Neutral Citation Number: [2017] EWHC 3047 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No. 2015-000471

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 November 2017

Before :

MR JUSTICE PHILLIPS

- -

Between :

SAINSBURY'S SUPERMARKETS LTD

Claimant

- and -

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

Defendants

- -
- -

Mark Brealey QC, Derek Spitz and Sarah Love (instructed by **Morgan, Lewis & Bockius UK LLP**) for **the Claimant**
Dinah Rose QC, Daniel Jowell QC, Brian Kennelly QC, Daniel Piccinin and Jason Pobjoy (instructed by **Milbank Tweed Hadley & McCloy LLP and Linklaters LLP**) for **the Defendants**

Hearing dates: 14-17, 21-24 and 28-30 November, 1, 6-9, 12-15 and 19-21 December 2016; 11-13, 16-19 and 23-25 January; 1, 22-24 and 27-28 February and 1 March 2017

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Approved Judgment

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Mr Justice Phillips :

INTRODUCTION

1. The claimant ("Sainsbury's") operates a supermarket business, selling predominantly food, household goods and fuel. Sainsbury's accepts payment from customers by way of debit and credit cards, including Visa-branded payment cards. Those cards are issued to the customers by banks and other financial institutions (each an "Issuer") under licence from the defendants (collectively "Visa") and governed by the regulations of the Visa Europe System ("the Scheme"), of which each Issuer is a member.

2. Sainsbury's, in common with all other merchants accepting Visa payment cards ("Merchants"), accepts those cards pursuant to an agreement with an "Acquirer", also a bank or financial institution belonging to the Scheme. The fee the Acquirer charges to Merchants for its services in respect of a transaction, known as the Merchant Service Charge ("MSC"), covers (i) the fee the Acquirer pays Visa ("the Scheme Fee"); (ii) a fee charged by the Issuer to the Acquirer (the Interchange Fee or "IF") and (iii) the Acquirer's own fee ("the Acquirer Margin").

3. Whilst individual Issuers and Acquirers are at liberty under the terms of the Scheme to negotiate with each other as to the level of the Interchange Fee to be applied in any transaction or class of transactions to which they are both party (a Bilateral Interchange Fee or "BIF"), such agreements are almost unknown in the UK market. In practice, therefore, the Interchange Fee paid by the Acquirer and passed on to the Merchant will be that set by Visa as the default for the relevant type of transaction, known as the Multilateral Interchange Fee or "MIF". It is common ground that Acquirers pass on all of the MIF (and the Scheme Fee) to Merchants through the MSC, negotiation between Acquirers and Merchants being limited to the level of the Acquirer Margin. In the case of large Merchants such as Sainsbury's, the MIF has accounted for about 90% of the MSC they pay.

4. In these proceedings Sainsbury's seeks a declaration that the MIFs set by Visa for transactions in the UK ("the UK MIFs") were at all relevant times unlawful as being contrary to Article 101 of the Treaty on the Functioning of the European Union 2012/C 326/01 ("TFEU")[1], which is of direct effect, and its domestic equivalent, s.2 of the Competition Act 1998 ("CA98")[2]. As no point arises as to territoriality and there is no difference between the effect of the provisions, reference need only be made to Article 101. Article 101(1) and (2) provide:

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

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[1] Formerly Article 81 EC.
[2] S.2 CA98 is set out below in Schedule 1 to this judgment.

> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development, or investment;*
>
> *(c) share markets or sources of supply;*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*"

5. It is common ground that Visa (or at any rate the second defendant ("Visa Europe") and/or the third Defendant ("Visa UK")) is an association of undertakings within the meaning of Article 101 and that the UK MIFs are set by a decision of that association or agreement between those undertakings. It is also not in dispute that the UK MIFs have an appreciable effect on trade in the relevant territory.

6. The central issue is whether the UK MIFs have the effect of restricting competition[3] in the relevant market, it being common ground (following the judgment of the CJEU in *Cartes Bancaires v European Commission* handed down on 30 June 2016) that the market which must be considered is the acquiring market, that is to say, the market in which Acquirers compete with each other to sell their services in relation to the processing of payment card transactions to Merchants. Sainsbury's pleaded case that the UK MIFs also have the object of restricting competition was formally abandoned in closing argument.

7. Visa denies that the UK MIFs (or indeed any of their MIFs) restrict competition within the meaning of Article 101(1). In the alternative, Visa relies on the recognised defence that such restriction is an "ancillary restraint" which is "objectively necessary" for what is otherwise accepted to be the beneficial effect of the Scheme.

8. If those defences are unsuccessful, Visa contends that the UK MIFs, alternatively UK MIFs at some lower level, are nevertheless lawful by reason of the exemption provisions in Article 101(3)[4]:

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

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[3] No party suggested that there was any relevant distinction for present purposes between preventing, restricting and distorting competition. The parties referred primarily to restriction of competition and I shall do the same.

[4] The domestic equivalent is s.9 CA98, set out below in Schedule 1 to this judgment.

> *— any agreement or category of agreements between undertakings,*
>
> *— any decision or category of decisions by associations of undertakings,*
>
> *— any concerted practice or category of concerted practices,*
>
> *which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
>
> *(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
>
> *(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*"

9. Sainsbury's further claims[5] damages from 18 December 2007[6] in the amount by which the total of the Interchange Fees paid by Sainsbury's since that date exceeds what Sainsbury's claims it would have paid had there been no UK MIF (and it had agreed and paid BIFs) or if the UK MIFs had been set at (what Sainsbury's claims would be) a lawful level. In its original Particulars of Claim Sainsbury's estimated that the lawful level of the UK MIF was (as a weighted average) 0.17% for debit cards and 0.15% for credit cards, on that basis claiming damages of £148,636,686 for the period ending November 2015. In closing submissions, Sainsbury's accepted that a UK MIF of up to 0.2% for debit cards and 0.19% for credit cards would be lawful.

10. The trial before me was to determine issues relating to liability and certain issues relating to quantum, referred to as "phase 1". The remaining issues relating to quantum (to the extent they arise) are to be determined at a subsequent "phase 2" trial.

11. The phase 1 issues in these proceedings were tried before me at the same time as parallel issues in claims against Visa by numerous other large Merchants[7] (for convenience, referred to collectively as "the Arcadia claimants"). All the Arcadia claimants, represented by one legal team, agreed settlements of their claims with Visa (and with Visa Inc and Visa International Service Association ("VI"), US corporations joined as defendants by the Arcadia claimants but not by Sainsbury's) prior to oral closing arguments. However, the evidence adduced by the Arcadia claimants (including that of their expert economist, Mr Neil Dryden of Compass Lexecon) and by Visa Inc and VI (in particular, that of their expert economist, Mr Derek Holt of AlixPartners) was also evidence in Sainsbury's claim and arguments advanced by the Arcadia claimants in opening the trial were largely adopted by Sainsbury's.

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[5] The cause of action is breach of statutory duty.
[6] The date six years before the issue of these proceedings.
[7] Comprising the Arcadia group of companies and other large retailers best known by the following trading names: Asda, B&Q, Comet, Debenhams, House of Fraser, Iceland, New Look, Next, Morrisons, Argos and Marks & Spencer.

12. Further similar claims against Visa brought by members of the Tesco group of companies were also due to be tried at the same time as those brought by Sainsbury's and the Arcadia claimants, but were compromised shortly before the phase 1 trial started. The only remaining relevance of the Tesco proceedings is that the report of Tesco's expert economist, Professor Jerry Hausman, was technically in evidence before me and the Joint Expert Statement prepared by the expert economists reflected his views, as well as those of the experts who were called to give evidence at the trial: Mr Dryden, Mr Holt, Dr Cristina Caffarra of Charles River Associates (instructed by Visa) and Mr Nils von Hinten-Reed of CEG Europe (instructed by Sainsbury's).

13. These proceedings (together with the Arcadia proceedings) were the third set of claims to reach trial in 2016 in which large UK Merchants sought to challenge payment card MIFs, including UK MIFs. The parties, the issues, the trials and the judgments have overlapped with each other to a considerable extent.

14. In the first claim to reach trial, Sainsbury's made parallel allegations against MasterCard to those made in these proceedings against Visa. The claim was brought in the Chancery Division but transferred to the Competition Appeal Tribunal ("the CAT") and tried between January and March 2016. The Tribunal, comprising Barling J, Professor John Beath OBE and Marcus Smith QC (as he then was), handed down judgment in favour of Sainsbury's on 14 July 2016: *Sainsbury's v MasterCard* [2016] CAT 11 ("the CAT Judgment").

15. The CAT Judgment determined, in summary and in so far as relevant to the issues in these proceedings, that:

    i) The setting of MasterCard's UK MIF was a restriction of competition by effect. But for the UK MIF, Bilateral Interchange Fees would have been agreed. Those Interchange Fees would have been:

        a) in the case of MasterCard credit card transactions, the equivalent of 0.5% (rather than 0.9%); and

        b) in the case of MasterCard debit card transactions, the equivalent of 0.27% (rather than 0.36%).

    ii) Although it was possible for some level of UK MIF to be exemptible under Article 101(3), that level would have been lower than the BIFs that would have been agreed. Therefore MasterCard's UK MIFs were not exempt under Article 101(3).

    iii) Sainsbury's was entitled to recover £68,582,245 in respect of the overcharge in relation to credit cards and £760,406 in respect of the overcharge in relation to debit cards. This was calculated as being: (a) an amount equivalent to the extent to which the UK MIF paid by Sainsbury's in the claim period exceeded the amount that Sainsbury's would have been charged absent the UK MIF, this being the difference between the amount of the UK MIF for MasterCard credit and debit cards and the Bilateral Interchange Fees; (b) reduced to 80% to reflect that Sainsbury's Bank was itself an Issuer of MasterCard-branded cards; (c) plus interest.

16. The CAT Judgment was handed down during the course of the trial of a second set of proceedings, brought by the Arcadia claimants (except for Marks & Spencer) against MasterCard in this court, again making parallel allegations to those made against Visa in these proceedings. The *Asda v MasterCard* proceedings (as those proceedings have subsequently been labelled) were case-managed on the basis that the phase 1 issues in those proceedings would be tried first, with the phase 2 issues (if any remained relevant) to be heard together with the phase 2 trial in these proceedings. The phase 1 trial in *Asda v MasterCard* took place between June and October 2016 before Popplewell J, whose judgment in favour of MasterCard was handed down on 30 January 2017 ("the Asda Judgment"), just after the conclusion of the evidence in the phase 1 trial in this case.

17. Popplewell J determined, in summary, as follows:

    i) The absence of MasterCard MIFs would not have resulted in Bilateral Interchange Fees, but those MIFs were nonetheless *prima facie* a restriction of competition because they imposed a floor below which the MSC could not fall;

    ii) However, in the absence of MIFs the MasterCard scheme would have suffered from its Issuers switching to Visa (which Popplewell J assumed would have continued to set MIFs), causing MasterCard to enter a "death spiral". As MasterCard would therefore not survive in the UK (or Ireland) in a materially and recognisably similar form, there would not have existed lower MasterCard MIFs (or Visa MIFs). The MasterCard MIFs did not, therefore, restrict competition;

    iii) For the same reason, the MasterCard MIFs were objectively necessary as an ancillary restraint.

    iv) In any event, the MasterCard UK credit and debit MIFs were (and had been throughout the claim period) exempt under Article 101(3) and therefore lawful.

18. It will be apparent from the above summaries that the CAT and Popplewell J made very different findings of fact and ultimately reached exactly opposite conclusions. The CAT found the MasterCard UK MIFs to be unlawful for the whole of the relevant period and awarded Sainsbury's damages accordingly: Popplewell J found that the very same MIFs were lawful throughout, both under Article 101(1) and, in the alternative, under 101(3), and so dismissed the Arcadia claimants' claims.

19. The Court of Appeal has granted MasterCard permission to appeal the CAT Judgment and granted the Arcadia claimants permission to appeal the Asda Judgment. The appeals are currently listed to be heard together in April 2018.

THE BACKGROUND

The Scheme

Ownership and decision-making

20. The Visa group claims to operate the world's largest retail electronic payments network and to manage the world's most recognised global financial services brand. Since May 2007 the Visa trademarks and associated technology have belonged to Visa Inc, a publicly traded US corporation and the parent of subsidiaries operating in all regions of the world except, until 21 June 2016, the region referred to as Europe (that is, the EEA and certain other countries).

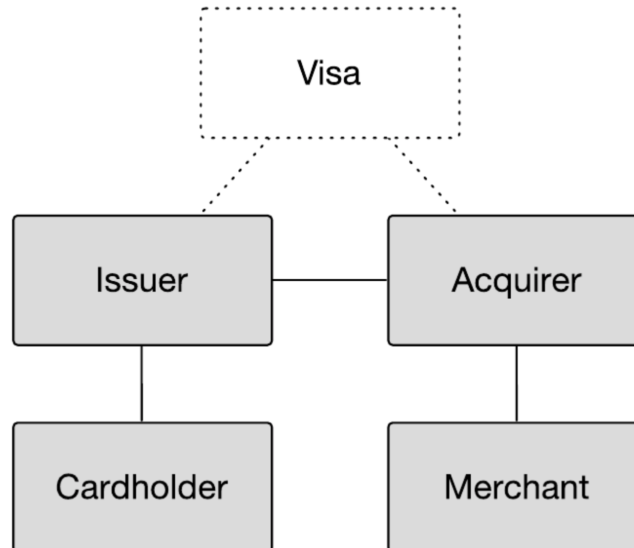
21. The system in Europe (that is, the Scheme) has been owned and operated by Visa Europe, a private limited company incorporated in England and Wales, since 2004. The first defendant, a US stock corporation registered in Delaware, is Visa Europe's operating subsidiary for the Scheme.

22. Until 21 June 2016 Visa Europe was independent of Visa Inc, being owned by its members (over 3000 European banks and other financial institutions in 37 countries) and the Scheme was run as a separate but linked system to the Visa system in the rest of the world. Visa Europe was granted the right to use the Visa trademarks and technology by the terms of a "Framework Agreement" with Visa Inc. Visa Europe therefore had responsibility (which Visa Inc and VI insisted was at "arm's length") for setting the MIFs for the Scheme, a responsibility it delegated to Visa UK in relation to the UK MIFs. Visa UK was (and remains) a private limited company incorporated in England and Wales, owned by the UK financial institutions and payment service providers in the Scheme, all of which were also shareholders of Visa Europe.

23. On 21 June 2016 Visa Inc completed the purchase of the shares of Visa Europe pursuant to the terms of a Put and Call Option contained in the Framework Agreement. It is unclear to what extent, since that date, the Scheme has been integrated into the global Visa system, but that question is not relevant to any issues in these proceedings.

The Scheme's mechanics and rules

24. The Scheme is an example of an open "four-party" scheme, although five parties are involved, as is apparent from the following diagrammatic representation:



25. Visa does not itself either issue cards or sign up Merchants to accept payment transactions. Instead it accepts as members all eligible financial institutions and payment providers (hence being an "open" system), those members being licensed to act, in specified territories, as Issuer or Acquirer or both.

26. The Scheme is governed by regulations issued by Visa and revised on a six-monthly basis. The Visa Europe Operating Regulations ("the Scheme Regulations") apply to the Scheme as a whole, specific provisions for the UK domestic market being contained in the Visa Operating Regulations for the UK and Gibraltar ("the UK Regulations"). It is common ground that the relevant provisions for the purpose of these proceedings have remained broadly the same throughout the claim period.

27. The Scheme Regulations provide as follows in section 7[8], dealing with the clearance and settlement of card transactions:

> "*7.1.H Reimbursement for Interchange Transactions*
>
> *Each Issuer must pay the Acquirer the amount due for Transactions occurring with the use of a valid Card. This includes Transactions resulting from geographically restricted Card use outside the country of issuance.*"

28. The effect of this provision is that an Issuer must pay the Acquirer 100% of the value of the transaction between the cardholder and Merchant (recovering that sum, of course, from the cardholder), referred to as "settlement at par" or "SAP".

29. Section 9 of the Scheme Regulations, dealing with fees, contains the following provisions:

[8] The regulations I refer to are taken from the versions of the Scheme Regulations and UK Regulations issued in November 2014.

9.9 INTERCHANGE REIMBURSEMENT FEES

This Section 9.9 specifies the fees reimbursed by one Member to a Customer or vice versa to cover Interchange for International Transactions. These fees shall also apply to Visa Europe Transactions and Domestic Transactions where a Member's domestic operating regulations do not provide for an equivalent fee.

For the avoidance of doubt, no Interchange Reimbursement Fees applicable to International Transactions shall be applied, by default, to Visa Europe Transactions.

9.9.A Merchant Transactions

For Transactions originating at a Merchant, an Acquirer reimburses the Issuer, or, where applicable, the issuer that is a Customer, an Interchange Reimbursement Fee for each Interchange Transaction. This fee is calculated as a percentage of net sales (Transaction Receipt totals less Credit Transaction Receipts).

9.9.B Default Domestic Interchange Reimbursement Fee

For Visa Europe Transactions, the Interchange Reimbursement Fees as specified in this Section 9.9, serve as the default Interchange Reimbursement Fees for Domestic Transactions in Visa Europe countries where Multilateral Agreements and/or Private Agreements are not in place.

9.9.C Domestic Interchange Reimbursement Fee Variances

The Visa Europe Board may, on request, establish country-specific default Interchange Reimbursement Fees for Domestic Transactions if the Members in that country are unable to reach agreement on appropriate default Interchange Reimbursement Fees for Domestic Transactions, or in other exceptional circumstances."

30. The UK Regulations (the domestic operating regulations for the UK) provide, in chapter 9, as follows:

"*This Chapter 9 details Member-to-Member fees applicable to Domestic Transactions in the United Kingdom and Gibraltar… where these fees differ from the [Scheme Regulations] and in the absence of Private Agreements.*"

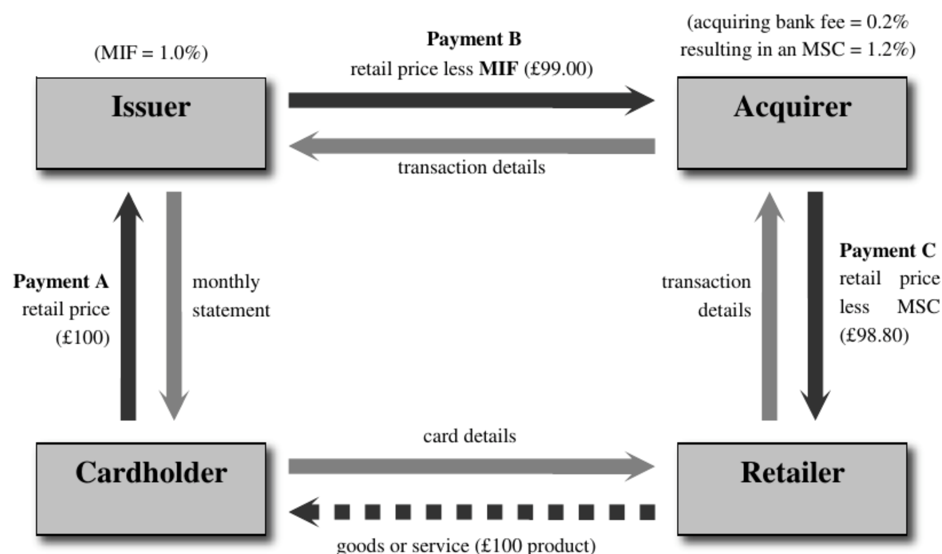
31. The fees so detailed, applicable in default of bilateral agreements (referred to as "Private Agreements") between the Issuer and the Acquirer, are the UK MIFs. Different MIFs are set for different types of transactions, depending on factors such as whether the transaction is paid for with a credit or debit card, whether the cardholder

is present in the store, whether the payment is verified by "chip and pin" ("EMV Chip") or is a contactless payment (referred to as a "proximity payment"). Depending on the type of transaction the MIF may be expressed as a percentage of the transaction value, a flat fee or a combined "two-part tariff" fee (containing both a percentage and flat fee). The UK Regulations dated November 2014 made provisions for the following UK MIFs, among others:

	Debit	Credit	Charge Card
Standard Fee:	18p	1.30%	1.55%
EMV Chip:	8p	0.77%	1.02%
CVV2 Card Not Present	10.5p	1.10%	1.35%
Card Not Present	18p	1.30%	1.55%
Proximity (up to £2):	1p	0.65%	0.65%
Proximity (£2.01 to £10)	4p	0.65%	0.65%
Proximity (£10.01 to £15)	8p	0.65%	0.65%
Proximity (£15.01 to £20)	8p	0.77%	1.02%

32. The result is that, when a cardholder has purchased goods or services from a Merchant, the cardholder's Issuer will transfer the transaction price (settling at par) less the MIF to the Acquirer; the Acquirer will then transfer the transaction price less the MSC (made up of the MIF and the Acquirer Margin, including the Scheme Fee) to the Merchant.

33. The sequence of payments, in a credit card transaction worth £100 and assuming a MIF of 1%, is shown in the diagram below:



i) Payment A: the cardholder pays the Issuer the full transaction consideration.

On a transaction for goods priced at £100, this would be £100.

ii) Payment B: the Issuer pays the Acquirer the transaction consideration after deducting the Interchange Fee. With an example Interchange Fee of 1% of the purchase price, the Issuer would pay the Acquirer £99.

iii) Payment C: the Acquirer pays the merchant the purchase price deducting the MSC, which is the sum of the Interchange Fee and the Acquirer Margin. Taking an example Acquirer Margin of 0.2%, the Acquirer pays the merchant £98.80.

34. Visa does not, of course, receive any of the MIF or the Acquirer Margin, its sole remuneration being the Scheme Fee. Visa's economic interest is therefore in maintaining and increasing the number of transactions with Visa-branded cards.

35. The Scheme also operates what is known as the 'honour all cards rule' ("HACR"). This is set out in the Scheme Regulations in the following terms:

> "*5.4.B Honouring Cards*
>
> *5.4.B.1 Card Types*
>
> *5.4.B.1.a A Merchant must accept all Cards properly presented for payment …..*"

36. The HACR requires that a Merchant, having agreed with an Acquirer to accept Visa-branded payment cards, must accept all such cards, regardless of which Issuer issued the card. However, in the UK (and, since 8 June 2015, the rest of the EEA), Merchants may choose to accept only certain categories of card (for example, only debit cards), in which case they would be obliged to accept all Visa-branded cards in that category. Visa suggests that the requirement would be better described as an "honour all Issuers" rule.

37. In the past Visa also had a no discrimination rule ("the NDR"), preventing Merchants from discriminating between types of payment cards. However, Merchants in the UK have been entitled to apply surcharges to credit card transactions since 1991 and to debit card transactions since 2009.

38. Visa also operates cross-border acquiring rules ("the CBA Rules"), which apply to transactions where a Merchant is established in a different state to its Acquirer. Prior to 31 December 2014 the CBA Rules required Acquirers to apply the UK MIF to transactions with UK Merchants, even if the Acquirer was domiciled in another Member State with a lower applicable MIF. Following the revision to the CBA Rules, Acquirers were permitted to choose between (i) the UK MIF or (ii) 0.2% for debit transactions and 0.3% for credit transactions. The evidence in these proceedings was that, following the revision, UK based Acquirers offered Merchants the option of routing the settlement of UK transactions through "offshore" subsidiaries of the Acquirer in order to attract the lower MIF rates (no doubt to avoid losing their custom to Acquirers based overseas). Many Merchants took up that offer, routing transactions so as to minimise their MIF costs. The benefit of that re-routing was relatively short-lived due to the introduction and application of the Interchange Fee Regulation

("IFR") (described below) in December 2015.

39. Sainsbury's and the Arcadia claimants both made claims that the CBA Rules (prior to their amendment) were a further unlawful restriction of competition under Article 101(1). The Arcadia claimants abandoned that allegation the day before the start of the phase 1 trial. Sainsbury's formally maintains the allegation, but it was not raised in cross-examination of Visa's factual or expert witnesses and Mr von Hinten-Reed ultimately favoured an analysis which did not result in the CBA Rules infringing Article 101(1). The claim was mentioned in Sainsbury's written closing but not in oral closing argument. To the extent it is seriously pursued it is without merit and I do not propose to consider it further.

Other payment card schemes

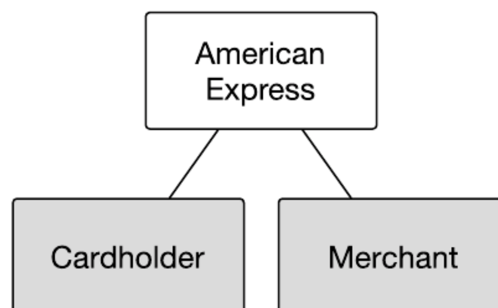
MasterCard

40. MasterCard operates a very similar scheme to Visa in structural terms, in that it is an open four-party scheme with Issuers offering both debit and credit cards with MIFs set by MasterCard's scheme rules. Unlike Visa, it offers a range of premium credit cards which have until recently been subject to higher MIFs than both its own, and Visa's, standard MIF rate.

American Express and Diners Club

41. The other type of payment card system in operation is known as a "three-party scheme": the best known being American Express. Diners Club is another example.

42. In contrast to a four-party scheme, in a three-party scheme the operator (such as American Express) both issues cards and settles transactions with Merchants; in other words, it assumes the role that Issuers and Acquirers undertake separately in a four-party scheme. When an American Express cardholder enters into a transaction with a Merchant, American Express transfers the transaction amount, less a fee, to the Merchant. American Express then retrieves the full transaction amount from the cardholder. The scheme can be represented in diagrammatic form as follows:



43. American Express also has a licensing business ("Amex GNS") whereby it permits banks and other financial institutions to issue American Express-branded cards. In this capacity the scheme operates in a similar manner to the Scheme and directly competes for Issuer business with both Visa and MasterCard. This type of structure is sometimes described as a "three-and-a- half party system".

Types of card

44. Issuers offer a range of different cards to their customers. The first distinction is between "pay now" cards, broadly covering debit and prepaid cards, and "pay later" cards, which are generally known as credit cards. The present claim only relates to cards held by consumers, as opposed to corporate or business cards. In the consumer market Visa has the dominant share of the debit card market, whereas MasterCard has a greater share of the credit card market.

45. In the credit card market there are broadly two types of card, designed to suit the needs of different consumers: standard and premium cards. Either of these types of card may offer cardholders rewards based on their spending, but premium cards are usually distinguished by offering greater rewards, which are financed by the Issuer demanding higher interchange fees for transactions involving premium cards. As mentioned above, both MasterCard and American Express offer premium cards, whereas Visa does not.

Types of card user

46. Credit card users (as opposed to debit card users) tend to fall into one of two categories: "transactors" and "revolvers". Transactors spend on their card throughout the month, but then settle their bill on the payment date in full thereby incurring no interest on their balance. Transactors tend therefore to be attracted to cards offering rewards (air miles, "gifts" or other benefits), as they are not using their cards as a means of accessing credit. Conversely, revolvers use their credit cards as a form of unsecured borrowing and allow their balance (apart from a minimum payment) to rollover to the next month, paying interest on their outstanding balance to the Issuer as result.

Analysis of the role of Interchange Fees in a four-party system

47. It is common ground that four-party systems such as the Scheme and the MasterCard system give rise to what is described as a "two-sided market". One side is that in which Issuers compete with each other for the business of customers to whom they will issue cards ("the issuing market"), the other is that in which Acquirers compete for the business of Merchants ("the acquiring market"). The two sides are closely linked and dependent on each other: the value of a Visa card to a cardholder is dependent on the extent to which it is accepted by Merchants and, correspondingly, the benefit Merchants gain from accepting Visa cards is dependent on the extent that consumers have and use those cards. Precisely what benefits Merchants gain from card transactions is a matter of dispute, but it is common ground that they benefit at least to the extent that card transactions are cheaper for them than cash transactions, involving the time costs, increased staff costs and bank charges of handling and banking cash.

48. Interchange Fees have the effect of moving value from one side of the system to the other, effectively incentivising the participants on one side to engage in card transactions at the immediate expense of those on the other, but possibly also to the longer term benefit of the latter. Thus Interchange Fees are paid by Merchants to Issuers (via Acquirers), but to the extent that they are passed-on by Issuers to cardholders in the form of rewards or other benefits, the cardholders' increased card

use will benefit Merchants.

49. In "*Bank Interchange of Transactional Paper: Legal and Economic Perspectives*" (1983) William Baxter ("Baxter") analysed the operation of four-party payment systems, including those of credit and debit card platforms. He suggested that, when completing transactions with Merchants, consumers would not necessarily choose the optimal method of payment for both the Merchant and the buyer. This is broadly because consumers are only likely to take into account the benefits that might arise for them in using a particular form of payment, and are unlikely to consider how such payment method might affect the Merchant to whom it is tendered. Although Merchants might benefit from a particular payment method being used for a given transaction, the choice over whether such method is deployed is in the hands of the purchaser. The unaligned interests of consumers and Merchants creates what the experts in this case have called an "externality". Thus the level of card transactions could fall below the level required to maximise the sum of benefits for both Merchants and consumers ("the Total User Surplus" or "TUS").

50. Baxter found, therefore, that there is an economic justification for Interchange Fees to rebalance the incentives between the Issuers and the Acquirers, such that Issuers are motivated to provide payment cards to consumers enabling consumers to transact at the requisite level to allow for the maximisation of benefits to both sides of the market. This is, however, subject to a *de facto* cap, determined by Merchants' willingness ultimately to pay Interchange Fees. The experts have referred to the solution provided by Interchange Fees in the payment card schemes as "internalising the externality".

51. Baxter's broader conclusion at page 586 is

> "*…that collective institutional determination of the interchange fee is both appropriate and desirable…individual establishment of interchange fees will almost certainly produce chaotic results, such as higher fees and instability within card systems.*"

52. Jean-Charles Rochet and Jean Tirole ("Rochet & Tirole") produced a seminal work entitled "*Must-Take Cards: merchant discounts and avoided costs*" (2011), which (the parties agree) has become the foundation for modern thinking on Interchange Fees. The authors first set out some of the key concepts of this paper as a lecture in 2006, and later released various working drafts of the paper prior to its final publication (as cited) in 2011.

53. Rochet & Tirole proposed that, in order to remain competitive in their market, Merchants find themselves in a situation whereby they are effectively compelled to accept payment cards, even if the cost of doing so negates any transactional benefit they might otherwise enjoy. This contradicted Baxter's theory that Merchants' ability and/or willingness to pay Interchange Fees acts as a controlling factor on MIF levels.

54. Additionally, Rochet & Tirole found that competition between card schemes (e.g. between Visa and MasterCard) could aggravate the problem of rising MIFs, as the schemes' major attraction to Issuers is the amount of revenue they are able to generate through card transactions: higher MIFs lead to higher Issuer revenues.

55. Rochet & Tirole further challenged Baxter's assumption that all Merchants are essentially identical. They contended that in a world where there are multiple sizes and types of Merchant, a common MIF, set only with the aim of maximising the TUS for a particular type or size of Merchant, might in fact be set at a detrimental level for other types or sizes of Merchant.

56. Thus MIFs could be set at excessive levels, to the detriment of Merchants. Rochet & Tirole characterised this as a market inefficiency. Their proposed solution was regulatory intervention in the form of a cap on Interchange Fees. The cap would reflect the relevant Merchants' transactional benefit of taking card payments, less the Acquirer Margin, in order to ensure that Merchants do not pay more to accept a card than they stand to make from a customer choosing a card over cash. This theory has been referred to as the "Tourist Test" (due to its analysis of a transaction with a one-off customer) or the "Merchant Indifference Test" ("MIT"). A MIF set at a level where Merchants are indifferent to receiving a card payment or a cash payment is said to be "a MIT-MIF".

57. This analysis, under which a MIT-MIF can maximise TUS, assumes that all the MIF is passed on to the cardholder by the Issuer in some form or another – either by way of rewards or by reducing the costs of having a card for the cardholder. If only some lesser portion is passed on, the MIT-MIF will exceed the TUS-maximising level.

58. The MIT-MIF has been used by the Commission in its calculation of the levels of the MIF caps in the IFR. It has also been referred to extensively by the parties to this litigation in their attempts to calculate a level of MIF that might be exemptible under Article 101(3).

59. It is worth noting that Rochet & Tirole's proposed solution of imposing a cap, a method by which a regulator might seek to correct an overstimulation of card-use (with a resulting disadvantage to Merchants) resulting from high MIFs, attempts to redress this market inefficiency; it does not necessarily follow that it addresses the issue of competition in the Acquirer market.

60. In "*Payment card regulation and the use of economic analysis in antitrust*" (2011), Jean Tirole ("Tirole") makes some important clarifications to the analysis set out by Rochet & Tirole. Tirole's most important clarification is that the MIT aims at providing a level for regulators, rather than a level applicable to MIFs set by payment card schemes themselves. He also explains that the method for calculating MIT, as set in the earlier paper, could produce low estimates (page 18):

> "*This level however probably is a conservative estimate of the socially desirable IF for two reasons:*
>
> *- It does not reflect industry profit and its long-run impact on entry, innovation and end-user welfare.*
>
> *- It does not reflect the negative social externalities exerted by alternative means of payment (tax evasion for cash, subsidized use for checks).*"

Decisions of competition authorities and EU courts and regulatory intervention

61. Both Visa and MasterCard have been subject to scrutiny by national and European competition authorities and regulators for decades, chiefly in connection with MIFs. The main aspects are outlined below.

Competition authorities

62. VI, then known as Ibanco Ltd, notified the European Commission ("the Commission") of certain of its operating rules, including MIFs, on 31 January 1977. Following an investigation, the Commission sent VI a letter of comfort on 29 April 1985, stating that the operating rules did not restrict competition for the purpose of Article 101(1) (then Article 81(1) EC). This decision applied until 11 December 1992.

63. Having reopened its investigations into the Scheme in 1992, the Commission issued a negative clearance decision on 9 August 2001 ([2001] OJ L 293/24), finding that the HACR, NDR and CBA Rules were not restrictive of competition. The Commission did not address the status of the MIF in its decision.

64. The Commission adopted a decision on 24 July 2002 ([2002] OJ L 318/17 ("Visa II")) in relation to Visa's EEA MIFs, finding that they were restrictive of competition for the purpose of Article 101(1) but that, subject to certain conditions being met, the MIFs were capable of being exempt under Article 101(3). The Commission therefore required Visa to enter into undertakings for a period of five years with the effect that Visa would:

    i) reduce the level of its MIFs over the five-year period such that debit cards would attract a maximum MIF (on a weighted average basis) of €0.28 and 0.7% for credit cards;

    ii) continue to ensure that the levels of its MIFs did not surpass the sum of three defined categories of Issuers' costs;

    iii) make relative percentages upon which the MIF levels were based more transparent to merchants; and

    iv) differentiate the MIF for mail order and telephone transactions from face-to-face transactions.

65. At paragraph 93 of the decision the Commission made it clear that:

> "*… on the basis of the present facts: an exemption for a determined period of time is needed to look at the new balance of interests and to allow the Commission to review the impact of the revised MIF again if necessary*".

66. The exemption provided by the Visa II decision expired on 31 December 2007.

67. Meanwhile, the Office of Fair Trading ("the OFT") investigated MasterCard's UK MIF, issuing a decision on 6 September 2005 that the UK MIF restricted competition under Article 101(1) and that it did not meet any of the exemption criteria under Article 101(3). MasterCard appealed against the OFT's decision to the CAT, Visa

Europe intervening and making submissions on the appeal. In response to the appeal the OFT attempted to alter the factual basis on which it had arrived at its decision. It subsequently withdrew its decision against MasterCard on procedural grounds, formally confirmed by the CAT on 10 July 2006 ([2006] CAT 14). The OFT, and subsequently its successor the CMA, continued to investigate MasterCard's (and Visa's) UK MIFs until September 2014, when it announced that, due to the imminent regulation of Interchange Fees (see below), its investigations were at an end.

68. On 19 December 2007 the Commission adopted a decision determining that MasterCard's EEA MIFs had, since 2 May 1992, been in breach of Article 101(1) and had not satisfied any of the exemption criteria under Article 101(3) ("the MasterCard Commission Decision").

69. The Commission recommenced its investigation into Visa's EEA MIFs in 2008. In September of that year the Commission informed Visa that it favoured the Merchant Indifference Test or MIT methodology for assessing whether Visa's MIFs were lawful, as opposed to the issuer based costs methodology that had previously been used, including in the Visa II decision. On 3 April 2009 the Commission sent a Statement of Objections to Visa Europe concerning its intra-EEA MIFs.

70. After negotiations between Visa and the Commission, during which Visa Europe proposed giving commitments capping the EEA and Irish debit MIFs, the Commission adopted a decision on 8 December 2010 approving Visa's proposal ("the Debit Commitments Decision"). The key provisions of the Debit Commitments Decision:

    i) obliged Visa to reduce its weighted average EEA Debit MIF to 0.2%;

    ii) recorded that there was an allegation MIFs had both the object and effect of restricting competition; and

    iii) without making a finding on liability, and subject to compliance with the decision, held that the Commission would not take further action against Visa's EEA MIFs.

71. On 24 May 2012 the MasterCard Commission Decision was upheld on appeal by the General Court (*MasterCard Inc. and others v Commission* [2012] 5 CMLR 5 (GC) ("the MasterCard GC Judgment")).

72. On 30 July 2012 the Commission sent a Supplementary Statement of Objections to Visa Europe concerning intra-EEA credit MIFs and the CBA Rule.

73. On 26 February 2014 the Commission accepted an offer made by Visa on 10 May 2013 that it would amend its CBA Rules from 1 January 2015 to allow cross-border Acquirers to elect between (a) the local domestic MIF rate or (b) a rate of 0.2% for debit transactions or 0.3% for credit transactions, and that it would cap intra-EEA Credit MIFs at a weighted average of 0.3% ("the Credit Commitments Decision").

74. On 11 November 2014 the CJEU dismissed MasterCard's appeal of the GC Judgment: *MasterCard Inc. and others v Commission* [2014] 5 CMLR 23 (ECJ) ("the MasterCard CJEU Judgment").

Interchange Fee Regulation

75. In 2013 the Commission published a proposal for capping Interchange Fees across Europe by way of regulation.

76. In order to verify the proposed appropriate levels for the caps, the Commission conducted (with assistance from Deloitte Consulting) a cost data survey of Merchants in the EEA in order to deliver benchmarks for the Merchant Indifference Test. 254 merchants from 10 different EEA states responded to the survey. The final report entitled '*Survey on merchants' costs of processing cash and card payments Final results*' was published on 18 March 2015 ("the Commission Survey"). A summary, released by the Commission on the date of publication, outlined the Commission's findings as follows:

> "*For large merchants - accounting for at least half of the card transactions in the EU 28 - the analysis found that in the medium-term, the merchant indifference thresholds stay well below the benchmarks applied in the settlements and the Interchange Fee Regulation and range between 0.06% and 0.16% for debit and between -0.04% and 0.13% for credit cards. In the short-term, the indifference benchmarks for debit and credit cards are slightly lower, while looking ahead more long-term, they are slightly higher. The data collected did not permit drawing conclusions for all merchants, beyond large merchants*."

77. Regulation (EU) 2015/751 on Interchange Fees for card-based payment transactions (the IFR referred to above) was adopted on 29 April 2015 and came into force on 8 June 2015. As from 9 December 2015 Article 3 of the IFR set a maximum weighted average rate cap of 0.2% on domestic and cross-border debit MIFs and Article 4 set a maximum *ad valorem* rate cap of 0.3% on domestic and cross-border credit MIFs.

78. The effect of the IFR is that both MasterCard and Visa, as well as Amex GNS, have had to reduce their debit and credit UK MIFs to comply with the caps referred to above.

79. It is important to bear in mind that the IFR is regulation by the European Parliament, not an application of competition law by the Commission. There is, however, instructive reasoning for the regulation set out in Recitals 10 to 13 and 20 IFR:

> "*(10) Interchange fees are usually applied between the card-acquiring payment service providers and the card-issuing payment service providers belonging to a certain payment card scheme. Interchange fees are a main part of the fees charged to merchants by acquiring payment service providers for every card-based payment transaction. Merchants in turn incorporate those card costs, like all their other costs, in the general prices of goods and services. Competition between payment card schemes to convince payment service providers to issue their cards leads to higher rather than lower interchange fees on the market, in contrast with the usual*

price-disciplining effect of competition in a market economy. In addition to a consistent application of the competition rules to interchange fees, regulating such fees would improve the functioning of the internal market and contribute to reducing transaction costs for consumers.

(11) The existing wide variety of interchange fees and their level prevent the emergence of new pan-Union players on the basis of business models with lower or no interchange fees, to the detriment of potential economies of scale and scope and their resulting efficiencies. This has a negative impact on merchants and consumers and prevents innovation. As pan-Union players would, as a minimum, have to offer issuing banks the highest level of interchange fee prevailing in the market they want to enter, it also results in persisting market fragmentation. Existing domestic schemes with lower or no interchange fees may also be forced to exit the market because of the pressure from banks to obtain higher interchange fees revenues. As a result, consumers and merchants face restricted choice, higher prices and lower quality of payment services, while their ability to use pan-Union payment solutions is also restricted. In addition, merchants cannot overcome the fee differences by making use of card acceptance services offered by banks in other Member States. Specific rules applied by the payment card schemes require the application of the interchange fee of the 'point of sale' (country of the merchant) for each payment transaction, on the basis of their territorial licensing policies. This requirement prevents acquirers from successfully offering their services on a cross-border basis. It can also prevent merchants from reducing their payment costs to the benefit of consumers.

(12) The application of existing legislation by the Commission and national competition authorities has not been able to redress this situation.

(13) Therefore, to avoid fragmentation of the internal market and significant distortions of competition through diverging laws and administrative decisions, there is a need, in line with Article 114 of the Treaty on the Functioning of the European Union, to take measures to address the problem of high and divergent interchange fees, to allow payment service providers to provide their services on a cross-border basis and for consumers and merchants to use cross-border services.

…

(20) The caps in this Regulation are based on the so-called 'Merchant Indifference Test' developed in economic literature, which identifies the fee level a merchant would be willing to pay if the merchant were to compare the cost of the customer's

> *use of a payment card with those of non-card (cash) payments (taking into account the fee for service paid to acquiring banks, i.e. the merchant service charge and the interchange fee). It thereby stimulates the use of efficient payment instruments through the promotion of those cards that provide higher transactional benefits, while at the same time preventing disproportionate merchant fees, which would impose hidden costs on other consumers. Excessive merchant fees might otherwise arise due to the collective interchange fee arrangements, as merchants are reluctant to turn down costly payment instruments for fear of losing business. Experience has shown that those levels are proportionate, as they do not call into question the operation of international card schemes and payment service providers. They also provide benefits for merchants and consumers and provide legal certainty*."

THE TRUE NATURE OF AN INTERCHANGE FEE

80. Whilst the focus of attention in these proceedings is on Interchange Fees (and in particular on MIFs), in my judgment it is important not to lose sight of the fact that such Fees are by way of adjustment to the principal sum passing between the Issuer and the Acquirer (and then on to the Merchant), equivalent to the price of the goods or services purchased with the Visa payment card.

81. The Scheme prevents the Issuer seeking to discount the principal payment (or the Acquirer seeking a premium) by the requirement that transactions must be settled at par (that is, 100% of the price). The Interchange Fee is expressed as a separate fee, calculated as a percentage of the price or a fixed sum for the transaction. However, as it is a sum passing between the parties to the underlying principal payment, calculated by reference to that payment, it could equally be expressed (and is economically equivalent to) a discount (or premium). An Interchange Fee of 1% is the same as settlement of the transaction at 99% and results in precisely that level of settlement. Settlement at par, with no Interchange Fee, is the equivalent of an Interchange Fee set at zero.

82. Once that is understood, certain aspects of the Interchange Fee become clear, as follows:

    i) The Interchange Fee is not a simple "one-way" price for services provided by the Issuer (or by the Acquirer), but is an adjustment to the amount at which the underlying principal payment is settled. A change in the level of an Interchange Fee increases the costs of the transaction for one side of the two-sided market and decreases it for the other side.

    ii) There is no obstacle to an Interchange Fee being a negative figure, equating to the Issuer being required to pay a premium on the price to the Acquirer (and hence the Merchant). Indeed, that is not merely a theoretical possibility but has been known to arise in practice in other countries such as Australia. Mr Dryden, the Arcadia claimants' expert economist, gave evidence that, in his

opinion, the efficient Interchange Fee for certain types of transactions in the UK would be negative. This is further supported by the Commission Survey (above), which found that the "lower" end of the range of merchant indifference thresholds for credit cards was negative (-0.04%). It is noteworthy that none of the previous decisions considering the competitive aspects of the MIF appear to have taken into account the possibility that the MIF might have a negative value, both in theory and in practice.

ARTICLE 101 ISSUES

Do the UK MIFs restrict competition in breach of Article 101(1)?

The relevant principles

83. The principles to be applied in determining whether an agreement gives rise to a restriction of competition in contravention of Article 101(1) are summarised in the Commission's *Guidelines on the applicability of Article 101 [TFEU] to horizontal cooperation agreements* ("the 101(1) Guidelines"), reflecting the case law of the CJEU, as follows:

> *"27. For an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties. This means that the agreement must reduce the parties' decision-making independence, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives.*
>
> *28. Restrictive effects on competition with the relevant market are likely to occur where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.*"

84. The Commission's *Guidelines on the application of [Article 101(3)] of the [TFEU]* ("the 101(3) Guidelines") contain further guidance as to what constitutes restriction of competition within Article 101(1), providing as follows:

> "*15. The type of co-ordination of behaviour or collusion between undertakings falling within the scope of Article [101(1)] is that where at least one undertaking vis-a-vis another undertaking undertakes to adopt a certain conduct on the market or that as a result of contact between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced.…*
>
> *16. Agreements between undertakings are caught by the prohibition of Article [101(1)] when they are likely to have an appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties.*"

85. The restrictive effects of an agreement, so described, do not fall to be considered in absolute terms, but in comparison with the state of competition which would exist in the absence of that agreement. The extract in the above paragraph from the 101(1) Guidelines continues with the following:

> "*29. The assessment of whether a horizontal co-operation agreement has restrictive effects on competition within the meaning of Article 101(1) must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions...*"

86. It is therefore necessary, in order to demonstrate that an agreement has restrictive effects, to identify a realistic hypothetical "counterfactual" in which, shorn of the alleged restriction, the market would be appreciably more competitive. Sainsbury's relies on the following passage from *Bellamy and Child: European Law of Competition* as summarising the role of the counterfactual at this stage of the analysis:

> "*The general criterion for deciding whether an agreement restricts competition is how competition would have operated in the market in question in the absence of that agreement. The hypothetical position which would pertain in the absence of the agreement is known as the counterfactual. If the agreement leads to an appreciably less restrictive market than the counterfactual, then there is a 'restriction of competition' within the meaning of Article 101(1). The Court of Justice established this method in* Société Technique Minière *and it has been reaffirmed many times since. The General Court has said that taking account of the effect of the agreement on competition and the counterfactual are 'intrinsically linked'.*"

87. Thus the MasterCard CJEU Judgment stated that in order to decide whether a MIF restricted competition within the meaning of Article 101(1):

> "*164 … the Court should, to that end, assess the impact of the setting of the MIF on the parameters of competition, such as price, the quantity and quality of the goods or services. Accordingly, it is necessary, in accordance with the settled case-law referred to in paragraph 161 of the present judgement, to assess the competition in question within the actual context in which it would occur in the absence of those fees.*"

88. The above summary requires clarification in one important respect. The 101(1) Guidelines (and possibly the 101(3) Guidelines) might be read (and the Arcadia claimants urged me to read them) as indicating that the mere fact that an agreement results in higher prices than if the agreement had not been made (amounting to an adverse effect on a parameter of competition) is in itself sufficient to entail that the agreement restricts competition within Article 101(1). On that reading, although such adverse effects may typically be the result of the agreement reducing competition between parties, demonstrating a reduction in rivalry is not essential: in other words, a restriction in competition is necessarily to be assumed or inferred from the adverse effect the agreement has on prices, regardless of whether that results from a reduction in competitive intensity or decision-making independence.

89. In my judgment that suggested reading is unsustainable as an interpretation of Article 101(1) and is contrary to both English and EU authority. Although Sainsbury's did not (at least expressly) base its case on such a reading, it is necessary to explain why it is wrong, both because it was central to the case advanced by the Arcadia claimants but also because it appears to underpin a persistent but heretical assumption about MIFs (and in certain of Sainsbury's submissions in the present case), namely, that MIFs are necessarily the result of restrictive agreements within the meaning of Article 101(1) because they result in higher MSCs than would be charged in their absence.

90. First and foremost, Article 101 is expressly concerned with competition, prohibiting agreements between undertakings which prevent, restrict or distort competition. Whilst such agreements will usually be identified by their adverse effect on prices (and such effect is an undesirable outcome the prohibition is designed to prevent), that is a result of the prohibited activity, not the activity itself. It would be a remarkable (and in my judgment, plainly impermissible) reading of Article 101 to hold that it prohibits agreements which do not, in fact, prevent, restrict or distort competition. If an agreement results in an increase in prices, but without restricting competition, that might be the result of one or more undertakings abusing a dominant market position in contravention of Article 102 TFEU, but that does not also amount to a breach of Article 101.

91. Second, the need to focus on the effect the impugned agreement has on competition (and not solely on the effect on prices) has been recognised in English authority. In *Bookmaker's Afternoon Greyhound Services Ltd. v Amalgamated Racing Ltd.* [2009] L.L. 584, a group of roughly half the racecourses in the UK (RUK) had jointly agreed to licence their media rights exclusively to a newly formed distributor (AMRAC), thereby excluding the sole existing broadcaster (BAGS). The result was that RUK earned more for their rights and licensed betting offices (LBOs) had to pay more for media services. The claimants argued that the agreement had the object and effect of restricting competition between market participants (the racecourses) and shielded

AMRAC from competition with BAGS, with the result that consumers (LBOs) did not receive the lowest price, "*offending against the most fundamental principles of EC competition law*".

92. The Court of Appeal rejected the contention that the agreement was prohibited by Article 101 because, although RUK's design was to increase its profits (by increasing prices), the true object and effect of the agreement was to increase competition by adding an additional distributor to compete with the existing sole distributor. Lloyd LJ (with whom the other members of the court agreed) explained the point, in the context of considering restriction by object, as follows:

> "*86. The proposition that the arrangements were designed to improve the profitability of the racecourses is correct, but I cannot agree with this submission that this was to be done by restricting competition. On the contrary, it was to be done by introducing competition into the previously monopsonistic upstream market. Nor is increasing profitability objectionable in itself. It is, after all, the motive of most commercial activity.*"

93. In the context of considering restriction by effect, Lloyd LJ, at §96, cited the following paragraphs in the decision of the Court of First Instance in *O2 (Germany) GmbH & Co, OHG v Commission (Case T-328/03)* [2006] ECR II-1231:

> "*68. Moreover, in a case such as this, where it is accepted that the agreement does not have as its object a restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking ...*
>
> *71. The examination required in the light of [Article 101 (1)] consists essentially in taking account of the impact of the agreement on existing and potential competition ... And the competition situation in the absence of the agreement ... those two factors being intrinsically linked...*
>
> *72. The examination of competition in the absence of an agreement appears to be particularly necessary as regards markets undergoing liberalisation or emerging markets ... where effective competition may be problematic owing, for example, to the presence of a dominant operator, the concentrated nature of the market structure or the existence of significant barriers to entry ...*"

94. Lloyd LJ emphasised that the references in the above quotation to considering the agreement in the light of the competition situation as it would be in the absence of the agreement in dispute was highly pertinent to the case the Court of Appeal was considering. On proper analysis, the overall effect of the joint venture was to increase competition, a beneficial effect on competition which would not have been possible without that agreement. The effect of the joint venture agreement was therefore not to restrict competition notwithstanding its effect on prices.

95. Third, the issue has been considered in the *MasterCard v Commission* proceedings in the context of MasterCard's MIFs. The General Court, in upholding the Commission's decision that MasterCard's EEA MIFs infringed Article 101, stated at §143 of the MasterCard GC Judgment:

> "*… Since it is acknowledged that the MIF sets the floor for the MSC … it necessarily follows that the MIF has effects restrictive of competition. By comparison with an acquiring market operating without them, the MIF limits the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold.*"

96. On appeal to the CJEU, MasterCard argued that the General Court had thereby erred by basing its finding on the premise that high prices in themselves constitute an infringement of Article 101(1). The Court rejected the argument that that was the effect of the General Court's finding at §195 of the MasterCard CJEU Judgment as follows:

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

97. The CJEU therefore made plain that the correct legal question is whether the effect of the agreement (in that case, the imposition of the MasterCard MIFs) was that it reduced competition in the relevant market, not merely whether it resulted in higher prices (in that case, the MSCs).

The relevant counterfactual

98. Sainsbury's and Visa were broadly in agreement as to the appropriate counterfactual for the purposes of considering the restrictive effects of the MIF (save for what assumption is to be made about MasterCard and its MIFs). The agreed characteristics of this counterfactual scheme are as follows:

   i) first and foremost, the restrictive provision, the setting of MIFs, would be absent, leaving Issuers and Acquirers free to agree the payment of an Interchange Fee (a BIF), but not having one imposed in default of agreement. It is therefore a "no-MIF" counterfactual;

ii) second, the Scheme would continue to provide that transactions would be settled at par and also, if necessary, would prohibit "ex post pricing" (that is, would prohibit agreement as to a BIF reached after a transaction is concluded). These provisions would be necessary to prevent Issuers from "holding up" transactions which merchants would have to enter (by reason of the HACR) in order to demand that the Issuer pay a discounted price (or otherwise be paid a higher Interchange Fee).

99. The crucial aspect of the above counterfactual is that it sets a default position for the settlement of transactions, just as does the rule which provides for MIFs in default of agreement. This reflects the fact that Sainsbury's accepts (and the Arcadia claimants accepted) that some collectively-agreed default rule for settlement of transactions was essential for the Scheme to function[9]. It was common ground that a scheme without a default (a "pure bilaterals" or "decentralised" counterfactual) would not work. In their Joint Statement (Summary Note), the five expert economists stated:

> "*We agree that, absent a default rule and in the presence of an Honour All Cards Rule, Issuers would have ability and incentive to demand high interchange fees to the detriment of all scheme participants and that such a system would likely be unworkable in practice …*"[10]

100. The default rule proposed as the appropriate basis for the counterfactual is settlement at par, with no ability to hold out for an additional fee, which is plainly and exactly equivalent in economic terms to setting a MIF at zero: all of the expert economists accepted that was the case[11].

101. I propose first to consider the comparison between competition in the Scheme with MIFs and in the no-MIF/default SAP counterfactual without making any assumption as to the position of MasterCard and its MIFs in the counterfactual world. I will then consider what effect, if any, MasterCard's assumed position might have on my initial conclusion.

Comparison between competition in the Scheme with MIFs and in the no-MIF/default SAP counterfactual

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

[9] The Arcadia claimants, but not Sainsbury's, proposed alternative counterfactuals in which Visa's MIFs would be set at lower levels than the actual levels, whether at an exempt level or a level which maximises TUS.
[10] §5(d).
[11] Joint Statement (Summary Note) §4(h).

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

103. Sainsbury's asserts that the UK MIF thereby restricts competition in the acquiring market in two principal respects[13]:

i) first, the MIF distorts the competitive process because it removes uncertainty among Acquirers about what their competitors are paying Issuers and reduces dramatically the scope for them to compete on price. In other words (and this is my interpretation), the MIF reduces competitive intensity as to the level of Interchange Fees to nil.

ii) second, the MIF acts as a *de facto* floor price that Merchants must pay.

104. I do not understand Visa to dispute that the MIF does indeed restrict competition in the above respects in absolute terms. The area of disagreement is that Visa contends that Sainsbury's cannot establish that the market would be any more competitive in the counterfactual situation where no MIFs were set and there was a default of settlement at par (the "no-MIF/default SAP counterfactual"). Visa's key contentions are that:

i) in the no-MIF counterfactual situation, Issuers and Acquirers would still not negotiate Bilateral Interchange Fees, but would proceed on the basis of the default provisions (i.e. settlement at par, with an implicit zero MIF) for exactly the same reasons as apply where there is a positive MIF in force;

ii) there would therefore be no difference in the competitive forces, the competitive processes or the competitive outcome: Issuers and Acquirers would proceed on the basis of the default set by the Scheme (equivalent to a zero MIF) and Merchants would have no ability to negotiate an even more favourable Interchange Fee outcome (which would be a negative MIF);

iii) the only difference would be in the <u>level</u> of Interchange Fee, not by reason of increased competition, but because the default Interchange Fee would implicitly be set at zero rather than at a positive figure. Visa contends that the mere fact that setting a positive MIF results in a higher price (or sets a higher "floor") does not, absent any other restriction in competition, amount to an infringement of Article 101.

105. As each of these contentions appear to run contrary to the outcomes of proceedings in this jurisdiction and in the EU courts (whether or not contrary to the reasoning in the relevant decisions), they require careful consideration.

(i) Competition in the no-MIF/default SAP counterfactual situation – would there be BIFs?

[12] There was evidence, given in private, of just one exception, where a merchant agreed that any increase in the MIF for contactless card transactions would not be passed on by its acquirer for a specified period.

[13] Opening submissions §66.

(a) The CAT Judgment

106. In *Sainsbury's v MasterCard* the CAT reached the conclusion that, in a no-MIF/default SAP counterfactual world, Issuers and Acquirers in the UK would probably reach bilateral agreements regarding the levels of Interchange Fees payable. At §197 of the decision the CAT set out its view as to the likely competitive process which would occur:

> "*Given market forces and the competition between Acquiring Banks, we conclude, on the basis of the factual material before us, that:*
>
> *(1) Bilateral Interchange Fees would be likely to be agreed between Issuing and Acquiring Banks, at a level that would result in Merchants paying less than the present UK MIF, but a rate that would encourage Issuing Banks to remain in the MasterCard Scheme, and not precipitate the fatal erosion that a zero MIF and no bilateral agreements would generate.*
>
> *(2) In part, Merchants would probably be prepared to pay such a price in order to retain the competition between MasterCard and Visa, and avoid what would, in effect, be a monopoly for Visa. They would also be sensitive to threats from MasterCard and the Issuing Banks that certain valuable services (free credit; fraud protection; immediate payment) would ultimately be stripped out of the Scheme or degraded unless a reasonable Interchange Fee was paid.*
>
> *(3) The manner in which the Interchange Fee would be paid might well radically change. It is likely that Acquiring Banks would, on the counterfactual hypothesis, be able properly to differentiate themselves, and to compete for the services of Merchants in a manner precluded by a default Interchange Fee like the UK MIF …*"

107. Based on the above reasoning and further lengthy analysis, the CAT determined that, in that counterfactual scenario, negotiations between Issuers and Acquirers would result in bilaterally agreed Interchange Fees in the UK with a weighted average of 0.5% for credit card transactions and 0.27% for debit card transactions. As those figures were lower than the UK MIFs charged by MasterCard during the relevant period, the CAT held that MasterCard's imposition of the UK MIF did restrict competition so as to increase Interchange Fees above those which would have been charged in the counterfactual market.

108. Visa accepts that the CAT thereby applied the correct legal test, namely, whether competition between Acquirers would be appreciably greater in the no-MIF/default SAP counterfactual than in the real world where the MasterCard UK MIFs are in force. Visa's case is that, even if the CAT was correct in its findings as to what would happen in the counterfactual in the case of MasterCard's MIFs (and Visa is highly critical of the CAT's reasoning in that regard and points out that no party to the present proceedings supported its approach), there is simply no basis for a similar

finding in the present case, all the evidence and reasoning pointing to the conclusion that no BIFs would be agreed in the counterfactual scenario.

(b) The Asda Judgment

109. In *Asda v MasterCard*, Popplewell J considered the very same issue in relation to MasterCard's MIFs in force in a similar period, including the UK MIF, but came to the opposite conclusion to that reached by the CAT. Popplewell J found that, in the relevant counterfactual world, Merchants and Acquirers would insist on the best settlement terms available, that is, settlement at par with no Interchange Fee: there would be no bilateral agreements.

110. After pointing out (i) that the CAT's bilateral interchange scenario formed no part of either Sainsbury's or MasterCard's case before the Tribunal, (ii) that it was rejected by the parties' respective experts when it was put to them in the course of their evidence and (iii) that it was therefore a "construct" of the Tribunal (§138), Popplewell J gave his reasons for regarding that scenario as unrealistic (at §142 to §149), including the following (which I paraphrase to some extent):

i) none of the 12 claimants in *Asda v MasterCard* (who were all also among the Arcadia claimants in these proceedings) put forward evidence to suggest that, despite being in a position to insist on transacting without paying any Interchange Fee, they would be prepared to pay Interchange Fees of the level suggested by the CAT;

ii) there was no evidence to support a conclusion that Merchants would have had, or perceived, an incentive to keep the MasterCard scheme going by volunteering to pay an Interchange Fee;

iii) it was in any event the combined view of the experts in *Asda v MasterCard* that no such collective move to agree positive Interchange Fees would emerge from the behaviour of individual Merchants, absent some agreement or concerted practice which was itself unlawfully anti-competitive. Each Merchant would be individually unwilling to pay an Interchange Fee which was any greater than that of its competitors and would be highly likely to be attracted by offers of a zero Interchange Fee, since they would be at a competitive disadvantage if their competitors did so and they did not. If an individual Merchant did agree to pay an Interchange Fee, it would bear all the costs of negotiating and paying such Fees but would gain only a small fraction of the benefit if others, while still taking the benefit, declined to pay anything (recognised as the "free rider" problem);

iv) the expert economists in *Asda v MasterCard* were agreed that competition amongst Acquirers would produce the outcome that Merchants wanted i.e. zero Interchange Fees. An Acquirer which attempted to recover a positive Interchange Fee through a higher MSC would lose business to Acquirers which did not do so. Faced with such competitive threat, Acquirers would therefore have no incentive to pay positive Interchange Fees to Issuers;

v) contrary to the CAT's assumption, the negotiation of Bilateral Interchange Fees between all Issuers and Acquirers would have entailed the negotiation

(and regular renegotiation) of a very large number of agreements, rising from 483 in 2007 to 1579 in 2015, each having to provide for Interchange Fees for many different types of transaction.

(c) The evidence and argument in these proceedings

111. Prior to the CAT Judgment, none of the claimant groups in these proceedings had advanced a case based on the no-MIF/default SAP counterfactual resulting in the agreement of Bilateral Interchange Fees.

112. On 3 August 2016, no doubt prompted by the publication of the CAT Judgment the previous month, Sainsbury's re-amended its Particulars of Claim in these proceedings (with the permission of Popplewell J, given prior to the conclusion of the *Asda v MasterCard* trial) to plead, as its primary case, that if Visa had not been entitled to deduct any Interchange Fee in the absence of bilateral agreements (i.e. a no-MIF/default SAP counterfactual), Sainsbury's would have had the benefit of Bilateral Interchange Fees lower than the MIFs it in fact paid.

113. On 2 September 2016 Sainsbury's served the second witness statement of David Brooks, Head of its Finance Operations team, presumably in order to provide evidential support for its recently pleaded case. In paragraph 8 Mr Brooks stated:

> "*In the context of bilateral negotiating between Issuers and Acquirers we would, in principle, be willing to accept some positive level of BIF provided it could be justified, for example if it could be shown that Issuers' costs exceeded the income they received from card use. In general, during my time in procurement, I had no problem in meeting a supplier's relevant costs in a negotiation, provided they were fairly calculated and based on an efficient operation of their businesses. I was not necessarily looking for them to cover their costs from other customers but was always prepared to accept our share of that cost. However, I would also be looking for recognition of the benefit to them of our business, so that here I would be looking for Issuers to provide recognition for the substantial sums of money we generate for them from the use of payment cards by our customers*."

114. Sainsbury's new case was, however, contrary to the position adopted by its own expert economist. In his first report for these proceedings dated 17 June 2016 Mr von Hinten-Reed stated:

> "*432. Because of the competitive pressures on acquirers and the free-rider problem, it would be in no individual acquirer's interest to agree to a positive interchange fee. Therefore, I consider that in the counterfactual, any Interchange fee is likely to be zero.*"

115. In a footnote to that paragraph Mr von Hinten-Reed explained that, in the no-MIF/default SAP counterfactual, "*bilateral agreements between acquirers and issuers result in an interchange fee of zero such that transactions are settled at par*". The

suggestion seems to be that Issuers and Acquirers would engage in bilateral negotiations as to Interchange Fees, but those would result in agreements to pay no Interchange Fee and to settle at the default position of par. That appears to be nonsensical in both economic and legal terms. An "agreement" to pay no Interchange Fee, but to settle at par, would not change either party's rights or obligations, nor the economic outcome. It would have no content and would be tantamount to making no agreement at all. It is absurd to suggest that Issuers and Acquirers would engage in multiple negotiations for no purpose or ultimate benefit. The concept of bilateral negotiations, resulting in zero Interchange Fees is, however, a continuing theme in Sainsbury's submissions, to which I shall return below.

116. In his second report Mr von Hinten-Reed confirmed his view that, in the no-MIF/default SAP counterfactual, the problem of "free-riding" would mean that no individual Acquirer would have the incentive to agree a positive Interchange Fee[14]. He then stated that this view was consistent with factual evidence served by Visa that Acquirers would be reluctant to agree Bilateral Interchange Fees[15]. From this it would appear that, by this point, Mr von Hinten-Reed was not pursuing his earlier suggestion that there would be negotiated bilateral "agreements" to pay zero Interchange Fee, but was recognising that it was unlikely that there would be bilateral agreements at all.

117. On 10 October 2016 the five expert economists agreed a Joint Expert Statement, in which they each (with knowledge of the CAT Judgment and reasoning) responded to the question "*Would bilateral agreements for positive interchange fees be agreed under this [no-MIF/default SAP] counterfactual? What is the relevance of free-riding to your answer?*" The responses were as follows:

> "***Caffarra (Visa):***
>
> ***No.*** *Even if the efficiencies arising from positive interchange fees meant a positive interchange fee was in merchants' collective interests, free rider and co-ordination issues would prevent acquirers/merchants from agreeing positive interchange fees. And even if these issues could be overcome, merchants would favour interchange fees below the efficient level.*
>
> ***Dryden (Arcadia):***
>
> ***No:*** *even if (contrary to my analysis) interchange fees benefit merchants collectively free-riding means that no individual merchant would agree to them.*
>
> ***Hausman (Tesco):***
>
> *No, and all experts are agreed. The ability incentive of merchants and acquirers to "free-ride" on the bilateral fees paid by rivals lead to an equilibrium where bilateral fees are unlikely to be agreed. This is true regardless of whether MasterCard is subject to the same constraints (a*

[14] §228.
[15] §229.

symmetric counterfactual) or is free to continue to set a MIF (the asymmetric counterfactual).

Holt (Visa):

No. *There would be little incentive for individual acquirers to agree positive bilateral interchange fees, so the settlement terms would be equivalent to a zero (MIF).* ***Free riding is relevant*** *to this answer: Each party (acquirer or merchant) would consider only their own interests rather than the interests of all participants in the payment card scheme as a whole. No individual acquirer would wish (nor be able) to put itself at a competitive disadvantage compared to rivals who can adopt the default rate.*

Von Hinten Reed (Sainsbury's):

(1) ***No.*** *Any interchange fee would be zero because of the competitive pressures on acquirers and the free-rider problem.*

(2) The free-rider problem is relevant because it is one of the reasons why interchange fees would be zero in the counterfactual."

118. The view of the expert economists, including those instructed by 12 of the largest Merchants in the UK, was therefore unanimous and unequivocal, as summarised in their Joint Statement (Summary Note) dated 1 November 2016 at para 5(e):

> "*We agree that, in a counterfactual with default settlement at par, free-rider issues would make bilateral agreements on interchange unlikely to emerge even if such agreements would make merchants collectively better off (which is not agreed). This applies in both the symmetric and asymmetric counterfactual.*'

119. It is noteworthy that Mr von Hinten-Reed was party to that Summary Note, agreeing that bilateral agreements on Interchange Fees were unlikely to emerge (rather than his earlier view, outlined above, that bilateral agreements would be made, but providing for zero Interchange Fees).

120. The gist of the experts' joint view was, therefore, that the competitive situation in the counterfactual scenario (whether or not MasterCard was assumed still to be setting MIFs) would be *exactly* the same as in the real world of MIFs: in either case there would be no incentive to depart from the default, regardless of the level at which the default was set.

121. In opening the trial, the Arcadia claimants accepted that there would be no bilateral agreements as to Interchange Fees in the no-MIF/default SAP counterfactual. Sainsbury's position, however, was that "*[w]hether or not bilateral agreements would be concluded between acquirer and issuer is a matter of evidence.*" Sainsbury's recognised that Mr Dryden did not believe that bilateral agreements would come into existence (ignoring the concurrence of Dr Caffarra, Mr Holt and Professor Hausman with that opinion), but suggested that Mr von Hinten-Reed considered that they would

be "*feasible for the UK market*", despite later quoting his opinion that, because of free-riding issues, "*... it would be in no individual acquirer's interest to agree to a positive interchange fee.*" Reference was also made to the CAT Judgment and to Mr Brooks' second witness statement.

122. However, at trial none of the witnesses of fact gave evidence capable of supporting the proposition that bilateral agreements would be reached in the no-MIF/default SAP counterfactual and, further, several witnesses gave unchallenged evidence that no such agreements would be made. In particular:

i) the Arcadia claimants called 11 executives (one from each of the major retailers bringing a claim against Visa) to give evidence, most being senior executives with responsibility for their employer's relationship and agreements with one or more Acquirers and the level of MSCs so agreed. Not one of them suggested that, if the default position was that they would pay no Interchange Fee, they would nonetheless volunteer to pay one.

ii) Mr Brooks, when cross-examined, clarified that paragraph 8 of his second witness statement (set out above) was addressing a "pure bilateral" counterfactual, where there was no default settlement rule and so an agreement had to be reached. He had not had in mind the possibility that the counterfactual would involve default settlement at par. Mr Brooks re-asserted that he would wish to negotiate the Interchange Fees paid by Sainsbury's below the cost of cash, and would wish to cooperate with Visa and MasterCard in that regard, but he did not go so far as to suggest that Sainsbury's would voluntarily pay more than it was obliged to pay if there was a default of settlement at par.

iii) Michael Ashworth, a senior executive of WorldPay UK Limited (one of the UK's leading Acquirers) with extensive experience of Interchange Fees in the UK market, gave unchallenged evidence that the factors identified in the CAT Judgment as making bilateral agreements as to Interchange Fees realistic would not be able to overcome the major commercial problems with agreeing positive BIFs. The first two problems he identified were (i) the serious practical difficulties given the volume of separate bilateral negotiations which would be required; and (ii) the "systems challenges" which would arise in giving effect to many bilateral agreements as to various rates of Interchange Fees. Mr Ashworth explained the third problem as follows:

"*... if WorldPay were to agree to positive BIFs with issuera, it would be at a significant competitive disadvantage relative to any acquirers who had not entered such agreements. Anticipating this risk, I believe that WorldPay would be reluctant to agree to BIFs. If, for example, WorldPay was pitching a MSC incorporating a positive BIF to a typical merchant on the basis that such a fee was better for all industry participants because it kept Visa in the marketplace, but another acquirer was offering an MSC based on a zero MIF (meaning that only an acquirer margin would be payable), I would expect the merchant to choose the lower-cost acquirer because merchants tend to focus on their short-term costs. My*

> *experience has shown that retailers are always pressing their acquirers to lower their MSCs, even if that cost saving is only temporary. I would expect that to be the case even if that approach jeopardised the continuing existence of a payment scheme which could not set MIFs. Accordingly, in my view, it would be near impossible to persuade merchants to accept a higher interchange fee if other acquirers were offering a MSC which did not include a MIF component – I would expect large or small Merchant alike to choose the acquirer offering the lower MSC. Given this commercial reality I would expect WorldPay to be reluctant to agree a positive interchange fee unless it could be certain that all other acquirers were doing the same.*"

123. When called to give oral evidence, Mr von Hinten-Reed confirmed that his expert opinion was as set out in his reports and the Joint Experts Statement, thereby (in my judgment) confirming that there would be no Bilateral Interchange Fees in the no-MIF/default SAP counterfactual. When cross-examined, he did seek to introduce (for the first time) one qualification, which was a suggestion that, whilst there would be no Interchange Fee paid on transactions in the Scheme (assuming a no-MIF/default SAP rule) with the HACR in force, some Merchants might agree to pay an Interchange Fee for a second type of Visa card which would be issued outside the main Scheme and providing different benefits, which not all Merchants would have to accept. This was not a scenario supported by any of the other expert economists and was not put to them in cross-examination as likely to arise. Mr Holt nevertheless considered the concept during his cross-examination, concluding that it might arguably surmount the problem of free-riding, but explained that it would be a wholly impractical model. The suggestion was not pursued by Sainsbury's in closing argument.

124. Sainsbury's written closing argument did not positively assert that Bilateral Interchange Fees would be likely to arise in the counterfactual, but did not entirely abandon the idea. The highest it was put was (i) a reference (§172) to the fact that "*Mr von Hinten-Reed at least acknowledged the possibility of bilaterally agreed interchange fees*" in his second expert report, and (ii) further (misplaced) reliance on Mr Brooks' second witness statement (§173). But neither of those aspects of the evidence ultimately provided any support for the proposition that BIFs would emerge in the no-MIF/default SAP counterfactual, particularly in view of the fact that all other expert and factual evidence, summarised above, pointed in the other direction. Sainsbury's did not even refer to that overwhelming and unanimous expert and factual evidence, let alone explain how it could be overcome.

125. Sainsbury's primary answer was not that BIFs would be agreed in the counterfactual, but that if no positive Interchange Fee emerged, such outcome was itself "*the result of the competitive pressure and acquirers having to compete for merchant business*". That was the basis on which Mr Brealey QC presented the case for Sainsbury's in oral closing submissions: he did not suggest that Bilateral Interchange Fes would emerge in the counterfactual, despite having appeared for Sainsbury's in the CAT proceedings and having been successful on that basis.

(d) Conclusion as to whether BIFs would emerge in the counterfactual

126. The starting point is that, despite the fact that MIFs have provided a default level of Interchange Fee for many years and at varying levels (both fixed and as a percentage of transaction values), bilateral agreements for a different level of Interchange Fee are unknown in the UK market. That demonstrates the very considerable strength of the market forces which keep the Interchange Fee at the level of the default: no party has persuaded another to move away from the default and no party has volunteered to do so for some perceived benefit.

127. As the no-MIF/default SAP counterfactual gives rise to a default settlement position just as does the MIF in the real world, the same market forces must be assumed to apply, unless some real difference is identified. The reasoning in the CAT Judgment was that individual Merchants who had the option of settling at par and paying no Interchange Fee would nonetheless volunteer to pay a positive fee, possibly in exchange for some negotiated benefit, but primarily in order to protect the relevant scheme from the loss of its Issuers to another scheme with MIFs.

128. However, the ability to negotiate special deals with special benefits is present in the current Scheme, but has not resulted in bilateral agreements. Further, the suggestion that individual Merchants would volunteer to pay more than their fierce competitors are obliged to pay seems inherently unlikely. Without unlawful coordination, a Merchant would be agreeing to increase its own costs (and thereby damage its competitiveness and/or profitability) in an effort to obtain a longer-term benefit for all Merchants accepting Visa cards, but knowing that its competitors might well take that benefit without themselves paying more: the classic free-rider Issuer. Would Tesco, Asda and others really agree to pay an Interchange Fee averaging 0.5% for credit card transactions knowing that Sainsbury's and Morrisons could refuse to do so and lower their prices and/or increase their profits accordingly?

129. In my judgment it would require clear evidence to support a finding that BIFs would emerge in a default settlement counterfactual when they do not arise in the actual default Scheme, whether in the form of witnesses of fact explaining why they would pay more or expert economists explaining the market forces which would lead to such a result. Whether or not the CAT had such evidence before it (or relied on the expertise of Professor Beath in that regard), it is clear that there is no such evidence in these proceedings. On the contrary, the evidence was unanimous and unequivocal to the opposite effect: in a no-MIF/default SAP counterfactual, whether or not MasterCard is assumed to be setting MIFs, there would not be bilateral agreements to pay Interchange Fees.

(ii) In the absence of BIFs, would there be "competition" in the no- MIF/default SAP counterfactual?

130. Sainsbury's case, as ultimately formulated by Mr Brealey in closing argument, was that, although the no-MIF/default SAP counterfactual would result in settlement at the default level (that is to say, at par with no Interchange Fee), that outcome was as a result of a "competitive process" which is absent where there is a MIF.

131. The argument was that payment to the Merchant of 100% of the price of the goods or services (the "par" in "settlement at par") should be regarded as a fixed and obvious

starting point for the transaction. In the absence of a MIF, the parties would be free to negotiate as to whether a fee should be paid by the Merchant to the Issuer (via the Acquirer) for receiving payment of that price via the Scheme. If the result of that negotiation was (as Mr Brealey accepted it was likely to be), that no Interchange Fee was payable, that was the result of the competitive process. In contrast, the MIF is not the result of competition, but is the imposition of a fee by the Scheme, which Visa is free to increase at will.

132. For that reason, Mr Brealey did not accept that the no-MIF/default SAP counterfactual was the same as a zero MIF. He recognised that the five expert economists had agreed that those two situations were "*economically equivalent*"[16], but he maintained that they nevertheless involved a different competitive process: the former was an agreement to pay the full price, with no agreement reached as to an added fee, whereas the latter was an imposed fee of zero.

133. In my view that argument is misconceived. First and foremost, there is simply no difference in the competitive process in the two scenarios under consideration in the absence of bilateral agreements. In either case, the market will not deviate from the default settlement rule set by the Scheme notwithstanding that the market participants are free to so. To the extent that there is a competitive process, in either scenario such process drives the price to the default setting.

134. Second, the argument is dependent on drawing a bright-line between settlement of the transaction price and a MIF. Mr Brealey seeks to categorise the former as some sort of basic "entitlement" and the latter as an "imposed" fee which would not be agreed if Merchants did not have to do so. However, there is no such natural or obvious distinction: there is no *a priori* reason why settlement of a financial transaction should be at par rather than at a discount (or at a premium) and Interchange Fees are no more or less than another way of expressing such a discount (or a premium if they have a negative value).

135. Third, it is fallacious to regard a default MIF as being "imposed", whereas a no-MIF/default SAP rule is somehow not so imposed. Both are (or would be) default provisions mandated by the Scheme Regulations, providing the parties with the certainty of a fall-back position. A simple example demonstrates the fallacy. If a hypothetical new card scheme wished to incentivise Merchant acceptance of its cards, it might at first provide for a negative MIF (equivalent to settling transactions at a premium). Once the product became widely accepted, the scheme might "raise" the MIF to zero, or simply cease to set a MIF, leaving a default of settlement at par. In that situation, the no MIF default settlement at par outcome has undoubtedly arisen by virtue of an increased default level of Interchange Fee "imposed" by the scheme. The same would be the case if, in a different scenario, a hypothetical scheme reduced a positive MIF to zero, or ceased to set a MIF, thereby again "imposing" settlement at par. In either case, the result of the scheme's mandatory change of rule is the exact outcome which Mr Brealey contends is the result of a competitive process, whereas it plainly is not.

136. Fourth, the fact that Mr Brealey is forced to insist that the no-MIF/default SAP counterfactual is conceptually distinct from setting a zero MIF reveals the illogicality

[16] Joint Statement (Summary Note) at §4(h).

of his position. As is apparent from the hypothetical examples in the above paragraph, there is no economic, practical or legal difference between the two situations: a scheme which decided to provide for transactions to be settled at par, with no default level of Interchange Fee, could produce that result by either route or, indeed, could expressly state the alternative formulations in its rules. Once it is recognised that the counterfactual in question is a zero MIF scenario, the attempt to distinguish that default from a positive (or negative) MIF is seen to be unsustainable.

137. Fifth, the effect of the argument is that any level of MIF, on the infinite scale from infinitely positive to infinitely negative (including an infinitesimally small level), is deemed to be a restriction of competition, all in comparison with an infinitesimally small point on that scale equating to there being no MIF (a figure of zero). But there is, in this context, no magic in the number zero and no reason why it represents an inherently more competitive situation than any other level.

138. Mr Brealey pointed out that the Commission had decided that MasterCard's intra-EEA MIFs restricted competition by reference to the no-MIF/default SAP counterfactual, a decision which had been upheld by the General Court and the CJEU. Mr Brealey suggested, albeit tentatively, that I was bound by the CJEU's decision that MIFs restrict competition for the purposes of Article 101. It was common ground that this court is bound by legal principles established by the CJEU, both in applying Article 101 (by virtue of s.3 of the European Communities Act 1972) and in applying the equivalent provisions of the Competition Act 2008 (by virtue of s.60 of that Act).

139. Ms Rose QC for Visa refuted the suggestion that the MasterCard CJEU Judgment has the effect suggested by Mr Brealey. She submitted that, whilst the legal principles established by the MasterCard CJEU Judgment were of course binding, its rejection of MasterCard's appeal did not amount to a finding that MIFs were, as a matter of legal principle, an infringement of Article 101. The CJEU, she submitted, did establish (to the extent it was in doubt) that it was necessary as a matter of law to show that MIFs restricted competition as compared to the counterfactual (and not merely that they resulted in higher levels of Interchange Fee), but the operative finding that there was such a restriction was a finding of fact by the Commission as to the effect of MasterCard's intra-EEA MIFs on competition in the acquiring market in that territory. The CJEU's decision was that the General Court had not erred in its approach to the Commission's factual findings. As far as the Commission's findings of fact were concerned, they arose in the context of a dispute between different parties and in respect of a different subject matter. It was again common ground that, although this court is obliged to have regard to the MasterCard Commission Decision (by virtue of s.60(3) of the Competition Act 1998) and will give it due weight, it is only part of the evidence and it should not be followed if the assessment of all the evidence shows that it is wrong: *Crehan v Inntrepreneur Pub Co (CPC)* [2007] 1 AC 333 per Lord Bingham of Cornhill at paragraphs 11 and 12 and per Lord Hoffmann at paragraph 69.

140. Given those competing arguments, it is necessary to examine the relevant parts of the decisions in some detail.

141. The key passages from the MasterCard Commission Decision stated as follows:

"458. If the concept of a restriction of competition within the meaning of Article [101(1)] … had to be interpreted as MasterCard suggests, then Article [101(1)] … would be entirely deprived of its effet utile. The MasterCard MIF not only creates an (artificial) common cost for acquirers and thereby sets a floor for the fees each acquirer charges to merchants. Acquirers also know precisely that all of their competitors pay the very same fees. The price floor and the transparency of it to all suppliers involved (that is to say the knowledge of each acquirer about the commonality of the MIF for all other acquirers in the MasterCard scheme) eliminate an element of uncertainty.

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

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

142. It can be seen that the Commission's conclusion that the MIF restricted competition in the acquiring market was based on its finding of fact that, in the absence of the MasterCard MIF, there <u>would</u> be bilateral negotiations and agreements in the intra-EEA market, with Acquirers negotiating different levels of Interchange Fees, those who agreed higher Fees becoming less competitive than those achieving lower levels. Whilst the Commission took the view that in the long-run this might be expected to lead to settlement at par and no Interchange Fee, this would be the result of a highly

competitive process whereby Acquirers engaged in competition with each other to offer Merchants the lowest price.

143. In the General Court, MasterCard (and a number of intervener banks) challenged the core reasoning from §460 of the Commission's Decision quoted above, the challenge being summarised by the General Court as follows:

> "*129. The applicants and a number of interveners submit that the Commission failed to fulfil its obligation to assess the competition in question within the actual context in which it would occur in the absence of the MIF. Essentially they raise two complaints.*
>
> *130. In the first complaint, the applicants refer to the absence of a competitive relationship between issuing and acquiring banks in forming the view that the Commission was not entitled to conclude that the MIF restricts competition, since its absence does not mean that there is a competitive process that would result in the reduction of interchange fees. They observe that the MasterCard system could not function without a default transaction settlement procedure. The applicants also take the view that the Commission wrongly concluded that, in the absence of the MIF, bilateral negotiations would be held between issuing banks and acquiring banks and that such negotiations would in due course lead to the disappearance of interchange fees ...*"

144. Applying the strict test applicable on such challenges (whether the Decision revealed a manifest error), the General Court rejected the appellant's contentions in the following terms:

> "*133. ... as regards the criticism relating to the reference in the contested decision to bilateral negotiations between issuing and acquiring banks, it should be noted that although the Commission referred to such negotiations in recital 460 to the contested decision, it did so essentially in order to point out that in a MasterCard system operating without a MIF acquirers accepting interchange fees on a bilateral basis would risk failing to remain competitive in the acquiring market, and that, therefore, in the absence of a MIF, it was to be expected that interchange fees would in due course cease to be charged on the settlement of transactions.*
>
> *134. It must be held that this analysis is not manifestly incorrect. The view might reasonably be taken that by allowing transparency between acquiring banks as to the level of interchange fees applied to transactions, the MIF helps to ensure that all, or at least a substantial portion, of those fees are passed on to merchants, the acquiring banks being assured that the resulting increase in the amount of the MSC will not affect their competitive position. However, the view might*

> *reasonably be taken that no such assurance would be available in a system operating without a MIF, and that, therefore, the passing on to merchants of an interchange fee accepted bilaterally would be likely to affect the competitive position of the acquiring bank in question.*"

145. In that context, the General Court also rejected the appellant's argument that "transparency" was the same where there was a MIF as it would be in the no-MIF/default SAP counterfactual, and that the only difference was one of the level:

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

146. On appeal, the CJEU first rejected the contention that the General Court's analysis of the competitive effect of the MIF was inadequate, holding as follows:

> "*192. Having properly relied on the 'counterfactual hypothesis' of a system operating on the basis of the prohibition of ex post pricing … the General Court did not regard the MIF, by their very nature, as being injurious to the proper functioning of normal competition, but analysed the competitive effects of those fees. It must be pointed out that the General Court's analysis in that regard is not to be found only in paragraph 143 of the judgment under appeal … but also includes all of the analysis in paragraphs 123 to 193 of that judgment.*
>
> *193. In particular, while the General Court clearly explained in paragraph 143 of the judgment under appeal that the MIF had restrictive effects in that they '[limit] the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold' … the General Court did not merely presume that the MIF set a floor for the MSC but, on the contrary, proceeded to carry out a detailed examination in paragraphs 157 to 165 of the judgment under appeal in order to determine whether that was in fact the case.*"

147. The CJEU then addressed the suggestion that the General Court, in §143 of its Judgment, had wrongly accepted that the mere fact that the MIF resulted in a higher price amounted to a restriction of competition. In §195, already set out above (paragraph 96), the CJEU rejected that interpretation of the General Court's reasoning, making it plain that the key point was the Commission's finding (upheld by the General Court) that the MIF reduced the pressure Merchants could impose on

Acquirers, with a resulting reduction in competition. The higher price was a result of restriction, not the cause of the restriction.

148. In the light of that summary, I consider that it is clear that Ms Rose's analysis of the MasterCard CJEU Judgment (and the decisions it considered) is correct. The finding that MasterCard's intra-EEA MIFs restricted competition was based on a determination of fact by the Commission that, in the absence of MIFs, there would be a highly competitive process as Acquirers sought to negotiate (bilaterally) with Issuers for the lowest Interchange Fees, under intense pressure from the Merchants they wished to have as customers. Based on that factual finding (which the General Court had been entitled to find not to be manifestly incorrect), the CJEU held that the elements required for the MIF to be restrictive of competition had been established: the CJEU did not decide that MIFs are, as a matter of law, a restriction on competition.

149. Indeed, the Commission's approach to determining whether there was a restriction of competition (endorsed by the CJEU's reasoning) was that it was necessary to find (and the Commission did find) a difference in the competitive process in the market in the absence of MIFs. Neither the Commission nor the CJEU came close to adopting the approach suggested by Mr Brealey in the present case, namely, that MIFs are inherently restrictive because they impose a fee on top of the price of the underlying transaction. That argument, in reality, is the same argument as the CJEU expressly rejected, namely, that MIFs should be regarded as restrictive simply because they result in a higher price for Merchants.

150. It might have been suggested that the Commission's finding that there would have been bilateral negotiations and agreements in the absence of the MasterCard EEA MIFs lent support to Sainsbury's case that bilateral agreements would arise in the absence of Visa's MIFs in the UK market. However, neither the Arcadia claimants nor Sainsbury's relied on the MasterCard Commission Decision for its factual findings; any such reliance would have made little difference given the weight of uncontested evidence referred to above that no bilateral agreements would emerge in the no-MIF/default SAP counterfactual.

151. I am therefore satisfied that, on the basis of my finding of fact that there would not be any actual competition in the acquiring market in the no-MIF/default SAP counterfactual, that counterfactual rule restricts competition just as much as a MIF. There is nothing inherently "competitive" about a system which sets the default settlement at the value of the underlying transaction, thereby stifling any competition which would otherwise arise as to the settlement level.

(iii) Does setting a MIF infringe Article 101(1) because it acts as a "floor" for the MSC?

152. In the Asda Judgment, Popplewell J, after rejecting the CAT's finding that bilateral agreements would arise in the no-MIF/default SAP counterfactual (in other words, finding that there would be no more actual competition in the counterfactual situation than where a positive MIF is set), nevertheless found that the MasterCard MIFs did amount to a restriction of competition, stating:

> "*156 … the MasterCard MIFs did amount to a restriction of competition on the acquiring market by comparison with a counterfactual of no MIF or a lower putative lawful MIF. They imposed a floor below which the MSC could not fall, because acquirers had to pay at least that much to issuers and had to recoup it from the merchants, which in turn led to higher prices charged by acquirers to merchants through the MSC than if the MIF were lower or zero. Such a floor restricts competition because it interferes with the ability of acquirers to compete for merchants' business by offering MSCs below such floor. It is no different in kind from a collective agreement by manufacturers to maintain inflated wholesale prices, which prevents wholesalers competing on the retail market below those prices.*

153. Popplewell J referred to the fact that the Commission had consistently viewed both Visa and MasterCard's EEA MIFs as constituting a "*de facto floor*" for the fees charged to Merchants, resulting in higher prices and thus restricting competition in the acquiring market. He then stated that the Commission's finding in that regard had been upheld by the General Court and by the CJEU, citing paragraph 195 of the MasterCard CJEU Judgment (set out above).

154. That conclusion, reached by another Judge of this Court in related and contemporaneous proceedings, is highly persuasive and one I would have wished to follow and adopt if and to the extent possible and appropriate. However, I am persuaded by Visa's arguments that the finding reveals an incorrect approach as a matter of logic, economics and the applicable legal principles.

155. First, the suggestion that a MIF creates a "floor" is no more than another way of expressing the fact that it is a default level of Interchange Fee and therefore determines a default level of settlement, from which no Issuer (and therefore no Acquirer) will agree to depart. It equally creates a "ceiling" for the Interchange Fee element of the MSC.

156. Second, the situation is exactly the same at any lower level of MIF, including a zero MIF or its equivalent, a no-MIF/default SAP counterfactual. At that lower level, the default settlement rule still provides a default level of Interchange Fee, and therefore (because of the lack of competitive pressure to depart from that default) both a floor and a ceiling for that fee. The only difference is the level. Popplewell J rejected that argument in the Asda Judgment, stating at §160 that "*… in a no MIF counterfactual the alleged vice is not the same as the actual: there is no floor.*" However, a zero MIF or no-MIF/default SAP counterfactual most certainly <u>does</u> give rise to a "floor", both in economic terms and as a matter of logic, particularly in the context of a two-sided market: it prevents the possibility of market forces driving the MIF to a negative level (equivalent to a premium on settling the transaction price). As I have mentioned above, that is not merely a theoretical possibility, as all the expert economists recognised that negative MIFs could and do arise in the real world (an example being the EFTPOS scheme in Australia) and Mr Dryden (supported by the contents of the Commission Survey) proposed negative levels of MIFs as the efficient level for certain types of transaction in this very case.

157. Third, it will be appreciated that Popplewell J's approach, treating the no-MIF/default SAP situation as intrinsically different from a MIF (in this case on the grounds that the counterfactual does not set a "floor"), is effectively the same argument as advanced by Mr Brealey that the underlying transaction price is somehow a "natural" starting point for settling transactions, so that a default set at that level does not involve an anti-competitive process but is, intrinsically and without any actual competition, to be deemed to be the product of "competition". To that extent, the reasons I set out above in paragraphs 133 to 137 for rejecting Mr Brealey's argument apply equally to the conclusions reached by Popplewell J.

158. Fourth, Popplewell J went even further than Sainsbury's submissions in the present case, holding that a MIF is restrictive of competition not only when compared with the no-MIF/default SAP counterfactual, but also when compared to a lower MIF which is putatively lawful (because it would be exempt under Article 101(3)), explaining that, in such situation "*..the counterfactual is a different floor, and one which ex hypothesi does not suffer from the alleged vice because it is set at a level which is justifiably competitive*". That reasoning appears to be open to a number of objections as follows:

    i) the fact that the lower putatively lawful MIF counterfactual gives rise to a "different floor" to the one created by the higher MIFs in the real world does not seem to identify any relevant distinction;

    ii) the purpose of comparing the impugned situation (the actual MIF) with a counterfactual (the lower MIF) is to determine whether there is a "vice", namely a greater restriction of competition. To find that there is a distinction between the actual and counterfactual situations because the latter does not suffer from the alleged "vice" is assuming the answer to the very question the comparison is trying to determine;

    iii) further and in any event, introducing issues of "lawfulness" under Article 101(3), which only arises if there is an infringement of Article 101(1), cannot be appropriate in considering whether there is a restriction of competition under Article 101(1);

    iv) if the above criticisms are valid, the only true distinction between the floor set by actual MIFs and that set by the lower putatively lawful MIFs is the level at which they are set.

159. Fifth, as is apparent from the points made above, the argument that the MIF creates a "floor" beneath the MSC ultimately equates to the argument that a MIF restricts competition purely and simply because it raises Interchange Fees above the level they would be at in the counterfactual world. This was the basis on which the argument was put by the Arcadia claimants in these proceedings, relying on what they asserted to be the "adverse" effect the MIF thereby had on a parameter of competition. I have already set out above (paragraphs 88 to 97) why I do not consider that that argument is tenable as a matter of law and it was not, in any event, the way the case was put by Sainsbury's in closing argument. Nevertheless, it is instructive to note certain aspects of the evidence called by the Arcadia claimants and the arguments they put forward in this respect:

i) Mr Dryden, the expert economist called by the Arcadia claimants both in these proceedings and in *Asda v MasterCard*, accepted that there would be no greater or lesser degree of competition (in the sense used by economists and, I would add, by lawyers) whatever the level at which the MIF was set, including zero. His analysis proceeded on the assumption that, as a matter of law, an increase in the level of MIF was a "restrictive effect" because it introduced and then increased a fixed cost which would have an adverse effect on a parameter of competition, namely the price represented by the MSC;

ii) On that assumption (which Mr Dryden accepted was a legal question outside his expertise), Mr Dryden accepted that *any* level of MIF would be deemed to be restrictive of competition in comparison with a lower MIF. That analysis, he readily accepted, extended to a zero MIF (which he viewed as the same as the no-MIF/default SAP counterfactual), which would be restrictive in comparison with any negative MIF. Mr Dryden did not suggest any economic reason for distinguishing "zero": he said that it would require a "legal or factual principle" outside his expertise to prevent a zero MIF being subject to the very same "theory of harm" as he viewed as applying to any other level of MIF. The "principle" supplied by the Arcadia claimants in argument, was simply that a zero MIF, unlike any other level of MIF, does not set a floor, providing, in my judgment, an answer that was both circular and inadequate;

iii) Mr Dryden also accepted that his reasoning would apply equally to a government tax which formed a fixed cost of goods or services, an increase in which would cause an increase in the price paid by the customer. He sought to distinguish the situation on the basis that the increased tax would not be an exercise of "market power", but could not explain why the result would not also amount to a restriction of competition if his approach was correct;

iv) Mr Dryden further accepted that the effects of MIFs on price levels in the acquiring market are "*equal and opposite*" to levels in the issuing market. It follows that, if a higher MIF restricts competition in the acquiring market merely because it increases prices in that market, a lower MIF must restrict competition in the issuing market in the same way. It would further follow that cardholders could complain that a zero MIF (or a no-MIF/default SAP rule) restricts competition when contrasted with a positive MIF.

160. Sixth, although it is correct that the Commission has consistently referred to the fact that MIFs set a floor under the MSC, that was in the context of finding that there would be actual competition (by bilateral negotiations) in the counterfactual world where MIFs were absent, a process which Popplewell J and I have both found (as a matter of the evidence before us) would not in fact occur in the counterfactual. Paragraph 195 of the MasterCard CJEU Judgment emphasises that the Commission's approach was correct because it held that MIFs limited pressure which would otherwise have taken place in their absence (i.e. bilateral negotiations). It does not support a conclusion that setting MIFs is in itself a restriction of competition because they set a floor at a higher level than would otherwise apply. Indeed, the CJEU's reasoning refutes the legitimacy of such a conclusion.

(iv) Conclusion as to whether there is a difference in competition between a Scheme with MIFs and the no-MIF/default SAP counterfactual

161. In summary, once it has been accepted or determined that there would be no bilateral agreements as to Interchange Fees in the counterfactual (as both Popplewell J and I have found on the basis of the evidence before us), the inevitable conclusion is that a MIF does not restrict competition any more than does a no-MIF/default SAP rule. The suggestions or findings that there is such a difference necessarily involve constructing some artificial concept of "competition", so as to demonstrate a distinction between two situations, neither of which result in negotiations or agreements but in the application of the default. The concepts of the MIF being "imposed", of the MIF being a "floor" or of the MIF inherently and adversely affecting a parameter of competition are all attempts to explain why a MIF is more restrictive than a default with no MIF, but all fail to identify any real distinction, let alone one which arises from a difference in competition or rivalry.

Symmetrical or asymmetrical counterfactual?

162. The above analysis and my conclusion is unaffected by the issue of whether it is assumed that MasterCard is equally constrained in the counterfactual not to charge MIFs (a symmetrical counterfactual) or whether it is assumed that MasterCard would be free to continue setting MIFs regardless of Visa not doing so (the asymmetrical counterfactual). However, the use of an asymmetrical counterfactual played a central role in the analysis and outcome in both the CAT Judgment and the Asda Judgment, but to very different effect:

    i) The CAT's assumption that Visa would continue to set MIFs (in a counterfactual where MasterCard could not do so) was crucial to its finding that Merchants would enter bilateral agreements to pay Interchange Fees, the motivation for doing so being to save MasterCard from losing its Issuers (and therefore its business) to Visa. The use of an asymmetrical counterfactual therefore resulted in the CAT finding a difference in the competitive process but also, because of the assumed altruistic approach of Merchants upon which it was based, one which preserved the MasterCard scheme against the loss of its business;

    ii) In contrast, Popplewell J held that the MasterCard MIFs were intrinsically an unlawful restriction of competition, but that they were "saved" because, adopting an asymmetrical counterfactual in which Visa continued to set MIFs, MasterCard would be forced out of business, a result which would be no more competitive than the status quo. Popplewell J took the view that it would not have been right to use the asymmetric counterfactual if Visa's MIFs were also intrinsically unlawful (as that would result in one unlawful scheme being preserved by another, possibly with circular effect), but as that issue was not before him, he would only assume the Visa MIFs were unlawful if there was evidence that the [Visa] Scheme and the MasterCard scheme were "materially identical". As that was not established on the evidence, Visa's MIFs were assumed to be lawful and present in the counterfactual and resulted in MasterCard's MIFs being held not to be an infringement of Article 101(1).

163. The above summary demonstrates, in my judgment, the inherent difficulty (if not absurdity) in attempting to analyse the competitive effects of one or other of the two major four-party schemes on the hypothetical basis that one of them is, in the counterfactual, deemed to be subjected to markedly different restraints than the other.

The result has been the need to construct unrealistic and contorted solutions to highly improbable scenarios and to undertake some mental gymnastics.

164. I have, in the event, found above that Visa's MIFs do not restrict competition under Article 101(1) regardless of the symmetry of the counterfactual. But if I had reached the parallel conclusion to that reached by Popplewell J as to the inherent unlawfulness of MIFs, and applied his approach to whether to use an asymmetrical counterfactual in which MasterCard's MIFs are present, the result would have been that both schemes' setting of MIFs would have been held to be inherently unlawful but each nonetheless would ultimately be held lawful because of the fact of the (unlawful) existence of the other – the very result Popplewell J regarded as unacceptable in the context of the proceedings he was determining. I do not consider that it would have been any more acceptable in the context of the determination of two closely related sets of proceedings. Indeed, one of Visa's submissions in these proceedings is that the MasterCard MIFs should be taken to be lawful in the counterfactual because of Popplewell J's ultimate finding to that effect in the Asda Judgment.

165. Visa nevertheless contends that established principles require that the counterfactual must be designed so as to examine competition in the actual context in which it would have occurred, which Visa argues entails that it must be assumed that MasterCard is continuing to set MIFs (whether or not lawful). In this respect Visa relies upon the MasterCard CJEU Judgment at follows:

> "*164… the Court should … assess the impact of the setting of the MIF on the parameters of competition, such as the price, the quantity and quality of the goods or services. Accordingly, it is necessary, in accordance with the settled case-law … to assess the competition in question within the actual context in which it would occur in the absence of those fees."*
>
> *165. In that regard, the Court of Justice has already had occasion to point out that, when appraising the effects of coordination between undertakings in the light of Article 81 EC, it is necessary to take into consideration the actual context in which the relevant coordination arrangements are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question …*
>
> *166. It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic. From that perspective, it is permissible where appropriate to take account of the likely developments that would occur on the market in the absence of those arrangements.*"

166. Visa therefore submits that the CAT correctly applied the law in refusing, when considering the MasterCard MIFs, to exclude Visa's MIFs from the counterfactual

(whether on the grounds that those MIFs should be assumed to be unlawful or otherwise), stating as follows at §159 of the CAT Judgment:

> *"(1) The agreement whose anti-competitive effect we are testing is the … agreement between MasterCard and its licensees to have a default UK MIF.*
>
> *(2) We stress that we are testing the anti-competitive effect of this agreement. It would be wholly wrong for us to enter upon this enquiry presuming the default UK MIF to be anti-competitive. The whole point of the counterfactual exercise we are undertaking is to provide an analytical framework whereby the effect of an agreement can be tested by hypothesising its absence.*
>
> *(3) That being the case, it would be wrong in principle to make any presumption as to the constraints on rivals to MasterCard, like Visa, that is not rooted or based on fact.*"

167. Visa criticised Popplewell J's qualification to the above approach, submitting that the requirement to look at the "actual context" ruled out any consideration of whether that context was or should be assumed itself to be lawful. The requirement of looking at a counterfactual which included MasterCard was not only required by established principle, Visa submitted, but was obviously appropriate given that MasterCard was in fact setting MIFs throughout the claim period and was still doing so, a situation which had at no time been within Visa's control.

168. In my judgment, however, that analysis is wrong for the following reasons:

i) First, the relevant exercise is not one of re-writing history so as to examine what would actually have happened over a period of time had Visa not set MIFs, but everything else remained exactly the same. The counterfactual is designed to test the competitive situation in the actual world against a likely hypothetical scenario, which must be realistic and so reflect the actual context. The question is whether Visa's MIFs were and are restricting competition by comparison with a <u>realistic</u> counterfactual, not whether Visa could have brought about that counterfactual itself;

ii) Second, a situation in which Visa would be prevented from setting MIFs but MasterCard would remain unconstrained is not merely unrealistic but seems highly improbable. Whilst there may have been insufficient evidence before me to justify a conclusion that the two schemes are "materially identical", it is abundantly clear that the schemes are engaged in the same business, using the same model and are fierce competitors. It is difficult to conceive of a circumstance in which one scheme would be unable to set any MIFs (or would do so by choice) whilst the other remained unconstrained: no such mechanism or commercial rationale has been suggested. As outlined above, competition authorities and regulators have approached them as posing identical problems and have sought to constrain them in similar ways. Indeed, all similar card schemes are now governed by the provisions of the IFR. The realistic

counterfactual, therefore, would assume that if Visa was unable (legally or commercially) to set MIFs, MasterCard would be similarly constrained;

iii) Third, the CJEU decision in *Cartes Bancaires* considered the argument that the Commission had erred in considering the restrictive effect of the *Cartes Bancaires* MEFRA rule on the issuing market without also considering the effect on Cartes Bancaires' competitive position in relation to other payment systems. The CJEU rejected that argument, in so doing approving the Commission's previous rejection (in the Visa II decision) of the argument that the effect of the MIFs on Visa's competitiveness and functionality was a matter that fell within Article 101(3). The CJEU stated:

> "*126. The question of knowing whether the restrictive effects of the measures on the issuing market would be counterbalanced by the alleged restrictive effects on competition on the payments systems market that would occur in their absence stems from the analysis under [Article 101(3)]. In this regard…the Commission deemed that the Group's argument relating to the indispensability of the measures for the survival of the CB system would be examined within the context of [Article 101(3)].*
>
> *127. Furthermore, it should be noted that, in its previous decision-making practice, i.e, in recital 59 of the Visa 2002 decision, the Commission had considered that Visa's argument that in the absence of the MIF, the extent of Visa's activities, and therefore, their competitive impact, would be greatly reduced, would be examined with regard to [Article 101(3)] and not to [Article 101(1)] for which the question that arose was to determine whether a clause was technically necessary for the functioning of the Visa payment system.*"

169. I therefore conclude that, both as a matter of law and logic, the question of whether Visa's MIFs restrict competition should (to the extent that it is relevant) be considered in a symmetrical no-MIF/default SAP counterfactual, that is, assuming that MasterCard is similarly restrained.

170. For the reasons set out above, that conclusion does not alter my finding that the Visa MIFs are not restrictive of competition. But if I am right that the appropriate counterfactual is symmetrical, that would be a further reason for declining to adopt the CAT's finding that there would have been Bilateral Interchange Fees in the absence of MasterCard's UK MIFs.

Conclusion on restriction of competition

171. For the reasons set out above, I find that Visa's UK MIFs do not restrict competition within the meaning of Article 101(1).

172. Sainsbury's written closing argument submitted such a finding was counter-intuitive as a matter of competition law as "*the MIF remains a price fixing agreement*". What

that submission fails to recognise, however, is that to the extent that the MIF fixes a price (in fact a level of settlement), all the Merchants (including Sainsbury's) accept that some price does have to be fixed for the Scheme to work. Their complaint is not really about the existence of a price fixing agreement, but about the level at which the price is fixed.

173. The one distinction which has troubled me is that a MIF, unlike a no-MIF/default SAP rule, can be increased (or decreased) by Visa at will and, indeed, the evidence is that competition between Visa and MasterCard (and to some extent American Express) for Issuers creates a general upward pressure on MIFs. However, it was not suggested by Sainsbury's (or the Arcadia claimants) that the ability of Visa to change the level of MIF (rather than the MIF *per se*) was restrictive of competition, and that would seem to be for good reason: such changes do no more than change the default settlement level, not the competitive process in the acquiring market. To the extent that the result is a settlement level which is inefficient, it can be and is liable to regulation and might be considered to be an abuse of a dominant position. But it is not an infringement of Article 101(1).

Are the UK MIFs objectively necessary for the Scheme?

174. Although not evident from the wording of Article 101(1), it is well established in EU cases that 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).

175. The proper approach to applying this exception was explained in the MasterCard CJEU Judgment as follows:

> "*91. Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in [Article 101(1)] because it is ancillary to a main operation that is not anti-competitive nature, it is necessary to enquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that the operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary ...*
>
> ….
>
> *93 ... The objective necessity test... concerns the question of whether, in the absence of a given restriction of commercial autonomy, a main operation or activity which is not caught by the prohibition laid down in [Article 101(1)] and to which that restriction is secondary, is likely not to be implemented or not to proceed.*
>
> ….

> *107 … It is necessary to consider not only whether that restriction is necessary for the implementation of the main operation or activity, but also whether that restriction is proportionate to the underlying objectives of that operation or activity.* "

176. It is apparent from the above that the test is a strict one: the ancillary restriction must be essential to the main operation, such that it would not survive without it. This again falls to be assessed by considering a counterfactual situation in which the ancillary restraint is absent, the proper approach to framing that counterfactual being set out in the MasterCard CJEU Judgment as follows:

> "*108. It should be pointed out that, irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that the hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic.*
>
> *109. Accordingly, in order to contest the ancillary nature of a restriction … the Commission may rely on the existence of realistic alternatives that are less restrictive of competition than the restriction at issue.*
>
> *…*
>
> *163. As is apparent from paragraph 108 of the present judgment, the same 'counterfactual hypothesis' is not necessarily appropriate to conceptually distinct issues …*"

177. Popplewell J, in §47 of the Asda Judgment, interpreted the above passages from the MasterCard CJEU Judgment in the following way, an interpretation with which no party in these proceedings took issue:

> "*… The test for choosing the counterfactual for the purposes of the ancillary restraint doctrine provides a lower threshold for the regulator or other person complaining of a restraint than the test for choosing the counterfactual for the purposes of establishing a restriction of competition within the prohibition of Article 101(1). For the ancillary restraint doctrine it is enough for a person complaining of infringement to point to one or more counterfactuals which might arise, by comparison with which the ancillary restraint is not necessary for the survival of the main operation. By contrast, in order for the prohibition in Article 101 (1) to bite on the restriction, it must be a restriction on competition by comparison with the restriction counterfactual which likely would arise …*"

178. It is common ground in these proceedings that the "main operation" of the Scheme, the payment card operation, does not restrict competition and, indeed, has highly beneficial effects for the proper functioning of the internal market. The question is whether the setting of MIFs, an ancillary aspect of that Scheme, is objectively

necessary to enable the Scheme to function. Whilst that issue does not strictly require determination given my finding above that the UK MIF does not infringe Article 101(1) in any event, I will nevertheless decide the point so as to complete my determination of all issues raised in relation to that provision.

179. Visa does not assert that the setting of MIFs is essential to the operation of any four-party system, it being common ground that such systems can and do exist in other jurisdictions without MIFs. Neither does Visa contend that there is anything specific about the Scheme which entails that it could not, in theory, operate without setting MIFs. Visa's contention is that the UK MIFs are nevertheless essential for its survival in the UK market because, without them, it would lose its Issuers to MasterCard. In other words, Visa's case on objective necessity is again wholly dependent on the use of an asymmetrical counterfactual, in which MasterCard is viewed as being unconstrained in setting MIFs.

180. The immediate answer to that contention is that the asymmetric counterfactual is no more realistic in the context of an assessment of objective necessity than it is in the context of considering restriction of competition, discussed above. Conversely, the symmetrical counterfactual is highly realistic and one which, in the context of the far stricter approach to assessing objective necessity, it is appropriate to use.

181. Sainsbury's contends that there is a more fundamental objection to the use of the asymmetric counterfactual in the context of assessing objective necessity. It argues that the concept is directed solely to the question of whether the ancillary restraint is essential for the functioning of operations of the type in question (taking into account the economic context in which such operations exist), not whether the specific operation in question needs the restriction to compete with another. Thus failing businesses cannot justify restrictive provisions as objectively necessary to enable them to survive against their competitors: such restrictions would have to be justified by demonstrating that they provide benefits satisfying the conditions of exemption under Article 101(3).

182. Sainsbury's relied in this regard on the often cited decision of the Court of First Instance ("CFI") in *Metropole Television (6) and Others v Commission* [2001] 5 CMLR 33. The CFI held at §109:

> "*... examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation.*"

183. This was the approach adopted in the MasterCard Commission Decision, the gist of which was summarised in the Commission Survey at §52 as follows:

> "*A restriction of competition may fall outside the scope of Article 101 TFEU if it can be shown that it is objectively necessary for the existence of an agreement of that type or nature. In MasterCard, however, the Commission concluded that a collective mechanism that shifts costs between acquiring and issuing banks is not indispensable for the operation of a four party payment scheme because issuing banks and acquiring banks can cover their costs directly via their respective customer groups. Indeed, the MasterCard decision identified five comparable payment card schemes that successfully operate in different Member states without a MIF.*"

184. The MasterCard General Court Judgment approved that approach, expressly relying upon the *Metropole* decision as follows:

> "89. *As [Metropole] shows, examination of the objective necessity of a restriction is a relatively abstract exercise. Only those restrictions which are necessary in order for the main operation to be able to function in any event may be regarded as falling within the scope of the theory of ancillary restrictions. Thus, considerations relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market are not part of an analysis of the ancillary nature of the restriction …*
>
> *90. Accordingly, the fact that the absence of the MIF may have adverse consequences for the functioning of the MasterCard system does not, in itself, mean that the MIF must be regarded as being objectively necessary, if it is apparent from an examination of the MasterCard system in its economic and legal context that it is still capable of functioning without it.*"

185. Sainsbury's therefore argued that Visa's objective necessity defence must fail as it is accepted that the MIF is not essential to the operation of a four-party payment system and the need to compete with another such system (MasterCard) which does set MIFs is not a valid consideration in that regard.

186. However, in the Asda Judgment Popplewell J held that the *Metropole* decision was (i) out of line with earlier decisions of the CJEU in *Remia BV & others v Commission* (1985) Case 42/84 and *Gøttrup-Klim Grovvaeforening v Dansk Landbrugs Grovvareselskab AmbA (DLG)* (1992) C-250/92 (despite the CFI in *Metropole* referring to *Remia* as support for its approach) and (ii) had effectively been overruled by the MasterCard CJEU Judgment, which did not approve the General Court's reliance on *Metropole*. In Popplewell J's view, the effect of the CJEU decisions was that the court must take account of competition facing the main operation when considering whether the ancillary restraint is objectively necessary to the main operation. I respectfully disagree with that analysis for the reasons I set out below.

187. The issue in *Remia* was whether restrictive covenants in agreements transferring businesses were objectively necessary to the main operation, namely, the transfer. The CJEU took into account the risk that the purchasers would face competition from the

vendors (who, by definition, had knowledge of the business and relationships with its customers) in the future, which would largely undermine the benefit of transfer. Popplewell J took the view that this was an analysis of the specific competitive effects on the purchaser and that it was irrelevant that the competition being considered was between the two-parties to the agreement, not competition with a third party. However, the analysis undertaken by the CJEU is one which applies to most transfers of a business, explaining why restrictive covenants are generally necessary for the implementation of such transfers. The fact that the CJEU was indeed considering transfers of business in general and not the specific circumstances of the parties before it appears clearly from the following extract from the passages cited by Popplewell J:

> "*19. If that were the case, and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business. Against that background, non-competition clauses incorporated in <u>an agreement for the transfer of an undertaking</u> in principle have the merit of ensuring that the transfer has the effect intended. By virtue of that very fact they contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market in question.*" (emphasis added).

188. In *Gøttrup-Klim* the issue was whether a clause in a cooperative purchasing agreement preventing members joining a rival scheme was objectively necessary. In my judgment it is clear from the following passages that the CJEU considered the issue in relation to the position of "a co-operation purchasing association" in general, concluding that permitting members to join more than one such association would jeopardise the proper functioning of an association:

> "*32. In a market where product prices vary according to the volume of orders, the activities of co-operative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.*
>
> *33. Where some members of two competing co-operative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members, especially where the members concerned, as in the case in point, are themselves co-operative associations with a large number of individual members.*
>
> *34. It follows that such dual membership would jeopardize both the proper functioning of the co-operative and its contractual*

> *power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of [Article 101(1)] and may even have beneficial effects on competition.*
>
> *35. Nevertheless, a provision in the statutes of a co-operative purchasing association, restricting the opportunity for members to join other types of competing co-operatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in [Article 101(1)], the restrictions imposed on members by the statutes of co-operative purchasing associations must be limited to what is necessary to ensure that the co-operative functions properly and maintains its contractual power in relation to producers.*"

189. In my judgment the approach in the above cases is not in the least inconsistent with that in *Metropole* and of the General Court in the MasterCard GC Decision. It follows that the fact that the CJEU in the MasterCard CJEU Judgment referred to *Remia* and *Gøttrup-Klim* and not to *Metropole* does not justify the conclusion that the CJEU was implicitly overruling the *Metropole* decision. Nor do I see any such significance in the fact that the CJEU, in approving the General Court's reasoning, did not expressly approve the citation of *Metropole* for the proposition that "... *considerations relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market are not part of an analysis of the ancillary nature of the restrictions*". The CJEU was generally approving the reasoning and decision of the General Court, which in turn was relying on *Metropole*. I accept Sainsbury's submission that it is inconceivable that the CJEU thereby intended to overrule *Metropole.*

190. It is instructive to note that the General Court conducted an extensive analysis of the effect of various market factors on four-party schemes such as MasterCard, including competition with three-party schemes and the effect of regulation (in the Australian market). The Court did not consider, and was not invited to consider, competition between MasterCard and Visa as relevant to the ancillary restraint doctrine. Indeed, the issue was not raised even in these proceedings until it was added by a relatively late amendment to Visa's Defence.

191. It follows that, if I had found that Visa's UK MIFs were a restriction of competition within Article 101(1), I would not have regarded such restraint as objectively necessary.

Conclusion on Article 101(1)

192. For the reasons set out above, I conclude that Visa's UK MIFs do not restrict competition within the meaning of Article 101(1) and have not done so at any time during the period covered by Sainsbury's claim.

193. I have reached that conclusion regardless of whether the counterfactual against which the restrictive effect of the UK MIFs is to be viewed is taken to be symmetrical or asymmetrical, although I would have selected the former, had it been necessary to do

so. For the same reason, had I found that Visa's UK MIFs were restrictive of competition within Article 101(1), I would not have found that they were objectively necessary.

194. Sainsbury's claim therefore fails in its entirety.

195. In view of the above finding, it is not strictly necessary for me to undertake the complex and detailed exercise of assessing what levels of UK MIFs (if any) would have been and would now be exempt under Article 101(3). However, given that the matter was extensively canvassed in evidence and argument before me and assuming (i) that this matter is to go further and (ii) the parties still wish me to determine the remaining issues, I propose to set out my findings on that question in a further judgment.

SCHEDULE 1

Competition Act 1998

2. Agreements etc. preventing, restricting or distorting competition.

(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which—

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void.

(5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

(6) Subsection (5) does not apply where the context otherwise requires.

(7) In this section "the United Kingdom" means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

(8) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter I prohibition".

9. Exempt agreements

(1) An agreement is exempt from the Chapter 1 prohibition if it-

(a) contributes to-

(i) improving production or distribution, or

(ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

(b) does not-

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter 1 prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied.