Neutral Citation Number: [2022] EWCA Civ 1278

Case No: CA-2021-003290

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Mr Justice Roth, Tim Frazer and Paul Lomas
[2021] CAT 35

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2022

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- - - - - - - - - - - - - - - - - - - -

Between:

DUNE GROUP LIMITED and others	**Claimants/ Appellants**
- and -	
(1) VISA EUROPE LIMITED (2) VISA EUROPE SERVICES LLC (3) VISA UK LIMITED	**Defendants/ Respondents**

And between:

DUNE GROUP LIMITED and others	**Claimants/ Appellants**
- and -	
(1) MASTERCARD INCORPORATED (2) MASTERCARD INTERNATIONAL INCORPORATED (3) MASTERCARD EUROPE SA (4) MASTERCARD/EUROPAY UK LIMITED	**Defendants/ Respondents**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Kassie Smith KC, David Wingfield and Fiona Banks (instructed by **Humphries Kerstetter LLP**) for the **Appellants**
Laurence Rabinowitz KC, Brian Kennelly KC, Daniel Piccinin and Isabel Buchanan (instructed by **Linklaters LLP and Milbank LLP**) for the **Visa Respondents**
Matthew Cook KC and Ben Lewy (instructed by **Jones Day LLP**) for the **Mastercard Respondents**

Hearing dates: 25-27 July 2022

- -

Approved Judgment

Lord Justice Newey:

1. These appeals concern fees known as "multilateral interchange fees" (or "MIFs") which are features of the payment card schemes operated by the defendants, to which I shall refer compendiously as "Visa" and "Mastercard". The claimants, who are traders, service companies and local authorities which accepted payment by Visa and Mastercard cards, claim that the rules of the schemes providing for various MIFs have had the effect of restricting competition and so infringed both European Union ("EU") and United Kingdom ("UK") competition law.

2. The Visa and Mastercard schemes are open four-party schemes. The parties to each scheme are *issuers*, *cardholders*, *acquirers* and *merchants*. *Issuers*, who are generally banks and other financial institutions, issue debit and/or credit cards to *cardholder* customers, while *acquirers*, who are again usually banks and other financial institutions, provide payment services to *merchants*. Visa and Mastercard do not themselves issue cards, recruit merchants or process transactions, but they set the rules of their schemes and license eligible institutions to act as issuers and acquirers.

3. The Supreme Court summarised how the Visa and Mastercard schemes operate in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24, [2020] 4 All ER 807 ("*Sainsbury's SC*") at paragraph 10:

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

> (vi) The scheme rules require that, whenever a cardholder uses a payment card to make a purchase from a merchant, the cardholder's issuer must make a payment to the merchant's acquirer to settle the transaction.
>
> (vii) The Visa and Mastercard scheme rules make provision for the terms on which issuers and acquirers (who are members of the scheme) are to deal with each other, in the absence of any different bilateral agreement made between them. These terms include issuers and acquirers settling transactions at the face value of the transaction ('settlement at par' or, as it is sometimes referred to, 'prohibition on ex post pricing') and also provide for the payment of an interchange fee on each transaction.
>
> (viii) Under both the Visa and Mastercard schemes, the default interchange fee (ie the MIF) which is payable by the acquirer to the issuer on each transaction is expressed either as a percentage of the value of the transaction, or as a flat figure in pence for each transaction. Different MIFs apply to different types of transaction (such as contactless payments, or payments made where the card 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 …."

4. The Visa and Mastercard schemes both include an "Honour All Cards Rule". The Supreme Court said this about it in paragraph 18 of *Sainsbury's SC*:

> "One of the scheme rules that both the Visa and Mastercard schemes also operate is an 'Honour All Cards Rule' …. 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 legislative framework

5. Article 101 of the Treaty on the Functioning of the European Union ("the TFEU"), replacing article 81 of the Treaty establishing the European Community ("the TEC"), provides as follows:

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

> — any agreement or category of agreements between undertakings,
>
> — any decision or category of decisions by associations of undertakings,
>
> — any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

6. Section 2 of the Competition Act 1998 ("the 1998 Act"), which imposes the "Chapter I prohibition", is modelled on article 101(1) of the TFEU but concerned with trade within the UK rather than between Member States. Section 2 states:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts …."

7. Section 9 of the 1998 Act provides for "exempt agreements" in terms mirroring article 101(3) of the TFEU.

8. It is also to be noted that a restriction that might otherwise be thought to be within the scope of article 101 of the TFEU or section 2 of the 1998 Act may be capable of being justified as objectively necessary to a legitimate operation or activity. The Court of Justice of the European Union ("the CJEU") said this on the subject in Case C-382/12 P *Mastercard Inc v European Commission* EU:C:2014:2201, [2014] 5 CMLR 23 ("*Mastercard CJ*"):

> "89. It is apparent from the case law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in art.81(1) EC, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other ….
>
> 90. Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with art.81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in art.81(1) EC.
>
> 91. Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in art.81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in art.81(1) EC."

9. In the present case, claims are made both pursuant to EU competition law and under the 1998 Act. Since, however, it is not suggested that the 1998 Act differs from EU competition law in any material respect, I shall in the remainder of this judgment refer only to the relevant EU provisions.

Previous proceedings

10. By a decision adopted on 19 December 2007, the European Commission ("the Commission") held that the Mastercard MIFs applicable within the European Economic Area ("the EEA") had since 1992 infringed what is now article 101 of the TFEU. The Commission identified several relevant product markets: a "system/network" market in which "card scheme owners compete to persuade financial institutions to join their schemes and on which they provide services to such institutions"; an "issuing" market, in which issuers compete for the business of cardholders; and an "acquiring" market, in which acquirers compete for the business of merchants: see recitals (278) to (282). The Commission concluded that the MIFs at

issue "restrict[ed] competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby [set] a floor under the merchant fee": see recital (664). It also decided that Mastercard had not demonstrated that the MIFs fulfilled the conditions of what is now article 101(3) of the TFEU: see recital (753).

11. Mastercard applied to the General Court for the Commission's decision to be annulled, but its application was dismissed: see Case T-111/08 *Mastercard Inc v European Commission* [2012] 5 CMLR 5 ("*Mastercard GC*"). An appeal by Mastercard to the Court of Justice ("the CJEU") was also unsuccessful: see *Mastercard CJ*.

12. By then, claims were already being brought in this jurisdiction in which it was alleged that the Mastercard and Visa schemes breached competition law. Some of those claims were the subject of trials in 2016-2017, before respectively the Competition Appeal Tribunal ("the CAT"), Popplewell J and Phillips J. The CAT proceedings related to the Mastercard MIFs applicable to domestic transactions in the UK; the proceedings which came before Popplewell J concerned Mastercard's intra-EEA MIFs and its UK and Irish domestic MIFs; and Visa's UK domestic MIFs were at issue in the proceedings heard by Phillips J. All the claims involved only consumer cards, not commercial/business cards. The judgments are reported as [2016] CAT 11 (the CAT), [2017] EWHC 93 (Comm) (Popplewell J) and [2017] EWHC 3047 (Comm) and [2018] EWHC 355 (Comm) (Phillips J in each instance).

13. All the judgments were appealed, and the appeals were heard together and the subject of a single judgment of the Court of Appeal, handed down on 4 July 2018: see *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2018] EWCA Civ 1536, [2019] 1 All ER 903 ("*Sainsbury's CA*"). The Court overturned all the judgments given below, and the Supreme Court in large part affirmed the Court of Appeal's decision in *Sainsbury's SC*, judgment in which was given on 17 June 2020.

14. As the Supreme Court explained in paragraph 40 of *Sainsbury's SC*, one of the issues before it was whether the Court of Appeal had erred in finding that there was a restriction of competition in the acquiring market contrary to article 101(1) of the TFEU and equivalent national legislation. The Supreme Court answered the question in the negative. It concluded, first, that it was bound to determine the issue against Mastercard and Visa by *Mastercard CJ* and, secondly, that it would anyway have concluded that there was a restriction on competition. With regard to the first of these points, the Supreme Court said:

> "[92] Whether *Mastercard CJ* is binding depends upon whether the findings upon which that decision is based are materially distinguishable from those made or accepted in the present appeals ….
>
> [93] In our judgment, the essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals. Those facts include that: (i) the MIF is determined by a collective agreement between undertakings; (ii) it has the effect of setting a minimum price floor for the MSC; (iii) the non-negotiable MIF element of the

> MSC is set by collective agreement rather than by competition; (iv) the counterfactual is no default MIF with settlement at par (that is, a prohibition on ex post pricing); (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower.
>
> [94] For all these reasons we conclude that *Mastercard CJ* is binding and that the Court of Appeal was correct so to hold."

On the second point, the Supreme Court said:

> "[95] In the light of our conclusion that this Court is bound by *Mastercard CJ* this further issue does not arise. Given the importance of the issues raised and the detailed arguments presented, we shall nevertheless briefly address it.
>
> [96] Under art 101(1) an agreement between undertakings which has the 'effect' of 'directly or indirectly' fixing 'purchase or selling prices' is a restriction of competition under art 101(1)(a).
>
> [97] It is well established that the prohibition of price fixing under art 101(1) also extends to the fixing of part of the price – *Krupp Thyssen Stainless GmbH v European Commission* (Joined cases T-45/98 and T-47/98) EU:T:2001:288, [2001] ECR II-3757, [2002] 4 CMLR 521 (paras 156–157).
>
> [98] The relevant selling price in the present appeals is the MSC.
>
> [99] On the facts as found, the effect of the collective agreement to set the MIF is to fix a minimum price floor for the MSC. In the words of Mr Dryden, AAM's expert economist, it sets a 'reservation price'.
>
> [100] That minimum price is non-negotiable. It is immunised from competitive bargaining. Acquirers have no incentive to compete over that part of the price. It is a known common cost which acquirers know they can pass on in full and do so. Merchants have no ability to negotiate it down.
>
> [101] Whilst it is correct that higher prices resulting from a MIF do not in themselves mean there is a restriction on competition, it is different where such higher prices result from a collective agreement and are non-negotiable.
>
> [102] Whilst it is also correct that settlement at par sets a floor, it is a floor which reflects the value of the transaction. Unlike

> the MIF, it involves no charge resulting from a collective agreement, still less a positive financial charge.
>
> [103] There is a clear contrast in terms of competition between the real world in which the MIF sets a minimum or reservation price for the MSC and the counterfactual world in which there is no MIF but settlement at par. In the former a significant portion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement made. In the latter the whole of the MSC is open to competitive bargaining. In other words, instead of the MSC being to a large extent determined by a collective agreement it is fully determined by competition and is significantly lower.
>
> [104] For all these reasons, which are essentially the same as those given by the Commission, the General Court, the Court of Justice, Popplewell J and the Court of Appeal, even if we were not bound by *Mastercard CJ*, we would follow it and conclude that there was in the present cases a restriction on competition."

15. The Court of Appeal had held that the proceedings before it should all be remitted to the CAT for, among other things, reconsideration of exemption issues arising under article 101(3) of the TFEU. The Supreme Court decided that the remittal should not extend to exemption issues as regards the proceedings which had been heard by Popplewell J.

<u>The present proceedings</u>

16. The proceedings before us, which were issued on various dates between November 2016 and December 2020, relate to UK, Irish and Italian domestic MIFs (and, in a small number of cases, domestic MIFs in Malta and Gibraltar), intra-EEA MIFs and inter-regional MIFs. In each case, the claims extend to both consumer card MIFs and commercial/business card MIFs. It is alleged, first, that Visa and Mastercard have infringed article 101 of the TFEU and, secondly, that they have abused dominant positions in breach of article 102.

17. On 30 December 2020, the claimants applied for summary judgment in respect of their claims that the rules providing for the various MIFs breached article 101(1) of the TFEU. In the judgment which is now under appeal, which was given on 26 November 2021, the CAT (Roth J, Mr Tim Frazer and Mr Paul Lomas) acceded to that application in part, concluding in paragraph 109 of its judgment that summary judgment should be granted against Visa and Mastercard as regards UK, Irish and intra-EEA consumer MIFs (and, in so far as relevant, Malta and Gibraltar domestic consumer MIFs) up to 8 December 2015. The CAT further held that Visa had no real prospect of defending the claims against it on the strength of the acquisition of Visa Europe by Visa Inc or the fact that inter-regional MIFs have been set by Visa Inc. However, the CAT refused summary judgment in respect of the period after 9 December 2015 and also in relation to inter-regional consumer MIFs, MIFs for commercial cards and Italian MIFs.

18. The claimants have not appealed against the CAT's decision so far as it concerned commercial MIFs and Italian MIFs. They do, however, challenge the CAT's refusal to give summary judgment with regard to (a) UK, Irish and intra-EEA consumer MIFs in the period after 9 December 2015 ("Ground 1" of the claimants' grounds of appeal) and (b) inter-regional consumer MIFs ("Ground 2" of the grounds of appeal). For its part, Visa has cross-appealed on the footing that the CAT was wrong to conclude that (a) the acquisition of Visa Europe by Visa Inc on 21 June 2016 did not give rise to an arguable defence to the claims after that date and (b) the fact that inter-regional MIFs were at all times set by Visa Inc did not give rise to an arguable defence to the claims relating to inter-regional MIFs.

19. The issues raised can conveniently be considered under the following headings:

    i) The position after 9 December 2015

    ii) Inter-regional consumer MIFs

    iii) The acquisition of Visa Europe by Visa Inc

    iv) Visa Inc's role with inter-regional MIFs

<u>The position after 9 December 2015</u>

20. As I have indicated, the Supreme Court held in *Sainsbury's SC* that the rules providing for the Mastercard default MIFs which were at issue before it involved a restriction of competition contrary to article 101(1) of the TFEU. The claimants contend that, in the circumstances, there can be no arguable defence to their claims that the UK, Irish and intra-EEA consumer MIFs infringed article 101(1). Visa and Mastercard argue otherwise, however, by reference to Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (the "Interchange Fee Regulation" or "IFR"). That served to cap with effect from 9 December 2015 the interchange fees that can be applied to card-based payment transactions carried out within the EU where both issuer and acquirer are located there (see article 1(1)). An issuer is barred from offering or requesting an interchange fee of more than 0.2% of the value of a debit card transaction or 0.3% of the value of a credit card transaction. Recital (20) to the IFR explained that "[e]xperience has shown that those levels are proportionate, as they do not call into question the operation of international card schemes and payment service providers" and that "[t]hey also provide benefits for merchants and consumers and provide legal certainty". It was also, however, stated, in recital (14), that the "application of [the IFR] should be without prejudice to the application of Union and national competition rules".

21. Visa's and Mastercard's case is that the introduction of the IFR has changed the counterfactuals which should be used when determining, among other things, whether their UK, Irish and intra-EEA MIFs were restrictive of competition. In Case T-491/07 *Groupement des Cartes Bancaires (CB) v European Commission* EU:T:2016:379 ("*Cartes Bancaires*"), the General Court noted that, "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"

(paragraph 108) and that the examination required "consists essentially in considering the impact of the agreement on the current and potential competition and competitive situation in the absence of agreement" (paragraph 110). The General Court went on in paragraph 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."

22. By the time the litigation which was the subject of *Sainsbury's SC* ("the *Sainsbury's* litigation") reached the Supreme Court, it was no longer in dispute between the parties that the question whether there was a restriction of competition "fell to be considered against a counterfactual in which the transactions would be settled at par by default, which was equivalent to a default MIF of zero": see paragraph 42 of *Sainsbury's SC*. In a similar way, the Court of Appeal had asked itself whether the scheme rules setting default MIFs restricted competition "by comparison with a counterfactual without default MIFs where the schemes' rules provide for the issuer to settle the transaction at par … (i.e. to pay the acquirer 100% of the value of the transaction)": see paragraph 7(i) of *Sainsbury's CA*.

23. Visa and Mastercard contend that, once the IFR had come into force, the counterfactual used in the *Sainsbury's* litigation ceased to be appropriate. Visa argues that, in the absence of the rules providing for default MIFs, it would have operated the "Unilateral Interchange Fee Model" (or "UIFM") which would have provided that, if no bilateral agreement said otherwise, transactions should settle at par unless the issuer had previously stipulated that it was only willing to settle on the basis of the addition (or subtraction) of an interchange fee that the issuer had itself chosen unilaterally. Visa states that its rules would have required issuers to notify Visa of any such interchange fees and to publish them. For its part, Mastercard suggests that it would have set no default settlement rules of any kind, leaving issuers and acquirers to negotiate their terms of dealing between themselves. This was referred to as the "bilaterals counterfactual".

24. Visa and Mastercard both maintain that, had the counterfactuals for which they contend been adopted, interchange fees would in practice have been set at the maximum amounts permitted by the IFR. That being so, they say, their default MIF rules can no longer have had the effect of restricting competition. The competitive situation, they say, would have been no different with or without those rules. In each case, there would have been interchange fees at the highest levels authorised under the IFR.

25. Visa and Mastercard supported their contentions with evidence from senior executives that their organisations would have adopted the UIFM and the bilaterals counterfactual respectively had the default MIF rules not existed. Further, Mastercard filed evidence from an economist, Dr Gunnar Niels, indicating that, using the

bilaterals counterfactual, interchange fees would have been as high as the IFR allowed.

26. The CAT accepted that these contentions gave Visa and Mastercard reasonably arguable defences as regards UK, Irish and intra-EEA consumer MIFs for the period after 9 December 2015. It stressed in paragraph 44 of its judgment that it was not deciding whether the UIFM or bilaterals counterfactual was correct, or whether they would have resulted in interchange fees at the level of the IFR caps, but accepted that they were arguable as a matter of fact. The CAT further considered that Visa and Mastercard were not precluded from advancing their arguments by *Sainsbury's SC* or *Sainsbury's CA*.

27. Ms Kassie Smith KC, who appeared for the claimants with Mr David Wingfield and Ms Fiona Banks, took issue with this aspect of the CAT's decision on two grounds. She submitted, *first*, that the CAT had failed to analyse correctly the competition concern which had led the Courts to find in the *Sainsbury's* litigation that the appropriate counterfactual was a no default MIF with settlement at par and, *secondly*, that the CAT had erred in finding that the counterfactuals proposed by Visa and Mastercard would not involve collusive/collective arrangements and so would not involve a restriction of competition. I shall consider these points in turn.

Failure to analyse the competition concern

28. Ms Smith emphasised that the rules providing for the MIFs at issue in the *Sainsbury's* litigation had been held to be restrictive of competition because they had "the effect of setting a minimum price floor for the MSC" while "in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower": see *Sainsbury's SC*, at paragraph 93. As the Supreme Court explained in paragraph 103 of *Sainsbury's SC*, in the "real world in which the MIF sets a minimum or reservation price for the MSC" "a significant portion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement", whereas in "the counterfactual world in which there is no MIF but settlement at par" "the whole of the MSC is open to competitive bargaining".

29. Ms Smith submitted that the same competition concern arose both before and after the introduction of the IFR and regardless of whether interchange fees had been capped. The counterfactuals proposed by Visa and Mastercard would involve the same anti-competitive conduct as has already been held to be unlawful in *Sainsbury's CA* and *Sainsbury's SC*, namely, the collusive imposition on merchants of an artificial fixed cost that sets a floor for the MSC. It is essential, Ms Smith said, that a counterfactual removes the anti-competitive vice identified in the actual, but neither the UIFM nor the bilaterals counterfactual would do so. In the circumstances, the only appropriate counterfactual even after the coming into force of the IFR is no default MIF with settlement at par: it is only then, Ms Smith submitted, that the artificial fixed cost collusively imposed on merchants is removed.

30. To assess the parties' submissions on this aspect of the appeal, it is necessary, I think, to see why no default MIF with settlement at par was accepted to be the appropriate counterfactual in the *Sainsbury's* litigation. The answer is principally to be found in *Mastercard GC* and *Mastercard CJ*. In *Mastercard GC*, it had been submitted by Mastercard that the Commission had wrongly found there to be restriction of

competition and also that the MIF was objectively necessary to the operation of the Mastercard scheme: see paragraph 74. In the course of rejecting Mastercard's submissions, the General Court said that "the Commission was legitimately able to conclude that the MIF was not objectively necessary for the operation of the Mastercard system" (paragraph 120) and that "the fact that the premiss of a Mastercard system operating without a MIF – solely on the basis of a rule prohibiting ex post pricing – appears to be economically viable is sufficient to justify its being taken into consideration in the context of the analysis of the effects of the MIF on competition" (paragraph 132).

31. On appeal, the CJEU explained in *Mastercard CJ* that, "[w]here it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in art.81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be *impossible* to carry out in the absence of the restriction in question" (paragraph 91, emphasis added) and that, "in order to contest the ancillary nature of a restriction … , the Commission may rely on the existence of realistic alternatives that are less restrictive of competition than the restriction at issue" (paragraph 109). The CJEU went on, however, to point out that "the same 'counterfactual hypothesis' is not necessarily appropriate to conceptually distinct issues" and that, "[w]here it is a matter of establishing whether the MIF have restrictive effects on competition, the question whether, without those fees, but by the effect of prohibiting *ex post* pricing, an open payment system such as the MasterCard system could remain viable is not, in itself, decisive" (paragraph 163). Having commented in paragraph 166 that "the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic" and that, "[f]rom that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements", the CJEU said:

> "167. In the present case, however, the General Court did not in any way address the likelihood, or even plausibility, of the prohibition of *ex post* pricing if there were no MIF, in the context of its analysis of the restrictive effects of those fees. In particular, it did not … address the issue as to how — taking into account in particular the obligations to which merchants and acquiring banks are subject under the Honour All Cards Rule, which is not the subject of the decision at issue — the issuing banks could be encouraged, in the absence of MIF, to refrain from demanding fees for the settlement of bank card transactions.
>
> …
>
> 169. In those circumstances, it is correctly submitted in the present case that, in relying on the single criterion of economic viability … to justify taking into consideration the prohibition of *ex post* pricing in the context of its analysis of the effects of the MIF on competition, and by failing therefore to explain in the context of that analysis whether it was likely that such a prohibition would occur in the absence of MIF otherwise than

> by means of a regulatory intervention, the General Court made an error of law."

32. The CJEU nonetheless upheld the General Court's decision. It explained:

> "172. In [95] and [96] of the judgment under appeal, the General Court correctly considered … that the Commission was fully entitled to conclude that:
>
> > 'the possibility that some issuing banks might hold up acquirers who are bound by the ["Honour All Cards Rule"] could be solved by a network rule that is less restrictive of competition than MasterCard's current solution that, by default, a certain level of interchange fees applies. The alternative solution would be a rule that imposes a prohibition on *ex post* pricing on the banks in the absence of a bilateral agreement between them.'
>
> 173. It follows from this that … the only other option presenting itself at first instance as enabling the MasterCard system to operate without MIF was in fact the hypothesis of a system operating solely on the basis of a prohibition of *ex post* pricing. In those circumstances, that prohibition may be regarded as a 'counterfactual hypothesis' that is not only economically viable in the context of the MasterCard system but also plausible or indeed likely, given that there is nothing in the judgment under appeal to suggest, and it is common ground, that it was not in any way claimed before the General Court that MasterCard would have preferred to let its system collapse rather than adopt the other solution, that is to say, the prohibition of *ex post* pricing.
>
> 174. Consequently, even though the General Court wrongly considered that the economic viability of the prohibition of *ex post* pricing in the context of the MasterCard system was sufficient, by itself, to justify taking that prohibition into consideration in the analysis of the effects of the MIF on competition, in the circumstances of the present case, as described in the judgment under appeal, the General Court was entitled to rely in its analysis of the restrictive effects of the MIF on the same 'counterfactual hypothesis' it had used in the context of its analysis of the objective necessity of those fees, albeit for reasons other than those stated by the General Court in [132] and [143] of the judgment under appeal. In those circumstances, the error of law established in [169] of the present judgment has no bearing on the analysis of the restrictive effects carried out by the General Court on the basis of the 'counterfactual hypothesis' in question."

33. The Court of Appeal referred to this aspect of *Mastercard CJ* at paragraph 150 of *Sainsbury's CA*. It said:

> "The CJEU held at paras 171–173 that the 'ancillary restraint' counterfactual that the General Court had justified at paras 94–96 of its decision was appropriate for the primary art 101(1) analysis. The General Court and the Commission had been entitled to conclude that the possibility of issuers 'holding up' acquirers who were bound by the Honour All Cards Rule could only, in effect, be solved by a scheme rule prohibiting *ex post* pricing. Such a rule was less restrictive of competition than MasterCard's existing MIF solution. That led the CJEU to conclude at para 173 that the *ex post* pricing prohibition could be regarded as a counterfactual hypothesis that was 'not only economically viable in the context of the MasterCard system but also plausible or indeed likely, given that there is nothing in the [General Court's] judgment … to suggest, and it is common ground … that MasterCard would have preferred to let its system collapse rather than adopt' that solution."

After further discussion of the CJEU's judgment, the Court of Appeal concluded in paragraph 156 that "the proper analysis of the CJEU's decision on these points is that it endorsed the counterfactual adopted by the General Court as a matter of law".

34. A little earlier in its judgment, the Court of Appeal had said in paragraph 142:

> "The 'no MIF' plus prohibition of *ex post* pricing counterfactual is not materially different from the no default MIF plus settlement at par counterfactual that the parties are agreed upon in this case. Both admit the possibility of bilateral interchange fees, but assume that in default there will be no imposed standard MIF and also settlement at par."

35. Ms Smith focused on the CJEU's observation in paragraph 167 of *Mastercard CJ* that the General Court had not "address[ed] the issue as to how … the issuing banks could be encouraged, in the absence of MIF, to refrain from demanding fees for the settlement of bank card transactions". This and other passages of *Mastercard CJ* show, Ms Smith argued, that the CJEU recognised that a counterfactual must ensure that, in that hypothetical world, conditions are such that there can be competition in the relevant market.

36. It seems to me, however, that the CJEU's reasoning was essentially that what has been called the "hold-up problem" meant that, for the Mastercard scheme to survive without a default MIF, *ex post* pricing had to be prohibited (or, in other words, there had to be settlement at par), and Mastercard would have preferred to adopt that solution than to let its scheme collapse. The relevant counterfactual thus had to be taken to be one incorporating a prohibition on *ex post* pricing. The prohibition was, in the circumstances, "not only economically viable" but also "plausible or indeed likely". The CJEU was not, therefore, saying anything about whether a counterfactual has to ensure better competition. It was rather talking about the likelihood of Mastercard having to adopt a prohibition on *ex post* pricing.

37. I should explain what the "hold-up problem" is. Dr Niels, who prepared the expert report which Mastercard has filed in these proceedings, explained the problem in these terms:

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

38. Visa and Mastercard contend that the arrival of the IFR has had important consequences for the hold-up problem. Dr Niels said this on the subject in his report:

> "The IFR limits the negotiating power that issuers obtain from the hold-up problem because it caps the interchange fee that issuers can recover in any event: at 0.2% for debit card transactions and 0.3% for credit card transactions. There is, therefore, no risk of competition between issuers pushing up interchange fees to a level that would damage the viability of the scheme. The IFR caps also limit the uncertainty and risk for acquirers, since they know that the maximum interchange fee issuers can deduct is set at a comparatively low level (compared to historical rates). The IFR caps, therefore, remove the factors that have previously been identified as making a counterfactual of 'No MIF with Pure Bilaterals' unrealistic."

39. The implication, according to Visa and Mastercard, is that the counterfactual endorsed by the CJEU in *Mastercard CJ* and later adopted in the *Sainsbury's* litigation, is no longer the appropriate one or, at least, that that is arguably so. Mr Laurence Rabinowitz KC, who appeared for Visa with Mr Brian Kennelly KC, Mr Daniel Piccinin and Ms Isabel Buchanan, and Mr Matthew Cook KC, who appeared for

Mastercard with Mr Ben Lewy, both emphasised that counterfactuals are used in "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" (to quote from *Cartes Bancaires*). Plainly, a counterfactual that would itself breach competition law could not be an appropriate one. Subject to that, however, a counterfactual should reflect what would be likely to have happened if the measures at issue had not existed. Comparison between what would have happened in that counterfactual world and the position with the measures in place allows it to be determined whether the measures restricted competition. That will be the case if there would have been more competition in the counterfactual world. If, on the other hand, the competitive position would have been no better, it can be seen that the relevant measures were not restrictive of competition.

40. In the present case, Mr Rabinowitz and Mr Cook said, the hold-up problem had the consequence that, before the IFR took effect, Mastercard and Visa would have been likely to adopt rules prohibiting *ex post* pricing because their schemes could otherwise have collapsed without default MIFs. A counterfactual including such a prohibition was thus appropriate. With the introduction of the IFR, however, the risk of collapse disappeared. That being so, *Mastercard CJ*, *Sainsbury's CA* and *Sainsbury's SC* can no longer be determinative as to the correct counterfactuals. If, as Visa and Mastercard say, their schemes would be likely to have adopted the UIFM and the bilaterals counterfactual, without any prohibition on *ex post* pricing, those will be the right counterfactuals to consider. There is no requirement that a counterfactual should remove the competitive "concern", "problem" or "vice" which exists with the measures in question in force. The position is rather that, if the competitive "concern", "problem" or "vice" would persist in the counterfactual world, that indicates that the measure in question does not itself restrict competition.

41. I accept that, for the reasons summarised in the last two paragraphs, it is at least seriously arguable that, with the advent of the IFR, the UIFM and bilaterals counterfactual became the relevant counterfactuals. Ms Smith submitted that, under the *Cartes Bancaires* test, it is imperative that a counterfactual removes the "anti-competitive vice" identified. To my mind, however, *Cartes Bancaires* does not support that proposition, and Ms Smith did not cite any other case in which it has been held that a counterfactual can be appropriate only if it would remove the competitive "concern", "problem" or "vice". More than that, it seems to me that it could make no sense for there to be such a requirement. As Mr Rabinowitz and Mr Cook said, counterfactuals are used to test whether a measure restricts competition. If it were the case that any counterfactual resulting in a continuing competitive "concern", "problem" or "vice" was to be ignored, the exercise would fail in its purpose. If a competitive "concern", "problem" or "vice" arose with the measure in operation, it would inevitably be found to be restrictive of competition since any counterfactual which allowed the issue to continue would be discarded.

42. In short, I do not consider that the claimants can impugn the CAT's decision on the footing that it failed to analyse correctly the competition concern which had led the Courts to find in the *Sainsbury's* litigation that the appropriate counterfactual was a no default MIF with settlement at par, as Ms Smith contends. As the CAT appreciated, it needed to ask itself about the likelihood of Visa and Mastercard having

adopted the UIFM and the bilaterals counterfactual once the IFR had come into force. The fact, if it be one, that the UIFM and bilaterals counterfactuals would not dispose of the "competition concern" would be a reason for concluding that the rules providing for the UK, Irish and intra-EEA MIFs were not themselves anti-competitive, not a basis for rejecting them.

Do the proposed counterfactuals involve collusive/collective arrangements?

43. Turning to the claimants' contention that the CAT erred in finding that the counterfactuals proposed by Visa and Mastercard would not involve collusive/collective arrangements and so would not involve a restriction of competition, the CAT said this in paragraph 41 of its judgment:

> "We think it is clear that the Bilaterals counterfactual would not involve any restriction of competition since under that scenario the interchange fee is not determined by a collective arrangement. Insofar as Ms Smith QC sought to argue on behalf of the Claimants that the UIFM counterfactual was a restriction of competition because it depended on a common scheme rule, we do not accept that submission. The restriction arising from the current rule is that it provides for a commonly determined default level of positive MIF that applies as between all issuers and acquirers. A rule that enables each issuer independently to determine the level of its interchange fee is not restrictive of competition."

44. Challenging these views, Ms Smith emphasised the breadth of "agreements … and concerted practices" as used in article 101(1) of the TFEU. Ms Smith cited in this connection Case 48/69 *Imperial Chemical Industries (ICI) Ltd v Commission of the European Communities* EU:C:1972:70, [1972] CMLR 557, Case 40/73 *Cooperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities* EU:C:1975:174, [1976] 1 CMLR 295 and *Balmoral Tanks Ltd v Competition and Markets Authority* [2019] EWCA Civ 162, [2019] 4 CMLR 25. In the *ICI* case, the CJEU said at paragraph 64 of its judgment that "concerted practice" refers to:

> "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".

In the *"Suiker Unie"* case, the CJEU said:

> "[173] The criteria of co-ordination and co-operation laid down by the case law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market, including the choice of the persons and undertakings to which he makes offers or sells.

> [174] Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

45. Ms Smith submitted that the CAT had failed to consider whether there was a mutual understanding which would inhibit issuers' freedom to determine interchange fees independently in either the UIFM or the bilaterals counterfactual and that, had it done so, it would have been bound to conclude that each counterfactual involved collusive conduct and so was unarguable as a matter of law.

46. As, however, was stressed by Mr Rabinowitz and Mr Cook, the mere fact that the UIFM and the bilaterals counterfactual might, if Visa and Mastercard are right, result in all issuers raising interchange fees to the levels allowed by the IFR does not of itself demonstrate that the UIFM and bilaterals counterfactual involve collusion. As the CJEU said in Case C-89/85 *Re Wood Pulp Cartel* EU:C:1993:120, [1993] 4 CMLR 407, at paragraph 71, what is now article 101 of the TFEU "does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors". It is on that basis, according to Mr Rabinowitz and Mr Cook, that the UIFM and bilaterals counterfactual would both have resulted in interchange fees being set at the maximum levels permitted by the IFR. It is noteworthy in this context that Visa pleads in paragraph 42A(e) of its draft Re-Re-Amended Defence that, under the UIFM, "issuers would have been likely to choose to stipulate the maximum interchange fee permitted by the IFR or other applicable regulation because it would have been in each of their economic interests, evaluated on an independent and individual basis (i.e. without any collective decision-making or collusion), to do so". There can, moreover, be no question of evidence from the claimants rendering such assertions untenable: the claimants did not file any evidence at all on these issues.

47. Ms Smith drew attention to the significance of the "Honour All Cards Rule". Arguably, it is that which would put issuers in a position to insist on the highest possible interchange fees if the UIFM or the bilaterals counterfactual applied. While, however, the claimants challenge the propriety of the "Honour All Cards Rule" in their particulars of claim, they do not suggest that their complaints about it are susceptible to summary determination, and the rules which matter for present purposes are those which would provide for the UIFM and the bilaterals counterfactual, not the "Honour All Cards Rule".

48. In all the circumstances, 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.

Conclusion

49. 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. Ground 1 of the claimants' grounds of appeal therefore fails.

Inter-regional consumer MIFs

50. Ground 2 of the claimants' grounds of appeal is that the CAT erred in considering that it was not bound by either the EU or domestic appellate judgments to find that inter-regional consumer MIFs infringe article 101(1) of the TFEU because they are potentially capable of being factually distinguished on the basis that the MIF does not set a minimum price floor for the MSC.

51. The CAT's conclusion as regards inter-regional consumer MIFs is to be found in paragraph 71 of its judgment, where it said:

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

Earlier in its judgment, the CAT had observed in paragraph 67 that it seemed clear that "the position regarding the inter-regional MIF does not fall within finding (ii) in the Supreme Court judgment at [93], which is mirrored in the reference at [103] to the MIF setting a minimum or reservation price for the MSC" and then said in paragraph 68:

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

52. That an infringement of article 101(1) by "effect" requires an appreciable effect on competition can be seen from, for example, Case C-226/11 *Expedia Inc v Autorité de la concurrence* EU:C:2012:795, [2013] Bus LR 705. In that case, the CJEU noted that it was "settled case-law that an agreement of undertakings falls outside the prohibition

in [article 101(1) of the TFEU] … if it has only an insignificant effect on the market" (paragraph 16); that, "[a]ccordingly, if it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition within the common market and be capable of affecting trade between Member States" (paragraph 17); and that "the competition authorities of the Member States can apply the provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU only where that agreement perceptibly restricts competition within the common market" (paragraph 20).

53. The "finding (ii)" in *Sainsbury's SC* to which the CAT referred in paragraph 67 of its judgment was that one of the facts constituting the "essential factual basis" on which the CJEU had held there to be a restriction on competition was that the MIF "has the effect of setting a minimum price floor for the MSC". As the CAT explained in paragraphs 63 and 64, there was evidence before it from Dr Niels and Mr Derek Holt, an economist who prepared reports filed by Visa, indicating that MIFs for inter-regional transactions may exceed MSCs rather than "setting a minimum price floor" for them. Mr Holt said in one of his reports:

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

For his part, Dr Niels said in his report:

> "3.7 The small volumes of inter-regional transactions call into question whether Inter-regional MIFs would constitute a price floor. It is likely that in many situations (particularly in sectors with few inter-regional transactions, and in the absence of 'MIF plus plus' contracts between the acquirer and a given claimant) acquirers will not have set separate MSCs for inter-regional transactions, and the MSCs would be set with reference primarily to domestic [MIFs] and the acquirer's own costs and margins. In such a circumstance there would be no price floor effect from the Inter-regional MIFs.
>
> 3.8 Even to the extent that acquirers had some regard for Inter-regional MIFs in determining their MSCs in the absence of 'MIF plus plus' contracts, the Inter-regional MIFs are unlikely to represent a price floor in the same sense as domestic MIFs. Domestic MIFs create a level below which MSCs (both overall,

> and those for domestic transactions) do not fall. By contrast, MSCs for any given acquirer are likely to be lower, on average, than Inter-regional MIFs in respect of transactions overall. As a result, for Claimants who do not have a 'MIF plus plus' contractual agreement with their acquirer, the MSC paid for inter-regional transactions may also be lower than the Inter-regional MIFs. Although this would mean that acquirers incurred a small loss on each inter-regional transaction, inter-regional transactions may be a peripheral consideration when evaluating customer level profitability.
>
> 3.9 Further information would be needed to ascertain whether a price floor applies to the inter-regional transactions relevant to the Claimants in this case …."

54. A footnote to Dr Niels' report explained that his reference to "MIF plus plus" contracts referred to the position "where the MSC for any transaction is set to the sum of the interchange fee, scheme fee, and a fixed acquirer margin". Where there is such a contract between a merchant and an acquirer, Ms Smith argued, it is beyond dispute that the inter-regional MIF sets a minimum price floor for the relevant MSC. Even where no such contract exists, Ms Smith said, it is evident that inter-regional MIFs prevent MSCs being fully determined by competition. If a merchant is charged a "blended" MSC reflecting the extent to which its transactions are inter-regional, the inter-regional MIFs will affect (and, since inter-regional MIFs are higher than domestic and intra-EEA MIFs, increase) the MSC regardless of whether the MSC is as much as any inter-regional MIF. Supposing such an MSC to be lower than the inter-regional MIFs, that will not show that the inter-regional MIFs have no impact, but merely that many transactions are not inter-regional.

55. Ms Smith relied in support of her submissions on passages in Visa's and Mastercard's Re-Re-Amended Defences. Mastercard's Re-Re-Amended Defence, for example, includes admissions that "fees paid by the Acquirer may impact on the level of the MSC that is agreed between the Acquirer and the merchant" (paragraph 35(e)) and that "the Acquirer will take account of its costs (which will include any applicable interchange fee) in negotiating its fee" (paragraph 47).

56. There is plainly force in Ms Smith's contentions. The suggestion that inter-regional MIFs serve to raise MSCs, at least often, is certainly plausible. However, the claimants have not filed any evidence to confirm that that is the case (or, in fact, any evidence at all from anyone other than their solicitor), and it has to be remembered that there must be an *appreciable* restriction of competition for article 101(1) to be breached. So far as "MIF plus plus" contracts are concerned, it can be argued, as Mr Cook did, that they cannot be taken to have caused an appreciable restriction on competition without evidence that there were many of them and with merchants with a substantial proportion of inter-regional transactions. There is, though, no such evidence. Nor is there evidence to show that inter-regional MIFs have *in fact* had an appreciable influence on "blended" MSCs and, hence, competition. True it may be that acquirers take account of their costs, among other factors, when negotiating MSCs, but it cannot simply be assumed, without evidence, that appreciably lower figures would have been agreed if the MIFs applicable to inter-regional transactions,

which make up "only a relatively minor part of merchant transactions compared to domestic and intra-EEA transactions", had been lower.

57. During her reply submissions, Ms Smith changed tack and sought to argue that what matters is whether the rule in each scheme providing for the payment of MIFs is, as a whole, restrictive of competition, not whether the provision for particular MIFs, such as the inter-regional MIFs, is anti-competitive. That prompted Mr Cook to object that the claimants' case had not been put in that way below and to point out that the manner in which Ms Smith was now framing her case was inconsistent with, for example, the separate consideration given to commercial MIFs and Italian MIFs. It seems to me that we must proceed on the basis that what is in issue is whether the scheme rules have an appreciable effect on competition *as they relate to the inter-regional MIFs*, not generally.

58. In my view, the CAT was right to decline to grant summary judgment as regards inter-regional consumer MIFs. It suffices to say that, on the available evidence, it cannot be said that Visa and Mastercard have no real prospect of successfully defending the claims on the basis that the rules providing for the inter-regional MIFs have not had an appreciable effect on competition.

59. That conclusion is enough to dispose of Ground 2 of the claimants' grounds of appeal. I do not need, therefore, to address the additional grounds (viz. by reference to different competitive conditions or as a lawful ancillary restraint) on which Visa and Mastercard have argued in respondent's notices that the CAT's decision in respect of inter-regional consumer MIFs should be upheld.

The acquisition of Visa Europe by Visa Inc

60. Until 21 June 2016, the MIFs applicable to transactions within Europe were set by Visa Europe Limited ("Visa Europe"), which was owned by banks and other financial institutions. With effect from 21 June 2016, however, Visa Europe became a wholly-owned subsidiary of Visa Inc, a Delaware corporation quoted on the New York Stock Exchange. The evidence indicates, moreover, that at this stage Visa Inc assumed responsibility for the setting and implementation of Visa's European MIFs (as well as continuing to set inter-regional MIFs).

61. Visa contends by way of cross-appeal that Visa Inc's acquisition of Visa Europe provides it with an arguable defence. One of the submissions which Visa advanced in this connection before the CAT was to the effect that, from 21 June 2016, there was no relevant agreement or concerted practice. Visa stressed that issuers and acquirers all enter into agreements with Visa, not between themselves. There is thus a series of vertical agreements, but, it was said, no horizontal agreement. Noting, however, the breadth of "agreement" and "concerted practice" in the context of article 101(1) (as to which, see paragraph 44 above), the CAT concluded in paragraph 101 of its judgment that, "although set by Visa Inc. after 21 June 2016, the Visa scheme MIFs constituted an agreement between undertakings or a concerted practice for the purpose of Art 101(1) and the acquisition of Visa Europe by Visa Inc. does not give rise to an arguable defence to the claims".

62. Before us, Mr Rabinowitz was prepared to assume (without formally conceding) that there was an agreement or concerted practice between the issuers, acquirers and Visa

rather than just bilateral agreements between each issuer/acquirer and Visa. He instead highlighted a different aspect of Visa's submissions, which, he said, the CAT had not addressed. This was to the effect that, even if there was an agreement or concerted practice between the banks and Visa (as the CAT held), it was not one that restricted competition.

63. Mr Rabinowitz pointed out that the Supreme Court found there to be a restriction of competition on the basis that "the MIF is determined by a collective agreement", "the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition" and "the effect of the collective agreement to set the MIF is to fix a minimum price floor for the MSC": see paragraphs 93 and 99 of *Sainsbury's SC*. The Supreme Court's reasoning, Mr Rabinowitz said, could no longer apply once Visa Inc had taken over Visa Europe since MIFs were no longer set by collective agreement but by Visa Inc alone.

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

65. Mr Rabinowitz pointed out that, when refusing Visa permission to appeal in this respect, the CAT said in paragraph 6 of its ruling:

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

This passage, Mr Rabinowitz submitted, betrays an error since the Visa scheme does not involve any competitors entering into transactions with each other. There are transactions between issuers and acquirers, but, so Mr Rabinowitz said, issuers do not compete with acquirers.

66. While, however, the Supreme Court referred to the MIF being "determined by a collective agreement", that view does not appear to have depended on the Visa MIFs having been set by Visa Europe as an association of undertakings. In paragraph 42 of *Sainsbury's SC*, the Supreme Court had cross-referred to parts of the first instance decisions when recording that it was "not in dispute that the setting of the UK MIF was pursuant to an agreement between undertakings within the meaning of art 101(1)". In the first of those decisions, that of the CAT, it was found that the setting of Mastercard's UK MIF was "an agreement or agreements between undertakings, the agreement being *between MasterCard and its licensees*" (emphasis added): see [2016] CAT 11, at paragraph 95. In the preceding paragraphs, the CAT had said that it was "obvious that the agreement by which a party becomes licensee of the MasterCard Scheme involves the creation of rights and obligations between licensees *inter se* in particular as regards the payment of the Interchange Fee" (paragraph 93) and that, "where no bilateral agreement is sought or made, licensees positively agree to be bound by the MIF stated by MasterCard" (paragraph 94). The CAT went on:

> "This is certainly 'acquiescence' in the MasterCard Scheme Rules: indeed, we would go further – there is, in our view, positive agreement on the part of all parties (MasterCard and the licensees) that MasterCard would set the default UK MIF which, absent bilateral agreement, the Acquiring Bank licensees would be obliged to pay and the Issuing Bank licensees entitled to receive."

In a similar vein, Popplewell J said at paragraph 34 of his judgment ([2017] EWHC 93 (Comm)):

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

67. Turning to Mr Rabinowitz's airport landing charges analogy, the CAT said this about it in paragraph 100 of the judgment now under appeal:

> "the airport analogy misses the point: there is no transaction as between the various airlines and they do not charge each other anything. Any credit card purchase leads to a transaction as between the acquirer and the issuer, and the MIF is the fee that the issuer charges the acquirer. Under the Visa scheme, on each issuer or acquirer becoming a licensee it is committed, respectively, to charge acquirers or pay issuers (in default of a bilateral agreement) the MIF set by Visa. Moreover, it is fundamental that 'agreement' for the purpose of Art 101(1) does not require a legally binding agreement: a mutual understanding that inhibits a freedom to determine conduct independently will suffice. 'Concerted practice' … is a still looser concept but reflects the same approach. And it was that agreement or concerted practice which gave rise to the common MIF, which then restricted competition on the acquiring market in the way that the Supreme Court judgment explains."

68. I agree that airport landing charges do not provide a useful analogy in the present case. While airlines might all pay the same landing charges, the payments are made to the airport, for what the airport is providing. In contrast, the MIFs which Visa Inc sets

are not paid to Visa or for anything Visa is supplying. MIFs instead pass from one set of participants in the Visa scheme (acquirers) to another (issuers) in accordance with rules to which they have all subscribed. While the various acquirers and issuers cannot be assumed to have any control over the levels at which Visa Inc determines the MIFs, they all agree to abide by whatever is decided and to conduct business as between themselves on that basis.

69. Perhaps the CAT expressed itself a little loosely in paragraph 6 of its permission to appeal ruling since, as Mr Rabinowitz said, the Visa scheme does not involve *competitors* charging each other fees. As, however, the CAT had noted in paragraph 5 of its ruling, "all the banks agreed with Visa Europe that (in the absence of bilateral agreements) they would conduct transactions with one another under the scheme rules and charge the MIF that was determined by Visa", and Mr Rabinowitz did not dispute before us that the CAT had been justified in concluding that, in the circumstances, there was an agreement or concerted practice for the purposes of article 101(1).

70. There is, moreover, no reason why the fact that MIFs were now being decided on by Visa Inc should have prevented the agreement or concerted practice which the CAT held to have existed from being restrictive of competition. The Supreme Court spoke in paragraph 99 of *Sainsbury's SC* of "a minimum price floor for the MSC" being fixed as a result of "the collective agreement to set the MIF". The word "set" might be thought inapt once Visa Inc is deciding the MIFs, but the thrust of the Supreme Court's reasoning is unaffected. By joining the Visa scheme, issuers and acquirers will alike have committed themselves to its default MIFs and, in consequence, have fixed a minimum price floor for the MSC. It is true that the market in which competition is said to have been restricted is the acquiring market and that the agreement or concerted practice which the CAT held to have existed extended beyond acquirers, but I cannot see why that should matter.

71. In all the circumstances, it appears to me that the CAT was right to conclude that Visa has no real prospect of founding a successful defence of the claims against it on Visa Inc's acquisition of Visa Europe.

<u>Visa Inc's role with inter-regional MIFs</u>

72. Visa has explained that, while European MIFs were formerly determined by Visa Europe, inter-regional MIFs have at all relevant times been set by Visa Inc. That being so, Mr Kennelly, who argued this part of the appeal for Visa, submitted that, so far as the claims against Visa relate to inter-regional MIFs, the arguments considered in the previous section of this judgment provide a defence not merely as regards the period since 21 June 2016, but to the totality of what is claimed. As I have indicated, however, I have not been persuaded of the merits of those arguments.

73. However, Mr Kennelly made a further point. The gist of his argument can be summarised as follows. The question whether the rules providing for inter-regional MIFs are restrictive of competition must be assessed by asking what would have happened without those rules. Within Europe, issuers and acquirers who wish to join the Visa scheme enter into agreements with Visa Europe, which is one of the defendants to the proceedings. While, though, Visa Europe might have been able to dispense with any default inter-regional MIFs within the scheme as it administered it, it had no power to compel issuers from another region to accept settlement at par.

That being so, the counterfactual adopted in the *Sainsbury's* litigation (namely, no default MIF with settlement at par) cannot be the right one. Even supposing that Visa Inc would have been entitled to impose a settlement at par rule on issuers from outside Europe, that must be irrelevant in circumstances where Visa Inc is not a defendant. Given the companies which the claimants have chosen as defendants, what matters is what would have happened if Visa Europe had just dispensed with default inter-regional MIFs, without imposing settlement at par on non-European issuers, and there is no evidence about that. In fact, Mr Kennelly said, the claimants have not even sought to identify any alternative counterfactual in their pleadings.

74. The CAT said the following on the subject in paragraph 107 of its judgment:

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

75. Mr Kennelly took the final sentence of paragraph 107 of its judgment to mean that the CAT was recognising that Visa Europe was not in a position to force issuers from outside Europe to settle at par and that the CAT was in effect adopting a different counterfactual, in which European acquirers would seek to negotiate bilaterally with non-European issuers. I am by no means sure that that is the right way to interpret what the CAT said. Be that as it may, however, 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.

76. On this particular point, therefore, I respectfully differ from the CAT. In my view, the (existing) Visa defendants have a real prospect of successfully defending the inter-regional MIF claims on the basis outlined in the preceding paragraphs.

Conclusion

77. I would dismiss both the claimants' appeal and Visa's cross-appeal so far as it relates to Visa Inc's acquisition of Visa Europe. I would, however, respectfully differ from the CAT to the extent of allowing Visa to seek to defend the inter-regional MIF claims on the basis outlined in paragraphs 73-75 above.

Lord Justice Nugee:

78. I agree.

Sir Julian Flaux, Chancellor of the High Court:

79. I also agree.