Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

11 September 2014*

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* Language of the case: English.

(Appeal — Cross-appeals — Admissibility — Article 81 EC — Open system of payment by debit, charge and credit cards — Multilateral fallback interchange fees — Association of undertakings — Restrictions of competition by effect — Standard of judicial review — Concept of 'ancillary restriction' — Objectively necessary and proportionate nature — Appropriate 'counterfactual hypotheses' — Two-sided systems — Treatment of annexes to the application at first instance)

In Case C-382/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 4 August 2012,

MasterCard Inc., established in Wilmington (United States),

MasterCard International Inc., established in Wilmington,

MasterCard Europe SPRL, established in Waterloo (Belgium),

represented by E. Barbier de la Serre, V. Brophy and B. Amory, avocats, and by T. Sharpe QC,

appellants,

the other parties to the proceedings being:

European Commission, represented by V. Bottka and N. Khan, acting as Agents,

defendant at first instance,

Banco Santander SA, established in Santander (Spain),

Royal Bank of Scotland plc, established in Edinburgh (United Kingdom), represented by D. Liddell, Solicitor, and M. Hoskins, Barrister,

HSBC Bank plc, established in London (United Kingdom), represented by R. Thompson QC,

Bank of Scotland plc, established in Edinburgh,

Lloyds TSB Bank plc, established in London,

represented by K. Fountoukakos-Kyriakakos and S. Wisking, Solicitors, and by J. Flynn QC,

MBNA Europe Bank Ltd, established in Chester (United Kingdom), represented by A. Davis, Solicitor,

British Retail Consortium, established in London, represented by R. Marchini, advocate, and A. Robertson, Barrister,

EuroCommerce AISBL, established in Brussels (Belgium), represented by J. Stuyck, advocaat,

United Kingdom of Great Britain and Northern Ireland, represented by M. Holt and C. Murrell, acting as Agents, and by J. Turner QC and J. Holmes, Barrister,

interveners at first instance,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh (Rapporteur), C. Toader and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 July 2013,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2014,

gives the following

Judgment

1 By their appeal, MasterCard Inc. and its subsidiaries MasterCard International Inc. and MasterCard Europe SPRL request the Court to set aside the judgment of the General Court of the European Union in *MasterCard and Others* v *Commission* (T-111/08, EU:T:2012:260) ('the judgment under appeal'), by which the General Court dismissed their action for, principally, annulment of Commission Decision C(2007) 6474 final of 19 December 2007 relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Cases COMP/34.579 — MasterCard, COMP/36.518 — EuroCommerce, COMP/38.580 — Commercial Cards; 'the decision at issue'), and, in the alternative, to annul Articles 3 to 5 and 7 of that decision.

2 By their respective cross-appeals, Royal Bank of Scotland plc ('RBS'), on the one hand, and, on the other, Bank of Scotland plc ('BoS') and Lloyds TSB Bank plc ('LTSB'), both of which (collectively 'LBG') are now under the control of Lloyds Banking Group plc and acting jointly for the purposes of the present proceedings, request the Court to set aside the judgment under appeal and to annul the decision at issue.

Background to the dispute and the decision at issue

3 As is apparent in particular from paragraphs 20, 24, 27, 35, 39 and 40 of the judgment under appeal, by the decision at issue, the Commission of the European Communities found, inter alia, in essence, that the setting of multilateral fallback interchange fees in the payment system operated by the international payment organisation known as 'MasterCard' ('MasterCard') which apply above all to cross-border bank card payments within the European Economic Area (EEA) or the euro area ('MIF') constituted a decision by an association of undertakings which led to a restriction of competition between participating banks providing merchants with services enabling them to accept MasterCard and/or Maestro debit, charge and credit cards, that that restriction was appreciable, that it affected trade between Member States, and that the appellants had not demonstrated to the requisite legal standard either that the MIF were objectively necessary for the operation of the MasterCard system or that the conditions for exemption imposed by Article 81(3) EC or Article 53(3) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) were satisfied.

4 It is evident from the file, and in particular from paragraph 17 of the judgment under appeal, that in an 'open' payment system such as the MasterCard system, the parties involved in each purchase made by bank card are, besides the owner of the payment system, the cardholder, the financial institution which

issues that card (referred to as the 'issuing bank'), the merchant, and the financial institution providing that merchant with services enabling him to accept the card as a means of settling the transaction concerned (referred to as the 'acquiring bank').

5 The background and key elements of the decision at issue for the purposes of the appeal and the cross-appeals, as set out in paragraphs 1 to 44 of the judgment under appeal, may be summarised as follows.

6 The appellants are responsible for the management and coordination of the MasterCard and Maestro card payments system, which includes, inter alia, establishing the rules for the system and providing participating financial institutions with authorisation and compensation services. The issuing of MasterCard and Maestro cards and the conclusion of membership agreements with merchants for the acceptance of such cards are dealt with by those financial institutions.

7 Before 25 May 2006, MasterCard was wholly owned and the corresponding voting rights held by the participating financial institutions. On that date, MasterCard Inc. was the subject of an initial public offering ('the IPO') on the New York Stock Exchange (United States), which modified the structure and governance of MasterCard.

8 On 30 March 1992 and 27 June 1997, the Commission received complaints from British Retail Consortium ('BRC') and from EuroCommerce AISBL ('EuroCommerce') respectively against, inter alia, Europay International SA ('Europay'), now MasterCard Europe SPRL.

9 Europay submitted notifications to the Commission in respect of its entire payment system.

10 On 13 April 2002, the Commission published a notice pursuant to Article 19(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), in which it announced its intention to adopt a favourable position with respect to some of the rules of Europay's system, which did not include those relating to fallback interchange fees.

11 By the decision at issue, the Commission found that the appellants had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area. That decision includes the considerations set out below:

— Interchange fees concern the relationship between issuing and acquiring banks on settlement of card transactions and correspond to a sum deducted in favour of the issuing bank. These fees must be distinguished from the costs charged to merchants by the acquiring bank (merchant service charges; 'MSC'). The decision at issue relates only to the MIF, and not to the interchange fees agreed bilaterally between issuing and acquiring banks or the interchange fees set collectively at national level.

— It is necessary to distinguish between three different product markets in the sphere of open bank card systems: first of all, the 'inter-systems market', in which the various card systems compete; then the 'issuing market', in which the issuing banks compete for the business of the cardholders; and, lastly, the 'acquiring market', in which the acquiring banks compete for the merchants' business. The relevant market for the purposes of the decision at issue is made up of the national acquiring markets in the Member States of the EEA.

— The appellants' decisions in relation to the setting of the MIF constitute decisions by an association of undertakings within the meaning of Article 81(1) EC, notwithstanding the changes in MasterCard's structure and governance arising from the IPO.

— The MIF have the effect of inflating the base of the MSC, while the latter could be lower if there were no MIF and if there were a prohibition of unilateral pricing *a posteriori* of transactions by the issuing banks, that is to say, a rule prohibiting issuing and acquiring banks from defining the amount of the interchange fees after a purchase has been made by one of the issuing bank's cardholders from one of the acquiring bank's merchants and the transaction has been submitted for payment ('prohibition of *ex post* pricing'). The MIF therefore lead to a restriction of price competition between acquiring banks to the detriment of merchants and their customers.

— MIF cannot be regarded as 'ancillary restrictions' in so far as they are not objectively necessary for the operation of an open payment card scheme. The scheme could function simply on the basis of the remuneration of issuing banks by cardholders, of acquiring banks by merchants, and of the owner of the scheme by the fees paid by the issuing and acquiring banks. Unlike restrictions which are necessary for implementing a main operation, restrictions which are merely desirable for the commercial success of that operation, or which offer greater efficiency, can be examined only within the framework of Article 81(3) EC.

— With regard to the impact of the requirement, in the context of the MasterCard system, that all Maestro or MasterCard cards should be accepted irrespective of the issuing bank (the 'Honour All Cards Rule'), the elimination of the MIF would not mean that the issuing banks could freely and unilaterally set interchange fees, since that risk could be avoided by a rule having effects less restrictive of competition, such as the prohibition of *ex post* pricing.

— As regards Article 81(3) EC, the economic arguments put forward by the appellants in relation to the role of the MIF in the balancing of the MasterCard system and its maximisation are inadequate for the purposes of establishing that the MIF generate objective advantages. The appellants notably did not produce evidence to show that any objective advantages counterbalanced the disadvantages of the MIF for merchants and their customers.

The action before the General Court and the judgment under appeal

12 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 1 March 2008, the appellants brought an action for annulment of the decision at issue or, in the alternative, for annulment of Articles 3 to 5 and 7 thereof.

13 As is apparent from paragraph 73 of the judgment under appeal, the appellants put forward four pleas in law in support of their action, alleging, first, infringement of Article 81(1) EC as a result of errors in the analysis of the effects of the MIF on competition; secondly, infringement of Article 81(3) EC; thirdly, infringement of Article 81(1) EC as a result of the MIF being incorrectly characterised as decisions by an association of undertakings; and, fourthly, errors vitiating the administrative procedure and errors of fact.

14 In their interventions before the General Court, BRC, EuroCommerce and the United Kingdom of Great Britain and Northern Ireland contended that the appellants' action should be dismissed, while Banco Santander SA, RBS, HSBC Bank plc ('HSBC'), BoS, LTSB and MBNA Europe Bank Ltd ('MBNA') claimed, inter alia, that the decision at issue should be annulled.

15 By the judgment under appeal, the General Court dismissed the appellants' action, ruling, essentially, that they had not established that the decision at issue was vitiated by an error of law or a manifest error of assessment.

Forms of order sought

16 The appellants claim that the Court of Justice should, in essence:

— set aside the judgment under appeal;

— annul the decision at issue; and

— order the Commission to pay the costs of both sets of proceedings.

17 RBS, HSBC, LBG and MBNA submitted responses in support of the appeal, whereas BRC, EuroCommerce and the United Kingdom support the Commission in its contention, primarily, that the appeal should be dismissed and, in the alternative, that the action for annulment of the decision at issue should be dismissed.

18 The forms of order sought in the cross-appeals of RBS and LBG are, in essence, the same as those sought in the appeal.

19 The appellants support the forms of order sought in the cross-appeals, while the Commission, supported by BRC, contends that the cross-appeals should be dismissed.

Admissibility of the cross-appeals

20 The Commission argues that the cross-appeals brought by RBS and LBG respectively are inadmissible, on the ground that each cross-appeal is included in the same document as the response to the main appeal lodged by the respective party concerned.

21 As the Commission points out, Article 176(2) of the Rules of Procedure of the Court of Justice, which entered into force on 1 November 2012, provides that the 'cross-appeal must be introduced by a document separate from the response'.

22 However, it must be noted that the electronic versions of the cross-appeals brought by RBS and LBG respectively were received at the Registry of the Court of Justice on 31 October 2012, and were followed by the lodging of the respective originals two and five days later.

23 Consequently, whether Article 57(7) of the Rules of Procedure in force from 1 November 2012 is applied, or Article 37(6) of the Rules of Procedure in force until that date, the fact remains that the cross-appeals were validly brought on 31 October 2012.

24 The Rules of Procedure in force on the latter date do not contain a provision corresponding to Article 176(2) invoked by the Commission. Therefore, the cross-appeals cannot be considered to be inadmissible in so far as they were submitted in responses to the main appeal.

25 The more specific objections of inadmissibility raised by the Commission will be examined in the context of the pleas in law concerned.

26 With regard to the main appeal, in so far as the Commission maintains, as a preliminary point, that that appeal is 'in a major part' inadmissible, the Commission is in fact pleading specifically that particular parts of that appeal are inadmissible, but is not claiming that the appeal is inadmissible in its entirety. Those specific objections must therefore be addressed in the context of the examination of the pleas concerned.

Substance

27 By their main appeal and their cross-appeals, the appellants, RBS and LBG complain that the General Court erred in law by ruling, in essence, that:

— several annexes to the application at first instance were inadmissible (third plea in the main appeal);

— the Commission did not err in concluding that the MasterCard payment system constitutes an 'association of undertakings' within the meaning of Article 81 EC, despite the changes brought about by the IPO (second plea in the main appeal);

— the decision at issue demonstrates to the requisite legal standard that the MIF have restrictive effects on competition (RBS's cross-appeal and first plea in LBG's cross-appeal);

— the MIF cannot be considered to be objectively necessary for the operation of the MasterCard system (first plea in the main appeal); and

— the Commission was able to conclude without erring in law that the appellants had not demonstrated that the MIF satisfy the conditions imposed in Article 81(3) EC (second plea in LBG's cross-appeal).

28 The first plea in the main appeal, the cross-appeal of RBS and the first plea in the cross-appeal of LBG concern the question whether the General Court erred in law by endorsing the conclusion in the decision at issue that the setting of the MIF is covered by the prohibition rule laid down in Article 81(1) EC. For the purpose of dealing with these pleas, the Court would have to address, first, the third plea in the main appeal. Since examination of the first plea in the main appeal, RBS's cross-appeal and the first plea in LBG's cross-appeal would be rendered superfluous if the second plea in the main appeal were well founded, the Court must address, secondly, that second plea.

The third plea in the main appeal, alleging an error of law concerning the admissibility of certain annexes to the application at first instance

The judgment under appeal

29 With regard to the complaint raised before the General Court in relation to the Commission's examination of the economic evidence submitted by the appellants during the procedure that led to the adoption of the decision at issue, the General Court stated, in paragraph 183 of the judgment under appeal, that the appellants were complaining that the Commission had failed to examine or respond to that evidence. The General Court noted, in paragraph 185 of the judgment under appeal, that that complaint 'is set out in particularly succinct terms in the application and that the arguments in support of it are in fact developed in Annexes A.13 [to] A.15 … drawn up by the various experts behind the economic evidence submitted during the administrative procedure and to which the [appellants] make a general reference'.

30 According to paragraphs 186 to 188 of the judgment under appeal:

'186 ... in paragraphs 52 to 54 of the application, the [appellants] merely state that they provided substantial economic arguments during the administrative procedure which have not been followed or which have been misrepresented by the Commission, and that "[their] economists' conclusions" sustain their legal analysis, according to which the Commission "was wrong [i]n concluding that the interchange fee [was] a restriction of competition; [t]o focus on the impact of

the interchange fee (or differences in its level) on MSCs without considering the effect on cardholder charges; [and in] denying that the scheme [had] to set an interchange fee level that maximises the volume of transactions and ignoring that this would promote consumer welfare".

187 Therefore, it must be held that while the application presents the terms of the [appellants'] complaint, it does not include the arguments to support it.

188 Consequently, the Commission was correct to maintain that the text of the application does not reveal sufficiently precise information to enable this Court to be able to exercise its power of review and the Commission to prepare its defence.'

31 In the first part of the fourth plea of the application at first instance, in paragraphs 111 to 130 of that application, alleging infringement of the appellants' rights of defence, the appellants inter alia criticised the Commission for a 'lack of clarity in the letter of facts' which the Commission had sent to them on 23 March 2007, after the hearing on 14 and 15 November 2006. In that regard, the General Court observed, in paragraph 278 of the judgment under appeal, that 'the [appellants'] arguments are included in their application only in particularly succinct terms'. In paragraph 280 of that judgment, the General Court considered that, since the appellants had merely made a general reference to Annex A.20 to the application at first instance, no account could be taken of that annex.

32 In paragraphs 189 and 282 of the judgment under appeal, the General Court rejected as inadmissible the complaints relating, respectively, to the Commission's examination of the economic evidence submitted by the appellants and to a lack of clarity in the letter of facts.

Arguments of the parties

33 The appellants claim that the General Court made errors of law with regard to the admissibility of several annexes to the application at first instance. Contrary to the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union, there is, according to the appellants, no legal basis on which the General Court may limit the right of access to the courts in this way.

34 In the alternative, even if the General Court had such powers, it erred in law in considering that that limitation had to be applied in the present case. In paragraphs 188 to 189 and 278 of the judgment under appeal, the General Court also made an error of assessment in considering that the text of certain complaints of the appellants did not reveal sufficiently precise information for the annexes relating thereto to be deemed admissible. The General Court should have concluded that paragraphs 52 to 54 and 122 of the application at first instance were sufficiently precise as regards the complaints and the arguments relied on, and that Annexes A.13 to A.15 and A.20 to that application were therefore admissible. In addition, in paragraph 219 of the judgment under appeal, the General Court did not rule on whether Annexes A.13 and A.14 to that application should be rejected, despite the fact that it rejected the claim referring to the very same annexes in paragraphs 185 to 189 of that judgment. In that regard, the appellants submit, in particular, that the fact that they identified, first, the specific points in that application which they wished to supplement with annexes and, secondly, the corresponding annexes, should have been sufficient.

35 In that context, the appellants also take issue with the statement in paragraph 190 of the judgment under appeal that, in essence, inasmuch as their complaint could be understood as criticising the Commission for 'having failed to take into account the economic arguments that demonstrate the advantages of the MIF for the MasterCard [payment] system, cardholders or consumers in general, [the complaint] is of no relevance in the context of a plea relating to infringement of Article 81(1) EC'.

36 According to the Commission, the appellants' reasoning in connection with the third plea in the main appeal is not clear. On the one hand, they claim that there is no legal basis to justify the limitation imposed by the General Court and that their right of access to the court is impaired. On the other hand, they maintain that the arguments set out in the annexes to the application at first instance were sufficiently summarised in the application, which is a question of fact that is inadmissible. Furthermore, the appellants do not explain how the outcome of the judgment under appeal would have been any different if the annexes concerned had been taken into account by the General Court.

37 RBS and HSBC do not comment on the third plea in the main appeal. LBG and MBNA support the plea but do not devote any specific arguments to it. BRC and EuroCommerce briefly contest the plea. Without putting forward a specific argument, the United Kingdom contends that the plea should be rejected.

Findings of the Court

38 Under Article 21 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 thereof, and Article 44(1)(c) of the Rules of Procedure of the General Court, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

39 It is clear from the case-law of the Court of Justice that the 'summary of the pleas in law' which must be stated in any application, as provided for by those articles, means that the application must specify the nature of the grounds on which the application is based (see judgments in *Fives Lille Cail and Others* v *High Authority*, 19/60, 21/60, 2/61 and 3/61, EU:C:1961:30, 295, and *Grifoni* v *EAEC*, C-330/88, EU:C:1991:95, paragraph 18).

40 Thus, in particular, it is necessary, for an action before the General Court to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may certainly be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (see, to that effect, judgments in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 94 to 100, and *Versalis* v *Commission*, C-511/11 P, EU:C:2013:386, paragraph 115).

41 In order to guarantee legal certainty and the sound administration of justice, the summary of the pleas in law of the applicant must be sufficiently clear and precise to enable the defendant to prepare its defence and the competent court to rule on the action (see, to that effect, judgment in *Grifoni* v *EAEC*, EU:C:1991:95, paragraph 18). Thus, it is not for the General Court to seek and identify in the annexes the pleas on which it may consider the action to be based (see judgment in *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraphs 97 and 100). Similar requirements are called for where a submission is made in support of a plea in law raised before the General Court (see judgment in *Versalis* v *Commission*, EU:C:2013:386, paragraph 115).

42 In those circumstances, the appellants are wrong to claim that there is no legal basis underpinning the approach taken by the General Court in relation to the account to be taken of the content of the annexes submitted to it.

43 With regard to the alternative arguments set out in paragraph 34 of the present judgment, it should be noted at the outset that, as is evident from paragraphs 189 and 282 of the judgment under appeal, the General Court declared inadmissible not the annexes in question, as the appellants claim, but two complaints which, although raised in the application at first instance, were not, according to the

General Court's assessment, accompanied by sufficiently precise information for the General Court to be able to exercise its power of review and the opposing party to be able to provide its defence. In that respect, the appellants have therefore misread the judgment under appeal.

44 It is also on the basis of that misreading that the appellants invoke the fact that, in paragraph 219 of the judgment under appeal, the General Court — in the context of the second plea of the application at first instance — did not rule on whether Annexes A.13 and A.14 to that application should be rejected, while rejecting the claim referring to the very same annexes in paragraphs 185 to 189 of that judgment.

45 Furthermore, in the present appeal, the appellants have not claimed, much less established, that the General Court distorted the content or scope of the relevant parts of the application at first instance in paragraphs 186 and 278 of the judgment under appeal in going on to conclude that those parts of the application at first instance were not stated in sufficient detail to comply with the requirements of Article 44(1)(c) of the Rules of Procedure of the General Court, and that no account could be taken of the annexes relating thereto.

46 In so far as, as is evident from paragraph 35 of the present judgment, the appellants criticise paragraph 190 of the judgment under appeal, their argument must be rejected as ineffective, since that paragraph concerns a ground of the judgment under appeal included for the sake of completeness, as is apparent, inter alia, from the use of the introductory term '[m]oreover'.

47 In the light of the foregoing, the third plea in the main appeal must be rejected in its entirety.

The second plea in the main appeal, alleging an error of law and/or inadequate reasoning with regard to the assessment of the question whether MasterCard is an association of undertakings

48 As a preliminary point, it must be noted that, in paragraph 259 of the judgment under appeal, the General Court ruled as follows:

'It must be held that in view of the two factors mentioned above, namely the retention, after the IPO, of the banks' decision-making powers within [MasterCard] and the existence of a commonality of interests between that organisation and the banks on the issue of the MIF, the Commission was legitimately entitled to take the view, in essence, that despite the changes brought about by [the IPO], [MasterCard] had continued to be an institutionalised form of coordination of the conduct of the [participating] banks. Consequently, the Commission was fully entitled to characterise as decisions by an association of undertakings the decisions taken by the bodies of [MasterCard] in determining the MIF.'

Arguments of the parties

49 According to the appellants, in ruling that, notwithstanding the changes to its structure and form of governance brought about by the IPO, MasterCard is an association of undertakings when taking decisions relating to the MIF, the General Court made an error of law and/or failed to provide adequate reasoning for the judgment under appeal.

50 First of all, the alleged commonality of interests between MasterCard and the participating banks and the banks' decision-making powers after the IPO on matters other than the MIF are, according to the appellants, insufficient to support the view that MasterCard is an association of undertakings when taking decisions relating to the MIF. The appellants state that it follows from the case-law of the Court of Justice that an organisation cannot be characterised as an association of undertakings within the meaning of Article 81(1) EC where, on the one hand, it is not composed of a majority of representatives of those undertakings and, on the other, it is required by national legislation to pursue

interests other than those of the undertakings when taking its decisions. After the IPO, the MasterCard Board was composed of a substantial majority of individuals having no affiliation with any financial institution. Moreover, MasterCard is a commercial entity separate from its banking customers, pursuing its own commercial interests, and guided by its Board of Directors which is required by law to act in accordance with its fiduciary duties towards the shareholders of MasterCard.

51 Next, after the IPO, the residual decision-making power of the participating banks on matters other than the MIF is manifestly irrelevant to the characterisation of MasterCard as an association of undertakings when taking decisions relating to the MIF. Thus, even on the assumption that, after the IPO, MasterCard could still be characterised as an association of undertakings when taking decisions on matters other than the MIF, that characterisation is irrelevant for the purpose of determining whether that is the case when it takes decisions that do concern the MIF. The appellants add that the inadequacy of the residual decision-making power of the participating banks on matters other than the MIF is confirmed by the use of the word 'seemed' in paragraph 249 of the judgment under appeal, which clearly shows that the factual elements were not even sufficient to support the view that MasterCard is an association of undertakings when deciding on matters other than the MIF.

52 The alleged commonality of interests between MasterCard and the participating banks in setting or maintaining high MIF is also wholly irrelevant and, in any event, inadequate for the purpose of characterising MasterCard as an association of undertakings. The judgment in *Verband der Sachversicherer* v *Commission* (45/85, EU:C:1987:34), cited in paragraph 251 of the judgment under appeal, does not support the view that a commonality of interests is a relevant factor in assessing whether there is an association of undertakings. Even on the assumption that the alleged commonality of interests between those banks and MasterCard is a relevant factor in determining whether MasterCard is an association of undertakings when taking decisions relating to the MIF, that factor would still be insufficient for that conclusion to be reached. The existence of an association of undertakings within the meaning of Article 81(1) EC cannot be inferred merely from the fact that a listed company may also take into account its customers' interests when adopting its decisions. More generally, moreover, inferring the existence of an association of undertakings for the purposes of applying competition law merely from the fact that two or more undertakings might have a common economic interest would lead to absurd and undesirable legal consequences, particularly in concentrated markets.

53 Lastly, the appellants submit that, even on the basis of the test of a commonality of interests, the Commission's position cannot be sustained. They criticise the General Court for having confined itself to stating that acquirers normally pass on the MIF to merchants and for having thus omitted to assess whether the Commission's assertion that the acquiring banks have an interest in high MIF was supported by any evidence.

54 The Commission contends, in essence, that the arguments summarised in paragraphs 50 to 52 of the present judgment, with the exception of those relating to the interpretation of the judgment in *Verband der Sachversicherer* v *Commission* (EU:C:1987:34), challenge the General Court's assessment of the facts and are therefore inadmissible. The Commission adds, in the context of its response regarding the substance, that, in so far as the second plea in the main appeal alleges inadequate reasoning, that plea is unsupported by arguments.

55 The United Kingdom maintains that the argument mentioned in paragraph 53 of the present judgment is inadmissible in so far as that argument is limited to challenging the assessment of the facts made at first instance.

56 As regards the substance, the Commission takes the view that, in accordance with the case-law, MasterCard may be characterised as an association of undertakings following the IPO, and the MIF as a decision of such an association. On that point it submits, in particular, that, depending on the circumstances, the Courts of the European Union have used a non-exhaustive multiplicity of criteria

in order to determine the existence of an association of undertakings. In the present case, the members of MasterCard are exclusively issuing and acquiring banks, which have limited their commercial freedom by delegating certain decisions to their common organ, namely the MasterCard Global Board or its delegates, which sets the level of the MIF for them. According to the Commission, 'MasterCard's strained distinction about the role of commonality of interest' is not valid.

57 RBS, HSBC, LBG and MBNA endorse the second plea in the main appeal. HSBC takes the view, in particular, that the legal criteria consistently applied by the Court of Justice in order to identify an association of undertakings, particularly the fact that the association is controlled by representatives of its members and acts solely in their interests, are not met in this case. LBG submits, inter alia, that the criterion of a 'commonality of interests', wrongly used by the General Court, is far wider than the 'concurrence of wills' criterion applied in order to determine whether there is an agreement that falls within Article 81 EC, since it is satisfied even in the absence of any form of collusion.

58 BRC, EuroCommerce and the United Kingdom challenge the arguments relied on in support of the second plea in the main appeal. In that regard, EuroCommerce contends, in particular, that the decision of the association of undertakings which MasterCard constituted prior to the IPO is still in effect, and therefore there was no need either for the Commission or for the General Court to examine whether, after the IPO, MasterCard was still an association of undertakings. In the view of the United Kingdom that plea adopts an unduly formal approach to the categories of act which are caught by Article 81 EC. According to the United Kingdom, the essential condition of co-ordinated behaviour is clearly satisfied in the present case.

Findings of the Court

– Admissibility

59 When the appellants claim, inter alia, in the context of the second plea in the main appeal, that the judgment under appeal lacks adequate reasoning, they are in fact merely arguing that the General Court misconstrued the concept of 'associations of undertakings' within the meaning of Article 81(1) EC. Consequently, in so far as this plea alleges a failure to provide adequate reasoning for the judgment, it must be rejected as inadmissible.

60 The Court must also uphold the objection of inadmissibility raised by the United Kingdom, set out in paragraph 55 of the present judgment. In that regard, it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, secondly, to assess those facts. However, when the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see, in particular, judgments in *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 51, and *Evonik Degussa* v *Commission*, C-266/06 P, EU:C:2008:295, paragraph 72). It follows from this that, in so far as the appellants are, by the argument set out in paragraph 53 of the present judgment, attempting to obtain from the Court of Justice a reassessment of the facts found by the General Court, their argument must be rejected as inadmissible.

61 As to the remainder, in so far as the arguments set out in paragraphs 50 to 52 of the present judgment allege an error of law with regard to the assessment of the question whether MasterCard is an association of undertakings, it should be noted that, contrary to the Commission's contention, the appellants are not, in essence, merely challenging the assessment of the facts made at first instance, but are relying, for the main part, on questions of law which are admissible at the appeal stage.

– Substance

62 Without prejudice to the right of economic operators to adapt themselves intelligently, but independently, to the existing or anticipated conduct of their competitors (see judgments in *Suiker Unie and Others* v *Commission*, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 174; *Ahlström Osakeyhtiö and Others* v *Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 71; and *Asnef-Equifax and Administración del Estado*, C-238/05, EU:C:2006:734, paragraph 53 and the case-law cited), Article 81 EC catches all forms of cooperation and of collusion between undertakings, including by means of a collective structure or a common body, such as an association, which are calculated to produce the results which that provision aims to suppress (see, to that effect, judgments in *Nederlandse Vereniging voor de fruit en groentenimporthandel and Frubo* v *Commission*, 71/74, EU:C:1975:61, paragraph 30; *van Landewyck and Others* v *Commission*, 209/78 to 215/78 and 218/78, EU:C:1980:248, paragraph 88; and *Eurofer* v *Commission*, C-179/99 P, EU:C:2003:525, paragraph 23).

63 Thus, it is settled case-law that, although Article 81 EC distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibitions of that article catch different forms of coordination between undertakings of their conduct on the market (see, in particular, judgments in *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraph 64; *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 112; and *Asnef-Equifax and Administración del Estado*, EU:C:2006:734, paragraph 32) and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate that conduct.

64 In the present case, as is apparent in particular from paragraph 238 of the judgment under appeal, it is undisputed that, before the IPO, MasterCard could be considered to be an 'association of undertakings' within the meaning of Article 81 EC. It is also apparent from that paragraph that, in the context of their third plea at first instance, the appellants complained that the Commission, in particular, had not taken into account the changes made by the IPO to MasterCard's structure and governance. In those circumstances, as is apparent from paragraph 244 of the judgment under appeal, the third plea before the General Court concerned the issue whether MasterCard could still be considered to be 'an institutionalised form of coordination of the banks' conduct' after the changes made by the IPO.

65 The arguments raised in the second plea in the main appeal must be examined in that context.

66 It is apparent from paragraph 259 of the judgment under appeal that, in relying, first, on the retention of the banks' decision-making power within MasterCard and, secondly, on the existence of a commonality of interests between that organisation and the banks on the issue of the MIF, the General Court rejected the appellants' arguments, recalled in paragraph 238 of the judgment under appeal, that, in essence, as a result of the changes to the structure and operation of MasterCard in the context of the IPO, that organisation could no longer be considered to be an 'association of undertakings' within the meaning of Article 81 EC at the time of the adoption of the decision at issue.

67 More specifically, as regards, in the first place, the arguments summarised in paragraphs 51 and 52 of the present judgment, it must be noted that the two factors on which the General Court concentrated in its analysis in the context of the third plea of the application at first instance must be read together. As is apparent from paragraph 238 of the judgment under appeal, the appellants had maintained that, after the IPO, the banks no longer controlled MasterCard and MasterCard determined the MIF unilaterally. Moreover, it is apparent from paragraph 239 of that judgment that it was claimed that the Commission had failed to establish that MasterCard was continuing to act in the interests of those banks or on their behalf, rather than on behalf of shareholders of MasterCard Inc.

68 In that regard, in paragraphs 245 to 249 of the judgment under appeal, the General Court essentially found in its definitive assessment of the facts, first, that, at the time of the adoption of the decision at issue, even though the MasterCard member banks were no longer taking part in the decision-making process within the bodies of that organisation in relation to the MIF, 'MasterCard … seemed instead to be continuing to operate in Europe as an association of undertakings, in which the banks were not merely customers for the services provided but participated collectively and in a decentralised manner in all essential elements of the decision-making power'. It should be emphasised in that regard that, notwithstanding the General Court's inappropriate use of the word 'seemed' in that context, it is evident from a reading of the whole of paragraphs 245 to 249 of the judgment under appeal that the General Court did ascertain that, at the date of the decision at issue, the banks were continuing, collectively, to exercise decision-making powers in respect of the essential aspects of the operation of the MasterCard payment organisation after the IPO, which meant that the conclusions to be drawn from the IPO were very much to be set in perspective. Secondly, in paragraphs 250 to 258 of the judgment under appeal, the General Court also found, in essence, that the Commission had been able properly to conclude that the MIF reflected the banks' interests, because there was, on that point, a commonality of interests between MasterCard, its shareholders and the banks.

69 Taken together, those two factors, summarised in paragraph 259 of the judgment under appeal, effectively explain why, according to the General Court, the setting of the MIF by MasterCard continued to operate, notwithstanding the changes arising from the IPO, as 'an institutionalised form of coordination of the conduct of the banks'. According to the logic of the General Court in the judgment under appeal, given that MasterCard's interests and those of the shareholders of MasterCard Inc. converged with regard to the setting of the MIF, the participating banks were in a position to delegate the setting of those fees, while retaining decision-making powers in many other respects.

70 In addition, it is apparent on reading paragraphs 238 to 260 of the judgment under appeal as a whole, and in particular paragraphs 243 to 245, 249 and 259 thereof, that, in the context of its examination of the question whether the institutionalised form of cooperation by which MasterCard operated prior to the IPO had ceased to operate after that event, the General Court definitively found the two criteria at issue to be relevant on the basis of the elements of fact and of law existing at the time of the adoption of the decision at issue, its assessment falling within the broader factual framework of which it was seised.

71 In particular, the General Court considered the existence of a commonality of interests to be relevant in this instance not only on the basis of a theoretical concurrence of the banks' interests and those of MasterCard, but also having taken into account, in its definitive assessment of the facts, specific factual circumstances in respect of which no allegation of distortion was made, including, first, as is apparent from the parties' arguments as set out in paragraphs 238 and 239 of the judgment under appeal, the fact that it was undisputed that MasterCard was acting in the interests of the banks before the IPO; secondly, as is apparent from paragraph 256 of that judgment, the developments after the IPO which indicate that that organisation is, in reality, continuing to take into account concrete banks' interests in setting the level of the MIF; and, thirdly, as is apparent from paragraph 258 of the same judgment, the fact that the interests of MasterCard's shareholders do not conflict with those of the banks.

72 In those circumstances, it was open to the General Court to find, in the particular circumstances of the case and taking into account the arguments expounded before it, that both the banks' residual decision-making powers after the IPO on matters other than the MIF, and the commonality of interests between MasterCard and the banks, were both relevant and sufficient for the purposes of assessing whether, after the IPO, MasterCard could still be considered to be an 'association of undertakings', within the meaning of Article 81 EC.

73 As to the reference, in paragraph 251 of the judgment under appeal, to the judgment in *Verband der Sachversicherer* v *Commission* (EU:C:1987:34, paragraph 29), it should be noted that that reference is intended simply to respond to the criticism, reproduced in paragraph 239 of the judgment under

appeal, that the criterion of the existence of a commonality of interests between MasterCard and the banks was not based on any legal authority. Contrary to what is suggested by the appellants, in recalling in that context that 'it follows from the case-law of the Court of Justice that the existence of a commonality of interests or a common interest is a relevant factor for the purposes of assessing whether there is a decision by an association of undertakings within the meaning of Article 81(1) EC', the General Court did not seek to impose a general criterion, much less an exclusive criterion.

74 As regards, in the second place, the arguments summarised in paragraph 50 of the present judgment, it is admittedly apparent from the case-law of the Court that a decision taken by a body having regulatory powers within a given sector might fall outside the scope of Article 81 EC where that body is composed of a majority of representatives of the public authorities and where, on taking a decision, it must observe various public-interest criteria (see, in particular, judgment in *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 87 and the case-law cited).

75 Nevertheless, the case-law cited in the preceding paragraph related, in essence, to the question whether, when they were adopting particular legislation, the bodies concerned, which were composed at least partly of representatives of economic operators from a given sector, had to be regarded as being associations of undertakings, or, on the contrary, as exercising public powers. No such question arose before the General Court in the present case. Similarly, the facts and legal problems raised by the case that resulted in the judgment in *Wouters and Others* (C-309/99, EU:C:2002:98) and the associated Opinion (Opinion of Advocate General Léger in *Wouters and Others*, C-309/99, EU:C:2001:390), on which the appellants principally rely, are not comparable to those of the present case.

76 In the light of all the foregoing considerations, it must be held that, as the Advocate General noted in point 45 of his Opinion, the appellants cannot maintain that a body such as MasterCard cannot be classified as an association of undertakings when adopting decisions relating to the MIF, since it is apparent from the foregoing that the General Court correctly found that, when those decisions are taken, those undertakings intend or at least agree to coordinate their conduct by means of those decisions and that their collective interests coincide with those taken into account when those decisions are adopted, particularly in circumstances where the undertakings in question pursued, over several years, the same objective of joint regulation of the market within the framework of the same organisation, albeit under different forms.

77 Having regard to the foregoing, the second plea in the main appeal must be rejected.

The first plea in the main appeal, alleging an error of law and/or inadequate reasoning with regard to the assessment of the objective necessity of the alleged restriction of competition

78 In the judgment under appeal, the General Court carried out an assessment of the objective necessity of the MIF, before addressing the question as to whether those fees produce anti-competitive effects. In those circumstances, it is appropriate, in the present judgment, to examine the plea concerning the ancillary nature of the MIF in relation to the MasterCard payment system, before addressing the plea relating to the possibly restrictive effects of those fees.

79 In essence, the first plea in the main appeal is expressed in four parts, the second, third and fourth of which are alternatives to the first.

The judgment under appeal

80 According to the General Court, the first plea of the application at first instance was composed, in essence, of two parts. In the first part of that plea, the appellants submitted that the Commission wrongly found that the MIF produced effects restrictive of competition. In the second part, the appellants claimed that the Commission ought to have concluded that the MIF were objectively necessary to the operation of the MasterCard system.

81 In examining in the first place that second part of the plea, the General Court stated the following in paragraph 89 of the judgment under appeal:

'... examination of the objective necessity of a restriction is a relatively abstract exercise. Only those restrictions which are necessary in order for the main operation to be able to function in any event may be regarded as falling within the scope of the theory of ancillary restrictions. Thus, considerations relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market are not part of an analysis of the ancillary nature of the restriction ...'

82 Next, the General Court stated, in paragraph 90 of the judgment under appeal, that 'the fact that the absence of the MIF may have adverse consequences for the functioning of the MasterCard system does not, in itself, mean that the MIF must be regarded as being objectively necessary, if it is apparent from an examination of the MasterCard system in its economic and legal context that it is still capable of functioning without it'. In paragraph 91 of its judgment, the General Court considered that '[t]he Commission's reasoning in inferring that the MIF is not objectively necessary from the fact that the MasterCard system could function without it is not, therefore, vitiated by any error of law'.

83 In paragraphs 94 to 99 of the judgment under appeal, the General Court rejected the appellants' argument that, in essence, the MIF is objectively necessary for the MasterCard system because it constitutes a default transaction settlement procedure, given that, without MIF, the Honour All Cards Rule would have the effect of placing acquiring banks 'at the mercy' of issuing banks.

84 In that context, after having found that the Commission's recourse to the prohibition of *ex post* pricing, as referred to in the fourth indent of paragraph 11 of the present judgment, does not disclose 'any manifest error of assessment', the General Court held, in paragraph 96 of the judgment under appeal, that '[t]he fact that there are default transaction settlement procedures less restrictive of competition than the MIF precludes the latter from being regarded as objectively necessary for the operation of the MasterCard system merely on the basis of the MIF's status as a default transaction settlement procedure'. In paragraph 99 of that judgment, it is stated, inter alia, that it was 'for the Commission to consider whether the premiss of a MasterCard system operating without a MIF was economically viable and could, therefore, be taken into account in the comparison'. However, the Commission, again according to paragraph 99, was 'not … obliged to demonstrate that market forces would compel the issuing and acquiring banks themselves to decide to adopt a rule less restrictive of competition than the MIF'.

85 Having held, in paragraph 120 of the judgment under appeal, that the Commission was legitimately able to conclude that the MIF were not objectively necessary for the operation of the MasterCard system, the General Court rejected the second part of the first plea of the application at first instance.

First part of the first plea in the main appeal

– Arguments of the parties

86 The appellants submit that the General Court misapplied the test of the 'objective necessity' of a restriction. Instead of applying the test under which a given limitation on commercial autonomy is 'objectively necessary' if, without it, it is either impossible or difficult to achieve the main operation, the General Court applied, notably in paragraphs 89 and 90 of the judgment under appeal, an incomplete test according to which a restriction is objectively necessary only if, without it, the main operation is incapable of functioning. The appellants rely in that respect on paragraph 109 of the judgment of the General Court in *M6 and Others* v *Commission* (T-112/99, EU:T:2001:215), according to which '[i]f, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation'. According to the appellants, in paragraph 89 of the judgment under appeal, the General Court amalgamated the objective necessity test for the purpose of determining the ancillary nature of the restriction with the indispensability test under Article 81(3) EC.

87 The Commission contends that if the distinction between 'ancillary' restraints and the indispensable restrictions referred to in Article 81(3) EC is not to be rendered meaningless, it is only the 'necessity' of those restraints that enables a restriction that can be justified under Article 81(3) EC to be distinguished from a restriction that can, as an ancillary restraint, escape the application of Article 81(1) EC.

88 RBS, HSBC, LBG and MBNA endorse the first part of the first plea in the main appeal. In support of the Commission, BRC, EuroCommerce and the United Kingdom essentially contend that it is the appellants who are mistaken about the test in question.

– Findings of the Court

89 It is apparent from the case-law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in Article 81(1) EC, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other (see to that effect, in particular, judgments in *Remia and Others* v *Commission*, 42/84, EU:C:1985:327, paragraphs 19 and 20; *Pronuptia de Paris*, 161/84, EU:C:1986:41, paragraphs 15 to 17; *DLG*, C-250/92, EU:C:1994:413, paragraph 35, and *Oude Luttikhuis and Others*, C-399/93, EU:C:1995:434, paragraphs 12 to 15).

90 Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 81(1) EC.

91 Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in Article 81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it

to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC.

92 However, that interpretation does not mean that there has been an amalgamation of, on the one hand, the conditions laid down by the case-law for the classification — for the purposes of the application of Article 81(1) EC — of a restriction as ancillary, and, on the other hand, the criterion of the indispensability required under Article 81(3) EC in order for a prohibited restriction to be exempted.

93 In that regard, suffice it to note that those two provisions have different objectives and that the latter criterion relates to the issue whether coordination between undertakings that is liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services, which is therefore covered by the prohibition rule laid down in Article 81(1) EC, can none the less, in the context of Article 81(3) EC, be considered indispensable to the improvement of production or distribution or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits. By contrast, as is apparent from paragraphs 89 and 90 of the present judgment, the objective necessity test referred to in those paragraphs concerns the question whether, in the absence of a given restriction of commercial autonomy, a main operation or activity which is not caught by the prohibition laid down in Article 81(1) EC and to which that restriction is secondary, is likely not to be implemented or not to proceed.

94 In ruling, in paragraph 89 of the judgment under appeal, that '[o]nly those restrictions which are necessary in order for the main operation to be able to function in any event may be regarded as falling within the scope of the theory of ancillary restrictions', and in concluding, in paragraph 90 of the judgment under appeal, that 'the fact that the absence of the MIF may have adverse consequences for the functioning of the MasterCard system does not, in itself, mean that the MIF must be regarded as being objectively necessary, if it is apparent from an examination of the MasterCard system in its economic and legal context that it is still capable of functioning without it', the General Court did not, therefore, err in law.

95 In those circumstances, the first part of the first plea in the main appeal must be rejected.

Second and third parts of the first plea in the main appeal

– Arguments of the parties

96 By the second and third parts of the first plea in the main appeal, which it is appropriate to deal with together, the appellants complain that the General Court failed to assess the restriction of competition constituted by the MIF, and therefore the issue of the objective necessity of those fees, in its proper context, by permitting the Commission to rely on a 'counterfactual hypothesis' — the prohibition of *ex post* pricing — that would never in fact occur. The Commission's view that some of the problems created by elimination of the MIF could be resolved by prohibiting *ex post* pricing is very different from an assessment of what would actually occur if the MIF were eliminated. The appellants claim that the General Court did not respond to the argument that such a prohibition simply would not occur without a regulatory intervention, but merely stated that the scenario envisaged did not have to be the result of market forces. By inserting a fictional condition in its analysis — the prohibition of *ex post* pricing — the Commission failed to comply with its obligation to assess the effects of the MIF on competition by comparison with what would actually occur in their absence. The appellants also complain that the General Court failed to state reasons, in that it did not explain how the prohibition of *ex post* pricing was materially different from the MIF actually applied by MasterCard.

97 In addition, the appellants claim, in essence, that the General Court ought not to have accepted what it describes, in paragraph 96 of the judgment under appeal, as '[t]he fact that there are default transaction settlement procedures less restrictive of competition than the MIF' when, in the decision at issue, the Commission had not first tried to understand how the activity in question would work in the absence of a default rule. According to the appellants, in the decision at issue the Commission simply replaced one default price with another, albeit one that was lower from the merchants' point of view.

98 Furthermore, the appellants criticise the General Court for having mischaracterised the 'counterfactual hypothesis' on which the Commission was actually relying before the General Court, according to which both the issuing banks and the acquiring banks should bear their own costs, without the need for a default rule consisting of an *ex post* pricing prohibition.

99 Lastly, the appellants maintain that the General Court wrongly substituted its own assessment for that of the Commission when examining the objective necessity of the MIF. The Commission's assessment was based on the combination of a number of findings set out in recitals 550 to 648 to the decision at issue. However, the General Court erred in relying on a limited number of those findings which played only a secondary role in that decision, while ignoring the core of the Commission's analysis and failing to acknowledge that that decision was composed of a body of evidence that, only taken together, purported to support the Commission's conclusions.

100 The Commission argues that the second and third parts of the first plea in the main appeal are inadmissible.

101 It submits that, by those parts of the plea, the appellants are challenging the General Court's assessment of the facts and evidence.

102 Moreover, the Commission contends that the appellants cannot rely, in support of their plea in the main appeal relating to the objective necessity of the MIF, on arguments originally put forward in support of a different plea in the application at first instance, which were accordingly addressed by the General Court in the context of that other plea. The Commission notes that the main appeal does not include any plea denying, as in the first part of the first plea of the application at first instance, that the MIF have the effect of restricting competition. In those circumstances, the Commission maintains, in essence, that the arguments raised to counter the assumption, in the examination of the objective necessity of the MIF, of a prohibition of *ex post* pricing as a realistic counterfactual hypothesis are inadmissible.

103 As regards the substance, the Commission states, in particular, that the case-law referring to what would occur in the absence of the agreement that is being examined concerns the prior question as to whether that agreement constitutes a restriction of competition at all. In the context of the first plea in the main appeal, however, the issue is that of determining whether an agreement which, *ex hypothesi*, is such a restriction is nevertheless necessary as ancillary to the functioning of a wider agreement. In that respect, the Commission notes that, in their appeal, the appellants do not contest the approach whereby the test of the 'objective necessity' of the MIF implies consideration of whether those fees are proportionate to the operation of the MasterCard system, which would invite consideration of whether there are less restrictive alternatives that are objectively possible.

104 RBS, HSBC, LBG and MBNA endorse the second and third parts of the first plea in the main appeal. BRC, EuroCommerce and the United Kingdom dispute the arguments raised by the appellants in support of those parts of the plea.

– Findings of the Court

105 Contrary to what is claimed by the Commission, the appellants are not simply challenging — without invoking the distortion of evidence — the General Court's assessment of the facts, but are raising questions of law which may, as such, be relied on in an appeal.

106 Next, it should be noted that, in so far as, by the objections of inadmissibility summarised in paragraph 102 of the present judgment, the Commission is merely claiming that certain arguments already put forward before the General Court are now put forward in the context of another plea, such objections cannot succeed. As regards the substance, as is apparent from paragraphs 96 and 97 of the present judgment, the appellants are critical of the fact that the General Court relied on the premiss of a prohibition of *ex post* pricing — a scenario which, in their view, would not occur, in the absence of MIF, without a regulatory intervention, and which in any event would not differ from that resulting from the existence of the MIF — in order to conclude in paragraph 96 of the judgment under appeal that '[t]he fact that there are default transaction settlement procedures less restrictive of competition than the MIF precludes the latter from being regarded as objectively necessary for the operation of the MasterCard system'.

107 It must be noted in that regard that, as is apparent from paragraphs 89 and 90 of the present judgment, in the context of the assessment, for the purposes of the application of Article 81(1) EC, of the ancillary nature of a given restriction of commercial autonomy in relation to a main operation or activity, it is necessary to consider not only whether that restriction is necessary for the implementation of the main operation or activity, but also whether that restriction is proportionate to the underlying objectives of that operation or activity.

108 It should be pointed out that, irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic.

109 Accordingly, in order to contest the ancillary nature of a restriction, as referred to in paragraphs 89 and 90 of the present judgment, the Commission may rely on the existence of realistic alternatives that are less restrictive of competition than the restriction at issue.

110 In that regard, as is apparent from paragraph 97 of the present judgment, the appellants also submit, in essence, that the General Court wrongly failed to penalise the Commission for not having tried, in the decision at issue, to understand how competition would function in the absence both of the MIF and of the prohibition of *ex post* pricing, a prohibition which the appellants would not have chosen to adopt without a regulatory intervention.

111 However, the alternatives on which the Commission may rely in the context of the assessment of the objective necessity of a restriction are not limited to the situation that would arise in the absence of the restriction in question but may also extend to other counterfactual hypotheses based, inter alia, on realistic situations that might arise in the absence of that restriction. The General Court was therefore correct in concluding, in paragraph 99 of the judgment under appeal, that the counterfactual hypothesis put forward by the Commission could be taken into account in the examination of the objective necessity of the MIF in so far as it was realistic and enabled the MasterCard system to be economically viable.

112 As regards the appellants' argument, set out in paragraph 96 of the present judgment, concerning a failure to state reasons, it must be held that that argument is unfounded. As is apparent from paragraphs 95 and 96 of the judgment under appeal, the General Court, in its definitive assessment of the facts, held that the Commission was fully entitled to conclude that the prohibition of *ex post* pricing was less restrictive of competition as it does not set a minimum price level on either side of the scheme, thus stating to the requisite legal standard the reasons for the conclusion set out in

paragraph 99 of that judgment. In that regard, it should be borne in mind that the obligation to state reasons which applies to the General Court does not require that court to provide an account that follows exhaustively and one by one all the reasoning articulated by the parties to the case (judgment in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 372).

113 Lastly, it must be stated that, as the Commission points out, the appellants' arguments to the effect that the General Court wrongly substituted its own assessment for that of the Commission when examining the objective necessity of the MIF amount, in fact, to a challenge in respect of the General Court's assessment of the evidence. On the grounds set out in paragraphs 94 to 120 of the judgment under appeal, at the end of a definitive appraisal of the facts of the case, which does not fall within the jurisdiction of the Court of Justice in the context of an appeal, the General Court held that 'the Commission was legitimately able to conclude that the MIF was not objectively necessary for the operation of the MasterCard system'. Those arguments must therefore be rejected as inadmissible.

114 In the light of the foregoing, the second and third parts of the first plea in the main appeal must be rejected, in so far as they seek to challenge the 'counterfactual hypothesis' employed by the General Court in its analysis of the objective necessity of the MIF and its assessment of the evidence in carrying out that analysis.

Fourth part of the first plea in the main appeal

– Arguments of the parties

115 The appellants submit that the General Court failed to apply the standard of judicial review required. In that regard, according to the appellants, even in the presence of complex economic assessments — a concept which should be interpreted strictly — the General Court, taking into account in particular Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, could not dispense with the conduct of a full and in-depth review of the decisions of the Commission. In the present case, however, the General Court carried out a very limited examination in the context of its analysis of the objective necessity of the MIF. The General Court limited the review of the Commission's findings to that of a manifest error of assessment, although those findings did not entail genuinely complex economic assessments. Even on the assumption that the 'manifest error' test is applicable, the General Court resorted to a new test through which it checked the 'reasonableness' of the Commission's conclusion. The appellants submit that that defective standard of review led the General Court, inter alia, to consider only a limited number of the grounds set out in the decision at issue and to give them radically more weight than the Commission itself gave them.

116 The Commission contends that the fourth part of the first plea in the main appeal is ineffective, since the arguments developed in support of that plea are a reprise of the 'no restriction of competition' argument raised at first instance, which is not among the pleas in the main appeal.

117 As regards the substance, the Commission maintains that no complaint can be made regarding the use of the expression 'manifest error' in the judgment under appeal. A long section of the judgment under appeal — paragraphs 77 to 122 — is devoted to assessing the objective necessity of the MIF, and MasterCard's main arguments are rejected.

118 RBS, HSBC, LBG and MBNA endorse the fourth part of the first plea in the main appeal. BRC, EuroCommerce and the United Kingdom contend that it should be rejected.

– Findings of the Court

119 It should be noted first that, in so far as, by their arguments in the fourth part of the first plea in the main appeal, the appellants take issue with the General Court for having misconstrued the standard of judicial review it should have adopted when analysing the legal criteria applied by the Commission in its assessment of the objective necessity of the MIF, the General Court was right, as is apparent from paragraphs 89 to 95 of the present judgment, to endorse the Commission's reasoning that the fact that the MIF are not objectively necessary could be inferred from the fact that the MasterCard system could function without them. In those circumstances, in so far as the appellants' arguments are critical of the General Court for having carried out too limited a review by confirming that legal test, those arguments are ineffective and must therefore be rejected.

120 Moreover, in so far as, by that fourth part of the plea, the appellants seek to challenge the standard of review adopted by the General Court when applying that test to the facts of the present case, it must be stated that the arguments relied on in that regard are essentially identical to those raised in the third part of the first plea in the main appeal, set out in paragraph 99 of the present judgment. Those arguments must therefore be rejected as inadmissible for the reasons stated in paragraph 113 of the present judgment.

121 Since the fourth part of the first plea in the main appeal is in part ineffective and in part inadmissible, it must be rejected. It follows from this that the first plea in the main appeal must be rejected in its entirety.

The single plea in RBS's cross-appeal and the first plea in LBG's cross-appeal

The judgment under appeal

122 In paragraphs 123 to 193 of the judgment under appeal, the General Court rejected the first part of the first plea of the application at first instance, alleging errors of assessment in the analysis of the effects of the MIF on competition.

123 In paragraph 132 of the judgment under appeal, the General Court held that 'for the reasons mentioned in paragraphs 94 to 120 [thereof], the fact that the premiss of a MasterCard system operating without a MIF — solely on the basis of a rule prohibiting *ex post* pricing — appears to be economically viable is sufficient to justify its being taken into consideration in the context of the analysis of the effects of the MIF on competition'.

124 Paragraphs 142 and 143 of the judgment under appeal read as follows:

> '142 ... the [appellants] submit, in essence, that the fact that the MIF had an impact on the level of the MSC does not affect competition between [acquiring banks], because the MIF applies in the same way to all [those banks] and operates as a cost that is common to all of them. Thus, the prohibition of *ex post* pricing would effectively impose a MIF set at zero which, from a competitive aspect, would be equivalent to and just as transparent as the current MIF, the only difference being the level at which it is set.
>
> 143 This line of argument cannot be accepted. Since it is acknowledged that the MIF sets a floor for the MSC and in so far as the Commission was legitimately entitled to find that a MasterCard system operating without a MIF would remain economically viable, it necessarily follows that the MIF has effects restrictive of competition. By comparison with an acquiring market operating without them, the MIF limits the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold.'

125 In paragraphs 150, 157 and 158 of the judgment under appeal, the General Court considered that the Commission had correctly found that merchants are unable to constrain the level of the MIF sufficiently in so far as that constraint is in fact likely to arise only above a maximum merchants' tolerance threshold, when the cost of the transaction becomes more significant than the negative effects on merchants' custom of a refusal to accept such means of payment, or of discrimination in that regard.

126 According to paragraphs 181 and 182 of the judgment under appeal:

'181 In the second place, with regard to the criticism concerning the failure to take the two-sided nature of the market into consideration, it must be pointed out that, in that context, the [appellants] highlight the economic advantages that flow from the MIF. Thus, in essence, the [appellants] state that the MIF enables the operation of the MasterCard system to be optimised by financing expenditure intended to encourage cardholder acceptance and use. They deduce from this that it is not in the interest of banks to set the MIF at an excessive rate, and, moreover, that merchants benefit from the MIF. The [appellants] also complain that the Commission overlooked the impact of its decision on cardholders, by focusing exclusively on merchants alone. In that regard, a number of interveners add that in a system operating without the MIF they would be compelled to limit the advantages conferred on cardholders, or even to reduce their activity.

182 Such criticisms have no relevance in the context of a plea relating to infringement of Article 81(1) EC, in that they entail a weighing-up of the restrictive effects of the MIF on competition, legitimately established by the Commission, with any economic advantages that may ensue. However, it is only within the specific framework of Article 81(3) EC that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, [judgment in] *Van den Bergh Foods* v *Commission*, [T-65/98, EU:T:2003:281], paragraph 107 and the case-law cited).'

Arguments of the parties

– The single plea in RBS's cross-appeal

127 RBS maintains that, in relying on general considerations and assumptions, the General Court erred in law in its assessment of the existence of a restrictive effect on competition.

128 First of all, in assessing whether a decision has a restrictive effect on competition, the Commission should have considered what the actual 'counterfactual hypothesis' would have been in the absence of the MIF. By not penalising that omission, notably in paragraph 132 of the judgment under appeal, and by thus relying solely on the economic viability of the prohibition of *ex post* pricing rather than on any consideration of the likelihood of such a prohibition actually being adopted, the General Court erred in law by confusing the legal conditions for objective necessity and those for effects on competition.

129 Next, in RBS's submission, according to the logic of the judgment under appeal, the MIF are presumed to give rise to a restrictive effect on competition because they fix the level of the interchange fee rate to be paid by all acquiring banks alike. However, while that 'short form analysis' might be sufficient for 'object infringement' of Article 81(1) EC, where the restriction of competition is so obvious that it is not necessary to consider its effects, in circumstances where the Commission has not found such an infringement, that approach is, according to RBS, wholly inadequate for the purpose of drawing up an analysis of the effects. Neither the Commission nor the General Court based its analysis of the effects on specific and concrete evidence. Thus, in paragraph 143 of the judgment under appeal in particular, the General Court made the mistake of applying an object-based approach rather than an approach based on the effects.

130 Lastly, referring to paragraphs 143, 150, 157 and 158 of the judgment under appeal, RBS maintains that, in any event, the General Court's analysis of the effects of the MIF on competition is wrong in law and based on an assumption that is contradicted in the judgment under appeal, namely that merchants can exert pressure on acquiring banks when negotiating the MSC.

131 The appellants endorse the sole plea in RBS's cross-appeal. As to the arguments set out in paragraph 129 of the present judgment, they maintain that the only difference between the MIF and the 'counterfactual hypothesis' relied on in the judgment under appeal lies in the pricing level of the MIF. Just like the MIF, the prohibition of *ex post* pricing would be determined by MasterCard, would apply by default, and would have the effect of setting the price charged between those banks (at zero). According to the appellants, setting the level of the MIF at zero creates the same 'floor setting' effect as the MIF, albeit at a level more favourable to merchants and less so for cardholders. Thus, by failing to explain how the Commission's chosen 'counterfactual hypothesis' of a prohibition of *ex post* pricing would have less restrictive effects on competition than the MIF, the General Court failed to sufficiently reason its finding that the MIF has a restrictive effect on competition.

132 According to the Commission, although RBS refers to paragraphs 123 to 182 of the judgment under appeal in general terms in its cross-appeal, no error is alleged save as regards paragraph 132 of that judgment, and therefore that cross-appeal is admissible only in so far as it challenges paragraph 132.

133 As regards the substance, the Commission maintains, in essence, that RBS is acting on the basis of a misreading of the judgment under appeal. According to the Commission, it is very clear that in paragraph 132 et seq. of the judgment under appeal the General Court considered the effect of the MIF on competition by reference to conditions of competition in the absence of those fees.

134 According to the Commission, the claim that the MIF are not restrictive of competition is inherently implausible. RBS fails to have regard to the actual context. On that point, the Commission asserts that the MIF stem from a decision by an association of undertakings to set prices and that the restrictive effects of those fees are obvious.

135 The Commission takes the view that the General Court did not err in law in declaring that the prohibition of *ex post* pricing could serve as a realistic basis for comparing the situation with and without the MIF. According to the Commission, the MasterCard system is an artificial construct. It is not necessary for the operation of a two-sided market for one side of that market to remunerate the other, but that is how the appellants have chosen to construct their scheme. The Commission considers that, taking into account paragraphs 107 to 110 of the judgment under appeal, the General Court did not err in law in using the prohibition of *ex post* pricing as an alternative to the MIF.

136 In addition, the Commission disputes that the judgment under appeal is based on the premiss that high prices constitute in themselves an infringement of Article 81(1) EC. According to the Commission, the finding upheld by that judgment is that these high prices arise as the result of a restrictive agreement.

137 The Commission also challenges the assertion that the General Court did not base its analysis on specific and concrete evidence, and the assertion of contradictory reasoning, referred to in paragraph 130 of the present judgment.

– The first plea in LBG's cross-appeal

138 LBG submits that the General Court made errors of law in its analysis of the effects of the MIF on competition in paragraphs 123 to 193 of the judgment under appeal.

139 First of all, the General Court failed to deal with the relevant arguments or evidence before it, and failed to provide adequate reasoning as to how the MIF affect competition in the acquiring market, when the 'price fixing' was alleged in the issuing market. In particular, the General Court did not explain how the MIF affect competition in the acquiring market in which they merely constitute a common entrance cost for all competitors.

140 Next, in the light of the parties' arguments and in particular the economic evidence, the General Court, according to LBG, erred in law in excluding various elements from the analysis. In particular, in considering an infringement of Article 81(1) EC, the General Court failed to recognise the importance of constraints from other payment systems and the relevance of the two-sided nature of the system, which, according to the General Court, are relevant only in the context of Article 81(3) EC. In LBG's submission, in order to rule that the Commission had demonstrated to the requisite legal standard that there was a restriction of competition, the General Court had to be satisfied that the Commission had considered the alleged restriction of competition in its proper context.

141 Lastly, according to LBG, the General Court applied an inappropriate standard of judicial review. As is apparent in particular from paragraph 169 of the judgment under appeal, the General Court actually applied a very limited standard of review, as distinct from that arising from the judgments in *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39) and *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraphs 94, 102 and 103).

142 The appellants endorse that plea with arguments similar to those invoked in support of RBS's cross-appeal.

143 The Commission takes the view, inter alia, that although BoS and LTSB were, in their capacity as interveners before the General Court, entitled to develop further arguments, they could not raise an entirely new plea for annulment relating to the definition of the relevant market, as the market definition used in the decision at issue had not been contested in the action at first instance. In that regard, the Commission asserts that paragraph 168 of the judgment under appeal, according to which '[t]he [appellants] and a number of interveners complain, in essence, that the Commission failed to take the two-sided nature of the market into account in its reasoning, and challenge the Commission's definition of the product market', is incorrect.

144 As regards the standard of review applied by the General Court to the economic evidence, the Commission claims that LBG's cross-appeal does not satisfy the requirements set out in Article 169(2) of the Rules of Procedure of the Court of Justice. Furthermore, the judgment in *KME Germany and Others* v *Commission* (EU:C:2011:810) is of limited relevance, being an appeal relating only to a fine and containing only *obiter dicta* on the standard of review of the legality of decisions.

145 Likewise, the Commission takes the view that LBG's argument in relation to the 'common entrance cost' was rejected by the General Court in paragraphs 142 and 143 of the judgment under appeal, which were not contested by LBG in accordance with the requirements of Article 169(2) of the Rules of Procedure of the Court of Justice.

146 Lastly, the Commission maintains that the complaint, reproduced in paragraph 140 of the present judgment, that the judgment under appeal failed to recognise the importance of the restrictive effects of other payment systems and did not take into account the two-sided nature of the system also does not comply with Article 169(2) of the Rules of Procedure, and is designed to obtain from the Court of Justice a reassessment of the facts.

Findings of the Court

– The Commission's objections of inadmissibility

147 The objection of inadmissibility set out in paragraph 132 of the present judgment is based on an inaccurate reading of RBS's cross-appeal. Contrary to what is claimed by the Commission, RBS does not confine itself to referring generally to the General Court's analysis of the restrictive effects of the MIF, but relies on specific paragraphs of the judgment under appeal in support of its arguments, which are set out in paragraphs 129 and 130 of the present judgment. The objection of inadmissibility set out in paragraph 132 of the present judgment must therefore be rejected.

148 Furthermore, in so far as RBS complains, by its argument set out in paragraph 128 of the present judgment, that the General Court failed to carry out a certain analysis, it must be borne in mind that where an appellant submits that the General Court did not respond to a plea, its submission cannot be challenged, in terms of the admissibility of the ground of appeal, on the basis that it does not cite any passage or part of the contested judgment as the specific object of its argument since, by definition, it is a failure to respond that is being alleged (see judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 423).

149 As to the argument set out in paragraph 143 of the present judgment, it is sufficient to hold that that argument is based on a misreading of LBG's cross-appeal. As is apparent from paragraphs 139 to 142 of the present judgment, LBG merely advances arguments relating to the absence of restrictive effects of the MIF without, however, challenging the definition of the relevant market as such. In those circumstances, the objection of inadmissibility set out in paragraph 143 must be rejected.

150 As regards the Commission's arguments, set out in paragraphs 144 to 146 of the present judgment, it should be borne in mind that, as is clear from paragraph 23 of this judgment, LBG's cross-appeal was brought on 31 October 2012. Article 169(2) of the Rules of Procedure of the Court of Justice, on which the Commission relies, did not enter into force until the following day. To the extent that that provision imposes a condition of admissibility by requiring that the pleas in law and legal arguments relied on in appeals 'identify precisely those points in the grounds of the decision of the General Court which are contested', it cannot be applied retroactively.

151 It is apparent, however, from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the latter's Rules of Procedure in force on the date on which LBG's cross-appeal was brought, that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, judgments in *Limburgse Vinyl Maatschappij and Others* v *Commission*, EU:C:2002:582, paragraphs 497 and 618, and *EFIM* v *Commission*, C-56/12 P, EU:C:2013:575, paragraph 21 and the case-law cited). An appeal or a plea which is too obscure for a response to be given does not satisfy those requirements and must be declared inadmissible (see, in particular, judgments in *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527, paragraphs 101 and 106; *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraphs 43 to 45; and *EFIM* v *Commission*, EU:C:2013:575, paragraph 21).

152 In the present case, the first plea in LBG's cross-appeal expressly identifies a part of the judgment under appeal which it refers to as having failed to comply with the standard of judicial review, namely paragraph 169 thereof, with clear reasoning to support that argument. In addition, in so far as, by that plea, LBG complains that the General Court failed to take account of the two-sided nature of the system and considered that it would be relevant to do so only in the context of Article 81(3) EC, it is sufficiently clear that that complaint concerns paragraphs 181 and 182 of the judgment under appeal, by which the General Court found that the appellants' criticisms regarding the two-sided nature of

the system were relevant only in the precise context of that provision. Furthermore, in so far as, by that plea, LBG takes issue with the General Court for having failed to recognise the importance of constraints from other payment systems, in the light of the case-law cited in paragraph 148 of the present judgment LBG cannot be criticised for having failed to enumerate the paragraphs of the judgment under appeal to which that complaint related. Lastly, contrary to the Commission's suggestion mentioned in paragraph 146 of the present judgment, such arguments do not merely challenge the assessment of the facts but constitute questions of law that are admissible at the appeal stage, since those arguments raise the question of the matters which should be taken into account when analysing the restrictive effects of the MIF under Article 81(1) EC.

153 It follows from this that the objections of inadmissibility set out in paragraphs 144 to 146 of the present judgment must also be rejected.

– The substance of the single plea in RBS's cross-appeal and the first plea in LBG's cross-appeal

154 As is apparent from paragraph 141 of the present judgment, LBG complains that the General Court applied an inappropriate standard of judicial review, notably in paragraph 169 of the judgment under appeal.

155 As regards the extent of judicial review, it is apparent from EU case-law that where the General Court is seised, in accordance with Article 263 TFEU, of an action for annulment of a decision applying Article 81(1) EC, the General Court must as a general rule undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of the question whether or not the conditions for the application of that provision are met (see, to that effect, judgments in *Remia and Others* v *Commission*, EU:C:1985:327, paragraph 34; *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraphs 54 and 62; and *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 59). The General Court must also establish of its own motion that the Commission has stated reasons for its decision (see, to that effect, judgments in *Chalkor* v *Commission*, EU:C:2011:815, paragraph 61 and the case-law cited, and *Otis and Others*, EU:C:2012:684, paragraph 60).

156 In carrying out such a review, the General Court cannot use the Commission's margin of discretion, by virtue of the role assigned to it in competition policy by the EU and FEU Treaties, as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (see, to that effect, judgments in *Chalkor* v *Commission*, EU:C:2011:815, paragraph 62, and *Otis and Others*, EU:C:2012:684, paragraph 61).

157 In the present case it must be noted that, in its assessment of the question of the restrictive effects of the MIF, the General Court used the expression 'limited review' in paragraph 169 of the judgment under appeal, which might suggest that it carried out a judicial review of the decision at issue that was more limited than that required by the case-law set out in paragraphs 155 and 156 of the present judgment.

158 However, in itself, such an expression does not necessarily demonstrate that the General Court did not in fact carry out the judicial review required. It is appropriate in this instance therefore to proceed to examine the pleas submitted to the Court of Justice (see by analogy, in particular, judgment in *KME Germany and Others* v *Commission*, EU:C:2011:810, paragraphs 108 and 109).

159 In the present case, by its argument relating to the inappropriate standard of judicial review, LBG relied specifically only on paragraph 169 of the judgment under appeal, a paragraph contained within the General Court's analysis of the complaints challenging the Commission's definition of the product market. However, in the present appeal, the appellants have not directly challenged the General Court's assessment in respect of that definition, namely the acquiring market.

160 In those circumstances, in so far as it criticises the General Court for the level of judicial review applied in that part of its analysis, the argument raised by LBG is in any event ineffective. As to the remainder, LBG's argument concerning judicial review must be rejected as inadmissible, since it does not precisely identify the other parts of the judgment under appeal to which it relates.

161 As regards RBS's criticism, summarised in paragraph 128 of that judgment, that, in assessing whether a decision has a restrictive effect on competition, the Commission should have considered what the actual 'counterfactual hypothesis' would have been in the absence of the MIF, it should be noted that the Court of Justice has repeatedly held that in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute (see judgments in *LTM*, 56/65, EU:C:1966:38, 250; *Béguelin Import*, 22/71, EU:C:1971:113, paragraphs 16 and 17; *Lancôme and Cosparfrance Nederland*, 99/79, EU:C:1980:193, paragraph 26; *L'Oréal*, 31/80, EU:C:1980:289, paragraph 19; *ETA Fabriques d'Ébauches*, 31/85, EU:C:1985:494, paragraph 11; *Bagnasco and Others*, C-215/96 and C-216/96, EU:C:1999:12, paragraph 33 and the case-law cited; and also *General Motors* v *Commission*, EU:C:2006:229, paragraph 72). As the General Court rightly held, in paragraph 128 of the judgment under appeal, the same applies in the case of a decision of an association of undertakings within the meaning of Article 81 EC.

162 Nevertheless, it is apparent in particular from paragraph 132 of the judgment under appeal that, in order to assess the competitive effects of the MIF, the General Court relied on 'the premiss of a MasterCard system operating without a MIF — solely on the basis of a rule prohibiting *ex post* pricing', that is to say, on the same 'counterfactual hypothesis' it applied in order to examine whether the MIF could be regarded as an ancillary restriction as referred to in paragraphs 89 and 90 of the present judgment, in relation to the MasterCard payment system.

163 As is apparent from paragraph 108 of the present judgment, the same 'counterfactual hypothesis' is not necessarily appropriate to conceptually distinct issues. Where it is a matter of establishing whether the MIF have restrictive effects on competition, the question whether, without those fees, but by the effect of prohibiting *ex post* pricing, an open payment system such as the MasterCard system could remain viable is not, in itself, decisive.

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

165 In that regard, the Court of Justice has already had occasion to point out that, when appraising the effects of coordination between undertakings in the light of Article 81 EC, it is necessary to take into consideration the actual context in which the relevant coordination arrangements are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, in particular, judgments in *Delimitis*, C-234/89, EU:C:1991:91, paragraphs 19 to 22; *Oude Luttikhuis and Others*, EU:C:1995:434, paragraph 10; *Asnef-Equifax and Administración del Estado*, EU:C:2006:734, paragraph 49 and the case-law cited; and *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, EU:C:2009:576, paragraph 54).

166 It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic. From that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements.

167 In the present case, however, the General Court did not in any way address the likelihood, or even plausibility, of the prohibition of *ex post* pricing if there were no MIF, in the context of its analysis of the restrictive effects of those fees. In particular, it did not, as required by the case-law set out in paragraphs 155 and 156 of the present judgment, address the issue as to how — taking into account in particular the obligations to which merchants and acquiring banks are subject under the Honour All Cards Rule, which is not the subject of the decision at issue — the issuing banks could be encouraged, in the absence of MIF, to refrain from demanding fees for the settlement of bank card transactions.

168 Admittedly, as is apparent from paragraph 111 of the present judgment, the General Court was not obliged, in the context of the examination of the ancillary nature — as referred to in paragraphs 89 and 90 of the present judgment — of the MIF, to examine whether it was likely that the prohibition of *ex post* pricing would occur in the absence of such fees. Nevertheless, taking into account the case-law referred to in paragraphs 161 and 165 of the present judgment, the situation is different in the separate context of establishing whether the MIF have restrictive effects on competition.

169 In those circumstances, it is correctly submitted in the present case that, in relying on the single criterion of economic viability, notably in paragraphs 132 and 143 of the judgment under appeal, to justify taking into consideration the prohibition of *ex post* pricing in the context of its analysis of the effects of the MIF on competition, and by failing therefore to explain in the context of that analysis whether it was likely that such a prohibition would occur in the absence of MIF otherwise than by means of a regulatory intervention, the General Court made an error of law.

170 It should be noted, however, that if the grounds of a decision of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such infringement is not one that should bring about the annulment of that decision and it is appropriate to carry out a substitution of grounds (see, to that effect, judgments in *Lestelle* v *Commission*, C-30/91 P, EU:C:1992:252, paragraph 28, and *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187 and the case-law cited).

171 That is the case here. The appellants' arguments before the General Court in relation to the objective necessity of the MIF, as described in paragraph 94 of the judgment under appeal, which is not contested in the present appeal, were based in essence on the claim that, without MIF, acquirers would be put at the mercy of issuers, who would be able to determine the level of the interchange fee unilaterally, since merchants and acquirers would be bound to accept the transaction.

172 In paragraphs 95 and 96 of the judgment under appeal, the General Court correctly considered, as is apparent from paragraphs 78 to 121 of the present judgment, that the Commission was fully entitled to conclude that 'the possibility that some issuing banks might hold up acquirers who are bound by the [Honour All Cards Rule] could be solved by a network rule that is less restrictive of competition than MasterCard's current solution that, by default, a certain level of interchange fees applies. The alternative solution would be a rule that imposes a prohibition on *ex post* pricing on the banks in the absence of a bilateral agreement between them'.

173 It follows from this that, as is evident from paragraphs 94 to 96 of the judgment under appeal, the only other option presenting itself at first instance as enabling the MasterCard system to operate without MIF was in fact the hypothesis of a system operating solely on the basis of a prohibition of *ex post* pricing. In those circumstances, that prohibition may be regarded as a 'counterfactual hypothesis' that is not only economically viable in the context of the MasterCard system but also plausible or indeed likely, given that there is nothing in the judgment under appeal to suggest, and it is common ground, that it was not in any way claimed before the General Court that MasterCard would have preferred to let its system collapse rather than adopt the other solution, that is to say, the prohibition of *ex post* pricing.

174 Consequently, even though the General Court wrongly considered that the economic viability of the prohibition of *ex post* pricing in the context of the MasterCard system was sufficient, by itself, to justify taking that prohibition into consideration in the analysis of the effects of the MIF on competition, in the circumstances of the present case, as described in the judgment under appeal, the General Court was entitled to rely in its analysis of the restrictive effects of the MIF on the same 'counterfactual hypothesis' it had used in the context of its analysis of the objective necessity of those fees, albeit for reasons other than those stated by the General Court in paragraphs 132 and 143 of the judgment under appeal. In those circumstances, the error of law established in paragraph 169 of the present judgment has no bearing on the analysis of the restrictive effects carried out by the General Court on the basis of the 'counterfactual hypothesis' in question.

175 Likewise, that error has no bearing on the operative part of the judgment under appeal, which is well founded on other legal grounds.

176 As to the argument, summarised in paragraph 140 of the present judgment, by which LBG accuses the General Court of having failed to recognise the importance of constraints from other systems, it is sufficient to note that, in paragraph 137 of the judgment under appeal, the General Court expressly found that the Commission was right to have taken inter-system competition into account in its analysis of the effects of the MIF. Based as it is on an erroneous interpretation of the judgment under appeal, that argument must therefore be rejected (see, to that effect, judgment in *Ojha* v *Commission*, C-294/95 P, EU:C:1996:434, paragraphs 48 and 49).

177 As regards the argument, also referred to in paragraph 140 of the present judgment, by which LBG accuses the General Court of having ruled the two-sided nature of the system to be relevant only in the context of Article 81(3) EC, it should be borne in mind that, as is apparent from paragraph 161 of the present judgment and as LBG, moreover, has submitted, the General Court was obliged to satisfy itself that the Commission had examined the alleged restriction of competition within its actual context. In order to determine whether coordination between undertakings must be considered to be prohibited by reason of the distortion of competition which it creates, it is necessary, according to the case-law referred to in paragraph 165 of the present judgment, to take into account any factor that is relevant, having regard, in particular, to the nature of the services concerned, as well as the real conditions of the functioning and the structure of the markets, in relation to the economic or legal context in which that coordination occurs, regardless of whether or not such a factor concerns the relevant market.

178 In the present case the General Court found, in paragraph 173 of the judgment under appeal — and this has not been directly challenged in the present appeal — that the Commission could use the acquiring market as the relevant market for its analysis of the competitive effects of the MIF. Furthermore, as is apparent from paragraph 176 of the judgment under appeal, in its definitive assessment of the facts, which is not contested in the present appeal, the General Court found that there are certain forms of interaction between the 'issuing' and 'acquiring' sides, such as the complementary nature of the services, and the presence of indirect network effects, since the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other.

179 In those circumstances, the economic and legal context of the coordination concerned includes, as the appellants, RBS and LBG maintain, the two-sided nature of MasterCard's open payment system, particularly since it is undisputed that there is interaction between the two sides of that system (see, by analogy, judgments in *Delimitis*, EU:C:1991:91, paragraphs 17 to 23, and *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 42).

180 However, in the present case, as is apparent from paragraphs 181 and 182 of the judgment under appeal, the arguments essentially put before the General Court, which are not contested in the present appeal, did not include the argument now advanced by LBG in the context of the present appeal, according to which, in order to assess a restriction of competition in its proper context, it is necessary

to take into account the two-sided nature of the system in question. On the contrary, the criticisms at first instance concerning the failure to take the two-sided nature of the system into account merely highlighted the economic advantages that flow from the MIF. As is evident from paragraph 93 of the present judgment and from the very wording of Article 81 EC, where it is established that a measure is liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services, and is therefore covered by the prohibition rule laid down in Article 81(1) EC, such advantages can be considered only in the context of Article 81(3) EC.

181 In the light of that finding, the General Court therefore correctly concluded, in paragraph 182 of the judgment under appeal, that the criticisms presented to it in relation to the two-sided nature of the system had no relevance in the context of a plea relating to infringement of Article 81(1) EC, in so far as they entailed the taking into account of economic advantages under that paragraph. The General Court also correctly concluded that any economic advantages that may ensue from the MIF are relevant only in the context of the analysis under Article 81(3) EC.

182 It follows from this that LBG's argument in relation to the two-sided nature of the system is based on an erroneous interpretation of the judgment under appeal and is not, therefore, well founded.

183 As regards RBS's complaint, summarised in paragraph 129 of the present judgment, that the General Court conducted a 'short form analysis' of the effects of the MIF, in particular in paragraph 143 of the judgment under appeal, the Commission retorts, as is clear from paragraph 134 of the present judgment, that the MIF stem from a decision by an association of undertakings to set prices and that the resulting anti-competitive effects are obvious.

184 In that regard, it is apparent from the case-law of the Court of Justice that certain types of coordination between undertakings reveal a sufficient degree of harm to competition for the examination of their effects to be considered unnecessary (see to that effect, in particular, judgments in *LTM*, EU:C:1966:38, 249; *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 15; and *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 34 and the case-law cited).

185 That case-law arises from the fact that certain forms of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (see to that effect, in particular, judgment in *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 35 and the case-law cited).

186 It must however be borne in mind that, as is apparent in particular from paragraphs 27 and 141 of the judgment under appeal, the decision at issue is based not on the existence of an infringement by object as provided for in Article 81(1) EC, but on the effects of the MIF.

187 In those circumstances, contrary to what is suggested by the Commission, mere suppositions or assertions that the anti-competitive effects of the MIF are 'obvious' cannot therefore, on the basis of the case-law set out in paragraph 184 of the present judgment, be relied upon (see to that effect, in particular, judgment in *Compagnie royale asturienne des mines and Rheinzink* v *Commission*, 29/83 and 30/83, EU:C:1984:130, paragraphs 16 and 20).

188 As regards the arguments with which paragraphs 131, 139 and 142 of the present judgment are concerned, which intersect to a certain extent with RBS's argument set out in paragraph 129 of the present judgment, it must be observed that the obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court (see, in particular, judgment in *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 135).

189 It has consistently been held that the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (see, in particular, judgments in *France Télécom* v *Commission*, C-202/07 P, EU:C:2009:214, paragraph 29, and *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 81). As has already been stated in paragraph 112 of the present judgment, the obligation to state reasons does not, however, require the General Court to provide an account that follows exhaustively and one by one all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, in particular, judgment in *Ziegler* v *Commission*, EU:C:2013:513, paragraph 82 and the case-law cited).

190 However, while it is the case, as is evident from paragraph 169 of the present judgment, that the General Court erred in law in its interpretation of Article 81(1) EC, in the light of the substitution of grounds in paragraphs 171 to 175 of this judgment, the arguments seeking to criticise the General Court for having conducted a 'short form' analysis of the effects of the MIF and for having given insufficient reasons in respect of that issue in the judgment under appeal cannot be founded on that sole error.

191 Moreover, in so far as the arguments mentioned in paragraph 188 of the present judgment seek to criticise the General Court for an inadequate analysis of or statement of reasons for the anti-competitive effects of the MIF, they cannot be upheld.

192 Having properly relied on the 'counterfactual hypothesis' of a system operating on the basis of the prohibition of *ex post* pricing, contrary to RBS's contention, the General Court did not regard the MIF, by their very nature, as being injurious to the proper functioning of normal competition, but analysed the competitive effects of those fees. It must be pointed out that the General Court's analysis in that regard is not to be found only in paragraph 143 of the judgment under appeal, as RBS seems to suggest, but also includes all of the analysis in paragraphs 123 to 193 of that judgment.

193 In particular, while the General Court clearly explained in paragraph 143 of the judgment under appeal that the MIF had restrictive effects in that they '[limit] the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold', in contrast with 'an acquiring market operating without them', the General Court did not merely presume that the MIF set a floor for the MSC but, on the contrary, proceeded to carry out a detailed examination in paragraphs 157 to 165 of the judgment under appeal in order to determine whether that was in fact the case.

194 It follows from this that RBS's argument that the analysis of the effects is comparable to an analysis of a restriction 'by object' is based on a partial reading of the judgment under appeal, focusing only on paragraph 143 thereof without taking into account the fuller examination of which it forms part.

195 Similarly, the appellants cannot criticise the General Court for having failed to explain how the hypothesis applied had less restrictive effects on competition than the MIF, given that the only difference between the two situations lies in the pricing level of the MIF. As the Commission rightly points out, the judgment under appeal is not based on the premiss that high prices in themselves constitute an infringement of Article 81(1) EC. On the contrary, as is apparent from the very wording of paragraph 143 of the judgment under appeal, high prices merely arise as the result of the MIF which limit the pressure which merchants could exert on acquiring banks, with a resulting reduction in competition between acquirers as regards the amount of the MSC.

196 In those circumstances, the Court of Justice is in a position to carry out its review of the analysis underlying the statements in paragraph 143 of the judgment under appeal. Taking into account the considerations in paragraphs 183 to 195 of the present judgment, the General Court gave reasons to the requisite legal standard for its analysis relating to the effects of the MIF on competition.

197 That conclusion is not undermined by the argument relating to the alleged contradiction in the grounds that was raised by RBS, which is set out in paragraph 130 of the present judgment. Suffice it to note that there is nothing contradictory in the General Court's reasoning in so far as it recognised that merchants are able to constrain the level of the MIF, while at the same time describing that pressure as insufficient to prevent the MIF from setting a floor and thereby reducing competition between acquirers. The General Court clearly explained in paragraph 158 of the judgment under appeal that the Commission was entitled to describe that constraint as insufficient in so far as it is liable to arise only above a maximum merchants' tolerance threshold. These are independent assessments which are not mutually contradictory, from which it follows that that argument is unfounded (see, by analogy, order in *Piau* v *Commission*, C-171/05 P, EU:C:2006:149, paragraph 85).

198 Having regard to all the foregoing, it must be held that while the General Court did err in law, as stated in paragraph 169 of the present judgment, that error is not capable of resulting in the judgment under appeal being set aside, in view of the substitution of grounds in paragraphs 171 to 175 of the present judgment. For the remainder, the arguments raised in the context of RBS's single plea and the first plea in LBG's cross-appeal are in part ineffective and in part unfounded.

199 In those circumstances, RBS's cross-appeal and the first plea in LBG's cross-appeal must be dismissed.

The second plea in LBG's cross-appeal

200 In essence, the second plea in LBG's cross-appeal, alleging infringement of Article 81(3) EC, is expressed in three parts. The appellants endorse this plea, while also submitting additional observations.

The judgment under appeal

201 According to the General Court, the second plea of the application at first instance was essentially in two parts. In the first part of this plea, the appellants complained that the Commission had imposed an excessively high burden of proof on them in relation to the proof that the conditions laid down in Article 81(3) EC had been satisfied. In the second part of the plea, they claimed that the Commission's analysis of those conditions was vitiated by manifest errors of assessment. Taking the view that it was impossible to examine that first part in the abstract, the General Court considered both parts of the second plea of the application at first instance together.

202 In paragraph 207 of the judgment under appeal, the General Court found that '[i]n so far as the MIF is not an ancillary restriction in relation to the MasterCard system, the Commission correctly considered whether there were appreciable objective advantages arising specifically from the MIF. Thus, the fact that the Commission admits in recital 679 to the [decision at issue] that payment card schemes such as the MasterCard system represent technical and economic progress is of no relevance to whether the MIF satisfies the first condition laid down under Article 81(3) EC'.

203 In paragraphs 208 to 216 of the judgment under appeal, the General Court examined the appellants' arguments concerning the role of the MIF in balancing the 'issuing' and 'acquiring' sides of the MasterCard system. In paragraph 217 of its judgment, the General Court concluded that '[i]n view of the foregoing, it must be held that the Commission was entitled, without thereby making a manifest error of assessment, to reject the arguments put forward by the [appellants] to show that the objective advantages which may arise from the MasterCard system are attributable to the role played by its MIF'.

204 In paragraph 220 of the judgment under appeal, the General Court added that, even on the assumption that it could be inferred that the MIF contribute to increasing the output of the MasterCard system, that is not sufficient to establish that they satisfy the first condition laid down in Article 81(3) EC. The General Court observed in that regard, in paragraph 221 of its judgment, that the primary beneficiaries of such an increase are the MasterCard payment organisation and participating banks, and that the improvement, within the meaning of Article 81(3) EC, cannot be assimilated to all the advantages which the parties obtain from the agreement in their production or distribution activities.

205 In paragraphs 222 to 225 of the judgment under appeal, the General Court considered the existence of appreciable objective advantages attributable to the MIF in regard to merchants and concluded, in paragraph 226 of that judgment that, 'in the absence of proof of a sufficiently close link between the MIF and the objective advantages enjoyed by merchants, the fact that the MIF may contribute to the increase in MasterCard system output is not, in itself, capable of establishing that the first condition laid down under Article 81(3) EC is satisfied'.

206 In paragraphs 227 to 229 of the judgment under appeal, the General Court found that, in the absence of proof of the existence of appreciable objective advantages attributable to the MIF in regard to merchants, one of the two groups of users affected by payment cards, the appellants' criticism that insufficient account was taken of the advantages of the MIF for cardholders was ineffective.

207 In the context of the appellants' arguments criticising the Commission for acting as a 'price regulator' in respect of the MIF, the General Court found, in paragraphs 230 to 232 of its judgment, that the Commission had examined and properly refuted the merits of the arguments developed by the appellants during the administrative procedure and that the lack of data capable of meeting the standard of economic proof demanded by the Commission, even if that were established, does not mean that the burden of proof is eased, or even reversed.

208 Lastly, in paragraphs 236 and 237 of the judgment under appeal, the General Court concluded its analysis of the second plea of the application at first instance, alleging infringement of Article 81(3) EC, in the following terms:

> '236 In the light of the foregoing considerations, it must be concluded that the [appellants] have not established that the Commission's reasoning in relation to the first condition of Article 81(3) EC was unlawful. Since the conditions set out in that article must be met if that article is to apply, the second part of the plea must be rejected, and there is no need to examine the [appellants'] objections concerning the other aspects of the Commission's analysis pursuant to that article.
>
> 237 Consequently, the first part of the plea, relating to the excessively high burden of proof imposed on the [appellants], must also be rejected. It is clear from the explanations given above that the Commission examined the arguments and the evidence put forward by the [appellants] and, in the circumstances of the case, was properly able to conclude that they did not establish that the conditions for the application of Article 81(3) EC were fulfilled. In so far as the Commission was properly able to conclude that the [appellants] had not produced proof of the exception on which they were relying, the allegation relating to infringement of the principle *in dubio pro reo* must also be rejected.'

First part of the second plea in LBG's cross-appeal

– Arguments of the parties

209 LBG submits that the General Court did not apply the correct test as regards the burden of proof, namely the balance of probabilities. Referring to the written observations which it submitted to the General Court in respect of Article 81(3) EC, LBG maintains that the General Court ought to have

examined the whole MasterCard scheme, which brings significant benefits to cardholders and merchants. The General Court ought not to have required MasterCard to justify the precise level of the MIF but should simply have required justification for the methodology followed by MasterCard in setting the MIF.

210 In the Commission's view the three main claims raised by LBG in the context of the second plea in its cross-appeal are inadmissible in so far as they are based on vague and general assertions which make it impossible to identify which parts of the judgment under appeal are contested or on which legal grounds, in accordance with the requirements in Article 169(2) of the Rules of Procedure of the Court of Justice. LBG fails to identify clearly an error of law by the General Court and merely reiterates arguments already advanced at first instance.

211 More specifically, the Commission contends that LBG does not identify any paragraph of the judgment under appeal to support the first part of the second plea in its cross-appeal, nor does it comment on the case-law relied on by the General Court as regards the correct standard of proof.

212 As regards the substance, the Commission submits that, so far as concerns the first part of the second plea of the application at first instance relating to the burden of proof, the General Court correctly relied, in paragraphs 196 and 206 of the judgment under appeal, on settled case-law according to which, in order to benefit from Article 81(3) EC, the undertaking must rely on convincing arguments and evidence which the Commission must examine. By contrast, the balance of probabilities test proposed by LBG is not supported by any case-law.

213 Furthermore, the Commission considers that, in so far as LBG seems to contest the requirement of a causal link between the actual restriction and efficiency gains, that argument is ineffective as LBG does not challenge the relevant paragraph of the judgment under appeal, namely paragraph 207. In any event, such a requirement is compatible with the case-law and, consequently, LBG's arguments to the effect that, first, the MasterCard scheme offers significant benefits to consumers and merchants and, secondly, the General Court applied an overly strict test under Article 81(3) EC, cannot succeed.

214 Lastly, the Commission maintains that it is not a question of justifying the precise level of the MIF, but rather of answering the question whether the MIF results in any objective efficiency gains.

– Findings of the Court

215 As is evident from paragraphs 150 and 151 of the present judgment, even though Article 169(2) of the Rules of Procedure of the Court of Justice, on which the Commission relies, cannot be applied retroactively to LGB's cross-appeal, it is clear from the provisions in force on the date when that cross-appeal was brought, notably Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice, that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal.

216 That requirement is not satisfied by an appeal confined to repeating or reproducing word for word the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by that court. In so far as such an appeal does not contain any arguments specifically contesting the judgment appealed against, it amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which, under Article 58 of the Statute of the Court of Justice, the latter does not have jurisdiction to undertake (see judgment in *John Deere* v *Commission*, C-7/95 P, EU:C:1998:256, paragraph 20 and the case-law cited).

217 While LBG claims that the General Court erred in law in failing to adopt the balance of probabilities as a standard for the burden of proof under Article 81(3) EC, it must be stated that, in that respect, the cross-appeal does not indicate, nor is it possible to identify precisely, the paragraphs or the part of the judgment under appeal which it is criticising.

218 It must also be stated that, by referring back to the arguments put forward in its statement of intervention at first instance, LBG is repeating the same arguments as those which it had already put before the General Court and is in fact seeking re-examination of its arguments without even attempting to adduce legal arguments specifically establishing that the General Court, by its approach, erred in law (see, to that effect, judgment in *John Deere* v *Commission*, EU:C:1998:256, paragraph 41).

219 Accordingly, the Commission's objection of inadmissibility is well founded and the first part of the second plea in LBG's cross-appeal is therefore inadmissible.

Second part of the second plea in LBG's cross-appeal

– Arguments of the parties

220 By the second part of the second plea in its cross-appeal, LBG, supported by the appellants, claims that the General Court made an error of law in paragraph 233 of the judgment under appeal by focusing on the benefits to merchants only, despite recognising, in paragraph 228 of that judgment, that the advantages may be taken into account for any market and service that benefits from the existence of the agreement in question and, in paragraph 176 of that judgment, that there is a link between cardholders and merchants. The General Court thus wrongly ignored the significant advantages which the MasterCard system and the MIF bring for cardholders, and, moreover, the two-sided nature of the system and the optimisation of the system which the MIF help to achieve.

221 The appellants endorse LBG's reasoning and add that the grounds of the judgment under appeal are circular, contradictory and insufficient inasmuch as they confirm the failure of the decision at issue to take into account the advantages of the MIF for cardholders. In particular, in paragraphs 107, 110 and 118 of that judgment, the General Court acknowledges that cardholders would bear much higher costs if the MIF were removed or reduced; in paragraphs 178 and 233 of that judgment, that some financial compensation from merchants for the services provided to them by the issuing banks is justified; and, in paragraphs 182 and 228 of that judgment, that the function of the MIF that involves a reduction in cardholders' costs ought to be taken into account in relation to Article 81(3) EC. It is therefore impossible to understand how the General Court could then conclude that 'the [appellants'] criticism that insufficient account was taken of the advantages of the MIF for cardholders is, in all events, ineffective'.

222 The appellants also submit that the General Court contradicted itself, in paragraph 233 of the judgment under appeal, by acknowledging that some financial compensation for the services which issuing banks provide to merchants appears justified, although it is not possible to establish precisely to what extent, while claiming that MasterCard failed 'to identify the services provided by the banks issuing debit, charge or credit cards capable of constituting objective advantages for merchants'.

223 The appellants add that, even supposing that they had not managed to provide sufficient evidence that merchants obtain appreciable objective advantages from the MIF, the General Court did not explain why, in the light of the case-law cited in paragraph 228 of the judgment under appeal, the first two conditions in Article 81(3) EC could not be satisfied on the basis only of the advantages the MIF produce for cardholders, or why all the categories of consumers must benefit from the same part of the profit.

224 In addition to the more general grounds of inadmissibility put forward by the Commission, as set out in paragraph 210 of the present judgment, the Commission contends that the second part of the second plea in LBG's cross-appeal is insufficiently substantiated. LBG challenges certain findings of fact relating to the lack of efficiency gains or to the fair share of benefit for consumers, without, however, alleging any distortion.

225 As regards the substance, the Commission considers that the existence of efficiency gains on several markets does not guarantee a fair share of the benefit to consumers, in accordance with the second condition laid down in Article 81(3) EC. The lack of a fair share of the benefit is a finding of fact, which is not amenable to appeal. In any event, LBG did not explain how the General Court's finding in relation to the accrual of a fair share of the benefit to customers is legally wrong. The interrelated nature of the markets in the two-sided scheme does not weaken the general rule that a fair share of efficiency gains must at least accrue to the customers harmed by the restriction in question.

226 Moreover, according to the Commission, the General Court did not ignore the advantages to cardholders, the maximisation of system output or the two-sided nature of the scheme, but, in paragraphs 208 to 229 of the judgment under appeal, simply rejected the arguments relating thereto. The findings of fact in that regard are not amenable to appeal and, in any event, do not disclose any error of law.

– Findings of the Court

227 The objection of inadmissibility raised by the Commission, according to which the second part of the second plea in LBG's cross-appeal is not sufficiently substantiated, cannot be upheld. Suffice it to note that LBG identified the precise paragraph of the judgment under appeal containing the alleged error of law, namely paragraph 233, and substantiated its arguments by invoking other specific paragraphs of that judgment as well as supporting legal arguments. It follows from this that LBG's arguments in that regard satisfy the requirements of the provisions and the case-law cited in paragraphs 215 and 216 of the present judgment.

228 It should also be noted that, contrary to what the Commission maintains, by that second part of the plea, LBG is not merely challenging the assessment of the facts at first instance, but is raising in essence the question as to which markets may be regarded as generating the objective advantages that may be taken into account for the purposes of the analysis of the first condition laid down in Article 81(3) EC. That issue is a legal issue which is admissible at the appeal stage.

229 As regards the substance, it must be borne in mind that LBG, supported by the appellants, complains, in essence, that the General Court focused only on the advantages the MIF provide to merchants, thereby ignoring the advantages which the MasterCard scheme and the MIF provide to cardholders, as well as the two-sided nature of the system and the optimisation of that system which the MIF help to achieve.

230 The Court must reject at the outset the argument that the General Court wrongly ignored the advantages to cardholders resulting from the MasterCard scheme. It will be recalled that any decision by an association of undertakings which proves to be contrary to the provisions of Article 81(1) EC may be exempted under Article 81(3) EC only if it satisfies the conditions in that provision, including the condition that it contribute to improving the production or distribution of goods or to promoting technical or economic progress (see, to that effect, judgment in *Remia and Others* v *Commission*, EU:C:1985:327, paragraph 38). Furthermore, as is apparent from paragraphs 89 and 90 of the present judgment, where it is not possible to dissociate a decision by an association of undertakings from the main operation or activity with which it is associated without jeopardising its existence and aims, it is appropriate to examine the compatibility of that decision with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary.

231 By contrast, where it is established that such a decision is not objectively necessary to the implementation of a given operation or activity, only the objective advantages resulting specifically from that decision may be taken into account in the context of Article 81(3) EC (see, by analogy, judgment in *Remia and Others* v *Commission*, EU:C:1985:327, paragraph 47).

232 In the present case, as is apparent from paragraphs 78 to 121 of the present judgment, it was open to the General Court to find in paragraph 120 of the judgment under appeal, without erring in law, that the MIF were not objectively necessary for the operation of the MasterCard system. In the light of that conclusion, the General Court also correctly concluded, in paragraph 207 of that judgment, that analysis of the first condition laid down in Article 81(3) EC called for an examination of the appreciable objective advantages arising specifically from the MIF and not from the MasterCard system as a whole. It follows from this that the argument that the General Court wrongly ignored the advantages to cardholders resulting from the MasterCard scheme cannot be accepted.

233 As to the argument that the General Court ignored the optimisation of the MasterCard system which the MIF help to achieve, it must be pointed out that, in paragraphs 208 to 219 of the judgment under appeal, the General Court examined the appellants' arguments based on the role of the MIF in balancing the 'issuing' and 'acquiring' sides of that system, and concluded that the argument that the MIF contribute to increasing the output of the system should be rejected. It follows from this that LBG's argument in that respect is based on a misreading of the judgment under appeal and is therefore unfounded.

234 As regards the arguments that the General Court wrongly ignored the two-sided nature of the system and the advantages flowing from the MIF for cardholders, first of all, it is settled case-law that the improvement, within the meaning of the first condition laid down in Article 81(3) EC, cannot be identified with all the advantages which the parties obtain from the agreement in their production or distribution activities. The improvement must in particular display appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition (see judgment in *Consten and Grundig* v *Commission*, 56/64 and 58/64, EU:C:1966:41, 348).

235 Next, the Court notes that the examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, must be undertaken in the light of the factual arguments and evidence provided by the undertakings (see to that effect, in connection with a request for exemption under Article 81(3) EC, judgment in *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 102).

236 Such an examination may require the nature and specific features of the sector concerned by the agreement in question to be taken into account if its nature and those specific features are decisive for the outcome of the analysis (see judgment in *GlaxoSmithKline Services and Others* v *Commission and Others*, EU:C:2009:610, paragraph 103). Furthermore, under Article 81(3) EC, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration (see, to that effect, judgment in *Asnef-Equifax and Administración del Estado*, EU:C:2006:734, paragraph 70).

237 It follows from this that, in the case of a two-sided system such as the MasterCard scheme, in order to assess whether a measure which in principle infringes the prohibition laid down in Article 81(1) EC — in so far as it creates restrictive effects in regard to one of the two groups of consumers associated with that system — can fulfil the first condition laid down in Article 81(3) EC, it is necessary to take into account the system of which that measure forms part, including, where appropriate, all the objective advantages flowing from that measure not only on the market in respect of which the restriction has been established, but also on the market which includes the other group of consumers associated with that system, in particular where, as in this instance, it is undisputed that there is interaction between

the two sides of the system in question. To that end, it is necessary to assess, where appropriate, whether such advantages are of such a character as to compensate for the disadvantages which that measure entails for competition.

238 However, in the present case, LBG's argument that the General Court wrongly ignored the two-sided nature of the system cannot be accepted. As noted in paragraph 233 of the present judgment, in paragraphs 208 to 219 of the judgment under appeal, the General Court examined the appellants' arguments as to the role of the MIF in balancing the 'issuing' and 'acquiring' sides of the MasterCard system and, for that purpose, specifically recognised, in paragraph 210 of that judgment, that there was interaction between those two sides. The fact that the General Court concluded that the argument that the MIF contribute to increasing the output of the system should be rejected does not alter the fact that the General Court took the two-sided nature of the system in question into account in its analysis.

239 Likewise, the General Court also took into account the two-sided nature of the system when examining the advantages flowing from the MIF that are enjoyed by merchants, notably in paragraphs 222 and 223 of the judgment under appeal, in which it recognised that the increase in the number of cards in circulation may increase the utility of the MasterCard system as far as merchants are concerned, even though, in its definitive assessment of the facts, the General Court concluded that the risk of adverse effects for merchants is higher the greater the number of cards in circulation.

240 In particular, as regards the argument by which LBG complains that the General Court did not take into account the advantages flowing from the MIF for cardholders, it must be held that, in the light of what has been stated in paragraphs 234 to 236 of the present judgment, the General Court was, in principle, required, when examining the first condition laid down in Article 81(3) EC, to take into account all the objective advantages flowing from the MIF, not only on the relevant market, namely the acquiring market, but also on the separate but connected issuing market.

241 It follows from this that, should the General Court have found that there were appreciable objective advantages flowing from the MIF for merchants, even if those advantages did not in themselves prove sufficient to compensate for the restrictive effects identified pursuant to Article 81(1) EC, all the advantages on both consumer markets in the MasterCard scheme, including therefore on the cardholders' market, could, if necessary, have justified the MIF if, taken together, those advantages were of such a character as to compensate for the restrictive effects of those fees.

242 However, as is recalled in paragraph 234 of the present judgment, examination of the first condition laid down in Article 81(3) EC raises the question whether the advantages derived from the measure at issue are of such a character as to compensate for the disadvantages resulting therefrom. Thus, where, as in the present case, restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot, in themselves, be of such a character as to compensate for the disadvantages resulting from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market, in particular, as is apparent from paragraphs 21 and 168 to 180 of the judgment under appeal, where the consumers on those markets are not substantially the same.

243 In the present case, and without any distortion having been claimed in that regard, the General Court concluded in paragraph 226 of the judgment under appeal that there was no proof of the existence of objective advantages flowing from the MIF and enjoyed by merchants. In those circumstances, it was not necessary to examine the advantages flowing from the MIF for cardholders, since they cannot, by themselves, be of such a character as to compensate for the disadvantages resulting from those fees. The General Court was therefore fully entitled to find, in paragraph 229 of the judgment under appeal, that 'the [appellants'] criticism that insufficient account was taken of the advantages of the MIF for cardholders is, in all events, ineffective'.

244 As regards the appellants' arguments, set out in paragraph 221 of the present judgment, that the grounds of the judgment under appeal are circular, contradictory and insufficient on that point, those arguments cannot be accepted.

245 Even if the General Court had recognised, in its analysis of the objective necessity of the MIF, that there were advantages for cardholders that could, in principle, be taken into account under Article 81(3) EC, it was not necessary, as is apparent from paragraphs 240 to 243 of the present judgment, to examine such advantages in the present case. The General Court's reasoning on that point, in particular in paragraph 229 of the judgment under appeal, is not, therefore, contradictory.

246 As to the argument in paragraph 222 of the present judgment that the General Court contradicted itself in paragraph 233 of the judgment under appeal, it must be observed that that argument is based on a selective quotation, resulting therefore from a misreading of that judgment. In using the expression 'financial compensation', the General Court was referring not, as the appellants suggest, to objective advantages for merchants, but to the MSC. The General Court did not, therefore, acknowledge that financial compensation from merchants for the costs incurred by issuing banks for the services they provide to merchants appeared justified, but merely found that the appellants had to identify the advantages that could be deemed to justify the MSC.

247 As regards the appellants' argument that the General Court did not explain why the first two conditions in Article 81(3) EC could not be satisfied on the basis only of the advantages the MIF produce for cardholders, it is sufficient to refer to paragraphs 240 to 245 of the present judgment.

248 Lastly, in so far as the appellants complain that the General Court did not explain why all the categories of consumers must benefit from the same share of the profit resulting from the MIF, suffice it to note that that complaint is based on a misreading of the judgment under appeal. The General Court did not in any way find that each group of consumers should benefit from the same share of that profit, but merely indicated that, as merchants constitute one of the two groups of users affected by payment cards, they should also enjoy appreciable objective advantages attributable to the MIF. Thus, by using the word 'also' in paragraph 228 of its judgment, the General Court correctly indicated that merchants had to enjoy the MIF 'as well as' cardholders, and not 'to the same extent' as them.

249 It must therefore be concluded that the appellants' arguments to the effect that the General Court did not state reasons to the requisite legal standard for the failure to take account of the advantages of the MIF for cardholders is unfounded.

250 In view of the foregoing, the second part of the second plea in LBG's cross-appeal must be rejected.

Third part of the second plea in LBG's cross-appeal

– Arguments of the parties

251 By the third part of the second plea in its cross-appeal, LBG submits that the General Court suggested, in paragraph 233 of the judgment under appeal, that the only factors that can be taken into consideration in verifying whether the MIF are set at an appropriate level are the compensation by merchants for costs incurred by the issuing banks for the services provided to merchants, and the other revenues obtained by the issuing banks. LBG criticises the Commission for its restrictive approach in the present case, an approach which the Commission seems also to have adopted in the Visa MIF case (Case COMP/39.398 — Visa MIF, C(2010) 8760). Referring to the written observations it submitted to the General Court in respect of Article 81(3) EC, LBG maintains that the Commission should have followed the approach it adopted in other comparable areas where it accepted much broader justifications under Article 81(3) EC.

252 LBG maintains that the General Court erred in law in approving an overly strict test under Article 81(3) EC which fails to take into account the significant advantages arising from the MasterCard scheme and the MIF for cardholders and merchants. Furthermore, the General Court's methodology is unworkable in practice, since it requires precise evidence to justify specific levels of MIF, evidence which, however, is unlikely to be provided. Neither the Commission nor the General Court had provided any guidance on the precise methodology that MasterCard should follow in order to set the MIF at a justifiable level. This uncertainty is causing significant concerns for market operators and is likely to harm consumers by stunting innovation in the market.

253 In addition to the more general objections of inadmissibility raised by the Commission, as set out in paragraph 210 of the present judgment, the Commission considers the arguments put forward in support of the third part of the second plea in LBG's cross-appeal, regarding the alleged absence of guidance by the General Court, to be ineffective.

254 As regards the substance, the Commission takes the view that LBG's argument relating to the alleged lack of guidance on the justifiable level of MIF implies a reversal of the burden of proof and discloses no error of law. LBG contradicts itself when it refers to paragraph 233 of the judgment under appeal concerning the proof which the appellants could have produced in order to satisfy the first condition laid down in Article 81(3) EC. Lastly, the reference to the Visa MIF case, mentioned in paragraph 251 of the present judgment, is irrelevant in the context of the present appeal.

– Findings of the Court

255 First of all, as regards the argument put forward by LBG that the Commission adopted too restrictive an approach in the present case, as also in the Visa MIF case mentioned in paragraph 251 of the present judgment, it is sufficient to hold that that argument does not in any way indicate the contested elements of the judgment under appeal and is therefore inadmissible.

256 Next, as regards the argument by which LBG complains that the General Court erred in law by approving an overly strict test which fails to take into account the significant advantages arising from the MasterCard scheme and the MIF for cardholders and merchants, that argument is, in essence, identical to those already examined in the context of the second part of the second plea in LBG's cross-appeal. That argument must therefore be rejected for the same reasons as those stated in paragraphs 227 to 250 of the present judgment.

257 Lastly, so far as concerns the arguments that the General Court's methodology is unworkable in practice, since it requires precise evidence to justify specific levels of MIF, which is unlikely to be provided, and the fact that neither the Commission nor the General Court provided any guidance on the precise methodology that MasterCard should follow in order to set the MIF at a justifiable level, it must be held that those arguments do not seek to claim that the General Court erred in law. Such arguments are therefore inadmissible.

258 The third part of the second plea in LBG's cross-appeal must therefore be rejected. Accordingly, the second plea in LBG's cross-appeal must be rejected in its entirety.

259 It follows from all the foregoing considerations that the main appeal and the two cross-appeals brought by RBS and LBG must be dismissed.

Costs

260 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

261 Under Article 138(1) of those Rules, which applies, *mutatis mutandis*, to the procedure on appeal by virtue of Article 184(1) of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

262 Since the appellants have been unsuccessful in their appeal and the Commission has applied for its costs to be paid by them, the appellants must be ordered to bear their own costs and to pay the costs incurred by the Commission in relation to the main appeal.

263 As regards the cross-appeals, since RBS and LBG have been unsuccessful and the Commission has applied for costs, RBS and LBG must be ordered to bear their own costs and to pay the costs incurred by the Commission in relation to their respective cross-appeals.

264 Furthermore, by virtue of the combined provisions of Article 140(3) and Article 184(1) of the Rules of Procedure of the Court of Justice, it is appropriate in this instance to order that the appellants bear their own costs relating to the two cross-appeals and that RBS and LBG each bear their own costs relating to the cross-appeal brought by the other.

265 In accordance with Article 184(4) of those Rules, HSBC, MBNA, BRC and EuroCommerce shall bear their own costs relating to the main appeal and the cross-appeals. Since Banco Santander SA did not participate in the proceedings before the Court, it cannot be ordered to pay the costs thereof.

266 Under Article 140(1) of those Rules, which is to be applied, *mutatis mutandis*, to the procedure on appeal by virtue of Article 184(1) of those Rules, the Member States which have intervened in the proceedings are to bear their own costs. In accordance with those provisions, the United Kingdom shall therefore bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the main appeal and the cross-appeals;**

2. **Orders MasterCard Inc., MasterCard International Inc. and MasterCard Europe SPRL to bear their own costs relating to the main appeal and the cross-appeals, and to pay the European Commission's costs relating to the main appeal;**

3. **Orders Royal Bank of Scotland plc, Bank of Scotland plc and Lloyds TSB Bank plc to bear their own costs and to pay the European Commission's costs relating to their respective cross-appeals;**

4. **Orders HSBC Bank plc, MBNA Europe Bank Ltd, British Retail Consortium, EuroCommerce AISBL and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]