merchant Claimants' Written Closing at [156] to [157].
344 Merchant Claimants' Written Closing at [159].
345 Merchant Claimants' Written Closing at [173].
346 Merchant Claimants' Written Closing at [175].
347 Merchant Claimants' Written Closing at [167].
348 Merchant Claimants' Written Closing at [168] to [169].
349 Merchant Claimants' Written Closing at [176].

ANNEX 6

FACTUAL FINDINGS IN REGARD TO ISSUES 4 AND 5

(Judgment at [255])

ISSUE 4: INTER-REGIONAL MIFS

(1) The evidence

1. A number of witnesses were called by the Schemes to support their arguments in this part of the case. The key points these factual witnesses made are set out below, identifying where appropriate the relevant witness. However, given that several witnesses addressed several issues, not every point is attributed to every witness, but only to those perceived as dealing with the point in greatest substance.

2. The expert observations and analysis which flowed from the factual evidence is also set out below. This was, in some relatively limited respects, the subject of disagreement between the experts.

3. Much of the factual and expert evidence was common to both the Visa and Mastercard Schemes. Where that is not the case, and if it is material, this will be made clear.

(2) General observations on the evidence about the inter-regional counterfactual

4. There were some unsatisfactory aspects of the way in which the evidence on this subject was presented:

   (1) A great deal of the argument was about what might be done by Issuers, Cardholders, Amex and other payment service providers. It was for example suggested to us that Amex might reverse a very material business decision to exit its 3.5 party scheme in the UK, following implementation of the IFR. The only evidence of that was speculation by the Schemes' factual and expert witnesses, which seemed

inconsistent with Amex's own regulatory filings and other public pronouncements.

(2) Similarly, evidence was heard from only one representative of an Issuer, Ms Dooney. She was a careful and helpful witness, but her knowledge of the matters relevant to this Issue 4 was (as she acknowledged) limited.[350] A great deal was said by the Schemes' factual and expert witnesses about Issuer costs, incentives and likely actions, without any real factual basis for those assertions.

(3) This was especially compounded in relation to inter-regional MIFs, where the Issuing banks are not UK banks but financial institutions in other countries around the world. According to Mr Knupp,[351] Visa has over 8,000 Issuers participating in its system globally. It was therefore surprising, and somewhat unhelpful, not to have any direct evidence from any of them on the points that follow. The Tribunal was instead invited (without any justification) to use largely indirect evidence about UK Issuers to support findings in relation to the likely actions of foreign banks. That was an exercise in more or less complete speculation.

(4) Some of the witnesses (particularly the Schemes' witnesses) relied on previous evidence in other proceedings, usually by cross reference to other witness statements. This meant that the factual evidence was fragmented, and the key factual narrative was at times difficult to follow without reading long and detailed statements prepared for other proceedings.

(3) The alleged differences between inter-regional and other MIFs

5. The Schemes' case is that there are a number of differences between inter-regional transactions on the one hand and consumer and EEA transactions on the other. These include:

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[350] In particular, Day 7, p 45, lines 19-25 to Day 7, p 47, lines 3-8.
[351] Knupp 1 at [27].

(1) There are considerably fewer inter-regional than domestic transactions, with the proportion by volume and value being at or under 5% of EEA transactions in 2012 and at or under [✂] of UK transactions by 2022[352] (Sarmiento 1 [14] to [15], Knupp 1 [36]).

(2) A much greater proportion of UK inter-regional transactions are card not present ("CNP") transactions – for Mastercard: [✂] compared with [✂] of domestic transactions, over the period 2012 to 2023 (Niels 1 [4.8]); for Visa: [✂] CNP and [✂] over the period 2012 to 2022 (Holt 8 [344]).

(3) Inter-regional transactions are generally more prevalent in certain sectors such as hospitality, travel, luxury goods, entertainment and car rental, as well as e-commerce transactions (Knupp 1 [37]).

(4) The average transaction value for inter-regional transactions tends to be higher than for consumer or EEA cards. Cash is often not a realistic alternative for such transactions (Sarmiento [16], Knupp 1 [38]).

(5) There is a different competitive landscape for inter-regional transactions, given the profile of Amex, Diners, China Union Pay and JCB in relation to the issuance of cards used in inter-regional transactions (Sarmiento 1 [26] to [28], Knupp 1 [39] to [40]).

(4) The connection between inter-regional Multilateral Interchange Fees and Issuer costs/the economics of inter-regional transactions

6. It was a constant theme of the evidence of the Defendants that inter-regional Multilateral Interchange Fees were an important revenue item for Issuers, to the extent that removal of the inter-regional MIF would substantially affect the economics of the issuance of consumer cards with inter-regional functionality

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[352] For Visa inter-regional transactions account for [✂] of all Visa card transactions globally and [✂] of all Visa card transactions in the UK. For Mastercard, inter-regional transactions into the UK made up [✂] by number of transactions and [✂] by value of total UK debit transactions; and [✂] by number of transactions and [✂] by value of total credit card transactions in 2022.

and would cause Issuers to adapt their offering for such cards (See e.g. Knupp 1 [47] and Sarmiento 1 [47] to [48]).

7. First, it was said that Issuers faced higher costs in respect of inter-regional transactions. The evidence on this point was largely given by Mr Knupp for Visa and Ms Sarmiento for Mastercard. The gist of their evidence was that:

(1) Inter-regional transactions had a higher incidence of fraud, which would in most instances be borne by the Issuer (Knupp 1 [42] and Sarmiento 1 [20]). This was said to be because the Merchant and Cardholder were less likely to know each other, the greater proportion of CNP transactions and the increased difficulty of monitoring international transactions for potential fraud, compared with domestic ones. Mr Knupp explained that fraud rates for Visa's UK acquired inter-regional transactions in 2022/23 were [✂] higher than the rate for domestic transactions. Ms Sarmiento explained that, for Mastercard, fraud on cross-border transactions is about [✂] as high as fraud on domestic transactions.

(2) There was a need for currency translation, to accommodate a wide range of different national currencies, which did not arise in other types of transactions. In particular, an Issuer in a country other than the US might need to settle through the Mastercard settlement system in US Dollars, which requires the maintenance of a USD account and some attendant costs associated with that (Knupp 1 [41] and Sarmiento 1 [24]).

(3) There was a need for enhanced customer service support from the Issuer, because of the global time zones in which the card might be used and to assist Cardholders travelling overseas in the event, say, of lost cards (Knupp 1 [41]).

(4) The funding costs which the Issuer bore for overseas transactions might be different from the funding costs of, say, UK Issuers (Sarmiento 1 [17]).

(5) Ms Sarmiento provided in her witness statement[353] a summary of some research into Issuer costs for inter-regional transactions, carried out by consultants Edgar Dunn & Company for Mastercard in 2007 and then in 2012. These are set out below:

Edgar Dunn & Company 2007 IR Cost Analysis

[✂]

Edgar Dunn & Company 2012 IR Cost Analysis

[✂]

8. As a consequence of these factors, the inter-regional MIF set by Visa and Mastercard in their respective schemes is generally higher than for other transactions. Mr Knupp explained[354] that Visa seeks to balance the added value and convenience for merchants of cards in inter-regional transactions (high value transactions where cash is not a realistic option and there is good fraud protection) with the higher costs faced by Issuers for such transactions (both in terms of the costs of maintaining the functionality supporting inter-regional transactions and in taking the risk on higher fraud rates). Ms Sarmiento gave evidence to similar effect.[355]

9. This approach also allows for further "fine tuning" by reference to the type of Card. For example, a premium card is likely to be used by a higher quality Cardholder, giving rise to greater value for a Merchant and therefore justifying a higher inter-regional MIF.[356]

10. In the course of cross examination of Ms Sarmiento by Mr Beal KC, the following salient points emerged in relation to the connection between Issuer costs for inter-regional transactions and the level of the inter-regional MIFs:

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[353] Sarmiento 1 at [18] and [19].
[354] Knupp 1 at [44] and [45].
[355] Sarmiento 1 at [36] and [37].
[356] Knupp 1 at [46].

(1) Ms Sarmiento was asked about the impact of Brexit on MIFs for CNP transactions between the UK and the EEA, and between Ireland and Northern Ireland. In each case, the MIF had gone from the amount capped under the IFR to a higher inter-regional rate. As Ms Sarmiento acknowledged, there was no increase in costs to justify the change in rate. Instead, she suggested, the underlying costs that applied notwithstanding the capped IFR rate were still present when the IFR ceased to apply, and therefore justified the higher MIF rate. Ms Sarmiento acknowledged that the PSR was investigating the increase and had indicated in an interim report that they had found no basis for any change in costs.[357]

(2) Similarly, Ms Sarmiento was challenged as to whether there was a different fraud risk between online transactions conducted with Amazon in Luxembourg and with a merchant in Birmingham. She said that, on average, domestic transactions carried less risk.[358]

(3) Ms Sarmiento also acknowledged that, although the underlying costs for different regions as set out in the Edgar Dunn reports were different, the inter-regional MIF applied to all the regions was the same. Ms Sarmiento was shown a Mastercard proposal for the 20th European Interchange Committee slides dealing with intra-EEA interchange rates and acknowledged (after some pressing) that the primary basis for the setting of the rate was the competitive position between Visa and Mastercard, rather than any underlying costs analysis in relation to Issuers.[359]

(4) Ms Sarmiento was reluctant to accept the response from the Commission, in *Mastercard I,* to the Edgar Dunn studies, and in particular the view that the costs data which Edgar Dunn had aggregated included costs of money in some very high interest environments (such as Brazil and Argentina, which were suffering hyperinflation). She

[357] Day 9, p246, line 20 to p253 line 11.
[358] Day 9, p266, line 14 to p267, line 6.
[359] Day 9, p254 line 19 to p258 line 16.

sought to justify the approach by referring to the high costs to Issuers in such countries arising from deferred settlement with Cardholders, compared with the benefit retained by a Merchant through near immediate payment. Ms Sarmiento was unable to comment on the Commission's view that Mastercard had only presented it with costs relating to Issuers, and not the costs of Acquirers. She did however accept that there was no exercise by Mastercard to allocate an Issuer's inter-regional revenue to the specific costs of that Issuer.[360]

(5) In relation to the costs of maintaining US Dollar accounts for settlement purposes, Ms Sarmiento accepted that, at least in general terms, an Issuer could benefit from net settlement reducing the extent of obligation and therefore the costs of settlement, as would be the case where the same institution acted as Issuer and Acquirer. [361]

(6) Ms Sarmiento's consistent evidence was that the deferred payment terms for Cardholders, which provided an interest free period, was a benefit to merchants which should be accounted for as a cost justifying the inter-regional MIF.[362]

11. When Mr Knupp gave oral evidence about the connection between inter-regional Issuer costs and inter-regional MIF rates, the following emerged:

(1) Mr Knupp helpfully explained, in response to a question from the Tribunal, the way in which Visa went about setting interchange fees:[363]

> So if we just take a bit of a step back, all right. So interchange is not Visa's revenue, right. So we make money the more throughput there is through the system, so the more transactions, the more volumes, we make money. So to do that, we need to maximise participation on both sides, so ultimately we want as many merchants to participate in the system and as many cardholders to participate in the system, right. The more we have of that, right, then the more interactions there are and the more transactions we have.
>
> So when you think about interchange, right, from the end point perspective it is quite black and white, right, so issuers will always prefer more interchange,

[360] Day 9, p258 line 17 to p264 line 4.
[361] Day 9, p269, line 6 to p272, line 1.
[362] Day 9, p272, line 9 to 274, line 20.
[363] Day 7, p104, line 8 to p107, line 12.

right, because then they can put better cardholder benefits, obviously it helps with their profitability and remember an issuer is serving the consumer in the capacity of "I am providing them a payment service", right.

Merchants want the lowest possible interchange at all times, right, so they want the lowest cost and they are by the way serving the exact same consumer, they just want to do it as the consumer's capacity as a shopper, right, so I want to offer the lowest cost or the best service to the consumer as the shopper. The issuer is doing it as the same consumer as their payment option. So, you know, merchant side wants it to be low, issuer side wants it to be high.

So the objective is to try and get the balance right and, you know, it is not perfect. Interchange is a little bit of a blunt instrument because we only have so many rates and there are, you know, tens of millions of merchants out there and, you know, thousands and thousands of issuers out there who create these benefits.

So we are trying to balance that to bring it, you know, into equilibrium. So the market, you know, doing that also realising we have competitors that are managing the same value propositions.

So, you know, historically, you know, American Express is one of our big competitors. They have chosen a higher merchant rate and better benefits to cardholders but that means that historically they have had less merchants accept them, right, that is their trade-off with the equilibrium. Visa and I guess Mastercard have chosen a slightly lower rate and we then have broader acceptance as a result.

So different networks can try and choose equilibriums and then the market will typically tell you when you have the balance wrong, right. So if another network has a higher interchange rate and they are doing very well on merchant acceptance, then, you know, competitively this will be disadvantaged. We have to consider that.

On the other hand, you know, we have a lot of merchants that today do not accept our rates and so, you know, clearly our pricing structure is not working for them and so then in those cases we often have to introduce lower rates to bring them into the system.

So it is not -- A lot of times this is made out to be like an issuer versus an acquirer or issuer versus merchant issue. It is not. You just have stakeholders in the merchant and the issuer who are trying to serve the consumer in the way that they have the relationship with that consumer.

So trying to balance that out, because at the end of the day, right, you said it might be a secondary consideration. Merchant costs and acceptance is a primary consideration, right, because the true value of the network is how many -- is the utility that we can provide to the cardholders and that utility is in the way that we can -- that the acceptance that is out there, right.

So there are really two primary things, which is how do we get the most merchants on the system and then how do we provide a great value proposition for the issuers to get the most cardholders? When it is out of whack, we will lose cardholders on the issuer side to a competing network or we will not have the merchant acceptance that we need to provide the utility back.

(2) Mr Knupp also said this about the “equilibrium”:[364]

Q (XX)	In essence, when you say Visa is somehow determining a balance, it is acting as a benign dictator, is it not, benign or malign, depending on your viewpoint. But it is acting -- it is directing what would otherwise be a market-driven process.
A (Mr Knupp)	Well, you are -- I do not think the system I am not sure what you mean by a "market driven process". Everybody, I mean, we -- every issuer -- I am not sure what you mean by that, I guess, I cannot answer the question. Market -- what is the counterfactual or what is the state of the market if we did not have an interchange fee in place that you are asking me to --
Q (XX)	Well, you would have a default settlement at par system which would be perfectly operational?
A (Mr Knupp)	Yes, but we -- we would not -- I mean, the network never would have gotten off the ground had we done that and I do not understand how we would be at all competitive if we did that.

(3) Mr Beal, KC asked Mr Knupp whether he accepted that the different elasticities of demand between merchants and Cardholders on the acquiring and issuing sides of the market tilted the balance in favour of the issuing side. He accepted[365] that it did tilt the balance in favour of a consumer acting as a Cardholder instead of a consumer acting as a shopper.

(4) Mr Knupp acknowledged that Visa does not tell Issuers how to spend interchange revenue.[366]

(5) It was put to Mr Knupp that Visa had no direct knowledge of what a particular Issuer’s costs structure might be. He responded as follows:[367]

“So that is not true. We do issuer cost studies from time to time in multiple markets where we try to understand what issuers' costs are, what their acquisition costs are -- let us just stick with credit cards right now -- what their

[364] Day 7, p151, lines 5 to 22.
[365] Day 7, p131, lines 5 to 14.
[366] Day 7, p143, lines 3 to 4.
[367] Day 7, p143, lines 9 to 24.

acquisition costs are, what their rewards costs are, what the risk in fraud costs are, what their customer service cost is, so it is a pretty extensive study to give us a sense of what those costs were. It differs by market, right, and it differs by issuer size, so we do that. But I will just say for the record so we do have a lot of good information on that but it is not meant to be purely a cost-based model. We do want to know what costs are but that is not what we use to drive interchange as the sole -- as the sole sort of -- it is not like the only factor that drives what we do for interchange."

(6) Mr Knupp also acknowledged[368] that Issuers had other means of raising revenue aside from Multilateral Interchange Fees. These included interest on credit card balances, fees for debit cards and fees for cheque accounts.

(7) Mr Beal, KC asked Mr Knupp about the change in inter-regional MIF rates following Brexit and Mr Knupp agreed that the costs had not changed for Issuers but said that the capped rates had been artificially low for a transaction between different countries.[369]

12. Ms Dooney, a Barclays executive, said very little about the question of Issuer costs in her statement (which was directed at Issue 3), but she did say she was aware of the costs of running both the debit and credit card business, and the contribution that Multilateral Interchange Fee revenue made towards those costs.[370] She was cross examined about the relationship between Issuer costs and interchange revenue. In summary, her evidence was that:

(1) Barclays earned revenue from customers by way of: interest charges on credit card balances; fees for certain types of cards (usually premium cards); fees on foreign exchange transactions involving cards; the use of customer deposits which are not interest bearing (for example, in current accounts); and fees charged on business accounts.[371]

(2) Ms Dooney confirmed that Barclays was not told by Visa how the MIF revenue should be applied.[372]

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[368] Day 7, p144 line 22 to p145 line 8.
[369] Day 7, p158, lines 22 to 25.
[370] Dooney 1 at [9].
[371] Day 7, p6, line 16 to p13 line 7.
[372] Day 7, p20, line 23 to p21 line 1.

(3) Ms Dooney was not able to give a global figure for the MIF revenue received by Barclays annually or the revenue that Barclays receives annually as a UK Issuing bank. She was however able to give the Tribunal a broad indication of the MIF revenue for the Retail Division, which would be the substantial portion of MIF revenue for the UK Barclays operation, being a sum in excess of £300 million.

(4) Ms Dooney explained how in practice fraud and fraud prevention costs would fall as between Issuer and Acquirer:[373]

(i) Issuers expend costs on fraud prevention through activities like upfront "Know your Customer" checks and transaction screening in real time. Ms Dooney did not accept that a material driver for these costs were incurred to ensure Barclays was paid; she told us that it was to prevent fraud and the consequences for customers.

(ii) Acquirers are also required by Visa and Mastercard to do due diligence on their merchant customers.[374]

(iii) In circumstances where the Cardholder was fraudulent, or in specific but exceptional cases of negligence, the Cardholder might be required to take responsibility.[375]

(iv) In the case of third party fraud, the Issuer often takes responsibility for making the customer whole, although the Acquirer may be held responsible for merchant fraud if it has not properly carried out its due diligence in accordance with Scheme requirements, in which case there is an established process for charging back the fraud costs from the Acquirer to the Issuer.[376]

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[373] Day 7, p25, line 20 to p35, line l7.
[374] Day 7, p31, line 21 to p32, line 13.
[375] Day 7, p27 line 12 to line 18.
[376] Day 7, p30 line 21 to p31, line 6 and Day 7, p34, line 9 to p35, line 3.

(v) There is a dispute resolution process established by each Scheme, to enable Issuers and Acquirers to resolve disagreements.[377]

(5) Fraud costs in relation to consumer debit and credit cards accounted for about 15% of the MIF revenue received by her Division.[378]

(6) Ms Dooney did not challenge the PSR's view that there had not been an underlying change in Issuers' fraud prevention or fraud costs after Brexit, in relation to UK/EEA transactions.[379]

(7) In response to questions from the Tribunal, Ms Dooney explained the budget setting process for her division, which involved both looking at the individual Card propositions and marginal costs and revenues, and the overall aggregate costs and revenues. In each case, there would be various "levers to pull" to achieve acceptable overall margin outcomes.[380]

(8) Ms Dooney also said that the inter-regional MIF revenue which Barclays received was not a sufficiently significant number for there to be any conscious correlation between that revenue and the costs assessment for providing the inter-regional functionality.[381]

(9) Finally, in a private session at the end of her evidence,[382] Ms Dooney (at Mr Kennelly, KC's request) gave the Tribunal a breakdown of the level of annual costs associated with the operation of Barclay's consumer card issuing business, as follows:

[✂]

377 Day 7, p32, line 22 to p33, line 5.
378 Day 7, p43, lines 7 to 25.
379 Day 7, p45, line 25 to p47, line 25.
380 Day 7, p47, line 19 to p53, line 7.
381 Day 7, p53, line 20 to p54, line 18.
382 Day 7, p69, line 17 to p72, line 7.

(10) Ms Dooney noted that these costs added up to about [✂], while the MIF revenue received for consumer cards was about [✂].

13. This was the only direct evidence about Issuer costs and their relationship with MIF revenue which the Tribunal received during the course of the trial.

(5) The consequences for Issuers and the schemes of no inter-regional interchange fee and their likely reactions

(a) Introduction

14. It was said by the Defendants' witnesses of fact (Sarmiento 1 at [48] and [49], Knupp 1 at [47] to [49]) that, in the absence of any default Multilateral Interchange Fee (i.e. the agreed counterfactual for inter-regional MIFs), Issuers would not be able to cover their costs in a competitive market just through Cardholder charges. According to Ms Sarmiento,[383] analysis undertaken by Mastercard in 2015 suggested that Issuers outside the EEA might lose [✂] per annum if inter-regional MIFs were eliminated.

15. As a consequence, the Defendants' witnesses of fact (Sarmiento 1 [48] and Knupp 1 [47]) stated that Issuers would be forced to take one of the following commercial responses:

(1) Increasing decline rates, or declining altogether to allow their Cardholders to make inter-regional transactions in the UK and Ireland.

(2) Reducing their payment card offering for inter-regional transactions.

(3) Increasing fees and charges to Cardholders, who would consequently switch to other schemes or other payment methods.

(4) Switching to other schemes that did provide a substantial contribution to the Issuer's costs of inter-regional transaction fees.

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[383] Sarmiento 1 at [53].

16. It was put to Ms Sarmiento that she had overstated the effect of removal of the inter-regional MIF, in terms of the likely effect on Issuers and their customers and the likely competitive threats offered by Amex and others. She declined to accept this challenge to her evidence.[384]

(b) Potential responses from the Schemes, including "unbundling"

17. Ms Sarmiento explained in her witness statement[385] that a possible reaction by Mastercard to Issuers losing inter-regional MIF revenue was to try and reduce the costs Issuers faced on Mastercard payment card inter-regional transactions. While she said there were limited operational costs that could be reduced, changes could have been made to the way Mastercard allocated responsibilities and risks between the issuing and acquiring sides. In particular:

    (1) Mastercard could change the settlement date, on credit transactions for example, to a date 45 days after the transaction, instead of the current standard settlement date of the day after the transaction. This would mean the merchant would take on the costs of funds for the interest free period which the Cardholder receives, while getting a lower MIF rate. This could potentially give rise to factoring activity by Acquirers, to provide liquidity (at a cost) to merchants.

    (2) Mastercard could change its rules associated with the payment guarantee, potentially removing the need for authorisation (or pre-authorisation), so that merchants took greater risk on the Cardholder having sufficient funds or a sufficient credit line.

    (3) Mastercard could remove the requirement for Issuers to pay for fraudulent transactions such that merchants would take the risk of a card being fraudulent or no longer valid, while the costs to Issuers of inter-regional transactions would fall.

[384] Day 9, p280, line 5 to p290, line 2.
[385] Sarmiento 1 at [54] to [59].

18. Notwithstanding the availability of these potential measures, Ms Sarmiento was of the view that, even if implemented, the consequence would be to make the Mastercard Scheme unattractive compared with other three or four party card payment schemes, leading to Issuers and Cardholders seeking alternative options.

19. Mr Knupp dealt with the same issues in Knupp 2 at [8] to [11]. He said that if Mastercard took steps to "unbundle" their payment cards to reduce Issuer costs and shift those to merchants, then Visa would have done the same things in order to remain competitive. He also said that he believed Visa would consider the same steps, even if Mastercard didn't, because the removal of inter-regional MIFs would create a disequilibrium in the system that would need to be addressed.

(c) The different competitive landscape and the likely competitive response of Amex (including reviving Global Network Services and the natural experiments – e.g. RBA, IFR, Maestro)

20. Ms Sarmiento described the competitive landscape for Mastercard (and Visa) in [28] of her statement as follows:

> **[28.1]** Amex is one example of a particularly strong competitor, both domestically and inter-regionally. There are approximately 133 million Amex cards issued worldwide. Its merchant network reached nearly 80 million acceptance locations worldwide by September 2022.
>
> **[28.2]** In addition, the Discover Global Network (i.e., the owner of Diners) also allows cardholders to use their card in over 200 countries and territories and 60 million locations worldwide.
>
> **[28.3]** Another formidable competitor is China Union Pay ("CUP"). Its cards are issued in over 70 countries. The Nilson May 2023 report records that CUP now has 9.4 billion issued cards worldwide …This is combined with the fact that CUP is accepted in 181 countries and territories (see page 12 of the Nilson December 2022 report …). In the United States, over 80% of merchants accept CUP credit cards for payment via signature verification. It is also accepted by most merchants in the EEA, except for certain sectors considered high risk or prohibited by the Chinese government.
>
> **[28.4]** JCB (Japan Credit Bureau) is a [sic] another large competitor with a significant international footprint (with 80 million cards issued that are accepted in more than 190 countries).

21. Mr Beal KC challenged the proposition that China Union Pay was a serious competitor to the Defendants in the UK (where it had, as at 2020, around 50% of the acceptance levels of the Defendants) and Ireland (where it had, in 2020, negligible levels of acceptance). Ms Sarmiento accepted that, but asserted that the UK acceptance level was now more like 70%, based on a recent press release.[386]

22. Ms Sarmiento[387] also made the point that the inter-regional market has changed considerably over the last twenty or so years. In 2000, most inter-regional transactions where the Cardholder was present were dominated by travellers' cheques and cash, and there would have been few transactions where the purchaser was not present. Now, inter-regional transactions are widely available as card transactions and the provision of credit by Issuers has increased access to the market by the less affluent. Cards also allow CNP transactions to provide long distance purchases which would previously have been difficult or impossible.

23. Mr Knupp[388] agreed with the list of competitors and added WeChat, Paypal and AliPay as global competitors to Visa and Mastercard. He noted that Cardholders for whom inter-regional transactions make up a material portion of their spend are likely to be more affluent customers who are more focused on Cardholder benefits (such as airmiles and cashback), given their spending habits.[389]

24. The switching argument advanced by the Defendants focused heavily on switching to Amex, so that became an area of some focus in the trial. There were a number of different aspects to this.

    (1) First, it was said by the Defendants that Amex was a viable option for inter-regional Cardholders to switch to, should they be so inclined.[390] This was in part because the profile of international card users was said

[386] Day 9, p257, line 21 to p277, line 23.
[387] Sarmiento 1 at [29].
[388] Knupp 1 at [40].
[389] Knupp 1 at [39].
[390] See Knupp 1 at [39].

to be likely to match the profile of Amex Cardholders (more affluent, focused on Cardholder benefits).

(2) Second, the extent of Amex's acceptance network was sufficiently developed to make them viable competitors for Cardholders who might switch from Visa or Mastercard Issuers.[391]

(3) Third, Amex would be incentivised to expand its issuing business to meet the demand from switching Cardholders.[392]

(4) Fourthly, Amex operates its Global Network Services (**GNS**) scheme in various locations throughout the world, allowing Issuers in those regions to switch to Amex if they perceived it to be a more attractive option.[393]

(5) Fifthly, Amex's competitive response to substantial switching by Cardholders from Visa and/or Mastercard would have been to maintain its pricing structure or, at the extreme, reducing it but only to the extent that it remains higher than the equivalent pricing structures applied by the Defendants.[394] Mr Holt for Visa modelled various outcomes.

25. These points were all challenged in cross examination by the Claimants. It was put to the Defendants' witnesses that:

(1) The arguments about Amex were being recycled, having failed before the Commission and the courts.[395]

(2) The PSR had formed the view that Amex did not pose a competitive constraint to the Defendant schemes in the market for card acquiring services, because the acceptance levels among merchants for Amex were substantially behind acceptance levels for Mastercard and Visa.[396]

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[391] See for example a 2022 Nilson report referred to by Ms Sarmiento, which showed that Amex has 130 million cards issued worldwide and an acceptance network of 80 million merchants by September 2022.
[392] Sarmiento 1 at [60].
[393] Sarmiento 1 at [60].
[394] Day 17, p157, lines 7-21 referring to Holt 9 at [404].
[395] See for example the cross examination of Mr Willaert, day 9, p31 line 13 to p35, line 20.
[396] Cross examination of Ms Suttle, day 9, p169, line 11 to p171, line 5.

(3) Amex acceptance rates meant that it was unlikely to be seen by international travellers as a complete solution, as reflected in data of current acceptance levels. Dr Niels (for example) resisted that suggestion.[397]

(4) Actions by the Reserve Bank of Australia to reduce and cap MIFs resulted in Amex reducing its own charges, not increasing them (discussed further below).

(5) There was no significant switching to Amex by Cardholders from Visa or Mastercard Issuers following a reduction in MIFs for in person debit transactions in New Zealand,[398] or following commitments to the European Commission by Mastercard and Visa to reduce inter-regional MIFs.

(6) Following the implementation of the IFR caps, Amex ended its GNS scheme in Europe and the UK and, despite a concerted marketing campaign, lost market share between 2018 and 2019.[399]

(d) The incentives and likely reaction of Cardholders to these scenarios (including the Oxera 2016 Report)

26. As the next step in the logic of the Defendants' case on the counterfactual in Issue 4, the Defendants' experts, and in particular Dr Niels, sought to analyse the likely outcomes from the putative competitive response from Issuers described above. Dr Niels based his analysis on a report carried out by Oxera, in 2016, in the course of the Mastercard II CAR Decision proceedings. The following is a passage from Dr Niels' first report at [4.59] to [4.60]:

> **[4.59]** I develop my assessment by building on an analysis carried out by Oxera in 2016, in the context of the Mastercard II proceedings. In that context, the following four hypothetical scenarios were considered regarding the measures that issuers and the schemes might have adopted in the absence of inter- regional MIFs.

[397] Day 16, p3, line 22 to p,4 line 4.
[398] Day 7, p94, line 24 to p95, line 4.
[399] Day 7, p172, lines 18 to 25.

• Scenario 1—Mastercard or Visa not being available at all for inter-regional payments.

• Scenario 2—cardholders paying a 1% increase in the transaction fee for Mastercard/Visa purchases in Europe.

• Scenario 3—cardholders not receiving any reward programme points, cashback or other benefits when using Mastercard/Visa cards in Europe.

• Scenario 4—cardholders facing a higher decline rate for Mastercard/Visa transactions.

[4.60] Under each of these scenarios, the extent to which non- European cardholders (specifically, those from the USA, Russia and Australia) would have switched to alternative payment methods for their transactions in Europe was assessed via a consumer survey. Oxera then estimated the merchant costs associated with each alternative payment method, and assessed the cost savings associated with Mastercard's inter- regional MIFs.

27. The scenarios were supported by evidence from Ms Sarmiento and Mr Knupp. However, for the most part these amounted to assertions about what Issuers might do in certain circumstances. There was no evidence from relevant Issuers on the point. Mr Knupp did refer to work carried out by Visa to analyse the level of UK acquired transactions declined by foreign Issuers after the 2019 Commitments resulted in a reduction of inter-regional MIFs.[400]

28. Dr Niels used the factual material provided by Ms Sarmiento and Mr Knupp to conclude that, in the counterfactual scenarios described by them, UK and Irish Merchants would have paid higher costs associated with more costly alternative payment methods that Cardholders would have used, in place of using Mastercard and Visa. As a consequence, Dr Niels concluded that, in the counterfactual, fees paid by merchants would be higher, meaning that inter-regional MIFs did not have an appreciable effect on competition by raising merchants' costs.[401]

29. Mr Holt adopted a similar approach to Dr Niels, with some adaptations.[402]

30. This approach was challenged by Mr Dryden in his second report, at [8.21] and following. The key points made by Mr Dryden were:

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[400] Knupp 1 at [48].
[401] Niels 1 at [4.68].
[402] Holt 8 at [451].

(1) A scepticism about whether Dr Niels' scenarios 1 to 3 would occur in practice, given that inter-regional functionality is not a standalone product, but rather an incidence of the whole functionality of a consumer card, for which a much wider array of costs and revenues would be taken into account by an Issuer.

(2) The factual evidence about decline rates was ambiguous, with a natural experiment following the introduction of the 2019 Commitments (relied on by Mr Knupp as showing a spike in decline rates) leaving open the question of what other factors (apart from the inter-regional MIF reduction) might have contributed to the spike.

(3) A challenge to the approach of treating inter-regional card functionality as a standalone product, given it is usually just an incident of a consumer card, and given the lack of any direct relationship between that functionality and MIF income.

(4) The provision of a long list of criticisms in Appendix D of Dryden 2, relating to the methodology underlying the original Oxera work and its suitability for the analysis carried out by Dr Niels.

31. There was debate about:

(1) The significance of the decision by Amex to withdraw its GNS scheme from the UK in 2016, as a consequence of the introduction of the IFR. This is of more significance to commercial card MIFs, and is dealt with more fully there, as it was acknowledged by Dr Niels that he had not assessed Issuer switching in relation to inter-regional functionality under Issue 4,[403] and Mr Holt did not pursue the question with any vigour.

(2) The approach Amex might have to expanding its Card issuance to capture switching Cardholders in response to the scenarios (being Cardholders with cards issued in countries outside the UK) and to the

403 Day 16, p5, line 8.

expansion of acceptance of Amex cards in the UK. However, no real evidence was presented on this point, beyond assertions from Dr Niels and Mr Holt that Amex would have incentives to take these steps and challenges from Mr Dryden based on Amex's historic and existing market position and public statements made by it in relation to regulatory events, in Europe in particular.

32. There was evidence about four incidents which were said to act as natural experiments to test whether material switching to Amex would occur in the event of removal of MIFs in the counterfactual:

(1) When Visa increased its MIF in 2007 but Maestro did not follow, this resulted in the UK Maestro scheme losing 90% of its market share to Visa by 2011.

(2) A similar MIF differential in Hungary, where Visa reduced its debit card MIF resulting in a 45% loss of market share to Mastercard at the beginning of 2012.

(3) Intra-EEA MIFs reduced to 0% from June 2008 to July 2009 as a result of the *Mastercard I* ruling.

(4) The cap on inter-regional MIFs imposed by the 2019 Commitments (referred to above in relation to Mr Knupp's evidence).

(5) Events in Australia following action in 2003 by the Reserve Bank of Australia, which capped and reduced interchange fees.

(6) Similar action in New Zealand in 2022 to cap interchange fees.

33. There was a great deal of evidence presented about:

(1) The outcome of these natural experiments, particularly in terms of the level of switching to Amex and the impact on Amex's pricing structure. This tended to show that there was not significant switching in any case

where the choice was not simply between Mastercard and Visa, and some evidence of a reduction in Amex charges in, for example, Australia.[404]

(2) The reasons for those outcomes and in particular the similarities and differences in background circumstances which meant that they were reliable experiments.

The likely effect on average MSCs and the impact on merchants

34. The logical conclusion of the arguments advanced by the Defendants is that the average Merchant Service Charge paid by a merchant would not reduce in the counterfactual, as the increased usage of Amex cards for inter-regional transactions would result in merchants paying the higher charges that Amex imposes on merchants, compared with Merchant Service Charges which comprise MIFs imposed by the Defendants. As a consequence, in the counterfactual merchants would not pay lower Merchant Service Charges and might potentially payer higher Merchant Service Charges. Therefore, the MIFs imposed by the Defendants do not have the effect of restricting competition.

35. Dr Niels and Mr Holt both acknowledged, in cross examination and in response to questions from the Tribunal,[405] that they had not sought to assess any other impacts on Merchants which might occur in the counterfactual posited by them. For example, the Tribunal heard evidence from Mr Steeley[406] to the effect that acceptance of different payment methods had different economic impacts on M&S, largely (putting to one side M&S's own card propositions) because of the demographic and purchasing patterns of the relevant consumer.

36. The position taken by Dr Niels and Mr Holt on this point was twofold:

[404] See for example a speech by Mr Tony Richards, Head of Payments Policy at the RBA, at the 26th Annual Credit Law Conference on 14 September 2016.
[405] See for example Day 15, p75, line 22 to p76, line 10; and Day 17, p126, line 16 to p127, line 21.
[406] Day 5, p9, line 10 to p14, line 13 and Steeley 1 at [31].

(1) First, it was not necessary to assess benefits received by Merchants in the counterfactual because they were not carrying out an Article 101(3) TFEU analysis. The focus of their exercise was on the impact on the Merchant Service Charge (and the theory of harm that MIFs put a floor under the Merchant Service Charge), so the appropriate question for the counterfactual was the impact on costs which fed into the Merchant Service Charge.

(2) Secondly, the evidence given by Mr Steeley did not read across to the counterfactual, because the transactions in question would take place in any event, so the impact on benefits for the Merchant was a constant.

(e) Any differences in relation to Ireland

37. It was common ground that the relevant market is acquiring services in the UK and Ireland, both being separate markets, regardless of any nuances between those markets. Minor nuances included that prior to 9 June 2016, the carve-out from the Honour All Products Rule with respect to credit/debit cards for UK merchants did not apply in Ireland.[407] Nothing was said to turn on these nuances and no expert considered the Irish market with any real specificity. As above, the Defendants' experts accepted that the post-IFR MIF would still apply in the Republic of Ireland, that the intra-EEA MIF would still be applicable in Ireland[408] and that the inter-regional MIF would apply to transactions.

38. As regards the switching argument, the RBR report (2021) notes that third party schemes like Amex have high levels of acceptance, particularly in areas with a large number of tourists.[409]

The analysis of effects – switching in the counterfactual on the Defendants' case

39. The following findings of fact are made in relation to this part of the case.

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[407] Holt 8, paragraph 693 and Holt 9, paragraph 474(c)(ii).
[408] Day 15, p21, line 13 to p22, line 11.
[409] RBR: Global Payment Cards Data and Forecasts to 2026 – Europe, September 2021.

(f) Differences between inter-regional and other transactions

40. There are aspects of inter-regional transactions which are different from other card payment transactions. Most notably, these are:

(1) The transactions make up a relatively small proportion of overall transactions, generally in the region of 10% or less by volume and value. inter-regional transactions tend to be more prevalent in the hospitality and travel sectors.

(2) There is a higher proportion of CNP transactions in inter-regional transactions compared with other Card transactions (the former being almost twice the rate of the latter).

(3) As a consequence of the high rate of online transactions and, perhaps, the use of Cards in different geographic regions, it is accepted that there is likely to be a higher incidence of fraud in inter-regional transactions and therefore increased costs for Issuers in relation to such transactions.

(4) Transaction values tend to be higher for inter-regional transactions than other transactions. Cash is less likely to be a substitute for inter-regional Card transactions.

(5) The competitive landscape for the Defendants in relation to inter-regional transactions is different from that for other Card transactions, because the Issuer base for such transactions is much wider and diverse than the Issuer base for (for example) UK consumer Card transactions.

(6) There are particular costs associated with some of these features which are not replicated in, or are different in extent from, the costs associated with other Card transactions.

41. These items do give rise to the need to consider different issues, or issues in a different way, in the counterfactual analysis. For example, in order to assess the impact of changes in MIF rates for international transactions, the relevant Issuer

community is all Issuers in all countries outside the UK and Ireland – literally thousands of Issuers, ranging from small domestic banks to huge payment schemes like China Union Pay.

42. It is also important, when considering the significance of these differences, to recognise that inter-regional transactions generally take place by a customer using a consumer or business Card, which the customer also utilises for other transactions. For example, an Australian visiting the UK, or purchasing online from a UK merchant, is likely to be using a Card issued by an Australian financial institution, which is also used for domestic Australian purchases.

(g) The connection between inter-regional MIFs and Issuer costs/the economics of inter-regional transactions

43. That, however, is where company parts with the arguments advanced by the Defendants. None of the differences between inter-regional transactions and other transactions identified are likely to lead to a materially different answer in relation to competitive effect than the exercises undertaken previously by courts and regulators in relation to domestic and intra-regional (i.e. EEA) MIFs.

44. The Defendants assert that there is a direct and correlated linkage between inter-regional MIFs and the costs incurred by Issuers in inter-regional transactions. That is said to justify the difference in levels between inter-regional MIFs and, say, domestic MIFs. This assertion, largely advanced in evidence by Ms Sarmiento and Mr Knupp, is speculative and unconvincing:

    (1) The only Issuer evidence before us was from Ms Dooney, on behalf of a UK Issuer, Barclays. She did not address inter-regional transactions specifically in her evidence. Her evidence was that, generally speaking, Barclays did not allocate MIF revenue to particular costs. That is inconsistent with the suggestions advanced by Ms Sarmiento and Mr Knupp about the way an Issuer looks at card transaction costs and the relationship between those and MIF revenues.

(2) There was therefore no direct evidence at all about Issuer costs in inter-regional transactions from Issuers outside the UK and Ireland, which as noted is a large and diverse community of financial institutions which may have a range of different approaches to the management of costs and revenues. It seems unlikely that there will be a single answer to the question of the significance of inter-regional costs and MIF revenue to these Issuers.

(3) There was indirect evidence, in the form of the Edgar Dunn studies. These are over a decade old and have been recycled from the Mastercard I Decision and Mastercard II CAR Decision proceedings, in which they were rejected by the Commission as establishing a linkage between inter-regional costs and MIFs. The studies identified substantial cost differences between regions, but (as Ms Sarmiento acknowledged) applied a single inter-regional MIF rate universally across them all. That in itself strongly suggests a lack of correlation between inter-regional transaction costs and inter-regional MIFs.

(4) Contrary to the suggestion of a desire to correlate inter-regional transaction costs and inter-regional MIFs, the evidence suggested that Visa and Mastercard set MIFs largely by reference to the competitive position between them, rather than any costs incurred by Issuers. Ms Sarmiento was reluctant to accept this conclusion,[410] but it was clear from the records of MIF rate setting meetings that were put to her. Further, it was apparent that the process of MIF rate setting did not involve any real assessment of any correlation with costs as adjustments were made over time. As Mr Willaert accepted,[411] the process is one of incremental adjustment, based on an assumption that an assessment made at an earlier point in time was correct. This was notwithstanding the potential for material changes in costs over time (for example, the adjustments to the costs of credit, which were presented by Edgar Dunn

[410] Day 9, p256, line 25 to p257, line 16.
[411] Day 9, p112, line 13 to p113, line 24.

as a material element of inter-regional transactions cost, as interest rates fluctuate).

(5) The so called "balancing" exercise which the defendants say is designed to create an equilibrium between the costs incurred by Issuers and the benefit to Merchants is, as already decided, in fact a mechanism to maximise participation by Issuers at the highest level of MIF that merchants will withstand. That position is entirely inconsistent with the notion that inter-regional MIFs are set by the Defendants at a level intended to reflect an Issuer's cost of those transactions.

45. It is therefore concluded that the inter-regional MIFs set by the Defendants in their respective schemes are not, and are not intended to be, any realistic reflection of the costs which Issuers actually incur by reason of the inter-regional transactions which take place on their cards. Based on the limited evidence before us, inter-regional MIF revenue is unlikely to be treated by Issuers as having any real correlation with the actual costs of inter-regional transactions. The reactions of Issuers to the removal of that revenue are likely to vary considerably, depending on the particular circumstances of the Issuer, including their own perception of the actual costs associated with inter-regional transactions and how that fits within their assessment of product and operating unit profitability.

46. The Claimants are also correct that inter-regional transactions are not a product in their own right. It is not possible to separate the functionality that allows inter-regional transactions from the functionality that allows domestic transactions in any meaningful way. The ability to use a Card for both domestic and inter-regional transactions is very likely to be a natural expectation of Cardholders and it is therefore very likely to be a natural expectation of Issuers to provide that combined functionality as a single product. That further suggests that any exercise to isolate costs incurred by an Issuer in relation to a Card with inter-regional functionality is unlikely to be meaningful or indeed carried out.

(h) The consequences for Issuers and the schemes of no inter-regional MIF and their likely reactions

47. In that context, the likely response from Issuers to a reduction in the inter-regional MIF is now considered.

48. As was properly accepted by Mr Dryden, a change in inter-regional MIF income might result in Issuers looking at the profitability of certain Card offerings, including the potential adjustment of existing charges or the addition of other charges, either on a by transaction basis or by reference to the general cost to a consumer of holding and using a Card.

49. However, the assertion by the Defendants that this would result in a significant alteration of business strategy by those Issuers, so as to affect the competitive position in the counterfactual in a material way is not accepted:

(1) There has been no evidence to that effect from an Issuer from outside the UK or Ireland.

(2) It is concluded that Issuers are likely to make some response to the removal of inter-regional MIF revenue. However, it is unlikely that the response would be limited to actions directed at inter-regional transactions, given the way in which Ms Dooney has described the setting of budgets,[412] the apparent lack of any real correlation between inter-regional MIFs and inter-regional transaction costs and the likely preference of customers to have, and Issuers to offer, inter-regional functionality on their Cards.

(3) Ms Dooney's evidence does not go anywhere near establishing the level of alteration of strategy that the Defendants suggest an Issuer would experience. She made it plain that issuing banks have a variety of options available to them to ensure their costs are covered by their revenues,

[412] Day 7, p47, line 16 to p53, line 8.

including the imposition or adjustment of fees for Card issuance, the maintenance of accounts, interest rates payable on deposits and so on.[413]

(4) While some of these may be commercially unattractive in some jurisdictions (for example, imposing significant Card issuance fees in countries where that does not presently happen), that may not be the case in other jurisdictions. In the absence of any real evidence on the subject, it is likely that financial institutions adjust and recover lost revenue in ways that consumers will accept and which are, or become, competitive in the relevant market.

(5) There are also various options open to an Issuer to cover their specific costs of inter-regional transactions, should the Issuer wish to do that in order to recover lost inter-regional MIF revenue. That includes imposing or increasing fees for inter-regional transactions – either as a direct transaction fee, or through some other mechanism such as the exchange rates applied to the transaction.

50. As a consequence, it is not accepted that the four scenarios posited by Ms Sarmiento and adopted by Dr Niels represent the range of reasonable and likely responses by Issuers to the removal of inter-regional MIFs. The likely and reasonable counterfactual which would emerge from a removal of inter-regional MIFs would involve a much more graduated and nuanced response from Issuers, not necessarily focusing just on inter-regional transactions and functionality, and probably varying considerably across that large and diverse community.

(i) Potential response of the Schemes

51. It follows that it is unlikely that the Defendant schemes would be put in a position where competitive conditions required them to take the unbundling steps they have suggested. It is much more likely that Issuers would absorb costs and adjust revenue streams in various ways that did not substantially affect the

[413] Day 7, p49, line 25 to p51, line 9.

competitive position of the Schemes. In those circumstances, there is no reason why the relatively extreme unbundling options, which were only described at a high level, would be attractive to the Defendants following the removal of inter-regional MIFs.

52. In any event, the unbundling options put forward by the Defendants are not credible or likely to be implemented in any reasonable counterfactual. They are threats which the schemes are unlikely to carry out, given their desire to remain competitive with each other and to maintain their market position vis a vis other payment schemes.

(j) The different competitive landscape and the likely competitive response of Amex

53. The Defendants exaggerate the competitive threat posed by Amex, and even more so the competitive threat posed by other international Card schemes such as Diners Club, China Union Pay and JCB.

54. The PSR's view in its November 2021 Report[414] was that Amex was unlikely to represent a competitive constraint to Visa and Mastercard in the market for Card acquiring services because:

(1) Nearly all merchants accept Visa and Mastercard, but not all accept other brands.

(2) Together, Visa and Mastercard accounted for c.98% for all Card payments at UK outlets in 2018, both by volume and value.

55. While Amex acceptance is, according to RBR, reasonably highly concentrated in "large multinational chains and urban areas, as well as traditional [travel and entertainment] outlets", there is a much lower (around 50%) acceptance rate for Diners Club, China Union Pay and JCB at those outlets.[415]

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[414] "Payment Systems Regulator, Market review into card-acquiring services, Final report, Annex 1: Industry background" 1 November 2021.
[415] RBR: Global Payment Cards Data and Forecasts to 2026 – Europe, September 2021.

56. As already noted, there was speculation by the Defendants, without any factual basis, that Amex might adapt its competitive response to seek to obtain market share in the event that inter-regional MIFs were removed. The only evidence of any substance on this subject were the natural experiments in Australia and Europe following various adjustments to MIF rates. Only the 2019 Commitments involved solely inter-regional MIF rates. In none of the situations was there any evidence of a substantial shift of market share to Amex. For these purposes, the natural experiments are discounted because they involved shifts in market share between Mastercard and Visa, as they deal with an entirely different competitive position and tell us nothing material about the ability of Amex to obtain market share.

57. In any event, the reaction by Amex and other market participants to a change in competitive position, and consequent increase in merchant costs in the counterfactual, depends (on the Defendants' case) on:

(1) A material change in business strategy by Issuers, along the lines posited by Dr Niels' four scenarios, which as already indicated is unlikely.

(2) A sufficient level of switching by Cardholders as a consequence of (1), which is now considered.

(k) The incentives and likely reaction of Cardholders to these scenarios (including the Oxera 2016 Report)

58. For the reasons given above, it is unlikely that the competitive response of Issuers in the counterfactual would have the significance of the four scenarios considered by Dr Niels. The four scenarios therefore lack credibility and cannot be said to represent a reasonable and likely counterfactual scenario.

59. In particular, it seems inherently unlikely that Mastercard or Visa would cease to offer a viable and competitive inter-regional payment service to Issuers. The existing strength of their competitive position compared with other payment providers (including Amex), the relative size and importance of inter-regional MIFs to Issuers, the combined functionality of cards to offer inter-regional and

domestic transactions and the way in which Issuers approach costs and revenues all weigh against such an outcome.

60. It seems quite possible that Issuers would increase the costs of inter-regional transactions, as recognised above. However, no reasoned basis was put forward for the assumption of an increase of 1% and that seems unlikely, given the other options open to Issuers to cover their costs and the lack of correlation between inter-regional MIFs and inter-regional transaction costs.

61. In relation to scenario three, it again seems possible that there might be a change in the way in which Issuers manage costs and benefits for Cardholders, but again no reasoned basis was put forward for the absolute assumption of the removal of all benefits and the limitation of that to inter-regional transactions on Mastercard and Visa cards in Europe.

62. Scenario four suffered from the same lack of rationale for the assumed scenario. The Oxera 2016 Report did not specify how much higher the decline rate faced by Cardholders would be. While in principle, it is possible that there could be changes in response to an increased decline rate, it is difficult to reach any meaningful conclusions about how Issuers and Cardholders would respond to a generalised 'higher decline rate'.

63. In summary on this point, the scenarios seemed speculative and lacking in any rationale as to why they were a possible outcome, let alone a likely and reasonable one. Instead, they seemed inherently unlikely.

64. Many of the criticisms advanced by Mr Dryden about the underlying Oxera 2016 Report were well put, and are sufficient to cast considerable doubt on the reliability of the output of the survey.

65. The main points in this regard are:

(1) the survey is not representative of inter-regional transactions in the UK because respondents from the USA, Russia and Australia do not account

for a majority of inter-regional transactions in the UK and cannot be assumed to be representative respondents;

(2) the survey design did not follow best practices as outlined by the CMA, including in relation to the selection and presentation of questions and potential responses;

(3) survey responses include odd results such as consumers substituting to cash for online purchases.

(4) scenario three regarding rewards programs, cashback and other benefits from inter-regional transactions was put only to credit card holders, but the results were applied to switching ratios for both credit and debit cards; and

(5) the time horizon considered by the survey is not clear.

66. For these reasons, the Defendants have failed to establish that there would be material switching in the counterfactual which applies to inter-regional transactions in relation to Issue 4.

(l) The likely effect on average MSCs and the impact on merchants

67. It therefore follows that, in the event that it is appropriate, in the context of an Article 101(1) TFEU analysis, to consider the competitive response of Issuers, Cardholders and other payment providers, and the consequent impact on the level of average Merchant Service Charges paid by Merchants, the Defendants' contention that those average Merchant Service Charges would be higher in the counterfactual is rejected.

68. In conclusion, if such an analysis is appropriate, the Defendants have failed to establish that, in a reasonable and likely scenario, the average Merchant Service Charge would be higher in the counterfactual. The same analysis that applies to the counterfactual in relation to consumer MIFs also applies to inter-regional

transactions,[416] namely, that inter-regional MIFs do have the effect of restricting competition.

(m) The position in Ireland

69. The evidence and submissions on inter-regional MIFs did not seek to make any distinction between the position in the UK and Ireland.

70. It was not therefore suggested that there would be any difference in the likely response of the Schemes or Amex in Ireland as compared to the UK in response to a reduction in inter-regional MIFs. Given that the ability to facilitate inter-regional purchases is a feature of cards in general and Amex is likely to be a less significant competitive threat in Ireland compared to the UK as a result of its more limited acceptance footprint in the former, the same conclusions for Ireland on Issue 4 are reached as for the UK.

ISSUE 5: COMMERCIAL CARD MIFS

(a) The contentions of the parties

71. The issues in relation to commercial Card MIFs are very similar to those described above in relation to Issue 4 and inter-regional MIFs.

72. The Defendants advance similar arguments about switching and unbundling arguments in relation to commercial Card MIFs, in the event they are correct about the correct approach to the counterfactual. As with Issue 4, the contention is that the Merchant Service Charge would be higher in the correct counterfactual, largely as a result of Cardholder and Issuer switching away from Mastercard and Visa, towards in particular Amex.

73. There are however some differences which arise from the nature of commercial Card transactions and the various market conditions surrounding those. The

[416] For example, as determined in the Sainsbury's SC Decision.

descriptions and analysis of inter-regional MIFs will not be repeated here, but those aspects of material difference that arise in relation to commercial Card MIFs will be identified.

74. By way of background to what follows it is noted that commercial Card MIFs are not subject to regulation under the IFR and were said by the Commission not to be a substitute for consumer credit or debit cards, given that they cater for specific market segments.

(b) The evidence

75. The factual evidence on behalf of Mastercard in relation to commercial Cards was provided by Ms Suttle, while Ms Jones gave evidence on the subject on behalf of Visa.

<u>The alleged differences between commercial Card transactions and other transactions</u>

76. Ms Suttle and Ms Jones identified the following key features which differentiated commercial Cards from other cards: [417]

(1) Commercial Cards are issued to corporate, business, public sector bodies (and their employees) and individuals in their professional capacities.

(2) Commercial Cards make up a small proportion of transactions (less than 5% by volume and only slightly above 10% by value for Visa).

(3) Average transaction values for commercial Cards tend to be considerably higher than for consumer Cards – in the region of two to four times greater.

(4) The vast majority of commercial Cards are charge Cards, meaning they require a monthly payment and so do not offer extended credit to the

[417] Largely to be found in Suttle 1 at [34] and Jones 1 at [21].

Cardholder (and therefore do not provide material revenue to Issuers from interest payments).

(5) Commercial Cards tend to offer more sophisticated and complex product features than consumer Cards. An example is the reporting functionality available to monitor transactions entered into by employees. These product features entail additional costs for Issuers.

(6) There are higher costs for Issuers as a result of the risk inherent in greater credit limits and fraud risks from the greater proportion of cross border, complex and CNP transactions.

(7) Commercial Card transactions are concentrated in the sectors of: home improvement and supply; retail services; and travel.[418]

(8) The competitive landscape for commercial Cards is different from that for consumer Cards. In particular, Amex has a strong presence in parts of the commercial Card market, where it is a substantial competitor both as an Issuer and by way of acceptance levels.

(9) Unlike consumer Cards, merchants are not obliged to accept commercial Cards (regardless of whether they accept the same Issuer's consumer Cards) and are entitled to add a surcharge (if otherwise permitted by law)[419]. However, the merchants who gave evidence before us said that they did not generally distinguish between consumer and commercial Cards and tended to accept the latter.

Nature of the sub-market for commercial Card transactions

77. Ms Suttle explained[420] that there are various levels of additional service provided by Issuers to commercial Card Customers, depending on their classification into the following broad categories:

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[418] Visa Written Closing at [411.6].
[419] Cross examination of Ms Suttle, day 9, p148 lines 7 to 8.
[420] Suttle 1 at [14] to [18].

(1) Small and medium sized enterprises ("SMEs") who use commercial debit, credit and prepaid Cards. These Customers will generally receive a basic Card (including a payment guarantee and interest free period), spend limits, bank statements, the separation of personal and corporate expenses and Card safety and security services. A standard fee is usually payable. More premium Cards might include longer interest free grace periods, more flexible credit limits, online statements, categorised statements, theft and fraud prevention and basic business travel benefits.

(2) Mid-market and large business Customers might receive additional levels of information including more extensive online functionality, business travel benefits, different fee structures, Card support and customer service and different Card functionality (e.g. contactless).

(3) Very large and multinational Customers, divided into:

(i) "T&E"[421] Customers, who might have access to virtual Cards[422] and centrally held Cards as well as physical Cards.

(ii) "B2B"[423] Customers, who might have access to virtual and physical Cards.

78. Ms Jones confirmed that Visa followed the same categorisation. She explained the levels of turnover or other size metrics which determined which category a business would be in. SMEs were issued Cards which Ms Jones categorised as "business cards". These could be debit or credit Cards, with credit Cards broken down into prepaid, charge and ordinary credit. Ms Jones estimated that about 81% of all Visa commercial Card transactions in the UK and Ireland in the year October 2022 to September 2023 were made on business cards.[424]

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[421] Travel and Entertainment.

[422] These offer high levels of security as they generate different Card numbers for each transaction and the real Card number is concealed from the Merchant. They are primarily used for hotel and airline expenditure.

[423] Business to Business.

[424] Jones 1 at [13] to [16].

79. It was apparent that the Cardholder benefits, and therefore the Issuer costs, which might apply to these different categories of customer might vary considerably between them. For example, Ms Suttle accepted[425] that a SME with a debit Card might be in materially the same position as a consumer Cardholder, in terms of the sophistication of benefits provided, while a large corporate client would have a much more sophisticated (and expensive) offering.

80. Ms Jones agreed that, at the SME level, the differences between a commercial Card and a consumer Card were not as significant as they would be for a large corporate (and that as a result the Issuer costs associated with the SME service might not be significantly different from those associated with a consumer Card).[426] Ms Suttle also acknowledged this.[427]

81. Ms Jones worked at Bank of America, prior to joining Visa. She said she was aware of the enhanced level of costs which Bank of America incurred in running a commercial Card programme, and that knowledge underpinned much of the commentary in her witness evidence about the costs of commercial Card transactions being higher than consumer Card transactions for Issuers. However, when pressed on this by Mr Beal KC, she acknowledged that she had no data to support her commentary.[428]

82. Ms Suttle explained that the competitive market in relation to commercial Card transactions was different from that for consumer Cards. In particular,[429] she said that cheques and bank transfers are important competing payment methods in the commercial Card market (which is not the case for consumer Cards) and that Amex in particular was in a much stronger competitive position in relation to some types of commercial Card transactions than it was in the consumer market.

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[425] Day 9, p144, lines 10 to 22.
[426] Day 8, p137, lines 4 to 9.
[427] Day 9, p144, lines 3 to 9.
[428] Day 8, p150, line 18, to p156, line 17.
[429] Suttle 1 at [34.8].

83. Ms Suttle set out in [26] of her witness statement a table which showed market shares (by value) in each of the categories of commercial Card transactions between 2017 and 2022:[430]

[✂]

84. This showed that the market position of all the Card Schemes, including Amex, differed considerably, over time and between categories of commercial Card.

85. In addition to Amex, there are other Card Schemes that compete in the UK and Ireland with the Defendants, including for example fuel Cards issued by major energy companies. There are also other means for corporates to effect payments, such as account to account direct payments and other bank transfers, as well as cash. However, it was acknowledged that these were not obvious substitutes for Card payments.[431]

<u>*The connections between commercial Card MIFs and Issuer costs*</u>

86. As with inter-regional transactions, the Defendants argue that the commercial Card MIFs are justified by and reflect the costs of Issuers in relation to commercial Card transactions.

87. As with inter-regional MIFs, there was no evidence presented that could reasonably be relied upon to conclude that commercial Card MIFs had any direct relationship or correlation with the actual levels of costs incurred by Issuers for specific product offerings. Again, there was no evidence from any Issuer, other than Ms Dooney (which is discussed above, and which does not establish a correlation between commercial Card MIF revenue and Issuer costs). Ms Suttle accepted[432] that she was not in a position to assist on this point and that she had no knowledge of what proportion of MIF revenue was used by an Issuer to cover any particular cost.[433] There was also no requirement imposed

[430] These are transactions made on commercial Cards, in USD billions unless otherwise indicated.
[431] See for example Jones 1 at [31].
[432] Day 9, p157, lines 10 to 14.
[433] Day 9, p157 lines 10 to 14.

by the Defendant Schemes on Issuers to use the revenue for any purpose related to commercial Cards, or indeed any purpose at all.[434]

88. Indeed, Ms Suttle appeared to say that the products needed to meet certain requirements as to their offering in order to justify a higher interchange fee, rather than the other way round:[435]

> *"158: 4 Q. The level of the MIF set for commercial card is not in*
> *5 fact calibrated by reference to the costs incurred by*
> *6 the issuer, is it?*
> *7 A. I believe that the way that we calculate the interchange*
> *8 is based on the market conditions, geographics, the*
> *9 vertical at which the product applies to. So my example*
> *10 here in, in paragraph 39, was a clear delineation with*
> *11 Mastercard explaining if you wanted to issue a premium*
> *12 product that would attract a different rate from*
> *13 a standard product, you would have to add these certain*
> *14 features and benefits to attribute that."*

89. Ms Jones acknowledged in her witness statement that:[436]

> *"The main payment schemes compete for issuer loyalty on price (i.e., the higher the level of interchange fee available, the more attractive the scheme to issuers, as the interchange fee allows issuers to fund more attractive products for their customers), relationship, product innovation, strategic objectives, marketing, thought leadership, data usage and brand strength."*

90. Ms Jones also said that, as the "P&L owner" of Visa's commercial Card business, she was not directly involved in the setting of commercial Card MIFs (which was done by the Interchange Pricing Team, as overseen by the Group Reviewing Interchange and Pricing), but she would expect to be consulted and

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[434] See for example Suttle, day 9, p155, lines 5 to 7; Jones day 8, p171 line 25 to p172, line 3.
[435] Day 9, p158, lines 4 to 14.
[436] Jones 1 at [28].

attend meetings if potential changes were instigated by her, or likely to be something she disagreed with. She told us that, in all the time she had been at Visa, she thought that commercial Multilateral Interchange Fees had only changed twice.[437]

91. Mr Beal, KC put to Ms Suttle a number of documents which suggested that Mastercard was setting commercial Card MIF rates by reference to various factors, such as likely revenue streams to Mastercard and the competitive position with Visa, but not by reference to Issuer costs specific to commercial Card transactions. Ms Suttle accepted that this was apparently the case.[438]

92. It was also apparent that there would be fees paid by many commercial Card holders to their Issuing bank, which was in part a reflection of the additional costs which an Issuer incurred in providing the enhanced services which came with commercial Cards. It was not clear from the evidence how that fee related to the costs of the services provided by the Issuer. See for example the following exchange from Ms Jones' evidence:[439]

> "*147: 7 THE PRESIDENT: Right, but there would be a payment flowing*
> *8 from the large corporate to the issuer for the service*
> *9 that is provided?*
> *10 A. There would.*
> *11 THE PRESIDENT: How would that typically be calculated?*
> *12 . I -- I would not -- I do not know the answer.*"

The likely reaction of Issuers, Cardholders and Amex to reductions in commercial Card MIFs

93. Ms Jones's evidence was that the removal of commercial Card MIFs would be highly disruptive, causing Issuers to impose fees on Cardholders or to exit the market. Visa would either need to exit the market or move to a three party system, which might not be a viable option. As a result of Visa's exit,

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[437] Jones 1 at [33] to [34].
[438] Day 9, p158 line 4 to p163, line 10.
[439] Day 8, p147, lines 7 to 12.

Cardholders would switch to Amex, who would charge higher fees to merchants (she suggested the Amex equivalent of the MIF was around three times the level of Visa's commercial Card MIF).[440]

94. Ms Suttle's evidence[441] was that the revenue to Issuers from commercial Card MIFs was very substantial, ranging (in aggregate) for Mastercard's top five Issuers from between [✂] to [✂] per annum. The removal of these revenues would make it no longer financially viable for Issuers to offer commercial Card products with anything like current levels of functionality. It would be difficult for the Issuers to recover the lost revenue by way of charging additional fees.

95. Commercial Card holders would therefore switch from their existing Issuers to Amex to retain the benefits they required, especially where Amex had strong market share, such as the SME credit Card market where Amex had more than a 50% share. Commercial Cardholders might also switch to alternative payment methods, especially in the B2B market.

96. In cross examination by Mr Beal KC, Ms Jones accepted that the limitations in Amex's network, which had materially lower acceptance than Visa's or Mastercard's, might make switching unattractive to Merchants.[442] She was unable to comment on material showing that the cap on consumer Card MIFs set by the IFR in 2015 had not resulted in Issuers switching to Amex.[443] She acknowledged that Amex's own regulatory filings showed that it would respond to reduced Visa and Mastercard Merchant Service Charges (which would be an inevitable consequence of removal of the MIF) by reducing its own charges.[444] She also agreed that it was possible that lower Merchant Service Charges would make merchants more willing to accept commercial Cards.[445]

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[440] Jones 1 [37] to [39].
[441] Suttle 1 [37] to [41].
[442] Day 8, p140, line 21 to p141, line 22.
[443] Day 8 p142, lines 12 to 22.
[444] Day 8, p168, lines 10 to 21.
[445] Day 8, p174, lines 10 to 15.

97. Ms Jones was also challenged on the extent to which Issuers would cease to issue commercial Cards to large corporates, resisting the suggestion that the corporates would not accept such an outcome.[446]

98. Ms Suttle accepted,[447] in cross examination by Mr Beal KC, that demand from Cardholders for specific products such as debit Cards for small businesses would persist, in a context where Amex does not provide such a service.[448]

99. Mr Beal KC put to Ms Suttle the PSR's view that Amex's limited acceptance network meant that Amex was not an effective substitute for Visa and Mastercard in the acquiring market. Ms Suttle resisted this suggestion, with particular reference to parts of the commercial Card market where Amex has a stronger acceptance network (such as travel and hospitality).[449]

100. There was speculation about whether Amex might, in the conditions described by Ms Jones and Ms Suttle, re-enter the UK market with its GNS scheme, under which Amex licences Issuers to issue Amex branded Cards (as opposed to the three party scheme in which Amex issues the cards itself). There was no direct evidence from Amex on this, and the only indirect evidence from Amex came from its investor relations and regulatory documentation, which suggested that it had withdrawn its GNS scheme in the UK (and the EU) following the introduction of the IFR and the Revised Payment Services Directive. A statement from Amex dated 12 January 2018[450] said:

> *"The combined impact of the EU Payments Package – including price caps, separation of payment scheme and processing operations, pan-European licencing, and network access requirement – impose a regulatory burden on the American Express licencing business that renders it no longer viable. American Express has, therefore, taken the decision to exit all of its licencing arrangements in the EU. As a result*

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[446] Day 8, p172, line 24 to p173, line 17.
[447] Day 9, p165, line 8 to p166 line 18.
[448] Day 9, p169, lines 9 to 10.
[449] Day 9, p170, lines 5 to 15.
[450] Statement on the Revised Payment Services Directive (PSD2) in the European Union, 12 January 2018.

of this, American Express will no longer be operating a licencing business within the EU and no new licences will be issued. The company has terminated its licences with existing partners, and is in the process of winding down those operations."

101. Amex's Form 10K filing with the US Securities and Exchange Commission for the year ended 31 December 2021 stated:[451]

> "*Among other things, regulation of bankcard fees has negatively impacted and may continue to negatively impact the discount revenue we earn, including as a result of downward pressure on our discount rate from decreases in competitor pricing in connection with caps on interchange fees. In some cases, regulations also extend to certain aspects of our business, such as network and cobrand arrangements or the terms of card acceptance for merchants, and we have exited our network businesses in the EU and Australia as a result of regulation in those jurisdictions, for example. There is uncertainty as to when or how interchange fee caps and other provisions of the EU and UK payments legislation might apply when we work with cobrand partners and agents in the EU and the UK. Given differing interpretations by regulators and participants in cobrand arrangements, we are subject to regulatory action, penalties and the possibility we will not be able to maintain our existing cobrand and agent relationships in the EU or the UK."*

The expert assessments of level of switching required to lead to an increase in MSC

102. As was the case with inter-regional MIFs, the experts disagreed about the extent to which there might be switching by Cardholders to Amex, such that the average Merchant Service Charge faced by merchants in the event commercial Card MIFs were removed remained as high, if not higher, than the present situation. In relation to commercial Card MIFs, this debate took place largely between Mr Holt (for Visa) and Mr Dryden (for the Claimants).

[451] At p17.

103. In his eighth report, Mr Holt carried out a critical loss analysis to determine what level of switching by cardholders would be required in order for the Merchant Service Charge paid by Merchants to remain unchanged. On the assumption that Acquirers passed on all of the commercial Card MIF reduction in the Merchant Service Charge, the loss of [✂] of Visa and Mastercard's transaction value would be sufficient to maintain the level of Merchant Service Charges for Merchants, with the implication that any greater shift would leave Merchants worse off.

104. Mr Holt also modelled scenarios where Acquirers did not pass on all of the reductions and where Amex responded by decreasing or increasing its own MSC. These resulted in different proportions of Visa and Mastercard transaction value that would be required to shift before Merchant Service Charges were unchanged – in the range of [✂] to [✂].

105. Mr Dryden made a number of points in response, including the following:

(1) As Amex does not offer a debit Card, it is not possible for commercial Card customers who wish to have that product to switch to Amex. Some 56% of the value of the entire commercial Card market in 2022 was comprised of debit/prepaid Cards, which (Mr Dryden said) is not open to competition by Amex.[452]

(2) Mr Holt had also not taken into account the potential for commercial Card customers to switch to alternative and lower cost means of payment, such as electronic funds transfer ("EFT"). That is an important factor in a market where 79% of commercial transactions (by volume) are made by EFT.

(3) Amex's fees are likely to be constrained by Visa and Mastercard's, so a significant drop in Merchant Service Charges occasioned by a reduction in commercial Card MIFs is likely to lead to Amex responding by reducing its own Merchant Service Charge.

[452] Dryden 2 paragraph 8.43(c).

Any differences in relation to Ireland

106. While Amex has a small share of credit transactions on commercial Cards in the UK, it has no discernible presence in relation to commercial Card transactions in Ireland. Ms Suttle, a Mastercard factual witness, noted that Amex does not have the same acceptance footprint in Ireland.[453] Ms Suttle considered that outcomes would likely have been different in the counterfactual for this reason. Irish corporate clients would have been incentivised to switch to other forms of payment such as cash, cheque or EFT.[454]

(c) Analysis of the commercial Card counterfactual

107. The evidence from the Defendants that there are distinctive features of commercial Card transactions (compared to consumer Card transactions) is accepted, which mean that there are different products offered by Issuers, different costs for Issuers, and a differing competitive landscape, in particular with Amex having a stronger market position than it has in the UK and Irish consumer Card market. However, these differences are not of a nature or scale to justify a different conclusion from that reached by the Commission or the courts in prior decisions about consumer Cards. In particular, for the reasons set out below, the evidence demonstrates that commercial Card MIFs are treated by the Defendants and by Issuers, for all relevant purposes, the same way as consumer Card MIFs.

108. It is clear that the MIF revenue flowing from Merchants to Issuers is a significant revenue stream, amounting (as Ms Suttle told us) to hundreds of millions of pounds of revenue each year for the largest five UK Issuers.[455] It is also accepted that Issuers incur costs in order to offer services to business customers, which differ according to the appetite of the customer for more or less sophisticated services. That tends to result in larger corporates receiving more sophisticated services and SMEs receiving less sophisticated services. It is apparent that at the smaller business end of the market, the services offered

[453] Suttle 1 at [49] – [53].
[454] Suttle 1 at [52].
[455] See Annex 6 [92] above.

to commercial Card customers do not differ significantly (either in terms of sophistication of the service or the costs associated with offering it) from the offerings to consumer Cardholders.

109. There was however very little evidence about:

(1) The actual level of the costs incurred by Issuers for the differing elements of the commercial Card services (for example, what a call centre support line costs, compared with fraud protection).

(2) The amount of revenue that Issuers receive from other sources, such as Cardholder fees and specific transaction costs (such as foreign exchange charges) or the revenue which Issuers derive from deposit and interest charges on business accounts.

(3) As a consequence, the extent to which Issuers depend on MIF revenue in order to be able to offer additional services, and the extent to which those services might be uneconomic for the Issuers if commercial Card MIF revenue ceased.

110. It is plain that the Defendants place no requirements on Issuers to allocate or spend MIF revenue in any particular way. It is also apparent that Visa and Mastercard themselves have little accurate information about Issuer costs, despite their assertion that those costs are an essential input into the setting of commercial Card MIFs.

111. That is not particularly surprising, as it is obvious from the documents which Mr Beal KC put to the Defendants' witnesses that:

(1) The Defendants are primarily concerned with their competitive position, mainly vis a vis each other, when setting commercial Card MIF rates.

(2) Another consideration is increasing the revenue to Issuers, but that is not done with any real knowledge of the costs of the Issuers in relation to the particular transaction. Instead, it appears to be with a view to

maximising the Schemes' own revenue by securing and building their Issuer customer base.

(3) Commercial Card MIFs rarely change and when they do, there is no apparent scrutiny of what costs might have changed for Issuers since the last rate was set.

112. In conclusion, there is, on the evidence before the Tribunal, no quantifiable link between the level of costs which Issuers incur in order to offer enhanced services to commercial Card customers and the level of the commercial Card MIF revenue which Issuers receive from Merchants.

113. Further, it is clear that Issuers have multiple revenue streams from which they can seek to cover their costs (generally, and specifically in relation to particular products and services). This includes the payment of fees by Cardholders, which is an existing feature of the commercial Card market already. Ms Jones and Ms Suttle stated that commercial Card customers would not accept increased fees, but that appeared to be nothing more than opinion and was not substantiated by any other evidence or analysis.

114. Mr Dryden accepted that it was likely that Issuers, faced with a reduction in commercial Card MIF revenue, would consider reducing costs, which might well reduce the quality of services offered to commercial Card customers (or indeed other customers).[456] He also made the point that this might more accurately reflect the balance between customer requirements and the costs of meeting those requirements.

115. In any event, the assertions by the Defendants about the likely reaction of Issuers are overblown and speculative. It is highly unlikely that Issuers would choose to walk away from the commercial Card market as a whole as a result of ceasing to receive commercial Card MIF revenue. There is no reason why the reaction by Issuers to such a scenario should be materially different from what has happened with consumer MIFs post the IFR, accepting that in some segments

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[456] Day 13, p33, line 14 to p34, line 14.

of the commercial Card market there might be altered offerings and changes in the way in which services are offered and paid for.

116. It follows therefore that the predictions from the Defendants' witnesses about Mastercard or Visa exiting the market are not accepted. Again, there is no reason why, in general, the consequence of removing the commercial Card MIF revenue from Issuers would be materially different from the consequences of reductions in other MIFs.

117. In this regard, the suggestion that Amex might re-enter the market in the UK or Ireland with its GNS scheme is entirely speculative. The material presented about Amex's decision to exit this operation makes it clear that the broad regulatory framework, including but not limited to caps on Multilateral Interchange Fees, was the motivation for this decision. It seems most unlikely that Amex would reverse that decision simply to be able to encourage UK and Irish Issuers to switch to Amex for commercial Card issuance.

118. As far as commercial Card customers are concerned, the limitations on acceptance of Amex Cards creates a degree of disincentive for businesses to switch to Amex. There is no question that the Amex Card has a materially lower degree of acceptance than Visa or Mastercard, even if Amex has higher market share in some sectors. Again, the natural experiments put in evidence (as discussed in Annex 6 [56] above) show no evidence of a material shift to Amex as a result of downward pressure on MIF revenue.

119. The experts disagree about the likely competitive response from Amex. In the absence of any evidence from Amex on the subject, there is only somewhat inconclusive evidence from previous natural experiments and argument between the experts from economic theory. The Claimants are likely to be correct in their views, but it is not necessary to resolve this question, as it is sufficient to consider the key question on the assumption that Amex would not materially lower its Merchant Service Charge in response to a removal of commercial Card MIFs.

120. There would be a degree of switching in some sectors of the Commercial Card market, prompted by reduced service offerings and/or higher card fees. However, again, the extent of that has been the subject of much speculation but no real evidence and it would not likely be at a significant enough level to materially alter the average MSC paid by merchants.

121. In that regard, Mr Holt's calculations show that a shift of at least 17.3% (on the assumptions most favourable to the Defendants) and 45.4% would be required in order for the average Merchant Service Charges paid by merchants to remain the same after commercial Card MIFs were removed. Even if Amex did not change its Merchant Service Charge at all after that event, Amex would have to achieve a market share of 34.8%, against a total addressable market of 43% of all commercial Card transactions (that is, a market excluding debit Cards, which Amex does not issue). That is, Amex would have to capture over 80% of its addressable market.

122. It was suggested to Mr Dryden that the 48% market share Amex already has in small business credit Cards illustrated Amex's ability to win market share. This is not a realistic comparator, given the considerably lower market shares that Amex has in other sections of the commercial Card market, including those where the greatest transaction value occurs. For example, in 2022, the small business credit segment had an aggregate value of [✂], compared with the large market segment value of [✂]. Amex had a [✂] market share of the former but only a [✂] market share of the latter. Overall, Amex's share of the commercial Card market was only [✂].[457]

123. The level of switching suggested by Mr Holt is inherently unlikely, particularly given that the Defendants have overstated the likely actions that they, Issuers and Cardholders might take. It is concluded that Mr Holt's analysis is unrealistic and does not represent a reasonable or likely outcome.

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[457] See the table at Suttle 1 at [26].

(d) The position in Ireland

124. It was not suggested that there would be any difference in the way that the Schemes or Amex would respond in Ireland, as compared to the UK, to a reduction in commercial Card MIFs. Given the very low acceptance and shares of purchase volumes on commercial Cards in Ireland, Amex is likely to be an even less significant competitive threat in Ireland compared to the UK. The same conclusions are reached for Ireland on Issue 5 as in the UK.