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IN THE COMPETITION APPEAL TRIBUNAL

Cases Nos: 1312-1325/5/7/19 (T) and 1350/5/7/20 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22 December 2020

Before:

THE HONOURABLE MR JUSTICE ROTH

(President)

TIM FRAZER

PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

DUNE SHOES IRELAND LIMITED & OTHERS

Respondents/Claimants

- and -

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

Applicants/Defendants

Heard remotely on 1 December 2020

RULING: APPLICATION FOR A REFERENCE TO THE CJEU

APPEARANCES

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

Mr Laurence Rabinowitz QC, Mr Brian Kennelly QC and Mr Daniel Piccinin (instructed by Milbank LLP and Linklaters LLP appeared on behalf of the Applicants/Defendants).

A. INTRODUCTION

1. This is an application by the Defendants ("Visa") for the Tribunal ("the CAT") to make a reference to the Court of Justice of the European Union ("the CJEU") for a preliminary ruling on a question arising in each of these three sets of proceedings.

2. Art 267 of the Treaty on the Functioning of the European Union ("TFEU"), provides insofar as relevant:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> …
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers, that a decision on the question is necessary to enable it to give judgement, request the Court give a ruling thereon."

3. It is common ground (a) that the CAT may make a reference until the end of the implementation period of the UK's withdrawal from the EU, i.e. 31 December 2020; and (b) that the CJEU will give a preliminary ruling on a reference from a UK court received before that date and its ruling, although given after that date, will be binding in the national proceedings: Arts 86(2) and 89(1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community and s. 7A of the European Union (Withdrawal) Act 2018.

4. The Claimants opposed the making of a reference, both because it was not necessary to determine the issues in these proceedings or, in the alternative, on the basis that this application by Visa amounted to an abuse of process because it had not advanced the arguments relied on here in previous proceedings in the Supreme Court concerning the same underlying issues.

5. At the conclusion of the hearing, the CAT stated that the application would be dismissed for reasons to follow. This judgment sets out the reasons for that decision.

B. BACKGROUND

6. As is well-known, Visa, like Mastercard, operates payment card schemes through branded credit and debit cards. These are four-party schemes whereby, on the one side, banks and financial institutions ("issuers") issue payment cards to their customers ("cardholders"), and on the other side, banks and financial institutions ("acquirers") provide payment services to those ("merchants") who have accepted payment by card from cardholders for goods or services. Visa and Mastercard do not themselves either issue cards or sign up merchants but set the rules for their respective schemes and allow institutions to join as issuers and/or acquirers.

7. When a merchant accepts payment from a cardholder by card, then pursuant to the contract which it has with an acquirer, it receives the financial value of the payment from the acquirer after deduction of a fee known as the merchant service charge ("MSC"). Under the scheme rules, whenever a cardholder uses his or her card for a transaction, the cardholder's issuer must make a payment to the merchant's acquirer to settle the transaction. The rules require that issuers and acquirers must settle these transactions without deduction (referred to as "settlement at par" or a "prohibition on *ex post* pricing") except for the payment of a so-called interchange fee. That is a fee from the acquirer to the issuer, in effect for the issuer's service in providing prompt settlement. Such interchange fees could in theory be negotiated bilaterally between each issuer and acquirer. But under both the Visa and Mastercard schemes there are default interchange fees applicable as between all issuers and acquirers for particular categories of transaction (e.g. debit cards, credit cards, cross-border transactions, etc.), known as multilateral interchange fees or "MIFs". In practice, there are no material bilateral agreements between issuers and acquirers in the UK, so the MIF always applies. The amount of the MIF, which is set as either a percentage of the transaction value or a fixed fee in pence per transaction, is passed on by the acquirer to the merchant in the MSC and, indeed, forms a substantial part of the MSC.

8. By decision adopted on 19 December 2007, the European Commission held that Mastercard MIFs applicable in the European Economic Area had since 22 May

1992 been in breach of Art 101(1) TFEU and did not satisfy the criteria for exemption under Art 101(3) TFEU ("the Mastercard Commission Decision"). Mastercard applied to the General Court for annulment of that decision, and several of the banks that were members of the Mastercard scheme intervened in the proceedings in support of the application. By its judgment given on 24 May 2012, the General Court dismissed that application: Case T-111/08 *Mastercard 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. It will be necessary to consider the judgment in *Mastercard CJ* in more detail below. It is appropriate to observe at the outset that the CJEU noted (at para 11) that an open four-party payment system such as Mastercard (and therefore, equally, Visa) involves three different product markets:

> "... first of all, the 'inter-systems market', in which the various card systems compete; then the 'issuing market', in which the issuing banks compete for the business of the cardholders; and, lastly, the 'acquiring market', in which the acquiring banks compete for the merchants' business."

10. The CJEU pointed out that the relevant market for the purpose of the Mastercard Commission Decision comprised the national acquiring markets in each Member State. At the same time, it is well recognised that the issuing and acquiring markets are interrelated and interdependent, constituting what economists describe as a "two-sided market". The value of a Mastercard or Visa card to cardholders is dependent on the extent to which it is accepted by merchants, and the value of the card to merchants is dependent on the extent to which their customers have and use such a card.

11. The present claims comprise three sets of proceedings brought by 479 claimants, all of whom are merchants, claiming damages against Visa for breach of, inter alia, Art 101 TFEU by reason of the setting and implementation by Visa of anti-competitive rules requiring the payment by acquirers to issuers of default MIFs in respect of transactions under the Visa system. The Claimants contend that as a result of these allegedly unlawful MIFs, the MSCs paid by them were higher than they otherwise would have been.

12. The claims are among a large number of similar claims that have been brought by merchants against both Visa and Mastercard. Indeed, the present claimants have also brought separate but similar claims against Mastercard, but Mastercard has not applied for a reference to the CJEU.

13. Three other sets of proceedings have been determined at trial and the resulting decisions were subject to appeal:

    (a) Proceedings brought by Sainsbury's against Mastercard were determined by a judgment of the CAT on 14 July 2016: *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11 ("the *Sainsbury's Mastercard* judgment"). The CAT held that Mastercard was in breach of Art 101(1) and failed to satisfy the criteria for exemption under Art 101(3), and awarded substantial damages;

    (b) Proceedings brought by Asda and Morrisons against Mastercard were combined with proceedings brought by Argos against Mastercard and determined by a judgment of Popplewell J in the Commercial Court on 30 January 2017: *Asda Stores Ltd v Mastercard Inc* [2017] EWHC 93 (Comm) ("the *AAM* judgment"). Popplewell J held that Mastercard would have infringed Art 101(1) but for what became known as the 'death spiral' argument: see para 18(b) below. He also held that, if he were wrong on Art 101(1), he would find that the arrangements were exempt under Art 101(3).

    (c) Proceedings brought by Sainsbury's against Visa were determined in two judgments of Phillips J in the Commercial Court. By the first judgment delivered on 30 November 2017, Phillips J dismissed the claim, holding that the relevant MIFs did not restrict competition in the acquiring market, although he differed from Popplewell J in rejecting the 'death spiral' argument: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2017] EWHC 3047 (Comm) ("the *Sainsbury's Visa* judgment"). At the request of the parties, Philips J gave a further judgment on 23 February 2018, which was strictly obiter, finding that if the Visa MIFs did restrict competition, Visa had not established that they satisfied the criteria for exemption under Art 101(3): *Sainsbury's*

Supermarkets Ltd v Visa Europe Services LLC [2018] EWHC 355 (Comm) ("the *Visa exemption* judgment").

14. There were appeals against all these judgments, which were heard together. The Court of Appeal determined the appeals in a single judgment handed down on 4 July 2018, which overturned all of the judgments below: [2018] EWCA Civ 1536 ("the CA judgment"). It is unnecessary for the purpose of the present application to summarise all the findings of the Court of Appeal, but insofar as relevant, the Court declared that in each of the three cases the agreements were restrictive of competition under Art 101(1) and:

    (a) allowed the appeal of Mastercard against the *Sainsbury's Mastercard* judgment insofar as the CAT had found (i) that the correct counterfactual comprised bilateral interchange fees, and (ii) that the criteria for exemption under Art 101(3) were not satisfied, since that was also based on a counterfactual of bilateral agreements. The case was remitted to the CAT for reconsideration of the Art 101(3) exemption issue and (if, on that basis, the agreements were found not to be exempt) the assessment of the quantum of damages;

    (b) allowed the appeal of the AAM parties against the *AAM* judgment on the Art 101(1) issue and on the ancillary restraints death spiral issue. Although the Court of Appeal found that Popplewell J should have held that Mastercard's claim for exemption under Art 101(3) failed, it nonetheless held that it was appropriate for the Art 101(3) issue to be reconsidered and it remitted the case to the CAT for that issue to be reconsidered alongside the other two remitted cases;

    (c) allowed the appeal of Sainsbury's against the *Sainsbury's Visa* judgment on the Art 101(1) issue and set aside Phillips J's conclusion in the *Visa exemption* judgment. It remitted the case to the CAT for reconsideration of the Art 101(3) exemption issue and (if, on that basis, the agreements were found not to be exempt) for assessment of the quantum of damages.

15. Visa and Mastercard appealed to the Supreme Court and the AAM parties cross-appealed against the remittal of the Art 101(3) issue in their case. The Supreme

Court delivered its judgment on 17 June 2020: [2020] UKSC 24 ("the Supreme Court judgment").

C. THE CA JUDGMENT

16. The Court of Appeal identified three primary issues that arose for decision on the appeals, which they summarised as follows:

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

17. The third of those issues is not relevant to this application and it is unnecessary to refer to it further. Similarly, there were some other issues addressed by the Court of Appeal which we need not discuss as they are not material to the present case. However, as the Court of Appeal observed, the death spiral argument was considered by the CAT and Popplewell J both in the context of Art 101(1) and of ancillary restraints/objective necessity: [7] at fn 4.

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

    (a) In the *Sainsbury's Mastercard* judgment, the CAT held that the starting point was a Mastercard rule that transactions would be settled at par, which was equivalent to a zero MIF, but that it was appropriate for the

counterfactual to take account of the Visa MIF which would have remained close to its existing level, as a result of which issuers in the Mastercard scheme would have bilaterally agreed interchange fees with acquirers at significantly lower levels.

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

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

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

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

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

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

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

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

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

19. The Court of Appeal considered (in Part IV of its judgment) the scope and application of the doctrine of ancillary restraints/objective necessity before it turned to address the issues arising in the appeals. This doctrine was explained in *Mastercard CJ* as follows:

> "89. It is apparent from the case-law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in Article 81(1) EC, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in

> that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other [citations omitted].
>
> 90. Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 81(1) EC.
>
> 91. Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in Article 81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC."

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

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

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

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

> "It follows that the ancillary restriction must be essential to the survival of the type of main operation without regard to whether the particular operation in question needs the restriction to compete with other such operations. All questions of the effect of the absence of the restriction on the competitive

> position of the specific main operation and its commercial success fall outside the ancillary restraint doctrine, …
>
> Those questions of the competitive effect of the absence of the restriction are to be considered, if at all, under art 101(3)…."

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

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

24. The Court of Appeal addressed the first of the three primary issues, i.e. the Art 101(1) issue (para 16 above), in Part VI of its judgment. In effect, the Court upheld the view of Popplewell J, and rejected the view of Phillips J, that the correct counterfactual had been established by the *Mastercard CJ* decision as a matter of law, which was therefore binding on the English courts. However, as already indicated earlier in its judgment, the Court held that Popplewell J had been wrong then to rely on the death spiral argument to reach a different conclusion on the question of a restriction of competition:

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

> the inter-system market, as was common ground in argument. The third question is whether there is an exemption under article 101(3). It is not legitimate to consider the death spiral argument at the first stage; Parts IV and VII of this judgment deals with its relevance to the second stage."

25. For much the same reason, the Court of Appeal held that the CAT had been wrong in the *Sainsbury's* judgment to take account of the factors beyond the acquiring market, and thus the effect in the counterfactual of Visa's MIFs on the Mastercard MIFs, in its initial Art 101(1) analysis of whether the MIFs amounted to a restriction by effect: CA judgment at [175].

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

> "185. … The correct counterfactual for schemes like the MasterCard and Visa schemes before us was identified by the CJEU's decision. It was "no default MIF" and a prohibition on ex post pricing (or a settlement at par rule). The relevant counterfactual has to be likely and realistic in the actual context [citing authorities], but for schemes of this kind, the CJEU has decided that that test is satisfied.
>
> 186. The CJEU's decision also made clear at [195] that MasterCard's MIFs, which resulted in higher prices, limited the pressure which merchants could exert on acquiring banks, resulting in a reduction in competition between acquirers as regards the amount of the merchants' service charge. This is not a decision from which this court either can or should depart….
>
> 187. … We do not discount the possibility that some evidence might conceivably enable other schemes to distinguish different MIFs from those upon which the CJEU was adjudicating. In the present case, however, the MIFs are materially indistinguishable from the MIFs that were the subject of the CJEU's decision. In both cases, the MIFs represented the vast majority of the merchants' service charge, and the appropriate counterfactual was a "no default MIF" plus a prohibition on ex post pricing.
>
> 188. The death spiral argument is not relevant at this stage of the debate because the article 101(1) question must be asked in relation to the acquiring market."

27. In Part VII of its judgment, the Court of Appeal addressed the second of the three primary issues it had identified: i.e. the death spiral argument in the context of ancillary restraints: para 16 above. Since the death spiral argument is fundamental to the question which Visa now seeks to have referred to the CJEU, it is appropriate to set out the Court of Appeal's full discussion and conclusions on this issue:

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

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

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

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

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

203. The correctness of that conclusion was not undermined by the points made by Ms Rose about what had happened historically in Hungary or even in the United Kingdom. The critical point is that the hypothesis of the asymmetrical counterfactual is that one of the schemes would be prevented

from setting any default MIF but the Commission and the UK competition authorities and regulators would allow the other scheme to carry on setting its default MIFs, without any constraints being imposed. That seems to us to be completely unrealistic and improbable. Realistically there would be similar constraints on both schemes.

204. Secondly, Popplewell J accepted at [189] of his judgment that, if the AAM parties were right that the two schemes were materially identical, he would have had to assume that, in the counterfactual world, Visa's MIFs would be constrained to the same extent as MasterCard's. His essential reasoning for that conclusion at [190]-[193] of his judgment was that it should not be open to one unlawful scheme to save itself by arguing that it otherwise would face elimination by reason of competition from the other scheme, which is itself unlawful.

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

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

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

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

28. We note that Mr Rabinowitz QC expressly accepted that Visa was not seeking in the present actions to challenge the finding in para 207 of the CA judgment: it was not seeking to suggest that its scheme at issue here was not materially identical to the Mastercard scheme.

D. THE SUPREME COURT JUDGMENT

29. The appeal by Mastercard and Visa to the Supreme Court was based on several grounds. The only one relevant to the present application concerned the Court of Appeal's conclusion that there was a restriction by effect on the acquiring market contrary to on Art 101(1). However, as noted by the Supreme Court at [45], neither Mastercard nor Visa sought to support Popplewell J's conclusion on the death spiral argument or to rely on that argument for their case that there was no infringement of Art 101(1).

30. The principal issues on the Art 101(1) restriction ground were whether the Court of Appeal was correct to find that it was bound by the *Mastercard CJ* decision to find that the MIFs restricted competition; and if not, whether that decision ought in any event to be followed. The Supreme Court conducted a careful analysis of the Commission's decision, *Mastercard GC* and *Mastercard CJ.* The Court summarised its conclusions at [93]-[94]:

> "93. In our judgment, the essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals. 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 (that is, a prohibition on ex post pricing); (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower.
>
> 94. For all these reasons we conclude that *Mastercard CJ* is binding and that the Court of Appeal was correct so to hold."

31. The Supreme Court nonetheless proceeded to consider briefly whether it should follow *Mastercard CJ* even if it were not bound to do so. It concluded that it would reach the same conclusion as *Mastercard* CJ because, in summary, the MIF fixes a minimum price floor for the MSC that is non-negotiable as between

the merchants and their acquiring banks, and so immunises a significant portion of the MSC from competition.

32. Following the argument before the Supreme Court, the CJEU issued its judgment in Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt*, EU:C:2020:265 (*"Budapest Bank"*). At the request of the parties, the Supreme Court received further written submissions on the significance of that judgment for the appeals.

33. It will be necessary to refer to *Budapest Bank* in further detail below. In summary, it concerned an agreement between banks that participated in both the Visa and Mastercard schemes in Hungary for the adoption of a uniform MIF applicable to both schemes ("the MIF Agreement"). The Hungarian national competition authority ("HCA") found that this agreement, and its application by Visa and Mastercard, infringed Art 101(1) in that it involved a restriction both by object and by effect, and imposed fines on the banks and on Visa and Mastercard. On appeal, the Supreme Court of Hungary referred four questions to the CJEU. The first question was whether under Art 101(1) it was permissible to find that an agreement gave rise to a restriction both by object and by effect. The third and fourth questions concerned the finding of infringement against Visa and Mastercard when they were not parties to the offending agreement. It is only the CJEU's ruling on the second question that was relied on by Visa and Mastercard in their submissions to the Supreme Court. That question was:

> "Can [Article 101(1) TFEU] be interpreted as meaning that the [MIF Agreement,] which establishes, in respect of … MasterCard and Visa, a unitary amount for the interchange fee payable to the issuing banks for the use of the cards of those two companies, constitutes a restriction of competition by object?"

34. The CJEU ruled that the agreement would only be classified as a restriction by object if:

> "86. ... that agreement, in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which is for the referring court to determine."

35. The Supreme Court held that the *Budapest Bank* judgment was not relevant to the issue which it had to decide, namely whether the MIF arrangements in either the Visa or the Mastercard schemes infringed Art 101(1) as a restriction of

competition by effect. The Court referred to that fact that the CJEU had rejected the Commission's argument that, in reliance on *Mastercard CJ*, the MIF agreement necessarily had the object of restricting competition. The Court noted that Visa and Mastercard particularly relied on a passage at paras 78-79 of the CJEU judgment which included the following:

> "... it is not possible to conclude on the basis of the information produced for this purpose that sufficiently general and consistent experience exists for the view to be taken that the harmfulness of an agreement such as that at issue in the main proceedings to competition justifies dispensing with any examination of the specific effects of that agreement on competition. The information relied on by the [Hungarian] Competition Authority, the Hungarian Government and the Commission in that connection, that is to say, primarily, that authority's decision-making practice and the case law of the Courts of the European Union, specifically demonstrates, as things currently stand, the need to conduct an in-depth examination of the effects of such an agreement in order to ascertain whether it actually had the effect of introducing a minimum threshold applicable to the service charges and whether, having regard to the situation which would have prevailed if that agreement had not existed, the agreement was restrictive of competition by virtue of its effects."

36. The Supreme Court continued as follows:

> "86. Visa and Mastercard contend that this shows that MIFs do not necessarily affect competition and that whether or not they do so is to be determined by the national court carrying out an "in-depth examination" of its effects on competition in the actual and counterfactual markets.
>
> 87. It is surprising that so much reliance should now be placed by Visa and Mastercard on *Budapest Bank*. At the hearing it was recognised by Visa that it raised a different question. As stated at para 116 of Visa's written case:
>
> > "That case concerned the question whether an agreement between a number of Hungarian banks introducing a uniform MIF for both Visa and Mastercard credit card transactions in Hungary should be characterised as having the object of restricting competition. It was therefore quite a different question from that which the CJEU had considered in *Mastercard CJ*, in that it concerned alleged infringements by object rather than effect, and a single agreement covering both Visa and Mastercard, rather than one scheme's rules applicable only to its own system."
>
> 88. In our judgment the case can clearly be distinguished in that: (i) it concerned restriction by object rather than effect; (ii) it involved a different type of MIF agreement and, in particular, one which was said to prevent escalating interchange fees; and (iii) it involved a different counterfactual, namely one where each scheme had its own MIF rather than there being no MIF.
>
> 89. The fact that the Commission sought to rely on *Mastercard CJ* in argument does not affect these important distinctions, all the more so given that the Commission's attempt to read across from an effect case to an object case was rejected by the Court of Justice.

> 90. In any event, in the present case there has been an examination by all courts of the effects of the MIF on competition in the actual and counterfactual markets, including whether it operates as a price floor. The issue is whether the effects as found are materially the same so that the same legal conclusion is to be drawn as in *Mastercard CJ*.
>
> 91. For all these reasons, in our judgment *Budapest Bank* does not support Visa and Mastercard's case on the restriction issue. Still less, as is boldly submitted, is it determinative in their favour."

37. Since, as noted above, that part of the CA judgment which addressed the death spiral argument was not challenged in the appeals to the Supreme Court, the position is that, subject to any further judgments of the EU Courts or the Supreme Court, the CAT is bound by the CA judgment to the effect that:

    (a) the death spiral argument is not relevant to the question whether there is a restriction of competition compared to the counterfactual, since that question is to be asked by reference to the acquiring market;

    (b) the death spiral argument and the so-called "asymmetric counterfactual" is not relevant to the question of ancillary restraints/objective necessity under Art 101(1); and

    (c) the death spiral argument could apply if at all under Art 101(3) but is to be rejected as "not only unrealistic but highly improbable."

38. Further, the CAT is bound by the Supreme Court judgment, subject to any further judgments of the EU Courts, to find that *Mastercard CJ* is binding to the effect that the Visa scheme at issue in the present actions constitutes a restriction of competition by effect, contrary to Art 101(1).

E. THE PRESENT APPLICATION

39. Visa seeks to have the following question referred to the CJEU, as set out in its counsel's skeleton argument:

> "In a situation where Visa and Mastercard operate independently in setting the level of Multilateral Interchange Fees ("MIFs"), in a claim alleging an infringement of Article 101(1), should each scheme's MIFs be judged against

> a counterfactual in which the other scheme remains free to compete by setting its own MIFs independently at higher positive rates?"

40. Mr Rabinowitz of course recognised that this question is answered in the CA judgment, as set out above, and that this would normally be binding on the CAT. However, he submitted that this aspect of the CA judgment, which the Court of Appeal based on its analysis of EU jurisprudence and *Mastercard GC* and *Mastercard CJ* in particular, was inconsistent with the subsequent ruling of the CJEU in *Budapest Bank*. It was therefore appropriate and necessary to seek clarification of the proper approach under Art 101(1) from the CJEU. The argument advanced for Visa therefore turned entirely on the import and implications of *Budapest Bank.* In that regard, it is necessary to consider the passage on which Mr Rabinowitz particularly relied, within the framework of the relevant part of the judgment.

41. At the outset of its discussion in *Budapest Bank* of the second question in the reference, the CJEU explained, in classic terms, the difference between a restriction by object and a restriction by effect:

> "51. ... the Court has already held that, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition to be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (*Cartes Bancaires*, para 53 and the case-law cited).
>
> 52. As regards the account taken of the objectives pursued by a measure being assessed under Article 101(1) TFEU, the Court has already held that the fact that a measure is regarded as pursuing a legitimate objective does not preclude that measure from being regarded — in the light of the existence of another objective which is pursued by the measure and which, for its part, must be regarded as illegitimate, account being taken in addition of the content of that measure's provisions and of the context of which it forms a part — as having an object restrictive of competition (see, to that effect, *Cartes Bancaires*, para 70).
>
> 53. Furthermore, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (*Cartes Bancaires*, para 54 and the case-law cited).
>
> 54. Moreover, the concept of restriction of competition 'by object' must be interpreted restrictively. The concept of restriction of competition 'by object'

> can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for it to be found that there is no need to examine their effects, as otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of competition. The fact that the types of agreements envisaged in Article 101(1) TFEU do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant (see, to that effect, *Cartes Bancaires*, para 58 and the case-law cited).
>
> 55.Where the agreement concerned cannot be regarded as having an anticompetitive object, a determination should then be made as to whether that agreement may be considered to be prohibited by reason of the distortion of competition which is its effect. To that end, as the Court has repeatedly held, it is necessary to assess competition within the actual context in which it would occur if that agreement had not existed in order to assess the impact of that agreement on the parameters of competition, such as the price, quantity and quality of the goods or services (see, to that effect, *Mastercard CJ*, paras 161 and 164 and the case-law cited).

42. At paras 80 *et seq*., the Court turned to consider "the context of which [the agreement] forms part", as referred to in para 51 quoted above, for the purpose of determining whether it gave rise to a restriction by object:

> "80. Finally, with regard to the context of which the MIF Agreement formed a part, in the first place, it is true that, as the Commission maintains, the complexity of the card payment systems of the type at issue in the main proceedings, the bilateral nature of those systems in itself and the existence of vertical relationships between the different types of economic operators concerned are not, in themselves, capable of precluding classification of the MIF Agreement as a restriction 'by object' (see, by analogy, Case C-32/11 *Allianz Hungária Biztosító and Others*, EU:C:2013:160, para 43 and the case-law cited). That said, the fact remains that such an anticompetitive object must be established.
>
> 81.In the second place, it was argued before the Court that competition between the card payment systems in Hungary triggered not a fall but an increase in the interchange fees, contrary to the disciplinary effect on prices which competition normally exerts in a market economy. According to those arguments, this is due, inter alia, to the fact that merchants can exert only limited pressure on the determination of the interchange fees, whereas it is in the issuing banks' interest to derive revenue from higher fees.
>
> 82. In the event that the referring court were also to find there to be, a priori, strong indications capable of demonstrating that the MIF Agreement triggered such upwards pressure or, at the very least, contradictory or ambivalent evidence in that regard, such indications or evidence cannot be ignored by that court in its examination of whether, in the present instance, there is a restriction 'by object'. Contrary to what it appears may be inferred from the Commission's written observations in this connection, the fact that, if there had been no MIF Agreement, the level of interchange fees resulting from competition would have been higher is relevant for the purposes of examining whether there is a restriction resulting from that agreement, since such a factor specifically concerns the alleged anticompetitive object of that agreement as regards the acquiring market in Hungary, namely that that agreement limited

> the reduction of the interchange fees and, consequently, the downwards pressure that merchants could have exerted on the acquiring banks in order to secure a reduction in the service charges.
>
> 83.In addition, if there were to be strong indications that, if the MIF Agreement had not been concluded, upwards pressure on interchange fees would have ensued, so that it cannot be argued that that agreement constituted a restriction 'by object' of competition on the acquiring market in Hungary, an in-depth examination of the effects of that agreement should be carried out, as part of which, in accordance with the case-law recalled in paragraph 55 of the present judgment, it would be necessary to examine competition had that agreement not existed in order to assess the impact of the agreement on the parameters of competition and thereby to determine whether it actually entailed restrictive effects on competition.
>
> 84. In the third and final place, it should be noted that the fact, pointed out by the referring court, that the banks which were parties to the MIF Agreement included, without distinction, the operators directly concerned by the interchange fees, namely both issuing banks and acquiring banks, which, moreover, often engage in both issuing and acquiring activities, is also relevant in examining whether that agreement may be classified as a restriction 'by object'.
>
> 85.In particular, although such a fact by no means precludes, in itself, a finding of a restriction of competition 'by object' in respect of an agreement such as that at issue in the main proceedings, it may be of some relevance in assessing whether the MIF Agreement had the objective of ensuring a degree of balance within each of the card payment systems concerned in the present instance. Not only were the issuing and acquiring banks able to seek, by means of that agreement, a way of reconciling their potentially divergent interests, but the banks that were present on both the issuing and the acquiring market perhaps also intended to attain a level of interchange fees that enabled their activities on those two markets to be best protected."

43. The *Budapest Bank* judgment says nothing about the so-called asymmetric counterfactual or the death spiral argument for the purpose of considering either a restriction by effect or ancillary restraints/objective necessity. That is unsurprising, since the second question addressed by the CJEU in *Budapest Bank* (see para 33 above) concerned only an objects case and no question concerning the nature of an analysis of restriction by effect was before the court. But Mr Rabinowitz relied on what is said in paras 82 and 83 of the judgment. At para 81, the CJEU refers to the argument raised before the referring court that competition between Visa and Mastercard in Hungary would lead to an increase in interchange fees. At para 82, the CJEU refers to the possibility that examination of the facts might show that, in the absence of the MIF Agreement, "the level of interchange fees resulting from competition would have been

higher." In para 83, the CJEU states that, if this were a strong possibility, such that the agreement cannot be held to be a restriction by object, then:

> "it would be necessary to examine competition had that agreement not existed in order to assess the impact of the agreement on the parameters of competition and thereby to determine whether it actually entailed restrictive effects on competition."

Mr Rabinowitz argued, and we accept, that the CJEU was here referring to the analysis that would have to be carried out to determine if there was a restriction by effect.

44. Mr Rabinowitz submitted that in these passages the CJEU was clearly envisaging the possibility of there being positive MIFs in the counterfactual, and that the counterfactual for the purpose of an effects analysis should therefore exclude the effect of regulation or intervention by the competition authority to prevent any MIF above zero. He submitted that the reasoning and conclusion of the Court of Appeal, based on its analysis of *Mastercard GC* and *Mastercard CJ*, cannot stand alongside this approach. The proper approach to the counterfactual in these circumstances was therefore at least unclear and was an issue for the CJEU to resolve.

45. However, we consider that this reads far too much into these passages in *Budapest Bank*, which have to be considered in context. This was a request for a preliminary ruling, where the CJEU confines itself to the particular questions submitted by the referring court. To answer the second question in the reference, the CJEU was considering whether, in the light of the arguments advanced before the referring court, the necessary legal conditions were met for an infringement by object to be found. Moreover, the agreement which the CJEU was addressing was an agreement between all the banks to set a common MIF for both the Visa and Mastercard systems. In its brief reference to analysis of the competitive effect of that agreement, the Court was naturally focussing on the contrary situation where there would be no common MIF. As Ms Smith QC pointed out, this says nothing about the relevant counterfactual to be applied when analysing a different restrictive arrangement, i.e. a MIF confined to one payment system.

46. The question whether the application of EU law mandated an asymmetric counterfactual, let alone taking account of the death spiral argument, in an effects case was therefore irrelevant to the particular issue before the CJEU in *Budapest Bank*. We see nothing in these brief extracts that casts any doubt on the legal analysis of those effects issues in the CA judgment. Nor was any question raised in *Budapest Bank* about the application of the ancillary restraints doctrine.

47. Furthermore, in the various English proceedings, the anticompetitive effect alleged concerned only the acquiring market. The Court of Appeal held, on the basis of EU jurisprudence, that when considering the acquiring market, the counterfactual comprised the situation on that market and it was not permissible to consider the effect of competition on another market (and thus the death spiral through competition from the other payment scheme on the issuing market). That conclusion is not affected by *Budapest Bank*, where the restriction was directly in the inter-systems market, and therefore the counterfactual would involve the situation on that market, and thus competition between the Mastercard and Visa payment schemes.

48. The problem with Mr Rabinowitz's argument is that it seeks to prove too much. If the passages on which he relied have any relevance, it is because they might suggest that the CJEU was contemplating the possibility of a counterfactual with positive MIFs, not zero MIFs, for both the Visa and Mastercard systems. Indeed, Mr Rabinowitz said that this is the central point on which *Budapest Bank* is inconsistent with the CA judgment. But if so, the inconsistency applies as much to the judgment of the Supreme Court, which held, on the basis of *Mastercard CJ,* that the restrictive effect was based on a counterfactual of a zero MIF or a rule requiring settlement at par. Mr Rabinowitz frankly acknowledged this, in response to a question from the Tribunal:

> "We are in a conundrum now, because you can't have, as the CJEU thought in *Budapest Bank* -- or at least contemplated the possibility of positive, standard, uniform MIFs being agreed and the Supreme Court, and indeed the Court of Appeal, saying effectively that is, of itself, anti-competitive."

49. However, in the first place, the Supreme Court reached its conclusion on the restrictive effect of a positive MIF after taking account of *Budapest Bank* and

hearing submissions from the parties on the implications of that judgment for what it termed "the restriction issue", i.e. whether the MIF arrangement was a restriction of competition in the acquiring market contrary to Art 101(1). Having found that *Mastercard CJ* led to an affirmative answer to that question, both as a matter of law and of reasoning, the Supreme Court held that this was not affected by *Budapest Bank*. The Court therefore rejected the submissions of Mastercard and Visa that in *Budapest Bank*:

> "... the CJEU has found that setting a floor under prices in the acquiring market does not necessarily amount to a restriction of competition, either by object or effect."

50. It may well be that before the Supreme Court the arguments on *Budapest Bank* were framed differently to the arguments now put forward on behalf of Visa. But it is inconceivable that the Supreme Court did not read the whole of that judgment and pay regard to it in reaching its conclusion that *Budapest Bank* could "clearly" be distinguished from the cases before it. That conclusion is binding on this tribunal.

51. Secondly, even aside from the Supreme Court judgment, it is inconceivable that in *Budapest Bank* the CJEU was seeking, *sub silentio*, to depart from or qualify its very full judgment in *Mastercard CJ.* The Commission had strongly relied on *Mastercard CJ* in its submissions in *Budapest Bank*: see the Opinion of Advocate General Bobek, EU:C:2019:678, at para 64. The CJEU in its judgment expressly refers to *Mastercard CJ*: see at para 55. One of the judges who decided *Budapest Bank* had been the presiding judge of the chamber of the CJEU which decided *Mastercard CJ.* As explained in both the CA judgment and the Supreme Court judgment, in *Mastercard CJ* the CJEU determined that the correct counterfactual was a 'no default MIF' with a prohibition on *ex post* pricing. Accordingly, once *Budapest Bank* is properly understood, as discussed above, there is no conundrum.

52. We should add that we did not derive any assistance for the issue before us from the judgment of Supreme Court of Hungary given after the CJEU ruling in the *Budapest Bank* proceedings, to which we were referred in translation.

53. Accordingly, the basis for Visa's application for a reference falls away.

F. CONCLUSION

54. We therefore find that there is no justification, within the terms of Art 267 TFEU, to refer the proposed question to the CJEU in order to decide the three cases pending before the CAT.

55. In the light of that conclusion, it is unnecessary to address the alternative argument put forward by the Claimants on the basis of abuse of process.

56. This judgment is unanimous.

The Honourable Mr Justice Roth
President

Tim Frazer

Paul Lomas

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

Date: 22 December 2020