Neutral citation [2023] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 March 2023

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
THE HONOURABLE LORD ERICHT
JANE BURGESS

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Defendants

Heard at Salisbury Square House on 12, 13, 16 and 17 January 2023

JUDGMENT (PRELIMINARY ISSUES)

APPEARANCES

Ms Marie Demetriou KC, Ms Victoria Wakefield KC and Ms Morag Ross KC (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative.

Ms Sonia Tolaney KC, Mr Matthew Cook KC, Mr David Johnston KC, Mr Ewen Campbell and Mr Daniel Benedyk (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. Mr Merricks as the class representative ("CR") brings these collective proceedings on an opt-out basis for a class comprising all individuals aged 16 and above and resident in the UK who between 22 May 1992 and 21 June 2008 ("the relevant period") purchased goods and/or services from businesses selling in the UK that accepted Mastercard cards. We shall refer to such persons as class members ("CMs"). A collective proceedings order ("CPO") was made by the Tribunal on 18 May 2022. The proceedings have already been the subject of a number of judgments of the Tribunal and the appellate courts, both before and after the CPO.

2. On 19 December 2007, the European Commission ("the Commission") adopted a decision finding that the Defendants ("Mastercard") had infringed Art 101 of the Treaty on the Functioning of the European Union ("TFEU") based on the rules and decisions of Mastercard concerning the cross-border EEA multilateral interchange fees ("MIFs") to be charged by cardholders' issuing banks to merchants' acquiring banks: COMP/34.579 and COMP/36.518 *Mastercard* ("the Decision"). Appeals against the Decision to the General Court and subsequently the Court of Justice of the EU ("CJEU") were dismissed. The CJEU judgment was issued on 11 September 2014: Case C-382/12P *Mastercard v Commission*, EU:C:2014:2201.

3. The present proceedings are follow-on claims for damages alleged to arise by reason of the infringement found in the Decision. The CR contends, in essence, that the EEA MIFs that were the subject of the Decision were causative of the domestic MIFs set by Mastercard; that those MIFs were passed through by acquiring banks in the charges they levelled on merchants for processing card transactions (the merchant service charge or "MSC"); and that the merchants passed through in whole or in part the MSC in the prices charged to their customers in the UK. A more detailed outline of the arrangements can be found in the judgment of the Supreme Court concerning the issue of a CPO in these proceedings: [2020] UKSC 51 at [6]-[10].

4. On the basis that there was such an overcharge to the CMs, the CR seeks aggregate damages on behalf of the class. Following the Tribunal's decision of 20 September 2022 [2022] CAT 43, the amended Claim Form seeks damages also for a run-off period beyond the end of the relevant period, but that is not relevant for the purpose of this judgment. The total size of the class is estimated at 45.5 million and the aggregate damages claimed (including interest to 28 September 2022) are estimated at over £16.7 billion, excluding the further damages claimed for the run-off period. On any view, this is a gargantuan claim.

5. At a case management conference held in September 2022, with the agreement of both sides, the Tribunal decided that the trial of the action should proceed in stages as that would be more manageable and efficient, with potentially very significant costs savings according to how those stages were resolved. On that basis, the Tribunal determined that several preliminary or split issues should be heard as the first stage in January 2023. As subsequently revised in the hearing and following the Tribunal's decision to permit the CR to re-amend his Reply, those issues are:

   (1) Is the application of the general legislation on limitation/prescription precluded by the Competition Act 1998 ("CA 1998") and the Competition Appeal Tribunal Rules ("the CAT Rules")? ("the Limitation/Prescription issue");

   (2) If the answer to question (1) is no, does s. 11(2) of the Prescription and Limitation (Scotland) Act 1973 ("PLSA 1973") apply to the claims insofar as they are governed by Scots law? ("the PLSA s. 11(2) issue");

   (3) For the purpose of limitation or prescription, what law governs the claims by CMs in relation to transactions with foreign merchants? ("the Proper Law issue");

   (4) As a matter of law, is Mastercard entitled to advance a counterfactual based on an alternative, exemptible EEA MIF pursuant to Art 101(3) TFEU? ("the Exemptibility issue").

6. For convenience, the relevant statutory provisions relating to issues (1)-(3) are set out in an Appendix to this judgment.

B. FORUM

7. Rule 18 of the Competition Appeal Tribunal Rules 2015 (the "2015 Rules") provides, insofar as relevant:

> "**Forum**
>
> 18 — (1) The Tribunal, after taking into account the observations of the parties, may at any time determine whether any proceedings, or part of any proceedings, before it are to be treated, for all or for any purpose (including a purpose connected with any appeal from a decision of the Tribunal made in those proceedings) as proceedings in England and Wales, in Scotland or in Northern Ireland.
>
> …
>
> (3) In making a determination under paragraph (1), the Tribunal may have regard to all matters which appear to it to be relevant and in particular the part of the United Kingdom where—
>
> (a) any individual party to the proceedings is habitually resident or has its head office or principal place of business;
>
> (b) the majority of the parties are habitually resident or have their head offices or principal places of business;
>
> (c) any agreement, decision or concerted practice to which the proceedings relate was made or implemented or intended to be implemented;
>
> (d) any conduct to which the proceedings relate took place;
>
> (e) in collective proceedings or proceedings concerning a collective settlement, the place where the class representative or settlement representative is habitually resident or has its head office or principal place of business.
>
> (4) Without prejudice to paragraph (3), in making a determination under paragraph (1) for the purposes of a claim under section 47A (claims for damages etc.) or section 47B (collective proceedings) of the 1998 Act(a), the Tribunal may have regard to the law which is applicable to the claim."

8. One important aspect of the determination made under this provision is that, as rule 18(1) indicates, it may determine the route of any appeal: s. 49(3) CA 1998.

9. By order made on 21 November 2016, the Tribunal held that the proceedings shall be treated as proceedings in England and Wales.

10. However, rule 18(1) is framed in broad and flexible terms. With the emergence of the PLSA s. 11(2) issue, the Tribunal has revisited the question of the forum. We consider that if there should be any appeal against our decision on that issue, it is more satisfactory and appropriate that it should go to the Court of Session in Scotland rather than to the Court of Appeal of England and Wales. Having raised this with the parties, both sides concurred. We shall accordingly direct that as regards the PLSA s. 11(2) issue and for the purpose of any appeal, the proceedings shall be treated as proceedings in Scotland. All other parts of the proceedings (and the entire proceedings save for the purpose of any appeals) shall continue to be proceedings in England and Wales.

C. THE LIMITATION/PRESCRIPTION ISSUE

11. As noted above, the relevant period for the claims starts on 22 May 1992. Mastercard contends that in the case of claims governed by English law, insofar as they are based on transactions prior to 20 June 1997 they are time-barred; and in the case of claims governed by Scots law, insofar as they are based on transactions prior to 20 June 1998 they are time-barred. This is said to follow from the effect of, respectively, the English law on limitation and the Scots law on prescription, as at the time when the original s. 47A CA 1998 and the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") came into force, i.e. 20 June 2003. The CR contends that all the claims are entirely within time, on the basis of s. 47A CA 1998 and rule 31(1)-(3) of the 2003 Rules, applied by reason of rule 119(2) of the 2015 Rules.

12. To explain the contrasting position of the two sides, it is necessary to visit again the vexed question of the transitional provisions under the CAT Rules. They were the subject of detailed consideration by the Tribunal in *DSG Retail Ltd v Mastercard Inc* [2019] CAT 5 ("*DSG CAT*") and then by the Court of Appeal, largely reversing the Tribunal's conclusions in [2020] EWCA Civ 671 ("*DSG CA*"). The outline of the legislative framework that follows draws on the description in *DSG CAT* which is not contentious and was adopted in *DSG CA*, but here takes account also of the Scottish position which was not addressed in *DSG*.

13. Prior to 2003, a private action claiming damages for breach of competition law could be brought only in the civil courts (i.e. in England and Wales, the High Court; in Scotland, the Court of Session; in Northern Ireland, the High Court of Northern Ireland). The Enterprise Act 2002 ("EA 2002") introduced a new s. 47A into the CA 1998, with effect from 20 June 2003, governing claims that may be brought before the Tribunal.

14. In its original form, s. 47A provided, in material part:

> "(1) This section applies to—
>
> > (a) any claim for damages, or
> >
> > (b) any other claim for a sum of money,
> >
> > which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.
>
> (2) In this section, "relevant prohibition" means any of the following –
>
> > (a) the Chapter I prohibition;
> >
> > (b) the Chapter II prohibition;
> >
> > (c) the prohibition in Article 81(1) of the Treaty;
> >
> > (d) the prohibition in Article 82 of the Treaty.
>
> (3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.
>
> (4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.
>
> (5) But no claim may be made in such proceedings—
>
> > (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and
> >
> > (b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision."

15. The decisions mentioned in s. 47A(6) were a decision of either the Office of Fair Trading or the Tribunal on appeal or, in respect of European competition law, a decision of the Commission. And the periods mentioned in s. 47A(7)-(8) were the period during which an appeal against the decision may be brought or, if an appeal was brought, the period before that appeal was determined: i.e.,

effectively the period until the decision became final. Accordingly, as regards the Decision that is the foundation of the present proceedings, the period for the purpose of s. 47A(8) ended on 11 September 2014 with the judgment of the CJEU: para 2 above.

16. The result was that the Tribunal's jurisdiction in damages claims was (i) confined to follow-on damages; (ii) could not be invoked before the relevant authority had taken a decision that the relevant prohibition had been infringed (an "infringement decision"); and (iii) if the infringement decision was under appeal, could be invoked before the determination of that appeal only with the permission of the Tribunal. The jurisdiction was subject to a new, special time-limit set out in rule 31 of the 2003 Rules: see para 27 below.

17. The special, but circumscribed, jurisdiction under s. 47A applied only to the Tribunal. Section 47A(10) expressly preserved the right to bring any other proceedings in respect of the claim. Accordingly, there was a parallel jurisdiction for claims for follow-on damages in the courts, which were subject to the ordinary rules on limitation/prescription that apply to such actions there. Stand-alone claims could be brought only in the courts.

18. The jurisdictional landscape changed dramatically with the coming into force of the Consumer Rights Act 2015 ("CRA 2015") on 1 October 2015. This substituted a new s. 47A, of which the material provisions are as follows:

> "(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.
>
> (2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—
>
> > (a) the Chapter I prohibition,
> >
> > (b) the Chapter II prohibition,
> >
> > (c) the prohibition in Article 101(1), or
> >
> > (d) the prohibition in Article 102.
>
> (3) The claims are—

> (a) a claim for damages;
>
> (b) any other claim for a sum of money;
>
> (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.
>
> (4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded."

19. Section 47A(6) defines an "infringement decision" to mean a decision of the Competition and Markets Authority ("CMA"), or the Tribunal on appeal from the CMA, that the Chapter I or Chapter II prohibition or Art 101(1) or Art 102 TFEU have been infringed, or a decision of the Commission that Art 101(1) or Art 102 have been infringed. Section 47A(5) is analogous to the old s. 47A(10) in preserving the right to bring claims in the courts: see para 17 above.

20. At the same time, a new s. 47B CA 1998 introduced the innovative regime for collective proceedings (replacing a much more limited, and little used, provision which had enabled a specified body to bring claims on behalf of consumers with their consent). The new s.47B(1) states:

> "Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings")…"

21. Accordingly, since 1 October 2015 the Tribunal has had full jurisdiction for competition damages claims, whether follow-on or stand-alone, that is parallel to the jurisdiction of the courts. And in addition, the Tribunal has exclusive jurisdiction for collective proceedings.

22. The CRA 2015 also introduced a new s. 47E into the CA 1998 providing for limitation and prescription. This provides, in material part:

> "(1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—
>
> (a) proceedings under section 47A, or
>
> (b) collective proceedings at the commencement of those proceedings.
>
> (2) Where this subsection applies—

> (a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;
>
> (b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;
>
> (c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court established by law."

23. Sub-sections 47E(3)-(6) contain provisions addressing the situation where a claim which was included in collective proceedings commenced under s. 47B was to be subsequently made under s. 47A (e.g. because the Tribunal refused to grant a CPO or subsequently revoked a CPO). Accordingly, subject only to those special provisions, proceedings before the Tribunal were subject to the same provisions regarding limitation and prescription that apply in the civil courts.

24. However, although the new s. 47A applies to claims whenever arising, the new s. 47E on limitation applies only to claims arising after 1 October 2015: CRA 2015, Sch 8, paras 4(2) and 8(2). Moreover, s. 47E has itself now been repealed by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385), reg 3 ("the 2017 Regulations"). The 2017 Regulations introduced Sch 8A into the CA 1998, which includes in Part 5 new and comprehensive limitation and prescriptive periods governing competition claims in both the courts and the Tribunal. But Part 5 of Sch 8A only applies, and the repeal of s. 47E only takes effect, as regards claims relating to loss or damage suffered after 9 March 2017: Sch 8A, para 42 and Sch 2, para 5(2) of the 2017 Regulations.

25. Accordingly, neither s. 47E nor Part 5 of Sch 8A apply to the present proceedings.

26. The EA 2002 s. 15 and Sch 4 provides for the making of rules with respect to proceedings before the Tribunal. The 2003 Rules and replacement 2015 Rules were made pursuant to those provisions.

27. Rule 31 of the 2003 Rules stated:

> "**Time limit for making a claim for damages**
>
> 31.—(1) A claim for damages must be made within a period of two years beginning with the relevant date.
>
> (2) The relevant date for the purposes of paragraph (1) is the later of the following—
>
> (a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;
>
> (b) the date on which the cause of action accrued.
>
> (3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.
>
> (4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A."

28. The 2015 Rules came into effect on 1 October 2015, corresponding to the new provisions of the CA 1998 introduced by the CRA 2015, including the collective proceedings regime. By r. 118 of the 2015 Rules, the 2003 Rules were revoked. The 2015 Rules contained no substitute provisions for the old r. 31. At that point, and as set out above, limitation and prescription was to be governed by the new s. 47E. However, since s. 47E did not apply to claims arising before 1 October 2015, the 2015 Rules contained a savings provision in r. 119, as follows:

> "**Savings**
>
> 119.—(1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") as if they had not been revoked.
>
> (2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—
>
> (a) proceedings under section 47A of the 1998 Act, or
>
> (b) collective proceedings.
>
> (3) A claim falls within this paragraph if—

(a) it is a claim to which section 47A of the 1998 Act applies; and

(b) the claim arose before 1st October 2015.

(4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015(c) continue to apply to the extent necessary for the purposes of paragraph (2)."

29. We make two observations regarding r. 31 of the 2003 Rules and r. 119 of the 2015 Rules:

(1) r. 31(4) applies only to the expiry of a limitation period; it does not cover the period of prescription under Scots law; and

(2) r. 119(2) preserves only r. 31(1)-(3); it does not preserve r. 31(4). In *DSG CAT*, the Tribunal stated that this omission must be deliberate; the Court of Appeal did not dissent from that view: *DSG CA* at [60].

30. The present proceedings were started after 1 October 2015 but comprise claims which arose before 1 October 2015. Accordingly, they fall within r. 119(3) of the 2015 Rules and are therefore subject to r. 119(2). They are therefore governed by r. 31(1)-(3) of the 2003 Rules. It is on that basis that the proceedings could be commenced on 6 September 2016, just within two years of the judgment of the CJEU. However, the 2003 Rules, which introduced this exceptional "two years after final decision" limitation provision, came into force on 20 June 2003.

31. Section 16(1) of the Interpretation Act 1978 ("IA 1978") states, insofar as relevant:

"(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

(a) revive anything not in force or existing at the time at which the repeal takes effect;

[…]

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment…"

This provision applies to the whole of the UK.

32. In *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553, the Privy Council held, as set out in the judgment of Lord Brightman at 563:

> "… an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable."

33. Moreover, it is notable that the Scots law of prescription involves a fundamentally different approach from the English law of limitation. Whereas the expiry of a limitation period under English law operates to bar the pursuit of a valid claim, under Scots law once the period of prescription expires the underlying obligation is extinguished.

34. In *DSG CA*, the Court of Appeal held that in competition damages actions started in the Tribunal prior to 1 October 2015, claims for which the limitation period had expired before 20 June 2003 remained time-barred. (The Court did not specifically address prescription since Scots law was not engaged in those proceedings.) Accordingly, if individual CMs had brought their claims against Mastercard in, say, January 2015, they would have been subject to this regime.[1] Because these proceedings for all CMs were started after 1 October 2015, they are subject to the 2015 Rules, which revoked the 2003 Rules. But rule 119 of the 2015 Rules does not express a contrary intention, for the purpose of s. 16(1)(a) and (c) IA 1978, either to affect any pre-existing right of a defendant to plead a time bar by reason of the expiry of the limitation period or to revive an obligation which had previously been extinguished by prescription. While the omission of incorporation of r. 31(4) of the 2003 Rules in r. 119 may appear surprising, we consider that this omission cannot lead to an "unavoidable" construction of r. 119 as affecting previously acquired rights of limitation; and it has no bearing in any event on the prescription period since that was never within the scope of r. 31(4): para 29(1) above.

35. The argument for the CR therefore rested primarily on the terms of s. 47A CA 1998, and in particular on s. 47A(4) which states:

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[1] Collective proceedings could not have been brought prior to 1 October 2015 since that is when the new regime introducing such proceedings came into force: para 21 above.

> "(4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded."

36. The correct interpretation and effect of this provision was fully considered by the Tribunal in *Deutsche Bahn AG v Mastercard Inc, Peugeot Citroen Automobiles UK Ltd v Pilkington Group Ltd* [2016] CAT 14, addressing in a single judgment a common argument on limitation that arose in two separate actions. There, s. 47A(4) was relied on by the claimants to argue that it had the effect of excluding the Foreign Limitation Periods Act 1984 ("FLPA") and the Scottish and Northern Irish equivalents,[2] so that the defendants were not entitled to rely on foreign law of limitation/prescription in answer to the claims (insofar as the claims were governed by foreign law).

37. The Tribunal rejected that argument. The judgment states at [56]-[59]:

> "56. Considering the current sect 47A, which applies to both the present claims, we agree with the claimants that sect 47A(1) may conveniently be considered as comprising two limbs:
>
> > "[LIMB 1] A person may make a claim to which this section applies in proceedings before the Tribunal, [LIMB 2] subject to the provisions of this Act and Tribunal rules."
>
> The original sect 47A(4) was to the same effect, although the phrases were differently ordered: see para 22 above.
>
> 57. Determination of the claims to which the section applies for the purpose of limb 1 is made according to sects 47A(2)-(4) and the definition of "infringement decision" in sect 47A(6). Therefore, it is for that purpose that any limitation rules or rules of prescription that would apply are disregarded under sect 47A(4). Thus, both the Pilkington and MasterCard claims fall within sect 47A and may be brought before the Tribunal, irrespective of any limitation defence under domestic or foreign law. The claimants accepted that sect 47A(4) does not in itself have the effect of excluding the application of the FLPA for all purposes, and in our view they were right to do so.
>
> 58. As regards limb 2, the claimants submitted that this establishes the CA and Tribunal Rules are a "distinct, sui generis scheme", which allowed no scope for the application of any external limitation rules save as expressly incorporated – as they are under the new sect 47E. However, in our judgment, the wording of limb 2 does not bear the weight which the claimants seek to thrust upon it. It of course means that the provisions of the CA and the Tribunal Rules will apply to a claim under sect 47A, but there is nothing in this language to require the exclusion

[2] PLSA s. 23A and The Foreign Limitation Periods (Northern Ireland) Order 1985.

> of otherwise applicable enactments. Indeed, since the express exclusion of limitation or prescription rules under sect 47A(4) is confined to determining the application of limb 1, those rules will continue to apply for all other purposes save as overridden by express provisions elsewhere in the CA and Tribunal Rules.
>
> 59. For claims arising before 1 October 2015, there are special provisions of limitation and prescription in rule 31: para 24 above. However, there is nothing in the language of that rule to suggest that it overrides the FLPA (or the equivalent statutory provisions in Scotland and Northern Ireland)."

38. Although not technically bound by that conclusion, we see no reason to differ from it, and indeed Ms Demetriou KC appearing for the CR did not suggest that that case was wrongly decided. We consider that it is clear that s. 47A has to be read as a whole. The statutory requirement to "disregard" limitation or prescription rules is not unlimited but, on the contrary, expressly directed to be "[f]or the purpose of identifying claims which may be made in civil proceedings" and therefore relates back to the jurisdiction of the Tribunal in private actions as defined by s. 47A(1)-(3). The sub-section precludes any argument that the jurisdiction of the Tribunal cannot be engaged because the claim cannot be made in civil proceedings because it is out of time.

39. We would reach that view, following *Deutsche Bahn/Pilkington,* even without having regard to s. 16(1) IA 1978. However, that provision reinforces this conclusion, since the requirement to disregard limitation/prescription rules for a specified purpose is far short of a statutory repeal nor does it express an intention more generally to revive an obligation extinguished by prescription or affect a right to plead a time-bar in the clear terms that would be required.

40. We have arrived at this conclusion by interpreting the statutory provisions in the light of established principles and authority. But our conclusion is strongly supported by the view of the Court of Appeal in *DSG CA*. In the actions subject to those proceedings, the Tribunal had given a somewhat strained construction to r. 31(4) so as to achieve consistency with its view that r. 119(2) by its incorporation of r. 31(1)-(3) but not r. 31(4) meant that the limitation period under the Limitation Act 1980 would not apply to claims which arose before 1 October 2015 but were commenced after that date: *DSG CAT* at [35]-[43]. (As set out above, we have come to a different view and do not consider that the

omission of r. 31(4) in itself can establish that result.) However, on appeal, the Court of Appeal reversed the Tribunal's construction of r. 31(4). The issue before the Tribunal regarding claims started after 1 October 2015 was no longer live before the Court of Appeal because the Europcar action raising that issue had settled. But the Court of Appeal addressed that issue since it raised the same concern to achieve consistency with the different construction which the Court had given to r. 31(4). Sir Geoffrey Vos C said in his judgment (with which Flaux and Newey LJJ agreed), at [59]-[60]:

> "59. … I do not think it is an inevitable conclusion that, in proceedings started after 1 October 2015, but which arose before that date, the preservation of rule 31(1)-(3), but not rule 31(4), by rule 119(2) has the automatic effect of expunging a defendant's right to rely upon an accrued right to claim that some of the losses claimed are time-barred. It should be emphasised that we are not asked to decide this question on this appeal, because the Europcar proceedings, which raised the point, were compromised shortly before the appeal hearing began.
>
> 60. The legislator's decision in 2015 to apply rule 31(4) to proceedings begun before 1 October 2015, but not to those begun afterwards may have been deliberate, as the Tribunal suggested. But that does not inform the question of whether, in the absence of rule 31(4), accrued limitation rights are to be abrogated. I accept it would be illogical and unsatisfactory to determine that those rights survived in proceedings started before 1 October 2015, but did not in proceedings started after 1 October 2015. Once, however, one accepts, as I think one must, that I have adopted the correct construction of rule 31(4), its disapplication to proceedings started after 1 October 2015 does not compel the conclusion that accrued limitation rights are being overridden. Instead, the extant legislation must be construed in accordance with section 16(1). Rule 31(4) may be disapplied, but that disapplication cannot, unless the contrary intention appears, "(c) affect any right … acquired under that enactment …". A contrary intention does not appear in the 2015 Rules. I cannot see anything in what Lord Bridge said in *Arnold* at pages 271-2 that contradicts that approach. I do not accept that *Yew Bon Tew* was departed from in *Arnold*, but I do not think a complete analysis of either case is required, since I repeat that I do not find rule 31(4) ambiguous. Finally, in this connection, it is to be noted that the new section 47E introduced in 2015 restored the application of the Limitation Act 1980 for claims arising after 1 October 2015. Although neither the Dixons nor the Europcar proceedings did arise after that date, the 2015 legislation was restoring the Limitation Act 1980 regime to follow-on claims, which gives no indication that the legislator would have been intending at the same time to revive statute barred claims in proceedings issued after the same date that arose before it."

41. Ms Demetriou said that this part of the judgment is *obiter* and therefore not binding on the Tribunal, and she submitted that it was wrong. She relied in that respect on her arguments concerning s. 47A CA 1998, which was not considered

by the Court of Appeal, and contended that if that view were correct, r. 31(4) was redundant. We think she may strictly be right that the passage cited above is *obiter*: see the emphasis in [59] that "we are not asked to decide this question on this appeal". But these observations were nonetheless relevant to the Court's decision on the construction of r. 31(4) because of the Court's desire to achieve consistency as between proceedings started before and proceedings started after 1 October 2015. And on any view, such a considered opinion of a very strong Court of Appeal is clearly highly persuasive. Even if *obiter*, we respectfully think it is correct.

42. If the CR's argument were right then, as Ms Demetriou acknowledged, proceedings commenced before 1 October 2015 might be subject to a time bar in respect of claims arising prior to 20 June 1997, whereas proceedings commenced after 1 October 2015 in respect of claims arising in the same period would not be time barred. We cannot imagine that the legislator could have intended such an illogical outcome and, like both the Tribunal and the Court of Appeal in *DSG*, we consider that the relevant legislative provisions should be construed insofar as possible to avoid this result. As set out above, it is perfectly possible to do so.

43. We should add that although in its Defence Mastercard pleads that the claims for transactions prior to 20 June 1997 were time-barred pursuant to r. 31(4) of the 2003 Rules, the CR was clearly correct in asserting that r. 31(4) has no application to the present claims because of the terms of r. 119(2) of the 2015 Rules, and we note that counsel for Mastercard did not seek to rely on r. 31(4) in their written or oral submissions. In the light of this, we do not think it is necessary to reach a view as to why it was thought appropriate to include r. 31(4) in the 2003 Rules.

D. THE PLSA S. 11(2) ISSUE

44. Section 6 PLSA 1973 provides, insofar as material:

> **"6. Extinction of obligations by prescriptive periods of five years.**

> (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
>
> > (a) without any relevant claim having been made in relation to the obligation, and
> >
> > (b) without the subsistence of the obligation having been relevantly acknowledged,
>
> then as from the expiration of that period the obligation shall be extinguished:
>
> …
>
> (3) In subsection (1) above the reference to the appropriate date … is a reference to the date when the obligation became enforceable."

45. Sub-section 6(4) sets out a derogation from the prescriptive period in certain circumstances where fraud of the debtor or an error induced by his words or conduct induced the creditor to refrain from making a claim. That provision is relied on by the CR, but involves factual considerations and is not the subject of a preliminary issue at this stage. However, the CR also relies on the special provision in s. 11(2) PLSA. Section 11 of the statute provides, insofar as relevant:

> "**11. Obligations to make reparation**
>
> (1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.
>
> (2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased."

46. It is not in dispute that any obligation to pay damages for breach of competition law falls within s. 11(1).

47. The operation of s. 11(2) PLSA was explained by Lord Reed (with whose judgment Lords Neuberger and Sumption agreed) in *David T Morrison & Co Ltd t/a Gael Home Interiors v ICL Plastics Ltd* [2014] UKSC 48 at [12]:

> "Section 11(2)… sets out a special rule which applies where "as a result of a continuing act, neglect or default loss, injury or damage has occurred before

> the cessation of the act, neglect or default". Loss, injury or damage must therefore have been caused by an act, neglect or default, as in subsection (1). What is special is that the act, neglect or default is of a continuing nature, and that loss, injury or damage has occurred before the cessation of the act, neglect or default. In that situation, the right of action arises as soon as any material loss is suffered as a result of the default. The prescriptive period does not however begin to run on that date: the loss, injury or damage is deemed, for the purposes of subsection (1), to have occurred on the date when the default ceased. For the purposes of prescription, therefore, the loss is deemed to have occurred on a later date than (some of) it actually did."

48. The CR contends that the special rule in s. 11(2) applies in this case. Mastercard says that it does not. The argument on Scots law was presented by Ms Morag Ross KC for the CR and by Mr David Johnston KC leading Mr Ewen Campbell for Mastercard.

49. Guidance on the application of s. 11(2) was given in *Johnston v Scottish Ministers* (2006) SCLR 5 at [17]. Lady Dorrian set out two steps to be applied in determining whether the special rule applies:

> "In determining where an action comes within the ambit of section 11(1) or 11(2) one must first identify what the act, neglect or default is. Then one must consider whether it is continuing."

50. That case concerned a statutory instrument made by the Scottish Government in 1986 prohibiting carriage of certain kinds of nets in a British fishing boat. A fisherman whose nets were confiscated under the 1986 Order raised an action to recover his losses from the Scottish Government on the basis that the 1986 Order was in breach of EC law. The action had prescribed if s. 11(1) applied but had not prescribed if s. 11(2) applied. The court found that the action had prescribed, stating at [17]:

> "…the promulgation of the Order in 1986 was a completed act at that date and cannot properly be seen as a continuing act. The fact that the 1986 Order had continuing consequences does not make the passing of the order a 'continuing act'."

51. The analysis of the law in *Johnston v Scottish Ministers* has been followed in subsequent cases: e.g., *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2010] CSOH 57 at [6]; *John G Sibbald & Son Ltd v Johnston* [2010] CSOH 94 at [8]; *Shore Porters' Society of Aberdeen v Brown* [2021] CSOH 37 at [57]. It was not disputed by the parties.

52. The CR relied on Art 1 of the Decision which states that Mastercard had infringed Art 101 "from 1 January 1994 until 19 December 2007 … by in effect setting a minimum price merchants must pay to their acquiring bank…". Ms Ross submitted, in summary, that for the purposes of both competition law and prescription there was a single continuing wrong. The various decisions in the period of the infringement setting the EEA MIFs were all identical in character and forming part of the same continuing wrong of having a multilateral default intra-EEA MIF arrangement. *Johnston v Scottish Ministers* was distinguishable on the facts as it involved a completed act, the promulgation by the Scottish Government of an order. The pursuer there sought to present the wrong as the 'maintenance, prosecution and enforcement' of the Order but the court unsurprisingly considered that those were activities of a different character and could not be regarded as the same 'act'. By contrast, Ms Ross argued, the present is not a case where there was a past, completed act with continuing consequences. She submitted that the closest case to the current situation was *Shore Porters' Society.* That case concerned the keeping of accounts and the alleged "misallocations" of revenue and expenses between the two different departments of the Society. The defenders sought to characterise these payments as a series of discrete acts but Lady Wolffe considered that approach to be artificial and simplistic: [59]. On the pursuer's averments, the "act" was "a course of conduct or the institution of a practice with a view to inflating the profitability of the Working Department, whose constituent elements are the individual misallocations", and the Lord Ordinary held that those circumstances are capable of constituting a continuing act for the purpose of s. 11(2): [61].

53. Ms Ross also referred to Johnston, *Prescription and Limitation of Actions* (2nd edn, 2012), at para 4.64, where the author gave breach of competition law as an example of a continuing act for the purpose of s. 11(2) PLSA 1973. She said that he was right to do so.

54. Mastercard argued that the identification in the Decision of a single continuous infringement bore on the Commission's ability to impose penalties (now under Art 25(2) of the Modernisation Regulation) but was not determinative of prescription under national law. The infringement here was the setting of a minimum price through a positive MIF, and determination of that positive MIF

was an essential element of the restriction. The setting of a zero MIF would not be infringing. Here, Mastercard took a series of distinct decisions on different dates to set different MIFs, following a sophisticated procedure in several steps. Mr Johnston submitted that there was accordingly no continuous act but a number of separate decisions, each of which had continuing consequences until such time as a later decision superseded it. In that regard, the case was analogous to *Johnston v Scottish Ministers*. *Shore Porters* should be distinguished on the facts as it was not dealing with a *decision* which had continuing effects; and in any event, the opinion in that case was only to reject a challenge as to relevancy and to determine that evidence was required. As for para 4.64 of *Prescription and Limitation of Actions*, that was no more than a general statement of the law and could not apply to the facts of every case.

Analysis

55. The present proceedings are a follow-on action in respect of the Decision finding an infringement. That infringement comprised two, related elements: the rules which established the system for the MIFs and the individual decisions setting positive MIFs.

56. The procedures for setting the level of the individual fees are set out in detail in the Decision at recitals (136)-(137) and (156)-(167). In summary, the procedures changed after 14 September 2006. Before then, every two years consultants calculated issuing costs in a cost study. Several times a year, the management of the Third Defendant prepared proposals on the level of the fees based on the cost studies and other factors. The Business and Marketing Advisory Committee decided whether or not to endorse the proposals and forwarded them to the European Board (composed of delegates from the participating banks) who could adopt or reject the proposals. After 14 September 2006, the power to set the fees lay with the president and chief executive officer of the First Defendant, who delegated this to the chief operating officer ("COO"). Consultants continued to compile cost studies. The staff of the Third Defendant prepared proposals based on the cost studies and other factors. A proposal which involved significant changes had to be communicated to Global Technology and Operations. The proposal was

brought to the European Interchange Committee, which met at least once every quarter, and if positively recommended was then approved by the COO.

57. However, the infringement did not consist of each such individual rate-setting decision taken in isolation. The Commission found the infringement to be the scheme as a whole and both the elements of the scheme referred to above accordingly formed part of the infringement. That is apparent from operative articles of the Decision and the recitals that form the essential basis of that operative part.

58. In section 3, under the heading "Subject of this Decision", the Commission states:

> "118. This decision addresses the MasterCard MIF. The MasterCard MIF is a decision of an association of undertakings comprising MasterCard's network rules <u>and</u> decisions of the organisation's bodies/managers…
>
> 119. The MasterCard MIF <u>is anchored</u> in the MCI Byelaws and Rules, the MCII Bylaws and Rules, the Interchange and Service Fees Manual as well as in the Maestro Global rules that are all issued by MasterCard International Inc. <u>These rules determine the principle that acquiring banks must pay issuing banks an interchange fee</u>…" [emphasis added].

And the Glossary at p. 9 of the Decision states:

> "**MasterCard MIF** is used as a reference to the organisation's network rules <u>and</u> the decisions of its bodies/managers that determine the Intra-EEA fallback interchange fees …" [emphasis added]

59. References to the act of infringement being the scheme as a whole rather than the individual acts of setting the level of the fees can be found throughout the Decision. For example, in rejecting Mastercard's argument that after the initial public offering (IPO) of the First Defendant in May 2006 Mastercard ceased to be an association of undertakings, the Decision states:

> "397….the MIF remains to be [sic.] the faithful expression of the association's [i.e., the Mastercard organisation's] resolve to coordinate the commercial conduct of its members.
>
> 398…."<u>the association's network rules that form part of the MasterCard MIF as well as</u> decisions taken by the European Board and/or by MasterCard's President and CEO and/or his designee the COO of Mastercard Incorporated which implement these rules by setting concrete levels and types of fallback interchange fees… have been and still remain decisions of an association of

> undertakings within the meaning of Article 81(1) of the Treaty." [emphasis added]

60. The Commission's conclusion on Art 101(1) was expressed by reference to the "MasterCard MIF" (see the definition at para 58 above) and that it was accordingly the scheme as a whole (rather than individual decisions which set the levels of fee) which restricted competition:

> "663. The MasterCard MIF constitutes a decision of an association of undertakings….
>
> 664. That decision restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby sets a floor under the merchant fee. In the absence of the multilateral interchange fee the prices set by acquiring banks would be lower to the benefit of merchants and subsequent purchasers."

61. Moreover, Mastercard's arguments during the proceedings before the Commission, both as to Art 101(1) and as regards exemption under Art 101(3), as we discuss in more detail in section F of this judgment below, did not concern individual decisions setting the various MIFs or the levels of MIF but, as summarised in recital (155), characterised the MIF as "a mechanism to balance the demands" of cardholders and merchants. That mechanism was operated continuously by Mastercard throughout the relevant period.

62. The remedy imposed by the Commission was accordingly the cessation of the entire scheme and not simply the revocation of individual decisions on fee level:

> "759. In order to remedy the restriction of competition by [the Defendants] these undertakings should be obliged to cease and desist from determining in effect a minimum price merchants must pay for accepting payment cards by way of setting Intra-EEA fallback interchange fees.
>
> …
>
> 761. Accordingly, the legal entities representing the MasterCard payment organisation should be required to modify the organisation's network rules on interchange <u>and</u> to repeal all relevant decisions of the European Board and of MasterCard's Chief Operating Officer with respect to Intra-EEA fallback interchange fees…[etc]" [emphasis added]

63. In the usual way, the large number of recital paragraphs precede and explain the operative part of the Decision (sometimes referred to by the French term, the *dispositif*). Article 1 states:

> "From 22 May 1992 until 19 December 2007 the MasterCard payment organisation and the legal entities representing it, that is MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe S.p.r.1., have infringed Article 81 of the Treaty and, from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards."

64. The Commission goes on to order the practical steps which are necessary to bring the act of infringement to an end. Those steps are directed at the scheme as a whole, not solely at the individual decisions on the level of fee. Thus by Article 3, the Mastercard entities were required within six months of notification of the Decision not only to repeal the fees but also to modify the relevant network rules. That is a reference to the rules referred to in recital (119):

> "…These rules determine the principle that acquiring banks must pay issuing banks an interchange fee for each POS payment card transaction with a MasterCard or Maestro branded payment card except if the banks involved in the transaction bilaterally agreed to clear and settle at other conditions…"

65. The first step under the Scots law analysis is to identify the act or default which causes the loss. This is a follow-on action which seeks reparation for the loss caused by the infringement of competition law set out in the Decision. As is clear from the passages from the Decision set out above, the infringement was not confined to individual fee-setting decisions looked at in isolation. Indeed, there is no discussion in the Decision of particular, individual decisions. The decisions were not free-standing, isolated acts but implemented a larger over-arching scheme, pursuant to the relevant Mastercard network rule which the Decision also condemned. Therefore, the Decision determined that the infringement was the scheme as a whole or, put another way, the combination of the default MIF settlement rule and the series of decisions that implemented it.

66. The second step is to consider whether the act or default was a continuing one. We consider that this was not a case of individual acts of fee-setting which had continuing consequences until the next fee decision was made. It was a case of a continuing act constituted by the scheme as a whole. Each individual decision setting a MIF was a component part of the continuing act and done in

implementation of the default MIF settlement rule, which was retained throughout.

67. For these reasons, we find that s. 11(2) PLSA applies and the loss and damage are deemed for the purpose of s. 11(1) to have occurred on 21 June 2008, being the date when Mastercard was required to (and did) bring the infringement to an end.

68. In coming to that conclusion we have considered and applied Scots law. We should add that our conclusion as to Scots law is consistent with the relevant EU law on limitation. The terms of Art 1 of the Decision make clear that the Commission considered this a continuing infringement. A "continuing" infringement is the term used for the purpose of the limitation period that applies to the power of the Commission to impose penalties[3] under Art 25 of Regulation 1/2003 ("the Modernisation Regulation").[4] Characterisation as a continuing infringement may be relevant also in establishing the duration of the infringement as a step in the calculation of a penalty, and the related concept of a "single or continuous" infringement is applied to attribute to an undertaking that participated in only some cartel meetings liability for the entire cartel and not only for decisions at those meetings. It was explained recently by the General Court in Case T-799/17 *Scania AB v Commission*, EU:T:2022:48[5] at para 191:

> "… an infringement of Article 101 TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions of the undertakings involved form part of an 'overall plan', because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole."

[3] Since the Decision was taken following notification of the Mastercard MIF under the former Reg. 17, a fine was not applicable in that case: Art 15(5) of Reg 17.
[4] Replacing the limitation provisions in the same terms in Art 1(2) of Reg. 2988/74.
[5] On appeal, Case C-251/22P, not yet decided.

E. THE PROPER LAW ISSUE

69. The question of the proper law arises because the proceedings encompass purchases by CMs in the UK from merchants based in foreign jurisdictions who were selling in the UK. It therefore covers mail order, internet and telephone purchases by consumers in the UK from suppliers abroad, although it is clear that this accounts for only a minor part of the transactions encompassed by the claims. Internet purchasing was of course far less frequent prior to 2008 than it has become since. The question of the proper law is similarly raised as regards purchases by Scottish CMs from merchants in England and Wales, and vice versa. Although such purchases would sometimes have been 'in person', for convenience we refer to all purchases in this overall category as "remote purchases".

70. Mastercard's position as to the governing law is set out at para 24 of its Defence:

> "The Class Representative will … need to establish the transactions which took place at merchants in each Member State and the claims in relation to each Member State will be governed by the national law of that state."

On that basis, and pursuant to the decision of the Tribunal in *Deutsche Bahn/Pilkington*, the question of limitation or prescription is governed by the limitation/prescription period of the applicable foreign law.

71. Although expressed this way in the Defence, Mastercard's essential case is that the proper law is the law of the place where the merchant's acquiring bank is situated. Mastercard explained its pleading on the basis that in practice the acquiring bank would be in the same country as the merchant. We are content to proceed on the basis of that assumption, which the CR did not question. Accordingly, as we understand it, there is no dispute that for purchases by CMs based in England and Wales from merchants in England and Wales, English law will apply; and similarly that for purchases by CMs based in Scotland from merchants in Scotland, Scots law will apply.

72. The CR's position is that the proper law is the law of the place where the CM is based who made the purchases, and accordingly will be English or Scots law for all their purchases, including remote purchases. As explained above,

although for CMs based in Northern Ireland, the CR's formal position is that Northern Irish law will govern, since the only relevant aspect of foreign law is limitation and the parties have agreed that the limitation position under Northern Irish law is the same as under English law, the CMs in Northern Ireland can be assimilated for these purposes to CMs in England and Wales, and they do not require separate consideration.

73. It is now agreed between the parties that the question of the proper law falls to be decided in respect of two periods:

(1) from 1 May 1996 to the end of the claim period, for which it is governed by the Private International Law (Miscellaneous Provisions) Act 1995 ("PILMPA 1995"); and

(2) from 22 May 1992 to 30 April 1996, for which it is governed by the common law rules.

74. The relevant part of the PILMPA 1995 apples to the whole of the UK: s. 18(3). As the forum of the proceedings is (save for the s. 11(2) PLSA issue) England and Wales, it is further agreed that the applicable common law as regards all claims is the law of England and Wales.

(1) PILMPA 1995

75. The relevant provisions of the statute are ss. 11-12, which provide as follows, insofar as material:

> "**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:
>
> > (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
> >
> > (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant event or elements of those events occurred.

…

12. Choice of applicable law: displacement of general rule.

(1) If it appears, in all the circumstances, from a comparison of:

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

76. The operation of these provisions was addressed by the Court of Appeal in *VTB Capital v Nutritek* [2012] EWCA Civ 808, where the Court set out a series of propositions derived from its consideration of the statute and previous cases. Lloyd LJ, giving the judgment of the Court, said at [148]-[149]:

"148. (1) Section 11 of the 1995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question. (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then section 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question. (3) In carrying out that exercise, it is the English law constituents of the tort that matter. (4) The analysis requires examination of the 'intrinsic nature' of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if section 12 is invoked. (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a 'value judgment' regarding the 'significance' of each of those 'elements'. 'Significance' means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation. (6) Under section 11(2)(c), (i.e. in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries) the applicable law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweigh the significance of any element or elements found in any other country.

149. If section 12 has to be considered, we derive the following additional propositions from our consideration of the statute and the cases. (7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule. (8) At this stage there has to be a comparison between the significance of those factors with the other country. The question is whether, on that comparison, it is 'substantially more appropriate' for the applicable law to be the law of the other country so as to displace the applicable law as determined under the 'general rule'. (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the 'elements of the events constituting the tort' in section 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict. (10) In particular the factors can include: (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict."

77. Although, on further appeal, the Supreme Court held that the Court of Appeal had erred in its conclusion as to the governing law of the tort in that case, while upholding the decision on other grounds, this statement of the relevant principles derived from PILMPA 1995 ss. 11-12 was not challenged and was accepted by the Supreme Court: [2013] UKSC 5 at [199].

78. The application of PILMPA 1995 in somewhat similar circumstances to the present proceedings was considered in the judgment of Barling J in *Deutsche Bahn AG v Mastercard Inc* [2018] EWHC 412 (Ch) ("*Deutsche Bahn*"). Both sides made extensive reference before us to that full and detailed judgment. That action was also a competition damages claim against Mastercard based on the MIFs (and also another rule of the Mastercard scheme,[6] although that did

[6] The Central Acquiring Rule ("CAR") whereby transactions processed by an acquiring bank in a different country from the merchant are treated as domestic transactions for the purpose of the applicable interchange fee: *Deutsche Bahn* at [11].

not affect the analysis). The MIFs alleged to restrict competition there comprised (as here) the EEA MIFs and also a series of domestic MIFs. The claimants were some 1,300 retailers comprising seven corporate groups which operated in 18 European countries. On the issue of governing law and s. 11 PILMPA 1995, Barling J cited the propositions set out in *VTB Capital* and stated:

> "40. In the light of this guidance, it is clear that in applying section 11 the task for 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.
>
> 41. In relation to "significance", it is clear that the correct approach is for the court to consider the significance of the relevant events in the light of the facts of the case before it. In *Protea Leasing v Royal Air Cambodge* [2002] EWHC 2731 (Comm) Moore-Bick J stated that the 1995 Act contains a "much more flexible principle and one which might yield different answers in different cases even in relation to the same kind of tort".

79. Barling J proceeded to identify the elements of the events constituting the tort of breach of Art 101 TFEU (and the parallel Art 53 of the EEA Agreement). The parties agreed that these included:

> "(a) the adoption of the relevant MIFs and the CAR 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."

And Barling J held that a restriction of competition was also a relevant event, stating at [50]:

> "The factual state of affairs constituting the outward manifestations of the competitive restriction represents an "event" or "events" for the purposes of section 11, no less than does any recoverable loss established by the Claimants. I see no justification for discounting these events which constitute a restriction on competition, simply because they may also have a role in the causation of any loss allegedly incurred by the Claimants."

80. It was common ground that relevant product market was the acquiring market and that the relevant geographical markets were national. The judge

accordingly held that the alleged restriction of competition took place as regards each claimant in the product and geographical market where it operated its business. As regards the location of the loss, that also occurred in the country where the merchant claimant operated its business. Finally, as regards the location of the setting of the EEA MIFs[7], that was the subject of some dispute but the judge found that it was Belgium, the location of the centre of the Mastercard's European operation, between 1992 and 2006, and thereafter (because of a change in the structure of Mastercard) the USA. Neither side suggested that the element of an effect on trade between EU Member States affected the analysis.

81. On that basis, Mastercard submitted as regards each of the claimants that the most significant element of the tort for the claim of each claimant occurred in the country where it operated its retail business. The claimants in that case submitted that the most significant factor was the setting of the EEA MIF, since that constituted Mastercard's wrongdoing, which they contended meant that Belgian law was the governing law (at least up to 2006).

82. The claimants relied on a number of decisions where the courts had held that the place where the loss was suffered was not the most significant element of the tort. Distinguishing those authorities, Barling J stated, at [118]:

> "The cases relied upon, although interesting, provide only limited assistance here. As we have seen, the significance of elements of a tort may differ even as between cases involving the same type of tort. In each of the three cases referred to above the alleged tort was a different one from the present, and it is not difficult to see why the court in each case selected as the applicable law that of the place "where all the relevant action is taking place", rather than the place where loss was suffered. In at least two of the cases, the place of loss appears to have been a matter of pure happenstance, unrelated to the real meat of the case. In the present case, by contrast, the location of the alleged loss is not fortuitous. The alleged loss of each of the Claimants is suffered in the country in which they are established, and it occurs there because that is the home of the market affected by the alleged restriction of competition."

83. On that basis, the judge expressed his conclusion as follows:

> "121. In my view, based on the value judgment I am required to make, the most significant elements/events in the tort alleged in the present case

[7] And also the CAR: fn. 6 above.

is not the loss allegedly suffered by the Claimants, significant though that element undoubtedly is. Nor is it the setting/management of the MIFs and the adoption of the CAR, though these also have significance. It is the restriction of competition. Although, as the Claimants have pointed out, loss is not a necessary element of an infringement of Article 101, a restriction of competition is necessary and, indeed, is at the heart of such an infringement. The same applies to the tort alleged here, based as it is on that Article (and kindred EEA and domestic provisions). If there is no restriction of competition, there is no tort. The mischief at which Article 101 is aimed, or to put it more positively, the beneficial aim of that provision is the protection of the competitive process. Competition does not occur in the abstract, but on a market. Here, it is not in issue that the material markets are each of the national markets for providing "acquiring" services. It is those separate markets which are alleged to have been subjected to the restriction of competition. Those markets are the theatres of the wrong allegedly done by the Defendants.

122. On the facts of this case outlined earlier, I do not regard the setting of the MIFs or the CAR as of equivalent significance. First, setting a MIF is not inherently unlawful, as the Claimants acknowledge. The unlawfulness depends on other factors, including the need for a multilateral (as distinct from a unilateral) decision, an agreement or a concerted practice. Even then, the unlawfulness probably depends on the level of the MIF. Further, as the facts of the present case amply demonstrate, precisely where a MIF is set/managed or where a rule is adopted is just as fortuitous as the place of the occurrence of the loss in *Protea Leasing* (above). For similar reasons, the element of setting of the MIF has somewhat diminished significance in this case. It could have occurred anywhere, and occurring in this place rather than that place would not have made the slightest difference to where, and to what extent, national markets were affected by the restriction of competition, or to who suffered loss as a result.

[…]

124. In summary, I find that the most significant elements/events of the tort in this case relate to the restriction of competition alleged to have occurred in each of the relevant national markets for "acquiring". The fact that any loss alleged to have been suffered by each of the Claimants would also have occurred in the same country as the relevant restriction of competition, reinforces that conclusion."

84. In the present proceedings, the contention of the CR was different. He argued that the most significant element of the tort is the place where the loss was suffered, i.e. England and Wales for the English CMs and Scotland for the Scottish CMs (and Northern Ireland for the Northern Irish CMs although, as noted above, there is no need in these proceedings to differentiate Northern Irish law from English law). Mastercard submitted that, as in *Deutsche Bahn*, the most significant element of the tort is the place where the restriction of competition took place. It is not disputed, since this was the determination in

the Decision, that the restriction occurred in the acquiring market and that acquiring markets were national. Accordingly, Mastercard argued that the most significant element of the tort occurred in the country where each merchant conducted its business, i.e. the same conclusion under s. 11(2)(c) PILMPA 1995 as in *Deutsche Bahn.*

85. There was some dispute between the parties as to what are the relevant elements of the events constituting the tort, with Mastercard suggesting in its skeleton argument that the pass-on of the MIF by acquiring banks to merchants was a distinct element. However, this was not really pursued in oral submissions. As regards the relevant events, we respectfully agree with the enumeration of the events constituting the tort set out by Barling J in *Deutsche Bahn*: para 79 above.

86. It will readily be appreciated that there is a fundamental difference between the present proceedings and *Deutsche Bahn.* There, the claims were brought by merchants so the location of the restriction of competition and the location of the loss were in the same country: i.e. the country where the merchant was based. Here, the claims comprising the collective proceedings are brought by consumers purchasing from merchants, so the loss is suffered in the country where the consumers lived. However, Ms Tolaney KC, appearing for Mastercard, pointed to the fact that Barling J reached his conclusion in *Deutsche Bahn* on the basis of the location of the restriction of competition, referring to the location of the loss only as reinforcing that conclusion: see judgment at [124]. On that basis, Mastercard submitted that: "the most significant element is the effective setting of a minimum price for merchants in the acquiring market, since this is the basis on which the EEA MIFs were found to restrict competition in breach of competition law."

87. For the CR, Ms Demetriou argued that a different result should apply in the present case since the claimants were all consumers resident in the UK and these were collective proceedings brought under a statutory regime which had the purpose of enabling consumers to recover aggregate damages for their loss. The whole purpose of the present proceedings was to obtain compensation for the consumers' loss, since the question of infringement of competition was not in

issue but established by the Decision. These factors were, in her submission, to be given particular weight in determining that in the present proceedings the loss was the most significant element of the claims.

88. The wording of s. 11(2)(c) sets out a relative test, and the statute does not set out the criterion according to which "significance" is to be evaluated. Ms Tolaney correctly pointed out that significance is applied by reference to the events constituting the tort. But that does not really assist: is it significance in terms of the tort seen in the abstract, or significance in terms of the part that those events will play in the proceedings, i.e. the extent to which they are in dispute? That question was not addressed in *Deutsche Bahn* where the claims were, at least in substantial part, stand-alone claims where infringement was in issue. If the answer to this question is the former, then we would follow *Deutsche Bahn* in holding that the most significant event is the restriction of competition; if it is the latter, then we consider that the most significant event is the occurrence of the loss.

89. We note that in *Protea Leasing*, quoted in *Deutsche Bahn* at [41], the court stated that PILMPA 1995 sets out a "flexible principle and one which might yield different answers in different cases even in relation to the same kind of tort." Ms Demetriou's suggestion that significance should relate to the role that the event will play in the case before the court has, in our view attraction, although we recognise the force of Ms Tolaney's objection that if a disputed issue were subsequently conceded then that could potentially lead to a change in the governing law. In reality, there is no prospect of the loss being conceded in the present proceedings since that is what the case is all about. We do not, however, see that a different approach to significance for the purpose of s. 11(2)(c) should apply because these are consumer claims brought by way of collective proceedings.

90. In the end, although not without hesitation, we consider that the assessment of significance should be made on the basis of the significance that the various events will have in the actual proceedings before the Tribunal. We therefore hold that the general rule of s. 11 leads to the applicable law being English law for claimants in England and Wales (and, in effect, Northern Ireland), and Scots

law for claimants in Scotland. However, if we are wrong about that, we proceed to consider whether the general rule should here be displaced under s. 12 PILMPA 1995.

91. In *VTB Capital*, after setting out the general propositions quoted above, Lloyd LJ summarised the test under s. 12 as follows:

> "159. This means that, in both cases, we have to go on to consider section 12, which requires us to make a comparison of the significance of the factors which connect a tort with the country whose law would be the applicable law under section 11(2)(c) with any factors which connect the tort with another country. We have to ask: is it substantially more appropriate for the applicable law of that other country to be the one that determines the issues (in tort) arising in the case; if it is then the applicable law will be that of the other country. The test is specific to the issues that arise in the particular case concerned. As already noted, section 12(2) makes it plain that a broad range of factors can be considered in this exercise."

92. We recognise that as a departure from the general rule, s. 12 should not readily be engaged, and that the threshold is a high one: "*substantially* more appropriate". See per Lord Clarke in *VTB Capital* in the Supreme Court at [205]-[206]. However, s. 12 is there in the statute because the legislator plainly envisaged that there will be circumstances where it is appropriate to displace the general rule. The non-exhaustive list of factors in s. 12(2) shows that a broad range of circumstances may be considered. If the law of the place where the restriction of competition occurred would be the governing law under the general rule, we have no doubt that in the particular circumstance of these proceedings that should be displaced for the purpose of determining the issues that arise by the law of the place where the CMs resided at the time they suffered loss, i.e. the law of England or Scotland as the case may be. We reach that conclusion for a number of reasons:

(1) This evaluation proceeds on the assumption that the restriction of competition is the most significant event for the purpose of s. 11(2)(c). But s. 12 directs attention to the determination of "the issues that arise in the case." The issues that arise and are strongly contested in these particular proceedings are not whether there was a restriction of competition (save possibly in one or two acquiring markets not

identified in the Decision) but causation and quantum of loss. Those factors, being factors relating to the events constituting the tort, point strongly to the law of the place of loss as the more appropriate law to govern determination of those issues.

(2) Although not relevant under s. 11(2)(c), factors relating to the parties are relevant under s. 12(2). The CMs for whom the claims are brought were all resident in England (or Wales or Northern Ireland) or Scotland at the material time. The countries where the merchants that made remote sales were located have no connection to them nor does Mastercard have a connection with those countries: its decisions on the rules and EEA MIFs appears to have been taken in Belgium and then the USA: see *Deutsche Bahn.* Further, we do regard it as material that the relevant consequence of the restriction of competition by Mastercard for the purpose of these proceedings is alleged to be the payment of higher prices by the many millions of consumers in the United Kingdom who constitute the class on whose behalf the proceedings are brought.

(3) As noted above, *Deutsche Bahn* was an action brought by some 1,300 merchants. Application of the law of the country where the merchant was located accordingly led to a single law governing each merchant's claim, and therefore to determining whether that claim was out of time by reason of limitation. It was only because the many merchants chose to bring their separate claims in one action that many different laws of limitation would have to be applied. Collective proceedings, although one action, do not give rise to a distinct cause of action but are a procedural regime which enables individual claims falling under s. 47A CA 1998 to be pursued collectively: see s. 47B(1). The CR is only the class representative: he is not a claimant bringing a new form of "mass tort" claim but represents a multitude of CMs with individual tort claims. But the position here on the facts of those tort claims is very different from *Deutsche Bahn.* It is obvious that each individual CM made the great majority of their purchases in their home country: any remote purchases would account for a very small proportion of their individual claim. If the law of the place where the merchant carried on business

were to be applied, then the issue of limitation for any such individual CM's claim would be determined by the law of the place where they lived for the major part of their loss, and by various laws of other countries for small elements of their loss: e.g. French law insofar as they made remote purchases from merchants in France, Dutch law insofar as they made remote purchases from merchants in the Netherlands, etc. If a CM brought his or her claim individually against Mastercard, we think it would clearly be more appropriate for the issue of limitation as regards that claim to be determined by a single system of law. We do not see that there should be a different evaluation under s. 12 just because the CR is combining multiple individual claims in collective proceedings seeking aggregate damages, so that remote purchases could be estimated across the class. As Lord Briggs observed in his judgment in the Supreme Court at an earlier stage of these proceedings, at [45]:

> "… it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose."

(2) The common law

93. The parties agree that the common law rule of double actionability is as stated in Rule 203 of *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) ("*Dicey 12th*") [8] at 1487-1488:

> "(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
>
> > a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
> >
> > b) actionable according to the law of the foreign country where it was done.
>
> (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."

[8] Edited by Lawrence Collins (now Lord Collins). This was the last edition of *Dicey* published prior to the commencement of PILMPA 1995 and therefore the last to address the common law rule comprehensively.

94. Clause 1(b) of the rule accordingly requires determination of the place where the act was done (i.e. the *lex loci delicti*). In *Deutsche Bahn*, when addressing the common law rule, Barling J explained at [154] that he placed little weight on the words "act done":

> "The rule is not enshrined in a statute, and the words in which it has been expressed in case law should not be treated as though it were a statutory enactment. I consider that the words used are intended to cover in a general sense the commission of the tort."

95. Although apparently not cited to Barling J, that comes close to the approach set out by the Court of Appeal in *Metall & Rohstoff v Donaldson Inc* [1990] 1 QB 391 at 446:

> "If a person by an act or acts committed in a foreign country has caused injury or damage to a person in this country, we see no reason in principle why he should *necessarily* be able to invoke a plea that the act (or one or more of a series of acts) which caused the damage was performed in a country whose civil law rendered it non-actionable. Everything must depend on the facts of the case.
>
> …
>
> In our judgment, in double locality cases our courts should first consider whether, by reference exclusively to English law, it can properly be said that *a tort has been committed within the jurisdiction of our courts*. In answering this question, they should apply the now well familiar "substance" test previously applied in such cases as *Distillers Co. (Biochemicals) Ltd . v. Thompson* [1971] A.C 458, *Castree v. E.R. Squibb & Sons Ltd.* [1980] 1 W.L.R 1248 and *Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey* [1928] 2 Lloyd's Rep. 91. If on the application of this test, they find that the tort was in substance committed in this country, they can thenceforth wholly disregard the rule in *Boys v. Chaplin* [19971] A.C. 356; the fact that some of the relevant event occurred abroad will thenceforth have no bearing on the defendant's liability in tort. On the other hand, if they find the tort was in substance committed in some foreign country, they should apply the rule and impose liability in tort under English law, only if both (a) the relevant events would have given rise to liability in tort in English law if they had all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed."

Referring to *Metall & Rostoff* and other cases, *Dicey 12th* observes as follows, at p. 1512:

> "… it is submitted that the English courts will apply the "substance" test to determine the place of a tort for the purposes of clause (1)(b) of the Rule. Adoption of such a test avoids the mechanical solution inherent in an outright choice between the place of acting and the place of harm. It is also sufficiently flexible to take account of factors such as the nature of the tort alleged to have been committed and the material elements of the relevant tort,

> and will, without undue rigidity, enable the court to locate the tort in one place for choice of law purposes."

96. In *Deutsche Bahn*, Barling J resolved the question of the *lex loci delicti* as follows:

> "For the reasons already rehearsed in the context of the section 11 criteria, in my view the *lex loci delicti* should be treated as the place where all those effects arise which Article 101 is aimed at preventing, and in particular the restriction on competition, that place being the marketplace where each Merchant operated. That is also the place where recoverable loss was allegedly suffered by each such Claimant, and, to adopt Mr Hoskins' [counsel for Mastercard's] phrase, is "the centre of gravity" of the tort. The location where one or more of the Defendants happened to be when the relevant decisions were adopted is of little real significance."

97. As we observed above, in *Deutsche Bahn* the claimants were merchants and, it appears from the judge's analysis, each merchant claimant operated in a single country. Each merchant's claim against Mastercard arose out of its transactions with its acquiring bank which all occurred in that country. And the fact that a large number of merchants chose to bring their tort claims together in one action could not alter the *lex loci delicti* for the purpose of the tort in each claim. The present proceedings are also an aggregation of a large number of individual tort claims, through the procedural regime of a collective action. But application of the "substance of the tort" test to the individual claims in the proceedings is much more problematic. The question arises only for those CMs who made remote purchases. As we observed above in discussion of PILMPA 1995, those remote purchases (a) accounted for only a minority – and probably a very small minority – of their purchases, and (b) may well have been made from merchants in several different EEA countries. However each such CM's tort claim against Mastercard, arising out of the infringement of competition law through determination of EEA MIFs that applied throughout the EEA, concerns all that individual's purchases, and therefore purchases made from domestic merchants as well as some remote purchases from merchants in potentially several foreign countries. Therefore application of the *Deutsche Bahn* approach of asking in which market the restriction of competition took place for the purpose of the tort does not here produce a single answer but leads to multiple answers. Although we agree with Mastercard that some important elements of the tort

took place outside the UK, we do not see that they can be located "in one place for choice of law purposes."

98. In that context we turn to clause 2 of Dicey Rule 203. The foundation of that principle is explained in *Dicey 12th* at p. 1497:

> "Clause (2) of the Rule originates in the judgments of Lord Hodson and Lord Wilberforce in *Boys v. Chaplin.* It must be considered as an exception to the general rule contained in clause (1) of the Rule which requires double actionability by the *lex loci delicti.* Lord Hodson stressed that the rule in *Phillips v. Eyre* must be given a flexible interpretation because Willes J. himself said that the rule was only applicable "as a general rule". Lord Wilberforce stressed the need to segregate the relevant issue and to consider whether, in relation to that issue, the general rule of double actionability ought to be applied or whether "on clear and satisfactory grounds", it ought to be departed from.
>
> … That an exception to the general choice of law rule in relation to foreign torts does now exist is generally accepted. Whilst it is only designed to take account of unusual cases, it will, in those cases, produce more appropriate results than will the reasoning that appealed to Lords Guest, Donovan and Pearson in *Boys v. Chaplin*."

99. *Dicey* proceeds to discuss the various circumstances in which the exception might apply in place of the general rule, and observes, at pp. 1500-1501:

> " … the strength of the case for displacement may also depend on the type of issue before the court and (perhaps) the kind of tort complained of. Lord Hodson and , in particular, Lord Wilberforce recognized that it was necessary to isolate the issue in the case in the process of answering the question whether the general rule of double actionability should, by way of exception, be departed from. For the law which has the most significant relationship with the occurrence and the parties is to be identified in the light of the issue in the case. In *Boys v. Chaplin* the issue was heads of recoverable damages. In the light of the English residence of the parties and their temporary presence in Malta, that issue was most significantly related to English law. The position might have been different if, for example, the issue had been that of quality of the act or of standards of conduct, e.g. whether the defendant was strictly liable or liable only for negligence or gross negligence. In respect of such an issue the case for displacement of the general rule may be weaker since, it may be persuasively argued, that standard of conduct is intimately connected with the place where the conduct occurs. It might thus be though that this issue should be considered by reference to the general rule and that there is normally no room for the operation of the exception. There is, however, a much stronger case for displacement of the general rule when the issue is peripheral to the law of torts or belongs to another branch of the law, e.g. the law of domestic relations, as when the question is whether a wife can sue her husband or vice versa, or the law of administration or succession, as when the question is whether a cause of action in tort survives for the benefit of the deceased victim's estate, or against the estate of the deceased tortfeasor. The case for displacement of the general rule may also depend on the particular kind of tort before the court."

100. We have regard to the following factors:

(1) application of the general rule by reference to the substance of the tort is problematic and unsatisfactory for the reasons set out above;

(2) the primary basis of liability of Mastercard is breach of EU competition law, which applies throughout all EU Member States. Mastercard is not being held liable for acts which were lawful under the law of any of the other countries which it contends should be the governing law.

(3) the issue for which the exception is being applied is limitation/prescription; that is not part of the substantive tort law here being applied, i.e. breach of statutory duty by reason of infringement of EU competition law;

(4) the acts which Mastercard itself carried out that give rise to the tort, as opposed to the consequences of those acts, were its rules and determination of the EEA MIFs which were to apply throughout the EEA, including in the UK;

(5) neither the CMs having the claims nor Mastercard as defendants have any connection with the various foreign countries from which remote sales were made.[9]

101. Although these factors are not all of equal weight, taking them together we consider that this is an unusual case where there are clear and strong grounds for the exception to apply as regards the issue of limitation/prescription, and that the governing law for that issue should be the law of the place where the loss was suffered, i.e. English law for the claims by CMs resident in England and Wales (and Northern Ireland) and Scots law for CMs resident in Scotland. Although Scots law is not the *lex fori*, as *Dicey 12th* observes (at p. 1499) there

[9] Save only that the Third Defendant is a Belgian company and the EEA MIFs may have been set in Belgium over this period; but neither side suggested that for this reason Belgian law should govern the torts.

would appear to be no reason why the *lex fori* and *lex loci delicti* should not both be displaced in favour of the law of a third country:

> "… it is submitted that if the exception to the general rule is to operate in a principled manner it should not be narrowly confined to a cases where it would result in the application of English law. Such a conclusion would be at variance with the flexibility which is the hallmark of clause (2) of the Rule."

F. THE EXEMPTIBILITY ISSUE

102. As noted at the outset, this is a follow-on action based on the Decision. It is common ground that the Tribunal is bound by, and Mastercard therefore cannot challenge, the infringement of Art. 101 found in the Decision. As in any competition damages claim, the claimants' loss is to be determined on the basis of the counterfactual, i.e. the extent to which, if at all, prices paid by the CMs would have been lower if Mastercard had not committed the infringement and had acted lawfully. A critical part of that counterfactual accordingly involves consideration of what would have been the position as regards Mastercard's EEA MIFs.

103. Mastercard contends it is open to it to demonstrate that the conditions of Art 101(3) for exemption would have been met in relation to alternative EEA MIFs set at a different level. Mastercard's Amended Defence states, at paras 15-16:

> "15. Mastercard will seek permission to call expert evidence in relation to exemption and expects expert evidence to show that alternative EEA MIFs were above or close to the EEA MIFs actually set.
>
> 16. If the lawful alternative EEA MIFs were higher than the EEA MIFs actually set, the Represented Persons will not have a claim for damages. Alternatively, their claim for damages is limited to the loss (if any) caused to them by the difference between the EEA MIFs actually set and the alternative EEA MIFs which could lawfully have been set."

104. Mastercard sets out its case on exemption in detail in paras 82-89 of its Amended Defence. It is appropriate to quote those paragraphs in full:

> "82. Mastercard will contend that, in respect of the period prior to 31 December 2007 (which is the date of expiry of the 2002 exemption decision in relation to the interchange fee charged by Visa Europe), for the same reasons set out in that decision, the Mastercard scheme could have lawfully adopted alternative EEA MIFs based on:

a. The cost of processing transactions.

b. The cost of the free funding period for cardholders, i.e. for debit cards, the period between payment to the acquiring bank and the debiting of funds from the cardholder's current account and for credit/charge cards the period between payment to the acquiring bank and when payment must be made by the cardholder or the balance of the credit card bill rolled over into the extended credit facility.

c. The cost of providing the "payment guarantee". While the Visa Europe exemption decision does not include a definition of the "payment guarantee", Mastercard will contend that this is properly to be understood as including the guarantee against fraud and cardholder default.

83. Mastercard will also contend, by analogy to the reasoning in the Visa Europe exemption decision, that the Mastercard scheme could have lawfully adopted alternative EEA MIFs based on the same categories of costs for the rest of the relevant period after 31 December 2007.

84. Alternatively, Mastercard will contend that it could have lawfully adopted alternative EEA MIFs based on these categories of costs subject to the caps in the Visa Europe exemption decision, i.e.:

a. in and prior to 2002, weighted EEA MIFs at levels similar to Mastercard's EEA MIFs in force;

b. for the period 2003 to 2007, alternative EEA MIFs which reduced on a straight-line basis over this period down to a weighted average of 0.7%; and

c. for debit cards, alternative EEA MIFs with a weighted average not exceeding EUR0.28.

85. Mastercard will rely on the fact that under the Visa Europe exemption decision Visa was lawfully entitled to operate and did operate on this basis of default consumer Intra-EEA MIFs set on this basis and that if Mastercard had not been able to operate with alternative EEA MIFs which were competitive with those set by Visa, Mastercard would have been unable to compete effectively with Visa in many national markets across Europe, resulting in reduced competition and choice for consumers.

86. Further or alternatively, Mastercard will contend that the Mastercard scheme could, in any event, in respect of the full relevant period, have lawfully adopted alternative EEA MIFs which were based on:

a. the costs avoided by merchants as a result of accepting Mastercard/Maestro credit/debit cards as compared to more expensive means of payment such as cash, cheques and American Express. Alternatively, the costs avoided as compared to accepting cash; and

b. the benefits which merchants received as a result of accepting Mastercard/Maestro credit/debit cards.

> 87. In relation to the benefits which merchants receive as a result of accepting Mastercard/Maestro credit/debit cards, Mastercard will contend that a proper account of these benefits should include the value of those features of the Mastercard scheme which would not have existed if the EEA MIFs had not been set at the levels in place during the relevant period (as to which see paragraphs 109 - 113 below).
>
> 88. Further or alternatively, Mastercard will contend that the Mastercard scheme could, in any event, in respect of the full relevant period, have lawfully adopted alternative EEA MIFs which were based on the costs avoided by merchants as a result of accepting Mastercard/Maestro credit/debit cards as compared to more expensive means of payment such as cash, cheques and American Express. Alternatively, the costs avoided as compared to accepting cash. In particular, Mastercard will rely upon the Commission's press-release of 1 April 2009 and/or its letter of the same date notifying Mastercard of the Commission's acceptance of Mastercard's undertakings in which the Commission accepted that Mastercard's proposed new EEA MIFs (subsequently introduced from July 2009) which were set at 0.3% for credit card and 0.2% for debit cards (being lower than the additional cost of cash to merchants) were set in accordance with a reasonable benchmark for assessing a level of MIF which met the conditions for exemption.
>
> 89. Mastercard will seek permission to call expert evidence to quantify each of these categories of costs/benefits in relation to the 16-year claim relevant period. Particulars of the relevant levels of interchange fee will be provided once permission for expert evidence is obtained and the expert has carried out their analysis. Mastercard expects expert evidence to show that the lawful alternative EEA MIFs were higher than the EEA MIFs actually set (or alternatively were close to the level actually set)."

105. The CR's case is that the only permissible counterfactual is a zero MIF with settlement at par (i.e. a prohibition on *ex post* pricing). He puts his case two ways:

(1) this results from the binding effect of the Decision for the purpose of these proceedings; alternatively

(2) it is an abuse of process for Mastercard in these proceedings to seek to contend otherwise.

106. We consider these two submissions in turn.

(1) The effect of the Decision

107. As noted above, the Decision comprises a large number of recital paragraphs preceding the operative part at the end. In this case, there were 776 recitals. Article 1 of the Decision is quoted at para 63 above.

108. The former Art 81 of the EC Treaty corresponds to what is now Art 101 TFEU and for convenience we will use the current numbering. As is well-known, this provision includes in Art 101(1) a prohibition of "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market"; and Art 101(3) which enables the provision of paragraph (1) to be declared inapplicable to an agreement, decision or concerted practice if specified conditions are met. The four cumulative conditions for such an exemption can be summarised as follows:

(1) the anti-competitive arrangements must contribute to improving the production or distribution of goods or to promoting technical or economic progress;

(2) consumers must be allowed a fair share of the resulting benefits;

(3) the arrangements must not impose on the participating undertakings any restrictions which are not indispensable to the attainment of these objectives; and

(4) they must not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

109. By the Decision, the Commission found that the setting by Mastercard of the EEA MIFs contravened Art 101(1) and did not qualify for exemption under Art 101(3). Section 7 of the Decision, comprising recitals (330)-(665), addresses Art 101(1), and Section 8 of the Decision, comprising recitals (666)-(753), addresses Art 101(3).

110. Prior to the coming into force of Reg 1/2003 on 1 May 2004, the Commission had exclusive jurisdiction to grant exemption under Art. 101(3). Moreover, to obtain exemption the agreement or decision had to be formally notified to the Commission. As the Decision records at (16), Mastercard made a series of notifications of its network rules and decisions on the EEA MIFs to the Commission between 1992 and 1995. The proceedings before the Commission which culminated in the Decision were taken pursuant to those notifications.

111. Pursuant to Art 16(1) of Reg 1/2003, the Decision is binding on the Tribunal for the purpose of these proceedings. In *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7 ("*Trucks – CAT*")[10], the Tribunal held that the binding effect of a Commission decision applies not only to the operative part but also to findings in recitals which are an essential basis or the necessary support for the finding in the operative part, or necessary to understand the scope of the operative part: see at [68]. Neither side before us sought to challenge that decision as a correct statement of the law.

112. As regards the determination under Art 101(1), the essential basis for finding a restriction of competition is summarised in recitals (458)-(460):

> "458. … The MasterCard MIF not only creates an (artificial) common cost for acquirers and thereby sets a floor for the fees each acquirer charges to merchants. Acquirers also *know* precisely that all of their competitors pay the very same fees. The price floor *and* the transparency of it to all suppliers involved (that is to say the knowledge of each acquirer about the commonality of the MIF for all other acquirers in the MasterCard scheme) eliminate an element of uncertainty.
>
> 459. In the absence of MasterCard's MIF, the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into account the acquirer's individual marginal cost and his mark up.
>
> 460. Statements of retailers demonstrate that they would be in a position to exert that pressure if acquirers were not able to refer to interchange fee as the "starting point" (that is to say, as the floor) for negotiating the MSC. This is because without a default that fixes an interchange fee rate in the absence of a bilateral agreement, merchants could shop around to contract with the acquirer who incurs the lowest interchange costs…."

[10] The decision was appealed to the Court of Appeal, but not on this issue: see para 155 below.

113. In *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2020] UKSC 24, the Supreme Court gave judgment in the appeals arising from three judgments in private actions brought by merchants against Mastercard and the operators of the Visa card payment scheme. The Supreme Court explained this aspect of the Decision as follows:

> "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.
>
> 76. It is correct that the Commission went on in recital 460 to describe the competitive process involved if there were bilateral negotiations over interchange fees, but the ultimate point it was here making is that that process would be transient and that "acquiring banks would eventually end up setting their MSCs merely by taking into account their own marginal cost plus a certain mark up". The transient nature of such a competitive process shows that the existence of such a process cannot have been integral to the Commission's decision that there was a restriction on competition. This is further borne out by footnote 517 in which the Commission stated that in the counterfactual "banks may or may not enter into bilateral agreements on interchange fees", thereby making it clear that such agreements were not essential to its reasoning."

114. As the Supreme Court proceeded to state at [77]-[78], this approach was upheld by the European Courts (i.e. the General Court and then the CJEU) in dismissing Mastercard's challenge to the Decision. And the Supreme Court held at [93] that "the essential factual basis" upon which the CJEU held that there was a restriction of competition included the facts that:

> "(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."

115. Since this is a follow-on claim for damages allegedly caused by the same MIFs which were the subject of the Decision, it is clear that the relevant counterfactual for the purpose of a restriction of competition is a no-default or zero MIF with

settlement at par. Mastercard would not be entitled to argue that a lower level of MIF would not restrict competition. That is fully accepted by Mastercard.

116. However, Mastercard submits that whereas the determination in the Decision as regards a restriction of competition was found by the Supreme Court to be a general finding as regards any MIFs, the determination in the Decision as regards the application of Art 101(3) concerned the actual level of MIFs that were the subject of those proceedings. It argues that it is therefore able to rely on a counterfactual of different levels of MIF which, although contrary to Art 101(1), would meet the criteria for exemption under Art 101(3). Mastercard states as follows in its skeleton argument:

> "… if Mastercard can show that an alternative positive EEA MIF would have met the criteria for exemption, the only wrongdoing was setting the EEA MIF at a level higher than this and Mr Merricks could only claim for the loss (if any) suffered by the Class Members as a result of the difference between the actual EEA MIFs and that exemptible level of EEA MIFs."

And Mastercard pointed to the statement by the CJEU in the *Mastercard* judgment, at para 163:

> "… the same 'counterfactual hypothesis' is not necessarily appropriate to conceptually distinct issues."

117. To determine this issue, it is important to consider the basis of the Decision as regards the application of Art 101(3) to the MIFs that are the subject of the present proceedings.

118. The Commission stated at the outset of section 8 of the Decision, in recital (666):

> "Agreements between undertakings or decisions of associations of undertakings which are caught by Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement may benefit from an exception if they satisfy the four cumulative conditions set out in Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement. Thus, multilateral interchange fees that have the object or effect of restricting price competition between a scheme's member banks are not as such illegal as they may potentially fulfil the conditions of Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement."

119. Mastercard submitted that this passage "contradicts the entire argument" advanced for the CR. We do not agree. The Commission is here simply

recording that, as in all Art 101 cases, the analysis of infringement does not end with Art 101(1) but that, save perhaps in the case of a 'hard-core' restriction for which no exemption is in practice possible, it is necessary to proceed to ask whether the conditions for exemption are satisfied.

120. Unsurprisingly, the Commission then prefaced its consideration of the four Art 101(3) conditions by stating, in recitals (668)-(669):

> "668. The starting point for the Commission's assessment is MasterCard's arguments as to the purpose and function of its MIF. As set out in detail in section 4.1.3[[11]], MasterCard's views have, however, evolved over time. While during most of the period of its existence MasterCard defined its MIF as a *price or fee paid for services* provided by issuers to acquirers and merchants, MasterCard later referred to the MIF as a *tool to balance cardholder and merchant demand.* In MasterCard's favour the Commission therefore analysed both possibilities under Article 81(3) of the Treaty in the two Statements of Objections.
>
> 669. As set out in section 3.1.8. MasterCard clarified in reply to the Supplementary Statement of Objections that its MIF was not a "fee for services" or a "price" for specific services but a balancing mechanism for cardholder and merchant demands."

121. The Commission proceeded to examine those arguments with respect to the Art 101(3) conditions.

122. As regards the first condition (efficiencies or technical/economic progress), the Commission observed as regards Mastercard's arguments:[12]

> "678. MasterCard argues that the Commission was wrong to request MasterCard to establish under Article 81(3) of the Treaty that the interchange fee *"set at a certain level"* was indispensable to achieve objective efficiencies within the meaning of Article 81(3) of the Treaty, because such requirement amounted to an *"attempt to regulate the level of MasterCard's interchange fees"* and the Commission would lack such powers to set MasterCard's interchange fees at a certain level."

123. Addressing Mastercard's main contention that the MIFs served as a balancing mechanism between issuers and acquirers, the Commission stated at (686):

> "Also, an "imbalance" between issuing and acquiring cannot be assumed on the basis of *cost* considerations only, but has to comprise an analysis of *revenues,* as well. A cost imbalance is as such no sufficient evidence to explain

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[11] This appears to be an erroneous cross-reference; the relevant section is 3.1.7.
[12] Footnote references are omitted from this and all quotations.

> why MasterCard's MIF is always paid by the acquirer to the issuer, irrespective of the concrete market situation. If receipts (interests, money exchange fees, penalty fees, etc.) or other monetary benefits (resulting from cost savings such as reduction of staff, paperwork etc.) from payment card issuing provide sufficient commercial incentives for banks to invest in incremental card issuing, a transfer from acquiring to issuing may be superfluous and even counterproductive as the revenue transfer dampens card acceptance due to the increase of costs on the merchants' side. Robust empirical evidence is therefore required to establish the necessity for and the direction of a fallback interchange fee."

124. Responding to Mastercard's arguments that a MIF maximises the overall benefits of a payment card system, the Commission stated, at (690):

> "Hence, whether a MIF should be paid by acquirers to issuers or vice versa, and whether it should be set at a certain amount or at zero, cannot be determined in a general manner by economic theory alone. A claim that an interchange fee mechanism creates efficiencies within the meaning of Article 81(3) of the Treaty therefore must be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts. Apart from MasterCard's general assertion that balancing of the demand of cardholders and merchants leads to a better performance of the MasterCard system, is inherent and indispensable to the operation of a four-party payment card system, contributes to overall economic welfare and therefore "undoubtedly" fulfils the first condition of Article 81(3) of the Treaty, no such analysis and empirical evidence was provided to the Commission."

125. At recital (696), the Commission referred to evidence of the "relatively good output" of other payment card schemes that operated without a MIF. The Commission proceeded to state, at (700)-(701):

> "700. None of the three Annexes, the two exhibits and the 64 appendices to MasterCard's reply to the first Statement of Objections dated 5 January 2004, the subsequent submissions of MasterCard's expert (Annexes 1.1 to 1.3), or the report on the Merchant Acceptance of payment cards and other payment means, nor the Research Market Study on the characteristics of retail credit contain empirical evidence that would have enabled the Commission to assess how and to what extent the MasterCard MIF contributed and continues to contribute to an efficient balance of cardholder and merchant demand in the MasterCard scheme, what that efficient balance would be and how this could contribute to economic and technical progress. This is even more surprising as supposedly this type of evidence forms the basis which MasterCard uses to set its MIF.
>
> 701. In conclusion, the MasterCard MIF does not meet the first condition of Article 81(3) of the Treaty as MasterCard failed to demonstrate a causal link between the MIF and objective efficiencies."

126. In section 8.2.3, the Commission set out its conclusions on the first condition of Art 101(3). The Commission referred there to its decision in *Visa II*, [13] where it granted exemption to Visa's EU MIF for five years subject to certain conditions and following changes to the Visa MIF arrangements, observing that a MIF can in principle satisfy the first condition of Art 101(3), and stated at (730) that:

> "The Commission's conclusion on the efficiencies of a MIF will depend on the concrete evidence brought forward by the parties."

The Commission continued:

> "731. Contrary to MasterCard's perception the Commission's position is not that only the level of a MIF is a decisive criterion for assessing whether that MIF fulfils the first condition of Article 81(3) of the Treaty. Rather, the existence of objective appreciable efficiencies is assessed in relation to the MIF as such, the effects it produces on the market and the manner in which it is set. In particular, the Commission verifies on the basis of the evidence submitted whether the model underlying a MIF is based on realistic assumptions (which is not the case here), whether the methodology used to implement that model in practice is objective and reasonable (which is not the case for the two methodologies used by MasterCard) and whether the MIF indeed has the positive effect on the market to the benefit of both customer groups which the model claims.
>
> 732. Any claim that a MIF creates efficiencies within the meaning of Article 81(3) of the Treaty must therefore be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts. MasterCard has not provided such analysis and empirical evidence, only a general assertion that the balancing of the demand of cardholders and merchants through a MIF leads to a better performance of the MasterCard system, is inherent and indispensable to the operation of a four-party payment card system, contributes to overall economic welfare and therefore "undoubtedly" fulfils the first condition of Article 81(3) of the Treaty.
>
> 733. In conclusion, the MasterCard MIF does not meet the first condition of Article 81(3) of the Treaty."

127. Turning to the second condition (fair share of benefits to consumers), the Commission summarised Mastercard's contention:

> "735. MasterCard argues that the key direct benefit of its MIF for consumers is to "optimize the use of a service which is characterized by collaborative joint service and joint demand and indirect network effects". Both cardholders and merchants would benefit from the MIF "through a better functioning system". The MasterCard MIF also leads to more general efficiencies of four party

[13] Case COMP/D1/29.373 of 22 November 2002. See the Decision at (33)-(34).

> systems, such as "competition among issuers and among acquirers, greater network benefits, greater coverage and overall better performance which, in each case, benefits both groups of users, that is to say merchants and cardholders.
>
> 736. MasterCard also believes that "if issuers presented cardholders with the issuers' costs and acquirers presented merchants with acquirers' costs, the outcome would be many fewer completed transactions and, ultimately, the demise of the MasterCard payment system"…."

128. The Commission analysed these arguments, observing that many replicated Mastercard's submissions with respect to the first condition, reviewed Mastercard's methodologies for setting its MIFs, and found that Mastercard's evidence did not support its contentions. Accordingly, the Commission concluded at (747) that the second condition was not satisfied.

129. Turning to the third condition (indispensability), the Commission summarised Mastercard's primary argument as follows, at (748):

> "MasterCard's claim that its MIF is *indispensable* to achieve efficiencies is based on arguments similar to those used to support the efficiency claim in relation to the first condition of Article 81(3) of the Treaty. MasterCard argues that its MIF setting methodology "is designed to lead to an optimal MIF level" and that the elements of that methodology, that is to say, the MasterCard's discretion in setting the cross-border interchange fees, the use of a "proxy for the merchants' elasticity of demand" and "the competitive environment of the payment system market", ensure that the fees were set at the "optimal" level."

130. The Commission assessed the indispensability condition somewhat briefly before concluding that this condition was not fulfilled. It stated that several payment card schemes in the EEA have been operating without a MIF for a long time. And the Commission added that it had concerns about the objectiveness of Mastercard's methodologies for setting its MIFs.

131. Having found that none of the first three conditions of Art 101(3) were satisfied, the Commission did not trouble to analyse the fourth condition.

132. Referring to recital (700), Ms Demetriou submitted that Commission had effectively invited Mastercard to submit empirical evidence that might justify its MIFs or some level of MIF, but Mastercard had disavowed that approach and sought to argue on the basis that the essential concept of a MIF and the way it was set met the criteria for exemption. Mastercard's arguments failed, and as a

result the Decision made a broad finding of infringement with no part of its MIFs exempt.

133. We think that submission is correct. It is clear that Art 1 of the operative part of the Decision stated that the infringement comprises the MIF as a restriction "by in effect setting a minimum price merchants must pay to their acquiring banks for accepting payment cards". That is the effect of <u>any</u> MIF; it is not dependent on the particular levels of MIFs which Mastercard had notified: see at para 64 above. And as we have concluded above in section D regarding s. 11(2) PLSA, the subject-matter of the Decision was the "Mastercard MIF", including the relevant Mastercard network rules, which Art 3 of the Decision required Mastercard to modify: see para 64 above.

134. A finding by the Tribunal that different levels of MIFs which might have been set by Mastercard for the period covered by the Decision did not infringe Art 101 because they met the conditions for exemption under Art 101(3) would, in our view, run directly counter to this determination. It is of course implicit in Art 1 of the Decision that Mastercard's MIFs were not exempted. And the essential basis for that finding, as set out in the antecedent recitals, did not rest on the level of those MIFs, as the extracts from the Decision set out above demonstrate.

135. Our view is reinforced by Arts 4-5 which required Mastercard to inform all financial institutions in the Mastercard network of these changes and repeals, and to publish a link to prescribed information about that repeal on Mastercard's websites for each EEA Member State. The basis for that requirement is found in recital (765):

> "To remedy the competitive harm in the market as fast as possible it is important that acquiring banks pass-on the cost reductions resulting from <u>the absence of MasterCard's Intra-EEA fallback interchange fees</u> to their customers. This presupposes in turn that merchants are adequately informed that their banks are now in a position to offer considerably lower merchant fees." [emphasis added]

136. Accordingly, we find that the case for exemption was argued by Mastercard on the high-level basis that its MIF scheme as such met the conditions for exemption, not that exemption was dependent on the level of the MIFs. As a

result, the Decision did not simply hold that the particular level of EEA MIFs set by Mastercard did not qualify for exemption, but that *for the period covered by the Decision* the relevant Mastercard rules and MIFs were not exempt.

137. In its response, Mastercard relied strongly on recital (13) in the Executive Summary at the start of the Decision:

> "As MasterCard's MIF restricts price competition between acquiring banks without fulfilling the first three conditions of Article 81(3) of the Treaty the Commission orders MasterCard to withdraw its intra-EEA and SEPA/intra-Eurozone fallback interchange fees within six months upon adoption of this decision. This remedy excludes one aspect of MasterCard's MIF as far as commercial cards are concerned. The Commission will further research the possibility of efficiencies in this respect. The order does not prevent MasterCard […] from adopting an entirely new MIF (other than the Intra-EEA fallback interchange fees and the SEPA/intra-Eurozone fallback interchange fees) that can clearly be proven to fulfil the four cumulative conditions of Article 81(3) of the Treaty based on solid empirical evidence."

138. However, in our view that only acknowledges and records the fact that the Decision deals with the Mastercard MIF over the relevant period and is not addressing any EEA MIFs which Mastercard may seek to set for a different period in the future. Thus for future periods, Mastercard can seek to argue that its rules and the MIFs it may introduce satisfy the conditions for exemption under Art 101(3), relying on sound evidence for that purpose. That is unsurprising, both on the analysis of the Art 101(3) conditions in the Decision to which we have referred and the fact that, as recorded in the Decision at recitals (33)-(35), the Commission had in 2002 granted a time-limited exemption to the Visa intra-regional MIF after Visa had reformed various elements of the MIF, including a change to the operating rules that applied to its member banks.

139. By contrast, what Mastercard is seeking to do in the present proceedings is to say that the Decision is not binding in respect of exemption for any MIFs over the relevant period other than the specific MIFs that had been notified for exemption, since it appears that the Commission would have been prepared to consider whether a particular level of MIF might be exemptible. We consider that this is a forensic attempt to recast the Decision made by the Commission, on a basis that was not advanced before the Commission but which Mastercard

could have advanced. In our judgment, the fact that the Commission might have made a different decision of more limited scope if the case before it had been argued differently cannot assist in determining what the Decision which the Commission did make actually decided. It is the Decision that was made which is binding on the Tribunal.

140. Mr Cook KC, who argued this part of the case for Mastercard and whose skilful submissions did not lack for ingenuity, submitted that the Decision does not consider other levels of MIF as it was addressing what happened in the actual world (i.e. the MIFs Mastercard set). The counterfactual world that is relevant for the assessment of damages is by definition hypothetical, so Mastercard should be free to submit that there were levels of MIF which would have qualified for exemption in the counterfactual world where Mastercard would have notified those MIFs (or perhaps a different method for setting MIFs) for exemption. But for reasons we have explained, that involves narrowing the scope of the Decision which as set out above concerns Mastercard's network rule and its setting positive MIFs, and which holds that the conditions for exemption for Mastercard's positive MIFs (as opposed to particular levels of Mastercard MIFs) were not satisfied. That was the infringement found by the Decision in this particular case and the counterfactual is accordingly a situation where that infringement did not exist: i.e. where Mastercard did not for the relevant period apply the relevant network rule or set positive EEA MIFs (save for commercial MIFs which were outside the scope of the Decision).

141. The fallacy in Mastercard's approach is highlighted by the contention at para 89 of its Amended Defence that it would seek to show that "lawful alternative EEA MIFs were higher than the EEA MIFs actually set (or alternatively were close to the level actually set)": see para 104 above. That was clarified in a letter from Mastercard's solicitors dated 30 November 2022, where they said:

> "Mastercard does not contend that the same level of EEA MIFs considered in the EC Decision would have met the criteria for exemption, since this would contradict the EC Decision which held that the actual EEA MIFs were unlawful. However, Mastercard is free to seek to establish that alternative levels of EEA MIFs (whether higher or lower) would have met the criteria for exemption, since each different EEA MIF will have different costs and benefits and consequently a finding that an alternative MIF would have met the criteria

> for exemption would not contradict the finding in the EC Decision that Mastercard had failed to establish that the actual EEA MIFs did so."

142. In response to a question from the Tribunal, Mr Cook said that Mastercard would not in fact seek to contend that MIFs at levels higher than those notified to the Commission and covered by the Decision would meet the criteria for exemption. But although that was no doubt a sensible concession, the logic of Mastercard's position is that it would indeed be free to argue for higher MIFs since the Decision was holding only that Mastercard had failed to produce evidence justifying the specific levels of MIFs which it had set. However, as explained above, in dealing with exemption the Decision did not scrutinise the particular levels of Mastercard MIFs at all. The Decision addressed the question of exemption for the "Mastercard MIF" in more general terms, responding to the arguments put forward. As the General Court stated at para 234 of its judgment in respect of the first ground for exemption, when rejecting Mastercard's ground of appeal challenging the Decision in respect of Art 101(3):

> "the Commission was entitled … to conclude that neither the method applicable to credit and charge cards nor that relating to debit cards had established that the first condition of Art [101](3) was satisfied."

143. We should add that while we heard interesting submissions from both sides as to whether it was more appropriate to ask what Mastercard *would* have done or what Mastercard *should* have done in the counterfactual, we did not find that particularly helpful. The critical question, in our view, is what the Decision, reading the operative part in the light of the recitals which form its foundation, actually decided. Therefore the question of alternative MIFs which Mastercard could or would have set arises only if, contrary to our view, the Decision was confined to particular levels of MIFs.

144. We also did not consider the tort analogies invoked by Mastercard were apposite. Thus Mastercard said that in a road accident case where the defendant had been driving at 40 mph in a 30 mph zone, the claimant's loss would not be assessed by assuming that the defendant would not have driven at all but on the assumption that he was driving at the lawful speed limit. That is of course correct, but there the unlawful conduct was driving in excess of the speed limit.

Here, the Decision nowhere states that the infringement comprised the setting by Mastercard of MIFs above a permissible limit: indeed, Arts 1 and 3 of the Decision are inconsistent with that interpretation.

145. We should add that we also do not think that the references to the counterfactual in the Court of Appeal and Supreme Court decisions in the domestic merchant appeals are applicable to the issue before us. We agree with Mastercard that the counterfactual there being considered concerned specifically the restriction of competition for the purpose of Art 101(1).

146. Mr Cook relied on the approach to exemption in the domestic merchant cases, and in particular the Court of Appeal's judgment, *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2018] EWCA Civ 1536. Dealing with quantum issues in Part IX of its judgment, the Court said, at [308]:

> "The issue is, … whether, if the agreement is not exempt under article 101(3), the merchants nevertheless carry the burden of proving what MIF agreement, if any, would have been exemptible, as the starting point for assessing the loss that they have sustained. Popplewell J and Phillips J reached different conclusions on that issue.

147. Then, after discussing the contrasting approaches at first instance of Popplewell J (in claims by a number of large retailers against Mastercard) and Phillips J (in a claim by Sainsbury's against Visa), the Court held, at [316]-[317]:

> "We agree with the conclusion of Phillips J on this issue. The correct analysis is to apply articles 101(1) and (3) in order to determine whether or not the default MIF, as charged, is in whole or in part unlawful, and then to assess damages on the unlawful amount or level as so determined.
>
> We also agree with Phillips J that, in any event, as a matter of principle, the burden of proving any particular exemptible level of default MIF for the purpose of assessment of damages should lie on the scheme rather than the merchant. The burden of proving that some agreement, other than the actual agreement, would have been lawful should lie on the party putting forward that assertion. Otherwise a heavy burden would be placed on the merchants, incompatible with the enforcement of competition legislation through private claims in national courts: see Case C-295/04 *Manfredi v Lloyd Adriatico SpA* [2007] Bus LR at [89]-[91]. It would require the merchants to prove a complex negative, namely the highest level at which the MIF would be exempt…."

148. However, as a matter of general principle that is not here in dispute. The Court of Appeal was not there considering the particular circumstances of a follow-on

claim, nor was it any part of the claimants' argument that the defendant schemes could not rely on exemption because of the Commission Decision, which of course concerned only Mastercard not Visa. The Court of Appeal was addressing the general approach to be taken to an exemption argument in terms of the burden and standard of proof. The CR does not suggest that on a stand-alone claim against Mastercard for a period after the period covered by the Decision, Mastercard would not be entitled to argue that its MIFs qualify for exemption.

149. More relevantly, Mastercard referred to the first instance judgment of Popplewell J, *ASDA Stores Ltd and ors v Mastercard Inc* [2017] EWHC 93 (Comm), where the judge said at [82(1)]:

> "The court is bound by the *MasterCard* Commission Decision insofar as the present claims relate to the application of the MasterCard EEA MIFs to intra EEA transactions for the period from 23 May 2007/5 October 2007 until 19 December 2007 (and the EEA MIFs as the default MIFs applicable to Irish domestic transactions for the period from 23 May 2006/5 October 2006 to 8 January 2007). In relation to this period, MasterCard acknowledged that the Commission concluded that the EEA MIFs actually set did not satisfy the exemption conditions and that this finding is binding. It contended, however, that because the Commission did not consider whether different EEA MIFs would satisfy the exemption conditions, this court is free to consider that question and must do so for the purpose of the Claimants' damages claim. That contention is well founded. The *MasterCard* Commission Decision was that MasterCard had failed to provide the necessary evidence to establish exemption for its MIFs in accordance with Article 101(3), but as recital 13 makes clear, the Commission did not regard its decision as precluding MasterCard from adopting new MIFs if it could prove that such MIFs fell within the exemption criteria based on further evidence."

150. However, we note that the period to which the judge referred was a very minor part of the period of the claims before him, which apparently extended to the date the actions were brought (or until trial). As the judge stated at [86], the period of overlap was very small. Perhaps because this had such minimal significance to those claims, it does not appear that arguments about the binding effect of the Decision as regards exemption, such as we have heard in the present proceedings, were addressed to the judge in that case: the claimants' argument there was framed more generally in terms of the burden of proof: see at [296]. Having had the benefit of extensive submissions on this issue, and with great

respect to Popplewell J, for all the reasons set out above we have reached a different conclusion.[14]

151. If we are correct in that view, it is unnecessary to consider the CR's argument of abuse of process. But as it was fully argued and in case we are wrong, we proceed to address that alternative case.

(2) Abuse of process

152. The application of the principles of abuse of process to a private damages claim following a Commission decision were considered by the Tribunal in *Trucks - CAT,* which was upheld by the Court of Appeal in *AB Volvo v Ryder Ltd* [2020] EWCA Civ 1475 ("*Trucks – CA*").

153. The Court held that the whole of a Commission decision finding infringement of Art 101(1) (in that case, a cartel decision) constitutes a "final decision" for the purpose of the abuse of process doctrine: see the judgment of Rose LJ (as she then was) at [97] (with whose judgment Sir Geoffrey Vos C and Flaux LJ agreed).

154. There, the Commission decision was made in proceedings which it had brought against Volvo and other truck manufacturers. The private actions in which the abuse of process doctrine was invoked were brought by direct and indirect purchasers of trucks, who had obviously not been parties to the proceedings before the Commission. The Court of Appeal endorsed the Tribunal's approach that the governing principles in such circumstances should be governed by the test derived from *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 at [38]:

> "If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of [the] process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated; or (ii)

[14] For entirely different reasons, the Court of Appeal reversed Popplewell J's conclusion that Mastercard's MIF arrangements were exempt under Art 101(3).

> to permit such relitigation would bring the administration of justice into disrepute."

155. The Tribunal in its judgment referred to authorities which emphasised that situations in which it will be an abuse to litigate an issue which has not previously been decided between the same parties will be "entirely exceptional" or "rare": see *Trucks – CAT* [121]-[122]. Rose LJ in the Court of Appeal endorsed this approach and held that "the appropriate, high threshold is inherent in the *Bairstow* test": see at [104]. In his concurring judgment, Sir Geoffrey Vos C similarly stated that that "the high threshold is inherent in the requirement of 'manifest unfairness'": see at [144].

156. The Tribunal there also referred, at [102] to the well-known speech of Lord Bingham in *Johnson v Gore Wood & Co* [2000] UKHL 65, [2002] 2 AC 1 (with which Lords Goff, Cooke and Hutton agreed). As the Tribunal explained:

> "The question arose in circumstances where there had been prior proceedings between a company which Mr Johnson controlled and the same defendants arising out of the same transaction. The issue involved the so-called rule in *Henderson v Henderson* directed against raising in a later case arguments, claims or defences which could have been raised in the earlier case. After discussion of the authorities, Lord Bingham considered the application of abuse of process in such circumstances and stated:
>
>> "It is ... wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."
>
> Following close examination of the particular facts, the House of Lords allowed Mr Johnson's appeal, holding that the Court of Appeal in its decision striking out his claim as an abuse:
>
>> "... adopted too mechanical an approach, giving little or no weight to the considerations which led Mr Johnson to act as he did and failing to weigh the overall balance of justice..." (per Lord Bingham at 34)".

157. Before us, there was no dispute regarding these general principles. The threshold is a high one, but at the same time the doctrine is flexible not

mechanistic. Since *Trucks - CA*, the Court of Appeal has again considered abuse of process in a number of cases. In *Tinkler v Ferguson* [2021] EWCA Civ 18, which was not cited before us, Peter Jackson LJ (with whose judgment Dingemans LJ and Sir Richard McCombe agreed) set out a convenient summary of the governing approach, at [35]:

> "In summary, the power to strike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act."

158. In *Trucks*, the defendants to domestic damages claims had previously, in proceedings before the Commission, admitted various matters regarding the cartel by which they infringed Art 101, leading to a settlement decision. The Court of Appeal upheld the Tribunal's decision that it was an abuse of process for the defendants to dispute before the Tribunal in their defence to the private claims matters which they had admitted in the Commission proceedings although those matters were recorded in non-essential recitals which would not otherwise be binding.

159. The finding of abuse there rested heavily on the fact that these were matters which the defendants had previously admitted as part of their settlement of the Commission proceedings: *Trucks – CA* per Rose LJ at [106]-[107]; per Vos C at [130]. The situation in the present case is clearly different, but abuse of process is particularly fact-sensitive. Therefore, and as in *Trucks*, it is necessary to consider what happened in the proceedings before the Commission.

160. Mastercard had repeated meetings with the Commission in the course of those proceedings: see recital (30). As stated at para 132 above, we accept Ms Demetriou's submission that the Commission had in effect been inviting Mastercard to submit empirical evidence to justify its MIF (or any part of it) but it is clear that Mastercard expressly disavowed any intention to justify particular levels of MIF. Hence in its reply to the Commission's supplementary statement

of objections, when addressing the third condition for exemption, Mastercard stated, at paras 707-708:

> "707. In order to fulfil the third condition of Article 81(3), the Commission states that MasterCard would need to demonstrate that the interchange fee is set with reference to objective criteria and that a interchange fee at a certain level is indispensable in order to achieve the identified benefits.
>
> 708. The Commission's analysis is wrongly focused on the level of the interchange fee as opposed to the freedom to set - and if necessary vary - the level of the interchange fee so as to balance the Scheme. It is the latter which MasterCard claims is indispensable in order to maintain the MasterCard network at its present size, not a specific level of interchange fee. Indeed, any outcome which fettered the freedom of the Scheme as to the proportions in which it can recover the overall costs of the Scheme from cardholders and merchants respectively would put the Scheme at a severe disadvantage relative to its competitors. Without this freedom the Scheme would be unable to compete effectively and could not, therefore, grow or even maintain its current level of business."

161. Mastercard concluded, at para 712:

> "Finally, the Commission proposes that setting the interchange fee with reference to the weighted average of relevant costs would allow MasterCard to set the interchange fee tiers for specific card technologies at level [sic] to incentivise the introduction of technology. This proposed "solution" to MasterCard's concerns about the effect of regulatory intervention on the use of the interchange fee to incentivise certain behaviour misses the point. It is not so much MasterCard's concern that reduction to a particular level will curb participant's ability to innovate but rather that MasterCard should retain the unfettered freedom to be able to use the interchange fee in this manner in the overall interests of the Scheme and its participants."

162. Accordingly, Mastercard had every opportunity to submit arguments to the Commission that the level of its MIFs met the conditions for exemption. If it had done so, then if the Commission considered that the Mastercard MIF was too high, it would have addressed what level would meet the criteria for exemption. That is evident from the very different approach adopted by Visa and the resulting *Visa II* decision on exemption.

163. *Visa II* was also a decision taken in the light of a complaint by a group of retailers (in fact the complaint by Eurocommerce covered both the Visa and Mastercard schemes and was considered in both the Commission's decisions).[15] In the course of the Visa proceedings, the Commission sent Visa a

[15] See the Decision at (15) and *Visa II* at (2).

supplementary statement of objections ("SO") stating that the Visa MIF scheme violated Art 101(1) and did not qualify for exemption under Art 101(3): recital (30). Following that SO and an oral hearing (attended also by Mastercard), Visa engaged with the Commission to discuss possible changes to its MIF scheme, and thereafter modified its scheme: recital (31). Among the major changes introduced was a reduction of the overall level of its EEA MIF: recitals (17)-(20); and the introduction of an independently verified benchmark that would provide a ceiling for the MIFs: recitals (21)-(24). In its assessment of the modified Visa scheme, the Commission held that the MIF arrangement restricted competition within Art 101(1) (recitals (64) et seq.). But as regards Art 101(3), the Commission held that although prior to the modifications the scheme would not have qualified for exemption, the modified scheme met the conditions for exemption: recital (107). Moreover, the exemption was granted subject to conditions, including provisions restricting the level of MIF that Visa could apply: Art 1(2)(c).

164. The approach adopted by the Commission in *Visa II* was not unusual. Before the Modernisation Regulation, when responsibility for exemption rested exclusively with the Commission, where the Commission considered that an agreement or arrangement would not qualify for exemption because of a particular feature, the notifying party or parties would often amend that feature in the course of the proceedings so as to obtain exemption: see, e.g., *Beecham/ Parke, Davis*, (1979) OJ L70/11, [1979] 2 CMLR 157, recitals (21) and (43) (research and development agreement modified in the course of the proceedings so as to obtain exemption for the amended agreement). That reflects the way that competition law was administered by the Commission prior to the radical change introduced by the Modernisation Regulation. As the CJEU stated in Cases 96/82 etc *IAZ v Commission* EU:C:1983:310, at para 15:

> "… the purpose of the preliminary administrative procedure is to prepare the way for the Commission's decision concerning the infringement of the competition rules although that procedure also provides the undertakings concerned with an opportunity to bring the practices complained of into line with the rules of the Treaty."

165. Here, no consideration by the Commission of what level of MIF or modified rule might qualify for exemption took place because Mastercard disavowed

seeking exemption on that basis. Indeed, in *Visa II* the Commission records, among the comments received from third parties, at recital (36):

> "One other card payment system commented that it failed to understand how in law a reduction in the level of a price could have any relevance for the granting of an exemption …"

Ms Demetriou submitted that this "other" card payment system was almost certainly Mastercard, and Mr Cook for Mastercard did not resist this suggestion. That comment is consistent with Mastercard's entire approach in the Commission proceedings. Moreover, although Mastercard challenged the Commission's conclusion on Art 101(3) in its appeal against the Decision to the General Court, that ground of its appeal did not contend that the Commission had failed to consider whether the level of its MIF was reasonable but that the Commission had erred in failing to find that *the role* played by its MIF in the Mastercard scheme was such as to qualify for exemption: judgment at paras 203-237.

166. This is not a case where Mastercard is seeking to raise again matters expressly addressed in the Decision. It is a case where Mastercard is seeking to raise an issue which could have been raised in the proceedings before the Commission but which it very deliberately chose not to raise at that time. It therefore relates to the kind of abuse adverted to by Lord Bingham in *Johnson v Gore Wood*: para 156 above. In considering whether such abuse is made out, we have regard to the fact that the parties in the present proceedings are not the same as those in the previous proceedings (as indeed was the position in *Johnson's* case), and the high threshold which accordingly applies.

167. Having chosen to go through extensive proceedings with the relevant competition authority on the basis that exemption under Art 101(3) did not depend on the level of MIF and despite every opportunity to engage with the authority on what level of MIF might satisfy the conditions for exemption for the period covered by those proceedings, when sued by the victims of the infringement determined by the authority claiming damages allegedly caused by the Mastercard MIFs over that same period, Mastercard seeks to contend that there are various alternative MIFs one of which, depending how the expert

evidence comes out, would have been granted exemption: see Mastercard's pleaded defence on exemption set out at para 104 above. Since for the overwhelming part of the relevant period exemption was in the exclusive jurisdiction of the Commission, the Tribunal would in effect have to determine the level of MIF which would probably have been exempted by the Commission although Mastercard never advanced its case before the Commission that way. Having regard to all the circumstances, we consider that to permit such a defence would bring the administration of justice into disrepute.

168. Moreover, we note that Mastercard, as one would expect, was aware of the antitrust risk created by its MIF. The Decision found that "a clear driving force" behind the IPO of the First Defendant, Mastercard Inc, in May 2006 was the aim to avoid exposure to such risk by changing the structure of Mastercard's decision-making: recital (378). That risk included the risk of private damages claims, as noted in the email communications of early 2005 set out in recital (88) at fn 96 (the president of the Third Defendant referring to "the monetary scale of potential private actions (following a negative decision of a competition authority")). Mastercard's strategy in response to the Commission's investigation and its decision (in contrast with Visa) not to engage in argument about an exemptible level of MIF were accordingly adopted with the recognition that if the Commission's decision went against it, it may very well face significant damages claims.

169. Finally, although fully recognising, as we state above, that as regards abuse this is a 'different parties' case, we observe that this is nonetheless very different from the kind of case considered in some of the authorities where there were two distinct private actions. The claims in the present proceedings lie in tort for breach of statutory duty and, as Mastercard indeed stressed in its arguments on PILMPA 1995, the infringement is an essential (indeed, Mastercard submitted, the most significant) element of that tort. Procedurally, as a follow-on action the case is therefore somewhat unusual in that the first part of the tort was established in the Commission proceedings and the CR is seeking to establish in these collective proceedings the second part of the tort, i.e. causation and quantum. We think there is some force in the submission of Ms Demetriou that

although clearly not the same proceedings, there is a close relationship between them.

170. As the authorities referred to above emphasise, abuse of process is a broad and flexible doctrine. It is to be applied with caution but the wording of prior judgments are not to be applied like a statute. In our view, to allow Mastercard to advance the case it wishes on alternative potentially exemptible levels of MIF would constitute an abuse.

G. CONCLUSION

171. For the reasons set out above, we determine the issues in this trial as follows:

(1) Application of the relevant general legislation on limitation/prescription is not precluded by the CA 1998 and the CAT Rules;

(2) Insofar as the claims are governed by Scots law, s. 11(2) of PLSA 1973 applies and the appropriate date for the purpose of the five year prescription period under s. 6(1) PLSA 1973 is 21 June 2008;

(3) English law applies for the purpose of limitation to claims by English CMs in relation to transactions with merchants selling from outside of England and Scots law applies for the purpose of prescription to claims by Scottish CMs in relation to transactions with merchants selling from outside of Scotland:

(i) for the period from 1 May 1996 onwards pursuant to PILMPA 1995;

(ii) for the period up to 1 May 1996, under the common law;

(The parties agreed that the position of Northern Irish CMs is the same as for English CMs).

(4) Mastercard is not entitled to advance a counterfactual based on alternative, exemptible EEA MIFs pursuant to Art 101(3) TFEU:

(i) by reason of the binding effect of the Decision; alternatively

(ii) because that would be an abuse of process.

172. Further, we determine that the forum of the proceedings for the purpose of any appeal regarding the decision in para 171(2) above is Scotland.

173. This judgment is unanimous.

The Hon. Mr Justice Roth Chair	The Hon. Lord Ericht	Jane Burgess

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 21 March 2023

APPENDIX: RELEVANT STATUTORY PROVISIONS

Competition Act 1998

Section. 47A (as at 20 June 2003)

“Monetary claims before Tribunal

(1) This section applies to—

(a) any claim for damages, or

(b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section *“relevant prohibition”* means any of the following—

(a) the Chapter I prohibition;

(b) the Chapter II prohibition;

(c) the prohibition in Article 81(1) of the Treaty;

(d) the prohibition in Article 82 of the Treaty;

(e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community;

(f) the prohibition in Article 66(7) of that Treaty.

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are—

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;

(b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or

(e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.

(7) The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection (6)(a), (b) or (c) may not be brought without permission are—

(a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46, section 47 or the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (S.I. 2001/2916);

(b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49 or under those Regulations;

(c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49 or under those Regulations;

(d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal;

and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.

(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are—

(a) the period during which proceedings against the decision or finding may be instituted in the European Court; and

(b) if any such proceedings are instituted, the period before those proceedings are determined.

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

(10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

Section 47A (as at 1 October 2015)

"Proceedings before the Tribunal: claims for damages etc.

(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.

(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition,

(b) the Chapter II prohibition,

(c) the prohibition in Article 101(1), or

(d) the prohibition in Article 102.

(3) The claims are—

(a) a claim for damages;

(b) any other claim for a sum of money;

(c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.

(4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded.

(5) The right to make a claim in proceedings under this section does not affect the right to bring any other proceedings in respect of the claim.

(6) In this Part (except in section 49C) *"infringement decision"* means—

(a) a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed,

(b) a decision of the Tribunal on an appeal from a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed, or

(c) a decision of the Commission that the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed."

Section 47B

"Collective proceedings before the Tribunal

(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").

(2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.

(3) The following points apply in relation to claims in collective proceedings—

(a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings,

(b) the proceedings may combine claims which have been made in proceedings under section 47A and claims which have not, and

(c) a claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim.

(4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.

(5) The Tribunal may make a collective proceedings order only—

(a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and

(b) in respect of claims which are eligible for inclusion in collective proceedings.

(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

(7) A collective proceedings order must include the following matters—

(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,

(b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and

(c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).

(8) The Tribunal may authorise a person to act as the representative in collective proceedings—

(a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but

(b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

(9) The Tribunal may vary or revoke a collective proceedings order at any time.

(10) *"Opt-in collective proceedings"* are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.

(11) *"Opt-out collective proceedings"* are collective proceedings which are brought on behalf of each class member except—

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.

(12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified.

(13) The right to make a claim in collective proceedings does not affect the right to bring any other proceedings in respect of the claim.

(14) In this section and in section 47C, *"specified"* means specified in a direction made by the Tribunal."

<u>Section 47E (as at 1 October 2015)</u>

"Limitation or prescriptive periods for proceedings under section 47A and collective proceedings

(1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—

(a) proceedings under section 47A, or

(b) collective proceedings at the commencement of those proceedings.

(2) Where this subsection applies—

(a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;

(b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;

(c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court established by law.

(3) Where a claim is made in collective proceedings at the commencement of those ("the section 47B claim"), subsections (4) to (6) apply for the purpose of determining the limitation or prescriptive period which would apply in respect of the claim if it were subsequently to be made in proceedings under section 47A.

(4) The running of the limitation or prescriptive period in respect of the claim is suspended from the date on which the collective proceedings are commenced.

(5) Following suspension under subsection (4), the running of the limitation or prescriptive period in respect of the claim resumes on the date on which any of the following occurs—

(a) the Tribunal declines to make a collective proceedings order in respect of the collective proceedings;

(b) the Tribunal makes a collective proceedings order in respect of the collective proceedings, but the order does not provide that the section 47B claim is eligible for inclusion in the proceedings;

(c) the Tribunal rejects the section 47B claim;

(d) in the case of opt-in collective proceedings, the period within which a person may choose to have the section 47B claim included in the proceedings expires without the person having done so;

(e) in the case of opt-out collective proceedings—

(i) a person domiciled in the United Kingdom chooses (within the period in which such a choice may be made) to have the section 47B claim excluded from the collective proceedings, or

(ii) the period within which a person not domiciled in the United Kingdom may choose to have the section 47B claim included in the collective proceedings expires without the person having done so;

(f) the section 47B claim is withdrawn;

(g) the Tribunal revokes the collective proceedings order in respect of the collective proceedings;

(h) the Tribunal varies the collective proceedings order in such a way that the section 47B claim is no longer included in the collective proceedings;

(i) the section 47B claim is settled with or without the Tribunal's approval;

(j) the section 47B claim is dismissed, discontinued or otherwise disposed of without an adjudication on the merits.

(6) Where the running of the limitation or prescriptive period in respect of the claim resumes under subsection (5) but the period would otherwise expire before the end of the period of six months beginning with the date of that resumption, the period is treated as expiring at the end of that six month period.

(7) This section has effect subject to any provision in Tribunal rules which defers the date on which the limitation or prescriptive period begins in relation to claims in proceedings under section 47A or in collective proceedings."

The Competition Appeal Tribunal Rules 2003

Rule 31

"Time limit for making a claim for damages

(1) A claim for damages must be made within a period of two years beginning with the relevant date.

(2) The relevant date for the purposes of paragraph (1) is the later of the following—

 (a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;

 (b) the date on which the cause of action accrued.

(3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.

(4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A."

The Competition Appeal Tribunal Rules 2015

Rule 118

"The following Rules are revoked—

(a) the Competition Appeal Tribunal Rules 2003

(b) the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004."

Rule 119

"(2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—

 (a) proceedings under section 47A of the 1998 Act, or

 (b) collective proceedings.

(3) A claim falls within this paragraph if—

(a) it is a claim to which section 47A of the 1998 Act applies; and

(b) the claim arose before 1st October 2015."

Prescription and Limitation (Scotland) Act 1973

Section 6

"**Extinction of obligations by prescriptive periods of five years.**

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished;

…

(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—

(a) any period during which by reason of—

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor was induced to refrain from making a relevant claim in relation to the obligation, and

…

shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

Section 11

"**Obligations to make reparation.**

(1) Subject to subsections (2) and (3) below; any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased."

The Private International Law (Miscellaneous Provisions) Act 1995

Section 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

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant element or elements of those events occurred."

Section 12

"Choice of applicable law: displacement of general rule.

(1) If it appears, in all the circumstances, from a comparison of-

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."