



Neutral Citation Number: [2023] EWHC 2522 (Admin)

Case No: CO/2015/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 October 2023

Before :

MR JUSTICE SWEETING

Between :

NoteMachine UK Limited

Claimant

- and -

The Payment Systems Regulator

Defendant

- and -

(1) LINK Scheme Holdings

(2) LINK Scheme Ltd

(3) Your Cash Ltd

Interested Parties

Michael Bowsher KC and Adam Aldred (instructed by Hill Dickinson LLP) for the
Claimant

Kassie Smith KC and Imogen Proud (instructed by Kingsley Napley) for the Defendant
James McClelland KC and Tim Johnston (instructed by RPC LLP) for the First and
Second Interested Parties

Hearing dates: 16 & 17 March 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

Mr Justice Sweeting:

Introduction

1. This is a claim for judicial review of three linked decisions of the Defendant rejecting the Claimant's application that it should pursue an investigation into the setting of fees by the Interested Parties.
2. Mr Justice Linden granted permission to apply for judicial review in respect of Grounds 1, 2, 4 and 5. He refused permission in respect of Ground 3.

The Parties and their relationship

3. The Claimant ("NoteMachine") installs, owns and manages automated teller machines ("ATMs") in retail and other locations across the UK. ATMs dispense cash or perform other banking services when an account holder inserts a bank card. NoteMachine is the second largest independent ATM operator in the UK, with over 9,000 ATM machines. It provides ATM services to financial institutions to enable them, in turn, to offer ATM facilities to their customers. It is not itself a financial institution. NoteMachine may add or remove ATMs from its network and decide whether or not to charge consumers a fee.
4. The Defendant, the Payment Systems Regulator Limited ("PSR"), was established in 2015 under the Financial Services (Banking Reform) Act 2013 ("FSBRA") to regulate the payment systems industry in the UK. Its general duties, statutory objectives and regulatory principles are set out in ss.49-53 of FSBRA. The PSR's statutory objectives are to promote competition, innovation and the interests of users of payment systems. It is a subsidiary of, but independent from, the Financial Conduct Authority ("FCA"). It is responsible for monitoring and enforcing compliance with provisions of the Payment Services Directive, 2015/2366 ("PSD2" or "the Directive"), brought into domestic law by the Payment Services Regulations 2017 ("PSR2017").
5. The PSR also has a wider role as a competition authority, with powers under The Competition Act 1998 ("CA98") and The Enterprise Act 2002, in relation to infringements of competition law arising from participation in payment systems. Its powers, in this respect, overlap with those of the Competition and Markets Authority ("CMA"), the FCA and other sector regulators.
6. The First and Second Interested Parties have been referred to in the litigation, and are referred to in this judgment, collectively as "LINK". LINK is a not-for-profit organisation and runs the LINK Network, which is a regulated payment system, as defined in s. 41 FSBRA. LINK is regulated by the Bank of England and by the PSR. The LINK Network connects the ATMs of network members and is the largest ATM network in the UK. Almost all ATMs in the UK are connected to LINK. The LINK Network allows banks and building societies to offer their customers access to cash across the whole of the UK.
7. Apart from the ATM user, each ATM transaction involves two parties: the "Issuer" and the "Acquirer". Issuers are banks and other financial institutions who issue the debit/charge cards used in the transaction. Acquirers, such as NoteMachine, provide and operate ATM machines and connect them to the LINK Network. Issuers and

Acquirers are not obliged to participate in the LINK Network. Rival schemes are operated by VISA and Mastercard. Issuers may issue cards for other schemes whilst remaining within the LINK network. Acquirers may also participate in other schemes.

8. NoteMachine receives an Interchange Fee (“IF”) from Issuers, when one of its Free to Use (“FTU”) ATMs is used for a cash withdrawal, balance inquiry or pin number change (there is no payment by Issuers for cash withdrawals at pay-to-use ATMs). LINK does not receive any part of the IF but facilitates the payment of the IF under a monthly settlement process.
9. LINK Network Members sign a “Members’ Agreement” which sets out their obligations to other Network Members and to LINK. The payment of fees, in accordance with the “Rate Card” appended to the agreement is a requirement of obtaining and maintaining access to the LINK Network. The Members’ Agreement contains the following provisions relating to payment:

“2.1 Each Network Member agrees with SchemeCo and each of the other Network Members that it will participate in the LINK Network either through its own processing system or through a Certified Service Bureau, which, in each case, is directly connected to the Service Provider Switch and to pay the fees, charges and sums payable by it to the Service Provider, SchemeCo, HoldCo and other Network Members from time to time in accordance with:

(A) this Agreement (including the Operating Manual and Appendix 2 (Rate Card); and

(B) the Switching and Settlement Agreement

3.4 Each Network Member shall pay the Fees in accordance with Appendix 2 (Rate Card).

4.2 Each Network Member shall comply with the provisions of (and, in respect of Schedule 5 (Operating Manual), the documents referenced in) Schedule 5 (Operating Manual), Appendix 1 (Services Description) and Appendix 2 (Rate Card) to this Agreement.

3.3 Each Network Member shall pay to the other Network Members the Interchange Fees (as applicable) which are to be set and calculated in accordance with paragraph 6 of this Appendix.”

10. The IF consists of the interchange rate (“IR”) together with any premiums which may apply to the particular LINK transaction. The amount of the IR depends on the type of transaction involved; for example, whether it is made at a branch or a non-branch ATM (recognising differences in the costs of provision) and whether the ATM concerned is a “Protected ATM,” situated a kilometre or more from the next FTU-ATM; in which case it attracts a higher IF.

Setting the Interchange Rate

11. One of LINK’s roles is to set an annual default or standard IR (and thus adjust the IF). Although members may agree different bilateral rates and fees between themselves this

has not occurred in practice. The exercise of reviewing the IR/IF is carried out by the LINK Board taking into account the views of a Consumer Council on which Issuers, Acquirers and consumers are represented. LINK provides an “Annual Interchange Notification” in relation to the level of fees. In setting fees, the Board has to balance the interests of Acquirers and Issuers, in order to secure their participation and ensure a geographic spread of ATMs that meets the interests of consumers.

12. Between 2001 and 2018, the default IR was set by reference to an annual “cost study” carried out by the accountancy firm KPMG on behalf of LINK. This was, in effect, a data collection exercise for the purpose of operating an average costs-based mechanism for setting annual rate changes. In broad terms, the exercise involved ascertaining the total network costs from the previous year and dividing them by the volume of transactions over the same period to arrive at a cost per transaction. This was then adopted as the basis for the current year’s IR. Under this methodology, if the network costs increased because more ATMs were installed without a corresponding increase in transaction volumes, the fee payable per transaction by Issuers to Acquirers would increase (and would increase further still if ATM use fell).
13. The mechanism also resulted in a single IF across the network. This led to the involvement of the Office of Fair Trading (“OFT”) which concluded, in 2001, that the IF (or “MIF - multi-lateral interchange fee” as it was described) had an anti-competitive effect because:

“... there are three potentially adverse effects raised by an MIF set by a payment system network: the restriction of members’ ability to set their own prices; the distortion of members’ behaviour towards their customers; and restriction of competition among payment systems.”
14. Notwithstanding this potential infringing effect, the OFT decided that the setting of a standard IR by LINK qualified for individual, statutory exemption under S.9 of the Competition Act 1998. The decision to grant such an exemption was taken on 16 October and was of 5 years duration, expiring in 2006.
15. In 2015, the Network Members Council authorised LINK to conduct an independent economic review of interchange fee arrangements. LINK commissioned a report from Frontier Economics which considered a range of alternative interchange mechanisms including a “strategically” set interchange fee to describe a model where the interchange fee is set at the discretion of Link Scheme Limited with a view of seeking to achieve some outcome in competition against other ATM schemes” but concluded that the costs study approach remained the preferable scheme, albeit that there was room for review and improvement. LINK and the PSR suggest that this conclusion was based upon an assumption that a cost-based system was necessary and, mistakenly, that a strategically set interchange fee would not be accepted by the PSR. I was also referred to an advice note from Allen & Overy and a Memorandum from Constantine Cannon (another solicitors’ firm) which were also relied upon by NoteMachine as providing support for a cost-based system.
16. In November 2017, LINK carried out a consultation with its members on proposed changes which would reduce the IR substantially over a period of four years and depart from the approach based upon the cost study model. The proposal nevertheless

envisaged that annual cost studies would continue to be carried out. The rationale for change was summarised as follows:

“Current interchange rates are too high as evidenced by the continuing growth in the free ATM network despite declining consumer usage of cash for payments and ATMs for cash withdrawals. There is an accelerating reduction in the demand for cash by consumers for payments and this should be leading to a reduction in the use of free ATMs and the number of free ATMs. UK Payments (now UK Finance) has reported that cash payments have fallen by 33% in the last ten years to 2016 and are forecast to fall by a further 43% in the next decade. However, free ATM numbers have grown by about 18,000 (50%) in the same ten-year period. In the last year (2017), cash withdrawals over the LINK network fell by 2.25%. However, there was a growth in the number of free ATMs from 53,872 to 54,995 in the same period. This is not sustainable and needs addressing now otherwise the future of LINK is in jeopardy. This includes the risk that free ATMs will continue unnecessarily to be concentrated in busy urban centres but become less viable in less busy communities, hence reducing geographic access to cash. It also includes the risk of LINK breaking up because some organisations choose to move to competing ATM networks such as VISA and Mastercard that have cheaper interchange regimes. LINK needs to address these risks now.”

17. This echoed the concerns of the PSR as to the viability of the LINK Network and the implications of a collapse on its own strategic priority to preserve a cash dispensing ATM network. The responses to the consultation from large Issuers suggested that there was an appetite for a greater reduction in fees. The views of the large Acquirers were generally antagonistic to the changes proposed.
18. LINK published its final decision and impact assessment in January 2018. The IR for FTU-ATMs was reduced. Protected ATMs were unaffected and the premium attaching to transactions at these ATMs was increased. The changes were summarised in the decision document as follows:

“A phased reduction of 20% in the main interchange rates over the next four years. This will allow the network to develop in size and location to better meet consumer demand and stabilise the competitive position of LINK against other ATM schemes such as VISA and Mastercard. This will start on 1st July 2018. It will mean for the 2018 calendar year an overall 2.5% interchange reduction equivalent to a 0.7p reduction in interchange per non-branch cash withdrawal worth approximately £30 per month in lost revenue for an average non-branch ATM. However, the position will be reviewed annually taking into account unavoidable increases in costs caused by interest rate increases and regulatory requirements, and other trends in the marketplace.

An increase in some interchange payments though a strengthened Financial Inclusion Programme to ensure that free ATMs are maintained across the country, including in areas where consumer demand is insufficient to justify a free ATM under normal rates. This will be achieved by paying a premium of up to 30p on top of the underlying interchange rates to maintain free ATM access within a kilometre distance. The kilometre distance will be interpreted flexibly to reflect actual travel conditions on the ground, rather than a rigid “as the crow flies” approach. In addition to this, there will be no reduction in the interchange for all current free

ATMs that are one kilometre or more from the next free ATM. This will ensure that no ATM that comes into this category will close as a result of the reduction in interchange rates generally.

A transparent annual review process supported by new publicly available information on changes to ATM numbers that will allow LINK to modify interchange if there is a need to make changes to maintain consumers' free access to cash position."

19. Whilst the decline in the use of cash reflects societal changes which are unlikely to be reversed, it is common ground that there remains a public interest in ensuring that an appropriate level of access to cash through ATMs remains in place. An impact assessment of the changes was carried out by KPMG on behalf of LINK which concluded that there would be a maximum reduction in the number of FTU ATMs in the UK of between 8 to 18% with the actual number probably being lower, in the 1 to 11% range, relative to 2017 levels. The PSR commissioned its own study in relation to the effect of a reduction in cash withdrawal volumes, coupled with a decrease in the level of the IR, on the number of FTU ATM' in the UK. In October of 2018 it directed LINK by Specific Direction 8 (made under s.54(2)(a) FSBRA), to adopt policies and procedures, where required, to replace ATMs that had closed and to report to the PSR on the implementation of the decisions which it had announced in January 2018. As set out above, LINK had proposed a phased reduction in four steps. The proposed 3rd and 4th reductions in the IR were cancelled by LINK in July 2018 and July 2020 respectively.
20. A reduction in the IR/IF necessarily reduces the immediate earnings of Acquirers who, in the first instance bear the cost of running ATMs. NoteMachine's evidence was that there had been a direct and adverse impact on its fee income. It suggested that the fees being paid to Acquirers would no longer cover the cost of the LINK network and characterised the changes implemented in 2018 as favouring Issuers at the expense of Acquirers. It contends that this amounts to unlawful price fixing, which is incapable of exemption because of a lack of transparency and arbitrariness. It asserts that LINK acted unlawfully in setting and implementing the IF in a way which was not compatible with its regulatory obligations or competition law (specifically the prohibition on anti-competitive agreements in Chapter 1 CA98).
21. NoteMachine asserts that, as a result, there has been a rapid contraction in the number of FTU ATMs (with many converted to pay-to-use), particularly in remote locations, and that this will continue if the fees set by LINK have no proper regard to the underlying cost of running the ATM network. Its position is that the public interest has not been well served in circumstances where had the cost study method been left in place the fees paid to Acquirers by Issuers would, it suggests, have declined naturally in line with cash usage.

The Application

22. On 10 August 2020, NoteMachine submitted a detailed complaint to the PSR under s.57 FSBRA making the contentions summarised above in relation to the changes introduced by LINK to the process of setting the IR. It requested that the PSR exercise its powers pursuant to s. 57 FSBRA and identified that it was seeking, specifically;

- a) a variation (by way of an increase) of the IFs payable to NoteMachine by Issuers in the LINK Network; and:
- b) a variation of the terms and conditions relating to NoteMachine's participation in the LINK Scheme and, in particular, the manner and means whereby new IFs are determined from time to time.

The Decisions

23. On 25 November 2020 the PSR gave an initial response in relation to the regime under which the complaint could be considered:

“We are unable to consider this matter as an application under s.57 FSBRA. This is because we consider Regulation 103 Payment Services Regulations 2017 (‘Prohibition on restrictive rules on access to payment systems’) applies to this situation, and s.108 FSBRA precludes us from exercising our access powers under s.57 FSBRA where that is the case.”

24. On 12 March 2021 the PSR sent two letters to NoteMachine setting out three decisions by which:

- i) It restated and maintained its position in relation to the application of Regulation 103 of the PSR2017 rather than s.57 FSBRA (“**the Jurisdiction Decision**”).
- ii) It declined to open an enforcement investigation under Regulation 103 because it was not satisfied that there had been any failure to comply with Regulation 103 (“**the Regulation 103 Decision**”). In a departure from its usual practice the PSR annexed to its decision letter the assessment it had carried out in deciding not to investigate.
- iii) It declined to exercise its powers under CA98 to take further action after having conducted an initial assessment against the prioritisation principles set out in its Administrative Prioritisation Framework (“APF”) (“**the CA98 APF Decision**”).

25. Each of these decisions are challenged. The Grounds and agreed issues, in the order in which they should sensibly be considered, are:

- i) **Ground 1: Misapplication of Statutory Provisions.** In relation to the Jurisdiction Decision, did the PSR fail to apply s.108 FSBRA correctly when it concluded that it was required to deal with NoteMachine's Application under Regulation 103 PSR2017, instead of under s.57 FSBRA? This ground therefore turns on the interpretation and application of s.108 FSBRA. It might be added that both the PSR and LINK contend that there is no difference in substance between the approach required under Regulation 103 and s.57. The outcome would, it is said, in all likelihood have been the same, rendering this ground academic so that it would fail pursuant to s.31(2A) of the Senior Courts Act 1981. The Claimant contends that Section 57 FSBRA and Regulation 103 involve different approaches with potentially different outcomes.
- ii) **Ground 4: The “Primacy Duty”.** In relation to the CA98 APF Decision, did the PSR make an error in its approach to s. 62 FSBRA (the PSR's Duty to

consider exercise of its powers under the Competition Act 1998)? This ground is linked to the first ground given that it must necessarily fail if Ground 1 fails as a matter of construction. Conversely if Ground 1 succeeds it is arguably academic.

- iii) **Ground 2: Error of Law in the interpretation of the term “Discrimination.”** In the Regulation 103 decision, did the PSR fail to apply the concept of “discrimination” correctly as required by Regulation 103(3)(b) PSR2017? This is essentially an argument that Issuers and Acquirers should be, but have not been, treated equally. It arises in the alternative to Ground 1 on the premise that Regulation 103 applies.
- iv) **Ground 5: Failure to Apply the Law on MIFs.** In relation to the CA98 APF Decision, did the PSR err in fact and/or in law in failing to appreciate that CA98 applies equally to MIFs (IFs) which are set too low?

26. NoteMachine’s contentions in relation to the effect of the new IFs is set out at length in its s.57 FSBRA complaint. However, none of the present grounds for judicial review involve any determination by the court as to which of the costs-based model which operated until 2018 or the methodology which replaced it are a more appropriate way of setting fees or securing a viable ATM network nor whether there was any infringement of competition law. Neither is the phased reduction of fees a matter on which any adjudication is required or possible in this application.

The Legal Framework

The Financial Services (Banking Reform) Act 2013 (“FSBRA”) and the PSR2017

27. A “payment system” is defined at s.41 of FSBRA as “a system which is operated by one or more persons in the course of business for the purpose of enabling persons to make transfers of funds...” The LINK scheme is a payment system under Regulation 103 PSR2017 and FSBRA.
28. Participants in a FSBRA payment system are defined at s.42 as:
- i) The operator of the payment system;
 - ii) Any infrastructure provider; and
 - iii) Any payment service provider.
29. The PSR has power to give directions to participants and make rules which have to be followed by the regulated payment system operator. Issuers are “payment service providers”; NoteMachine is not a payment service provider under PSR2017 (subject only to an argument, on which nothing turns, that it may fall within the FSBRA definition of a payment services provider) but provides infrastructure and so is a FSBRA participant. It is also a party to the underlying agreements. It is entitled to apply to the PSR to exercise its powers under s.57 FSBRA which provides as follows:

“57 Variation of agreements relating to payment systems

(1) This section applies to the following agreements—

(a) any agreement made between the operator of a regulated payment system and a payment service provider;

(b) any agreement made between a payment service provider with direct access to a regulated payment system and another person for the purpose of enabling that other person to become a payment service provider in relation to the system;

(c) any agreement concerning fees or charges payable in connection with

(i) participation in a regulated payment system, or

(ii) the use of services provided by a regulated payment system.

(2) The Payment Systems Regulator may, on the application of a party to an agreement to which this section applies, vary the agreement by—

(a) varying any of the fees or charges payable under the agreement, or

(b) in the case of an agreement within subsection (1)(a) or (b), varying any other terms and conditions relating to the payment service provider's participation in the payment system.

(3) In the case of an agreement within subsection (1)(b), the reference in subsection(2)(b) to the payment service provider is to the payment service provider which does not have direct access to the payment system.

(4) The power under this section to vary any fee or charge includes power to specify a maximum fee or charge.

(5) If the Payment Systems Regulator varies an agreement under this section the agreement has effect subject to the variation.”

30. The operation of the PSR’s powers under s.57 FSBRA is however subject to s.108 which prohibits the exercise of the FSBRA powers for the purposes of enabling a person to obtain or maintain access to, or participate in, a payment system if Regulation 103 or 104 of the PSR2017 apply. It is common ground that absent the application of the prohibition contained in s.108, s.57 FSBRA would be the pathway for an application for a variation in respect of fees payable under the LINK scheme.

31. S.108 provides:

“(1) The Payment Systems Regulator may not exercise any power under sections 54 to 58 for the purposes of enabling a person to obtain or maintain access to, or participation in, a payment system in circumstances in which regulation 103 (prohibition on restrictive rules on access to payment systems) or 104 (indirect access to designated payment systems) of the Payment Services Regulations 2017 applies in relation to access to, or participation in, the payment system by the person.”

32. Regulation 103 PSR2017 provides:

“(1) Rules or conditions governing access to, or participation in, a payment system by authorised or registered payment service providers must—

(a) be objective, proportionate and non-discriminatory; and

(b) not prevent, restrict or inhibit access or participation more than is necessary to—

(i) safeguard against specific risks such as settlement risk, operational risk or business risk; or

(ii) protect the financial and operational stability of the payment system.

(2) Paragraph (1) applies only to such payment service providers as are legal persons.

(3) Rules or conditions governing access to, or participation in, a payment system must not, in respect of payment service providers, payment service users or other payment systems—

(a) restrict effective participation in other payment systems;

(b) discriminate (whether directly or indirectly) between

(i) different authorised payment service providers; or

(ii) different registered payment service providers; in relation to the rights, obligations or entitlements of participants in the payment system; or

(c) impose any restrictions on the basis of institutional status.”

33. The requirement that rules and conditions governing access to and participation in payment systems must be proportionate objective and non-discriminatory is generally referred to as the “POND” requirement.

34. S.108 FSBA, in its present form, was the result of an amendment introduced by Schedule 8, paragraph 5 of the PSR2017. The regulations were the means by which the EU law requirements of the Second Payment Services Directive were brought into domestic law. The Directive was a maximum harmonisation measure, meaning that Member States were expressly barred from introducing provisions which went beyond those prescribed in the Directive; specifically for present purposes, Article 35.1 which provides:

“Article 35

Access to payment systems

1. Member States shall ensure that the rules on access of authorised or registered payment service providers that are legal persons to payment systems are objective, non-discriminatory and proportionate and that they do not inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk and business risk and to protect the financial and operational stability of the

payment system. Payment systems shall not impose on payment service providers, on payment service users or on other payment systems any of the following requirements:

- (a) restrictive rule on effective participation in other payment systems;
- (b) rule which discriminates between authorised payment service providers or between registered payment service providers in relation to the rights, obligations and entitlements of participants;
- (c) restriction on the basis of institutional status.”

35. The purpose of s.108 FSBRA was accordingly to ensure that the PSR's powers were not exercised in a manner which was incompatible with EU law by preventing any overlap between the powers under s.57 FSBRA (which are non-harmonised) and Regulation 103 PSR2017.

Ground 1

36. It is convenient for the purpose of considering the arguments advanced to regard s.108 FSBRA as giving rise to two questions (as the parties did in submissions); that is to say whether in response to the NoteMachine application the PSR:

- i) Would be exercising its powers under s.57 FSBRA “for the purposes of enabling a person to obtain or maintain access to, or participation in, a payment system” within the meaning of s.108 FSBRA and:
- ii) Would it be doing so in “circumstances in which regulation 103 ... of the Payment Services Regulations 2017 applies in relation to access to, or participation in, the payment system by the person”.

37. NoteMachine’s starting position is that s.108 FSBRA was not engaged by its application so that the PSR was obliged to deal with the complaint under s.57 FSBRA, which was in any event the appropriate regime. There was therefore an error of law in its approach.

38. NoteMachine advanced a number of arguments about the construction and operation of s.108 FSBRA and Regulation 103 in support of this general proposition.

39. In the first instance it was said that the application was not made “for the purpose” of enabling NoteMachine (or anyone else) to obtain or maintain access to, or participation in, a payment system. Further, that the person referred to in s.108 “must be the person who made the application pursuant to or in reliance on ss.54 to 58 FSBRA”.

40. Since the application was made by NoteMachine and was not for the purpose of accessing or participating in a payment system, its right to do so not being in doubt, s.108 FSBRA did not apply. This interpretation of the statutory provision was, it was argued, consistent with it being concerned with applications made by or on behalf of Issuers for the purpose of enabling them to obtain or maintain access to, or participation in, a network such as LINK. Mr Bowsher KC, on behalf of NoteMachine, did not shrink from accepting that the consequence of this construction was that s.108 FSBRA would not be engaged even if the application by NoteMachine and the steps it was asking the

PSR to take, in fact affected the ability of Issuers to access and participate in the LINK network.

41. The argument was bolstered by the contention that Regulation 103 itself is concerned with access and participation arrangements relating to payment service providers under PSR2017 (for present purposes, Issuers). It was not, it was said, an available option in dealing with an application under s.57 FSBRA by non-payment service providers such as NoteMachine. It was pointed out that Regulation 103 is to be found in part 8 of PSR2017, the explanatory notes to which state that “Part 8 contains provisions relating to access to payment systems and to bank accounts for payment service providers”. This in turn, it was submitted, reflected the purpose of the Second Directive which at Recital 50 provides:

“Provision should be made for the non-discriminatory treatment of authorised payment institutions and credit institutions so that any payment service provider competing in the internal market is able to use the services of the technical infrastructures of those payment systems under the same conditions.”

42. NoteMachine characterised the Directive as being concerned with facilitating market access across the European Union to Issuers, that is to say banks and financial institutions; not as a measure designed to protect the interests of infrastructure operators (to whom it does not apply). Applications for access and participation pursuant to PSR2017 were confined to payment service providers as defined in the regulations. The logical consequence was that NoteMachine had “no standing” to bring such an application. It argued that this conclusion was one that could be arrived at as a matter of statutory interpretation comparing the language of FSBRA and PSR2017. It contrasted, what it said was, the narrow focus of PSR2017 with the comprehensive statutory framework of protection for all participants under the FSBRA provisions. In these circumstances Parliament, it was contended, must have intended FSBRA to apply in preference to the generalised wording of the regulations, which do not even refer to fees or charges.

Discussion

43. Although I accept that the word “person” in s.108 FSBRA is used consistently and is the same person there is nothing to indicate that it is confined to a person making an application under s.57 FSBRA, or that an identified person is required at all. What is required is that the object of the exercise of the powers is a person. The powers encompassed by s.108 FSBRA are in turn those in ss.54 to 58. Some of these powers, such as those available under s.56 are indeed contingent upon there being an “applicant” but others are not. Sections 54 and 55 are concerned, respectively, with the power to give directions and set system rules. Section 58 is different again, allowing the PSR to direct the disposal of an interest in a payment system where absent such a direction there is likely to be a restriction or distortion in competition.
44. S.108 FSBRA will not necessarily apply to every rule change or direction. The exercise of the range of powers across ss.54 to 58 falls within s.108 only where carried out in respect of a person for the purposes identified in the section. The purpose of the exercise of the power cannot depend upon the subjective intention of a person making an application under s.57 FSBRA. Once what the PSR is being asked to do, or is contemplating doing, would involve using its powers under ss.54 to 58 FSBRA for the

purposes set out in s.108 then the only remaining issue is whether it would be doing so in circumstances in which Regulation 103 applies. The regulation relates to “rules or conditions governing access to or participation in a payment system by... payment service providers”. The statutory scheme therefore required that the exercise of a power by the PSR to intervene in relation to access to and participation in a payment system should be under Regulation 103 where it affected the terms on which payment service providers can access and participate. That must be the position irrespective of whether the powers exercised by the PSR were directed at other participants in a payment system as well as payment service providers. The overarching purpose of harmonisation would otherwise be defeated.

45. Neither does it follow, in my view, that the use of the phrase “for the purposes of enabling” precludes the application of s.108 FSBRA because NoteMachine “as applicant is not someone whose right of access or participation is in any doubt”. The section is not confined to persons applying initially to access the LINK scheme or seeking to establish their right to participate. The natural meaning of “enable” is simply “to make possible”. That includes in the present circumstances, for example, the exercise of powers for the purpose of continued participation in the scheme as well as gaining access to it. It is the purpose of the exercise of the power which is referred to in the section and not NoteMachine’s purpose in making an application. S.108 FSBRA is, equally, neutral as to whether the exercise of the power has or may have an adverse or beneficial effect on any participant.
46. The fact that, as NoteMachine observed, the Directive does not apply to cash withdrawal services offered by means of ATM providers pursuant to Article 3(o) does not seem to me to take the matter further. The removal of ATM providers from the ambit of the Directive ensures that they do not have to meet obligations in relation to authorisation and capitalisation. But the central issue here is whether rules and conditions relating to payment service providers would be affected by the exercise of the PSR’s powers.
47. As both the PSR and LINK submitted, payment of the IF in accordance with the fee setting mechanism is, on any view, a condition of access to and participation in the LINK scheme by payment service providers. NoteMachine’s application required the PSR to exercise its powers to increase the IF and alter the methodology from which it was derived. Because the IF is bilateral neither the fee nor the methodology employed to set it can be changed for Acquirers without also changing it for Issuers. It is difficult to see how what was sought would be other than a variation of the “rules or conditions” governing access and participation by Issuers. Such rules and conditions are subject to Regulation 103 which requires that they meet the POND requirement, guard against operational business risks and protect the financial and operational stability of the payment system.
48. I agree with the submissions of the PSR and LINK that it is an unduly restrictive reading of the Directive to suggest that its purpose was solely to protect the interests of payment service providers. What it sought to achieve were the wider economic and social benefits resulting from market harmonisation. The application of Regulation 103 necessarily involves consideration of the interests of other stakeholders apart from payment service providers in determining whether fees are proportionate and whether the mechanism used to set fees would in fact ensure a stable payment system. LINK’s

evidence was that the changes made to rates and the rate setting mechanism were intended to ensure the viability of the network.

49. NoteMachine’s argument involves the proposition that it could seek significant changes to the rules or conditions affecting access or participation by Issuers but that none of the harmonisation criteria in Regulation 103 would be engaged. This would appear to me to be an odd result, particularly if the position would be different if an Issuer was seeking the same variations in order, for example, to access the network. It cannot, logically, matter that the PSR is acting as the result of the application by an Acquirer if it is exercising powers that will also affect Issuers. Where that is the case, s.108 FSBRA operates to ensure that the requirements of Regulation 103, and ultimately therefore the Directive, are met. Equally the terms of s.108 FSBRA do not in any way limit its operation to the exercise of the PSR’s powers at the instigation of Issuers.
50. I am also not persuaded that there is any room for the argument that as a matter of statutory interpretation the specific language of s.57 FSBRA means that it is to be preferred to the more general provisions set out in the regulations as the regime for dealing with applications by non-PSR2017 payment services providers. These are not competing provisions involving a choice as to which are more apposite. The language of the regulations reflects their derivation from the Directive. The FSBRA was enacted in December 2013. The regulations were made in July 2017 to give effect to the 2015 Second Directive. As the PSR argued, s.108 FSBRA reflected the primacy of EU law and was intended to change the pre-existing regime which is disapplied in circumstances where Regulation 103 applies. If Regulation 103 did apply, then the PSR was bound to proceed under the regulation. It was not open to it to decide that the FSBRA better protected the interests of infrastructure/ATM operators.
51. This did not mean that NoteMachine was deprived of a remedy if it considered that the fees paid by Issuers were too low and the system for setting them took insufficient account of its interests. Contrary to its argument it does not appear to me that there is any requirement of “standing to make an application” in relation to Regulation 103. The regulations, in contrast to s.57 FSBRA, do not make any provision for an application to be made at all. Part 10 of PSR2017 sets out the powers available to the PSR in relation to enforcing compliance with the regulations. These include giving directions in respect of a regulated payment system. The PSR may do so of its own volition or in response to a complaint of non-compliance. In the present case the PSR did in fact consider the issues raised by NoteMachine under Regulation 103. In my view the statutory provisions were not misapplied; they were followed. Section 108 FSBRA was engaged and Ground 1 therefore fails.

The Competition Act 1998

52. S.61 FSBRA provides that the functions of the CMA under Part 1 of the Competition Act 1998 in relation to participation in payment systems “are to be concurrent functions of the Payment Systems Regulator and the Competition and Markets Authority”.
53. S.62 FSBRA then provides:
 - “(1) Before exercising any power within subsection (2), the Payment Systems Regulator must consider whether it would be more appropriate to proceed under the Competition Act 1998.

(2) The powers referred to in subsection (1) are—

- (a) its power to give a direction under section 54 (apart from the power to give a general direction);
- (b) its power to impose a requirement under section 55 (apart from the power to impose a generally-imposed requirement);
- (c) its powers under sections 56, 57 and 58.

(3) The Payment Systems Regulator must not exercise the power if it considers that it would be more appropriate to proceed under the Competition Act 1998.”

54. The obligation under s.62 FSBRA, to consider whether it would be more appropriate to proceed under the CA98, was referred to in argument as the “Primacy Duty”.

Ground 4

55. NoteMachine’s argument was that it was improper for the PSR to make the CA98 APF decision before carrying out the assessment required under s.62 FSBRA. Absent a decision that it would be more appropriate to proceed under CA98 the PSR remained under an obligation to deal with NoteMachine’s application under s.57 FSBRA.
56. However, the clear effect of s.62(2) FSBRA is that the Primacy Duty can only arise where the PSR is in a position to exercise the powers referred to in that subsection and is considering doing so. S.62 FSBRA has no application to the PSR2017. If the exercise of the power under s.57 FSBRA is precluded by the operation of section 108 FSBRA then the Primacy Duty never arises. Ground 4 is therefore predicated on a finding that there was an error in relation to the application of s.108 FSBRA. If, as I have concluded, that was not the case then there was no failure to comply with the duty under s.62 FSBRA. Conversely, if NoteMachine had made out its case on Ground 1 then it would have established that its application should have been dealt with under s.57 FSBRA and Ground 4 would be academic. For those reasons there was no failure to meet the Primacy Duty and Ground 4 also fails.
57. As a matter of discretion the PSR did consider whether to open an investigation under its CA98 powers but decided not to do so. That is the subject of a separate challenge under Ground 5.

Ground 2

58. This Ground is advanced on the alternative basis that Regulation 103 PSR2017 is applicable. It raises a narrow point. NoteMachine contends that the PSR failed to define and apply the concept of “discrimination” correctly as required by Regulation 103(3)(b). NoteMachine draws attention to the PSR’s letter of response of the 10th of May 2021 at paragraph 56 which states:

“Discrimination requires different treatment of entities that are similar or similar treatment of entities that are different. As noted at paragraph 39 of the Annex to the Regulation 103 Decision, when conducting a non-discrimination assessment under the PSR2017, the PSR will consider whether similar rules or conditions apply to participants with similar profiles or characteristics. Issuers and ATM Operators

play fundamentally different roles in the LINK Scheme. Therefore, discrimination is not relevant here.”

59. NoteMachine’s factual position is that it has been treated unfairly by LINK which has advanced the interests of Issuers over those of Acquirers by setting fees which favour the former over the latter and that this is inherently discriminatory. It was argued that the failure on the part of the PSR to recognise that this is capable of being discriminatory and that Issuers and Acquirers should be treated alike is an error which potentially vitiated the decision not to investigate.

60. In *R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills (Respondent)* [2015] UKSC 6 Lord Sumption characterised the obligation not to discriminate as a principle of legal rationality [26]:

“The general principle of equality in EU law is that comparable situations are not to be treated differently or different situations comparably without objective justification. This is not a principle special to the jurisprudence of the European Union. It is fundamental to any rational system of law, and has been part of English public law since at least the end of the nineteenth century. As Lord Hoffmann pointed out when delivering the advice of the Privy Council in *Matadeen v Pointu* [1999] 1 AC 98, para 109:

“Is it of the essence of democracy that there should be a general justiciable principle of equality? ... Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.”

61. Whilst Issuers and Acquirers may for some purposes be in comparable situations, it is much less easy to see how their positions can sensibly be equated in relation to the setting and payment of fees. As Mr McClelland KC observed on behalf of LINK, the fundamental difference is that one pays and the other receives the fee. As he submitted, setting the amount of the fee and the methodology used involves a balancing act. This may well engage the POND requirement and the need to ensure a viable payment system but recruiting the legal concept of discrimination is inappropriate and unworkable. There is no point of equilibrium at which setting a higher fee discriminates against Issuers or at which a lower fee is discriminatory as far as Acquirers are concerned. NoteMachine has not suffered discrimination just because it now receives a lower fee in relation to ATM transactions or has to bear greater costs. As Ms Smith KC argued on behalf of the PSR, there is nothing irrational in an adjustment to the costs of the system in the context of a decline in cash usage. Far from there being discrimination in the legal sense, NoteMachine’s argument, she submitted, was tantamount to contending that those in different positions ought not to be treated differently. The PSR did in fact consider for the purpose of its decision whether the rules adopted by LINK were non-discriminatory in accordance with the guidance published by the PSR in relation to monitoring and enforcing the Directive. In its assessment the PSR stated:

- a) In relation to its assessment under (Regulation 103(1)(a) PSR2017); “The IR received by any individual ATM Operator under the LINK rules is the same for the same transaction, regardless of the identity or other characteristics of the ATM Operator concerned. The level of IR will vary as between branch ATMs and non-branch ATMs, recognising differences in the costs of provision. Similarly, the IR payable by an Issuer is the same for the same transaction.”
 - b) In relation to Regulation 103(3)(b) PSR2017; “We assess above whether there were circumstances to suggest that the rules and conditions governing access might discriminate against either Issuers or ATM Operators and found no circumstances to suggest they may have. We consider this conclusion applies equally in relation to the rights, obligations or entitlements of participants in the payment system being in this context the right of an ATM operator to receive an IR in respect of a particular transaction and the obligation of an Issuer to pay it.”
62. Mr Hemsley, who carried out the assessment, elaborated on what had been involved in the exercise in his witness statement, confirming that he considered the question of whether LINK had advanced the interests of banks over the interests of ATM operators in relation to the objectivity and proportionality limbs of Regulation 103. As Mr McClelland submitted, an error in relation to the meaning of discrimination would therefore essentially be one of taxonomy rather than substance. NoteMachine has not challenged those parts of the Regulation 103 decision which relate to objectivity and proportionality where the allocation of benefits between Issuers and Acquirers was expressly addressed. The merits of the balancing act required in relation to setting the IR do not fall to be determined in this judicial review. I conclude that the PSR defined discrimination correctly and assessed whether comparable situations were being treated differently or different situations treated comparably without objective justification. There was no error in the application of the concept of discrimination to the circumstances of this case. Ground 2 therefore fails.

Ground 5

63. The remaining ground relates to the CA98 APF decision which is said to contain a manifest error of law and fact in that the PSR's competition analysis did not appreciate that CA98 applies equally to fees set too low as it does to those which are set too high.
64. The error is said to be evident from the last paragraph on the second page of the letter of the 12th of March 2021, addressing competition issues pursuant to CA98, where the PSR stated: “the impact alleged is therefore diametrically opposite to the conduct of concern considered in relevant precedents... In these precedents, the competition law concern related to the impact of interchange fees or rates being set at a level that is too high.”
65. This appears to be, and was treated in the course of submissions, as a reference to the Supreme Court's Judgment in *Sainsbury's Supermarkets Ltd v Visa Europe Service LLC* [2020] UKSC 24 where the court considered whether the setting of multilateral interchange fees in relation to credit/debit cards amounted to a monopoly restriction of competition in the acquiring market because the prices which were paid by merchants to the banks were set too high. NoteMachine argued that this was directly analogous to

its own complaint which engaged an equivalent theory of harm and infringing behaviour. It contends that the PSR must have erroneously rejected its arguments in relation to the significance and application of the case law on the basis that it could only apply to circumstances in which fees were inflated. This may have coloured its view as to the prospects of establishing a competition infringement. In its written submissions NoteMachine suggested that the consequence of this was as follows:

“Had the PSR appreciated then that the New MIFs prima facie amounted to unlawful price fixing (a hard core competition law breach) without thinking it was distinguishable on grounds which are clearly wrong, the CA98 AFP Decision might have been different because a key component of D’s Competition Act Administrative Prioritisation Framework is whether there is, in fact, a breach of competition law. D says it did not come to a view, but it clearly was of the view that C was wrong to rely on the authorities that it was relying on.”

66. The short answer to this ground on the part of the PSR is that it is based upon a factually incorrect premise. The PSR did not assert at any stage that CA98 does not apply to fees which are set too low. Rather it stated expressly that it had not taken a decision on the merits of NoteMachine’s complaint that there had been a breach of competition law. It did not accept that there had been any prima facie “hard core competition law breach”.
67. The observation made in relation to the *Sainsbury* case was accurate and was made in the context of NoteMachine’s own acknowledgement in its application that whilst there were similarities there were also material differences between ATM payment card schemes and debit or credit purchase card schemes. The consequence was that the principles in *Sainsbury* were not necessarily capable of being readily applied to the LINK scheme; the letter of 12th March 2021 included a comment not a conclusion, and it was a fair one to make in the circumstances of a factually and legally complex decision.
68. Further it was only one part of the overall determination of the PSR that the investigation of whether there was a competition law breach, including the potential application of an exemption, was also likely to be a complex and resource intensive task. The PSR letter of the 12th of March 2021 concluded:

“In relation to resources and risk, we consider that, in order to progress the investigation of Notemachine’s complaint in relation to competition law, it would be necessary to divert significant resources from other matters some of which are high priorities for the PSR and deploy them to examine, for a considerable period of time, the existence of a potential CA98 infringement, when the outcome and prospects of success for such investigation are not clear. In our view, significant further work would be required in order to establish the alleged infringement and understand/measure the impact of the potential harm.”
69. Further explanation of the background was given by Ms Begent, the PSR’s General Counsel who explained that the assessment had been carried out against the four factors set out in the prioritisation criteria. The likelihood of action by the PSR resulting in a successful outcome is only one factor. The relevant considerations also include the allocation of resources and the prioritisation of work against the PSR’s statutory objectives.

70. In *CityHook v OFT* [2009] EWHC 57 the court identified that in relation to decisions, such as this, which involve the management and allocation of resources the relevant test was that of irrationality:

“163. However, it is plain that the OFT must have the power to close the file on cases otherwise it would not be able to function satisfactorily. Since it is the body to which Parliament has given the decision-making powers, it is only in very limited circumstances that this court can interfere as indeed was recognised on behalf of Cityhook in its arguments before the CAT [...]

165. The power of this court to intervene, not merely at the stage with which that case was concerned, but in the stages of the process with which this case is concerned, exists. However, it exists within the well-established, but relatively limited, traditional public law parameters. When it comes to the most appropriate allocation of limited resources, whether financial or manpower or both, the court may only require the body charged with the statutory responsibility for the deployment of those resources to think again if the decision under challenge was irrational in the *Wednesbury* sense. For the reasons I have given, I am unable to conclude that that threshold has been crossed in this case.”

71. In my view the short passage in the PSR letter relied upon by NoteMachine falls far short of establishing that the PSR had concluded as a matter of fact and law that CA98 did not apply to rates which are set too low. That is not what the letter of the 12th of March 2021 says nor is it implicit in the comment made in relation to the *Sainsbury* case. Further I see no reason not to accept the PSR’s evidence that its decision was driven largely by the resource implications of an investigation and the need to ensure the achievement of its wider statutory objectives. The decision on those grounds involved an assessment that the PSR is best placed to make and cannot be characterised as irrational. For that reason, Ground 5 does not succeed.

The Senior Courts Act 1981

72. Both the PSR and LINK submitted in relation to a number of the grounds that if there were errors of fact or law relief should be refused pursuant to section 31(2A) of the Senior Courts Act 1981 on the basis that it is “highly likely” that the outcome would not have been substantially different. The relevant standard of proof as to whether an outcome was highly likely falls between the civil and criminal law standards (see *R (Glatter) v NHS Herts Valleys Clinical Commissioning Group* [2021] EWHC 12 (Admin), at [98]. Section 31(2A) applies to all judicial review claims (*R (Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179 [77] – [78]).
73. I am satisfied that section 31(2A) applies to the following grounds in this case.

Ground 1.

74. Having decided that it did not have jurisdiction under s.57 FSBRA the PSR nevertheless considered NoteMachine’s application under Regulation 103. The assessment was provided with the decision letter. Further background is given in Mr Hemsley’s statement of 28 October 2021. The published PSR guidance as to its approach to applications under ss.56 and 57 FSBRA provides at 1.14 that: “When undertaking a detailed assessment the substantive test we will have regard to is whether a provider’s

access requirements and approach to supplying access (including the terms, conditions, fees and charges on which any access is offered) to a regulated payment system are proportionate, objective and non-discriminatory, and do not prevent, restrict or inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk, and business risk and to protect the financial and operational stability of that regulated payment system”. This adopts the wording of, and is equivalent to, the test set out in Regulation 103(1). Paragraph 6.11 of the guidance is in similar terms. Paragraphs 2.17 and 2.18 of the guidance indicate that non access disputes will be treated in the same way. Since the PSR would have been applying the same criteria, I conclude that it is highly likely it would have come to the same decision. Although NoteMachine set out in its written submissions a number of issues which it asserted might have been assessed differently had its application been considered under the FSBRA framework it is not obvious why they were not equally amenable to consideration within PSR2017. NoteMachine in fact declined to make further representations having been given the opportunity to do so when it was notified that the PSR intended to proceed under Regulation 103.

Ground 4.

75. In her witness statement of 28th October 2021 Ms Begent explained: “Notwithstanding that we considered that the Primacy Duty did not apply, and therefore that the PSR was under no duty to decide whether action under CA98 was more appropriate, the PSR nevertheless chose to consider – in addition to its assessment under Regulation 103 of the PSR2017 – whether the issues raised merited further consideration under the CA98. This too was explained in the email of 25 November 2020 [PB/11/294]. From this point onwards, the PSR assessed the allegations of CA98 breaches as a CA98 complaint.”
76. The PSR therefore considered whether it should investigate competition law issues under CA98 notwithstanding that it had concluded that the Primacy Duty did not apply. There is no real distinction to be drawn between the initial exercise it carried out and that which it would have been required if it had arrived at the same position by the s.62 FSBRA route. I am satisfied that it is highly likely that it would have come to the same conclusion.

Ground 5.

77. Even had there been an error in the PSR’s conclusions as to the application and effect of case law to the setting of a rate that was too low (rather than too high) that was only one consideration underpinning its decision not to open a full investigation. The main factors which influenced the decision stemmed from the complexity of an investigation and the drain on resources that it would entail. The first point made by the PSR in its decision letter was: “... It is not possible to investigate every matter brought to our attention. We have to decide on a case-by-case basis whether to prioritise a matter in order to make the best use of our resources across all areas falling under our responsibility.” I conclude that it is highly likely that the PSR would have taken the same decision even if it had formed an erroneous view as to whether the precedents relied upon by NoteMachine were on point.

Overall Conclusion

78. It follows for the reasons given above that the application for judicial review is dismissed.