Neutral citation [2021] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1288/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

28 June 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
TIM FRAZER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

SAINSBURY'S SUPERMARKETS LTD

Claimant

- v -

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

Defendants

JUDGMENT – ASYMMETRIC COUNTERFACTUAL

APPEARANCES

Mark Brealey QC and Derek Spitz (instructed by Morgan Lewis & Bockius UK LLP) appeared on behalf of the Claimant.

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

A. INTRODUCTION

1. These proceedings come before the Tribunal ("the CAT") on remittal from the Supreme Court. Pursuant to the CAT's order of 16 December 2020, the parties served Statements of Case on the issue of quantum. The Claimant ("Sainsbury's") applied for an order that the Defendants ("Visa") should not be permitted to pursue the contention set out in para 27 of their Defence on quantum. In effect, that was an application to strike out that paragraph.

2. The parties agreed that this application could be determined on the basis of their written submissions. At a case management conference ("CMC") held on 29 March 2021, the President informed the parties that the application would be granted insofar as para 27 alleged what has been called an "asymmetric counterfactual" with Mastercard but not as regards the allegation that there would have been switching of card usage to American Express ("Amex"), and that the reasons for that decision would be given in writing. This judgment sets out our reasons for that decision.

B. BACKGROUND

3. Sainsbury's application arises in unusual circumstances.

4. By a decision adopted on 19 December 2007, the European Commission held that the multilateral interchange fees ("MIFs") applicable to cross-border transactions within the European Economic Area under the rules of the Mastercard scheme gave rise to a breach of Art 101(1) of the Treaty on the Functioning of the European Union ("TFEU") and did not satisfy the criteria for exemption under Art 101(3) TFEU ("the Mastercard Commission Decision"). Mastercard applied to the General Court for annulment of that decision, and several of the banks that were members of the Mastercard scheme intervened in the proceedings in support of the application. By its judgment given on 24 May 2012, the General Court dismissed that application: Case T-111/08 *Mastercard, Inc. v Commission*, EU:T:2012:260 ("*Mastercard GC*"). Mastercard and some of the intervening banks appealed that decision to the Court of Justice of the European Union (the "CJEU"). On 11 September 2014, the CJEU dismissed

those appeals: Case C-382/12P *Mastercard, Inc. v Commission*, EU:C:2014:2201 ("*Mastercard CJ*").

5. A significant number of claims have been brought before the English courts and the CAT in the light of those decisions, claiming damages against Mastercard and/or Visa for breach of Art 101 TFEU and the corresponding Chapter I prohibition under s. 2 of the Competition Act 1998 ("CA 1998"), based on the level of the Mastercard and Visa MIFs.

6. The present claim by Sainsbury's against Visa is one of those cases, and Sainsbury's also brought separate but corresponding proceedings against Mastercard. Both those claims concerned domestic UK MIFs. In their various defences, both schemes pleaded that the levels of MIFs charged satisfied the criteria for exemption under Art 101(3) (and s. 9 CA 1998). Sainsbury's claim against Visa came on for trial before Phillips J in the Commercial Court. After a trial lasting 40 days, Phillips J dismissed Sainsbury's claim in a judgment issued on 30 November 2017, holding that there was no restriction of competition and thus no breach of Art 101(1) (or s. 2): *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2017] EWHC 3047 (Comm) (the "*Sainsbury's Visa* restriction judgment"). By a further judgment, issued on 23 February 2018, Phillips J held that if, contrary to his first judgment, there was a restriction of competition, Visa's MIFs were not exempt under Art 101(3) (or s. 9): *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2018] EWHC 355 (Comm) (the "*Sainsbury's Visa* exemption judgment").

7. Sainsbury's parallel claim against Mastercard (the "Sainsbury's Mastercard proceedings") was transferred from the High Court to the CAT, which heard it over 23 days in January-March 2016. The CAT gave judgment on 14 July 2016, holding that the UK MIFs under the Mastercard scheme restricted competition in breach of Art 101(1) (and s. 2); that the conditions for exemption under Art 101(3) (and s. 9) were not satisfied; and awarding substantial damages to Sainsbury's: *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2016] CAT 11 (the "*Sainsbury's Mastercard* judgment").

8. Several other large retail chains also brought actions against Mastercard, concerning not only Mastercard's UK MIFs but also its separate cross-border EEA MIFs and, in one claim, its Irish domestic MIFs. Those actions were heard together by Popplewell J in the Commercial Court in a liability trial that took place in June to July and September to October 2016. Popplewell J gave judgment on 30 January 2017 dismissing the claims. He held that, subject to what was called the "death spiral" argument, the various MIFs would have restricted competition in violation of Art 101(1) but that by reason of this argument there was no violation; and that in any event the various MIFs were exempt under Art 101(3): *Asda Stores Ltd v Mastercard Incorporated* [2017] EWHC 93 (Comm) (the "*AAM* judgment").

9. Appeals against the outcome in all these cases were heard together in the Court of Appeal. The Court of Appeal gave a single judgment in which it held that the MIFs at issue under both the Visa and Mastercard schemes infringed Art 101(1), but remitted all the cases to the CAT to reconsider the issues under Art 101(3) and, insofar as it held that the exemption did not apply, the quantum of damage: *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2018] EWCA Civ 1536 (the "CA judgment"). Further appeals in all the cases went to the Supreme Court, which gave a single judgment in June 2020. The Supreme Court varied the decision and order of the Court of Appeal in certain specific respects: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 (the "SC judgment").

10. The relevant parts of the order of the Court of Appeal, as varied by the Supreme Court, provide:

> "15. The claims brought by Sainsbury's against each of Mastercard and Visa shall be remitted to the Competition Appeal Tribunal for re-consideration, not retrial, in accordance with the Judgment, of Mastercard's and Visa's cases advanced in the Court/Tribunal below that the MIFs subject to these claims satisfy the conditions for exemption pursuant to Article 101(3) TFEU, section 9 of the Competition Act 1998, Article 53(3) EEA and/or section 4(5) of the Irish Competition Act 2002. …
>
> 16. The Competition Appeal Tribunal will also determine all issues relating to quantum and any other issues reserved to the Phase 2 trial in *Sainsbury's v Visa* ….

> 17. So far as concerns the *Sainsbury's v Visa* case, the Competition Appeal Tribunal shall give effect to the acceptance by Sainsbury's at the trial in *Sainsbury's v Visa* that MIF levels of up to 0.2% for debit cards and up to 0.19% for credit cards would be lawful, these being Sainsbury's estimates of the UK MIT-MIF at the *Sainsbury's v Visa* trial."

11. Subsequently, Sainsbury's and Visa resolved the Art 101(3) exemption issue in the present case by Visa accepting that it would not seek to argue that any higher level of UK MIF would qualify for exemption than the levels conceded by Sainsbury's (referred to by Visa as "the Concession") as recorded in para 17 of the Court of Appeal order. Accordingly, the outstanding issues in the present case concern only quantum. Visa contends that it in fact set its MIFs for debit cards at (on average) 0.2% and that Sainsbury's can therefore recover damages only in respect of Visa's credit cards MIFs. Sainsbury's disputes this. It was against that background that the CAT ordered the parties to serve Statements of Case relating to the quantum issues.

C. THE DISPUTED ALLEGATION

12. In their pleaded Defence to the quantum issues, Visa states at para 27:

> "Visa's primary case is that the adverse consequences of lower MIFs should be quantified on the basis that only Visa reduced its MIFs to the levels of the Concession, without also assuming that Mastercard would have reduced its MIFs to those levels as well. That is so because the measure of damages is what compensation is necessary to put the Claimant in the position it would have been if Visa had not breached its statutory duty. Visa had no duty or ability to procure that Mastercard reduced its MIFs, and so cannot be required to compensate the Claimant for losses that the Claimant would also have suffered even if Visa had cut its MIFs to the levels of the Concession, because Mastercard would have continued to set higher MIFs. On that basis, it is likely that Mastercard would have chosen to retain its MIFs at their actual levels in the counterfactual, so as to attract more issuers and cardholders away from the Visa scheme. Substantial volumes of Visa credit card transactions in the real world would therefore have been Mastercard or American Express transactions in the counterfactual, because Visa issuers and/or credit cardholders would have switched to those schemes for the more favourable terms made available by substantially higher MIFs. The Claimant can only claim the overcharge on the portion of transactions that would have remained Visa transactions in the counterfactual, and must give credit for the extent to which transactions that were Visa transactions in the real world would have been more expensive Mastercard or American Express transactions in the counterfactual. Those sums will be quantified in evidence following disclosure in due course."

13. Mastercard, like Visa, is a four-party payment scheme. It is unnecessary to lengthen this judgment by a description of how such a scheme operates when

that is fully described in the earlier judgments referred to: see in particular the SC judgment at [6]-[10]. By contrast, Amex is a three-party scheme where the scheme operator (i.e. Amex) acts as both acquirer and issuer and clears payments itself. Essentially, the argument advanced by Visa at para 27 is that the quantum of damage should be assessed on the basis that in the counterfactual where Visa would have operated with much reduced MIFs at the levels which the parties agree would have been lawful, Mastercard would not have done likewise but should be regarded as continuing to operate with the much higher MIFs. On the basis of this "asymmetric counterfactual", Visa contends that issuing banks and/or cardholders would have switched away from Visa to Mastercard, since those higher MIFs would have benefited issuers and/or enabled them to offer better terms to cardholders. Further or alternatively, cardholders would have switched to Amex which, as a three-party scheme, does not have MIFs but would be offering more favourable terms to cardholders than Visa.

D. SUBMISSIONS

14. Sainsbury's submits that this argument is not open to Visa for two reasons. In summary, first, it says that the Court of Appeal has already considered the asymmetric counterfactual and rejected it in the CA judgment as "completely unrealistic and improbable". Secondly, Sainsbury's submits that for Visa to advance this as a hypothetical counterfactual in the remitted proceedings would be an abuse of process. The CA judgment was given in the present action (along with other proceedings) and involved rejection of Visa's submissions on this very point. Sainsbury's says that Visa's approach is also contrary to the governing principle set out in rule 4(1) of the Competition Tribunal Rules 2015 which seeks "to ensure that each case is dealt with justly and at proportionate cost."

15. Sainsbury's also points out that the CAT has separately held that Mastercard is not entitled to advance a case based on the converse asymmetric counterfactual (i.e. that Mastercard had low or zero MIFs while Visa's MIFs remained much higher) in its ruling at the CMC on 24 February 2021 in the remitted *Sainsbury's v Mastercard* proceedings.

16. Visa submits that the CA judgment was addressing a different proposition from the one which it now seeks to advance. It says that the argument before the Court of Appeal concerned the situation where one of the two schemes (i.e. Mastercard or Visa) was prevented from setting any default MIFs at all. That more extreme scenario was advanced because the argument at that stage concerned Art 101(1) where the counterfactual was a zero MIF, and each scheme contended that if the other was unconstrained it could not have survived. By contrast, Visa is now seeking to argue, at the quantum stage, only that it would have lost substantial volumes of business to Mastercard and Amex. Further, Visa points out that in fact it had operated with lower levels of MIFs than Mastercard at various points.

17. Secondly, Visa argues that in its observations on the asymmetric counterfactual the Court of Appeal was not dealing with the situation under Art 101(3), which it expressly distinguished. Popplewell J in the *AAM* judgment said that the two schemes may not be materially identical for the purpose of Art 101(3), and for the purpose of quantum the counterfactual concerns what lawfully would have happened, so that it cannot be assumed that Mastercard "could not have succeeded in defending the MIFs that it operated in the real world under Article 101(3)".

18. Thirdly and in any event, Visa submits that the analysis of the asymmetric counterfactual in relation to Art 101(1) was wrong in law, as inconsistent with the more recent decision of the CJEU in Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt*, EU:C:2020:265 (*"Budapest Bank"*). That same argument was advanced by Visa in separate proceedings commenced by a large number of other merchant claimants, where late last year Visa applied for an order that the CAT refer the question of the correct counterfactual to the CJEU for a preliminary ruling. Following a hearing on 1 December 2020, the CAT unanimously rejected that application, holding that *Budapest Bank* did not cast any doubt on the approach of the Court of Appeal, and that Visa's arguments based on *Budapest Bank* were, on proper analysis, contrary to the reasoning in the SC judgment which considered *Budapest Bank*: see *Dune Shoes Ireland Ltd v Visa Europe Ltd* [2020] CAT 26 (the "*Dune* judgment"). Visa states that it wishes to preserve its position on this point for any appeal.

E. DISCUSSION

(1) The CA judgment

19. In order to assess the submissions, it is necessary to analyse the CA judgment in some detail. In doing so, we follow the approach adopted in the *Dune* judgment.

20. The Court of Appeal identified three primary issues that arose for decision on the appeals, which they summarised at [7] as follows:

> "(i) **The article 101(1) issue**: Do the schemes' rules setting default MIFs restrict competition under article 101(1) in the acquiring market, by comparison with a counterfactual without default MIFs where the schemes' rules provide for the issuer to settle the transaction at par ("settlement at par" or "SAP") (i.e. to pay the acquirer 100% of the value of the transaction)?
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> (ii) **The ancillary restraint death spiral issue**: Should the schemes' argument that the setting of a default MIF is objectively necessary for their survival be evaluated on the basis of a counterfactual that assumes that the rival scheme would be able to continue to impose (unlawful) MIFs? This issue is known as the "death spiral" issue because, if the counterfactual assumes a rival scheme that can continue to set high MIFs, the scheme under scrutiny would be likely to lose most or all of its business to the rival scheme, where issuers received high MIFs and cardholders received benefits as a result.
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> (iii) **The article 101(3) exemption issue**: If the setting of default MIFs infringes article 101(1), should it have been held that the four conditions required for the application of the exemption in article 101(3) were applicable in these cases, and if so at what level(s) were the MIFs exemptible? …"

There were also some other issues addressed by the Court of Appeal which are not material to the present case. However, as the Court of Appeal observed, the death spiral argument was considered by the CAT and Popplewell J both in the context of Art 101(1) and of ancillary restraints/objective necessity: [7] at fn 4.

21. Since the submissions on the application before us concern the question of the counterfactual, and to understand the CA judgment in its context, it is appropriate to explain how each of the three first instance judgments dealt with the counterfactual against which the restrictive effects of the Visa and Mastercard schemes were to be tested.

(1) In the *Sainsbury's Mastercard* judgment, the CAT held that the starting point was a Mastercard rule that transactions would be settled at par, which was equivalent to a zero MIF, but that it was appropriate for the counterfactual to take account of the Visa MIF which would have remained close to its existing level, as a result of which issuers in the Mastercard scheme would have bilaterally agreed interchange fees with acquirers at significantly lower levels.

(2) In the *AAM* judgment, Popplewell J also held that the starting point was a rule that transactions would be settled at par and that this was equivalent to a zero MIF. He disagreed with the CAT that bilaterally agreed MIFs would emerge. He proceeded to adopt the reasoning of the Mastercard Commission Decision, *Mastercard GC* and *Mastercard CJ* that this was a restriction of competition because the MIF creates a floor for the merchant service charge ("MSC") and interferes with the ability of acquirers to compete for merchants by offering MSCs below that floor. On that basis, he would have held that the arrangement infringed Art 101(1) but for the death spiral argument. His reasoning is helpfully summarised in the CA judgment at [46]:

> "… [Popplewell J] expressed this argument in the following stages: (i) it is legally permissible for the counterfactual to take into account competition; (ii) the proper assumption in the present case is that Visa's MIFs would have been the same in the counterfactual as they were in reality; and (iii) this would have led to the collapse of the MasterCard scheme as issuers abandoned it in pursuit of higher MIFs. With respect to the first stage, he held that it is permissible to consider competition, on the basis of CJEU jurisprudence, including [177]-[179] of the CJEU's decision; the contrary principle stated by the Court of First Instance in *Métropole Télévision (M6) v Commission* ("*Métropole*")[1] was out of line with that jurisprudence ([164]-[185]). Regarding the second stage, he held that Visa's MIFs should be assumed to be the same in the counterfactual as they actually were, and not the same as MasterCard's counterfactual MIFs, unless there was sufficient evidence that the two schemes were "materially identical", which there was not ([186]-[219]). As for the third stage, he concluded, on the basis of the evidence of MasterCard's witnesses and of both parties' experts, that the MasterCard scheme would not have survived in such circumstances ([220]-[236]). Therefore, the MIFs as set did not restrict competition by effect, and were objectively necessary as an ancillary restraint, with the consequence that they did not infringe article 101(1)."

[1] Case T-112/99 *Métropole Télévision (M6) v Commission*, EU:T:2001:215.

(3) In the *Sainsbury's Visa* restriction judgment, Phillips J held that the starting point for the counterfactual was a rule that transactions were settled at par and that this was equivalent to a zero MIF. In agreement with Popplewell J, he rejected the view of the CAT that bilateral agreements would be concluded. However, he held that:

(i) he was not bound by *Mastercard CJ* to find that the MIFs restricted competition within Art 101(1), on the basis that this was a finding of fact;

(ii) the fact that Visa's MIFs imposed a floor below which the MSCs could not fall should not be regarded as a restriction of competition, since the restrictive nature of a zero MIF was not different from the restrictive nature of a higher MIF;

(iii) accordingly, there was no infringement of Art 101(1).

Although this conclusion did not involve any consideration of the Mastercard MIFs, Phillips J proceeded to reject the argument that the proper assumption for the counterfactual was that Mastercard's MIFs would remain unconstrained. We again gratefully adopt the summary of his reasoning set out in the CA judgment at [53]-[54]:

> "53. … [Phillips J] disagreed with both the CAT and Popplewell J on that issue at [162]-[169]. He thought it difficult to conceive of circumstances in which one scheme would be unable to set any MIFs whilst the other continued to operate unconstrained. More importantly, such an assumption would mean that two unlawful schemes could each escape censure merely by virtue of the existence of the other, which could not be right.
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> 54. Though not strictly necessary, Phillips J went on to consider the ancillary restraint exemption to article 101(1). In this respect, Visa had relied solely on the 'death spiral argument', which the judge had already rejected in the context of whether the MIFs restricted competition. He considered that his reasoning equally applied in the context of ancillary restraint ([179]-[180]). He disagreed with Popplewell J that the CJEU jurisprudence made it permissible to take into account competitors in either context ([181]-[190]). Accordingly, had Phillips J reached a different conclusion on whether the MIFs amounted to a restriction of competition, he would not have regarded the restriction as objectively necessary to the operation of the Visa scheme ([191])."

22. In Part IV of its judgment, the Court of Appeal considered the scope and application of the doctrine of ancillary restraints/objective necessity before it turned to address the issues arising in the appeals. The Court summarised the doctrine as follows, at [58]:

> "a provision of an agreement which has the effect of restricting competition does not constitute an infringement if it is objectively necessary for the implementation of the "main operation" of the agreement, provided that the main operation does not itself infringe article 101(1)."

23. The Court of Appeal accepted the arguments of the merchants and the Commission (which had intervened in the appeals), relying on the judgment of the Court of First Instance in the *Métropole* case, that:

> "the consideration of objective necessity is a relatively abstract exercise concerned with whether, without the restriction in question, a main operation of the type in question would be impossible to carry out. The test, they said, is not concerned with whether the restriction is necessary for the particular operation in question to compete successfully or be commercially successful. They also said that an analysis of the pro- and anti-competitive effects of the restriction is for article 101(3) and does not form any part of the article 101(1) exercise, including as to ancillary restraint." (CA judgment at [60])

24. The Court rejected the finding of Popplewell J in the *AAM* judgment that *Métropole* was out of line with the jurisprudence of the CJEU and had been implicitly overruled in *Mastercard CJ*. In that regard, the Court examined various CJEU judgments, including *Mastercard CJ* itself.

25. Having rejected the challenge to *Métropole*, the Court of Appeal stated, at [72]-[73]:

> "It follows that the ancillary restriction must be essential to the survival of the type of main operation without regard to whether the particular operation in question needs the restriction to compete with other such operations. All questions of the effect of the absence of the restriction on the competitive position of the specific main operation and its commercial success fall outside the ancillary restraint doctrine …. Those questions of the competitive effect of the absence of the restriction are to be considered, if at all, under art 101(3). …"

26. After referring to the more recent judgment of the General Court in Case T-491/07 *Cartes Bancaires v Commission*, EU:T:2016:379, the Court of Appeal concluded, at [74]:

> "It follows, in our judgment, that Popplewell J was wrong to conclude that the issue of whether, in the absence of the restriction in question, here the default MIF, the MasterCard scheme would survive in view of the competition from Visa, was one which could be considered under the ancillary restraint doctrine under article 101(1) …."

27. The Court of Appeal addressed the first of the three primary issues, i.e. the Art 101(1) issue (para 20 above), in Part VI of its judgment. In effect, the Court upheld the view of Popplewell J, and rejected the view of Phillips J, that the correct counterfactual had been established by the *Mastercard CJ* decision as a matter of law, which was therefore binding on the English courts. However, as already indicated earlier in its judgment, the Court held that Popplewell J had been wrong then to rely on the death spiral argument to reach a different conclusion on the question of a restriction of competition:

> "161. … In our judgment, Popplewell J fell into error (particularly at [182]-[185]) in considering the death spiral argument at all in relation to the question whether the measures were a restriction of competition under article 101(1). It is common ground that the correct approach to deciding the primary article 101(1) question was set out at [111] in *Cartes Bancaires* as follows: "determining whether, in the absence of the measures in question, the competitive situation would have been different on the relevant market, that is to say whether the restrictions on competition would or would not have occurred on this market".
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> 162. It is common ground that the relevant market for article 101(1) purposes is the acquiring market. That is stated in the first issue agreed between the parties under article 101(1). But the death spiral argument does not concern a comparison between the state of competition in the acquiring market with and without the "measures in question". Instead, it concerns the effects on the inter-system market and the issuing market of issuers switching to a competing scheme in order to earn MIFs in the absence of MIFs being imposed in the MasterCard scheme. It is true that the putative decline of business in the inter-system market and the issuing market affects the level of business in the acquiring market, but in our judgment that is not to the point. The first question is whether the measures in question restrict competition in the acquiring market. The second question is whether the scheme can show that the restriction is objectively necessary for a scheme of that type to survive, at which stage it is legitimate to consider both sides of the two-sided market and the inter-system market, as was common ground in argument. The third question is whether there is an exemption under article 101(3). It is not legitimate to consider the death spiral argument at the first stage; Parts IV and VII of this judgment deals with its relevance to the second stage."

28. For much the same reason, the Court of Appeal held that the CAT had been wrong in the *Sainsbury's Mastercard* judgment to take account of the factors beyond the acquiring market, and thus the effect in the counterfactual of Visa's

MIFs on the Mastercard MIFs, in its initial Art 101(1) analysis of whether the MIFs amounted to a restriction by effect: CA judgment at [175].

29. After considering and rejecting various other arguments advanced on behalf of Mastercard and Visa, the Court of Appeal summarised its conclusions at [185]-[188], of which the material parts are the following:

> "185. … The correct counterfactual for schemes like the MasterCard and Visa schemes before us was identified by the CJEU's decision. It was "no default MIF" and a prohibition on *ex post* pricing (or a settlement at par rule). The relevant counterfactual has to be likely and realistic in the actual context [citing authorities], but for schemes of this kind, the CJEU has decided that that test is satisfied.
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> 186. The CJEU's decision also made clear at [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. …
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> 187. … We do not discount the possibility that some evidence might conceivably enable other schemes to distinguish different MIFs from those upon which the CJEU was adjudicating. In the present case, however, the MIFs are materially indistinguishable from the MIFs that were the subject of the CJEU's decision. In both cases, the MIFs represented the vast majority of the merchants' service charge, and the appropriate counterfactual was a "no default MIF" plus a prohibition on *ex post* pricing.
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> 188. The death spiral argument is not relevant at this stage of the debate because the article 101(1) question must be asked in relation to the acquiring market."

30. In Part VII of its judgment, the Court of Appeal addressed the second of the three primary issues it had identified: i.e. the death spiral argument in the context of ancillary restraints: para 20 above. Since the way the Court of Appeal dealt with the death spiral argument is fundamental to Sainsbury's objection to Visa's pleading, it is appropriate to quote the Court of Appeal's full discussion and conclusions on this issue:

> "198. On this issue, we will apply the legal principles applicable to the ancillary restraint doctrine as set out in Part IV of this judgment. On that basis, Popplewell J was wrong, as we have said, to conclude that the issue of whether, in the absence of the default MIF, the MasterCard scheme would survive in view of the competition from Visa was one which could be considered under the ancillary restraint doctrine under article 101(1). Such questions relating to the application of the so-called asymmetrical counterfactual are not for the ancillary restraint issue under article 101(1), but for the issue of exemption under article 101(3).

199. We agree with the merchants that, if questions of the subjective necessity of a restriction for the survival of the particular main operation were relevant for the purposes of the ancillary restraint doctrine, it would enable failing or inefficient businesses that could not survive without a restrictive agreement or provision to avoid the effects of article 101(1), which would undermine the effectiveness of that provision of EU law and the underlying competition policy.

200. The only question in relation to the potential application of the ancillary restraint doctrine in the present context is whether, without the restriction of a default MIF (which is the relevant counterfactual), this type of main operation, namely a four-party card payment scheme, could survive. The short answer to that question is in the affirmative and the contrary was not suggested by MasterCard or Visa. There are a number of such schemes in other parts of the world which operate perfectly satisfactorily without any default MIF and only a settlement at par rule.

201. Even if Popplewell J had been correct in his conclusion that the decision of the Court of First Instance in *Métropole* was implicitly disapproved by the CJEU in *MasterCard,* so that it was appropriate to consider, in the context of the ancillary restraint doctrine, the competitive effects of the removal of the restriction in question on the specific main operation, we consider that his adoption of the asymmetrical counterfactual was incorrect for two related reasons.

202. First, as the CJEU's decision makes clear at [108]-[109], the counterfactual must be a realistic one. The asymmetrical counterfactual which Popplewell J accepted assumes that MasterCard would be prevented from setting default MIFs but Visa would remain unconstrained. As Phillips J said at [168(ii)] of his first judgment, addressing the mirror argument made by Visa in that case, that situation is "not merely unrealistic but seems highly improbable". As Phillips J said, the schemes are engaged in the same business, using the same model and are fierce competitors. We were not impressed in this context by the arguments on behalf of the schemes that there have been inconsistencies in approach on the part of the Commission and other competition authorities and regulators. Whilst there have been differences in the detail, as appears from the chronological background set out at Part II of this judgment, the competition authorities and regulators have sought to constrain both schemes in a broadly similar fashion. We consider that a realistic counterfactual would assume that, if one of the schemes was unable (whether for commercial or legal reasons) to set default MIFs, the other scheme would be similarly constrained.

203. The correctness of that conclusion was not undermined by the points made by Ms Rose about what had happened historically in Hungary or even in the United Kingdom. The critical point is that the hypothesis of the asymmetrical counterfactual is that one of the schemes would be prevented from setting any default MIF but the Commission and the UK competition authorities and regulators would allow the other scheme to carry on setting its default MIFs, without any constraints being imposed. That seems to us to be completely unrealistic and improbable. Realistically there would be similar constraints on both schemes.

204. Secondly, Popplewell J accepted at [189] of his judgment that, if the AAM parties were right that the two schemes were materially identical, he would have had to assume that, in the counterfactual world, Visa's MIFs would

be constrained to the same extent as MasterCard's. His essential reasoning for that conclusion at [190]-[193] of his judgment was that it should not be open to one unlawful scheme to save itself by arguing that it otherwise would face elimination by reason of competition from the other scheme, which is itself unlawful.

205. On the evidence before him, however, Popplewell J considered that the AAM parties had not established that the Visa scheme was materially identical to the MasterCard scheme he was considering. He concluded at [204] that what was material was whether and to what extent Visa's MIFs as set constituted an unlawful restriction of competition infringing article 101, which involved considering all the features of the Visa scheme which might affect the lawfulness of its MIFs, including those relevant to article 101(3) issues. He rejected the argument by the AAM parties that it was sufficient to posit material identity between the schemes only in respect of aspects relevant to the issue of restriction of competition under article 101(1), concluding that it was necessary also to show material identity which might affect the level at which a MIF was exemptible under article 101(3).

206. This conclusion suffers from the same fallacy as Popplewell J's acceptance of the argument that, for the purposes of the ancillary restraint doctrine, it is permissible to look at the competitive or commercial effect of the removal of the restriction in question on the specific main operation. It brings into the article 101(1) analysis matters which are only to be considered under article 101(3). Once it is recognised that the relevant test is only satisfied if the restriction is objectively necessary for the survival of the type of main operation in question and the subjective necessity of the restriction for the survival of the specific main operation is irrelevant, it is clear that it is only material identity in respect of matters relevant to article 101(1) that would have to be established.

207. We consider that the two schemes are materially identical for the purposes of the article 101(1) analysis. They are both four-party card payment schemes with an Honour All Cards Rule for credit and debit cards, in which default MIFs are set which are paid to issuing banks and passed on to the merchants as part of the merchants' service charge imposed by acquiring banks. In those circumstances, even if Popplewell J had been correct that it was appropriate to consider, in the context of the ancillary restraint doctrine, the competitive effects of the removal of the restriction in question on the specific main operation, he should have gone on to conclude that the schemes were materially identical, so that in the counterfactual world Visa's MIFs would be constrained to the same extent as MasterCard's.

208. For all these reasons, we consider that Popplewell J erred in accepting the death spiral argument and should have upheld his initial conclusion that MasterCard's MIFs were a restriction on competition under article 101(1). By parity of reasoning, Phillips J was correct to reject the death spiral argument in his first judgment."

31. In Part VIII of its judgment, the Court of Appeal addressed the Art 101(3) exemption issue (see para 20 above). Under this head, the Court considered the *AAM* and *Sainsbury's Visa* cases separately. As regards the *AAM* case, the Court held that Popplewell J was wrong on the evidence to find that the

conditions of Art 101(3) were fulfilled: he should have held that Mastercard was not entitled to exemption under Art 101(3). As regards *Sainsbury's Visa*, the Court had earlier in its judgment rejected the challenge to Phillips J's approach to the standard of proof under Art 101(3). But the Court accepted Visa's argument that the judge had failed to take account of relevant evidence regarding the way that card usage might be stimulated by issuers and held that he had been wrong to find that Visa had failed to produce empirical evidence to support its case on the benefits to card users that resulted from the issuers' receipt of positive MIFs. On that basis, the Court of Appeal concluded that the case should be remitted for renewed consideration of the Art 101(3) issue, while expressly recognising that the same conclusion might be reached: CA judgment at [295]-[296]. That is therefore the basis on which this case has been remitted to the CAT. However, we note that it was not part of Visa's case before the Court of Appeal under Art 101(3) that the approach of Phillips J in the *Sainsbury's Visa* exemption judgment was flawed because he did not apply an asymmetric counterfactual.

32. Both Visa and Mastercard appealed to the Supreme Court. Their appeals were based on several grounds. The only ground relevant to the present application concerned the Court of Appeal's conclusion that there was a restriction by effect on the acquiring market contrary to Art 101(1). However, as noted by the Supreme Court at [45], neither Mastercard nor Visa sought to challenge the Court of Appeal's conclusion on the death spiral argument or to submit that the Court of Appeal had been wrong to uphold Phillips J's rejection of the asymmetric counterfactual. In summary, the Supreme Court upheld the Court of Appeal's conclusion on the Art 101(1) issue and held that there was a restriction of competition in violation of that provision. As regards Art 101(3), there were several strands to the appeals but neither scheme sought to argue that, whatever the position as regards Art 101(1), the asymmetric counterfactual was applicable in the context of Art 101(3).

33. The extensive extracts from the CA judgment set out above show that it is correct, as Visa submitted, that the Court of Appeal's discussion of the counterfactual was in the context of Art 101(1), and that the asymmetric counterfactual was relied upon for the argument that if one scheme had to

operate with a zero MIF while the other was unconstrained, it could not survive – hence the characterisation of this point as a 'death spiral'. Visa is also correct that it now seeks to put forward an asymmetric counterfactual not in support of an argument of objective necessity for the MIF, or to argue that its scheme could not survive, but that there would be a significant diversion of card usage to Mastercard. Visa also rightly points out that as a matter of EU competition law (and therefore similarly under the CA 1998), the relevant counterfactual is not necessarily the same for all purposes: see *Mastercard CJ* at paras 163 and 168.

34. However, the CJEU stated at para 108:

> "… irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic".

At the present stage of these proceedings, the issue to which the counterfactual relates is the assessment of damages, and therefore a comparison between the MSCs which Sainsbury's in fact paid to its acquiring bank(s) in respect of Visa transactions with the MSCs which it would, on the balance of probabilities, have paid if the relevant Visa MIFs had been at the level to satisfy the conditions for exemption under Art 101(3). The latter is the counterfactual world which, by definition, never actually existed.

35. Visa of course did not set all of its MIFs at those lower, lawful levels (as it could have done if it had so wished). The Court of Appeal noted at [202] the finding of Phillips J that the Visa and Mastercard schemes "are engaged in the same business, using the same model and are fierce competitors". The Court emphasised that while there have been differences in the detail, competition authorities and regulators have sought to regulate the two schemes in a broadly similar way. We repeat the Court's material finding, at [203]:

> "… the hypothesis of the asymmetrical counterfactual is that one of the schemes would be prevented from setting any default MIF but the Commission and the UK competition authorities and regulators would allow the other scheme to carry on setting its default MIFs, without any constraints being imposed. That seems to us to be completely unrealistic and improbable. Realistically there would be similar constraints on both schemes."

36. The logic and effect of that conclusion is not changed if for "any default MIF" there was substituted "any MIF above the exemptible level". Not only do we respectfully agree that this is "completely unrealistic and improbable", but we consider that we are in any event bound so to hold by the CA judgment, subject only to Visa's distinct argument in reliance on *Budapest Bank*. If a counterfactual is completely unrealistic when put forward on the question of restriction, it does not become realistic just because it is put forward when the analysis moves to consideration of quantum. Moreover, if Visa's argument were to be accepted, so that it could contend in its defence to Sainsbury's quantum claim in these proceedings that Visa transactions would have diverted to Mastercard, then by the same token Mastercard could contend in its defence to Sainsbury's quantum claim in the *Sainsbury's Mastercard* proceedings that Mastercard transactions would have diverted to Visa. The result would be that each of Visa and Mastercard could avoid their liability in damages for operating an unlawful scheme, either in total or in large part, by relying on the effects of competition arising from the other's unlawful scheme. As we have observed, the CAT was indeed faced with such a plea in Mastercard's defence in the remitted proceedings in the Sainsbury's Mastercard case, and held on 24 February 2021 that it is not open to Mastercard to advance this contention: para 15 above.

37. However, the same considerations do not apply to Visa's plea that there would have been diversion of card usage to Amex. That does not involve an asymmetric counterfactual since Amex is not a four-party scheme and is structured in a materially different way. In particular, Amex itself issues cards and makes the payments to merchants for cardholder transactions, so there are no issuing and acquiring banks and no interchange fees: see the *Sainsbury's Visa* restriction judgment at [42]. It follows that it is entirely realistic to consider that if Visa and similarly Mastercard had lower MIFs in the counterfactual so as to avoid infringement of Art 101, no such constraint would apply to Amex. Accordingly, we consider that Visa should be able to advance the plea in para 27 of its Defence as regards Amex.

(2) Budapest Bank

38. Visa advances the further or alternative submission that the analysis of the Court of Appeal on the asymmetric counterfactual is wrong in law, on the basis of the CJEU's decision in *Budapest Bank.* If Visa is right in that regard, then the basis for striking out the asymmetric counterfactual set out above falls away.

39. As noted above, Visa of course acknowledges that the CAT has already rejected its arguments based on *Budapest Bank* in the *Dune* proceedings (by a tribunal with the same composition as in the present case). Visa realistically does not seek to repeat, although it relies upon, the various arguments which it advanced in that case.

40. It is unnecessary, and would unduly lengthen this judgment, to repeat the analysis of *Budapest Bank* and the SC judgment which we carried out in our judgment in *Dune.* For the same reasons as are set out in that judgment, and which we incorporate by reference, we reject that submission.

41. However, there is a further and independent ground for holding that this submission is not open to Visa in the present case. The CJEU issued its ruling in *Budapest Bank* after the conclusion of the oral argument in the Supreme Court in these proceedings (and the related cases), although the Opinion of the Advocate General had been issued on 5 September 2019, several months before the oral argument in the Supreme Court. At their request, Visa (and Mastercard) were allowed to make written submissions to the Supreme Court as to the significance of *Budapest Bank*. That CJEU judgment, and the schemes' submissions based upon it, are summarised in the SC judgment at [80]-[87]. Those submissions went to the issue of whether their MIFs gave rise to a restriction of competition under Art 101(1). The Supreme Court proceeded to hold that *Budapest Bank* was clearly distinguishable. However, in its reliance before the Supreme Court on *Budapest Bank*, Visa did not advance the argument concerning the asymmetric counterfactual, which it now wishes to advance in the remitted proceedings.

42. The well-known rule in *Henderson v Henderson* (1843) 3 Hare 100 prevents a party raising in later proceedings matters which were not, but could and should have been, raised in earlier proceedings. It seems clear that the rule can apply to defendants and defences as much as to claimants and claims: see e.g. *Barnett-Waddington Trustees (1980) Ltd v The Royal Bank of Scotland Plc* [2017] EWHC 834 (Ch). The modern application of the rule has been authoritatively set out in the speech of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 (with which Lords Goff, Cooke and Hutton agreed). After discussion of the authorities, Lord Bingham stated:

> "It is ... wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

43. It is established that an abuse under this principle does not apply only in the context of a distinct second set of proceedings. As Jefford J stated in *Daewoo Shipbuilding and Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2020] EWHC 2353 (TCC) at [128]:

> "… an abuse of process may arise (albeit does not necessarily arise) where the issue could and should have been raised at an earlier stage and … the authorities to which my attention has now been drawn support the proposition that that may be the case at different stages of the same proceedings as well as in subsequent proceedings and that an abuse of process may properly be found to arise in the context of proposed amendments. The question of whether the issue or issues then raised have been determined or were within the scope of the matters to be determined or were relevant to the matters to be determined is all part of the broad merits based judgment of the facts …."

44. We note also the observations of Coulson J in *Seele Austria GmbH Co v Tokio Marine Europe Insurance Ltd* [2009] EWHC 255 (TCC) at [107]:

> "… I accept that, where certain issues are dealt with by the court in advance of others, genuine mistakes may occur, where it would be unfair and unreasonable to prevent one party from raising an issue on the merits which, for whatever reason, has not been the subject of a clear determination before. *Tannu* and *Aldi Stores* are good recent examples of such a case. But at the same time, the court should be astute to prevent a claiming party from putting its case one way,

> thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again. The Civil Procedure Rules are designed to avoid the litigation equivalent of death by a thousand cuts."

45. In the present case, the issue of an asymmetric counterfactual in the context of Art 101(1) was strongly argued before the Court of Appeal. At that stage, the *Budapest Bank* case had not been decided. But Visa sought, and was granted, permission to make submissions on *Budapest Bank* when this case was before the Supreme Court. We do not think that it is an adequate explanation for Visa's failure to advance before the Supreme Court the argument based on *Budapest Bank* that it now wishes to advance before the CAT that this point was not covered by Visa's grounds of appeal to the Supreme Court. If, as Visa contends, the judgment of the CJEU in *Budapest Bank* had the fundamental effect of showing that the basis on which the Court of Appeal held that there was a restriction of competition within Art 101(1) was incorrect as a matter of EU law, it would have been open to Visa to apply to amend its grounds of appeal. No such application was made.

46. This is major litigation where Visa has had the benefit of substantial and sophisticated legal representation. We have no doubt that the approach which Visa adopted before the Supreme Court following the *Budapest Bank* judgment came after full and careful consideration.

47. We recognise that a party is not lightly to be shut out from advancing an argument that it wishes to advance in the course of ongoing proceedings. But the present case has now reached the quantum stage, following a full trial and appeals up to the highest level. The issue of infringement of Art 101(1) was fully considered, and decided, by the Supreme Court. Moreover, we note that in this very case, albeit in the different context of the challenge to the Court of Appeal's order that in the remittal of the *AAM* case Mastercard should be able to re-argue the Art 101(3) issue, the Supreme Court emphasised the importance of the principle that there should be finality in litigation. The SC judgment at [239] quoted with approval the observations of Lord Bingham (then Sir Thomas Bingham MR) in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257 at 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 for ever 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."

The Supreme Court added:

> "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."

48. Adopting a broad, merits-based test, we consider that it is an abuse of process, and contrary to the overriding objective (which is mirrored in the governing principles under rule 4 of the Competition Appeal Tribunal Rules 2015) for Visa to seek to raise this argument in this case now before the CAT. If Visa were permitted to advance this argument and it were to succeed, there would almost inevitably be a further appeal to the Court of Appeal, and potentially yet again to the Supreme Court, for Visa to make submissions based on *Budapest Bank* in this case for the second time.

49. This judgment is unanimous.

The Honourable Mr Justice Roth
President

Tim Frazer

Paul Lomas

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

Date: 28 June 2021