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IN THE COMPETITION APPEAL TRIBUNAL

Cases Nos: 1349-1350/5/7/20 (T)
1383-1384/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 June 2021

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

Sitting as a Tribunal in England and Wales

BETWEEN:

WESTOVER LIMITED & OTHERS v MASTERCARD INCORPORATED & OTHERS

WESTOVER LIMITED & OTHERS v VISA EUROPE LIMITED & OTHERS

ALAN HOWARD (STOCKPORT) LIMITED & OTHERS v MASTERCARD INCORPORATED & OTHERS

ALAN HOWARD (STOCKPORT) LIMITED & OTHERS v VISA EUROPE LIMITED & OTHERS

Heard remotely on 12 April 2021

JUDGMENT: PRELIMINARY ISSUE

APPEARANCES

Ms Kassie Smith QC and Ms Fiona Banks (instructed by Humphries Kerstetter LLP) appeared on behalf of the Claimants.

Mr Matthew Cook QC and Mr Ben Lewy (instructed by Jones Day) appeared on behalf of the Mastercard Parties.

Mr Brian Kennelly QC, Mr Daniel Piccinin, Mr Jason Pobjoy and Ms Isabel Buchanan (instructed by Milbank LLP and Linklaters LLP) appeared on behalf of the Visa Parties.

A. INTRODUCTION

1. This is the judgment on a preliminary issue in these four sets of proceedings. Two of the four proceedings are brought by a large number of claimants (referred to as the "Westover claimants" and the "Alan Howard claimants" after the names of the lead claimants) against three companies concerned with the operation of the Visa payment cards scheme. The other two proceedings are brought by the same two groups of claimants against four companies concerned with the operation of the Mastercard payment cards scheme. The defendants will be referred to compendiously as "Visa" and "Mastercard" respectively, save where it is necessary to distinguish between individual defendants. The substantive allegations in the two proceedings against Visa and similarly in the two proceedings against Mastercard are identical and, save as regards the role of the various Visa and Mastercard companies in the respective schemes, the Visa and Mastercard proceedings are very similar.

2. Most of the Westover claimants and Alan Howard claimants are English companies. However, 34 of the Westover claimants and four of the Alan Howard claimants are Italian companies. Those Italian claimants contend that they can base their claims on English law. Visa and Mastercard contend that they are not entitled to do so and that their claims are governed by Italian law. The distinction is important, in particular since it appears that the limitation period under Italian law is a year shorter than the period under English law. In the light of that and with the consent of the parties, the Tribunal directed that there should be tried as a preliminary issue in all four proceedings the question of which law governs the claims by the Italian claimants.

3. The question raises a difficult issue on the proper interpretation and application of Regulation 864/2007 on the law applicable to non-contractual obligations ("Rome II"). It has been well argued by all counsel.

B. BACKGROUND

4. Both Visa and Mastercard are what are known as open four-party payment schemes for credit and debit cards. The four parties for any transaction are the issuing bank or financial institution (the "issuer") which issues the card to a

cardholder; the cardholder; the merchant to whom the cardholder presents his or her card when making a purchase; and the bank or financial institution to which the merchant transmits details of the purchase transaction and from which it receives payment (the "acquirer"). The operation of these schemes was summarised as follows by the Supreme Court in its judgment in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24, a case which we discuss further below, at [10]:

> "(i) Issuers and acquirers join the Visa and/or Mastercard schemes, and agree to abide by the rules of the schemes.
>
> (ii) A cardholder contracts with an issuer, which agrees to provide the cardholder with a Visa or Mastercard debit or credit card, and agrees the terms on which they may use the card to buy goods or services from merchants.
>
> (iii) Those terms may include a fee payable by the cardholder to the issuer for the use of the card, the interest rate applicable to the provision of credit, and incentives or rewards payable by the issuer to the cardholder for holding or using the card (such as airmiles, cashback on transactions, or travel insurance).
>
> (iv) Merchants who wish to accept payment cards under the scheme contract with an acquirer, which agrees to provide services to the merchant enabling the acceptance of the cards, in consideration of a fee, known as the merchant service charge ("the MSC"). The acquirer receives payment from the issuer to settle a transaction entered into between cardholder and merchant, and passes the payment on to the merchant, less the MSC.
>
> (v) The MSC is negotiated between the acquirer and the merchant. Typically, it is set at a level that reflects the size and bargaining power of the merchant, the level of the acquirer's costs (including scheme fees payable to Visa and Mastercard, and any interchange fees payable by the acquirer to issuers), and the acquirer's margin.
>
> (vi) The scheme rules require that, whenever a cardholder uses a payment card to make a purchase from a merchant, the cardholder's issuer must make a payment to the merchant's acquirer to settle the transaction.
>
> (vii) The Visa and Mastercard scheme rules make provision for the terms on which issuers and acquirers (who are members of the scheme) are to deal with each other, in the absence of any different bilateral agreement made between them. These terms include issuers and acquirers settling transactions at the face value of the transaction ('settlement at par' or, as it is sometimes referred to, 'prohibition on ex post pricing') and also provide for the payment of an interchange fee on each transaction.
>
> (viii) Under both the Visa and Mastercard schemes, the default interchange fee (ie the MIF) which is payable by the acquirer to the issuer on each transaction is expressed either as a percentage of the value of the transaction, or as a flat figure in pence for each transaction. Different MIFs apply to different types of transaction (such as contactless payments, or payments made where the card is not present, including internet payments). Different MIFs

also apply to transactions depending on whether the issuer and acquirer are based in the same state/region or different states/regions.

(ix) Under the Visa and Mastercard schemes, issuers and acquirers are not required to contract on the basis of the MIF. Under the rules, they are free to enter into bilateral agreements with different terms. In practice, however, issuers and acquirers do contract on the basis of the MIF, as both trial judges below found…."

5. Visa and Mastercard therefore do not themselves issue cards, make arrangements with merchants or process the payments. They license eligible banks to act as issuers and/or acquirers, in specified territories, and set the rules of their respective scheme to which the licensee banks all subscribe.

6. For present purposes, three different categories of MIF are relevant:

(a) domestic MIFs, which apply where both the issuing bank and the merchant to which the card is presented are in the same country;

(b) intra-EEA MIFs, which apply where the issuing bank and the merchant are in different EEA Member States;[1] and

(c) inter-regional MIFs, which apply where the issuing bank is in a different region of the world from the merchant where the card is presented (e.g. North America and the EEA).

In categories (a)-(c), the country of the issuing bank will generally correspond to the country of the cardholder. In both the UK and Italy there were domestic MIFs over the period of the claims.

7. As we understand it, these broad categories of MIFs can be broken down further: for example, there were separate MIFs for consumer cards and for business or commercial cards; but those categories or sub-categories are not relevant to this preliminary issue.

8. By decision adopted on 19 December 2007, the European Commission held that Mastercard's EEA MIFs had since 22 May 1992 been in breach of Art 101(1)

[1] As at the time of this judgment, the intra-EEA MIFs under both schemes continue to apply to the UK, notwithstanding Brexit.

of the Treaty on the Functioning of the European Union ("TFEU") and did not satisfy the criteria for exemption under Art 101(3) TFEU ("the Mastercard Commission Decision"). Mastercard applied to the General Court for annulment of that decision. By its judgment given on 24 May 2012, the General Court dismissed that application: Case T-111/08 *Mastercard v Commission,* EU:T:2012:260 ("*Mastercard GC*"). Mastercard and some of the intervening banks appealed that decision to the CJEU. On 11 September 2014, the CJEU dismissed those appeals: Case C-382/12P *Mastercard v Commission,* EU:2014:2201 ("*Mastercard CJ*").

9. In its Decision, the Commission determined (recitals 278-282) that such four-party payment card systems involve three different product markets:

   (a) the inter-systems market, in which various card systems compete;

   (b) the issuing market, in which the issuing banks compete for the business of cardholders; and

   (c) the acquiring market in which the acquiring banks compete for the merchants' business.

   This analysis was upheld by the General Court: *Mastercard GC* at para 173; and it was not challenged further in the appeal to the CJEU.

10. The present proceedings are among a significant number of claims that have been brought by merchants against Mastercard and Visa seeking damages based on the levels of the MIFs which, in light of the EU Mastercard proceedings, are alleged to have been unlawful and to have directly affected the level of the MSCs charged to the merchant claimants. Three of those proceedings went to trial in 2016-2017, two before the Commercial Court and one before the CAT. Two of those trials (the cases brought by Sainsbury's against Visa and against Mastercard) concerned UK MIFs; the other trial concerned UK MIFs, Irish domestic MIFs and intra-EEA MIFs. The appeals from the judgments in those three cases were heard together by the Court of Appeal, resulting in a single judgment: [2018] EWCA Civ 1536 (the "CA judgment"). Visa and Mastercard appealed to the Supreme Court and the claimants in one of the three cases cross-

appealed, resulting in the judgment of the Supreme Court of 17 June 2020 from which we have quoted above (the "Supreme Court judgment"). The Supreme Court upheld the finding of the Court of Appeal that both the Mastercard and Visa arrangements involved a restriction of competition contrary to Art 101(1) TFEU and the equivalent national legislation.

11. In the European proceedings, the EU Courts upheld the approach of the Commission in using the acquiring market as the relevant market for the purpose of analysing the competitive effect of the MIFs: see *Mastercard CJ* at para 178. The Supreme Court similarly noted that the English proceedings before it concerned the effect of MIFs on competition in the acquiring market: Supreme Court judgment at [16].

C. THE PRESENT PROCEEDINGS

12. The claims in the present proceedings allege infringements of both Art 101 TFEU and the corresponding Chapter I prohibition under the Competition Act 1998 ("CA 1998") and an abuse of a dominant position contrary to Art 102 TFEU and the corresponding Chapter II prohibition under the CA 1998. However, by order of 2 February 2021, all issues save the issues concerning whether the MIFs infringe Art 101 TFEU were stayed, pending the resolution of those issues. Moreover, although not expressly excluded in the pleadings, it is assumed that the claims of the Italian claimants with which this judgment is concerned, at least as regards the Italian domestic MIFs, rest only on Art 101. Accordingly, no further reference will be made in this judgment to the CA 1998.

13. The claims allege that the rules of, respectively, the Visa and Mastercard schemes which provide for payment of a MIF in default of an expressly agreed bilateral interchange fee ("the default MIF settlement rule") constitutes an infringement of Art 101, either alone or, alternatively in combination with various other scheme rules that restricted the freedom of merchants to decline to accept valid cards or to discourage customers from paying with that card. The latter rules, referred to compendiously in the Particulars of Claim as "Anti-Steering Rules" varied over time and differed in various respects as between Visa and Mastercard.

14. It is alleged that the Visa and Mastercard default MIF settlement rules are each determined by an agreement between undertakings, concerted practice and/or decision by an association of undertakings. For the purpose of this preliminary issue it is unnecessary to distinguish between those alternatives and we refer to them compendiously as a "collusive arrangement". The Particulars of Claim state that the "essential factual basis" of the claims are indistinguishable from that in which the CJEU held that there was a restriction of competition in *Mastercard CJ* and rely on the Supreme Court judgment, at [93], in that regard. They state that those facts include that:

> "(i) the MIF is determined by a collective agreement between undertakings;
>
> (ii) it has the effect of setting a minimum price floor for the MSC;
>
> (iii) the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition;
>
> (iv) the counterfactual is no default MIF with settlement at par;
>
> (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and
>
> (vi) in the counterfactual the whole of MSC would be determined by competition and the MSC would be lower."

15. It is alleged that the Visa and Mastercard scheme rules distort competition on the respective Visa and Mastercard acquiring markets as follows:[2]

> "a. The [Visa/Mastercard] Rules require an Interchange Fee plus [Visa/Mastercard] Acquirer Fees to be paid by Acquirers to Issuers and the various MIFs fix a minimum level of the Interchange Fee rate for all Acquirers. This inflates the base on which Acquirers set charges to merchants with that base being common for all Acquirers. The MSC will typically reflect the costs of the relevant MIF with the result that the MIF fixes a minimum price floor for the MSC, which leads to a restriction of price competition between Acquirers and/or a distortion of competition in the [Visa/Mastercard] Acquiring Market, by artificially raising prices, to the detriment of merchants such as the Claimants. In particular, the MIF as a minimum price floor for the MSC:
>
> i. is immunised from competitive bargaining. Acquirers have no incentive to compete over that part of the price which is a known common cost which Acquirers know they can pass on in full and do so;

[2] Amended Particulars of Claim in the Westover Visa proceedings, para 68; Amended Particulars of Claim in the Westover Mastercard proceedings, para 69; Particulars of Claim in the Alan Howard Visa Proceedings, para 68; Particulars of Claim in the Alan Howard Mastercard Proceedings, para 69.

ii. is non-negotiable, merchants having no ability to negotiate it down."

16. The relevant allegation of infringement of Art 101(1) is then set out as follows:[3]

> "The aforesaid agreements and/or concerted practices and/or decisions had and continue to have the object and/or effect of preventing, restricting or distorting competition in the relevant product and geographic markets as follows:
>
> a. The obligation to pay an Interchange Fee in respect of each transaction facilitated by the [Visa/Mastercard] Platform, alternatively, the obligation to pay the applicable MIF, either alone or in combination with the Anti-Steering Rules, or in the further alternative, the Anti-Steering Rules alone restrict competition on the Platform Issuer Market and the Issuing Market by foreclosing the aforementioned Markets and/or creating a barrier to entry and/or expansion for other undertakings seeking to compete on those Markets. Moreover, the anticompetitive effects extend beyond the aforementioned Markets so as to foreclose and/or exclude other lower cost payment methods, such as those provided by inter-bank payment schemes or cash. The Claimants repeat and rely upon the matters set out in paragraph [67/68] above.
>
> b. … the obligation to pay an Interchange Fee in respect of each transaction facilitated by the [Visa/Mastercard] Platform, alternatively, the obligation to pay the applicable MIF, either alone or in combination with the Anti-Steering Rules; or in the further alternative the Anti-Steering Rules alone restricts competition on the [Visa/Mastercard] Acquiring Market and/or between payment platforms. In the absence of the aforementioned obligations and Rules there would be competition, alternatively more effective competition, between Acquirers and/or other payment platforms for merchants' business. The Claimants repeat and rely upon the matters set out in paragraph [68/69] above."

17. We note that the allegation under sub-paragraph (a) concerning a restriction on the platform issuer market and the issuing market was not the basis of the Commission Decision or the Supreme Court judgment. Ms Smith QC for the claimants submitted that the arguments in respect of those markets for the purpose of the preliminary issue were the same.

D. ROME II

18. The provisions of Rome II continue to apply in the UK for the period up to 31 December 2020 pursuant to s. 7A of the European Union Withdrawal Act 2018 and Art 66 of the EU-UK Withdrawal Agreement. For the period of the claims after 31 December 2020, Rome II remains enforceable as retained EU law pursuant to the European Union (Withdrawal) Act 2018, subject to amendments

[3] Amended Particulars of Claim in the Westover Visa proceedings, para 80; Amended Particulars of Claim in the Westover Mastercard proceedings, para 81; Particulars of Claim in the Alan Howard Visa Proceedings, para 80; Particulars of Claim in the Alan Howard Mastercard Proceedings, para 81.

made by the Law Applicable to Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019. However, those amendments only reflect the fact that the UK is no longer a Member State of the EU and do not affect the substance of the issue before the Tribunal.

19. Article 4 of Rome II states as follows:

> "**General rule**
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

20. Articles 5 et seq. proceed to set out special rules that apply to particular non-contractual obligations. Article 6 concerns unfair competition and acts restricting free competition. Art 6(1)-(2) is directed at acts of unfair competition. Art 6(3) is as follows:

> "3 (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
>
> (b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claims against each of these defendants relies directly and substantially affects also the market in the Member State of that court."

21. Recitals (16)-(19) explain the approach of the Regulation:

> "(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni)* strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.
>
> (17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.
>
> (18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.
>
> (19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake."

22. Recitals (21)-(22) address Art 6, as follows:

> "(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.
>
> (22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised."

23. Recital (23) proceeds to make clear that the concept of restriction of competition covers prohibitions on anti-competitive agreements, decisions by associations of undertakings and concerted practices as well as prohibitions on the abuse of a dominant position, whether under the TFEU or national law.

24. The background to Art 6(3) is explained in *Dickinson, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2008):

> "6.60 The solution adopted in Art 6(3)(a), i.e. the law of market affected by a restriction of competition, was one of the options presented by the Commission in the working paper accompanying its Green Paper on damages action for breaches of Arts 81 and 82 of the EC Treaty. In this connection, the authors of the working paper submitted that:
>
>> 'Such claims could be governed by the law of the state on whose market the victim was affected by the anti-competitive practice. The civil remedy (damage claim) would thus be linked to the restriction or distortion of competition…
>>
>> The application of such an effects-based test would lead to the application of one single law in those cases in which the market affected is either national or subnational. If, however, the affected market is bigger than one single state or where there are several national markets, special problems arise with the proposed rule as in such a case the laws of a number of different states could be applicable to a claim. The recovery of each loss would be governed by the law specifically applicable to it. This could render litigation very complex.'
>
> 6.61 Difficulties of the kind described in the last paragraph led to the adoption of Art 6(3)(b), giving the person seeking compensation the right, in certain cases, to choose to base his claim on the law of the court seised of the dispute. The Council press release, issued at the conclusion of the Rome II conciliation process, described this as a 'compromise solution' that 'will allow for the application of one single law, while at the same time limiting as far as possible, "forum shopping" by claimants. In its subsequent White Paper on damages actions, the Commission has declared that compromise to be satisfactory in terms of achieving the objectives of EC competition law."
>
> (footnotes omitted)

25. *Dicey, Morris and Collins on The Conflict of Laws* (15th edn) comments on Art 6(3) as follows, at para 35-061:

> "Where the market is, or is likely to be, affected in more than one country (whether because the restriction of competition affects a market whose geographical area covers two or more countries, or because it affects two or more separate markets), then, in principle, Art.6(3)(a) would lead to a distributive application of the laws involved, i.e. the law applicable to the relevant act would be the law of each country in which the market affected was situated. Article 6(3)(b), however, makes further provision for such situations, being apparently intended to promote the more effective private enforcement of [EU] competition rules. When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant (i.e. apparently, the person from whom the compensation is sought, ignoring the possibility of an action for a negative declaration), may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises…. Article 6(3)(b) also stipulates that where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in the court of the domicile, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of the

> defendants relies directly and substantially affects also the market in the Member State of that court. This amplification of the general principle of Art.6(3)(b) is obviously necessary to protect the interests of co-defendants, once the general principle is accepted."

(footnotes omitted)

26. It was common ground between the parties that this view of Art 6(3)(b) is correct: i.e. it will apply both where the relevant geographic market covers more than one country and where a single restriction affects two or more distinct national geographic markets.

E. THE ISSUE

27. The Italian claimants contend that the "restriction of competition" on which their claims are based is the collective agreement concerning the default MIF settlement rule, as part of the rules of the Visa and Mastercard schemes. It is that rule which provides for the setting of a uniform MIF, and the levels at which particular MIFs are then set are relevant only to the quantum of damage or exemption under Art 101(3). Accordingly, the restriction involved in that rule directly and substantially affects the market in Italy. The default MIF settlement rule applies on a pan-European basis and it is the restriction which is similarly relied on in the claims by the English claimants. It directly and substantially affects the market in the UK. On that analysis, under Art 6(3)(b) the Italian claimants are entitled to base their claims in this country on English law.

28. The defendants, while they have some specific arguments that we discuss further below, essentially contend that the "restriction of competition" for the purpose of Art 6(3)(b) cannot be viewed in the abstract but has meaning only by reference to the market in which competition is restricted (which may nonetheless produce effects in other national markets). In the present cases, that is the Italian acquiring market since the restriction of competition on which the claims of the Italian claimants are based is a restriction of competition between acquiring banks for the custom of Italian merchants. On that analysis, the claims by the Italian claimants fall outside the scope of Art 6(3)(b).

29. The issue, therefore, depends on the correct approach to the identification of the "restriction of competition" for the purpose of Art 6(3)(b). The researches of

counsel have not discovered any authority which discusses the proper approach to that question under Rome II. Beyond the background set out by *Dickinson*, it appears that no assistance can be derived from the *travaux préparatoires*.

F. ARGUMENTS AND ANALYSIS

30. For the claimants, Ms Smith QC very properly accepted that the burden is on them to satisfy the Tribunal that their claims fall within Art 6(3)(b). They are electing to choose English law and must show that the conditions for this choice are fulfilled.

31. In their Particulars of Claim, the claimants state:

> "The definition of the relevant markets will be the subject of expert evidence in due course. Pending the preparation of that expert evidence, the Claimants plead as follows:
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> …
>
> The relevant geographic markets are national in scope. Alternatively, the relevant geographic markets extend to the territory of the EEA."

32. By their respective Defences, both Visa and Mastercard admit that the relevant geographic markets are national in scope.

33. Ms Smith submitted that this question was not determined and that it would be open to the claimants to pursue their alternative contention that the various relevant markets, including the acquiring market, are EEA-wide. We do not accept that submission. This was not an interim hearing but the final trial of a preliminary issue. The claimants have not chosen to put in expert evidence on the geographic market and, importantly, their primary plea has been admitted by all the defendants and is therefore no longer in contention. We hold that the relevant geographic markets are therefore national, which means that the relevant markets in the UK and Italy are distinct.

34. In support of their contention that the "restriction of competition" is the default MIF settlement rule, the claimants relied strongly on the CA and Supreme Court judgments.

35. In the Court of Appeal, the Court expressed the issue concerning Art 101(1) which it had to decide in the following terms, at [7(i)]:

> "Do the schemes' rules setting default MIFs restrict competition under article 101(1) in the acquiring market, by comparison with a counterfactual without default MIFs where the schemes' rules provide for the issuer to settle the transaction at par ('settlement at par' or 'SAP') (ie to pay the acquirer 100% of the value of the transaction)?"

36. In the subsequent discussion of this issue, after setting out the parties' various arguments, the Court commenced its discussion as follows:

> "[126] The General Court said at para 111 in *Cartes Bancaires* that:
>
> > "the analysis of the competitive situation in the absence of the measures in question aims to determine whether the measures restrict the competition that would have existed in their absence. This concerns, in particular, determining whether, in the absence of the measures in question, the competitive situation would have been different on the relevant market, that is to say whether the restrictions on competition would or would not have occurred on this market."
>
> [127] In our judgment, the schemes' arguments as to the correct counterfactual ignore these fundamental propositions. The "measures in question" in this case are the agreements between the issuers and the acquirers to be bound by the scheme rules set by the scheme defendants, or, put even more simply, the scheme rules set by the scheme defendants. Those rules set default MIFs payable in the absence of bilateral agreements being reached. Without those measures, there would have been no interchange fees charged unless bilateral interchange fees were agreed between issuers and acquirers …."

37. The Court noted that the Commission Decision was dealing with the same factual situation in relation to both Visa and Mastercard, and concluded its examination of *Mastercard CJ* in these terms:

> "[156] In our judgment, the proper analysis of the CJEU's decision on these points is that it endorsed the counterfactual adopted by the General Court as a matter of law. It rejected the arguments (i) that the 'no default MIF' and prohibition on *ex post* pricing counterfactual was inappropriate, (ii) that there was no basis for saying that the MIF set a floor on the merchants' service charge (see also the CJEU at para 197), and (iii) that the imposition of the MIFs did not restrict competition between acquirers because the merchants could still compete in relation to the parts of the merchants' service charge that were unaffected by the MIF."

38. The Court then observed, at [157] that:

> "It would be remarkable if the same scheme rule requiring the payment of MIFs in default of the agreement of bilateral interchange fees were held to be in breach of art 101(1) in one member state, but not in breach of it in another

> member state, whatever the factual or expert evidence might have been as to what might have happened in the postulated counterfactual."

39. Ms Smith pointed out that when addressing one of the judgments of the courts below, the Court of Appeal again emphasised that the infringement of Art 101(1) was the default MIF settlement rule, stating at [168]:

> "As we have already said, the exercise under art 101(1) is to consider whether there would be more competition in the absence of the measure in question. The measure in question here was the rule that, in the absence of bilateral agreements, a default MIF would be imposed."

40. The claimants submitted that the Supreme Court judgment was to the same effect. The Court focused on the anti-competitive effect of the MIF, not on any particular level of MIF or the various different MIFs that may be at issue. In particular, the Court analysed the Commission Decision and two judgments of the European Courts, which it then held were binding in establishing the restriction of competition that applied in the three English cases. It summarised their relevant findings as follows:

> "[74] In relation to the Mastercard Commission Decision, in the section of the decision relied upon by Visa and Mastercard, recital 459, read in the context of recitals 457 and 458, is as important as recital 460. Recital 459 bears repetition; it states:
>
> > 'In the absence of MasterCard's MIF, the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into account the acquirer's individual marginal cost and his mark up.'
>
> [75] The Commission was here focusing on the process by which merchants bargain with acquirers over the MSC. It was contrasting the position where that charge is negotiated by reference to a minimum price floor set by the MIF and one where it is negotiated by reference only to the acquirer's individual marginal cost and his mark up - ie between a situation in which the charge is only partly determined by competition and one in which it is fully determined by competition. In the latter situation the merchants have the ability to force down the charge to the acquirer's individual marginal cost and his mark up and to negotiate on that basis. This is the "pressure" which is referred to in recital 460 of the decision. This is made clear by the reference in the first sentence of recital 460 to 'that' pressure - ie the pressure referred to in recital 459."
>
> …
>
> [77] *Mastercard GC* is properly to be interpreted in a similar way. In para 143 the General Court rejected the zero MIF argument and held that since the MIF sets a minimum price floor for the MSC (which is not determined by competition) 'it necessarily follows that the MIF has effects restrictive of competition'. This is the context in which the 'pressure' referred to in the next sentence falls to be considered. The consequence of the minimum price floor

> set by the MIF is that such pressure is limited to only part of the MSC - ie that relating to the acquirer's individual marginal cost and mark up (in the present case about 10% of the MSC).
>
> [78] A similar analysis applies to *Mastercard CJ*. The 'pressure' which the Court of Justice referred to at para 195 is the same as that referred to in para 143 of *Mastercard GC*, which the Court of Justice was endorsing."

41. Although holding that it was bound by *Mastercard CJ*, the Supreme Court proceeded to consider briefly whether, if it were not so bound, it should nonetheless follow that judgment. It held that it would come to the same conclusion:

> "[103] There is a clear contrast in terms of competition between the real world in which the MIF sets a minimum or reservation price for the MSC and the counterfactual world in which there is no MIF but settlement at par. In the former a significant portion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement made. In the latter the whole of the MSC is open to competitive bargaining. In other words, instead of the MSC being to a large extent determined by a collective agreement it is fully determined by competition and is significantly lower."

42. On the basis of the two English appellate judgments, Ms Smith submitted that for the purpose of the required analysis under Rome II, it was not necessary or appropriate to look at different MIFs. The default MIF settlement rules apply on a pan-European basis, and give rise to the same restriction of competition throughout.

43. The defendants stressed that the default MIF settlement rule does not in itself impose any MIF. It is purely an enabling rule, and the schemes would be entitled to set a zero MIF, which it is accepted would not restrict competition, or no MIF at all. Mr Cook QC, for Mastercard, pointed out that Mastercard had indeed reduced its EEA MIF to zero between 12 June 2008 (following the Commission Decision) and 30 June 2009, pending discussion with the Commission about the acceptable level of a MIF.

44. The claimants responded that this was wholly unrealistic. Mastercard's zero MIF was a purely temporary arrangement in response to regulatory intervention while it held discussions as to what positive MIF would be accepted as exemptible under Art 101(3). Both Visa and Mastercard's pleaded cases in these proceedings was that they had to set positive MIFs in order for the scheme

to function. All participants envisaged and expected that positive MIFs would be the norm.

45. We consider that the claimants are probably correct on this point. Competition law looks to the substance not the form, and we consider that the implication of Visa's and Mastercard's pleadings in the present cases, as well as their evidence in the three previous trials, is that the schemes envisaged that they needed to set positive MIFs. However, we do not think that we need to reach a concluded view on this. Even if setting positive MIFs had been the common expectation, that does not mean that the actual setting of a positive MIF was not an essential element in the restriction of competition. In her oral submissions, Ms Smith said that there were, at least conceptually, three steps or stages in the process adopted under the schemes: first, the enabling rule, secondly the decision to put in place a positive default MIF to all transactions in Europe, and thirdly to set different levels of MIF for each of different types of transactions, such as the domestic MIFs, EEA MIFs and interregional MIFs. We are not clear that either Visa or Mastercard necessarily approached matters in this structured way: the evidence for that is not before us. But we think that Ms Smith was correct in saying that, for the purpose of Art 101(1), the first two of these steps must be looked at together.

46. Accordingly, even if the relevant scheme rule envisaged the setting of positive MIFs, we consider that the setting of a positive MIF pursuant to that rule was an essential element of the restriction. We think that emerges sufficiently from the passages in the various judgments quoted above, in particular the references by the Supreme Court to *the MIF* having the effect that is restrictive of competition (at [77]) and *the MIF* setting a reservation price for the MSC (at [103]). Although there are statements, in particular in the CA judgment, where the "measure in question" is referred to as the rule and not the MIF, they should not be applied as if they were a statutory definition of the restriction of competition, and there are other passages which show that the Court clearly had in mind that it was "positive MIFs of the kind charged by Mastercard" which are a restriction of competition: see e.g. at [171]. Moreover, that is highlighted by the period of a year when Mastercard did set a zero MIF. Notwithstanding the reason for that step, as discussed above, in our view it is clear that, in respect

of EEA transactions to which that zero MIF applied, Mastercard could not be said to have infringed Art 101(1) although it retained its default MIF settlement rule throughout.

47. We do not, however, accept the argument advanced in Mastercard's skeleton that:

> "32. … Whether a particular MIF has the effect of restricting competition in a particular national market depends on the level at which it is set, the competitive dynamics within that market(s), and whether the MIF satisfies the criteria for exemption under Article 101(3) TFEU."

This confuses the question of lawfulness with the question of restriction of competition. MIFs at particular levels may be exempt under Art 101(3) but that exemption applies to an arrangement which falls within Art 101(1): i.e. an arrangement which restricts competition but where that restriction can be justified because it brings particular benefits which satisfy the Art 101(3) conditions.

48. The defendants emphasised that the restrictive effect of the MIFs, as explained by the Commission Decision, the two EU judgments and the CA and Supreme Court judgments, was in the acquiring market. The consequence of the MIF charged by issuers to acquirers was to introduce a non-negotiable element in the MSC charged in turn by the acquirers to merchants. It therefore led to a restriction of competition between acquiring banks. As we have held, those acquiring markets were national in scope.

49. In the light of these findings, we turn to look at the application of Art 6(3)(b) of Rome II. In our view, it is important to consider Art 6(3)(b) within its context and having regard to the Regulation as a whole.

50. The general rule is that the governing law is the law of the country where the damage occurs: Art 4. That is considered to strike a fair balance between the defendant and the claimant: recital (16). Thus Art 6(3)(a) can be seen as a particular application of this approach: where there is a restriction of competition then the market affected is likely to correspond to the place where the anti-competitive damage occurs. On that basis, it is logical, within the

scheme of Rome II favouring the *lex loci damni*, that the applicable law should be the law of the country where that market is located.

51. However, if the restriction of competition (e.g. a pan-European cartel) affects several national markets and a claimant suffers loss in more than one of those markets, Art 6(3)(a) has the effect that his claim would be governed by a different national law according to the country in which that part of the loss was suffered. That is the "distributive application of law" to which *Dicey* refers: para 25 above and see also *Dickinson*: para 24 above. Indeed, *Dicey* notably considers that the same approach would have to apply if there was one market spanning several countries.

52. Art 6(3)(b) seeks to avoid this unsatisfactory result by creating an exception where the defendant is sued in the court of its domicile. Thus a company that carries on business in several European countries which suffers loss through inflated purchase prices in each of those countries as a result of a pan-European cartel, can bring a claim in the court of one of those countries where a cartelist is domiciled and have all its losses determined in a single claim under the *lex fori*. That is regarded as a sensible outcome and conducive to both procedural efficiency and the effectiveness of the right to compensation for infringement of competition law. For the proper interpretation and application of Art 6(3)(b), we think it is important to appreciate that it is designed as a modification for this purpose of the primary rule for competition claims set out in Art 6(3)(a).

53. In applying Art 6(3)(b), we think it is necessary to address three questions:

(a) what is the non-contractual obligation on which the claim is based;

(b) what is the restriction of competition out of which that obligation arises;[4] and

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[4] The second part of Art 6(3)(b) refers to "the restriction of competition on which the claim … relies" but we do not see that this is intended to have a different meaning to the formulation in the first part of Art 6(3)(b). The French text of Art 6(3)(b) here refers to "*l'acte restreignant la concurrence auquel se rapporte l'action intentée*".

(c) does that restriction of competition directly and substantially affect the market in the country of the forum?

54. Here, the answer to (a) is clearly the liability for damage caused by infringement of Art 101.

55. The answer to (b), is the restriction of competition which constitutes the infringement of Art 101. Thus, it is the restriction which contravenes Art 101(1). On the basis of the analysis above, we think that this restriction is the collusive arrangement setting a positive MIF pursuant to the default MIF settlement rule. That MIF may then have the consequence of restricting competition in various distinct national acquiring markets by placing a floor on the MSC which acquirers charge to merchants, but in our view that is the result of the underlying restriction of competition which gives rise to the contravention of Art 101(1).

56. The position can be examined by considering the paradigm case of a pan-European cartel by competing producers A, B, C and D, each of them domiciled in a different EU Member State. Those producers agree to increase the price of their products by 15%. Accordingly, they are jointly and severally liable for infringement of Art 101(1). If the relevant geographic market covers the whole of the EU, it is accepted that a merchant who purchases that product from some of the cartelists for its outlets in three different EU countries (X, Y and Z) could bring proceedings against all the cartelists in any of those three countries where it could obtain jurisdiction over A, B, C or D on the basis of domicile, and choose under Art 6(3)(b) to base its entire claim on the *lex fori*. The merchant would not have to bring three sets of proceedings in each of X, Y and Z; and it would not have to segregate (or "distribute") its claim in the single set of proceedings brought against A, B, C or D according to the laws of X, Y and Z. As we understood the submissions of Mr Kennelly QC, it is accepted by the defendants that the same result applies if the relevant geographic markets are national, so that X, Y and Z are distinct markets, if the merchant bought directly from one or more of the cartelists.

57. But what if the relevant geographic markets are national and, as is not uncommon, the cartelists do not sell directly into those markets but operate

through local subsidiaries? Then the merchant's purchases in X are made from companies in X owned by, say, A, B and C; and its purchases in Y are made from companies in Y owned by, say, B, C and D (since A does not operate in Y); and its purchases in Z are made from companies in Z owned by A, B and D (since C does not operate in Z). The prices charged by those local subsidiaries are inflated by reason of the cartel but it is axiomatic that the merchant can claim against their parent companies, i.e. the cartelists (and any decision of the Commission would be addressed to the parent companies that made the price-fixing agreement). The effect of the cartel was to restrict competition as between the suppliers in national market X, which was distinct from the competition as between the different suppliers in national market Y, which in turn was distinct from the competition as between the different suppliers in national market Z. If the defendants' basic contention was correct, although the merchant would be able to bring a single set of proceedings claiming all its loss against A, B, C and D in the court of a country where one of them is domiciled, that claim would be governed by different laws according to where it suffered damage. In our judgment, that is the consequence which would otherwise apply under Art 6(3)(a) but which Art 6(3)(b) is designed to avoid. Moreover, it avoids the potentially serious difficulty of the claimant having to determine the boundaries of the geographic market in order to know what law or laws govern its claim: the fact that in the present proceedings that difficulty does not arise (because of the prior Commission Decision) should not obscure the fact that in stand-alone cases market definition can be a matter of substantial dispute, involving complex and contested economic analysis: see in the context of Art 6(3), *Dickinson* at para 6.64.

58. On this basis, we turn to address the application of Art 6(3) in the present proceedings. As regards Italian domestic MIFs, we consider that the restriction of competition out of which liability in respect of those MIFs arises (or on which the claims in respect of those MIFs rely) is the collusive arrangement to set those positive MIFs. Those Italian MIFs directly and substantially affected the acquiring market in Italy. It cannot be suggested that the setting of the Italian domestic MIFs affected the acquiring market in the UK, still less that it did so directly and substantially. Accordingly, in our judgment the law governing the

claims relying on the Italian domestic MIFs is determined by Art 6(3)(a) and is Italian law. Art 6(3)(b) has no application.

59. The two cross-border MIFs, i.e. the intra-EEA MIF and the inter-regional MIF, can be considered together. The restrictions of competition out of which the liability in respect of those MIFs arises (or on which the claims in respect of those MIFs rely) are the collusive arrangements to set those MIFs at positive levels. Both of those MIFs directly and substantially affected the acquiring market in Italy but the arrangement setting those positive MIFs also directly and substantially affected the acquiring market in the UK, since single rates were set, by the same process, which applied in both the UK and Italy, for those categories of transaction. Accordingly, in our judgment the claims for damages resulting from those MIFs fall within the scope of Art 6(3)(b) and the Italian claimants are entitled to choose to have their claims in the CAT governed by English law.

60. Mr Cook QC for Mastercard, arguing that all the claims were outside Art 6(3)(b), submitted that there can be no justification for allowing Italian merchants, who claim in respect of alleged losses suffered only in Italy, to choose to have their claims governed by English law with which those claims have no connection. That is a forensically attractive argument, but it obscures the fact that the relevant provision of Rome II is not dealing only with this situation. Art 6(3)(b) will be engaged if some of the many English claimants in these proceedings also suffered loss in Italy, and in several other EU Member States, by reason of credit card sales from its branches in those countries. If, as we consider, Art 6(3)(b) enables the English merchants to have their whole claim against Visa or Mastercard governed by English law, because the third Visa defendant and the fourth Mastercard defendant to those claims are English companies, then that same interpretation enables the Italian claimants to choose English law for their claims.

61. Mr Cook also stressed that there will be no violation of Art 101(1) if the impugned arrangement was objectively necessary or, to put it another way, an ancillary restraint. The ancillary restraints/objective necessity doctrine was succinctly summarised by the Court of Appeal in its judgment at [58]:

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

The argument of objective necessity/ancillary restraint advanced by Mastercard (and Visa) was rejected in the Court of Appeal in the preceding cases: see Part IV of the CA judgment. But Mr Cook submitted that the position might be different having regard to the distinct circumstances of the Italian market. That may be so: that is a matter for trial. But in our view this simply reflects the fact that the Italian acquiring market and the UK acquiring market are distinct. It provides no basis for finding that the Italian market was not directly and substantially affected by the restriction of competition on which the claims rely, i.e. the collusive arrangements setting cross-border MIFs, which is the relevant issue for Art 6(3)(b).

62. Art 6(3)(b) focuses on the "agreement which has the effect of restricting competition", which, here, were the collusive arrangements to set, respectively, a positive EEA-MIF and a positive inter-regional MIF. Those are the restrictions of competition out of which the claims by the Italian claimants arise, and they are the same restrictions of competition as are relied on for the claims of the English claimants. Whether or not the restrictions might constitute *ancillary* restraints, or be objectively necessary, is a separate and subsequent question. We would add that, although not the ground for our decision, it is highly desirable that the court should be able to determine the question of governing law at the outset, not after a trial in which the success or failure of an objective necessity argument has been resolved.

63. Finally, both sides referred to the judgment in *Deutsche Bahn AG v Mastercard Inc* [2018] EWHC 412 (Ch), on which the defendants particularly relied. Those were claims based on the Mastercard MIFs (including EEA MIFs and domestic MIFs) brought by some 1,300 retailers operating in 17 EEA countries and Switzerland. Some of the claims were also based on the Mastercard scheme's Central Acquiring Rule ("CAR") which is not relevant for present purposes. The court held a trial of a preliminary issue to determine the applicable law in respect of the claims relating to four sample countries. The period of the claims in those

proceedings stretched back to 22 May 1992 and therefore went back well before the coming into force of Rome II on 11 January 2009.

64. At the trial, it was (or became) common ground that for the period post-11 January 2009 the applicable law would be determined by reference to the place of establishment of the merchant concerned in the card transaction. Accordingly, the judgment does not discuss or consider the proper interpretation of Art 6(3)(b). Barling J simply observes, at [22], that:

> "By the stage of closing submissions, the parties had reached agreement that the country "where the market is, or is likely to be, affected" is the country in which the Merchant was based at the time of the transaction upon which an MSC was paid by the Merchant to the Acquiring Bank."

65. This is, with respect, clearly correct. It quotes the wording of Art 6(3)(a) and under that provision (and absent Art 6(3)(b)), as we have observed above, for a claim by an Italian merchant the governing law would be Italian.

66. For the period 1 May 1996 to 10 January 2009, the governing law was determined by s. 12 of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"). The relevant part of that section provides:

> "**11. Choice of applicable law: the general rule**
>
> (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being -
>
> …
>
> (c) in any other case, the law of the country in which the most significant event or elements of those events occurred."

67. Barling J held that in applying section 11, the task of the court is threefold:

> "… first, to identify all the (English law) elements of the events constituting the alleged tort, then to identify the countries in which those elements and/or events took place, and finally to decide, on the basis of a value judgment, in which one of those countries occurred the element(s) which was the most significant in relation to the tort in question."

68. The judge proceeded, at [42], to hold that the principal elements of the tort of breach of statutory duty by infringement of Art 101 there alleged are:

> "(a) the adoption of the relevant MIFs … by means of a decision by an association of undertakings, including the Defendants; (b) the decision must have the object or effect of restricting competition within the EU; (c) loss or damage is caused to the claimant. In addition, in so far as concerns the claims based on Article 101 TFEU and Article 53 of the EEA Agreement, the decision must be capable of affecting trade between Member States."

69. He then stated, at [49]-[50]:

> "Essentially the allegation in each case is that the EEA MIF restricted competition in the relevant national product and geographic markets by (absent a bilateral agreement) fixing the level of the Interchange Fee for all Acquiring Banks alike, thereby inflating the basis on which Acquiring Banks levied MSCs on the Claimants, in circumstances where the MSCs set by Acquiring Banks would be lower in the absence of the EEA MIF. …
>
> A restriction on competition, actual or presumed, is the result of a combination of circumstances which manifest themselves on the relevant market, in the form of, for example, higher prices, poorer quality, fewer competitors etc etc…."

70. Noting that it was accepted that the relevant product market is the acquiring market and that this was national in scope, Barling J proceeded to conclude at [55]:

> "the alleged restriction of competition in relation to each category of claim … took place in each of the product and geographic markets where the relevant Claimant(s) operated its retail business."

71. Accordingly, the relevant question under the 1995 Act addressed in *Deutsche Bahn* was to identify the country where the element of the tort constituted by the restriction of competition occurred and the judge accordingly looked at the places where the restrictive effect took place. That is different from the question under Rome II presented in the present proceedings, which is to identify the restriction of competition out of which the liability under Art 101 arises, and then ask whether it directly and substantially affects the different national markets at issue. For domestic MIFs, the collusive arrangement setting a positive Italian MIF directly and substantially affects only the Italian market. But the collusive arrangements setting positive cross-border MIFs that apply in several markets directly and substantially affect all those markets: there is no separate restrictive arrangement affecting the Italian market from the one affecting the UK. We therefore derived limited assistance from the *Deutsche Bahn* case.

G. CONCLUSION

72. For the reasons set out above, we therefore determine the preliminary issue as follows:

    (a) the claims by the Italian claimants in respect of Italian domestic MIFs are governed by Italian law, pursuant to Art 6(3)(a) of Rome II;

    (b) the claims by the Italian claimants in respect of EEA MIFs and Inter-regional MIFs fall within Art 6(3)(b) of Rome II and those claimants are therefore entitled to choose to base them on English law.

73. This judgment is unanimous.

The Hon Mr Justice Roth President	Tim Frazer	Paul Lomas

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

Date: 7 June 2021