Trinity Term
[2020] UKSC 24
On appeal from: [2018] EWCA Civ 1536

JUDGMENT

Sainsbury's Supermarkets Ltd (Respondent) *v* Visa Europe Services LLC and others (Appellants) Sainsbury's Supermarkets Ltd and others (Respondents) *v* Mastercard Incorporated and others (Appellants)

before

Lord Reed, President
Lord Hodge
Lord Lloyd-Jones
Lord Sales
Lord Hamblen

JUDGMENT GIVEN ON

17 June 2020

Heard on 20, 21, 22 and 23 January 2020

Visa Europe Services LLC and others

Appellant
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Jason Pobjoy
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Respondent
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Derek Spitz
Sarah Love
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Intervener
(European Commission)
Nicholas Khan QC
Thomas Sebastian
(Instructed by the European Commission, assisted by Langleys Solicitors LLP)

Mastercard Incorporated and others

Appellant
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Respondent (1)
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Intervener
(European Commission)
Nicholas Khan QC
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Respondents:-
(1) Sainsbury's Supermarkets Ltd
(2) Asda Stores Ltd; Argos Ltd and others; WM Morrison Supermarkets PLC

JUDGMENT OF THE COURT:

1. This appeal concerns whether certain rules of the payment card schemes operated by Visa and Mastercard have the effect of restricting competition, in breach of article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), and equivalent national legislation. The rules in question provide for fees which are known as "multilateral interchange fees" or "MIFs".

2. Visa and Mastercard deny that there has been any restriction of competition, and contend that, in any event, the rules in question are exempt from the prohibition in article 101(1) because they satisfy the requirements of article 101(3) TFEU.

The outline facts

3. These are helpfully set out in the parties' statement of facts and issues, as summarised below.

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. The respondents, Asda Stores Ltd ("Asda"), Argos Ltd and others ("Argos") and WM Morrison Supermarkets plc ("Morrisons") (together "AAM") and Sainsbury's Supermarkets Ltd ("Sainsbury's"), are retailers. The respondents accept payments from customers by way of debit and credit cards, including Visa and Mastercard branded cards.

6. Visa and Mastercard each operate open four-party payment card schemes ("the Visa scheme" and "the Mastercard scheme"), under which:

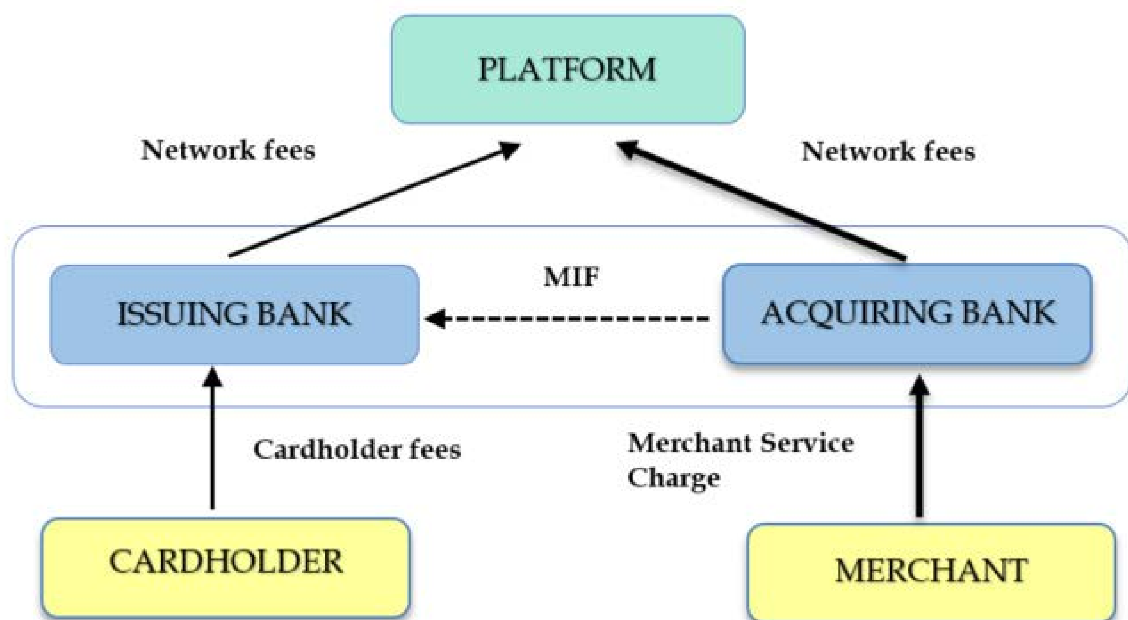
   (i) *Issuers* (who are generally banks and other financial institutions) issue debit and/or credit cards to their *cardholder* customers; and

   (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 transactions. 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:



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 (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, as both trial judges below found.

(a) Popplewell J stated in *Asda Stores Ltd v Mastercard Inc* [2017] EWHC 93 (Comm); [2017] 4 CMLR 32, para 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."

(b) Phillips J stated in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2017] EWHC 3047 (Comm); [2018] 2 All ER 611, para 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. 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 to a higher fee. Both sides of the negotiation 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 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, 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 acquirer's 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 (ie be added to the payment made by the issuer to the acquirer). There are some four-party payment card 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 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 issuer and 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 scheme fees paid by issuers and acquirers. The lawfulness of those scheme fees is not the subject of these proceedings.

15. Four-party payment card 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.

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 (ie 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 Rule" ("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.

The legal framework

19. Articles 101(1) and 101(3) TFEU provide as follows:

> **Article 101(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."

Article 101(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."

20. Section 2 of the Competition Act 1998 ("the 1998 Act") makes the same provision as article 101(1) in relation to agreements which may affect trade within the UK, and which prevent, restrict or distort competition within the UK. Section 2 is the counterpart of article 101(1) and section 9 is the counterpart of article 101(3).

21. Section 60 of the 1998 Act sets out principles to be applied when determining questions under sections 2 and 9. It provides as follows:

"**Principles to be applied in determining questions**

(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 [EU] law in relation to competition within the [European Union].

(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 [EU] law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission. …"

The regulatory history

22. Both the Visa and the Mastercard schemes have been subject to scrutiny by national and European competition authorities and regulators over many years, including in relation to MIFs. The Court of Appeal included a summary of the regulatory background in its judgment: [2018] EWCA Civ 1536; [2019] Bus LR 198; [2019] 1 All ER 903, paras 12-36.

23. Of particular relevance to the appeal is the European Commission ("the Commission") decision of 19 December 2007 that the Mastercard MIFs applicable within the European Economic Area ("EEA MIFs") had, since 22 May 1992, been in breach of article 101(1), and Mastercard had not proved to the requisite standard that any of the first three article 101(3) exemption criteria were met: Decision C (2007) 6474 in Cases COMP/34.579 - MasterCard, COMP/36.518 - EuroCommerce, and COMP/38.580 - Commercial Cards ("the Mastercard Commission Decision").

24. Mastercard applied to the Court of Justice of the European Union ("the CJEU") for the annulment of the Mastercard Commission Decision. On 24 May 2012, the General Court gave judgment dismissing Mastercard's application: *MasterCard Inc v European Commission* (Case T-111/08) [2012] 5 CMLR 5 ("*Mastercard GC*").

25. Mastercard appealed the General Court's decision to the Court of Justice. On 11 September 2014, the Court of Justice gave judgment dismissing Mastercard's appeal: *MasterCard Inc v European Commission* (Case C-382/12 P) [2014] 5 CMLR 23 ("*Mastercard CJ*").

The trial proceedings

26. The appeal relates to three sets of proceedings: the Mastercard Sainsbury's proceedings, the AAM proceedings and the Visa Sainsbury's proceedings.

27. In the Mastercard Sainsbury's proceedings, Sainsbury's issued a claim against Mastercard in the Chancery Division for damages for infringement of article 101(1) TFEU and section 2 of the 1998 Act, in respect of the Mastercard MIFs applicable to domestic transactions in the United Kingdom ("UK MIFs") for the period 19 December 2006 onwards. The claim was transferred to the Competition Appeal Tribunal ("the CAT") on 1 December 2015.

28. A liability and quantum trial was heard in the CAT over 23 days in January to March 2016. Judgment was given on 14 July 2016, with the CAT finding that, from 2006 to 2015, the Mastercard UK MIFs restricted competition by effect: *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2016] CAT 11; [2016] Comp AR 33. Damages of around £68.5m were awarded to Sainsbury's (and subsequently adjusted to take into account the impact of corporation tax).

29. In the AAM proceedings, Asda and Morrisons issued like claims for damages against Mastercard, ultimately limited to the Mastercard UK MIFs since 23 May 2006 and the Mastercard EEA MIFs since 23 May 2007. Argos also issued a claim limited to the Mastercard UK MIFs since 5 October 2006, the Mastercard EEA MIFs from 5 October 2007, and Mastercard's Irish domestic MIFs ("Irish MIFs") from 5 October 2006 to 5 January 2007 and from 20 January 2009 onwards. The parties' various claims were combined.

30. A liability trial took place before Popplewell J in the Commercial Court in June to July, and September to October 2016. On 30 January 2017, Popplewell J dismissed the claims: *Asda Stores Ltd v MasterCard Inc* [2017] EWHC 93 (Comm); [2017] 4 CMLR 32. He found that, subject to what came to be called for shorthand "the death spiral argument", Mastercard's UK and Irish MIFs restricted competition in the acquiring market contrary to article 101(1), but that the effect of that argument was that they did not infringe that provision. He also held that Mastercard's UK, Irish and EEA MIFs were exempt under article 101(3) in any event.

31. In the Visa Sainsbury's proceedings, Sainsbury's issued like claims for damages against Visa in respect of the Visa UK MIFs since 18 December 2007.

32. Sainsbury's claim was heard by Phillips J in the Commercial Court in a 39-day trial of liability issues in the period 14 November 2016 to 1 March 2017. On 30 November 2017, Phillips J dismissed Sainsbury's claim against Visa: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2017] EWHC 3047 (Comm); [2018] 2 All ER 611. Phillips J found that the Visa UK MIFs did not restrict competition in the acquiring market and the claim was dismissed ("the Visa restriction judgment").

33. On 23 February 2018, Phillips J gave a further judgment, at the request of the parties, although it was strictly *obiter*. He found that if, contrary to his conclusion in the Visa restriction judgment, the Visa UK MIFs did restrict competition, they were not exempt, at any level, under article 101(3) because Visa had not established to the requisite standard that the Visa UK MIFs caused any benefits to consumers: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2018] EWHC 355 (Comm); [2018] 4 CMLR 24 ("the Visa exemption judgment").

34. The judgments below and their essential reasoning are summarised by the Court of Appeal at paras 37-57 of its judgment.

The Court of Appeal decision

35. The Court of Appeal directed that the appeals in the Mastercard Sainsbury's proceedings, the AAM proceedings and the Visa Sainsbury's proceedings be heard together. There was a ten-day hearing between 16 and 27 April 2018. Judgment was handed down on 4 July 2018, overturning all four of the judgments given below.

36. As regards Popplewell J's judgment in the AAM proceedings, the Court of Appeal endorsed his view that Mastercard's default MIFs involved a distortion of competition contrary to article 101(1), but disapproved his reasoning on the death spiral argument, with the result that the Mastercard default MIFs were found to infringe article 101(1). The Court of Appeal also overruled the judge in relation to his conclusion on Mastercard's claim of exemption under article 101(3). It held that Mastercard had not advanced evidence at trial which was capable of substantiating its claim for exemption under that provision; therefore, the judge should have concluded that Mastercard's claim for exemption failed.

37. Despite this ruling regarding article 101(3) in the AAM proceedings, the Court of Appeal remitted the issues arising under article 101(3) in all three sets of proceedings to the CAT, for reconsideration together on the basis of the existing evidence which had been adduced in all three sets of proceedings.

38. On 29 November 2018 Visa and Mastercard were given permission to appeal against the Court of Appeal decision on all grounds.

39. On 6 November 2019 AAM were given permission to cross-appeal against the order for remittal made by the Court of Appeal.

The issues

40. The issues which arise on the appeal are as follows:

(i) Did the Court of Appeal err in law in finding that there was a restriction of competition in the acquiring market contrary to article 101(1) TFEU and equivalent national legislation? (“the restriction issue”)

(ii) Did the Court of Appeal find, and if so did it err in law in finding, that Visa and Mastercard were required to satisfy a more onerous evidential standard than that normally applicable in civil litigation, in order to establish that their MIFs were exempt from the prohibition on restrictive agreements pursuant to article 101(3) TFEU, because of the economic benefits to which they contributed? (“the standard of proof issue”)

(iii) Did the Court of Appeal err in law in finding that in order to show that consumers receive a fair share of the benefits generated by the MIFs, for the purpose of satisfying the test for exemption under article 101(3) TFEU, Visa was required to prove that the benefits provided to merchants alone as a result of the MIFs outweighed the costs arising from the MIFs, without taking any account of the benefits received by cardholders as a result of the MIFs? (“the fair share issue”)

(iv) Did the Court of Appeal find, and if so did it err in law in finding, that a defendant has to prove the exact amount of loss mitigated in order to reduce damages? (“the broad axe issue”)

41. If it arises, the issue on the cross-appeal is whether the Court of Appeal erred in remitting the AAM proceedings for reconsideration in relation to exemption under article 101(3) (“the remission issue”).

Issue (i) - The restriction issue

42. In the CAT proceedings, the CAT decided two issues which are no longer in dispute, namely that: (i) the MIF did not amount to a restriction of competition by object; and (ii) the restriction issue 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. It is also not in dispute that the setting of the UK MIF was pursuant to an agreement between undertakings within the meaning of article 101(1)

(see para 95 of the CAT judgment, para 34 of Popplewell J's judgment and para 5 of the Visa restriction judgment).

43. The CAT considered that bilateral MIF agreements would be made in the counterfactual and made detailed findings on this basis. Both Popplewell J and Phillips J disagreed with this conclusion. As Phillips J stated at paras 126-129 of the Visa restriction judgment:

> "126. … despite the fact that MIFs have provided a default level of Interchange Fee for many years … bilateral agreements … are unknown in the UK market. That demonstrates the very considerable strength of the market forces which keep the Interchange Fee at the level of the default: no party has persuaded another to move away from the default and no party has volunteered to do so for some perceived benefit.
>
> …
>
> 129. In my judgment it would require clear evidence to support a finding that [bilateral agreements] would emerge in a default settlement counterfactual when they do not arise in the actual default Scheme … it is clear that there is no such evidence in these proceedings. On the contrary, the evidence was unanimous and unequivocal to the opposite effect …"

44. It is now common ground that Popplewell J and Phillips J were correct so to find. It follows that the findings made by the CAT on the counterfactual on the basis of bilateral agreements being made are not relevant to the appeal.

45. In the AAM proceedings, Popplewell J would have found that the Mastercard MIFs were a restriction on competition were it not for the death spiral argument. That argument was not supported on appeal. The reason that he would otherwise have found that there was a restriction is summarised at para 156 of Popplewell J's judgment:

> "156. ...They [the MIFs] imposed a floor below which the MSC could not fall, because acquirers had to pay at least that much to issuers and had to recoup it from the merchants, which in turn led to higher prices charged by acquirers to merchants through the MSC than if the MIF were lower or zero. Such a floor restricts competition because it interferes with the ability

> of acquirers to compete for merchants' business by offering MSCs below such floor. It is no different in kind from a collective agreement by manufacturers to maintain inflated wholesale prices, which prevents wholesalers competing on the retail market below those prices."

46. Phillips J disagreed with this reasoning and conclusion. His main reason for doing so is set out at para 156 of the Visa restriction judgment:

> "156. … the situation is exactly the same at any lower level of MIF, including a zero MIF or its equivalent, a no-MIF/default SAP [settlement at par] counterfactual. At that lower level, the default settlement rule still provides a default level of Interchange Fee, and therefore (because of the lack of competitive pressure to depart from that default) both a floor and a ceiling for that fee. The only difference is the level. Popplewell J rejected that argument in the Asda Judgment, stating at para 160 that 'in a no MIF counterfactual the alleged vice is not the same as the actual: there is no floor.' However, a zero MIF or no-MIF/default SAP counterfactual most certainly *does* give rise to a 'floor', both in economic terms and as a matter of logic, particularly in the context of a two-sided market: it prevents the possibility of market forces driving the MIF to a negative level (equivalent to a premium on settling the transaction price). As I have mentioned above, that is not merely a theoretical possibility, as all the expert economists recognised ..."

47. The Court of Appeal held that it was bound to follow the decision in *Mastercard CJ* that the MIFs in issue restricted competition within the meaning of article 101(1). It stated that this was not a decision from which the Court "either can or should depart". Its reasoning is summarised at paras 185-186 of the judgment:

> "185. Our conclusions on the primary article 101(1) issue can be summarised quite shortly. The correct counterfactual for schemes like the MasterCard and Visa schemes before us was identified by the [Court of Justice's] decision. It was 'no default MIF' and a prohibition on ex post pricing (or a settlement at par rule). The relevant counterfactual has to be likely and realistic in the actual context (see the *O2 Germany GmbH & Co OHG* case [2006] ECR II-1231, paras 68-71 [*O2 Germany v Commission* (Case T-328/03)] and the [Court of Justice's]

> decision, para 169), but for schemes of this kind, the [Court of Justice] has decided that that test is satisfied.
>
> 186. The [Court of Justice's] decision also made clear at para 195 that MasterCard's MIFs, which resulted in higher prices, limited the pressure which merchants could exert on acquiring banks, resulting in a reduction in competition between acquirers as regards the amount of the merchants' service charge. This is not a decision from which this court either can or should depart. It answers the schemes' argument that, whether as a matter of evidence or not, the competitive process will not differ in the counterfactual. The default MIFs may be a transparent common cost, which is passed on by acquirers to merchants, and which does not figure in the negotiations between them, but it does not follow that acquirers none the less compete as strongly for merchants' business in relation to the acquirer's margin and the additional services they offer, as they would in the absence of the default MIFs."

48. It follows that there are essentially two issues which arise: (i) whether, as the Court of Appeal held, the court is bound by the *Mastercard CJ* decision on the restriction issue; and (ii) if not, whether that decision ought to be followed. This requires a detailed consideration of what was decided by the Commission, the General Court and the Court of Justice, and of their reasoning.

Is the court bound by Mastercard CJ?

The Mastercard Commission Decision

49. The decision is summarised at paras 396-405 of the Court of Appeal judgment.

50. The restriction of competition identified by the decision is summarised in the Executive Summary, point 2, as follows:

> "The MIF in MasterCard's scheme restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby setting a floor under the merchant fee. In the absence of the multilateral interchange fee the merchant fees set by acquiring banks would be lower."

51. This reflects the finding made at recital 410:

> "MasterCard's MIF constitutes a restriction of price competition in the acquiring markets. In the absence of a bilateral agreement, the multilateral 'default' rule fixes the level of the interchange fee rate for all acquiring banks alike, thereby inflating the base on which acquiring banks set charges to merchants. Prices set by acquiring banks would be lower in the absence of this rule and in the presence of a rule that prohibits ex post pricing. The MasterCard MIF therefore creates an artificial cost base that is common for all acquirers and the merchant fee will typically reflect the costs of the MIF. This leads to a restriction of price competition between acquiring banks to the detriment of merchants (and subsequent purchasers)."

52. This is further explained at recital 448 as follows:

> "… The decisive question is 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) the banks."

53. At recitals 455 to 460 the Commission addressed the argument of Mastercard and Visa (who had been allowed to participate in the proceedings) that the MIF was not a restriction because its effect would be like an excise tax. This argument is recorded at recital 219 in the following terms:

> "At the oral hearing Visa's expert also argued that it was hard to imagine how a multilaterally set interchange fee could possibly restrict competition between acquiring banks. Competition among acquirers could not be stronger with '*at par*' clearing than with a MIF, just as it would be hard to assume that breweries would compete more keenly if one scraps excise taxes."

54. This is essentially the same argument as that advanced successfully by Visa before Phillips J and again on this appeal. In summary, in a counterfactual with settlement at par (equivalent to a zero rated MIF) there is no process of competition

as to that default term of settlement, just as there would not be if there was a MIF, a common and transparent cost which is also a default term of settlement, not a price or charge. In both the factual scenario and the counterfactual, competition is limited to the acquirer's individual marginal cost and mark up. There is accordingly no difference in the competitive process and no restriction on competition ("the zero MIF argument").

55. The Commission rejected this argument for the following reasons:

> "455. MasterCard puts forward that the interchange fee does not favour a particular acquirer or type of acquirer over other acquirers/types of acquirers. '*The interchange fee is a common identical cost, borne by all acquirers, that does not influence price competition between acquirers in terms of determining the level of MSCs*'. Visa's expert raised a similar argument at the oral hearing by comparing the MIF to an excise tax.
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> …
>
> 457. … even if one were to qualify a MIF as a kind of 'excise tax' this is no reason why the MIF should fall outside article 81(1) of the Treaty [now article 101(1) TFEU]. The collective act of competing undertakings to raise charges for consumers is subject to the prohibition of article 81(1) of the Treaty.
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> 458. If the concept of a restriction of competition within the meaning of article 81(1) of the Treaty had to be interpreted as MasterCard suggests, then article 81(1) of the Treaty would be entirely deprived of its *effet utile*. The MasterCard MIF not only creates an (artificial) common cost for acquirers and thereby sets a floor for the fees each acquirer charges to merchants. Acquirers also *know* precisely that all of their competitors pay the very same fees. The price floor *and* the transparency of it to all suppliers involved (that is to say the knowledge of each acquirer about the commonality of the MIF for all other acquirers in the MasterCard scheme) eliminate an element of uncertainty.
>
> 459. In the absence of MasterCard's MIF, the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into

account the acquirer’s individual marginal cost and his mark up.

460. Statements of retailers demonstrate that they would be in a position to exert that pressure if acquirers were not able to refer to interchange fee as the ‘starting point’ (that is to say, as the floor) for negotiating the MSC. This is because without a default that fixes an interchange fee rate in the absence of a bilateral agreement, merchants could shop around to contract with the acquirer who incurs the lowest interchange costs.[517] Acquirers who bilaterally agree to pay relatively high interchange fees to issuers would ultimately not remain competitive, as other acquirers could undercut their merchant fees by refusing to enter into bilateral agreements with issuers or by agreeing on relatively lower interchange fees. The uncertainty of each individual acquirer about the level of interchange fees which competitors bilaterally agree to pay to issuers would exercise a constraint on acquirers. In the long run this process can be expected to lead to the establishment of inter-bank claims and debts at the face value of the payment that is without deducting any interchange fees. A multilateral rule that by default sets a certain interchange fee rate in the absence of bilateral negotiations prevents this competitive process. In the absence of such a rule (and in the presence of a prohibition of ex post pricing) acquiring banks would eventually end up setting their MSCs merely by taking into account their own marginal cost plus a certain mark up.”

56. Footnote 517 to para 460 provides as follows:

“Note that in the Commission’s view in the absence of a default MIF banks may or may not enter into bilateral agreements on interchange fees. The existence of such bilaterally agreed interchange fees is no pre-requisite for the viability of the MasterCard payment card scheme. In the absence of a default MIF prices are established on both sides of the MasterCard scheme as set out in section 7.3.4.1, ie: each bank determines its service levels and prices in a manner that maximises its individual profits.”

Mastercard GC

57. Mastercard applied to the CJEU for annulment of the Commission's decision. Its application was determined by the General Court.

58. The General Court's decision is summarised at paras 406-411 of the Court of Appeal judgment.

59. On the restriction issue the General Court summarised the Commission's reasoning and conclusion as follows:

> "28. According to the Commission, the members of the MasterCard payment organisation collectively exert market power vis-à-vis merchants and their customers. Thus, the MIF had the effect of inflating the base of the MSC, while the latter could be lower if there were no MIF and if there were a prohibition of unilateral pricing a posteriori of transactions by the issuing banks ('prohibition of ex post pricing'). It follows from this that the MIF examined by the Commission in the contested decision led to a restriction of price competition between acquiring banks to the detriment of merchants and their customers (recitals 410, 411 and 522 to the contested decision). …"

60. The General Court addressed the complaints made relating to the assessment of competition in the absence of the MIF at paras 129-167. At para 140 it made the following general observation about the purpose of article 101(1)(a):

> "140. … it is helpful to point out that article 81(1)(a) EC [now article 101(1)(a) TFEU] expressly provides that measures which directly or indirectly fix purchase or selling prices constitute restrictions of competition, and that, according to the case law, the purpose of article 81(1)(a) EC is to prohibit undertakings from distorting the normal formation of prices on the markets (*ICI v Commission* (Case T-13/89) [1992] ECR II-1021, para 311)."

61. At para 142 the General Court set out the complaint made based on the zero MIF argument:

> “142. … the applicants submit, in essence, that the fact that the MIF had an impact on the level of the MSC does not affect competition between acquirers, because the MIF applies in the same way to all acquirers and operates as a cost that is common to all of them. Thus, the prohibition of ex post pricing would effectively impose a MIF set at zero which, from a competitive aspect, would be equivalent to and just as transparent as the current MIF, the only difference being the level at which it is set.”

62. The General Court rejected this argument and set out its conclusion at para 143 as follows:

> “143. This line of argument cannot be accepted. Since it is acknowledged that the MIF sets a floor for the MSC and in so far as the Commission was legitimately entitled to find that a MasterCard system operating without a MIF would remain economically viable, it necessarily follows that the MIF has effects restrictive of competition. By comparison with an acquiring market operating without them, the MIF limits the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold.”

Mastercard CJ

63. Mastercard appealed against the General Court’s decision to the Court of Justice.

64. The Advocate General recommended that the appeal be dismissed. He summarised the Commission’s reasoning and conclusion as follows:

> “AG6 - In the decision at issue, the Commission considered that the decisions setting the MIF, which it characterised as decisions of an association of undertakings within the meaning of article 81(1) EC, restrict competition between acquiring banks and thereby infringe that article and article 53 of the EEA Agreement, in that they amount in fact to setting a minimum price for the MSC …
>
> …

AG54 - In the present case, the Commission examined the competitive process that would have developed on the acquiring market in the absence of the MIF at recitals 458 to 460 to the decision at issue and concluded that, in the absence of the MIF and with a prohibition on *ex post* pricing, the prices charged to merchants by acquirers 'would only be set taking into account the acquirer's individual marginal cost and his mark up'. …"

65. The Court of Justice's decision is summarised at paras 412-417 of the Court of Appeal judgment.

66. The Court of Justice explained and affirmed the General Court's conclusion at para 143 of its judgment in the following terms:

"193. In particular, while the General Court clearly explained in para 143 of the judgment under appeal that the MIF had restrictive effects in that they:

'[limit] the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold', in contrast with 'an acquiring market operating without them',

the General Court did not merely presume that the MIF set a floor for the MSC but, on the contrary, proceeded to carry out a detailed examination in paras 157 to 165 of the judgment under appeal in order to determine whether that was in fact the case."

67. The Court of Justice endorsed the General Court's rejection of the zero MIF argument in the following terms:

"195. … the appellants cannot criticise the General Court for having failed to explain how the hypothesis applied had less restrictive effects on competition than the MIF, given that the only difference between the two situations lies in the pricing level of the MIF. As the Commission rightly points out, the judgment under appeal is not based on the premiss that high prices in themselves constitute an infringement of article 81(1)

> EC. On the contrary, as is apparent from the very wording of para 143 of the judgment under appeal, high prices merely arise as the result of the MIF which limit the pressure which merchants could exert on acquiring banks, with a resulting reduction in competition between acquirers as regards the amount of the MSC."

Visa and Mastercard's arguments

68. Ms Dinah Rose QC for Visa (whose argument is adopted and supported by Mr Mark Hoskins QC for Mastercard) submits that the Court of Appeal was wrong to conclude that it was bound by *Mastercard CJ*. The decisions of the Court of Justice and the General Court depended on the factual basis of the Mastercard Commission Decision. Crucial to that factual basis was the Commission's 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.

69. Ms Rose relies in particular on para 460 of the Mastercard Commission Decision which describes how, if there were no default MIF, merchants "could shop around to contract with the acquirer who incurs the lowest interchange costs" and how the "uncertainty of each individual acquirer about the level of interchange fees which competitors bilaterally agree to pay to issuers would exercise a constraint on acquirers". This is the "pressure" which merchants would be able to exert in the counterfactual, as borne out by "statements of retailers".

70. This is to be contrasted with the evidence before and the findings made by Phillips J in the Visa restriction judgment. He found that there would be no bilateral agreements in the counterfactual (para 129) and no resulting competition (para 151). It followed that there would be no competitive pressure as found by the Commission.

71. Ms Rose submits that this is the "pressure" referred to in para 143 of *Mastercard GC* and para 195 of *Mastercard CJ*. In para 195 the Court of Justice was making it clear that the Commission's finding of infringement had been upheld by the General Court because of the Commission's findings that MIFs limit this pressure which merchants could otherwise exert on acquirers, thereby reducing competition between acquirers.

72. *Mastercard CJ* is accordingly factually distinguishable. It turned on the factual assessment made by the Commission which was different to that made by

Phillips J. Although Popplewell J did not make the same findings as Phillips J, he also found that there would be no bilateral agreements in the counterfactual, which is a critical difference in the factual assessment. It is well established that a court is not bound by factual assessments made by the Commission - *Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening)* [2007] 1 AC 333; [2006] UKHL 38. The Court of Appeal was therefore wrong to conclude that it was bound by *Mastercard CJ*.

73. In our judgment Visa and Mastercard's arguments involve a misinterpretation of the Mastercard Commission Decision, *Mastercard GC* and *Mastercard CJ*.

74. In relation to the Mastercard Commission Decision, in the section of the decision relied upon by Visa and Mastercard, recital 459, read in the context of recitals 457 and 458, is as important as recital 460. Recital 459 bears repetition; it states:

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

75. The Commission was here focusing on the process by which merchants bargain with acquirers over the MSC. It was contrasting the position where that charge is negotiated by reference to a minimum price floor set by the MIF and one where it is negotiated by reference only to the acquirer's individual marginal cost and his mark up - ie between a situation in which the charge is only partly determined by competition and one in which it is fully determined by competition. In the latter situation the merchants have the ability to force down the charge to the acquirer's individual marginal cost and his mark up and to negotiate on that basis. This is the "pressure" which is referred to in recital 460 of the decision. This is made clear by the reference in the first sentence of recital 460 to "that" pressure - ie the pressure referred to in recital 459.

76. It is correct that the Commission went on in recital 460 to describe the competitive process involved if there were bilateral negotiations over interchange fees, but the ultimate point it was here making is that that process would be transient and that "acquiring banks would eventually end up setting their MSCs merely by taking into account their own marginal cost plus a certain mark up". The transient nature of such a competitive process shows that the existence of such a process cannot have been integral to the Commission's decision that there was a restriction on competition. This is further borne out by footnote 517 in which the Commission

stated that in the counterfactual "banks may or may not enter into bilateral agreements on interchange fees", thereby making it clear that such agreements were not essential to its reasoning.

77. *Mastercard GC* is properly to be interpreted in a similar way. In para 143 the General Court rejected the zero MIF argument and held that since the MIF sets a minimum price floor for the MSC (which is not determined by competition) "it necessarily follows that the MIF has effects restrictive of competition". This is the context in which the "pressure" referred to in the next sentence falls to be considered. The consequence of the minimum price floor set by the MIF is that such pressure is limited to only part of the MSC - ie that relating to the acquirer's individual marginal cost and mark up (in the present case about 10% of the MSC).

78. A similar analysis applies to *Mastercard CJ*. The "pressure" which the Court of Justice referred to at para 195 is the same as that referred to in para 143 of *Mastercard GC*, which the Court of Justice was endorsing.

79. Accordingly, we do not consider that *Mastercard CJ* can be factually distinguished in the manner suggested by Visa and Mastercard.

80. Visa and Mastercard further contend that the recent decision of the Court of Justice in *Gazdasági Versenyhivatal v Budapest Bank Nyrt* (Case C-228/18) EU:C:2020:265 ("*Budapest Bank*") established that the question whether MIFs that set a floor under the MSC restrict competition has not been settled by *Mastercard CJ*, but must be determined by a national court by carrying out an in-depth evidential examination of its effects, and that this was contrary to the judgment of the Court of Appeal.

81. The Court of Justice's decision in *Budapest Bank* was pronounced after the conclusion of the hearing of this appeal but the parties were allowed to make written submissions as to its significance. The Advocate General's opinion had already been referred to in argument.

82. *Budapest Bank* concerned an agreement made by banks that participated in both the Visa and Mastercard schemes in Hungary, by which they agreed on a uniform MIF that was applicable to both schemes. It was argued by the parties in the national proceedings that the agreement had the effect of preventing the fees from escalating upwards.

83. The issue in the proceedings was whether the agreement had the object of restricting competition. It did not concern whether it had the effect of so doing.

84. The Hungarian Supreme Court referred four questions to the CJEU for a preliminary ruling. The second question concerned whether the MIF agreement had the object of restricting competition. The Court of Justice ruled that it would only do so if the agreement "in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which is for the referring court to determine".

85. In so ruling the Court of Justice rejected the Commission's argument that, in reliance on *Mastercard CJ*, the MIF agreement necessarily had the object of restricting competition. Particular reliance is placed by Visa and Mastercard on paras 78-79 of the judgment which state:

> "78. Second, as regards the acquiring market in Hungary, even assuming that the MIF Agreement had inter alia as its objective the fixing of a minimum threshold applicable to the service charges, the Court has not been provided with sufficient information to establish that that agreement posed a sufficient degree of harm to competition on that market for a restriction of competition 'by object' to be found to exist. It is, however, for the referring court to carry out the necessary verifications in that respect.
>
> 79. In particular, in the present instance, subject to those verifications, it is not possible to conclude on the basis of the information produced for this purpose that sufficiently general and consistent experience exists for the view to be taken that the harmfulness of an agreement such as that at issue in the main proceedings to competition justifies dispensing with any examination of the specific effects of that agreement on competition. The information relied on by the Competition Authority, the Hungarian Government and the Commission in that connection, that is to say, primarily, that authority's decision-making practice and the case law of the Courts of the European Union, specifically demonstrates, as things currently stand, the need to conduct an in-depth examination of the effects of such an agreement in order to ascertain whether it actually had the effect of introducing a minimum threshold applicable to the service charges and whether, having regard to the situation which would have prevailed if that agreement had not existed, the agreement was restrictive of competition by virtue of its effects."

86. Visa and Mastercard contend that this shows that MIFs do not necessarily affect competition and that whether or not they do so is to be determined by the national court carrying out an "in-depth examination" of its effects on competition in the actual and counterfactual markets.

87. It is surprising that so much reliance should now be placed by Visa and Mastercard on *Budapest Bank*. At the hearing it was recognised by Visa that it raised a different question. As stated at para 116 of Visa's written case:

> "That case concerned the question whether an agreement between a number of Hungarian banks introducing a uniform MIF for both Visa and Mastercard credit card transactions in Hungary should be characterised as having the object of restricting competition. It was therefore quite a different question from that which the CJEU had considered in *Mastercard CJEU*, in that it concerned alleged infringements by object rather than effect, and a single agreement covering both Visa and Mastercard, rather than one scheme's rules applicable only to its own system."

88. In our judgment the case can clearly be distinguished in that: (i) it concerned restriction by object rather than effect; (ii) it involved a different type of MIF agreement and, in particular, one which was said to prevent escalating interchange fees; and (iii) it involved a different counterfactual, namely one where each scheme had its own MIF rather than there being no MIF.

89. The fact that the Commission sought to rely on *Mastercard CJ* in argument does not affect these important distinctions, all the more so given that the Commission's attempt to read across from an effect case to an object case was rejected by the Court of Justice.

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

91. For all these reasons, in our judgment *Budapest Bank* does not support Visa and Mastercard's case on the restriction issue. Still less, as is boldly submitted, is it determinative in their favour.

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. 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*.

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.

Should the court follow Mastercard CJ?

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 article 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 article 101(1)(a).

97. It is well established that the prohibition of price fixing under article 101(1) also extends to the fixing of part of the price - *Krupp Thyssen Stainless GmbH v Commission of the European Communities* (Joined Cases T-45/98 and T-47/98) [2001] ECR II-3757; [2002] 4 CMLR 15, 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.

Conclusion on the restriction issue

105. For these reasons we dismiss the appeal on issue (i).

Issue (ii) - The standard of proof issue

106. This ground of appeal is advanced jointly by Visa and Mastercard. They submit that the Court of Appeal erred in law insofar as it concluded that, in relation to article 101(3) TFEU:

(i) there is a specific requirement for robust and cogent evidence, which is a more onerous standard than that under the normal domestic civil standard of proof on the balance of probabilities; and

(ii) there is a legal requirement that matters required to be considered have to be proved by facts and empirical data.

107. We are concerned here with circumstances in which a party in breach of article 101(1) seeks exemption by satisfying the requirements of article 101(3). The following four conditions must be satisfied. First, the anti-competitive conduct must contribute to improving the production or distribution of goods or to promoting technical or economic progress. Secondly, consumers must be allowed a fair share of the resulting benefit. Thirdly, it must not impose on the participating undertakings any restrictions which are not indispensable to the attainment of these objectives. Fourthly, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products in question. (See, for example, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (Case T-168/01) [2006] ECR II-2969; [2006] 5 CMLR 29 ("*GlaxoSmithKline*"), para 234.) It is common ground between the parties that if the restriction on competition established under article 101(1) is to be justified, the burden of satisfying the four conditions set out in article 101(3) lies on the defendant. Visa and Mastercard describe the present issue as relating to the standard of proof.

108. Visa and Mastercard maintain that in the first instance proceedings in the Commercial Court the judges adopted diverging views as to the standard of proof and the nature of the evidence required to satisfy that standard. In the AAM proceedings, Popplewell J followed the orthodox common law approach that the standard of proof is the balance of probabilities and that there is no additional requirement as to the evidence which is capable of satisfying that standard.

> "In the context of exemption the requirement for 'substantiation' is no more than a requirement for evidence, and the suggestion that it needs to be empirical and convincing means no more than that it must be based on evidence, not speculation, and be sufficient to convince the court to the requisite standard of proof which is the balance of probabilities. If the epithet 'robust' is intended to add more and connote an enhanced standard of proof, it is difficult to discern any legal basis for such an approach, …" (at para 305)

In the Visa exemption judgment, Phillips J referred to the agreement between the parties that it was for Visa to establish on the balance of probabilities that its UK

MIFs at a particular level are or were exempt. He went on to address the relationship of that standard of proof with the requirement under EU law (citing the Mastercard Commission Decision at para 690) that the claim that a restrictive agreement creates efficiencies must be founded on detailed, robust and compelling analysis and that assumptions and deductions be based on empirical data and facts.

> "In my judgment the distinction being drawn is between: (a) real links to real efficiencies, capable of being observed and demonstrated on the facts by evidence (in other words, requiring empirical data); and (b) theoretical or logically assumed links and efficiencies based on broad economic or logical analysis, opinion or anecdotal evidence, perhaps sound in theory but possibly failing to take into account one or more of the many factors which arise in highly complex interactions in the real economy. I see no difficulty in this court determining whether the former has been proved on the balance of probabilities. That test is capable of accommodating varying requirements as to what is expected to meet the standard: contract terms must be 'certain', allegations of fraud must be 'distinctly proved' and it is often said that 'cogent' evidence is required to rebut certain presumptions. In the case of article 101(3), it is recognised that robust analysis and cogent evidence will be required to establish, on the balance of probabilities, that a restrictive agreement in fact and in the real world (as opposed to in theory) gives rise to pro-competitive effects." (at para 24)

Phillips J went on to state (at para 25) that in his view this analysis did not differ significantly from that of Popplewell J.

109. The Court of Appeal began its consideration of the conditions for exemption under article 101(3) with the following uncontroversial statement:

> "77. Pursuant to article 2 of the Modernisation Regulation [Council Regulation (EC) No 1/2003 on the implementation of Treaty competition rules (OJ 2003 L1, p 1)] the burden of proving that these cumulative conditions are satisfied is upon the schemes. Recital 5 to the [Modernisation] Regulation makes it clear, however, that the standard of proof is for the national law, so that the usual civil standard of the balance of probabilities applies."

It then adopted para 24 of the Visa exemption judgment of Phillips J and continued:

> "80. We agree with Phillips J (at para 25 of that judgment), that this analysis does not differ significantly from that of Popplewell J at para 305 of his judgment, but to the extent that there are any differences, we prefer the analysis of Phillips J. In so far as Ms Dinah Rose QC, leading counsel for Visa, sought to argue that Phillips J adopted too prescriptive an approach and that any evidence should suffice provided it meets the civil standard of proof, we do not accept that argument. We consider that Phillips J was right that regard should be had to the requirement of the Commission and the CJEU for cogent and convincing arguments and evidence (see *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (Case T-168/01) EU:T:2006:265, [2006] ECR II-2969; [2006] 5 CMLR 1623 … para 235, which was applied and followed in the General Court's decision in *MasterCard* at para 196).
>
> 81. Although the standard of proof is a matter of English law, the nature of the evidence which will satisfy that standard must be informed by European Union law and Commission decisional practice since, ultimately, whether a party is entitled to exemption involves the application of a European treaty. Furthermore, in that context, it is important to maintain a consistency of approach across member states as to the requirements of article 101(3)."

Other passages in the judgment of the Court of Appeal (paras 85, 86 and 249) demonstrate that it considered that EU law requires cogent factual and empirical evidence to satisfy article 101(3). In particular, the Court of Appeal (at paras 84 and 85) derived from the Commission Guidelines on the application of what is now article 101(3) TFEU (2004/C 101/8) ("the Guidelines") and the EU jurisprudence on article 101(3), first, a need for the relevant benefits to be causally linked to the relevant restriction and, secondly, for that causal link to be established "by facts and evidence supported by empirical analysis and data and not just economic theory". It added (at para 86):

> "Thirdly, as para 54 of the Guidelines makes clear, the causal link must be sufficiently direct to be capable of proof and an indirect effect will not generally be sufficient, precisely because cogent evidence of the link based on empirical analysis and data and not merely economic theory is required."

110. It is convenient to observe at this point that, contrary to the submission of Mastercard, the Court of Appeal did not conclude that "only facts and empirical data but not economic theory may be relied upon" in this regard. The Court of Appeal made clear that its objection was to reliance solely on economic theory and that, in its view, a claim under article 101(3) must be based on empirical data and fact and not economic theory alone (paras 85 and 86).

111. Visa and Mastercard complain that the Court of Appeal wrongly adopted an unduly onerous standard of proof. They take as their starting point Council Regulation (EC) No 1/2003 on the implementation of Treaty competition rules ("the Modernisation Regulation"). The major change effected by the Modernisation Regulation was that whereas previously the grant of exemption from the prohibition on agreements which restrict competition had been the exclusive function of the European Commission, the Modernisation Regulation introduced a directly applicable exception system in which the competition authorities and courts of the member states have the power to apply the exemption provisions under what is now article 101(3). The previous system of notification to the Commission for exemptions was abolished and the widespread involvement of national courts and authorities in exempting restrictive agreements was clearly contemplated. It is in this context that recital 5 of the Preamble states:

> "In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under articles 81 and 82 [now articles 101 and 102] of the Treaty. It should be for the party or the authority alleging an infringement of article 81(1) and article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the member states to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law."

Similarly, article 2 which bears the heading "Burden of proof" provides:

> "In any national or Community proceedings for the application of articles 81 and 82 of the Treaty, the burden of proving an infringement of article 81(1) or of article 82 of the Treaty shall

> rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."

There is, accordingly, a clear allocation of the burden of proof, while questions as to the standard of proof are left to the law of the member state concerned, provided that the national rules are compatible with general principles of EU law. Visa and Mastercard submit, therefore, that EU law expressly reserves the question of the standard of proof to national law, subject to the principles of effectiveness and equivalence.

112. In this regard, Visa and Mastercard rely further on the following passage in the decision of the Court of Justice in *Eturas UAB v Lietuvos Respublikos konkurencijos taryba* (Case C-74/14) [2016] 4 CMLR 19, paras 30-32:

> "30. Although article 2 of Regulation No 1/2003 expressly governs the allocation of the burden of proof, that regulation does not contain any provisions on more specific procedural aspects. Thus, in particular, that regulation does not contain any provision in relation to the principles governing the assessment of evidence and the standard of proof in national proceedings for the application of article 101 TFEU.
>
> 31. That conclusion is confirmed by recital 5 of Regulation No 1/2003, which expressly states that the regulation does not affect national rules on the standard of proof.
>
> 32. According to settled case law, in the absence of EU rules on the matter, it is for the national legal order of each member state to establish them in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) …"

113. This passage, however, is not as helpful to Visa and Mastercard as might at first appear. The issue in that case, which was a reference from the Supreme Administrative Court of Lithuania in proceedings where an anti-competitive concerted practice was alleged, was whether certain evidence was sufficient proof

of a fact which, if established, would trigger a presumption of liability under article 101(1). The passage in the judgment of the Court of Justice at paras 30-32, cited above, was concerned with the specific question whether the dispatch of a message through an electronic system may constitute sufficient evidence to establish that the operators which used the system were aware, or ought to have been aware, of the content of that message. Unsurprisingly, the Court of Justice held that, in accordance with the principle of procedural autonomy, the standard of proof in relation to establishing that fact was a matter for the national legal order of the member state concerned. The Court of Justice went on, however, (at para 33) to distinguish the presumption arising under article 101(1) of a causal connection between a concertation and the market conduct of the undertakings participating in the practice. That presumption, it emphasised, followed from article 101(1) and consequently formed an integral part of the EU law which the national court was required to apply. The Court of Justice then went on (at paras 46-49) to address in detail the nature of the evidence that would be sufficient to rebut the presumption.

114. In our view, the fact that the Court of Justice in *Eturas* addressed, as a question of EU law, what evidence was capable of rebutting the presumption of participation in a concerted practice provides the key to resolving the present issue. In that case Advocate General Szpunar observed (at AG100), with regard to rebuttable presumptions in competition law:

> "Insofar as such presumptions stem from article 101(1) TFEU, as interpreted by the court, and consequently form an integral part of applicable EU law, they do not fall within the scope of the principle of the autonomy of national procedural law and are therefore binding on national authorities when they apply EU competition rules."

As Mr Nicholas Khan QC, on behalf of the Commission, put it in his oral submissions, *Eturas* illustrates how the nature of the evidence by which a finding of infringement can be secured or rebutted may be a question of EU law. In the same way, the nature of the evidence by which an undertaking may establish that a restriction on competition is exempted by virtue of article 101(3) may also be a question of EU law.

115. In the present case, the essential complaint made by Visa and Mastercard under this ground of appeal does not relate to the standard of proof but to the nature of the evidence required to meet the standard of proof in this context. More specifically, it relates to the type of evidence needed to establish that the benefits from the MIF rules under consideration outweigh the detriments to merchants and are indispensable for achieving those benefits. The Court of Appeal recognised this distinction at paras 77 to 81 of its judgment, where it expressly accepted that the

applicable standard of proof was the usual civil standard of the balance of probabilities but observed that the nature of the evidence which will satisfy that standard must be informed by EU law and Commission decisional practice. While the Modernisation Regulation recognises the autonomy of member states in determining the legal test for the standard of proof under article 101(3), it does not recognise any autonomy in the member states to determine the nature of the evidence required to satisfy that standard. The outcome on this issue, therefore, does not depend on Visa and Mastercard upholding national procedural rules about the standard of proof but on whether EU law imposes requirements as to what type of evidence is capable of discharging that burden.

116. It is clear, in our view, that article 101(3) does impose requirements as to the nature of the evidence which is capable of discharging the burden on an undertaking to establish an exemption under that provision. Section 60 of the 1998 Act imports these requirements into domestic competition law. Article 101(3) is founded on the notion that notwithstanding the existence of a restriction on competition and its likely negative effect on competition and consumers, efficiencies and benefits arising from the conduct which gave rise to the restriction may, nevertheless, justify exemption from the prohibition in article 101(1). This is an inherently empirical proposition and necessarily requires the authority or court addressing the issue to carry out a balancing exercise - a "complex assessment" (*GlaxoSmithKline*, Court of First Instance, at paras 241, 304 and 307) - involving weighing the pro-competitive effect against the anti-competitive effect of the conduct in question. Cogent empirical evidence is necessary in order to carry out the required evaluation of the claimed efficiencies and benefits. To the extent that objective efficiencies caused by a restriction cannot be established empirically, they cannot be balanced with the restrictive effects. As a result, although the standard of proof is a matter of domestic law, the nature of the evidence which will satisfy that standard must take account of the substantive requirements of article 101(3).

117. This view is confirmed by the practice of the Commission and the judgments of the EU courts.

118. The Guidelines were issued in 2004, in part to assist national courts and authorities in member states in undertaking what was for them the new role of applying article 101(3). The Guidelines are not binding but they are based on the experience and expertise of the Commission which had previously had sole responsibility for carrying out the balancing test and granting exemptions, and they provide an analytical framework for the application of article 101(3). In particular, they address (at paras 50 and 51) what is involved in identifying and evaluating the causal link between a restriction of competition and the creation of an efficiency and they cast light on this balancing exercise.

"50. The purpose of the first condition of [article 101(3)] is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of [article 101(3)]. The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies. Given that for [article 101(3)] to apply the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.

51. All efficiency claims must therefore be substantiated so that the following can be verified:

(a) The *nature* of the claimed efficiencies;

(b) The *link* between the agreement and the efficiencies;

(c) The *likelihood* and *magnitude* of each claimed efficiency; and

(d) *How* and *when* each claimed efficiency would be achieved." (Original emphasis)

This procedure requires the party seeking exemption to identify, substantiate and evaluate the claimed efficiencies and to verify their causal link with the anti-competitive conduct as a pre-condition to the balancing process which could not otherwise take place. There is a requirement for detailed, empirical evidence and analysis in order that this evaluative exercise can be carried out.

119. In its judgment in *GlaxoSmithKline* (which was upheld by the Court of Justice, Third Chamber, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P) [2009] ECR I-9291; [2010] 4 CMLR 2), the Court of First Instance (Fourth Chamber, Extended Composition) observed (at para 235) that a person seeking to rely on what is now article 101(3) must demonstrate that its conditions are satisfied, by means of convincing arguments and evidence. Referring to the reviewing jurisdiction of the Court of First Instance it noted (at para 242) that it is for the court to establish not only whether the evidence relied on is factually

accurate, reliable and consistent, but also whether it contains all the information which must be taken into account for the purpose of assessing a complex situation and whether it is capable of substantiating the conclusions drawn from it. With regard to the first condition it observed (at para 248):

> "It is therefore for the Commission, in the first place, to examine whether the factual arguments and the evidence submitted to it show, in a convincing manner, that the agreement in question must enable appreciable objective advantages to be obtained …" (See also paras 249, 263, 304, 307)

120. We are unable to accept the submission on behalf of Visa, that in *GlaxoSmithKline* the evidential basis for the application for article 101(3) which was accepted by the Court of First Instance was almost entirely theoretical and based on economic studies. Having referred (at para 235) to the need for convincing arguments and evidence to demonstrate that the conditions of article 101(3) were satisfied, the General Court referred (at para 256) to the "items of economic or econometric evidence submitted by GSK during the administrative procedure". The description of that material at paras 258 and 259 shows that it essentially comprised empirical evidence. The General Court observed (at para 263) that the factual arguments and the supporting evidence submitted by GSK appeared to be relevant, reliable and credible, having regard to their content which was corroborated in a number of significant aspects by documents originating with the Commission.

121. This approach was followed in the Mastercard Commission Decision. There, the Commission stated (at recital 671):

> "Given that for [article 101(3)] of the Treaty to apply the pro-competitive effects flowing from the agreement must outweigh anti-competitive effects, it is necessary to verify what the link between the agreement and the claimed efficiencies and what the value of these efficiencies are."

The Commission did not dispute that payment card schemes such as Mastercard's may represent, as such, economic and technical progress. However, it considered that the decisive question was whether the Mastercard MIF specifically contributed to that progress (at recital 679). In addressing Mastercard's "balancing of demand" arguments the Commission referred to the assumption underlying the Mastercard MIF that there was a perceived imbalance between the issuing and the acquiring business in the scheme. The Commission observed (at recital 686):

> "Also, an 'imbalance' between issuing and acquiring cannot be assumed on the basis of *cost* considerations only but has to comprise an analysis of *revenues* as well. A cost imbalance is as such no sufficient evidence to explain why MasterCard's MIF is always paid by the acquirer to the issuer, irrespective of the concrete market situation. If receipts (interests, money exchange fees, penalty fees, etc) or other monetary benefits (resulting from cost savings such as reduction of staff, paperwork etc) from payment card issuing provide sufficient commercial incentives for banks to invest in incremental card issuing, a transfer from acquiring to issuing may be superfluous and even counterproductive as the revenue transfer dampens card acceptance due to the increase of costs on the merchants' side. Robust empirical evidence is therefore required to establish the necessity for and the direction of a fallback interchange fee." (Original emphasis) (See also recital 720)

122. Similarly, in a section of the decision headed "Need for empirical evidence - No excessive burden of proof on MasterCard", the Commission explained (at recital 694) that Mastercard erred in its assertion that the Commission imposed an excessively high burden of proof on Mastercard if it required Mastercard to demonstrate empirically a causal link between the MIF and the actual effects on system output as well as the objective efficiencies that could result from increased system output. It continued (at recital 695):

> "It is on the undertakings in the first place to present to the Commission the evidence intended to establish that the agreement in question fulfils the conditions laid down by [article 101(3)] of the Treaty. In the context of the first condition it has to be ascertained that the restrictive effects are offset by efficiencies. In this context the undertakings concerned must demonstrate whether a MIF generates the positive effects which the underlying model claims to achieve, here: an increase of system output and possible related efficiencies. To the extent that objective efficiencies cannot be established empirically, they cannot be balanced with the restrictive effects. Some form of convincing empirical evidence on the actual effect of a MIF on the market is therefore required."

A footnote to the third sentence of recital 695 (footnote 840) reads:

> "Again, it should be noted that an increase in system output does not constitute an objective efficiency if the benefits of increased card usage only accrue to banks, while customers and merchants are worse off due to higher retail prices and increased merchant fees. Hence, evoking the maximisation of system output also requires a convincing analysis that consumers benefit from this."

123. On behalf of Visa and Mastercard it is submitted that these passages must be read in the context that the Commission was responding to the very different evidence put forward by Mastercard in that case, namely the Baxter framework, "a different, older and less sophisticated economic theory" which had been superseded by the work of Rochet and Tirole (discussed further in para 132 below). However, the Commission's statements at recitals 686 and 695 are general statements made before consideration of the Baxter framework which is introduced at recital 703. It is immediately preceded by the statement (at recital 702) that notwithstanding the lack of evidence to bolster Mastercard's efficiency claim, the Commission has also assessed the theoretic underpinnings of Mastercard's MIF.

124. Similarly, the schemes are not assisted by their reliance on the following passage at recital 731 of the Mastercard Commission Decision which, they maintain, describes the Commission's approach:

> "Contrary to MasterCard's perception the Commission's position is not that only the level of a MIF is a decisive criterion for assessing whether that MIF fulfils the first condition of [article 101(3)] of the Treaty. Rather, the existence of objective appreciable efficiencies is assessed in relation to the MIF as such, the effects it produces on the market and the manner in which it is set. In particular, the Commission verifies on the basis of the evidence submitted whether the model underlying a MIF is based on realistic assumptions (which is not the case here), whether the methodology used to implement that model in practice is objective and reasonable (which is not the case for the two methodologies used by MasterCard) and whether the MIF indeed has the positive effect on the market to the benefit of both customer groups which the model claims."

The Commission was not subscribing here to the view that convincing proof of efficiencies can be provided by economic modelling and assumptions alone. On the contrary, the Commission made abundantly clear the need for empirical evidence in the immediately preceding recital:

> "There is no presumption that MIFs in general enhance the efficiency of card schemes just as there is no presumption that they do not fulfil the conditions of [article 101(3)] of the Treaty and are therefore illegal. A MIF may be used by banks to achieve efficiencies as well as to extract rents. The Commission's conclusion on the efficiencies of a MIF will depend on the concrete evidence brought forward by the parties." (recital 730)

and the immediately following recital:

> "Any claim that a MIF creates efficiencies within the meaning of [article 101(3)] of the Treaty must therefore be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts. MasterCard has not provided such analysis and empirical evidence, …" (recital 732)

125. The appeal against the Commission decision was dismissed by the General Court in *Mastercard GC*. In those proceedings, Mastercard had complained that "an excessively high burden of proof" had been imposed on the applicants in relation to the conditions of what is now article 101(3) TFEU, whereas the Commission had been "required to analyse the arguments and the evidence adduced by reference to the balance of probabilities alone" (paras 194, 195 and 237). In rejecting this submission, the General Court observed (at para 196) that "a person who relies on [article 101(3)] must demonstrate that those conditions are satisfied, by means of convincing arguments and evidence". At a later point in the judgment the General Court observed:

> "232. So far as concerns the allegation relating to the lack of data capable of meeting the standard of economic proof demanded by the Commission, even if that were established, it does not mean that the burden of proof is eased, or even reversed, as the applicants seem to suggest. It must be observed that such a difficulty might be regarded as having resulted from the arguments developed by the applicants during the administrative procedure.
>
> 233. Thus, inasmuch as it is not possible to establish precisely the extent of the advantages that can be deemed to justify some financial compensation from merchants for the costs incurred by issuing banks, it is reasonable to conclude that

> it was for the applicants - in order to prove that the MIF satisfied the first condition laid down in [article 101(3), TFEU] - to identify the services provided by the banks issuing debit, charge or credit cards capable of constituting objective advantages for merchants. It was also for them to establish that there was a sufficiently clear correlation between the costs involved in the provision of those services and the level of the MIF. As regards the last point, it must be noted that those costs cannot be determined without taking into account other revenues obtained by issuing banks on the provision of those services or by including costs which are not directly linked to them."

This is entirely consistent with and supports our view that, in identifying what evidence may be required to discharge the burden on an undertaking claiming exemption under article 101(3), the Commission and the EU courts are not adjusting the standard of proof.

126. The decision of the General Court in *Mastercard GC* was upheld by the Court of Justice in *Mastercard CJ*. Before the Court of Justice, a plea contending that the General Court had failed to apply the correct standard of proof, ie the balance of probabilities, was held inadmissible. (See Advocate General Mengozzi at paras 136-149, *Mastercard CJ* at paras 209-219.)

127. It is noteworthy that both the General Court and the Court of Justice placed reliance on the authority of *GlaxoSmithKline*. The Court of Justice stated:

> "235. Next, the court notes that the examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, must be undertaken in the light of the factual arguments and evidence provided by the undertakings (see to that effect, in connection with a request for exemption under article 81(3) EC, judgment in *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (C 501/06 P, C 513/06 P, C 515/06 P and C 519/06 P) EU:C:2009:610, para 102).
>
> 236. Such an examination may require the nature and specific features of the sector concerned by the agreement in question to be taken into account if its nature and those specific features are

> decisive for the outcome of the analysis (see judgment in *GlaxoSmithKline Services*, EU:C:2009:610, para 103)."

128. In their written cases, Visa and Mastercard submit that there is no EU law that concerns the nature of the evidence required before national courts in order to satisfy the four conditions under article 101(3). In their submission, the EU has, by legislation, expressly deferred procedural autonomy to member states, not just in respect of the legal test for the standard of proof, but also in relation to the nature of evidence required to satisfy that domestic standard, subject only to the EU principles of equivalence and effectiveness. In our view, this submission is contradicted by authority and is simply wrong. While EU law has deferred to the law of member states in respect of the standard of proof under article 101(3), subject to the principles of equivalence and effectiveness, it clearly maintains its own requirements as to the type of evidence which may be capable of discharging the appropriate standard of proof. Moreover, those requirements cannot vary depending on whether EU competition law is being applied by EU courts or authorities or the courts or authorities of member states. As the Court of Appeal observed in the present case (at para 81), it is important to maintain a consistency of approach across member states as to the requirements of article 101(3). It should be noted, in this regard, that the Modernisation Regulation emphasises the importance of the effective and uniform application of competition law within the EU. (See recitals 1, 14, 17, 19, 21 and 22 and article 16.) In the same way, national courts are required by section 60(2) of the 1998 Act to ensure consistency in the application of article 101 with that of the General Court and the Court of Justice. In our view, EU law clearly requires an undertaking seeking exemption under article 101(3) to produce cogent empirical evidence in support of that claim.

129. Visa submits that, while in some cases it may be difficult to prove that a causal link is real without specific empirical evidence and data, it will depend on the particular circumstances of the case. In the present case, Visa submits, a judge would be entitled to conclude that nothing more is required than the expert evidence of economists to prove that an issuing bank which receives a payment on each card transaction undertaken by its customers will probably invest more to encourage its customers to engage in a greater number of such card transactions than it would do if it did not receive any such payments. This submission, however, grossly underestimates the complexity and subtlety of the balancing exercise required under article 101(3). In particular, as the AAM parties point out, an assessment of any benefits accruing to consumers and merchants from MIFs will depend on a range of factors including "issuer pass-through" (the extent to which issuing banks decide to recycle MIF revenues into promotional behaviour) and "always card transactions" (the extent to which cardholders alter their behaviour in the light of any incentives provided). Thus, in the present case the Court of Appeal correctly concluded (at para 88) that establishing the requisite causal link involves two critical stages: first that the default MIFs in each case incentivise the issuers to take steps they would not

otherwise have taken, and secondly that the steps taken did indeed increase card usage or increase the efficiencies of transactions which would have been card transactions anyway. (See also the judgment of Popplewell J at para 310 and the Visa exemption judgment of Phillips J at para 37.) Such factors must necessarily be taken into account in assessing whether appreciable objective advantages for consumers arise from the restriction in question so as to compensate for its competitive disadvantages. This process necessarily requires empirical evidence.

130. A further demonstration of the need for empirical evidence is provided by the General Court in *Mastercard GC* (at para 233) where it calls, inter alia, for a comparison between the cost of providing services from which merchants are said to benefit as a result of the MIF and the level of the MIF itself:

> "Thus, inasmuch as it is not possible to establish precisely the extent of the advantages that can be deemed to justify some financial compensation from merchants for the costs incurred by issuing banks, it is reasonable to conclude that it was for the applicants - in order to prove that the MIF satisfied the first condition laid down in [article 101(3)] - to identify the services provided by the banks issuing debit, charge or credit cards capable of constituting objective advantages for merchants. It was also for them to establish that there was a sufficiently clear correlation between the costs involved in the provision of those services and the level of the MIF. As regards the last point, it must be noted that those costs cannot be determined without taking into account other revenues obtained by issuing banks on the provision of those services or by including costs which are not directly linked to them."

131. Visa complains that the approach adopted by the Court of Appeal in this case is inconsistent with the object and purpose of the relevant legislation in that article 101 and the Chapter I prohibition under the 1998 Act apply to agreements between undertakings, or decisions of associations of undertakings, from the date that they are made and before they have been implemented and had any effect at all. As a result, it is submitted, the prohibition applies before empirical, real world evidence of the type demanded by the Court of Appeal can be available. Undertakings, it is said, must be able to make a realistic assessment, at the time of making their agreement, as to whether article 101(3) is satisfied or not and that can only be done with the best evidence that is reasonably available at the time. In our view, there is nothing in the Court of Appeal's approach which is inconsistent with the object and purpose of the legislation. Indeed, the answers advanced by the AAM parties are, in our view, compelling. First, the Guidelines state (at para 58) that, in cases where an agreement has yet to be fully implemented, "the parties must substantiate any projections as to the date from which the efficiencies will become operational so as

to have a significant positive impact in the market". (See also the General Court in *GlaxoSmithKline* at para 249.) Secondly, it is not the case that where, as in the present case, there is experience of restrictive measures over many years, the courts must disregard the evidence then available to them in assessing the issue of exemption. Thus, in *Krka Tovarna Zdravil d d v European Commission* (Case T-684/14) [2019] 4 CMLR 14, the General Court (Ninth Chamber) observed (at para 360), with regard to the assessment of distortion of competition under article 101(1) by comparison with the situation which would have existed but for the agreement:

> "It appears paradoxical - where the clauses of an agreement have been implemented and their impact on competition can be measured by taking into account the relevant factual developments, including those subsequent to the conclusion of the agreement, which took place before the Commission issued its decision - to allow the Commission to demonstrate merely the anticompetitive effects that such clauses are likely to have and, to that end, to make the comparison … without taking those developments into account."

132. Finally, in this regard, it is necessary to say something about the reliance placed by Visa and Mastercard on the "merchant indifference test" ("MIT"). The MIT, which is also known as "the tourist test", is an economic methodology developed by Professors Rochet and Tirole, initially in a paper published in 2008. It embodies the notion that there is a level of MIF which, when included in the MSCs paid by merchants, equalises the cost to merchants of accepting a scheme card with the cost of their accepting other methods of payment such as cash. If the MIT is set at that level, a merchant would be indifferent as to whether a one-off customer (such as a tourist) chooses to pay with cash or card, so long as he does not choose to shop elsewhere. If, however, it is set at a higher level, while a merchant could in principle be better off by refusing to accept scheme cards because other forms of payment would be cheaper, in reality, if he did so, he would probably lose sales to rivals who did accept them ("the business-stealing effect"). There are "must-take cards" that merchants cannot turn down. The MIT seeks to put an upper limit on MIFs so that the schemes are not able to exploit their market power over merchants in this way (Rochet and Tirole, Must-Take Cards: Merchant Discounts and Avoided Costs, (2011) Journal of the European Economic Association 9(3): 462 at 463). Visa and Mastercard rely on the MIT in two ways.

133. First, they submit that in the EU Interchange Fee Regulation 2015 (Regulation (EU) 2015/751 of the European Parliament and of the Council on Interchange Fees for Card-based Payment Transactions (OJ 2015 L123, p 1)) ("the IFR") the EU legislature has endorsed the MIT test as meeting the requirements of article 101(3). This is not correct. While the Commission and the European Parliament accepted the MIT for the purpose of setting a cap under the Regulation,

the Commission has consistently maintained that adoption of the MIT alone will not lead to automatic exemption. This is reflected in recital 10 of the IFR:

> "In addition to a consistent application of the competition rules to interchange fees, regulating such fees would improve the functioning of the internal market and contribute to reducing transaction costs for consumers."

and in recital 14:

> "The application of this Regulation should be without prejudice to the application of Union and national competition rules. It should not prevent member states from maintaining or introducing lower caps or measures of equivalent object or effect through national legislation."

In enacting the IFR, the Commission and the European Parliament were concerned with regulation and were not specifically addressing issues of EU competition law.

134. Secondly, Visa and Mastercard submit that the Commission has repeatedly taken into account a variety of forms of available evidence, including economic theory and in particular the MIT, when examining MIFs. In this regard, they rely in particular on a number of commitment decisions made under article 9 of the Modernisation Regulation. It is undoubtedly correct that the Commission has in these decisions had regard to the MIT as a proxy or a benchmark. However, it is important to bear in mind that these decisions are not instances of the application of article 101(3) but pragmatic means employed by the Commission to compromise outstanding investigations in return for commitments. As Mr Khan explained on behalf of the Commission, whereas an infringement decision adopted pursuant to article 7 of the Modernisation Regulation would have to include an assessment of any claim by the addressee that the agreement in issue qualified for an article 101(3) exemption, a commitment decision pursuant to article 9 does not include such an assessment. The essence of a commitment decision is that the Commission does not take a position on the existence of an infringement of article 101(1) TFEU, the approach being based on procedural economy. Moreover, the Commission has made clear that a MIF which satisfies the MIT will not automatically be considered compliant with what is now article 101(3). Thus, in its Memorandum of 1 April 2009 (Memo/09/143), at the time of accepting undertakings from Mastercard, it accepted that the MIT provides "a reasonable benchmark for assessing a MIF level that generates benefits to merchants and final consumers". However, it went on to point out that the general applicability of the test for the purposes of what is now article 101(3) "depends on the specifics of the markets at hand". Having listed some

"cautionary examples", it emphasised that where a MIF is restrictive, the parties to the agreement must demonstrate that the conditions under article 101(3) are met. It continued:

> "In this respect, there is a need to ascertain that the concrete model underlying a MIF is based on realistic assumptions, that the model is plausibly implemented through an objectively verifiable methodology and that the MIF indeed yields the objective efficiencies on the market which are claimed by the parties. The methodology underlying a MIF should be transparent to the final users of a scheme. However, if a card scheme wishes to pre-determine the fees merchants pay through a MIF, it must be aware that the burden of proof to demonstrate the fulfilment of the four conditions under [article 101(3)] lies upon the scheme and its members." (at pp 6-7)

135. There is a further and more fundamental reason why the MIT does not assist Visa and Mastercard on the present issue. It is not designed as a substitute for the balancing test as a means of establishing efficiencies and benefits under article 101(3). It is, rather, designed to meet the specific concern that merchants may be vulnerable because they are typically in a poor position to resist consumers who want them to accept cards in exchange for goods or services. As a result, the MIT seeks to ensure that the collective interchange fees do not rise above a level at which payment by card is more expensive for merchants than other methods of payment.

136. In a situation where a MIF satisfies the MIT and where the issuing bank recycles all of its MIF income to cardholders, there should be no net detriment to cardholders and merchants considered together. If, on the other hand, as in the present case, the issuer pass-through is less than 100% (ie the issuer retains a part of the MIF), there is likely to be a net loss to cardholders and merchants considered together. A net benefit could still arise in these circumstances, however, if the MIF revenue passed to cardholders caused them to make greater use of their cards, so that merchants were relieved of a sufficiently large number of transactions using a more expensive form of payment, with the result that the loss to cardholders and merchants considered together from reduced issuer pass-through was outweighed. Whether this in fact occurs will depend on the extent of issuer pass-through, the extent of always card transactions and the difference in cost for merchants between accepting a scheme card and an alternative form of payment. As Mr Jon Turner QC put it on behalf of the AAM parties, the theory of the MIT does not even purport to avoid the need to address such issues, which would be essential if an appropriate balancing exercise under article 101(3) were to be carried out. These are highly relevant matters that can be brought into account only on the basis of empirical evidence.

137. In the present case, the Commission intervened before the Court of Appeal and explained why Visa and Mastercard were wrong to suggest that the MIT had been treated by it as an appropriate basis for assessing the issue of exemption. We agree with the conclusion of the Court of Appeal (at para 109), accepting the submissions of the Commission, that the Commission regards the MIT as a useful starting point but not as a substitute for the facts of the case. It is not a silver bullet for Visa and Mastercard. In order to obtain exemption, they still have to back up any reliance on the MIT as a benchmark with robust analysis and cogent empirical evidence.

Conclusion on the standard of proof issue

138. For these reasons we dismiss the appeal on issue (ii).

Issue (iii) - The fair share issue

139. The third issue in the appeal is raised by Visa. It concerns the interpretation of article 101(3) TFEU, under which an agreement, decision or concerted practice which is restrictive of competition is exempted from the prohibition imposed by article 101(1) provided it satisfies certain conditions. The terms of article 101(3) have been set out at para 19 above. As described at para 107 above, four conditions must be met before an exemption can be granted. It is the second of those conditions which is here in issue, namely that consumers must receive a fair share of the benefits resulting from the restriction of competition.

140. The context in which that condition has to be considered in the present case includes the fact, explained in paras 15-16 above, that the Visa and Mastercard schemes operate in a "two-sided market". 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). The cardholders are the consumers in the issuing market. 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). Merchants are the consumers in the acquiring market. As has been explained, MIFs restrict competition in the acquiring market. They do not restrict competition in the issuing market.

The judgments at first instance

141. At first instance, Phillips J concluded in the Visa restriction judgment (wrongly, as we have held) that the MIFs did not infringe article 101(1), but went on in the Visa exemption judgment to consider whether, if that was incorrect, the

MIFs would have qualified for exemption under article 101(3). He concluded that they would not. That was because, in his opinion, they did not meet the first condition for exemption under article 101(3): it had not been proved that they produced any benefits. He nonetheless went on to consider the second condition at paras 53-64 of the Visa exemption judgment. He accepted Visa's argument, based on its analysis of the judgment in *Mastercard CJ*, particularly at paras 240-243 and 247, that for the purpose of deciding whether "consumers" received a fair share of the resulting benefits, it was necessary in the context of a two-sided market to consider the position of consumers in both markets as a whole. Benefits accruing to cardholders as a result of MIFs could therefore be taken into account in determining whether the benefits at least equalled the disadvantages. He considered that there must, however, be at least some objective advantages for merchants, even if they were less than the burden they suffered. On that interpretation, the second condition could be satisfied even if merchants were worse off as a result of MIFs, provided they received some objective advantages, and the benefits to cardholders and merchants, considered in aggregate, outweighed the disadvantages. However, given his finding that no benefits were generated by MIFs, it followed that that requirement was not met.

142. Phillips J's analysis differed in important respects from that adopted by Popplewell J in the AAM proceedings. Like Phillips J, he considered that the MIFs were not prohibited by article 101(1), but went on to consider whether, if that was incorrect, they would qualify for exemption under article 101(3). He concluded that they would, applying what we have held to be an incorrect approach to the standard of proof. In relation to the first condition, he accepted at para 278 that, in a two-sided market such as the Mastercard scheme, the relevant consumers included cardholders as well as merchants, and that the relevant benefits were not, therefore, confined to those arising on the acquiring market. When it came to the second condition, however, since merchants were the consumers who were adversely affected by the restriction of competition caused by MIFs, he concluded at paras 280-287 that the "fair share" requirement would not be met unless, as a minimum, they obtained benefits from MIFs which matched the anti-competitive disadvantages which MIFs imposed on them. In addition, he considered that the MIFs must not generate unduly high profits for issuers: para 287. On the facts, he concluded at para 409 that those requirements were met, again applying a standard of proof which we have held to be mistaken.

143. In the CAT proceedings, it was found on the evidence that Mastercard's MIFs infringed article 101(1) and did not result in any benefits. Accordingly, the first condition under article 101(3) was not met, and the question whether consumers received a fair share of any benefits did not arise.

The judgment of the Court of Appeal

144. Before the Court of Appeal, Sainsbury's challenged Phillips J's interpretation of the second condition, while Visa maintained that it was correct. Popplewell J's analysis was not challenged. The court carefully considered the relevant sections of *Mastercard GC* and *Mastercard CJ* at paras 96-104 of its judgment. It interpreted paras 240-243 and 247 of *Mastercard CJ*, in particular, as meaning that in applying both the first and the second conditions in a situation where the restriction affects two markets, if the restriction causes disadvantages overall to the consumers in the market under consideration (here the merchants in the acquiring market), those disadvantages cannot be compensated by advantages to consumers in the other market (here the cardholders in the issuing market), unless the two groups of consumers are substantially the same; which is not the position in this case. In the Court of Appeal's view, the consumers in the relevant market, here the merchants, would only receive a fair share of the benefits if the advantages to them caused by the restriction outweighed the disadvantages, so that they were no worse off. The Court of Appeal therefore concluded that Popplewell J's analysis of the law was correct, and Phillips J's was wrong.

The parties' arguments on the present appeal

145. In its appeal to this court, Visa challenges the decision of the Court of Appeal and argues that Phillips J's analysis of the second condition was correct. As will be explained in greater detail, it maintains, in particular, that the issue was considered and decided, in the manner for which it contends, in *Mastercard CJ*, particularly at paras 241 and 247. All parties agree that the question as to how the second condition should be applied in the context of two-sided markets is a question of EU law, which has to be answered by considering the relevant jurisprudence of the CJEU.

The Mastercard Commission Decision

146. It is best to begin by considering the Mastercard Commission Decision, which was the subject-matter of the judgments of the General Court and the Court of Justice in *Mastercard GC* and *Mastercard CJ* respectively. The Commission concluded at recital 733 that the Mastercard MIFs did not meet the first condition of article 81(3) of the EC Treaty (now article 101(3) TFEU). When it went on to consider the second condition, it stated at recitals 740 to 742:

> "740. There is no reason to assume from the outset that an interchange fee paid by acquirers to issuers increases the utility of the payment card system to [both] groups of consumers

> alike. The Commission does not dispute that *merchants may benefit through enhanced network effects from the issuing side, but this does not necessarily offset their losses* which result from paying inflated merchant fees. In setting a MIF the member banks of a card scheme must guarantee a fair share of the benefits to [all] customers, not only to those that are on the side of the scheme which receives the MIF. In a scheme where the MIF is paid by the acquirer to the issuer, *the efficiencies must in particular counterbalance the restrictive effects to the detriment of merchants* (and subsequent purchasers). MasterCard has not submitted evidence in this respect.
>
> 741. The Commission has therefore reviewed the methodologies which MasterCard uses as 'starting point' for setting the level of the Intra-EEA fallback interchange fees. It … can be left open in this case whether cardholders sufficiently benefit from MasterCard's MIF. The Commission's concerns under the second condition of article 81(3) of the Treaty in this decision relate to the customer group which bears the cost of the MIF, that is the merchants.
>
> 742. *While merchants may benefit through enhanced network effects from the issuing side, this does not necessarily offset their losses* which result from paying inflated merchant fees." (Emphasis added)

The Commission concluded at recital 743 that "without further evidence - which Mastercard failed to submit - it cannot safely be assumed that … Mastercard is creating objective efficiencies that benefit *all* customers, including those that bear the cost of its MIF (merchants and subsequent purchasers)" (emphasis in original).

147. It is apparent from the foregoing, and perhaps especially from the passages which we have italicised in recitals 740 and 742, that the Commission proceeded on the basis that, in order for the second condition to be satisfied, it was necessary that the consumers who suffered the losses resulting from the restrictive agreement - that is to say, the merchants - must have those losses offset or counterbalanced by benefits enjoyed by themselves.

The Guidelines

148. That approach was consistent with the Guidelines. Under the heading of "General principles", they state at para 43:

> "… [T]he condition that consumers ([55]) must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market ([56]). Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same ([57])." (Emphasis added)

That analysis also underpins the discussion of the second condition in paras 85-86 of the Guidelines.

149. The case law on which para 43 is based is cited in the footnotes. Footnote 56 refers to the judgment of the Court of First Instance in *Shaw v Commission of the European Communities* (Case T-131/99) [2002] ECR II-2023, para 163, where the court observed that the assessment of countervailing benefits under article 81(3) EC had to be made within the same analytical framework as that used for assessing the restrictive effects.

150. Footnote 57 refers to the judgment of the Court of First Instance in *Compagnie Générale Maritime v Commission of the European Communities* (Case T-86/95) [2002] ECR II-1011. The case concerned a price-fixing agreement relating to inland transport services provided to shippers by maritime carriers as part of intermodal transport. The alleged benefits relied on by the parties to the agreement related to maritime transport services provided to shippers by the same companies. The court stated at para 343:

> "For the purposes of examining the merits of the Commission's findings as to the various requirements of article 85(3) of the [EEC] Treaty and article 5 of Regulation 1017/68 [which

> applied competition rules to the transport sector], regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, namely that for inland transport services provided as part of intermodal transport, but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement. Both article 5 of Regulation 1017/68 and article 85(3) of the Treaty envisage exemption in favour of, amongst others, agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market."

151. That passage is expressed in wide terms. However, the last sentence is plainly concerned with the first condition of article 85(3) EEC (equivalent to article 81(3) EC and article 101(3) TFEU), and the passage as a whole responds to a criticism of the Commission's approach to the first condition: see para 305 of the judgment. In addition, on the facts of the case, the consumers in both markets were substantially the same. In those circumstances, it would be unsurprising if the benefits accruing to the same consumers in both markets were aggregated for the purpose of assessing compliance with article 85(3). The Court of First Instance subsequently made a similar observation in *GlaxoSmithKline* at para 248, again in the context of a challenge to the Commission's application of the first condition.

152. The Guidelines are not legally authoritative, but they form an important element of the decentralised system for the enforcement of competition law established by the Modernisation Regulation. National authorities and courts are expected to take due account of them in accordance with their duty of sincere cooperation: see the Opinion of Advocate General Kokott in *Expedia Inc v Autorité de la concurrence* (Case C-226/11) EU:C:2012:544, points 37-38.

Mastercard GC

153. When the Mastercard Commission Decision was challenged before the General Court, it was argued, in relation to the first condition in article 81(3) EC, that the Commission had failed to take into account the positive effects of the MIFs on the issuing market. In response, the General Court stated at paras 228-229:

> "228. … [I]t is indeed settled case law that the appreciable objective advantages to which the first condition of article 81(3) EC relates may arise not only for the relevant market but

> also for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement *(Compagnie Générale Maritime v Commission of the European Communities* (T-86/95) [2002] ECR II-1011 at para 343, and *GlaxoSmithKlineServices* (T-168/01) [2006] ECR II-2969 at para 248). However, as merchants constitute one of the two groups of users affected by payment cards, the very existence of the second condition of article 81(3) EC necessarily means that the existence of appreciable objective advantages attributable to the MIF must also be established in regard to them.
>
> 229. Therefore, in the absence of such proof, the applicants' criticism that insufficient account was taken of the advantages of the MIF for cardholders is, in all events, ineffective."

154. It appears from the last sentence of para 228 that the General Court considered that it was essential, in order to satisfy the second condition of article 81(3), to prove that merchants benefited from appreciable objective advantages which were attributable specifically to the MIFs. The court seemingly inferred that the advantages with which the first condition was concerned must, therefore, include appreciable objective advantages for merchants. In the absence of proof of such advantages, the criticism that the Commission had taken insufficient account of the advantages for cardholders went nowhere, as the court indicated at para 229.

155. The General Court went on to state at para 233 that it was for the applicants (Mastercard and other financial institutions), in order to prove that the MIF satisfied the first condition, to identify the services which were capable of constituting objective advantages for merchants, and that there was a clear correlation between the costs involved in the provision of those services and the level of the MIF. Since that had not been done, it followed that the challenge to the Commission's reasoning in relation to the first condition must be rejected: para 236. Since the first condition was not satisfied, there was no need to examine the other aspects of the Commission's analysis: ibid.

Mastercard CJ

156. On further appeal to the Court of Justice, it was argued that the General Court had erred in focusing on the benefits to merchants, despite recognising in para 228 that advantages could be taken into account for any market that benefited from the

existence of the agreement in question. The General Court had thus wrongly ignored, it was argued, the significant advantages which the Mastercard system and the MIF were said to bring about for cardholders.

157. That argument, so far as it bore on the second condition, was considered in the Opinion of Advocate General Mengozzi. He identified the question of law arising from the argument in relation to the second condition:

> "AG154. The point of law underlying that complaint is therefore whether, in order for the exemption provided for in article 81(3) EC to be applicable in such a context, it is necessary that the fair share of the profit resulting from the advantages arising from the agreement, as provided for in article 81(3) EC, be reserved for the direct consumers of the services provided on the market on which the restrictive effects for competition are produced - in this case, in particular, merchants - or whether it can be considered that the restrictive effects harming those consumers may be compensated by the advantages produced for consumers of the services provided on a related market, namely, in this case, cardholders."

158. The Advocate General's answer to that question was that the restrictive effects harming merchants could not be compensated by the advantages produced for cardholders: in order to satisfy the second condition, merchants themselves must receive a fair share of the benefits resulting from the restrictive agreement.

159. He began his reasoning on this point by making some general points about the second condition:

> "AG155. It should be borne in mind, as a preliminary point, that the second condition in article 81(3) EC requires that, in order for a restrictive agreement to benefit from the exemption provided for in that provision, consumers must be allowed a fair share of the resulting benefits.
>
> AG156. In that regard, it should be observed, first, that *the consumers referred to in that provision must be considered to be the direct or indirect consumers of the goods or services covered by the agreement*. Secondly, it is apparent from consistent case law that, in order for an agreement restrictive of competition to be capable of being exempted under article

> 81(3) EC, the appreciable objective advantages created by that agreement must be of such a character as to compensate for the disadvantages which they cause for competition. It may be inferred from that case law that, *in order for a restrictive agreement to be able to benefit from the exemption, the advantages resulting from that agreement must ensure that consumers are compensated in full for the actual or probable adverse effects that they must bear owing to the restriction of competition resulting from the agreement*. In other words, the benefits arising from the restrictive agreement must counterbalance its negative effects." (Emphasis added)

160. It followed from the points which we have italicised that, in order for the second condition to be satisfied, the disadvantages suffered by consumers in the market where competition was restricted must be counterbalanced by advantages benefiting the same consumers, as the Advocate General went on to explain:

> "AG157. To my mind, however, that compensation must apply to consumers who are directly or indirectly affected by the agreement. It is the consumers that suffer the harm caused by the restrictive effects of the agreement at issue that must, in principle, be allowed, as compensation for that harm, the fair share of the benefit resulting from the agreement referred to in article 81(3) EC."

161. Furthermore, as the Advocate General explained, the contrary view would result in competition authorities favouring one category of consumers at the expense of others, something which was no part of the function of competition law:

> "AG158. In fact, if it were possible to take into consideration the advantages resulting from an agreement for *one* category of consumers of certain services in order to counterbalance the negative effects on *another* category of consumers of other services on a different market, that would amount to allowing the former category of consumers to be favoured to the detriment of the latter category. However, distributive logic of that type seem[s] to me, in principle, to have no connection with the practical scope of competition law. Competition law is intended to protect the structure of the market, and thus competition, in the interest of competitors and, ultimately, consumers in general. Conversely, it is not intended to favour one category of consumers to the detriment of a different category." (Emphasis in original)

162. In its judgment, the Court of Justice noted at para 208 that the General Court had rejected the submission that the Commission had erred in applying the first condition of article 81(3) EC, rendering further analysis unnecessary. The Court of Justice then focused in its own judgment on the first condition rather than the second. It characterised the challenge to the reasoning of the General Court at para 228 as "raising in essence the question as to which markets may be regarded as generating the objective advantages that may be taken into account for the purposes of the analysis of the first condition".

163. In the course of its discussion of whether the first condition was met, the court explained at para 234 that "the improvement, within the meaning of the first condition laid down in article 81(3) EC … must in particular display appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition". It added at para 237 that, in the case of a two-sided system such as the Mastercard scheme, in order to assess whether the first condition was met, it was necessary to take into account, where appropriate, all the objective advantages flowing from the restrictive measure in both markets, and to assess whether the advantages were of such a character as to compensate for the disadvantages which the measure entailed for competition.

164. The court then stated at paras 240 and 241:

> "240. In particular, as regards the argument … that the General Court did not take into account the advantages flowing from the MIF for cardholders, it must be held that … the General Court was, in principle, required, when examining the first condition laid down in article 81(3) EC, to take into account all the objective advantages flowing from the MIF, not only on the relevant market, namely the acquiring market, but also on the separate but connected issuing market.
>
> 241. It follows from this that, should the General Court have found that there were appreciable objective advantages flowing from the MIF for merchants, even if those advantages did not in themselves prove sufficient to compensate for the restrictive effects identified pursuant to article 81(1) EC, all the advantages on both consumer markets in the MasterCard scheme, including therefore on the cardholders' market, could, if necessary, have justified the MIF if, taken together, those advantages were of such a character as to compensate for the restrictive effects of those fees."

165. In the present appeal, Visa relies on para 241, which it describes as crucial to its argument. That paragraph is, however, concerned with the first condition of article 81(3), not the second. It is also qualified by the proviso contained in its final words: "if, taken together, those advantages were of such a character as to compensate for the restrictive effect of those fees". That proviso was not satisfied in the case before the Court of Justice, as it explained in para 242:

> "However, as is recalled in para 234 of the present judgment, examination of the first condition laid down in article 81(3) EC raises the question whether the advantages derived from the measure at issue are of such a character as to compensate for the disadvantages resulting therefrom. Thus, *where, as in the present case, restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot, in themselves, be of such a character as to compensate for the disadvantages resulting from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market*, in particular, as is apparent from paras 21 and 168 to 180 of the judgment under appeal, where the consumers on those markets are not substantially the same." (Emphasis added)

166. The passage which we have italicised makes it clear that in a situation where the disadvantages resulting from a restriction of competition are felt on only one side of a two-sided market - which is the position in this case - then the advantages on the other market cannot be taken into account for the purposes of the first condition of article 81(3) EC (or article 101(3) TFEU), in the absence of particular circumstances justifying such a course (as where the consumers in both markets are substantially the same), unless it has been proved that the restrictive measure also causes appreciable objective advantages in the market where the restrictive effects are felt. Since no such advantages had been proved in the case before the court, it followed that the first condition was not satisfied.

167. That was confirmed by the court in para 243:

> "In the present case, and without any distortion having been claimed in that regard, the General Court concluded in para 226 of the judgment under appeal that there was no proof of the existence of objective advantages flowing from the MIF and enjoyed by merchants. In those circumstances, it was not necessary to examine the advantages flowing from the MIF for

> cardholders, since they cannot, by themselves, be of such a character as to compensate for the disadvantages resulting from those fees. The General Court was therefore fully entitled to find, in para 229 of the judgment under appeal, that 'the [appellants'] criticism that insufficient account was taken of the advantages of the MIF for cardholders is, in all events, ineffective'."

168. The court went on to state in para 247, in the other passage relied on by Visa in the present appeal:

> "As regards the appellants' argument that the General Court did not explain why the first two conditions in article 81(3) EC could not be satisfied on the basis only of the advantages the MIF produce for cardholders, it is sufficient to refer to paras 240 to 245 of the present judgment."

169. Visa submits that, in that paragraph, the court clarified that the analysis in paras 241-243 of its judgment, which had been expressed by reference to the first condition, also applied to the second. In our opinion, there is no warrant for that interpretation of para 247. The court had previously explained in paras 240-245 why the challenge to the General Court's conclusion in respect of the first condition was rejected. The court had not said anything about the second condition. The way in which the "fair share" requirement should be applied in a situation where the restrictive effects were felt on only one side of a two-sided market had not received any consideration. All that the court said in substance, in para 247, was that it had already explained, in its discussion of the first condition, why the first two conditions could not be satisfied on the basis only of the advantages which the MIF produced for cardholders. As the court had already noted at para 208, where it cited para 236 of the judgment of the General Court, where the first condition was not satisfied, there was no need to examine the other aspects of article 81(3).

170. If Visa's argument were correct, the Court of Justice would effectively have treated the first and second conditions of article 81(3) as interchangeable: both could be satisfied by the same aggregation of the benefits on both sides of a two-sided market, and the second condition would add nothing to the first. They are, however, essentially different. The second condition adds a distinct requirement of "fairness" to the considerations of economic efficiency with which the first condition is primarily concerned. Consideration of aggregate efficiency gains across different markets may well be relevant to the first condition, in situations where restrictive measures have effects in more than one market, but they cannot ordinarily be determinative of the question, under the second condition, whether a "fair share" of those gains has accrued to the consumers affected by the restriction of competition.

Conclusions on the fair share issue

171. It follows that the Court of Appeal arrived at the correct decision on this point, albeit by reasoning which was not precisely the same as that set out above. We therefore dismiss the appeal on issue (iii). Having reached that clear conclusion, it is unnecessary, and would be inappropriate, for this court to make a reference to the CJEU merely for the purpose of obtaining its clarification of the effect of the second condition in article 101(3) TFEU. It may, however, be helpful if, in addition to rejecting Visa's argument, we provide some positive guidance, based upon our own understanding of the EU materials, while recognising that it lacks the authority accorded by EU law to a judgment of the CJEU.

172. The second condition in article 101(3) arises only if the first condition is satisfied. In order to meet the requirements of the first condition, in a situation where there is a two-sided market and the restrictive effects of the measure in question are experienced by consumers in only one of those markets, and where the consumers in both markets are not substantially the same, it has to be proved (1) that the measure causes appreciable objective advantages for consumers in the market where the restrictive effects are felt, and (2) that the objective advantages caused by the measure for consumers in both markets, taken together, compensate for the disadvantages which the measure entails for competition: see paras 240-242 of *Mastercard CJ*.

173. If the first condition is satisfied, and the second condition then has to be considered, the best available guidance from the CJEU as to how it should be applied in the context of a two-sided market is the Opinion of Advocate General Mengozzi in *Mastercard CJ*, the matter not having been considered by the Court of Justice in its judgment in that case, or by the General Court in *Mastercard GC*. The Advocate General's reasoning in point 156 of his Opinion can be summarised in the following propositions:

> (1) The "consumers" referred to in the second condition are the direct or indirect consumers of the goods or services covered by the measure: here, the merchants.
>
> (2) Those consumers must be compensated in full for the adverse effects that they bear owing to the restriction of competition resulting from the measure.

174. That reasoning is consistent with the Guidelines. It also reflects the language of the second condition. The merchants are the consumers of the services which are

subject to the restriction of competition, and are therefore the consumers which the second condition is presumably intended to protect. If the merchants are not fully compensated for the harm inflicted on them by the restrictive measure, it is difficult to see how they can be said to receive a "fair" share of the resultant benefits. As the Advocate General indicated at point 158 of his Opinion, it is not the purpose of competition law to permit anti-competitive practices to harm consumers in one market for the sake of providing benefits to those in another.

Issue (iv) - The broad axe issue

175. This issue is concerned with the degree of precision that is required in the quantification of mitigation of loss where a defendant to a claim for damages arising out of a breach of competition law asserts that the claimant has mitigated its loss through the passing on of all or part of an overcharge to its customers.

176. Mastercard raises this issue, which relates to a passage in the judgment of the Court of Appeal (para 331) in which the court rejected the submission that the "broad axe" principle of establishing recoverable loss "applies to the burden on Mastercard to establish <u>the fact and amount</u> of pass-on by Sainsbury's" (emphasis added). The court continued:

> "The broad axe principle is applicable where the claimant has suffered loss as a result of the defendant's culpable conduct but there is a lack of evidence as to the amount of such loss. There is no scope for the application of any such principle where the burden lies on the defendant to establish a pass-on of the unlawful overcharge in order to reduce the amount recoverable by the claimant."

The broad axe issue which is said to arise out of this statement is: "Did the Court of Appeal find, and if so, did it err in law in finding, that a defendant has to prove the exact amount of loss mitigated in order to reduce damages?".

177. The Court of Appeal's statement is part of its discussion of a ground of appeal based on the assertion that the CAT had been inconsistent in rejecting Mastercard's case that the merchants had mitigated their loss by pass-on while making an allowance, when awarding compound interest, for pass-on, which it estimated at 50% of the claimed loss (paras 320-342). Mastercard has not renewed that submission in these appeals, but, as we explain below, the debate around this issue widened in the course of the hearing.

178. The Court of Appeal's statement, which is the subject matter of this issue, must not be read in isolation. In the following paragraph (para 332) the court stated:

> "On the other hand, we accept Mr Hoskins's submission that in each case it is a matter for the judge to decide whether, on the evidence before her or him, the defendant can show that there is a sufficiently close causal connection between an overcharge and an increase in the direct purchaser's price. We see no reason why that increase should not be established by a combination of empirical fact and economic opinion evidence. It is not appropriate for us on these appeals to be more specific as to the nature and type of evidence capable of satisfying a trial judge that there is a sufficiently close causal connection."

It is therefore clear that the Court of Appeal was not excluding any form of evidence as relevant to the establishment of pass-on, but was drawing a distinction between the degree of precision in quantification required of the defendant pleading pass-on in mitigation of loss and that which was required of the victim of the wrong in establishing its claim. The questions which arise are whether there is a requirement in European law or otherwise a basis in principle for that distinction.

179. Mastercard's stance at the hearing before this court was that it has to prove that the merchants passed on some of the overcharge to their customers but that having done so, the quantification of the extent of the pass-on did not have to be precise where such precision could not reasonably be achieved. The court, having regard to all of the evidence, could and should estimate the extent of the pass-on in order to give adequate compensation to the claimant and avoid over-compensation. Mastercard accepts that at the trial before the CAT of Sainsbury's claim against it, which covered quantification as well as liability (see para 28 above), it had not succeeded in proving that the overcharge had caused Sainsbury's to raise the prices which it charged its customers. The matter is closed in that dispute but it remains a live issue in relation to other claims.

180. The scope of the issue expanded as a result of exchanges with the bench during the hearing of the appeal. On the invitation of the court, Mastercard and Visa made further written submissions on the burden of proof. They argue that the legal burden lies on the claimant to prove its loss in the form of lost profits, that no question of mitigation of loss arises, and that there is no burden on the defendants in relation to the quantification of the merchants' claims resulting from the pass-on of the overcharge. AAM and Sainsbury's have lodged written submissions in reply.

181. In addressing the issue and these submissions, we examine, first, the requirements of EU law in relation to the claims for damages which the merchants advance; secondly, (in order to determine whether there is a question of mitigation of loss) whether the merchants are entitled in law to use the overcharge which is included in the MSC as the prima facie measure of their losses; thirdly, the burden of proof in the assessment of the damages due to the claimants; and, fourthly, the question of the degree of precision required in establishing the likely extent of any pass-on.

The requirements of EU law

182. The claims of the merchants in these appeals are for damages for loss caused to them by the tortious acts of the operators of the payment card schemes in breach of their statutory obligations under the 1998 Act. It is not in dispute, as we discuss below, that the fundamental principle underlying the merchants' claims is that the damages to which they are entitled are compensatory; the merchants are entitled to be placed, so far as money can achieve that, in the position which they would have been in but for the tortious acts which have caused them loss.

183. Most of the case law of the CJEU, to which both the CAT and the Court of Appeal have referred, concerns claims for restitution arising from illegally levied taxes and similar charges such as occurred in the classic case of *Amministrazione delle Finanze dello Stato v San Giorgio SpA* (Case 199/82) [1983] ECR 3595. In those cases, the CJEU recognised the right of the defendant to meet the claim for restitution with the defence of pass-on so that the claimant would not be unjustly enriched. The CJEU analysed the defence as an exception to the principle that taxes incompatible with EU law must be reimbursed: *Société Comateb v Directeur Générale des Douanes et Droits Indirects* (Joined Cases C-192/95 to C-218/95) [1997] ECR I-165; [1997] STC 1006, para 21. The CJEU has limited the scope of that defence; it requires that the defence be interpreted strictly because it operates as a restriction upon the EU right to repayment of the unlawfully levied taxes. There can be no presumption that the unlawful charges have been passed on. Whether there has been a pass-on is a question of fact to be established on evidence adduced before the national court: *Société Comateb* (above) para 25; *Weber's Wine World Handels-GmbH v Abgabenberufungskommission Wien* (Case C-147/01) [2005] All ER (EC) 224; [2003] ECR I-11365; [2004] 1 CMLR 7, paras 93-97. The direct pass-on of a wrongly-levied tax is the sole exception to the right of reimbursement: *Lady & Kid A/S v Skatteministeriet* (Case C-398/09) [2012] All ER (EC) 410; [2011] ECR I-7375; [2012] 1 CMLR 14, paras 20 and 26. In that case, the Court of Justice rejected an argument that the taxpayer would be unjustly enriched by repayment of an unlawful levy because the taxpayer would have benefited from the concomitant abolition of other levies charged on a different basis. The benefit of the saving arising from the abolition of the other levies could not be regarded as unjust

enrichment in EU law and could not be set off against the burden of the unlawful levy: para 26.

184. No challenge is or can be made in relation to those judgments. But these appeals are not concerned with the EU rules on the reimbursement of unlawfully levied charges. They are concerned with claims for damages for losses incurred as a result of breaches of competition law. It is necessary to consider what EU law requires in relation to such claims.

185. The CJEU recognises that the ability of persons, who have suffered loss by the anti-competitive practices of others, to obtain damages in the courts of member states by the application of the rules of national law makes an important contribution to the maintenance of effective competition in the EU: *Courage Ltd v Crehan* (Case C-453/99) [2002] QB 507, paras 26-27.

186. In para 29 of that judgment the Court of Justice sets out the essential requirements which are to govern actions in national courts for damages for breach of EU competition law. It states:

> "[I]n the absence of Community rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness): see *Palmisani v Istituto Nazionale della Previdenza Sociale* (Case C-261/95) [1997] ECR I-4025, 4046, para 27."

187. In para 30 of its judgment, the Court of Justice confirmed that Community law does not prevent national courts from taking steps to ensure that the protection of rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them. It refers in support of this principle to, among others, *Hans Just I/S v Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] ECR 501, 523, para 26. *Hans Just* is a case about the unlawful imposition of excise levies on imports, and in para 26 of that case the Court of Justice stated:

> "There is nothing therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers."

In our view the reference in *Courage Ltd* to that paragraph in the *Hans Just* judgment is a recognition of the possibility and relevance of pass-on. It is not an oblique incorporation of any other rules concerning the right of a taxpayer to obtain restitution of taxes levied in breach of EU law, which is a claim with a different legal basis.

188. In relation to claims under national law for damages for breach of the statutory rules of competition law, the requirements of EU law are that a member state can lay down procedural rules governing actions which safeguard such rights derived from EU law, provided that the rules comply with the principle of equivalence and the principle of effectiveness: *Courage Ltd* (above) paras 29-30. We are not concerned on these appeals with the principle of equivalence. The only constraint on national law at the relevant time therefore was the principle of effectiveness which requires that the rules of domestic law do not make it practically impossible or excessively difficult to exercise rights guaranteed by EU law. The court must therefore give effect to the rules of English law governing claims for damages for breach of statutory duty unless those rules were to conflict with the principle of effectiveness.

189. It is therefore a question of fact in each case, which the national court must resolve on the evidence adduced before it, whether an overcharge resulting from a breach of competition law has caused the claimant to suffer loss or whether all or part of the overcharge has been passed on by the claimant to its customers or otherwise mitigated. The principle of effectiveness applies to the procedural and evidential rules by which the court determines whether and to what extent the claimant has suffered loss.

190. On 9 March 2017, the United Kingdom implemented Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (OJ 2014 L349, p 1) ("the Damages Directive") by bringing into effect Schedule 8A to the 1998 Act (as inserted by Schedule 1 to the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385)), which in paragraph 11(2) imposes on the defendant the burden of proving that the claimant has passed on an overcharge

resulting from an infringement of competition law, and the extent to which the claimant did so. But we are not concerned with this provision because the substantive provisions of the Damages Directive are not retrospective and the other provisions do not apply to cases of which a court was seised before 26 December 2014: article 22. The merchants in these appeals each issued their claims before that date.

191. The Damages Directive does not govern these claims. Nonetheless, the Damages Directive casts some light on the pre-existing requirements of EU law, as recital 12 states that it reaffirms the acquis communautaire as to the right to compensation for harm caused by breach of EU competition law. We return to this when we discuss the degree of precision required of the defendant. Further, the Damages Directive has taken EU competition law in a radically different direction from the federal law of the United States in its approach to pass-on. It leaves it to the English courts to apply the normal rules of English law on mitigation of damages, including the effect of pass-on.

The nature of the claims

192. The merchants' claims are for the added costs which they have incurred as a result of the MSC, which the acquiring banks have charged them, being larger than it would have been if there had been no breach of competition law. Sainsbury's claims damages measured by the difference between the sums which it paid the acquirers through the MSC and the sums which it would have paid if the acquirers' market had not been distorted by the MIF. Similarly, AAM's principal pleaded case is that they are entitled to recover the basic amounts by which they have been unlawfully overcharged with an alternative case that in so far as the unlawful overcharges have been passed on in their selling prices to their customers, they have suffered a loss of profit on the sales of the goods concerned through a reduced volume of sales.

193. In each case the merchants' primary claim of damages is for the pecuniary loss which has resulted directly from the breach of competition law by the operators of the schemes. That direct loss is prima facie measured by the extent of the overcharge in the MSC.

194. It is trite law that, as a general principle, the damages to be awarded for loss caused by tort are compensatory. The claimant is entitled to be placed in the position it would have been in if the tort had not been committed. A classic statement of this principle is that of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; (1880) 7 R (HL) 1, 7:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

See also *Watson, Laidlaw, & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18, 29 per Lord Shaw of Dunfermline, who spoke of the principle of "restoration"; *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649, paras 25-27 per Lord Reed.

195. In the United States, concerns about the complexity, uncertainty and cost of calculating the existence and effects of pass-on in federal anti-trust litigation have caused the US Supreme Court to exclude a defence of pass-on under federal law and to allow the claimant to use the amount of the overcharge as the basis of its claim in a treble-damage suit: *Hanover Shoe Inc v United Shoe Machinery Corpn* 392 US 481 (1968), 491-494 per White J.

196. By contrast, in the United Kingdom there is, as is well known, no entitlement to treble damages. Nor is there any exclusion of pass-on as an element in the calculation of damages and the normal rule of compensatory damages applies to claims for damages for breach of statutory duty: *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2009] Ch 390, 477, para 147 per Longmore LJ, pp 478-479, para 151 per Tuckey LJ; *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch); [2010] Ch 48, paras 36 and 37 per Sir Andrew Morritt C; *W H Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377; [2014] Bus LR 156, para 40 per Arden LJ. In this respect, English law and Scots law are consistent with EU law which now requires member states to ensure that there is a pass-on "defence": articles 12(2) and 13 and recital 39 of the Damages Directive. In the legal systems of the United Kingdom pass-on is an element in the quantification of damages rather than a defence in a strict sense. But so long as the UK's competition rules remain aligned to those of the EU, the pass-on of an overcharge remains a relevant factor in the assessment of damages.

197. There are sound reasons for taking account of pass-on in the calculation of damages for breach of competition law. Not only is it required by the compensatory principle but also there are cases where there is a need to avoid double recovery through claims in respect of the same overcharge by a direct purchaser and by subsequent purchasers in a chain, to whom an overcharge has been passed on in whole or in part.

198. The question then arises as to whether the merchants are entitled to claim as the prima facie measure of their loss the overcharge in the MSC which results from the MIF. The merchants say that they are so entitled because they have had to pay out more than they would have but for the anti-competitive practices of the schemes and so have suffered pecuniary loss. On the other hand, Visa in its supplementary written submissions submits that their claims are for pure economic loss and must be claims for the loss of the profit which they would have enjoyed but for the alleged wrongful act of the defendants.

199. We are satisfied that the merchants are correct in their submissions that they are entitled to plead as the prima facie measure of their loss the pecuniary loss measured by the overcharge in the MSC and that they do not have to plead and prove a consequential loss of profit. There are many circumstances, which are not confined to damage to property, in which the law allows the recovery of damages without regard to the claimant's profitability.

200. If a claimant suffers damage to property, such as a vehicle or a ship, as a result of the tortious actions of a defendant, it can claim as damages the diminution in value of the damaged property, usually measured by the cost of repairing the property, and consequential loss, such as the loss of use of the property while it was being repaired, without having to show that that expenditure diminished its overall profitability. See, for example, *Coles v Hetherton* [2013] EWCA Civ 1704; [2015] 1 WLR 160; *The London Corpn* [1935] P 70; *The World Beauty* [1970] P 144.

201. In a claim for contractual damages resulting from the failure of a supplier to deliver goods to a purchaser, the prima facie measure of damages is the difference between the market value of those goods and the contract price which the purchaser would have had to pay: *Garnac Grain Co Inc v H M F Faure & Fairclough Ltd* [1968] AC 1130, 1140 per Lord Pearson.

202. Where charterers of a vessel redelivered the vessel two years before the contractual date on which the charterparty ended, the court accepted the owner's claim for loss of profits from that charterparty during the remaining two years of the charterparty without having regard to the overall profitability of the claimant: *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2017] UKSC 43; [2017] 1 WLR 2581.

203. The effect of the breach on the overall profitability of the claimant in each case was not the relevant measure of damages.

204. Similarly, if a claimant incurs expenditure in replacing items which a supplier had failed to deliver, it is entitled to damages without having to show that the breach of contract adversely affected its overall profitability. An illustration of this is the judgment of Leggatt J in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm); [2016] 1 All ER (Comm) 675. The case concerned a claim for damages resulting from the defendant's (Koito's) breach of contract through the late delivery and failure to deliver aircraft seats to Thai Airways for use in new aircraft which they had purchased. Thai Airways, facing a shortage of aircraft to perform its planned services, leased three aircraft on short-term operating leases to cover the gap in capacity and ordered replacement seats for its new aircraft from another supplier. It claimed as damages the costs which it incurred in mitigating its loss and its principal claim was for the cost of leasing the replacement aircraft. Leggatt J held that Thai Airways was entitled to recover among other things, the costs of leasing the replacement aircraft for two years. Thai Airways did not attempt to base its claim on an estimate of a net loss of profits measured by the differential between what its overall profits would have been if Koito had performed its contractual obligations and the profits which Thai Airways actually made during the period of the leases of the replacement aircraft. Having regard to the complexity of the arrangements by which the airline sought to maximise the efficiency of the use of its aircraft, that calculation would have been extremely complex.

205. In the present appeals, the merchants by paying the overcharge in the MSC to the acquirers have lost funds which they could have used for several purposes. As sophisticated retailers, which obtain their supplies from many suppliers and sell a wide range of goods to many customers, they can respond to the imposition of a cost in a number of ways, as the CAT pointed out in paras 434 and 455 of its judgment. There are four principal options: (i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or (iv) the merchant can pass on the costs by increasing the prices which it charges its customers. Which option or combination of options a merchant will adopt will depend on the markets in which it operates and its response may be influenced by whether the cost was one to which it alone was subjected or was one which was shared by its competitors. If the merchant were to adopt only option (i) or (ii) or a combination of them, its loss would be measured by the funds which it paid out on the overcharge because it would have been deprived of those funds for use in its business. Option (iii) might reduce the merchant's loss. Option (iv) also would reduce the merchant's loss except to the extent that it had a "volume effect", if higher prices were to reduce the volume of its sales and thereby have an effect on the merchant's profits.

206. In our view the merchants are entitled to claim the overcharge on the MSC as the prima facie measure of their loss. But if there is evidence that they have adopted either option (iii) or (iv) or a combination of both to any extent, the compensatory principle mandates the court to take account of their effect and there will be a question of mitigation of loss, to which we now turn.

Mitigation and the burden of proof

207. Visa and Mastercard submit that the burden is on a claimant to prove its loss taking account of any pass-on. Visa presents the merchants' claims as claims for loss of profits. On this presentation, the claim for the overcharge incorporated in the MSC is a poor surrogate for loss of profits and must be reduced by any pass-on if it is to comply with the compensatory principle. Sainsbury's and AAM on the other hand submit that, as they have stated a prima facie case of their loss, it falls to the defendants to assert and prove that the merchants have mitigated their loss by passing on the relevant costs in the prices which they charged their customers.

208. There are two reasons why the merchants are correct in their submission that they do not have the legal burden of proving their loss of overall profits caused by the overcharge.

209. First, if the law were to require a claimant, which is a complex trading entity, to prove the effect on its overall profits of a particular overcharge, the claimant might face an insurmountable burden in establishing its claim. Were there to be such a domestic rule, it would very probably offend the principle of effectiveness. It is the duty of the court to give full effect to the provisions of article 101 by enabling the claimant to obtain damages for the loss which has been caused by anti-competitive conduct.

210. Secondly, an exclusive focus on the claimant's profits would result in it being undercompensated if the overcharge had caused it to forgo discretionary expenditure to develop its business which did not promptly enhance its profits (ie option (ii) in para 205 above).

211. We are also satisfied that the merchants are correct in their assertion that there is a legal burden on the defendants to plead and prove that the merchants have mitigated their loss. See for example, "*The World Beauty*", 154 per Lord Denning MR; *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778; [2016] 2 Lloyd's Rep 432, para 47 per Christopher Clarke LJ. The statement of the Court of Appeal in para 324 of its judgment in the present case is an accurate statement of English law:

> "Whether or not the unlawful charge has been passed on is a question of fact, the burden of proving which lies on the defendant … who asserts it."

But in the context of these appeals, as we discuss below, the significance of the legal burden should not be overstated.

212. In some cases of mitigation, the court is concerned with additional benefits which a claimant has gained from the mitigation action which it has taken. In such a case, it is for the defendant to show that the benefits should be set off against the prima facie claim of loss. For example, in *Thai Airways* (above) it fell to Koito to prove that the net benefits that the airline received as a result of leasing the replacement aircraft during the relevant period offset the losses which it suffered from the delayed entry into service of the aircraft for which Koito failed to supply the seats. Such cases raise delicate questions as to whether a benefit is sufficiently causally connected with the breach of contract or (in tort) the wrong or whether the benefit was the result of an independent commercial decision by the claimant.

213. In *Fulton Shipping* at para 30, Lord Clarke of Stone-cum-Ebony explained that there must be a sufficiently close link between the benefit and the loss caused by the wrongdoer: "The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation". In that case, by selling the vessel after the charterparty had been prematurely terminated the owners avoided a substantial capital loss occasioned by the collapse in the market for such vessels following the financial crisis in 2008. While the premature termination of the charterparty in *Fulton Shipping* was the occasion for the owners' decision to sell the vessel, the court held that that decision was not necessitated by the termination but was a commercial decision of the owners at their own risk.

214. In other cases, the court may be concerned with a failure of a claimant to act reasonably in its response to its loss. As Leggatt J stated in *Thai Airways* at para 33, quoting from an article by A Dyson and A Kramer, "There is No 'Breach Date Rule': Mitigation, Difference in Value and Date of Assessment" (2014) 130 LQR 259, 263: "damages are assessed as if the claimant acted reasonably, if in fact it did not act reasonably". Thus, for example in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* ("*The Golden Victory*") [2007] UKHL 12; [2007] 2 AC 353, Lord Bingham of Cornhill stated (at para 10):

> "An injured party such as the owners may not, generally speaking, recover damages against a repudiator such as the charterers for loss which he could reasonably have avoided by

> taking reasonable commercial steps to mitigate his loss. Thus where, as here, there is an available market for the chartering of vessels, the injured party's loss will be calculated on the assumption that he has, on or within a reasonable time of accepting the repudiation, taken reasonable commercial steps to obtain alternative employment for the vessel for the best consideration reasonably obtainable."

215. We are not concerned in these appeals with additional benefits resulting from a victim's response to a wrong which was an independent commercial decision or with any allegation of a failure to take reasonable commercial steps in response to a loss. The issue of mitigation which arises is whether in fact the merchants have avoided all or part of their losses. In the classic case of *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, at 689 Viscount Haldane described the principle that the claimant cannot recover for avoided loss in these terms:

> "[W]hen in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account …" (Emphasis added)

Here also a question of legal or proximate causation arises as the underlined words show. But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein? The merchants, having acted reasonably, are entitled to recover their factual loss. If the court were to conclude on the evidence that the merchant had by reducing the cost of its supplies or by the pass-on of the cost to its customers (options (iii) and (iv) in para 205 above) transferred all or part of its loss to others, its true loss would not be the prima facie measure of the overcharge but a lesser sum.

216. The legal burden lies on the operators of the schemes to establish that the merchants have recovered the costs incurred in the MSC. But once the defendants have raised the issue of mitigation, in the form of pass-on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business. Most of the relevant information about what a merchant actually has done to cover its costs, including the cost of the MSC, will be exclusively in the hands of the merchant itself. The merchant must therefore

produce that evidence in order to forestall adverse inferences being taken against it by the court which seeks to apply the compensatory principle.

The degree of precision required in establishing the extent of pass-on of an overcharge

217. The court in applying the compensatory principle is charged with avoiding under-compensation and also over-compensation. Justice is not achieved if a claimant receives less or more than its actual loss. But in applying the principle the court must also have regard to another principle, enshrined in the overriding objective of the Civil Procedure Rules, that legal disputes should be dealt with at a proportionate cost. The court and the parties may have to forgo precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates. The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved: *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch); [2009] Ch 390, 408, para 30 per Lewison J.

218. In *Livingstone v Rawyards Coal Co* (above) Lord Blackburn in speaking of getting "as nearly as possible" to the sum which would restore the claimant, recognised that the court's task in achieving reparation is not always precise. Similarly, Lord Shaw in *Watson Laidlaw & Co Ltd* (above, at 29 to 30) spoke of restoration by way of compensation being "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe" and of the attempt of justice "to get back to the status quo ante in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed". When the court deals with claims for personal injury, loss of life or loss of reputation, it has to put a monetary value on things that cannot be valued precisely. But the task of valuing claims for purely monetary losses may also lack precision if the compensatory principle is to be honoured, particularly when one is dealing with complex trading entities such as the merchants in these appeals. We see this for example in AAM's alternative case which seeks to assess the loss of profit caused by the volume effect where the overcharge was passed on to their customers in the form of higher prices. Such a claim is likely to depend in considerable measure on economic opinion evidence and involve imprecise estimates.

219. We see no reason in principle why, in assessing compensatory damages, there should be a requirement of greater precision in the quantification of the amount of an overcharge which has been passed on to suppliers or customers because there is a legal burden on the defendants in relation to mitigation of loss. The contrary view appears to have been based on an application of (a) the CJEU jurisprudence relating to a defence to claims for restitution, that there should be an identifiable increase in a retail price directly attributable to the unlawful charge and (b) the requirement, discussed in *Fulton Shipping*, of a close causative link between a wrong and a benefit

which the victim obtains as a consequence of the wrong: see the judgment of the Court of Appeal at paras 327-330, 337-340.

220. As we have said, the relevant requirement of EU law is the principle of effectiveness. The assessment of damages based on the compensatory principle does not offend the principle of effectiveness provided that the court does not require unreasonable precision from the claimant. On the contrary, the Damages Directive is based on the compensatory principle. The European Commission has issued "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" (2019/C 267/07) ("the 2019 Guidelines") in accordance with a power conferred by article 16 of the Damages Directive. The 2019 Guidelines make clear (para 12) that the compensatory principle "underlies the entire Damages Directive and must be understood as requiring that a person entitled to claim compensation for the harm suffered must be placed in the position in which that person would have been had the infringement not been committed". It goes on to state that pass-on may be invoked by an infringer as a shield against a claim for damages and by an indirect purchaser as a sword to support the argument that it has suffered harm (paras 18-19).

221. Article 12.1 of the Damages Directive requires member states to ensure not only that both direct and indirect purchasers who have suffered harm should be able to claim full compensation but also that compensation exceeding the harm caused by the infringement of competition law is avoided. Article 12.5 states:

> "Member states shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on."

222. Similarly, in article 17.1 the Damages Directive states:

> "Member states shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member states shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available."

223. In discussing those articles of the Damages Directive, the 2019 Guidelines (section 2.3, paras 30-35) recognise that the national courts in addressing the issue of pass-on will have to resort to estimates. In para 33 the 2019 Guidelines state that the principles of equivalence and effectiveness mean, as regards the power to estimate, that "national courts cannot reject submissions on passing-on merely because a party is unable to precisely quantify the passing-on effects". The power to estimate "requires national courts to, firstly, base their assessment on the information reasonably available and, secondly, strive for an approximation of the amount or share of passing-on which is plausible" (para 34). The 2019 Guidelines note that several member states already have rules which correspond to the power to estimate which the Damages Directive envisages and (in footnote 39) refer to Lord Shaw's statement in *Watson, Laidlaw & Co Ltd* (above) that harm may be quantified "by the exercise of a sound imagination and the practice of the broad axe", and to the application of that statement by the Court of Appeal in *Devenish Nutrition Ltd* (above), para 110.

224. As the regime is based in the compensatory principle and envisages claims by direct and indirect purchasers in a chain of supply it is logical that the power to estimate the effects of passing-on applies equally when pass-on is used as a sword by a claimant or as a shield by a defendant.

225. The loss caused by the overcharge included in the MSC was an increased cost which the merchants would in all probability not address as an individual cost but would take into account along with a multiplicity of other costs when developing their annual budgets. The extent to which a merchant utilised each of the four options, which the CAT identified and we described in para 205 above, can only be a matter of estimation. In accordance with the compensatory principle and the principle of proportionality, the law does not require unreasonable precision in the proof of the amount of the prima facie loss which the merchants have passed on to suppliers and customers.

Conclusion on the broad axe issue

226. In conclusion, we do not interpret the Court of Appeal as having held that the defendants had to prove the exact amount of the loss mitigated. But in so far as the Court of Appeal has required a greater degree of precision in the quantification of pass-on from the defendant than from a claimant, the Court erred. For these reasons, the appeal succeeds on issue (iv).

Issue (v) - The remission issue: AAM's cross-appeal

227. The cross-appeal is only relevant to the AAM proceedings. By our judgment on this appeal, we have upheld the conclusion of the Court of Appeal that the default MIFs infringed article 101(1). Therefore, it is necessary to consider Mastercard's claim in the AAM proceedings that the default MIFs should be treated as exempt under article 101(3). This was an issue which was fully canvassed at trial before Popplewell J.

228. The judge correctly held that in order to qualify for exemption under article 101(3) an anti-competitive restriction must meet a number of cumulative conditions. It is the first and second conditions which are relevant for present purposes, namely that any given default MIF must: (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress and (ii) allow consumers a fair share of the relevant benefits.

229. At trial, Mastercard had a full opportunity to present any evidence it wished in support of its case that the default MIFs at issue should be treated as exempt pursuant to article 101(3). Popplewell J considered that Mastercard had established its case that the default MIFs were exempt. A critical part of his reasoning was that part of the MIFs paid to issuers had been passed through to their cardholder customers in the form of incentives to encourage use of scheme credit or debit cards to purchase more goods from merchants, thereby providing (so Mastercard asserted) increased benefits for the merchants - "issuer pass-through".

230. The Court of Appeal considered this aspect of Popplewell J's judgment at paras 211-271. It held that there were a number of flaws in the judge's analysis. It noted that there was a critical gap in the evidence put forward by Mastercard: it did not provide evidence from issuers regarding the extent to which there was pass-through of the MIFs to cardholders, and had not attempted to obtain such evidence (paras 242-244). It was therefore impossible to tell to what extent (if at all) the cost to merchants of having to pay a default MIF in relation to each card transaction might be outweighed by countervailing benefits to them from use of MIF income to incentivise increased card use. The judge had failed to carry out this balancing exercise (paras 246-248). As the Court of Appeal noted at para 245, all that could be said was that the expert witnesses on each side agreed, purely on the basis of economic theory, that pass-through could incentivise card use; but there was no empirical, factual evidence on the point as would have been necessary to show that pass-through did in fact occur, the extent of it and whether incentives to cardholders would in fact have resulted in more use of scheme cards (as opposed to cardholders simply using their scheme cards all the time in any event, without being influenced by incentives, so that the merchants bore the cost of the MIFs without any corresponding benefit: the "always card transactions" point described at paras 250-

251). Since Mastercard could not establish by evidence the extent of pass-through, it could not show the extent to which MIF revenue was used to incentivise card usage, nor whether and to what extent it did in fact stimulate additional card usage; and this was "fatal" to Mastercard's case for exemption (paras 252-254).

231. Accordingly, the Court of Appeal held (at para 255) that "the judge should have concluded, by reference to this 'always cards' point, that Mastercard could not establish, even on the basis of economic theory, that the extent of pass-through was such that the advantages thereby conferred outweighed the disadvantages to the relevant consumers [the merchants]"; and it further held (ibid) that the various materials relied on by Mastercard did not satisfy the requirement for cogent factual or empirical evidence of pass-through. The court then proceeded to make further explicit rulings in paras 257-259 as follows:

> "257. The judge should have concluded that, in the absence of any evidence as to the actual extent of the pass-through, Mastercard had failed to establish by robust analysis and cogent evidence, or otherwise, a sufficient causal link between the default MIFs and any net benefits, so that their claim for exemption under article 101(3) failed.
>
> 258. … [T]he judge should have concluded, on the basis of the evidence before him, that the first condition of article 101(3), the benefits requirement, was not satisfied so that Mastercard had not established entitlement to an exemption under article 101(3).
>
> 259. … [Further, in relation to the second condition for an exemption under article 101(3), the fair share requirement, on the evidence advanced at trial by Mastercard] had the judge carried out the necessary balancing exercise, he would inevitably have concluded that Mastercard could not satisfy the second condition either."

232. As regards the evidential standard to be applied, this court has confirmed that as a matter of EU law, cogent empirical evidence is required to show that the claim for exemption is made out. In the light of this, the Court of Appeal's conclusions in the AAM proceedings, as set out above, cannot be faulted. AAM should have succeeded on its claim under article 101(1). So far as concerns Mastercard's defence based on article 101(3), there had been a full trial on this issue and on the evidence adduced at trial the judge should have dismissed it, as the Court of Appeal rightly held.

233. Despite reaching this conclusion in the passages referred to above, the Court of Appeal made an order remitting the AAM proceedings to the CAT, alongside the two other sets of proceedings, for reconsideration of whether Mastercard's case under article 101(3) in the AAM proceedings should have succeeded in whole or in part. According to the order, it is not open to any party to advance a new case or to adduce any fresh evidence on the remittals for reconsideration of Mastercard's and Visa's cases in each set of proceedings for exemption under article 101(3), but "the parties to each of the proceedings may rely on evidence from the other two proceedings if and only to the extent that it is relevant to the case on exemption advanced in the proceedings in question".

234. On any view, we consider that it would be impossible to justify an order in this form unless all the parties affected consented to it, since it would mean that a party's case could be determined by reference to evidence in other proceedings which it had not had a fair opportunity to controvert or subject to criticism or cross-examination. Such consent was not obtained before the Court of Appeal made its order. Upon enquiry at the hearing in this court, it was only the parties in the Mastercard Sainsbury's and Visa Sainsbury's proceedings who said they were content with this order. AAM did not.

235. However, the point taken by AAM in their cross-appeal is a still more fundamental one. They say that, having rightly decided that the trial judge should have dismissed Mastercard's article 101(3) defence and given judgment for AAM on its claim under article 101(1), it was not open to the Court of Appeal to order that the article 101(3) issue should be remitted for reconsideration and hence permit it to be re-opened by Mastercard. This offends against the principle of finality in litigation.

236. The Court of Appeal's reasoning on this point is at para 366:

> "We take the view that, despite what we have said above, it is not certain that, had Popplewell J had the benefit of this judgment and thus been fully aware of the need for empirical data and facts in order to prove an exemption, MasterCard's case on article 101(3) would have failed in its entirety. It is possible, bearing in mind the acceptance by Sainsbury's and the CAT in the other two cases that there was a lawful level of MIF, that the judge would have found that there was some exemptible level of MIF, albeit a lower one than he in fact found. Altogether removing the article 101(3) issue from reconsideration could therefore result in an unjustified windfall for the AAM parties. It seems far more just to us that the issue should be reconsidered in all three cases, based on the same

> principles, by the same tribunal. There is no real injustice to the AAM parties in the course we propose, since the windfall to which we have referred would have arisen from the procedural mishap caused by the separation of three cases raising almost identical issues. If the CAT is now able to reach a consistent conclusion in all three cases on the exemption and quantum issues, that will produce a fair and just outcome for all the parties. It would be a triumph of form over substance if we were to hold that we were unable to reach a just solution simply as a result of a procedural accident."

237. In our judgment, this reasoning cannot be supported. We accept the submission of Mr Jon Turner QC for AAM that the Court of Appeal has erred in principle by allowing Mastercard to re-open the article 101(3) issue on which, as the Court of Appeal held, it had lost after a full and fair trial of the issue. This offends against the strong principle of public policy and justice that there should be finality in litigation, which the Court of Appeal did not take properly into account. The court was wrong to characterise victory for AAM as "an unjustified windfall" or the product of a "procedural mishap" or "accident". It was wrong to say that re-opening the article 101(3) issue involved "no real injustice" for AAM.

238. Under the Civil Procedure Rules ("CPR"), litigation is to be conducted in accordance with the overriding objective set out in CPR Part 1, that is in a manner "enabling the court to deal with cases justly and at proportionate cost". CPR rule 52.20(2) provides that on an appeal, the appellate court has power, among other things, to "(a) affirm, set aside or vary any order or judgment made or given by the lower court; (b) refer any claim or issue for determination by the lower court; or (c) order a new trial or hearing". By virtue of CPR rule 1.2(b) the procedural rules in the CPR are to be interpreted so as to give effect to the overriding objective; and by virtue of CPR rule 1.2(a) any power conferred on a court by the CPR is to be exercised so as to give effect to it. The higher courts have in a number of respects laid down important and binding principles regarding what justice requires in the context of litigation, and these inform the proper approach to the interpretation and application of the overriding objective.

239. One such principle which is well established is that there should be finality in litigation. This is a general principle of justice which finds expression in several ways, which tend to be grouped under the portmanteau term "res judicata": see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, paras 17-26 per Lord Sumption. When a legal claim has finally been determined in litigation, a cause of action estoppel arises and it cannot be reopened. A binding issue estoppel may arise in respect of a matter, other than a legal claim, which is directly the subject of determination in proceedings. Further, parties are generally required to bring forward their whole case in one action, and attempts to revisit

matters that have already been the subject of a determination (even if not formally a matter of cause of action estoppel or the subject of an issue estoppel) are liable to be barred as an abuse of process: *Henderson v Henderson* (1843) 3 Hare 100, 114-116 per Wigram V-C; *Johnson v Gore-Wood & Co* [2002] 2 AC 1, 31 per Lord Bingham of Cornhill and 58-59 per Lord Millett; *Virgin Atlantic* (above). Under this rule, first explored in *Henderson v Henderson*, a party is precluded "from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones" (*Virgin Atlantic*, para 17). As Sir Thomas Bingham MR (as he then was) explained in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260:

> "The rule in *Henderson v Henderson* … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided … once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

This is a rule based on what is required to do justice between the parties as well as on wider public policy considerations. It is a rule which is firmly underwritten by and inherent in the overriding objective.

240. In our view, the order made by the Court of Appeal to remit the article 101(3) issue in the AAM proceedings for reconsideration by the CAT is contrary to the principle of finality in litigation as it finds expression in the rule in *Henderson v Henderson*. The trial before Popplewell J was a final trial between AAM and Mastercard of the issues between them under article 101(1) and 101(3) so far as affected Mastercard's liability to AAM. In preparing for the trial, Mastercard was aware of the significance of the issue of pass-through, not least because attention had been called to that issue in the Mastercard Commission Decision (as noted in para 243 in the judgment of the Court of Appeal). In any event, the issue of pass-through was central to the way in which Mastercard sought to justify its claim for exemption under article 101(3). It had a full and fair opportunity to adduce any evidence it wished in respect of that claim. Yet, as the Court of Appeal found (at para 244), it did not attempt to obtain factual, empirical evidence on that issue,

choosing instead to support its claim of exemption under article 101(3) by reference to economic theory.

241. As explained above, on the evidence adduced at trial, the Court of Appeal rightly found that the judge should have upheld AAM's claim of infringement of article 101(1) and in the course of doing so should have dismissed Mastercard's defence based on article 101(3). We agree with Mr Turner's submission that in circumstances where: (i) in a final trial between private litigants to determine their rights and obligations inter se each side has had a fair opportunity to bring forward all the evidence that it wants to bring forward in support of its case, and (ii) where the appellate court has concluded that, on the basis of that evidence, one party ought to have won, the court should dispose of the matter by awarding a final remedy that reflects that outcome. This is necessary to do justice to the parties (so that the party that has won in a fair - and it might be added, very expensive - contest is not deprived of the fruits of its victory), to achieve finality, and to avoid the court enlarging the dispute outside the way in which the parties have chosen to frame it.

242. In the adversarial system of litigation in this country, the task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather than to carry out some wider inquisitorial function as a searcher after truth. In *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041, Dyson LJ observed (at para 21): "It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone." As Lord Wilberforce stated in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438:

> "In a contest purely between one litigant and another … the task of the court is to do, and be seen to be doing, justice between the parties … There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done."

243. In our view, and with respect to them, the Court of Appeal lost sight of these principles when it made an order which would permit Mastercard to reopen its case under article 101(3) and rely upon evidence (adduced in other proceedings, but new in the AAM proceedings) which was not adduced at the trial of that issue.

244. The matter may further be tested in various ways. Suppose Popplewell J had determined the issues before him as the Court of Appeal held they should have been determined by him (ie on the basis that Mastercard's defence under article 101(3) failed) and there had been no need for an appeal. He would have made a final order in AAM's favour in 2017 giving judgment for them on their article 101(1) claim (necessarily thereby rejecting the article 101(3) defence), and that order would have constituted a cause of action estoppel in their favour. There could have been no question of Mastercard seeking to reopen that order by seeking to litigate again on the same issues, by relying on new evidence as adduced in other proceedings. It is difficult to see how it could be right for the Court of Appeal to produce a different outcome by reason of the adventitious circumstance that AAM had to go through the process of appeal to arrive at the result it was entitled to have achieved at first instance. Alternatively, one could analyse the outcome which would have been arrived at in relation to the article 101(3) defence as a matter of issue estoppel, and the same point could be made. Or again, one could analyse the position by reference to the rule in *Henderson v Henderson* and say that it would have been an abuse of process for Mastercard to have sought to re-open the article 101(3) issue by reference to new evidence, the substance of which it had had the opportunity to adduce previously at trial before Popplewell J. Since it would have been unjust to allow an application by Mastercard to do that, it is difficult to see how it could be compatible with justice for the Court of Appeal to produce that same outcome by its exercise of discretion on its own initiative under CPR rule 52.20(2). On the contrary, in our view it was contrary to justice and to the overriding objective for the Court of Appeal to make the order it did in the AAM proceedings. It was also contrary to CPR rule 52.20(2) itself, on its proper construction, since under CPR rule 1.2(b) that provision falls to be interpreted in a way which is in conformity with the overriding objective.

245. This is sufficient to justify allowing AAM's cross-appeal. However, we also consider the comments made by the Court of Appeal at para 366 (above) to be misplaced. If it is decided by the CAT after the further hearing in the Mastercard Sainsbury's proceedings and the Visa Sainsbury's proceedings that, on the evidence and concessions made by Sainsbury's in those proceedings (concessions with which AAM do not agree and which they consider to be baseless and wrongly made), there was some level of MIFs which would have been exempt under article 101(3), with the result that Sainsbury's claims for damages for breach of article 101(1) would be reduced, that would in no way show that there was an unjustified windfall for AAM arising out of a final order in their favour in the AAM proceedings. As the Court of Appeal rightly held, after the fair trial which took place, the judge should have found that AAM succeeded in its claim. That result is not a windfall, nor is it unjustified. It is the just outcome of the contest fought by the parties in those proceedings.

246. It would have made no difference if the fact that there was a separate trial of the AAM proceedings could be described as the result of a procedural mishap or

accident, or if with hindsight it might have been thought better for all three sets of proceedings to be tried together. The fact would still remain that, as events transpired, Mastercard had lost to AAM at trial after a fair hearing on the issues between them. However, in any event, in our view it is not correct to characterise the way in which the AAM proceedings were dealt with separately from the other proceedings and went forward to be dealt with at a separate trial as being the result of a procedural mishap or accident. There are many sets of interchange damages claims pending against Mastercard and Visa (and other card system operators) in the court system, and it would be wholly impracticable for them all to be tried together at the same time. In a sensible and responsible way, Visa, Mastercard, Sainsbury's and AAM debated at various stages whether the proceedings involving them could be case managed or heard together, and on each occasion the judgment was made that there were good reasons why they should not be. The fact that there have been three separate trials in the three sets of proceedings is not the result of any procedural accident, but rather of deliberate and informed choices made by the parties, courts and the CAT as to how these complex claims should be determined within the court system. It may also be observed that, contrary to what the Court of Appeal seems to have thought it would achieve by ordering a combined hearing in the CAT in the three sets of proceedings at issue in this appeal, that combined hearing will not produce a single, comprehensive determination of liability in relation to the other interchange fee damages claims. Those other claims will have to be determined in each case on the basis of the pleadings and the evidence adduced in that case.

Conclusion on AAM's cross-appeal

247. For the reasons given above, AAM's cross-appeal is allowed. The order made by the Court of Appeal will be varied, to substitute an order declaring that the relevant MIFs charged to AAM in the relevant period were contrary to article 101(1) (and the equivalent provisions of UK and Irish competition law); and that Mastercard has failed to discharge the burden on it of demonstrating that a MIF set at any positive level would have met the test for exemption under article 101(3) (and the equivalent provisions of UK and Irish law). If not settled, the AAM proceedings should then proceed to a trial on the issue of quantum of damages.