<u>IN THE COURT OF APPEAL</u>

APPEAL Nos: C3/2016/4520, A3/2017/0889, A3/20170888, A3/2017/0890, A3/2017/0892, A3/2017/3493

ON APPEAL FROM:
THE COMPETITION APPEAL TRIBUNAL
AND
THE COMMERCIAL COURT
QUEEN'S BENCH DIVISION OF
THE HIGH COURT OF JUSTICE

BETWEEN:

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA (formerly known as MasterCard Europe SPRL)

Appellants (Defendants)

- and -

SAINSBURY'S SUPERMARKETS LIMITED

Respondent (Claimant)

AND BETWEEN:

(1) ASDA STORES LIMITED
(2) ARCADIA GROUP BRANDS LIMITED and others
(3) ARGOS LIMITED and others
(4) WM MORRISON SUPERMARKETS PLC

Appellants (Claimants)

- and –

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

Respondents (Defendants)

AND BETWEEN:

SAINSBURY'S SUPERMARKETS LIMITED

Appellant (Claimant)

- and -

(1) VISA EUROPE SERVICES LLC
(2) VISA EUROPE LTD
(3) VISA UK LTD
(Together "Visa")

Respondents (Defendants)

AND:

EUROPEAN COMMISSION

Intervener

EUROPEAN COMMISSION'S WRITTEN OBSERVATIONS OF 21 FEBRUARY 2018

I. INTRODUCTION

1. These are the Written Observations of the European Commission ("the Commission") on the above Appeals listed to be heard from 16 April, made pursuant to Article 15(3) of Regulation 1/2003 and the Order of Flaux LJ of 1 February 2018. They are served prior to (i) the parties' composite skeleton arguments, due to be filed on 9 and 23 March under the Court's Order of 15 December 2017 (ii) the list of issues to be filed by the parties by 23 March (although the Commission has seen a proposed draft circulated by Stewarts on 8 February) and (iii) the second Judgment of Phillips J addressing the Article 101(3) analysis.

2. The Commission has been investigating the application of Article 101 to multilateral interchange fees ('MIFs') since the 1980s. The EU decisional practice and case law, in which intra-EEA MIFs have consistently been found to restrict competition within the meaning of Article 101(1), is summarised in the Judgments under appeal.[1] The Commission currently has extant investigations under Article 101 in respect of certain inter-regional MIFs in the MasterCard and Visa schemes. The EU also recently adopted legislation regulating MIFs in the form of the Interchange Fee Regulation ("IFR").[2]

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[1] See *Asda Stores v MasterCard* ("*Asda v MC*"), §§63-79; *Sainsbury's v Visa*, ("*Sainsbury's v Visa*"), §§62-79; and Annex 2 to *Sainsbury's v MasterCard* ("*Sainsbury's v MC*").

[2] OJ L 123 of 19 May 2015, p.1.

3. The Commission addresses below the following issues arising in the Appeals which have implications for the coherent application, and effective enforcement, of Article 101, in the light of relevant EU case law / decisional practice:

i. whether the MIF restricts competition compared to a default rule providing for settlement at par ("SAP");

ii. whether the 'death spiral' argument is a permissible counterfactual in relation to the assessment of either objective necessity and/or restriction; and

iii. issues relating to the availability of exemption for MIFs under Article 101(3).

4. These Observations are concerned with the approach to be taken to the analysis of MIFs under Article 101, rather than the particular facts at issue in the Appeals.

II. DO THE RULES IN THE MASTERCARD/VISA SCHEMES PROVIDING FOR DEFAULT MIFS RESTRICT COMPETITION UNDER ARTICLE 101(1) COMPARED TO A DEFAULT RULE PROVIDING FOR SETTLEMENT AT PAR?

5. The Commission addresses in this section (i) the EU decisional practice and case law on the above issue; (ii) the errors in the interpretation of that case law in the Judgment of Phillips J; (iii) Visa's specific argument concerning the impact of SAP in the issuing market; and (iv) broader principles concerning the application of Article 101(1) to MIFs, including some brief points on the analysis of MIFs as restrictions 'by object'.

a. Analysis of MIFs under EU law: restriction in the acquiring market

6. As set out below, the Commission and EU Courts have consistently found that rules providing for default MIFs in 4 party payment card schemes harm competition in the acquiring market by impeding the ability of merchants to negotiate the fees charged by acquirers below the threshold imposed by the MIF. Accordingly, the approach to the analysis of MIFs under EU law is that Article 101(1) is infringed in circumstances where the MIF gives rise to a price floor in

the acquiring market below which the fees charged to merchants cannot be driven.

7. The position was succinctly summarised by the Commission in its Decision addressed to MasterCard of 19 December 2007 ("the 2007 MasterCard Decision") as follows:

> "The collective decision by the MasterCard organisation to set a MIF inflates prices charged by acquirers to merchants for acquiring cross-border credit and debit card transactions with MasterCard's payment cards. This finding is in line with the Commission's previous practice. The Commission found in its VISA II decision that a MIF has the effect of distorting the behaviour of acquirers vis-à-vis their customers, because it creates an important cost element which is likely to constitute a de facto floor for fees charged to merchants they acquire." (recital 412)[3]

8. The Commission also explained that the price floor had the effect of raising the prices paid by merchants:

> "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."[4]

9. The principal counter argument raised in the Appeals – that, in terms of its impact on competition, a rule providing for SAP is analytically equivalent to a positive MIF default rule, on the basis that the former simply sets the floor at the lower

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3 See also the Commission Decision addressed to Visa of 24 July 2002 ("the 2002 Visa Decision") §68.

4 §2. Notably, that finding was reinforced by the empirical analysis conducted by the Commission which showed that even large merchants could not negotiate an MSC below the level of the MIF. See §§425-438, in particular §435.

level of zero – was originally deployed in MasterCard's appeal against the 2007 MasterCard Decision and definitively rejected by both the General Court of the EU ("GCEU") and the Court of Justice of the EU ("CJEU").

10. MasterCard's challenge on this point was summarised in the following terms by the GCEU:

> "… 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, <u>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.</u>"[5] (emphasis added)

11. The particular argument advanced by MasterCard therefore depended only on a comparison between, on the one hand, positive MIFs (the "actual") and, on the other, zero MIFs (the "counterfactual"). The argument did not engage, or challenge the validity of, a counterfactual involving bilaterally agreed interchange fees. Accordingly, factual findings in the 2007 MasterCard Decision concerning the likelihood of bilateral negotiations in the absence of the MIF were not relevant for the purposes of this aspect of MasterCard's appeal which was predicated on a zero MIF.

12. The GCEU rejected MasterCard's argument at §143 of its Judgment ("the *MasterCard* GC Judgment") in the following terms:

> "<u>Since it is acknowledged that the MIF sets a floor for the MSC</u> and in so far as the Commission was legitimately entitled to find that a MasterCard system operating without a MIF would remain economically viable, <u>it necessarily follows that the MIF has effects restrictive of competition.</u> By comparison with an acquiring market operating without them, the MIF limits the pressure which merchants can exert on acquiring banks when

[5] Case T-111/08 *MasterCard v Commission* EU:T:2012:260, §142.

negotiating the MSC by reducing the possibility of prices dropping below a certain threshold."[6] (emphasis added)

13. Thus the harm to competition, identified by the GCEU, wrought by a positive MIF – compared to a zero MIF - is the imposition of a price floor in the acquiring market which limits the commercial pressure which can be brought to bear by merchants in negotiating fees with acquirers. Rivalry between acquirers is constrained.

14. MasterCard reiterated the argument before the CJEU as follows:

> "… the only difference between the MIF and the counterfactual hypothesis relied on in the judgment under appeal lies in the pricing level of the MIF. Just like the MIF, the prohibition of *ex post* pricing would be determined by MasterCard, would apply by default, and would have the effect of setting the prices charged between those banks (at zero). According to the appellants, setting the level of the MIF at zero creates the same floor setting effect as the MIF, albeit at a level more favourable to merchants and less so for cardholders."[7] (emphasis added)

15. The CJEU rejected that argument at §195 of its Judgment ("the *MasterCard* CJEU Judgment"), upholding the reasons given at §143 of the GC's Judgment:

> "… 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 [101(1)]. On the contrary, as is apparent from the very wording of paragraph 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,

[6] Cited at *Asda v MC* §145.

[7] Case 382/12P *MasterCard v Commission* EU:C:2014:2201§131.

with a resulting reduction in competition between acquirers as regards the amount of the MSC." (emphasis added)

16. The Commission's submission, specifically endorsed by the CJEU in the excerpt above, was that:

> "… the Commission disputes that the judgment under appeal is based on the premiss that high prices constitute in themselves an infringement of [Article 101(1)]. According to the Commission, the finding upheld by that judgment is that these high prices arise as the result of a restrictive agreement."[8]

17. This reaffirmed the truism that Article 101(1) is engaged by high prices which are the product of coordinated pricing behavior only. The Commission made the same point in the decision under appeal:

> "[T]he collective act of competing undertakings to raise charges for consumers is subject to the prohibition of [Article 101(1)] of the Treaty."[9]

b. Errors in the interpretation of the EU *MasterCard* case law in *Sainsbury's v Visa*

18. In the light of the above, the Commission respectfully observes that Phillips J fundamentally misconstrued the findings in the EU *MasterCard* case law as regards the nature of the anti-competitive restriction brought about by the rule providing for default MIFs. In particular, the Judge erred in holding that:

    i. the Commission's finding that MasterCard MIFs restricted competition depended on a determination of fact by the Commission that, in the absence of MIFs, there would be a "highly competitive process"[10]

[8] *MasterCard* CJEU Judgment §136.

[9] 2007 MasterCard Decision §457.

[10] Judgment §148.

between issuing and acquiring banks in the form of bilateral negotiations which amounted to "actual competition"[11];

ii. that the CJEU in turn relied on that supposed finding by the Commission as to restriction in concluding that MasterCard's MIFs restricted competition[12] and, at §195 of the *MasterCard* CJEU Judgment, specifically held that the "pressure" which had been "limited", and would have been brought to bear in the absence of MIFs, was the competitive pressure of bilateral negotiations between issuers and acquirers[13]; and

iii. the CJEU did not find that the restriction lay in the setting of a price floor in the acquiring market.[14]

19. *First*, as set out above, the argument put by MasterCard which was rejected by the CJEU at §195, involved a comparison of its intra-EEA MIFs with a zero MIF counterfactual, not with bilateral negotiations between banks.

20. *Secondly*, §195 expressly refers to the effect of the MIF being to limit the commercial pressure which <u>merchants</u> are able to exert on acquiring banks. That is a restriction of the competitive process on the acquiring market in which merchants buy acquiring services from banks. The Judge failed to appreciate that the CJEU was referring to an effect on the acquiring market, instead wrongly construing the reference to "limited pressure" as referring to a restriction on bilateral negotiations. But bilateral negotiations would take place on a different market from the one in which merchants buy acquiring services, namely the one on which issuing and acquiring banks agree the level of interchange fees to be paid *inter se*. The wording of paragraph 195 is clear: it explicitly refers to the pressure exerted by merchants and there is no reference in that section of the Judgment to the possibility of bilateral negotiations. While the Judge was correct to say that the higher price "was a result of restriction"[15], the restriction in question

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[11] Judgment §160.

[12] Judgment §148.

[13] Judgment §160.

[14] Judgment §160.

[15] Judgment §147.

was the impediment to the merchants' ability to drive down prices charged by acquirers, due to the setting of the price floor, not the absence of bilateral negotiations.

21. *Thirdly*, findings in the 2007 MasterCard Decision concerning the likelihood of bilateral negotiations in the absence of the MIF did not affect the Commission's central conclusion that it is the impediment to the merchants' ability to negotiate MSCs down to the competitive level in the acquiring market which constitutes the unlawful restriction of competition. Since that impediment does not arise in a payment card scheme providing for SAP, in which competitive forces can operate unfettered, a positive default MIF is necessarily restrictive compared to a zero MIF counterfactual.

22. *Fourthly*, the GCEU confirmed at §133 of the *MasterCard* GC Judgment that the Commission's observations concerning the possibility of bilateral negotiations, in the absence of the MIF, did not form part of the Commission's core assessment of whether the MIFs restricted competition – which was instead based on a comparison with a rule prohibiting *ex post* pricing. The GCEU found that reference to bilateral negotiations was made in the context of the Commission's factual finding that such negotiations would have been short-lived and would ultimately give way to a zero MIF. Accordingly, the 2007 MasterCard Decision and subsequent Appeals were all predicated on a counterfactual providing for SAP, as the CJEU also underlined at §173 of its Judgment.

23. In those circumstances, the approach to the nature of the anti-competitive restriction in the acquiring market adopted by the Commission in its 2002 Visa and 2007 MasterCard Decisions, should, as a matter of principle and logic, apply to the analysis of the effects of MIFs in cases where the relevant counterfactual is a zero MIF, irrespective of whether bilateral negotiations between banks are also considered likely or not. In the words of the GCEU, such harm "necessarily" follows where a positive MIF is compared with a zero MIF.

c. A zero MIF does not restrict competition between issuers

24. Visa's additional argument that a zero MIF must necessarily restrict competition in the issuing market is based on false logic.[16] MIFs offend against competition law because they are a collective agreement amongst banks to draw revenue away from acquirers' customers, in ever-increasing amounts, to the issuing market on the other side of the scheme. SAP does not represent the logical converse of that arrangement since it does not leech revenue from the issuing market to acquirers. It simply allows costs to lie where they fall and, as such, does not restrict the competitive process between issuing banks in their provision of services to card-holders.

d. The application of Article 101(1) to MIFs is consistent with fundamental principles of EU competition law

25. The analysis upheld in the *MasterCard* CJEU Judgment is consistent with established principles as regards the treatment of coordinated pricing behaviour under Article 101(1). The MIF is a collective arrangement which has the effect of imposing heavy collectively set charges on merchant customers, and through them on the public at large.

26. The specific characteristics of four party payment systems, and the two-sided markets involved, merit particular scrutiny under Article 101 because normal pricing constraints do not apply. Those features facilitate the imposition of high costs on merchants, through coordinated behaviour by the banks, the impact of which is further exacerbated by the significant upward pressure on MIFs arising out of inter-system competition between card schemes and the appetite of card-holders for rewards and other benefits. Unlike price signals in conventional markets, higher MIFs make a scheme *more* attractive to issuers and card-holders, but draw increasing amounts of revenue away from merchants, to the detriment of their customers. As such, they constitute a collectively agreed revenue stream

[16] Visa Skeleton §45.

which MasterCard and the banks have a clear incentive to maximise and which can, in the words of Phillips J, be increased by them "at will".[17]

27. This is why the Commission has indicated in past decisions that the MIF may have the object as well as effect of restricting competition given the intrinsically negative impact on competition: see, for example, the Visa 2014 Commitments Decision[18] at §23 and the 2007 MasterCard Decision at §§401-407. The GCEU appears to have endorsed the proposition that MIFs may have an anti-competitive object at §140 of the *MasterCard* GC Judgment, regarding it as "helpful to point out that Article [101(1)(a)] expressly provides that measures which directly or indirectly fix purchase or selling prices constitute restrictions of competition, and that …[its] purpose is to prohibit undertakings from distorting the normal formation of prices on the markets …"[19]

28. As such, it is appropriate to draw an analogy with a cartel between all acquiring banks to charge their customers a substantially inflated fee. The Commission endorses Popplewell J's conclusion that the imposition of a price floor by virtue of a positive MIF "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."[20] Popplewell J is also correct to rely on the same analogy to reject Visa's argument that competition on the acquiring market is not restricted because acquirers are free to compete on their margin.[21] It is trite law that fixing a part of the final price engages Article 101 TFEU.[22]

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[17] *Sainsbury's v Visa* §173.

[18] Commission Decision addressed to Visa Europe of 26 February 2014, Case AT.39398.

[19] See Judgment §§138-141.

[20] *Asda v MC* §156.

[21] *Asda v MC* §161.

[22] See Case T-265/12 *Schenker v Commission* ECLI:EU:T:2016:111 at §§85-91.

29. Nor does the analogy break down due to the need for some form of default rule in payment card systems given that, unlike a default MIF, the counterfactual of SAP does not impose collectively set charges on merchants and their customers. Contrary to Phillips J's finding at §151, a rule providing for SAP does not "stifle" competition in the acquiring market but instead allows competitive forces to operate unfettered. Whether some level of positive MIF may nonetheless be justified in the context of any particular payment scheme is a distinct issue which can only be considered under Article 101(3).

30. Article 101(1) is therefore the appropriate tool to address this form of coordinated pricing behaviour, which severely impedes competition between acquirers where there is both the means and incentive to subject merchants and their customers to ever increasing charges. Excluding its application in such circumstances would deprive Article 101(1) of its 'effet utile' and threaten its coherent application within the EU. The Commission therefore regards the conclusion of Phillips J that the MIFs do not restrict competition within the meaning of Article 101(1) to be irreconcilable with the consistent body of EU case law and decisional practice analysing the effect of MIFs.

III. WAS IT OPEN TO THE COURTS BELOW TO FIND THAT, IF THE MIF ARRANGEMENTS OF THE SCHEME UNDER SCRUTINY WERE REMOVED, THE RIVAL SCHEME'S MIF ARRANGEMENTS WOULD CONTINUE IN THEIR EXISTING FORM LEADING TO ISSUING BANKS BEING ATTRACTED TO THE RIVAL SCHEME AND THE FIRST SCHEME BEING RENDERED UNVIABLE?

a. The legal test for objective necessity

31. As regards the case law on the ancillary restraints doctrine and its application to the death spiral argument, the Commission makes the following brief observations:

i. *Métropole*[23] was invoked by MasterCard before the EU Courts in support of its argument that, in order to meet the relevant threshold for identifying an ancillary restraint, it is sufficient to show that the main operation would be more difficult to implement or less profitable in its absence. That argument was rejected by the CJEU at §91 of the *MasterCard* CJEU Judgment which confirmed that the operation must be impossible to carry out without the restriction, in order to qualify as an ancillary restraint.

ii. The ancillary restraints doctrine must therefore be strictly construed as it covers only those restraints without which the main operation could not be implemented.

iii. *Métropole* was not invoked by MasterCard in relation to the death spiral argument, which did not feature at all in the EU MasterCard litigation, as *per Sainsbury's v Visa* §190. Accordingly the CJEU's formulation at §111 of the *MasterCard* CJEU Judgment, that an ancillary restraint counterfactual must be realistic and enable the payment card system to be economically viable, was not intended to address the specific question of whether the death spiral argument is permissible in the context of the analysis of objective necessity. Instead, the CJEU was there concerned with MasterCard's different claim that it would not have adopted a prohibition on *ex post* pricing unless required to do so by regulatory intervention (which was rejected). Since the death spiral argument raises conceptually distinct issues, concerning in particular the effectiveness of Article 101(1), the CJEU's choice of words at §111 should not be treated as determinative of this issue, and Popplewell J erred in doing so.[24]

iv. The issue of whether the death spiral argument may be taken into account should instead be addressed by reference to the nature and underlying purpose of the exercise in determining whether a restriction can be

[23] Case T-112/99 *Métropole télévision (M6) and others v Commission*, ECLI:EU:T:2001:215.

[24] *Asda v MC* §177.

characterised as an ancillary restraint which escapes prohibition under Article 101(1).

v. *Métropole* §109, followed in *MasterCard* GCEU Judgment §89, makes clear that the examination of objective necessity is a relatively abstract exercise. The GCEU specifically rejected the applicants' argument at *Métropole* §88 that the ancillary restraints doctrine requires an in-depth analysis of the market, noting that, in the previous Commission Decisions relied on by the applicants in that case, the Commission had not carried out an analysis of competition in addressing objective necessity (see §112).

vi. Nor is there any basis for finding that the *MasterCard* CJEU Judgment implicitly overruled the finding in *Métropole* that the examination of objective necessity is a relatively abstract exercise, as Phillips J correctly held at §189 of *Sainsbury's v Visa*.

vii. Further, the Judgments in *Remia*[25] and *Gottrup-Klim*[26] are consistent with *Métropole* on that point, as the CJEU considered in each case whether the type of arrangements at issue was necessary (respectively, the transfer of a business and a co-operative buying society) rather than any detailed consideration of specific market circumstances.

viii. The *Métropole* approach is also consistent with the underlying purpose of the ancillary restraints doctrine, which is to serve as a narrow exception for objectively necessary restrictions, and which must not be confused with the balancing of pro- and anti-competitive effects of an agreement that is permissible only under Article 101(3): *Métropole*, §107.

ix. Restrictions which have a negative impact on third parties over a long period do not qualify as ancillary restraints: *Métropole* §130.

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[25] Case 42/84 *Remia BV and others v Commission*, ECLI:EU:C:1985:327.

[26] Case 250/*92 Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, ECLI:EU:C:1994:413.

32. Accordingly, the question which the courts below should have asked in determining whether the MIFs could escape prohibition under the ancillary restraints doctrine was whether the MIFs are essential for the functioning of payment card operations of the type in question.[27] The competitive situation on the specific market does not fall for consideration. On that basis, it is not permissible to take account of the so-called death spiral argument or asymmetric counterfactual in assessing the objective necessity of the MIF.

b. Reliance on the death spiral under Article 101(1) is impermissible

33. The Commission's position is that the Schemes' contention that the MIF in one payment card scheme may be justified by reference to the inclusion of the MIF in a rival scheme is not a permissible consideration under Article 101(1) – whether in relation to the restriction counterfactual or the ancillary restraints counterfactual, and irrespective of the precise legal test governing the latter.

34. Allowing the Schemes to evade Article 101(1) by reference to the death spiral counterfactual would undermine effective competition enforcement policy in this area and infringe the EU legal principles of effectiveness and the right to compensation.[28]

35. In view of the anti-competitive impact of MIFs described in particular at §§25-30 above, a fully effective competition enforcement policy requires that Article 101(1) applies to this form of price coordination, with the weighing of pro- and anti-competitive effects taking place only under Article 101(3).[29] Excluding its application to MIFs would denude Article 101(1) of its full effectiveness, both as regards public and private enforcement, in a highly significant area of economic

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[27] See *Sainsbury's v Visa* §181.

[28] Case C-453/99 *Courage v Crehan*, ECLI:EU:C:2001:465§26. See, also, Article 3 of Directive 2014/104/EU of 26 November 2014 on actions for damages for infringements of the competition rules (the ' EU Damages Directive'), OJ L 349, 5.12.2014, p. 1–19.

[29] *Métropole*, §§72-74. See, also T-65/98 *Van den Bergh Foods v Commission*, ECLI:EU:T:2003:281, §106.

activity and frustrate the ability of consumers and undertakings to claim compensation for losses thereby suffered. In particular, Article 4 of the EU Damages Directive requires that the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by infringements of competition law.

36. Further, Popplewell J's conclusion that the death spiral argument precludes the application of Article 101(1) on the basis that the MasterCard and Visa schemes are not materially identical[30] is, in the Commission's view, flawed for the following reasons.

37. *First*, the MIFs provided for by the two payment card schemes <u>are</u> materially identical in all respects which are relevant for the purposes of the Article 101(1) analysis, upheld by the CJEU. As explained above, the relevant features giving rise to the restriction within the meaning of Article 101(1) are that the MIFs are the product of coordinated pricing conduct by banks which impose a floor under MSCs thereby limiting the pressure which merchants can exert in negotiations with acquirers. When compared with a zero MIF counterfactual, it "necessarily" follows that positive MIFs are restrictive compared to a zero MIF counterfactual.

38. Applying that approach, the MIFs contained in each of the main schemes infringe Article 101(1). This is reflected in the Commission's decisional practice: the Commission has pursued investigations under Article 101 in respect of both schemes, adopting the same theory of harm - which has since been endorsed by the CJEU - and resulting in the cost capping of their respective MIFs.

39. *Secondly*, the analogy posited by Popplewell J at §195 with a manufacturer's price cartel, which seeks to justify price-fixing by reference to a cartel of other manufacturers, is apposite: although the MIF in each scheme does infringe Article 101(1) under the approach upheld by the CJEU, each is nonetheless saved from prohibition under Article 101(1) by the existence of the other, notwithstanding its apparent unlawfulness. The reasoning is circular, and the conclusion that an

[30] Judgment §§199-219.

unlawful MIF, with all the anti-competitive characteristics described above, can be transformed into an arrangement outside the purview of competition law by virtue of a rival scheme's existence, is perverse. The Judge was correct to observe that such a result is inconsistent with the policy behind Article 101(1). The ramifications of such an approach for the effective enforcement of competition law would be far-reaching, both in relation to the assessment of MIFs and the application of Article 101(1) more generally.[31]

40. It is also relevant that, unlike the hypothetical manufacturer's cartel which seeks to compete with a cartel made up of <u>other</u> manufacturers, most banks are in fact members of both schemes. Thus the logic of the Schemes' argument is that the banks' participation in one unlawful restriction eludes competition law by virtue of the very same banks' participation in a rival scheme involving a parallel anti-competitive restriction.

41. *Thirdly*, a possible corollary of Popplewell J's approach is that the substantive finding as to whether the MIF infringes Article 101(1) may depend on the happenstance of whether proceedings against <u>all</u> competing payment schemes are consolidated, which would determine whether the court or competition authority is in a position to review the lawfulness of each scheme by reference to its own particular facts.

IV. EXEMPTION UNDER ARTICLE 101(3)

a. Does the claimant bear the burden of proving what level of MIF would have been exemptible under Article 101(3) in the assessment of loss?

42. The Commission considers that Popplewell J's approach of shifting the burden of proof to the Claimants as regards the level of exemptible MIF under Article 101(3)[32] frustrates the ability of Claimants fully to recover losses suffered as a result of competition law infringement. As such, it infringes the EU general principle of effectiveness and right to full compensation, as now enshrined in

[31] See, e.g., T-148/89 *Tréfilunion v Commission*, ECLI:EU:T:1995:68, §108 rejecting the argument that a cartel can be justified by the existence of another cartel.

[32] *Asda v MC* §§293-302, 417.

Articles 3 and 4 of the EU Damages Directive, and the requirement under Article 2 of EU Regulation 1/2003 that an undertaking claiming the benefit of Article 101(3) bears the burden of showing that the Article 101(3) conditions are satisfied.

b. Was Popplewell J right to identify business-stealing as a relevant benefit enjoyed by merchants for the purposes of Article 101(3) TFEU?

43. The Commission considers that Popplewell J made a serious error in treating so-called business stealing as a competitive advantage for the purposes of the Article 101(3) analysis.[33]

44. Payment cards are often a "must take" form of payment from the merchant's perspective.[34] It is precisely because merchants are often obliged to accept payment cards, that the banks are able collectively to impose the MIF on merchants, and through them, the general public. Far from conferring a competitive advantage on card-accepting merchants relevant for the purposes of Article 101(3), the MIF is a collective device which exploits the merchant's dependence on payment cards.

c. Did the Court in *Asda v MC* err in finding that MasterCard had shown that, without MIF income, the issuing banks would not have encouraged card use to the same extent and that this would leave merchants worse off?

45. The Commission considers that Popplewell J erred in the following respects:

    i. The Judge's statement at §312 that the unsuccessful argument advanced by MasterCard before the Commission was limited to the system output argument which "was in itself sufficient to prove exemption for the MIFs at the levels set" is incorrect. Although MasterCard's central efficiency claim before the Commission related to the maximising of system output, MasterCard went on to argue that the output maximising effect in turn contributed to a number of other efficiencies listed at §688 of the 2007

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[33] *Asda v MC* §§316-328; 390-396.

[34] See e.g. *Sainsbury's v Visa* §391 regarding larger retailers and 2007 MasterCard Decision §§114-115 on MasterCard's strong acceptance network.

MasterCard Decision, which overlap with the benefits identified by the Judge at §369.

ii. The Judge was wrong to reject the Claimants' submission that maximising system output can be positively detrimental, at §313 of the Judgment, including for the reasons set out above in respect of business stealing. As the Commission explained in the 2007 *MasterCard* Decision at §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."

d. Did the Court in Asda v MC err in its approach to the assessment of whether consumers obtained a "fair share" of the relevant benefits from the MIF, under Art. 101(3) TFEU?

46. The Commission considers the Judge erred in:

i. rejecting the Claimants' submission that maximising system output can have detrimental effects on merchants, for the reason given at §45(ii) above; and

ii. failing to take account of the fact that many card transactions which incurred a MIF may nonetheless have been made had there been no MIF. Those card transactions are not attributable to the MIF and so represent a detriment to the card-accepting merchant of which account should have been taken under Article 101(3).

47. The point at §46(ii) above underlines the importance of the merchant indifference test, which is the basis for the fee caps in the IFR[35]. Merchants are left worse off where the customer uses a more expensive payment instrument - which merchants are often unable to resist – in cases where a less expensive form of payment would have been available. In such cases, there is no 'alignment benefit' for the merchant. This feature of MIFs is relevant to both the fair share and indispensability conditions under Article 101(3).

[35] See §20.

e. Did the Court in *Asda v MC* err in its approach to the "indispensability" condition under Art. 101(3) TFEU?

48. The Judge was wrong to assume that the indispensability criterion was met on the sole basis that there is no other realistic counterfactual in which something other than a MIF could confer the relevant benefits. In particular, he failed to consider whether a lower MIF might have offered the <u>same</u> level of benefits conferred by the MIFs actually charged. If a lower MIF would not have reduced the benefits to merchants, the higher MIFs charged cannot be characterised as indispensable for obtaining those benefits.

V. PRELIMINARY RULING

49. The Commission stands ready to assist the Court in relation to any questions it may have, including at the hearing of the Appeals if the Commission's application to make oral submissions is granted. It is also open to the Court to seek a preliminary ruling from the CJEU on any question of European Union law under the Article 267 TFEU procedure.

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