Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 30 January 2014[1]

Case C-382/12 P

MasterCard and Others
v

European Commission

(Appeals — Competition — Article 81 EC — System of debit, charge and credit card payments — Multilateral fallback interchange fees — Decisions of an association of undertakings — Restrictions of competition by effect — Concept of 'ancillary restriction' — Objective necessity — Agreements on multilateral interchange intra-EEA fees applied by MasterCard to cross-border card payment transactions — Conditions for exemption under Article 81(3) EC — Procedure before the General Court — Conditions of admissibility of the annexes to the application)

I – **Introduction**

1. The present case has as its subject-matter an appeal by the holding company MasterCard Incorporated and its two subsidiaries, respectively MasterCard Inc., MasterCard International Inc. and MasterCard Europe and together 'the main appellants', and also two cross-appeals by (i) The Royal Bank of Scotland plc ('RBS') and (ii) Lloyds TSB Bank plc ('LTSB') and Bank of Scotland plc ('BOS') against the judgment of 24 May 2012 in *MasterCard and Others* v *Commission* ('the judgment under appeal'),[2] in which the General Court dismissed the applicants' action for 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').

2. The case centres on the payment organisation represented by the appellants ('the MasterCard payment organisation' or 'MasterCard'). That organisation was owned and administered by the affiliated banking institutions until 25 May 2006. On that date, and when the administrative procedure leading to the adoption of the decision at issue was in progress, MasterCard Inc. was the subject of an initial public offering ('IPO') on the New York Stock Exchange (United States), which modified its structure and governance.

3. MasterCard operates an 'open' (or 'four-part') payment card system. Unlike a 'closed' (or 'three-part') system, such as that operated by American Express, in which the owner of the system itself enters into agreements with cardholders and merchants, an open system, to which different financial institutions may belong under a common card trade mark, entails three levels of interaction: the first between the owner of the system and the affiliated banks; the second between the issuing

1 — Original language: French.
2 — Case T-111/08.

banks (or issuers)[3] and the acquiring banks (or acquirers);[4] and the third between those banks and their respective customers, namely the cardholders and the merchants.[5] In such a system, the owner of the system, apart from owning and promoting the logo of the payment cards, generally coordinates the practices of the affiliated banks and may act as a network operator, providing an IT infrastructure for the transmission of the electronic messages that close the transactions. It invoices fees and charges to banks for their participation in the system and, where it acts as network operator, fees for processing card payments.[6]

4. The present case concerns, more specifically, the MasterCard decisions setting the multilateral fallback interchange fees which apply by default within the European Economic Area (EEA) or the euro area, that is to say, in the absence of any bilateral agreement between the acquiring bank and the issuing bank or interchange fees set collectively at national level ('the MIF').[7] These fees are paid by the acquiring banks to the issuing banks for any transaction carried out by MasterCard or Maestro branded payment cards[8] (together 'MasterCard cards') between Member States of the EEA or the euro area. In principle, the MIF are included in full in the fees invoiced by the acquiring banks to merchants ('merchant service charges' ('MSC'))[9] and thus passed on to merchants as joint production costs.[10] According to the argument put forward by the main appellants during the administrative procedure, and accepted by the Commission as the basis for its assessment, the MIF are a 'mechanism for balancing cardholder and merchant demand' in order to allocate the cost of delivering the service between the scheme's issuers and acquirers.[11]

5. Until 25 May 2006 the MIF were fixed by MasterCard's European Board ('the European Board'), composed of representatives of the banks established throughout the EEA. After that date, only MasterCard's Global Board, in its new composition, remained competent to take decisions relating to the MIF.

6. In the decision at issue, the Commission considered that the decisions setting the MIF, which it characterised as decisions of an association of undertakings within the meaning of Article 81(1) EC, restrict competition between acquiring banks and thereby infringe that article and Article 53 of the EEA Agreement, in that they amount in fact to setting a minimum price for the MSC.[12] It therefore ordered the MasterCard payment organisation and the main appellants, under pain of a daily penalty

3 — The credit institutions which make the card available to the cardholder and allow him to use it.

4 — The credit institutions which have a contractual relationship with a merchant under which the card is accepted at point of sale. The issuing banks send the acquiring banks the data relating to the cardholder and the card (authentification, authorisation, etc.) and transfer funds via the IT infrastructure of the network, whereas the acquiring banks route the transactions from the merchants' point-of-sale terminal to the issuers' processing centres, transmit the data for authorisation and take part in making payment for and processing the transaction.

5 — See recitals 234 to 238 and 242.

6 — See recitals 239 to 241 to the decision at issue.

7 — See recital 118 et seq. to the decision at issue.

8 — More specifically, MasterCard branded consumer credit and charge cards and MasterCard or Maestro branded debit cards (see Article 1 of the decision at issue).

9 — These fees cover the supply of payment terminals and other technical and financial services and consist of a percentage of the transaction value or a fixed fee (see recitals 246 and 247 to the decision at issue).

10 — See recital 248 to the decision at issue.

11 — See recitals 146 to 155 to the decision at issue, especially recital 153.

12 — See Article 1 of the decision at issue. It should be emphasised that the Commission had already dealt with bank interchange fees in the context of card payment systems, notably in Decision 2002/914/EC of 24 July 2002 (Case No COMP/29.373 – Visa International – Multilateral Interchange Fee, OJ 2002 L 318, p. 17), in which the Visa intra-regional multilateral interchange fees in the European Union were exempted for a period of five years, on certain conditions, the main condition being that the fees should be linked, subject to a maximum amount, to the level of certain costs. A second Visa decision was adopted by the Commission on 8 December 2010 (COMP/D-1/39.398, Visa MIP), making the commitments proposed by Visa binding, including, among others, the setting of a maximum amount for the MIF. In January 2012 the Commission published the Green Paper – Towards an integrated European market for card, mobile and internet payments, COM(2011) 941 final, and launched a public consultation which also dealt with certain aspects relating to bank interchange fees in the context of card payment systems.

payment,[13] to bring an end to the infringement within six months, that is to say, by 21 June 2008, by repealing the MIF,[14] modifying the network rules accordingly, repealing all decisions relating to the MIF[15] and communicating the actions taken to the financial institutions belonging to the MasterCard network.[16]

7. Before the General Court, the main appellants claimed, primarily, that the Court should annul the decision at issue in its entirety or, in the alternative, annul Articles 3 to 5 and 7 of that decision, in which the Commission set out the abovementioned corrective measures and also the daily penalty. Six financial institutions, including the three cross-appellants, intervened in support of the form of order sought by the main appellants, while the United Kingdom of Great Britain and Northern Ireland and two associations, one representing retailers in the United Kingdom and the other the retail, wholesale and international industry in the European Union, namely the British Retail Consortium ('BRC') and EuroCommerce, respectively, intervened in support of the form of order sought by the Commission, which claimed that the Court should dismiss the action. After examining all the pleas raised in support of the principal form of order sought and those raised in the alternative, and declaring certain annexes to the application inadmissible, the General Court dismissed the action and ordered the appellants to pay the costs.

8. On 12 June 2008, MasterCard provisionally repealed the cross-border MIF, while continuing the discussions with the Commission. These discussions eventually led to undertakings by MasterCard concerning, inter alia, the adoption of a new method of calculating the MIF that should substantially reduce the level of the MIF by comparison with the level deemed to be contrary to the Treaty competition rules.[17]

9. By document lodged at the Court Registry on 4 August 2012, MasterCard International Inc. and MasterCard Europe lodged the appeal in the present case. Intervening in support of the form of order sought by them were, in addition to RBS, LTSB and BOS, which also lodged cross-appeals, were MBNA Europe Bank Ltd ('MBNA') and HSBC Bank PLC ('HSBC'). EuroCommerce and the United Kingdom intervened in support of the form of order sought by the Commission, which contends that the appeal should be dismissed.

II – **The appeals**

A – *Admissibility*

10. The Commission questions the admissibility of the cross-appeals, on the ground that they do not comply with the procedural conditions laid down in Article 176(2) of the Rules of Procedure of the Court which entered into force on 1 November 2012. That provision, amending the former Rules of Procedure, states that the cross-appeal must be introduced by a document separate from the response.

11. In the present case, the cross-appeals lodged by RBS and by LTSB and BOS were sent by email on 31 October 2012 and the originals of those documents were received at the Court Registry on 2 and 5 November 2012 respectively. According to Article 57(7) of the Rules of Procedure, 'the date on and time at which a copy of the signed original of a procedural document … is received at the Registry by telefax or any other technical means of communication available to the Court shall be deemed to be

13 — See Article 7 of the decision at issue.

14 — And the SEPA (Single Euro Payments Area) fallback interchange fees.

15 — And also the SEPA/Intra-Eurozone fallback interchange fees. See Articles 2 and 3 of the decision at issue.

16 — See Article 5 of the decision at issue. That article also requires MasterCard to make available on its website, for a certain time, the information set out in Annex 5 to that decision.

17 — See the Commission's press release of 1 April 2009 (IP/09/515). There is a reference to the undertakings given by the appellants at paragraph 60 of the judgment under appeal.

the date and time of lodgement for the purposes of compliance with the procedural time-limits, provided that the signed original of the procedural document, accompanied by the annexes and copies referred to in paragraph 2, is lodged at the Registry no later than 10 days thereafter'. As the cross-appeals were lodged at the Court Registry before 1 November 2012, the Commission's objection of inadmissibility is untenable in fact and in law and must therefore be rejected.

12. The Commission also puts forward a series of specific complaints alleging inadmissibility aimed at most of the pleas and arguments raised in support of both the main appeal and the cross-appeals. Those complaints will be examined separately, when I analyse those various pleas and arguments.

B – *Substance*

13. MasterCard Inc., MasterCard International Inc. and MasterCard Europe put forward three pleas in law in support of their appeal. The first two pleas allege an error of law and/or failure to state reasons vitiating the parts of the judgment under appeal in which the General Court examined, respectively, the objective necessity of the restriction of competition and the nature of MasterCard as an association of undertakings. By their third plea, they claim that the General Court was wrong to reject as inadmissible a number of annexes to the application at first instance.

14. In support of its cross-appeal, RBS puts forward a single plea in law, alleging an error of law by the General Court in its assessment of a restrictive effect on competition. The joint cross-appeal lodged by LTSB and BOS (together 'LBG') relies on two pleas in law. The first, like the first plea raised in support of RBS's cross-appeal, alleges an error of law affecting the General Court's assessment of the effects of the MIF on competition. By its second plea, LBG claims that the General Court made an error of law in its analysis pursuant to Article 81(3) EC. Both RBS and LBG support and develop the first and second pleas in the main appeal.

15. With the exception of the third plea in the main appeal, the various pleas and arguments put forward in support of the appeals, both the main appeal and the cross-appeals, may be grouped around the following themes: the characterisation of MasterCard as an association of undertakings; the existence of effects restrictive of competition; the necessity of the restriction; and the application of Article 81(3) EC.

16. Before addressing each of those themes, it is appropriate to examine the third plea in the main appeal, in so far as, in claiming that the General Court unlawfully rejected certain documents annexed to the application, it seeks, in essence, to demonstrate that the General Court based its assessment on an incomplete evidential framework.

1. Third plea in the main appeal, alleging that the General Court wrongly rejected as inadmissible a number of annexes to the application at first instance

17. The main appellants claim that the General Court erred in law in declaring inadmissible certain annexes which they produced before it. First, they dispute the existence of a legal basis that would justify the approach taken in the judgment under appeal. The provisions to which the General Court refers in that judgment require merely that the applicant state in its application the subject-matter of the dispute and also a summary of the pleas in law on which the application is based. On the other hand, there is no legal basis that would prevent an applicant from supporting its pleas by including arguments in annexes, provided that those arguments are clearly summarised in the application. The over-restrictive approach taken by the General Court thus constitutes a breach of both the principle

of effective judicial protection, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and also by Article 6(1) ECHR, any limitation of which must be in accordance with the law, and also the principle of proportionality. Second, the appellants dispute the way in which the General Court actually dealt with certain annexes.

18. As regards, in the first place, the complaint concerning the legal basis for the treatment of the annexes, it should be observed that, at paragraphs 68 and 69 of the judgment under appeal, the General Court relied on Article 21 of the Statute of the Court of Justice and on Article 44(1)(c) of the Rules of Procedure of the General Court. Under those provisions, every application is to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

19. With respect to those provisions, the Court has already had occasion to make clear that they are to be interpreted as meaning that, in order for an action to be admissible, it is necessary that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself and that, while the body of the application may 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 provisions referred to in the preceding point, must appear in the application. In the same context, the Court has held that similar requirements are called for where a submission is made in support of a plea in law.[18] That interpretation has its basis in the purely probative and instrumental purpose of the annexes, which means that, in so far as a document annexed to the application contains elements of law on which certain pleas expressed in the application are based, those elements must be set out in the actual body of the application to which that document is annexed or, at the very least, be sufficiently identified in the application. In the light of that purpose of the annexes, 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.[19]

20. Such an interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court is not in any way contrary to the principle of effective judicial protection. According to the case-law of the European Court of Human Rights on the interpretation of Article 6(1) ECHR, to which reference must be made in accordance with Article 52(3) of the Charter, the right to a court is not absolute. The exercise of that right is subject to limitations, in particular as to the conditions for the admissibility of an action[20] and therefore, *a fortiori*, of a plea, an argument or an annex to the parties' written pleadings. However, those limitations are permissible, according to the European Court of Human Rights, only where they pursue a legitimate aim and are proportionate to that aim and do not restrict the individual's access to a court in such a way that the very essence of the right is impaired.[21] In addition, while the persons concerned should expect those limitations to be applied, their application must not prevent litigants from availing themselves of an available legal remedy.[22]

18 — Case C-511/11 P *Versalis* v *Commission* [2013] ECR, paragraph 115.

19 — Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 97 and 99.

20 — See Case C-334/12 RX-II *Review of Arango Jaramillo and Others* v *EIB* [2013] ECR, paragraph 43, and order of 16 November 2010 in Case C-73/10 P *Internationale Fruchtimport Gesellschaft Weichert* v *Commission* [2010] ECR I-11535, paragraph 53, which contain references to the case-law of the European Court of Human Rights.

21 — See, in particular, to that effect, point 83 of my Opinion in Case C-354/04 P *Gestoras Pro Amnistía and Others* v *Council* [2007] ECR I-1579, where there are other references to the case-law of the European Court of Human Rights. See also the order in *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, paragraph 53, and also the Opinion of Advocate General Cruz Villalon in Case C-625/11 P *PPG and SNF* v *ECHA* [2013] ECR.

22 — See *Review of Arango Jaramillo and Others* v *EIB*, paragraph 43, and point 73 of the Opinion of Advocate General Cruz Villalon in *PPG and SNF* v *ECHA*.

21. As regards the aim pursued by Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, namely to ensure legal certainty and the proper administration of justice, the appellants themselves acknowledge that it is legitimate. Furthermore, an approach that requires that applicants state in the application, at least in summary form, the elements of fact and of law on which the pleas and arguments put forward are based does not seem disproportionate to those aims, nor is it capable of impairing the essence of the right to a court.

22. It follows from the foregoing that, in basing the approach which it took in the judgment under appeal, in particular at paragraphs 68 and 69 of that judgment, to the annexes to the parties' pleadings on the provisions referred to at point 20 above, as interpreted by this Court, the General Court did not err in law.

23. It is appropriate, in the second place, to analyse the General Court's specific application of those provisions with respect to the annexes the treatment of which is disputed by the main appellants. Their arguments refer specifically to the analysis set out at paragraphs 183 to 190 of the judgment under appeal and, in particular, to the treatment of Annexes A.13, A.14 and A.15, and also to the analysis set out at paragraphs 275 to 282 of the judgment under appeal and, in particular, to the treatment of Annex A.20. The main appellants claim that they summarised the pleas in law in the application and that both the General Court and the Commission understood the arguments which they put forward. In addition, the elements set out in the annexes are elements of fact. Where the annexes contain only factual elements, those elements do not need to be set out in the body of the application. The General Court ought therefore to have concluded that the application was sufficiently precise with respect to the pleas and arguments on which the application was based and that the annexes were therefore admissible.

24. As regards, first of all, the treatment of annexes A.13, A.14 and A.15, it is clear on reading the application submitted at first instance by the main appellants that the General Court was correct to take the view that they had stated their complaint – relating to the examination of the economic evidence adduced during the administrative procedure – in such succinct terms that it was impossible to identify in the body of the application any argument capable of supporting it. The arguments in support of the complaint are to be found, and must be sought, in full in those annexes. That is clear, moreover, from paragraphs 185 and 186 of the judgment under appeal. The same analysis applies to the treatment of Annex A.20, referred to at paragraph 280 of the judgment under appeal. As regards that annex, it must be observed that the appellants confined themselves in their application before the General Court to making a general reference to that annex in a footnote, without further detail. In those circumstances, I consider that the General Court did not err in its treatment of those annexes.

25. As for the argument that where the annexes contain only factual elements those elements need not be stated in the body of the application, it should be borne in mind that, according to the case-law referred to at point 19, the essential elements *of fact* and *of law* on which the application, or a plea or even an argument, is based must not only be set out in summary form in the application, but must be clear, in a coherent and comprehensible fashion, from the body of the application, which, as may be seen from point 24 above, is not the case here.

26. In the light of all the foregoing, I consider that the plea alleging errors of law in relation to the admissibility of certain annexes must be rejected.

2. MasterCard as an ‘association of undertakings’ (second plea in the main appeal)

a) The judgment under appeal

27. The General Court addressed the question of the characterisation of MasterCard and the decisions setting the MIF in the light of Article 81(1) EC at paragraphs 241 to 260 of the judgment under appeal. It first of all defined the scope of that question as being whether, ‘in spite of the changes made by the IPO, the MasterCard payment organisation [had continued] to be an institutionalised form of coordination of the banks’ conduct’ (paragraph 244) and the MIF to be the expression of that coordination.[23] Next, it observed, at paragraphs 245 to 247, that, since the IPO, ‘the banks [had] continued, collectively, to exercise decision-making powers in respect of the essential aspects of the operation of the MasterCard payment organisation … both at a national and at a European level’ and that the retention of such decision-making powers ‘mean[t] that the conclusions to be drawn from the IPO [were] very much to be set in perspective’. At paragraphs 250 to 258, moreover, the General Court held that, owing to the existence of a commonality of interests between MasterCard and the banks in setting the MIF at a high level, the Commission had been entitled to take the view that ‘the MIF essentially reflected the banks’ interests even though they no longer controlled MasterCard after the IPO’. The General Court therefore concluded, in the light of the same elements of continuity on which the Commission had relied, that the Commission had been entitled to characterise MasterCard as an association of undertakings and the decisions taken by the bodies of MasterCard setting the MIF as decisions by an association of undertakings.

b) The appeal

28. The main appellants, supported by RBS, LBG, HSBC and MBNA, claim that the General Court’s finding that MasterCard is an association of undertakings when it sets the MIF is vitiated by an error of law and/or a failure to state reasons. They maintain that the first ground relied on in order to support that finding, namely the fact that, after the IPO, the banks retained a residual decision-making power within the MasterCard payment organisation, is irrelevant, since that power is exercised in relation to matters other than the setting of the MIF and since the General Court itself acknowledged, at paragraph 245 of the judgment under appeal, that decisions relating to those fees ‘[were] taken by the bodies of the MasterCard payment organisation and that the banks [did] not take part in that decision-making process’. Furthermore, they claim that the second ground on which the General Court relied, namely the alleged commonality of interests between the MasterCard payment organisation and the banks in setting the MIF, is neither relevant, in the light of the Court’s case-law, nor sufficient to demonstrate the existence of an association of undertakings, which cannot be inferred, in particular, from the mere fact that a company may be induced to take account of its customers’ interests when adopting its business decisions. In addition, the General Court’s reasoning amounts to maintaining that the acquiring banks also have an interest in the MIF being set at a high level, in spite of the fact that that entails an increase in their costs and therefore a potential reduction in their profits.

23 — Relying on a number of factors relating, in particular, to the operating rules of the organisation, the relationship between its managing bodies and the member banks, the system of affiliation to the network, and also the nature of the decisions relating to the MIF and the fact that they were binding on the member banks, the Commission concluded in the decision at issue that MasterCard constituted an association of undertakings within the meaning of Article 81(1) EC (recitals 344 to 349) until 25 May 2006, the date of the IPO, and that the decisions which it adopted concerning the MIF were, until that date, decisions by an association of undertakings for the purposes of that provision (recital 371).

c) Analysis

29. The issue of the characterisation of MasterCard and its decisions in the light of Article 81(1) EC after the flotation of MasterCard Inc. has, since the administrative procedure, been the subject of a debate part between rupture and continuity. While the appellants – which did not dispute the characterisation of MasterCard as an association of undertakings during the period up to 25 May 2006 – emphasised the significance of the changes in the structure and governance of the organisation after that date, both the Commission and the General Court found that its mode of operation was substantially the same before and after the IPO and concluded that the IPO had not altered either the pre-existing balance between the mutual interests of the various players in the system or the economic reality of the MIF.

30. Although, in such a context, the complaints being analysed reveal a number of elements of criticism of the assessments of fact carried out by the General Court, they none the less, contrary to the Commission's contention, raise a point of law, concerning the interpretation and application in the present case of the concept of an 'association of undertakings' within the meaning of Article 81(1) EC.

i) The alleged failure to have regard to the Court's case-law on the concept of 'association of undertakings'

31. The main appellants take issue, first of all, with the General Court for having failed to follow this Court's case-law on that concept. They maintain that, according to that case-law, an entity cannot be characterised as an association of undertakings within the meaning of Article 81(1) EC unless it is composed of a majority of representatives of the undertakings concerned and unless, in the light of the applicable national legislation, it is free to take its decisions in the exclusive interest of those undertakings.

32. Let me say at the outset that such an interpretation strikes me as being excessively restrictive. While it is actually based on two criteria, connected with the composition and legal framework of the activities of the entity in question, which may be identified in the Court's case-law, it none the less argues in favour of a strict application of those criteria which is difficult to reconcile with both the purpose of Article 81 EC, which is to cover every form of cooperation between undertakings that is contrary to the objectives pursued by that article, and the broad scope that the case-law affords to the concept of association of undertakings.

33. As the General Court correctly observed in the judgment under appeal,[24] it follows, generally, from the case-law that the concepts of 'agreement', 'concerted practice' and 'decision by an association of undertakings' in Article 81(1) EC are intended to catch all collusion between undertakings which tends to produce the effects prohibited by that provision, irrespective of the form which it takes.[25] Accordingly, undertakings cannot avoid the prohibition laid down in that provision by the mere fact that they coordinate their conduct on the market through a body or a joint structure or that they entrust such coordination to an independent body.[26] As regards, more specifically, the concept of association of undertakings, it has been given a broad interpretation as designating any body, even

24 — See paragraphs 241 and 242.

25 — See Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 131; Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraphs 31 and 32; and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 23; see also Case T-191/06 *FMC Foret* v *Commission* [2011] ECR II-2959, paragraph 102.

26 — See the Opinion of Advocate General Leger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, point 62. It also follows from the case-law that, in such a closed system, the Commission cannot be prevented from characterising the collusion alternatively as an agreement, a concerted practice or a decision by an association of undertakings (see, for example, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 697, and, most recently, judgment of 5 December 2013 in Case C-449/11 P *Solvay Solexis* v *Commission*).

one without legal personality or a non-profit-making body,[27] and irrespective both of its legal classification under national law[28] and of the fact that its members are natural or legal persons or are themselves associations of undertakings.[29] The concept of decision of an association of undertakings has also been given a broad interpretation. It follows from the case-law that that concept covers any measure, even if it is not binding,[30] which, regardless of what its precise legal status may be, constitutes the faithful reflection of the association's resolve to coordinate the conduct of its members.[31]

34. Contrary to the main appellants' contention, it cannot be inferred from the case-law which they cite, and in particular from *Wouters*,[32] that the two criteria referred to below are intended to apply irrespective of the body in question. That case, like the other cases to which the main appellants refer,[33] did not concern private bodies of a purely commercial nature, like MasterCard, but public bodies with a principally professional mission, often having regulatory powers conferred by law and pursuing, in addition to the collective interests of their members, aims of general interest.[34] In all those cases the essential question to be assessed was whether, in the light of the public-law regime to which those bodies were subjected, they acted independently on the market, so that the conduct which they pursued and the measures which they adopted, or in the adoption of which they participated, could be regarded as collusive acts for the purposes of Article 81(1) EC. In the context of that assessment, the Court has sometimes been led, as was the case in *Wouters* and, more recently, in *Ordem dos Técnicos Oficiais de Contas*,[35] to draw a distinction between the activities in which the entity in question acted as a body invested with public powers and/or pursued aims in the public interest and those in which it behaved as an association acting in the exclusive interest of its members.

35. It is in that context of a mixture between public and private interests and powers that the Court developed and applied the two criteria on which the main appellants rely. It is in the same context that the Court followed the functional approach on which they also rely, according to which an entity may constitute an association of undertakings within the meaning of Article 81(1) EC where it carries out certain tasks and not others, so that, for the purposes of its correct classification under the competition rules, all that matters is the nature of the functions which it carries out when adopting the measure which is assumed to infringe those rules.

36. It is not disputed that MasterCard is a private-law body that pursues a commercial aim. It is not subject to a public-law regime, nor is it entrusted with a public service, and the decisions adopted by its bodies are solely a function of private interests. In such circumstances, in the light of the considerations developed at points 34 and 35 above, recourse to those criteria, which were developed

27 — See Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 88.

28 — See Case 123/83 *Clair* [1985] ECR 391, paragraph 17; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 40; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 85.

29 — See Case T-193/02 *Piau* v *Commission* [2005] ECR II-209, paragraph 69, and Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987, paragraph 49, upheld in Joined Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Others* v *Commission* [2008] ECR I-10193.

30 — See Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 210.

31 — See, to that effect, Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 32.

32 — Cited at footnote 26.

33 — In particular, Case C-185/91 *Reiff* [1993] ECR I-5801; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883; Joined Cases C-140/94 to C-142/94 *DIP and Others* [1995] ECR I-3257; and *Commission* v *Italy*, paragraphs 36 to 38.

34 — *Wouters* concerned the Netherlands Bar; *Commission* v *Italy* concerned the National Council of Customs Agents; *Reiff* and *Delta Schiffahrts- und Speditionsgesellschaft* concerned, respectively, the committees responsible for setting tariffs for long-distance carriage of goods by road and tariffs for commercial waterways traffic in Germany; *Centro Servizi Spediporto* concerned the committee responsible in Italian law for keeping the national register of road-haulage operators; and, last, *DIP* concerned the municipal committees involved in the procedure for issuing licences to open shops in Italy.

35 — Case C-1/12 [2013] ECR.

for the purpose of assessing contexts substantially different from that of the present case, was not mandatory and the General Court could, without disregarding the concept of association of undertakings as thus interpreted in this Court's case-law, take other elements of assessment into consideration.

ii) The alleged irrelevance of the elements on which the General Court relied

37. The main appellants submit, next, that the elements on which the General Court relied, namely, first, the fact that the banks retained a residual decision-making power within the MasterCard payment organisation and, second, the alleged commonality of interests between that organisation and the banks in the setting of the MIF, are of no relevance for the purpose of assessing whether there was an association of undertakings within the meaning of Article 81(1) EC and, in any event, are insufficient to characterise such an association.

38. As regards the first of those elements, the main appellants claim that the fact that the banks retained decision-making powers after the IPO is irrelevant, in so far as those powers do not relate to the setting of the MIF. In relying on that fact in order to conclude that MasterCard acted as an association of undertakings when it set the MIF, the General Court disregarded the functional approach followed by the Court of Justice in *Wouters*.

39. In that regard, without going into the substance of the General Court's assessment of the importance recognised to those decision-making powers, I observe at the outset that that assessment differs from that made by the main appellants, which tend to present those powers as substantially negligible. At paragraph 247 of the judgment under appeal, the General Court emphasised that the European Board had retained power to decide on 'key issues' relating to different aspects of the operation of the organisation at regional level.

40. That having been made clear, I refer to the considerations set out at points 34 and 35 above, and also to the assertion made at point 36 above, from which it follows that the General Court was not required in the circumstances of the present case to follow that functional approach and was therefore able to take into account, as an element of assessment, the decision-making powers retained by the banks after the IPO, without being required to ascertain, as the main appellants claim, whether such powers could have an impact on the setting of the MIF.

41. As regards the second of the elements referred to above, namely the existence of a commonality of interests between MasterCard and the banks in setting the MIF, the main appellants essentially maintain that to infer from a mere coincidence of interests between two or more economic operators the existence of an association of undertakings, would result in Article 81 EC being applied in the absence of any evidence of collusion, which assumes a concurrence of wills.

42. To my mind, that argument must be rejected. In the present case, the General Court found the existence of an institutionalised framework to which the banks belong and within which they cooperate among themselves and with MasterCard in order to achieve a joint project which entails limiting their commercial autonomy and defines the lines of their reciprocal action. It is therefore a very different scenario from that of mere parallel conduct, to which the main appellants refer, in which the interest of the undertakings concerned in not competing is pursued by each of them independently, by aligning its conduct with that of its competitors. The present case is also to be distinguished from *BAI and Commission* v *Bayer*,[36] to which LBG refers. While it is true that in that case the General Court concluded that, having failed to establish a concurrence of wills between Bayer and its wholesalers with a view to reducing parallel trade, the Commission had been wrong to find the

36 — Joined Cases C-2/01 P and C-3/01 P [2004] ECR I-23.

existence of an agreement under Article 81 EC, that conclusion was based on the finding that the respective intentions of the parties had been misinterpreted and that neither Bayer's intention to impose an export ban, nor even the tacit acquiescence on the part of the wholesalers to the imposition of such a ban, had been demonstrated.[37]

43. It follows from the analysis carried out at points 32 to 35 above that a body comes within the concept of an association of undertakings within the meaning of that provision when it constitutes the framework in which, or the instrument whereby, the undertakings coordinate their conduct on the market, provided that that coordination or the results which it achieves are not imposed by the public authorities. It also follows from that analysis that, in view of the function fulfilled by the concepts of 'association of undertakings' and 'decision of an association of undertakings' within the structure of Article 81(1) EC, the question whether they apply in a specific case must be assessed in the light of all the relevant elements of the particular case, which must disclose the intention of the undertakings in question to coordinate their conduct on the market through a collective structure or a joint body.

44. The relevance of the two elements referred to at point 37 above cannot be disputed in the circumstances of the present case, where the question of the classification of MasterCard as an association of undertakings within the meaning of Article 81(1) EC essentially entails an assessment of the impact of the IPO on its operating method, on its relationship with the affiliated banks and also, more generally, on the equilibrium within it. In that regard, I observe that the arguments which the main appellants put forward at first instance in order to challenge such a classification were based essentially on the assertion that no coordination could be imputed to the banks after 25 May 2006 with respect to the MIF, which were now set by MasterCard and applied to the affiliated banks in the context of a supplier-customer relationship.

45. As to whether those elements were sufficient in the present case to confirm the Commission's classification of MasterCard as an association of undertakings, I consider, on the basis of all the foregoing considerations, that it cannot be precluded outright that a body may be classified as an association of undertakings even where, as in MasterCard's case, the decisions which it adopts are not taken by a majority of the representatives of the undertakings in question or in their exclusive interest, if it follows from a global assessment of the circumstances of the case that those undertakings intend or at least agree to coordinate their conduct on the market by means of those decisions and that their collective interests coincide with those taken into account when those decisions are adopted. *A fortiori*, such a classification cannot be precluded outright in a context such as that of the present case, 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.

37 — In upholding the judgment at first instance, the Court stated, moreover, that '[f]or an agreement … to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers', see paragraph 102.

46. On the basis of its assessment of the facts and circumstances of the case, the General Court concluded that the decisions of the Global Board of MasterCard Inc. setting the MIF continued to reflect the collective interests of the banks affiliated to the system and that those banks continued knowingly to coordinate their policy on cross-border interchange fees by means of those decisions, in spite of the fact that they no longer took part in the decision-making process leading to the adoption of those fees. That assessment, subject to any distortion of the facts and/or the evidence, [38] is in itself not amenable to review by the Court.

47. In that regard, it is necessary to reject the criticism which the main appellants, supported by HSBC, direct against the General Court for having confirmed the Commission's assertion that the acquiring banks also had an interest in the setting of high MIF. In the first place, that criticism seeks to challenge the General Court's assessment of the facts and the evidence without claiming any distortion of either the facts or the evidence or advancing any proof going beyond mere assertions. [39] In the second place, contrary to the main appellants' assertion, the General Court did not merely state, on that point, that the acquiring banks could pass the MIF on to their customers, but it made clear that a system of multilateral fallback setting of interchange fees such as the MIF provided the acquiring banks with a guarantee that an increase in those fees would not have had an impact on their competitive position. [40] Last, as for the General Court's reference to the rule of the MasterCard system that banks wishing to acquire transactions were required also to have a card-issuing business, the main appellants cannot claim that it is irrelevant merely by relying on the fact that that rule was applied until 31 December 2004 and was no longer in force on the date of the IPO. It is clear from paragraph 254 of the judgment under appeal that the General Court accepted the Commission's explanation that, owing to the abovementioned rule, the system had developed in such a way that virtually all banks engaged in the acquiring business were also card issuers and benefited to that extent from the MIF, and remained the same after that rule was abolished. It is also clear from that paragraph of the judgment under appeal that the applicants did not put forward before the General Court any evidence to challenge the merits of that explanation.

48. In conclusion, examination of the above complaints has not enabled it to be established that, in confirming the Commission's classification of MasterCard as an association of undertakings, the General Court failed to have regard to the concept of association of undertakings within the meaning of Article 81(1) EC as interpreted by the Courts of the European Union.

38 — In their respective responses, LBG and HSBC claim that there has been a distortion of the facts, and take issue with the General Court for not having taken into account the witness evidence which they had produced before it, which showed that, after the IPO, the banks had no control or influence over the setting of the MIF, concerning which they were neither consulted in advance nor informed until after the MIF had been adopted. In that regard, it is sufficient to observe that the General Court did not rely, in its assessment of the facts, on any involvement of the banks in the process of adoption of the MIF. On the contrary, at paragraph 245 of the judgment under appeal, it described as being of 'common ground' the fact that 'since the IPO, decisions relating to the MIF have been taken by the bodies of the MasterCard payment organisation and that the banks do not take part in that decision-making process'. Accordingly, those complaints, in so far as they must not be declared inadmissible on the ground that they are new by comparison with the main appeal and not raised in a cross-appeal, are ineffective.

39 — The main appellants merely assert that the General Court's reasoning is 'manifestly incorrect' and claim that the issuing banks have an interest in reducing the level of the MIF in order to reduce their costs and increase their profits on the MSC.

40 — See paragraphs 253 and 134 of the judgment under appeal.

3. The existence of effects restrictive of competition (the single plea in RBS's cross-appeal and the first plea in LBG's cross-appeal)

a) The decision at issue and the judgment under appeal

49. In the interest of clarity, it is appropriate to set out briefly the various passages of the analysis in the decision at issue relating to the effects of the MIF on competition. In that decision, the Commission concluded that, in so far as they influenced the amount of the interchange fees charged by the issuing banks to the acquiring banks,[41] which passed the costs of the fees charged on to the merchants, the MIF produced restrictive effects on price competition on the acquiring market, to the detriment of merchants and their customers.[42] In order to arrive at that conclusion, it found, in the first place, relying on two quantitative analyses, that the MIF constituted a minimum level for fees charged by the acquiring banks to merchants irrespective of their size.[43] In the second place, it inferred from an investigation among merchants carried out by the Commission itself in 2004 ('the 2004 market study') that the MIF prevented the MSC from being reduced below a certain level. In the third place, after rejecting the arguments whereby MasterCard challenged the argument that the MIF had a restrictive effect on competition in the acquiring market,[44] the Commission examined the effects of the MIF on the issuing market, and concluded that the banks operating on that market tended to favour the cards generating the highest interchange revenues and that that strategy was capable of further increasing the cost of accepting cards on the acquiring market.[45] In the fourth place, the Commission observed that intersystem competition (between the different card payment networks, essentially between Visa and MasterCard), not only did not prevent MasterCard from maintaining interchange fees at a high level but exercised an upward pressure on those fees, increasing the distortions of competition on the acquiring market.[46] In the fifth place, the Commission found that the MIF were not subject to any constraint either on the part of the acquiring banks or on the part of merchants.[47] In the latter regard, the Commission took into consideration, among other factors, the rule of the MasterCard network whereby merchants (and acquiring banks) were required to honour all cards, namely all the products offered by MasterCard on the issuing market, no matter what the issuing bank (the Honour-All-Cards Rule; 'the HACR'). Last, the Commission considered that the members of MasterCard exercised collectively market power vis-à-vis merchants and their customers and that the MIF allowed them to exploit that power.

50. The General Court examined the question of the effects of the MIF on competition at paragraphs 123 to 193 of the judgment under appeal. In the first place, it addressed and rejected the complaint alleging failure to examine how competition would function in the absence of the MIF. In that context, it rejected, first, the criticisms relating to the fact that the Commission took into account, in its counterfactual analysis, a rule prohibiting *ex post* pricing[48] as a fallback rule replacing the MIF (paragraph 132 of the judgment under appeal) and, second, those relating to the reference, made by the Commission in the context of that analysis, to the fact that bilateral negotiations would be held between issuing banks and acquiring banks, leading, ultimately, to the disappearance of interchange fees (paragraph 133). The General Court then rejected the arguments criticising the

41 — This influence was exercised both in the case of crossborder transactions, to which the MIF applied in the absence of more specific interchange fees, and in the case of national transactions, where the MIF either applied in the absence of domestic interchange fees or served as a reference when those fees were adopted (recitals 412 to 424 to the decision at issue).

42 — While it did not preclude the possibility that the MIF, by restricting the determination of prices by competition, might have had an anti-competitive object, the Commission none the less decided not to take a position on that point, as it considered that their restrictive effects were clearly established (recitals 401 to 407).

43 — Relying on data relating to 2002, the Commission estimated that the MIF could represent on average up to 73% of those fees.

44 — Recitals 439 to 460.

45 — Recitals 461 to 466.

46 — Recitals 467 to 496.

47 — Recitals 497 to 521.

48 — Namely, a rule prohibiting issuers and acquirers from defining the amount of the MIF after a purchase has been made by one of the issuer's cardholders from one of the acquirer's merchants and the transaction has been submitted for payment.

Commission for having failed to establish that the elimination of the MIF would raise the level of competition between acquirers (paragraphs 135 and 136) and, in particular, the argument alleging an assimilation of the MIF to a common entrance cost, neutral from the aspect of competition (paragraph 143). In the second place, at paragraphs 168 to 182 of the judgment under appeal, the General Court addressed and rejected a number of complaints relating to the examination of the product market, confirming the market analysis in the decision at issue. As regards, in particular, the existence of an autonomous acquiring market, the General Court emphasised that, in spite of a certain complementarity between the 'issuing' and 'acquiring' sides of the market, the services provided to cardholders and those provided to merchants could be distinguished and, furthermore, cardholders and merchants exerted separate competitive pressure on issuing and acquiring banks respectively (paragraphs 176 and 177). In the same context, the General Court considered that the criticisms relating to the failure to take the two-sided nature of the market into consideration highlighted the economic advantages flowing from the MIF and were therefore irrelevant in a plea alleging infringement of Article 81(1) EC. Last, the General Court rejected both the complaint, put forward by the main appellants, relating to the examination of the economic evidence submitted during the administrative procedure (see point 139 et seq. above) and a complaint alleging failure to state reasons for the Commission's change of approach by comparison with the Visa decision of 24 July 2002.[49]

b) The single plea in RBS's cross-appeal

i) The complaint alleging an error of law affecting the counterfactual analysis carried out by the General Court

51. By its sole plea in law, RBS, supported by the main appellants, first of all takes issue with the General Court for having failed to ascertain whether the hypothesis developed by the Commission in its counterfactual analysis, based on the application of a rule prohibiting the issuing banks from *ex post* pricing, would have been likely to apply in the absence of the MIF. In confining itself to confirming the economic viability of such a rule, the General Court confused the analysis of the effects of the MIF on competition and the analysis of the objective necessity for the restriction which they would produce.

52. According to a consistent line of decisions, in order to assess whether an agreement (or a decision by an association of undertakings) must be considered to be prohibited owing to its effects on the market, it is necessary to examine competition within the actual context in which it would occur in the absence of the agreement (or the decision) in dispute.[50] The method of analysis indicated by this Court therefore entails a comparison between the competitive structure caused by the alleged restriction and that which would have prevailed in its absence.

53. As the second factor in that comparison is the result of an assessment based on hypotheses, it cannot be required that proof be adduced that the scenario used in the context of that assessment will inevitably arise in the absence of the presumed restriction.[51] That scenario must however be sufficiently realistic and plausible, and therefore not merely theoretically possible, in the light of all the relevant factors such as, in particular, the nature of the products or services concerned, the

49 — Decision 2002/914.

50 — Case 56/65 *LTM* [1966] ECR 235, at 250; Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 19; Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10; Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 76; Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 90; Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 33; and Case T-328/03 *O2 (Germany)* v *Commission* [2006] II-1231, paragraph 68.

51 — See Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 39.

position of the parties to the agreement on the relevant market,[52] the structure of the market and also the economic, legal and technical context governing its functioning,[53] the conditions of competition, both actual and potential,[54] the existence of barriers to entry,[55] the degree of market saturation and consumer loyalty to existing brands[56] and the existence or exercise of intellectual property rights.

54. In the present case, the Commission examined the competitive process that would have developed on the acquiring market in the absence of the MIF at recitals 458 to 460 to the decision at issue and concluded that, in the absence of the MIF and with a prohibition on *ex post* pricing, the prices charged to merchants by acquirers 'would only be set taking into account the acquirer's individual marginal cost and his mark up'. According to the Commission, '[t]he uncertainty of each individual acquirer about the level of interchange fees which competitors bilaterally agree to pay to issuers would exercise a constraint on acquirers', so that '[i]n the long run this process can be expected to lead to the establishment of inter-bank claims and debts at the face value of the payment, that is without deducting any interchange fees'. At paragraph 133 of the judgment under appeal, the General Court approved that analysis. Thus, contrary to the assertion of RBS and the main appellants, in particular at the hearing, the decision at issue does not lack a counterfactual analysis and the judgment of the General Court did not err in law in not taking issue with the Commission for such an alleged omission.

55. RBS disputes the assertion at paragraph 132 of the judgment under appeal that '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'.

56. In order to comprehend the meaning and the scope of that paragraph, it is appropriate to observe that in the judgment under appeal the General Court addressed the complaints alleging errors of assessment in the analysis of the effects of the MIF on competition after it had addressed the complaint alleging an incorrect examination of the objective necessity of the MIF. The General Court considered that, in view of the criticisms aimed at the Commission's assessment pursuant to Article 81(1) EC, it was preferable to ascertain the economic viability of a MasterCard system operating without the MIF before assessing, as required by the case-law cited at point 52 above, how competition on the acquiring market would be exercised in the context of such a system.

57. Such a process led the General Court to introduce into the framework of the examination of the effects of the MIF on competition the conclusions which it had reached following its examination of their objective necessity. Thus, having concluded, following that examination, that the Commission had been entitled to find that a mechanism of regulation by default containing MIF of a positive level was not objectively necessary for the viability of the MasterCard system, and that that system could have operated on the basis of a less restrictive alternative, namely a rule prohibiting *ex post* pricing, it considered, at paragraph 132, that it was permissible for the Commission to take as a starting point for its analysis of competition in the absence of the MIF a scenario characterised by such a rule. Contrary to RBS's claim at the hearing, such a counterfactual scenario was not developed by the General Court in order to fill a gap in the decision at issue, but already appeared in that decision.[57]

52 — See, in particular, *LTM*, at 250.

53 — See also *O2 (Germany)* v *Commission*, paragraph 72, where the General Court emphasised the importance of the examination of competition in the absence of an agreement in the case of markets undergoing liberalisation or emerging markets.

54 — Joined Cases T-274/94, T-375/94, T-384/84 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 137.

55 — See *O2 (Germany)* v *Commission*, paragraph 72.

56 — Case C-234/89 *Delimitis* [1991] ECR I-935.

57 — See, in particular, recitals 408 and 410 to the decision at issue, where the Commission states that '[p]rices set by acquiring banks would be lower in the absence of [the multilateral "fallback" rule] and in the presence of a rule that prohibits *ex post* pricing', and also recital 460, referred to above.

58. The General Court therefore did not confuse the criteria of the analysis of the effects of a restriction on competition and those applicable to the examination of the objective necessity of an ancillary restriction, nor did it disregard the principles laid down in the case-law referred to at point 52 above, substituting for the 'actual framework' in which competition in the absence of the presumed restriction must be assessed an 'economically viable' framework. At paragraph 132 of the judgment under appeal, the General Court, in essence, merely recalled, on the basis of the results of its assessment of the objective necessity of the MIF, the conditions in which, *in the absence of the presumed restriction*, the MasterCard system would have been able to continue to operate.

59. As regards the assertion which the main appellants reiterate in their response to RBS's cross-appeal, namely that the introduction of a rule prohibiting fallback pricing would not be realistic, that such a rule would not be the result of market forces and that it would never have been adopted by MasterCard, unless it had been made compulsory by regulatory intervention, I refer to the considerations developed at points 101 to 106 below in the context of the examination of the objective necessity of the MIF. At this stage, I shall merely observe that, at first instance, the main appellants insisted at length, first, that a fallback mechanism to regulate transactions is an essential requirement of any four-party system characterised by the HACR and, second, that there is no market process between issuing and acquiring banks. In those circumstances, I wonder whether such a fallback mechanism is not *necessarily* the result of intervention alien to market forces, whether a decision taken within a payment system [58] or intervention by the competition authority. [59]

60. Thus, the situation with which we are faced here is very different from that in *O2 (Germany)* v *Commission*, [60] to which the main appellants also refer in their response to RBS's cross-appeal. In that judgment, the General Court took issue with the Commission for not having properly reconstructed the competitive structure that would have applied in the absence of the agreement at issue, in so far as it had, in particular, taken for granted O2's presence on the 3G mobile telephone market, when such a fact was not only unsubstantiated but, moreover, was contradicted by the analysis which the Commission had carried out under Article 81(3) EC. In the present case, on the other hand, the Commission is, in essence, criticised for having examined the competitive situation on the acquiring market in the absence of the MIF without taking into account the fallback mechanism that MasterCard would in all likelihood have *decided* to adopt in order to replace the MIF.

61. For the reasons set out above, I consider that RBS's complaint alleging an error of law affecting the General Court's counterfactual analysis should be rejected.

ii) The complaint alleging an insufficient analysis of the effects of the MIF on competition

62. Next, RBS takes issue with the Commission and the General Court for not having based their analysis of the effects of the MIF on competition on specific and concrete evidence but having confined themselves to general considerations and mere assumptions, taking an approach which is appropriate where a restriction by object is presumed but not, as in the present case, a restriction by effect.

58 — On the basis, inter alia, of intersystem competition.

59 — That clearly does not in any way prejudge the Commission's analysis, according to which, in the absence of the MIF, competition between acquiring banks would ultimately lead to the elimination of any interchange fees.

60 — Cited in footnote 50.

63. That complaint contains little detail and in essence merely refers to the general nature of the General Court's assertions and is based on a selective reading of the judgment under appeal. Contrary to the impression which RBS gives in referring to the wording used in the second sentence of paragraph 143 of the judgment under appeal,[61] the General Court did not merely infer the restrictive effects of the MIF from the sole finding that they set a floor for the MSC. On the contrary, it, first, recalled, at paragraph 140 of the judgment under appeal, the wording of Article 81(1)(a) EC, emphasising that its objective 'is to prohibit undertakings from distorting the normal formation of prices on the market'. Second, in rejecting the complaint alleging that the MIF acted as a common entrance cost, the General Court explained that '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' (third sentence of paragraph 143). Third, the General Court addressed and rejected the various complaints and arguments submitted by the main appellants and also by the interveners against the analysis of the restrictive effects in the decision at issue. In that context, it examined and approved the Commission's assessment relating, in particular, to whether the Commission had demonstrated to the requisite legal standard that the MIF set a floor price for the MSC (paragraphs 159 to 165) and that the constraint exercised by merchants over the MIF was insufficient (paragraphs 157 and 158), whether the Commission had correctly defined the product market (paragraphs 169 to 173) and taken as an autonomous and relevant market the acquiring market (paragraphs 175 to 178) and whether it had been correct to exclude from its analysis the competitive pressure brought to bear on the level of the MIF by other payment methods (paragraph 180) and also the two-sided nature of the market (paragraphs 181 and 182). Last, the General Court examined and approved both the reliability and the probative value of the documents on which the Commission had relied, namely, first, the statements of a petroleum company, a supermarket chain based in the United Kingdom, an airline and a furniture shop (paragraphs 146 and 147) and, second, the 2004 market study (paragraphs 148 to 158).

64. In the light of the foregoing, the General Court cannot to my mind be criticised for having carried out, as RBS claims, an insufficient analysis in regard to a restriction by effect. In any event, while it is true that in the decision at issue the Commission did not adopt a definitive position as to a possible anti-competitive object of the MIF and that, accordingly, it was required to assess their effects on the market, the fact none the less remains that, in a situation involving collusion which directly affects the pricing mechanism, its ability to distort the normal development of prices on the market may in fact be easier to demonstrate. In that regard, I observe that, in the judgment concerning the Austrian banks,[62] the General Court, without being contradicted by the Court of Justice on appeal,[63] asserted that, in order to establish whether a pricing agreement implemented by the participating undertakings has had an actual impact on the market, 'it is sufficient that the agreed prices have served as a basis for determining individual transaction pieces, thereby limiting customers' room for negotiation'.[64] Admittedly, the collusive arrangement at issue in that case had been considered to be restrictive by object and the Commission had taken its effects on the market into account only when assessing the gravity of the infringement for the purpose of setting the fine. However, it cannot be considered that a lower degree of rigour in proving the effects of a collusive arrangement on the market should be required for the purpose of determining the level of the fine than for the purpose of determining whether the arrangement in question falls under Article 81(1) EC.[65]

61 — The sentence reads as follows: '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'.

62 — Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169.

63 — Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraphs 116 to 119.

64 — Paragraph 285 and the case-law cited.

65 — See, to that effect, the Opinion of Advocate General Bot in *Erste Group Bank and Others* v *Commission*.

iii) The complaint alleging a contradiction vitiating the grounds of the judgment under appeal

65. RBS claims, last, that there is a contradiction concerning the ability of merchants to influence the pricing policy of MasterCard and its members, which is asserted at paragraph 143 of the judgment under appeal, and the findings set out at paragraphs 150, 157 and 158 of that judgment.

66. In my view, this complaint must also be rejected. The 'constraint' discussed at paragraphs 150, 157 and 158 of the judgment under appeal is the constraint that merchants could bring to bear on the level of the MIF by refusing or discouraging the use of MasterCard cards, a constraint which, on the basis of the 2004 market study, the Commission and the General Court deemed insufficient, owing to the negative effects that such conduct on the merchants' part could have had on their customers.[66] At paragraph 143 of the judgment under appeal, on the other hand, the General Court refers to the 'pressure' that merchants can exert on acquiring banks when negotiating the MSC: that pressure is limited by the MIF – which constitute the threshold below which the MSC are in principle unlikely to drop – but would be increased in an acquiring market operating in their absence. There is therefore clearly no contradiction between the paragraphs of the judgment under appeal to which RBS refers, since they relate to different situations.

iv) Conclusions on the single plea in RBS's cross-appeal

67. On the basis of all the foregoing considerations, I consider that the single plea in RBS's cross-appeal and, accordingly, the cross-appeal in itself, must be rejected as unfounded.

c) The first plea in LBG's cross-appeal

68. In the context of its first plea in law, LBG puts forward, in essence, three criticisms of the judgment under appeal.

69. LBG takes issue with the General Court, in the first place, for not having provided sufficient reasons for its finding that the MIF distort competition on the acquiring market although they constitute a common entrance cost. In that regard, it is sufficient to observe that the General Court rejected the complaint alleging that the MIF acted as a common entrance cost at paragraph 143 of the judgment under appeal, where it explained that, by comparison with an acquiring market operating in the absence of such fees, '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'. That explanation is accompanied by a reference to the finding made by the Commission, and approved by the General Court, concerning the viability of a MasterCard system operating without an MIF. Taken as a whole, such reasoning, which relies on an inversely proportionate ratio between the merchants' scope for negotiating the MSC and the level of the MIF, and also on the assertion that the MIF is artificial and not objectively necessary, is to my mind sufficient to enable the General Court's reasoning to be followed.

70. In the second place, LBG takes issue with the General Court, in essence, for having found the existence of pricing collusion on the issuing market but having examined the effects of that collusion on the downstream acquiring market. It confines itself, in that regard, to referring to the arguments which it developed at paragraphs 48 to 52 of its statement in intervention before the General Court, to which the latter did not respond.

66 — The General Court, first of all, at paragraph 150 of the judgment under appeal, set out the conclusions which the Commission had drawn from the 2004 market study, namely that the merchants were unable sufficiently to constrain the level of the MIF 'because an essential factor in merchants' acceptance of card payments was the consumers' preference for them and that, therefore, to refuse that form of payment or to discriminate against it could have a negative impact on their custom', then, at paragraph 157, it found that those conclusions were well founded and, last, at paragraph 158, it discussed certain consequences of those conclusions.

71. In the Commission's submission, this complaint is inadmissible since, in its capacity as an intervener, LBG was not allowed to rely on those arguments, which in reality raised a new plea in law by comparison with those relied on in support of the application, alleging an error in the definition of the relevant market. In that regard, I observe that, at the abovementioned paragraphs of LBG's statement in intervention at first instance, LBG sought, in essence, to take issue with the Commission, first, for having chosen, in its counterfactual analysis, a hypothesis – namely, a MasterCard system operating without MIF but with a rule prohibiting *ex post* pricing – having the same impact on competition between acquiring banks as the MIF (paragraphs 49 and 50), second, for having relied on the 2004 market study, the probative value of which is called into question (paragraph 51) and, third, for having adopted an 'unusual' approach by examining the restrictive effects of the MIF on the acquiring market and not on the issuing market, where the collusive arrangement was put in place (paragraphs 52 to 54). In fact, the General Court responded to the first two complaints, or to broadly similar complaints raised at first instance by the main appellants, at paragraphs 143 and 149 to 156, respectively, of the judgment under appeal. As regards the third complaint, it is in part confused with the complaint alleging failure to take the two-sided nature of the market into account, which was also raised by LBG at first instance, and which is at issue in the third criticism which it puts forward in the context of the plea being analysed, examined at points 73 to 75 below, and, in part, seeks to call into question the Commission's choice of the relevant market. As regards the latter aspect, the General Court gave its response at paragraphs 168 to 178 of the judgment under appeal. LBG was therefore, in principle, entitled to rely on any errors of law affecting the assessments set out in the abovementioned paragraphs of the judgment under appeal.

72. In that it claims an omission to adjudicate, the complaint being analysed must, however, be rejected on the substance, since, as I have just said, the General Court did in fact respond to the various arguments put forward by LBG in the abovementioned paragraphs of its statement in intervention. For the remainder, in the absence of any challenges specifically directed against the paragraphs of the judgment under appeal containing such a response, the mere assertion that the arguments and evidence submitted were not 'properly addressed' by the General Court can be interpreted only as a request to the Court to review those arguments and that evidence which, as such, is inadmissible in an appeal.

73. The same applies to the third criticism put forward by LBG against the judgment under appeal, whereby it takes issue with the General Court for not having taken account of either the importance of the constraints exercised by the 'other payment systems' on the issuing market or the two-sided nature of the market.

74. In essence, LBG merely asserts that the General Court was wrong to exclude those questions from its analysis under Article 81(1) EC and to recognise their relevance only for the purpose of the application of paragraph 3 of that article; however, it fails to explain the reasons why such a process is incorrect, but merely reiterates the arguments already put forward in the context of its first and second criticisms and refers to the content of its statement in intervention at first instance. In that regard, I observe that, at paragraphs 180 and 181 of the judgment under appeal, the General Court considered that the criticisms relating to the failure to take the two-sided nature of the market into account '[had] no relevance in the context of a plea relating to infringement of Article 81(1) EC', in that they 'highlight[ed] the economic advantages that flow from the MIF'. In its cross-appeal, LBG has put forward no argument to challenge such an interpretation of the arguments which it had submitted on that point at first instance or to explain what advantages ought to have been taken into account by the General Court under Article 81(1) EC and the reasons why it was necessary to take them into account in the present case, in view, in particular, of the relevant case-law of this Court and the General Court. I also observe that, contrary to what LBG appears to maintain, at paragraphs 179 and 180 of the judgment under appeal the General Court addressed and rejected the argument alleging failure on the Commission's part to take 'other forms of payment into account …, either in the context of a single

market with bank card schemes or, in any event, as exerting competitive pressure'. In this case, too, LBG does not challenge the assessment carried out by the General Court. In the absence of more detailed argument, the Court would be required to exercise its power of review on the basis of the mere allegation of a supposedly deficient analysis on the part of the General Court.

75. In that the criticism in question claims a failure to state reasons for the points at issue, it must to my mind be rejected as unfounded, as the relevant grounds of the judgment under appeal enable the reasoning followed by the General Court to be understood.

76. On the basis of the foregoing, the first plea in LBG's cross-appeal should in my view be rejected in its entirety.

4. The objective necessity of the MIF (first plea in the main appeal)

a) The judgment under appeal

77. The General Court addressed the issue of the objective necessity of the MIF at paragraphs 77 to 121 of the judgment under appeal. Before embarking on that examination, it stated, at paragraph 75, that the main appellants' reference to the alleged objective necessity of the MIF must be understood 'to mean that the Commission ought to have concluded that the MIF was an ancillary restriction in relation to the MasterCard system and that, therefore, the Commission was not entitled to consider its effects on competition independently, but should have examined it in conjunction with the effects of the MasterCard system to which it related'.

78. After briefly recalling the principles established in *M6 and Others* v *Commission*[67] concerning ancillary restrictions, the General Court examined and rejected the complaint put forward by the main appellants alleging that wrong legal criteria had been applied (paragraphs 84 to 92 of the judgment under appeal). It then analysed, separately, the alleged objective necessity of the MIF as a default transaction settlement procedure (paragraphs 94 to 99) and as a mechanism for transferring funds to the issuing banks (paragraphs 100 to 121). In the context of the first examination, the General Court approved the Commission's assessment, namely that the introduction in the MasterCard system of a rule prohibiting *ex post* pricing would be a less restrictive alternative to the MIF of positive value. Following its analysis, the General Court concluded that the Commission had been entitled to establish that the MIF were not objectively necessary for the operation of the MasterCard system.

b) The first plea in the main appeal

79. By their first plea, the main appellants, supported by RBS, MBNA, HSBC and LBG, claim that the General Court made a number of errors of law and failed to provide adequate reasoning when assessing the objective necessity of the MIF. This plea consists of four parts, alleging, respectively, the application of an incorrect legal test, failure to examine the restriction of competition in its context, substitution of the General Court's assessment for the Commission's assessment and the application of an insufficient standard of review.

67 — Case T-112/99 [2001] ECR II-2459.

i) First part of the first plea in the main appeal, alleging application of an incorrect legal test

80. By the first part of their first plea, the main appellants take issue with the General Court for having disregarded the legal test applicable to the examination of the objective necessity of an ancillary restriction, as defined, in particular, in the judgments of this Court in *DLG*[68] and of the General Court in *M6 and Others* v *Commission*.[69] Whereas in those precedents the Courts of the European Union held that a restriction is objectively necessary where, in its absence, the objective pursued by the main operation would be impossible to achieve or the ability of the parties to pursue it would be undermined, namely where that operation 'is difficult or even impossible to implement',[70] at paragraph 89 of the judgment under appeal the General Court rendered that test rigid by asserting 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'. In the main appellants' submission, the correct test to be applied should be realistic from a commercial viewpoint and not require strict necessity in logical terms. It should allow a restriction whose absence 'would in practice prevent the effective functioning' of the main operation or its ability to function 'effectively' to be regarded as objectively necessary.

81. It should be borne in mind that, according to *M6 and Others* v *Commission*, to which many references are made at paragraphs 77 to 82 of the judgment under appeal, 'the concept of an "ancillary restriction" covers any restriction which is directly related and necessary to the implementation of a main operation'.[71] According to that judgment, in order to assess the necessity of such a restriction, '[i]t is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it'.[72] As regards the examination of the objective necessity of the restriction, that judgment makes clear that '[i]t is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation' and that '[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'.[73]

82. It should also be observed that neither the main appellants nor the interveners dispute, in itself, the legal test applicable to the examination of the objective necessity of an ancillary restriction as defined in *M6 and Others* v *Commission*: they merely maintain that the General Court applied that test only in part, notably by failing to assess whether the elimination of the MIF would have rendered the MasterCard system 'difficult … to implement'. It is appropriate, therefore, first, to define the precise scope of that test and, second, to ascertain whether the General Court erred as it is alleged to have done.

83. As regards the first aspect, I observe that, in European Union law, the 'ancillary restrictions' theory originates in a number of precedents of the Court, beginning with *Metro SB-Großmärkte* v *Commission*,[74] where the Court considered that limitations of the autonomy of the parties to an agreement which are 'necessary' in order to achieve a particular legitimate commercial aim do not

68 — Case C-250/92 [1994] ECR I-5641.

69 — Cited at footnote 67.

70 — *M6 and Others* v *Commission*, paragraph 109.

71 — *M6 and Others* v *Commission*, paragraph 104.

72 — *M6 and Others* v *Commission*, paragraph 106.

73 — See, to the same effect, Case T-360/09 *E.ON Ruhrgas and E.ON* v *Commission* [2012] ECR. The principles established in *M6 and Others* v *Commission*, were also applied by analogy in Case T-451/08 *Stim* v *Commission* [2013] ECR.

74 — Case 26/76 [1977] ECR 1875, paragraphs 20 and 27. In that judgment, the Court, after having confirmed that, on certain conditions, 'selective distribution systems constitute[d], together with others, an aspect of competition which accords with Article 8[1](1) [EC]', considered that '[t]o be effective, any marketing system based on the selection of outlets necessarily entails the obligation upon wholesalers forming part of the network to supply only appointed resellers' and, accordingly, that '[p]rovided that the obligations undertaken in connection with such safeguards do not exceed the objective in view they do not in themselves constitute a restriction on competition but are the corollary of the principal obligation and contribute to its fulfilment'.

constitute restrictions of competition within the meaning of Article 81(1) EC. In those precedents, the condition of the necessity of the restriction has been applied relatively strictly and the Court has generally required that the limitation in question be necessary in order to permit the implementation of the commercial operation seen in terms of 'possibility', 'effectiveness' or 'viability'.[75]

84. The rationale for such a rigorous approach lies mainly in the fact that, in principle, such restrictions automatically benefit from the assessment of compatibility with Article 81(1) EC which the agreement enjoys. Such treatment is the consequence of the positive way in which the legal and economic function fulfilled by the agreement is assessed in the European Union legal order and of the priority which that legal order recognises to the legitimate objective which it pursues, tolerating any (slight) restrictions of competition that might prove necessary in order to achieve that objective. In keeping with that rationale, the classification of 'objectively necessary ancillary restriction' can be recognised only to restrictions without which the agreement would be unable fully to satisfy the legal and economic function which characterises it and/or its implementation would be impossible or seriously jeopardised. It is those terms that, to my mind, the reference in *DLG* to the need to ensure that the main operation 'functions properly' and the reference in *M6 and Others* v *Commission* to the main operation being 'difficult … to implement' must be interpreted.[76]

85. The need to ensure that the examination relating to the objective necessity of an ancillary restriction does not duplicate the examination carried out under Article 81(3) EC has also been referred to in the context of the assessment of the objective necessity of an ancillary restriction.[77] Thus, it was made clear that it is in the context of the latter provision and not in the context of Article 81(1) EC that restrictions that make it possible to implement the main operation, improve its efficiency or ensure its commercial success and, in general, those that are 'indispensable' in view of the competitive situation on the market, must be taken into account.[78]

86. I shall therefore proceed to consider whether, in assessing the objective necessity of the MIF by reference to the MasterCard system, the General Court failed to apply the legal test as defined above.

87. In that regard, I observe that the General Court first of all referred, at paragraphs 77 to 82 of the judgment under appeal, to the principles established in *M6 and Others* v *Commission*, including the reference at paragraph 109 of that judgment to the main operation being 'difficult … to implement'. Next, at paragraphs 88 and 89, the General Court stated that the advantages which the MIF represents for the MasterCard system and also considerations relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market are not to be taken into

75 — Thus, for example, in Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraphs 19 and 20, the Court held that non-competition clauses in contracts for the sale of undertakings, in so far as, in principle, they ensure 'that the transfer has the effect intended', contribute 'to the promotion of competition because they lead to an increase in the number of undertakings in the market in question', provided, however, that they are 'necessary to the transfer of the undertaking concerned and [that] their duration and scope [are] strictly limited to that purpose'. In that case, the Court had observed that the agreement for the transfer of the undertaking in question 'could not [have been] given effect' without the clause at issue, since '[t]he vendor, with his particularly detailed knowledge of the transferred undertaking, would still [have been] in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business'. Again, in Case 161/84 *Pronuptia* [1986] ECR 353, paragraph 15 et seq. and paragraph 1(b) of the operative part, the Court held that a number of ancillary clauses in franchise agreements were not caught by the prohibition in Article 81(1) EC in so far as they were 'strictly necessary for the functioning of the system of franchises'. Last, in *DLG*, on which the main appellants rely, the Court held that 'a provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organised cooperation which are in direct competition with it, is not caught by the prohibition in Article 8[1](1) [EC], so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers'.

76 — Thus, a clause that merely facilitates the implementation of the agreement, without being necessary in the sense described, will escape the prohibition in Article 81(1) EC only where it does not entail any restriction of competition or where it may be exempted under Article 81(3) EC.

77 — See *M6 and Others* v *Commission*, paragraphs 109 and 121.

78 — See *M6 and Others* v *Commission*, paragraphs 109 and 121, which refer in that regard, inter alia, to paragraph 24 of *Pronuptia*, where this Court declared that the territorial exclusivity clause at issue constituted a limitation of competition for the purposes of Article 81(1) EC, while acknowledging that, in the absence of such territorial protection, a prospective franchisee might have been deterred from taking the risk of becoming part of the chain.

account in order to establish their objective necessity under the 'ancillary restrictions' theory.[79] In the same context, the General Court stated, at 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, at paragraph 90, it concluded 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'. Contrary to the main appellants' assertion, I do not believe that those passages, taken out of context, can be interpreted as representing an attempt on the part of the General Court to tighten, subsequently, what were already the strict assessment criteria laid down in the case-law referred to at point 83 above.

88. Nor does such an interpretation appear to be confirmed either in the light of a global reading of the grounds of the judgment under appeal devoted to explaining those criteria, or in the light of the assessment carried out in this case by the General Court. The General Court concluded, following its analysis, that the difficulties for the operation of the MasterCard system, highlighted by the main appellants and by the interveners, that the elimination of the MIF would entail were not such as actually to prevent the operation of that system, assessed in its legal and economic context. In that regard, I observe, moreover, that in their application at first instance the main appellants had maintained that the elimination of the MIF would have jeopardised the very survival of the MasterCard system – which could not function solely on the basis of bilateral agreements between issuing and acquiring banks on the interchange fee and in the absence of a fallback rule – and not merely made its implementation more difficult.

89. In the light of the foregoing, I consider that the first part of the first plea in the main appeal must be rejected as unfounded.

ii) Second part of the first plea in the main appeal, alleging failure to examine the restriction of competition in its context

90. In the context of the second part of their first plea, the main appellants put forward, in essence, five complaints.

– The complaint relating to the adoption of a less restrictive alternative that is not the result of market forces

91. The main appellants dispute, in the first place, the assertion at paragraph 99 of the judgment under appeal that the Commission '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'. They maintain that the appropriate counterfactual hypothesis *for the purpose of assessing the objective necessity of a restriction* must necessarily be the result of market forces and not intervention by a regulatory authority, and that to take a different approach would be to disregard the case-law cited at point 53 above, which requires that the 'real framework' that would come about in the absence of the agreement, decision of an association of undertakings or concerted practice be taken into account.

79 — To the same effect, see paragraph 101 of the judgment under appeal, where the General Court, before embarking on its examination of the objective necessity of the MIF as a mechanism for transferring funds to the issuing banks, stated that '[i]t [was] not a question of making a comparison in order to determine whether the MasterCard system [would operate] more efficiently with the MIF than on the basis of a prohibition of *ex post* pricing alone'.

92. The Commission disputes the admissibility of this plea. Its argument consists in asserting that the main appellants cannot put forward, in support of their plea relating to the objective necessity of the MIF, an argument, namely the argument that a counterfactual hypothesis based on a prohibition of *ex post* pricing is inappropriate, which they raised at first instance in order to support a different plea, namely the plea alleging that there was no restriction of competition. That objection must in my view be rejected. Since the General Court responded to that argument in the part of the grounds of the judgment under appeal dealing with the assessment of the objective necessity of the MIF and the main appellants challenge the legal merits of that response in the same context, the complaint being analysed is to my mind admissible.

93. As for the substance, I observe that it follows from the case-law of this Court and of the General Court that the condition relating to the necessity of a restriction entails an examination of, first, 'whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it', namely whether its material and geographic scope does not exceed (or is strictly limited to) what is necessary in order to implement that operation. [80]

94. Such an examination of proportionality means that, where there is a less restrictive alternative that allows the legitimate objectives pursued by the restriction at issue to be achieved, that restriction cannot be regarded as necessary for the implementation of the main operation and is therefore caught by Article 81(1) EC. The possibility of such an alternative must be assessed in the light of all the relevant elements and, as the General Court observes at paragraph 99 of the judgment under appeal, must be realistic, in particular from an economic viewpoint.

95. On the other hand, the Commission cannot in my view be required, in order to be able to employ a *less restrictive alternative scenario* in the context of the *examination of the proportionate nature of an ancillary restriction*, to show that, in the absence of that restriction, market forces would move towards such a scenario.

96. In that regard, the main appellants cannot rely on the case-law cited at point 53 above, which does not relate specifically to the examination of the objective necessity of an ancillary restriction. Admittedly, the Court has recognised, in line with that case-law, that, in order to determine whether a restriction is objectively necessary for the implementation of the main operation with which it is linked, it is necessary to examine what the state of competition would be if the restriction did not exist, [81] in order to determine whether, in such a case, the operation would be difficult or even impossible to implement. [82] However, that requirement cannot be interpreted as meaning that, where the Commission considers that a less restrictive alternative exists, it must demonstrate that that alternative would be the consequence of the state of competition in the absence of the limitation imposed by the parties to the main operation, still less that those parties would be likely to adopt it. [83]

80 — See *Remia and Others* v *Commission*, paragraph 20, and *M6 and Others* v *Commission*, paragraph 113.

81 — See *Remia and Others* v *Commission*, paragraphs 18 and 19.

82 — *M6 and Others* v *Commission*, paragraph 109.

83 — I refer, in that regard, concerning the instant case, to the considerations set out at point 66 above.

97. It follows, conversely, from the case-law that what counts in such a context is, first, that such an alternative is viable, in particular from an economic viewpoint, [84] and, second, that it is capable of meeting the legitimate objectives for which the restriction in question had been envisaged, without going beyond what is necessary for that purpose, while allowing the main operation to be implemented. [85]

98. Last, I observe, on that point, that the assessment of the proportionate nature of an ancillary restriction, in that it is intended to ascertain whether there are any less restrictive alternatives that would be capable of replacing the requirements agreed between the parties to the main operation and also the balance of the mutual obligations sought by those parties, necessarily contains an aspect of a 'regulatory' type, to use the word used by the main appellants.

– The complaint alleging that the introduction into the MasterCard system of a rule prohibiting *ex post* pricing lacks credibility

99. In the second place, the main appellants take issue with the General Court for having 'allowed' the Commission to rely on an alternative scenario that was 'not credible'.

100. Such a complaint must in my view be rejected as inadmissible, since in reality it seeks a reassessment of the facts by the Court. Furthermore, the underlying argument must also be rejected, as ineffective. Where they assert that it is 'virtually inconceivable' that once the MIF have been eliminated market forces would force MasterCard to foreclose other ways of paying issuing banks for the advantages which they would obtain from the acquiring banks and merchants by prohibiting *ex post* pricing and that logic would dictate precisely the opposite, the main appellants disregard the fact that, following the examination carried out at paragraphs 100 to 119 of the judgment under appeal, the General Court reached the conclusion that no mechanism for transferring funds from acquiring banks to issuing banks was necessary. Thus, contrary to the main appellants' contention, the General Court did not implicitly accept that the MIF having a positive value were necessary for the operation of MasterCard, but it explicitly stated the contrary. As for the introduction into the MasterCard system of a rule prohibiting *ex post* pricing, the main appellants' argument ignores the fact that such a possibility was referred to, at paragraphs 95 and 96 of the judgment under appeal, as a less restrictive alternative to the MIF in order to ensure that the issuing banks were not able, by unilaterally setting the amount of the interchange fee, to exploit the acquiring banks, which were bound by the HACR.

84 — Although other factors, for example considerations associated with the political context in which the main operation is set, may also be taken into consideration: see, to that effect, *E.ON Ruhrgas and E.ON* v *Commission*, paragraph 75.

85 — Thus, for example, in *Remia and Others* v *Commission*, the Court approved the approach taken by the Commission, consisting in applying a period of four years for the non-competition clause in the agreement for the transfer of an undertaking at issue instead of the 10 years specified by the parties, an approach based on 'the conclusion', arrived at after examining all the circumstances of the case, 'that only a duration of four years was objectively justified' to enable the transferee to introduce his new trade mark and to win customer loyalty for it and to avoid a new penetration of the market by the vendor (paragraph 30). Likewise, where, in *Metro SB-Großmärkte* v *Commission*, the Court examined the proportionate nature of the clauses limiting the parties' freedom of action in a selective distribution agreement, its analysis related solely to whether such clauses exceeded what was necessary in order to achieve their objective by imposing on the parties obligations that were more restrictive than necessary (in particular, paragraphs 27, 37 and 39). In *M6 and Others* v *Commission*, in examining the exclusivity clause, which was to apply for a period of 10 years, in the contract for the creation of a satellite television company, the General Court concluded that such a duration was 'deemed excessive' in so far as the company in question had to establish itself on the market before the end of that period, that it was 'quite probable' that its competitive disadvantage would diminish over time and that it '[could not], therefore, be ruled out' that such exclusive broadcasting, although initially intended to strengthen the company's competitive position on the pay-TV market, 'might ultimately allow it, after some years, to eliminate competition on that market'. See also *DLG*, paragraphs 35 and 40, and, albeit in a different context, *Wouters*, paragraph 109, and Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraph 47, Case C-136/12 *Consiglio Nazionale dei Geologi and Autorità garante della concorrenza e del mercato* [2013] ECR and *Ordem dos Técnicos Oficiais de Contas*, paragraph 100.

101. I observe, last, incidentally, that in so far as they regard the MIF as a mechanism for remuneration for the services which the issuing banks provide for the acquiring banks and merchants, the main appellants seem to go back on the position which they maintained during the administrative procedure and before the General Court, namely that the MIF are, rather, a mechanism that serves to balance the demands of cardholders and merchants and to allocate the cost of the services between issuers and acquirers of the system. [86]

– The failure on the part of the General Court to take into account the argument that the prohibition of *ex post* pricing would have the same effects on competition as the MIF and a failure to state reasons in that regard

102. In the third place, the main appellants take issue with the General Court for having failed to take into account the arguments which they raised at first instance concerning the substantial identity, from the viewpoint of the effects on competition, between, on the one hand, the MIF and, on the other, a prohibition on *ex post* pricing. In each case it is a question of a rule that would be applied by default, would be set centrally by MasterCard and would 'set the price that is charged between issuers and acquirers'.

103. In that regard, it is sufficient to observe, as I have already done at point 69 above, when examining a similar complaint but forward by LBG in its cross-appeal, that the General Court responded to those arguments at paragraph 143 of the judgment under appeal, where it stated that the difference between those situations lies in the fact that, '[b]y 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'. Admittedly, it follows from that explanation that the General Court focused its attention on the aspects connected with the level of prices, whereas the arguments put forward by the main appellants related rather to the aspects connected with the structure of prices. However, that difference in approach cannot in itself mean that the complaint under consideration, alleging failure to adjudicate, should be upheld. [87] The assessment set out in that paragraph is, moreover, not amenable to review by the Court, save where the facts or the evidence have been distorted, which is not alleged in the present case.

104. The complaint alleging failure to state reasons in relation to the same issue must also be rejected, as paragraph 143 of the judgment under appeal clearly and unequivocally discloses the reasoning followed by the General Court.

86 — See paragraph 19 of the judgment under appeal and recitals 146 to 155 to the decision at issue.

87 — In any event, even on the assumption that a prohibition of *ex post* pricing had, on the acquiring market, effects 'qualitatively' similar to the effects of the MIF, in that, just like the latter fees, it eliminates transparency with respect to the costs linked with the interchange fees in the absence of bilateral agreements, the fact would none the less remain that, 'quantitatively', those effects cannot be assimilated. I recall, in that regard, that in the decision at issue the Commission, relying on the data for 2002, estimated that the MIF could represent up to 73% of the fees invoiced by the acquiring banks to merchants (see recitals 425 and 426). Furthermore, even on the assumption that what the main appellants mean, namely that the Commission merely disputes the *level* of the MIF, is correct, I recall, first, that the Commission's assessment was carried out on the basis of the MIF applicable at the time of the administrative procedure; second, that no complaint relating to any threshold beyond which the restriction linked with the level of the MIF would become appreciable was raised at first instance – and, in any event, no such complaint has been relied on in the present proceedings; and, third, that the part of the judgment in which the General Court rejects the complaints relating to the disproportionate nature of the measure imposed, namely the elimination in full of the MIF, by comparison with the fact that the Commission had in mind only the level of those fees, has not been challenged in the context of the present proceedings.

– The complaint alleging failure to take into consideration the restrictive effects of a rule prohibiting *ex post* pricing on the 'issuing aspect' of the MasterCard system

105. In the fourth place, the main appellants claim that 'the Commission's zero MIF also creates a restriction on the other side of the two-sided market by prohibiting issuers from charging acquirers for the services that they supply to them'. They maintain, in that regard, that '[t]he Commission has refused to focus on this unavoidable effect and instead has concerned itself only with one side of the two-sided market, namely the effect on merchants'.

106. It must be stated that that criticism is aimed solely at the assessment carried out by the Commission and does not identify either the paragraphs in the grounds of the judgment under appeal to which it refers or the errors with which those paragraphs are alleged to be vitiated. In any event, in so far as it must be understood as indirectly criticising the General Court for not having correctly assessed the effects on competition of a reduction of the MIF to zero by comparison with the existing MIF, on the ground that it had failed to take into account the restrictions that such a reduction would cause to the other side in the two-sided market, I observe, first, that the General Court responded to arguments seeking to challenge the Commission's assessment on the ground that it confined its economic analysis solely to the acquiring market at paragraphs 172 to 182 of the judgment under appeal, where, in essence, it endorses the definition of the issuing and acquiring markets as autonomous markets. Second, I observe that the main appellants do not explain why such a limitation in the relationship between issuing banks and acquiring banks would have restrictive effects on competition in the issuing market.[88] In that regard, I observe, last, that the explanation that the MIF constitute a mechanism for remuneration for services which the issuing banks provide to the acquiring banks and merchants had been dropped by the main appellants during the administrative procedure.

– The complaint alleging distortion of the decision at issue as interpreted by the Commission at first instance

107. In the fifth, and last, place, the main appellants maintain that the General Court erred in its characterisation of the counterfactual hypothesis as envisaged by the Commission, which, in its rejoinder, had explained that that hypothesis consisted in eliminating the MIF completely and advocating bilateral negotiations between the banks, the prohibition on *ex post* pricing having been added only as a subsidiary point.

108. In that regard, it is appropriate to point out that, at paragraph 95 of the judgment under appeal, the General Court reproduced in full recital 544 to the decision at issue, where the Commission envisaged, as a less restrictive possible alternative to the MIF, a rule imposing a prohibition on *ex post* pricing. After considering, at paragraph 96 of the judgment under appeal, that the reasoning followed in that recital did not disclose any manifest error of assessment, the General Court based the remainder of its analysis on the hypothesis set out in that recital. Even on the assumption that, as the main appellants contend, the Commission did in fact substantially alter its position during the proceedings, the General Court's approach, consisting in adhering to the content of the contested measure, which, moreover, was clear in the case of the recital in question, is not in itself open to criticism.

– Conclusions on the second part of the first plea in the main appeal

109. In the light of all the foregoing considerations, I consider that the second part of the first plea in the main appeal must be rejected.

88 — There is no competition between issuing banks for the services offered to acquiring banks (for each transaction the issuing bank is always the bank that issued the card) and it is therefore not possible to identify a market for those services.

iii) The third part of the first plea in the main appeal, alleging substitution of the General Court's assessment for that of the Commission

110. In the context of the third part of their first plea, the main appellants claim that, in its analysis of the objective necessity of the MIF, the General Court substituted its own assessment for that of the Commission by taking into account only a limited number of the grounds on which the Commission relied in the decision at issue.

111. In that regard, I observe that, according to a consistent line of decisions, invoked by the main appellants, the Courts of the Union cannot substitute their own assessment for that of the author of the contested measure,[89] or, when reviewing the complex economic assessments carried out by the Commission, substitute their economic assessment for that of the Commission.[90]

112. In the first place, the main appellants take issue with the General Court because, '[a]s regards the possibility of applying a rule prohibiting *ex post* pricing, [it] accepted this conclusion with no analysis as to why this is the case'. This complaint seeks in reality to criticise the General Court for having carried out a flawed analysis rather than having substituted its own assessment for that of the Commission and, accordingly, is confused with the arguments relied on in support of the fourth complaint in the plea being analysed, alleging insufficient judicial review. In any event, I observe that the reasoning followed by the General Court at paragraphs 95 to 99 of the judgment under appeal is strictly modelled on the Commission's reasoning. Consequently, there can be no question, on this point, of any substitution of the General Court's reasoning and/or grounds for those contained in the decision at issue.

113. In the second place, the main appellants take issue with the General Court for having 'afforded far more weight' than the Commission to the 'wider context of the resources and economic advantages which the banks derive from their card issuing business' and also to the lack of impact on the MasterCard system in Australia of the reduction in interchange fees imposed by the Central Bank of Australia ('the Australian example').[91]

114. In that regard, I consider that the Courts of the Union, in an action for annulment, cannot be prevented from affording, in the context of their review of the legality of the contested measure, more importance to certain elements of the reasoning on which that measure is based than on others, provided that such an approach does not alter the internal logic of the measure at issue to such an extent that there is a de facto substitution of other grounds or another assessment for the grounds or the assessment which it contains. That, in my view, is not the case here. While it is true that the General Court focuses its attention on the analysis of the revenues which the banks derive from their issuing business and places particular importance on the Australian example, neither the Commission's assessment, nor the grounds of the decision at issue, which are also based on such elements,[92] appear to have been disregarded or to have had another assessment or other grounds substituted for them.

89 — Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraphs 38 and 42. The Court explained, however, that although the General Court may be led to interpret the reasoning of the contested measure in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons, it cannot do so where there is no material factor to justify such a course of action (paragraph 42).

90 — Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 57, and Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 66.

91 — See paragraph 106 et seq. of the judgment under appeal.

92 — See recitals 609 to 614 to the decision at issue.

iv) The fourth part of the first plea in the main appeal, alleging an insufficient standard of review

115. In the context of the fourth part of their first plea, the main appellants, supported by MBNA, HSBC, RBS and LBG, take issue with the General Court for having carried out a very limited judicial review as concerns the objective necessity of the MIF. First, as the Charter and the case-law of the European Court of Human Rights have become applicable, the General Court was required to undertake a comprehensive review of those assessments, not one limited to manifest errors. Second, the General Court did not observe the standard of review required by this Court, in that, first, it applied the 'manifest error' test to findings of the Commission not entailing genuinely 'complex' economic assessments and, second, it replaced that test by another, less rigorous, test limited to ascertaining their 'reasonableness'.

116. Before going on to examine those complaints, I observe that, in the context of the part of the plea being analysed, the main appellants also reiterate a number of arguments that overlap with those raised in the third part, examined above. I am referring, in particular, to the assertion that the General Court relied solely on a part of the grounds of the decision at issue, afforded greater importance to those grounds by comparison with that recognised to them by the Commission, and substituted its own assessment for that of the Commission. As those arguments have already been discussed when I examined that part of the plea, I shall merely refer, on this point, to the considerations developed at points 110 to 114 above, not without pointing to a certain substantive contradiction between those allegations and the assertion that the General Court shows excessive deference to the Commission's power of assessment in economic matters.

117. Having stated that, I observe that the complaints being examined raise once again before the Court the delicate issue of the extent of the judicial review that should be applied to Commission decisions imposing penalties on undertakings for infringements of the competition rules. [93]

118. That review is first of all circumscribed by the type of review that the Courts of the European Union are required to exercise in the context of the judicial function conferred on them by the Treaty. Other than with respect to fines, where they have unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation (EC) No 1/2003, [94] those Courts carry out, pursuant to the first paragraph of Article 263 TFEU, a review of legality, which enables them only to dismiss an action for annulment or to annul the contested decision, but not to vary that decision or to determine its appropriateness. A second limit, highlighted by the case-law, is of an institutional nature and results from the separation of powers between the Commission and the Courts of the Union, the Treaty having conferred on the Commission a supervisory role in the sphere of competition law, which includes, as well as investigating and punishing infringements of the competition rules, the task of developing and pursuing a general policy 'designed to apply … the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles'. [95] In that context, the case-law has recognised that it is not for the European Union judicature, within the framework of its review of the legality of the decisions of the Commission in competition matters, to substitute its own point of view for that of the Commission, or to vary the decision at issue, as otherwise it would disrupt the interinstitutional balance provided for in the Treaty. [96] A third limit concerns, last, the nature of the assessments which the Commission is led to carry out when adopting decisions pursuant to Article 81 EC. It has been recognised as having a certain margin of discretion where it carries out complex economic or technical assessments, on the basis of the consideration that these assessments

93 — In this case, the decision at issue does not impose a fine, but provides for the application of daily penalty payments in the event of non-compliance with the corrective measures imposed.

94 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

95 — See, for example, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 149.

96 — See, for example, Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraphs 160, 319 and 320.

may require a high degree of technical ability and economic expertise and also entail choices of economic policy which it is for the Commission to take. Review of those assessments by the Courts of the Union is therefore restricted. Thus, according to a consistent line of decisions, that review is limited to 'verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers'. [97]

119. For several years the scope of the case-law on marginal review has been significantly reduced, [98] also as a consequence of the gradual criminalisation of EU competition law. Thus, in *KME Germany and Others* v *Commission* and *Chalkor* v *Commission*, this Court held that 'whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'. [99] The Court went on to say, moreover, that 'the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward' and that they cannot, in carrying out that review, use the Commission's margin of discretion 'as a basis for dispensing with the conduct of an in-depth review of the law and of the facts'. [100] The precise scope of that dictum, which has in itself the potential to neutralise de facto the very principle of the recognition of a margin of economic assessment to the Commission, is not yet clear. [101] On the other hand, it clearly shows the Court's intention to reduce as much as possible the impact of such a margin of discretion on the extent of judicial review of Commission decisions imposing penalties for infringement of Article 81 EC. [102]

120. As to whether the scope of judicial review by the Courts of the European Union, as described above, is compatible with respect for the right to effective judicial protection and the right to a fair trial, it should be observed that in *KME Germany and Others* v *Commission* and *Chalkor* v *Commission* the Court asserted that '[t]he review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of

97 — Initially confined to the application of Article 81(3) EC, this case-law was subsequently extended, beginning with *Remia and Others* v *Commission*, paragraph 34, to the context of the application of paragraph 1 of that provision; see, *inter alia*, Joined Cases 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 *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 279. One might ask why the reasons underlying such deference on the part of the Courts have persisted up to the present time, particularly in view of the process of decentralisation of the enforcement of EU antitrust law and the experience acquired in that area over the years by the Courts of the European Union.

98 — This process concerns, first of all, different sectors, such as the control of concentrations and State aid: see, respectively, Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39, and *Spain* v *Lenzing*, paragraphs 56 and 57.

99 — See Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 94; Case C-389/10*KME Germany and Others* v *Commission*, paragraph 121; and Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 54.

100 — Case C-389/10 P *KME Germany and Others* v *Commission*, paragraph 129, and *Chalkor* v *Commission*, paragraph 62. See also Case C-199/11 *Otis and Others* [2012] ECR, paragraphs 59 and 61.

101 — In view of both its content and its context, it appears that its scope must remain confined to the choice and the assessment of the factors taken into account in setting the amount of the fine and not extend to review of the assessments made when finding the infringement. However, it might be asked whether the same restrictive approach would not be all the more justified in the context of such a review where, by contrast to the determination of the fine, the Courts of the European Union do not have unlimited jurisdiction.

102 — A further step in the same direction was taken by the EFTA Court, in Case E-15/10 *Posten Norge AS* v *EFTA Surveillance Authority*, not yet published in the EFTA Court Reports, which expressly enshrined the dropping of review restricted to manifest error in the complex economic assessments carried out by the EFTA Surveillance Authority (paragraph 102). In the grounds of the judgment, after interpreting the relevant case-law of the EU Courts as a reference to the limits of the review of legality (paragraph 96), the EFTA Court concluded that, in the light of the constraints arising under the criminal aspect of Article 6(1) ECHR, where the EFTA Surveillance Authority imposes fines for infringement of the competition rules, it does not enjoy any margin of discretion in the assessment of complex economic matters which goes beyond the leeway inherent in those limits (paragraph 100). Thus, according to the EFTA Court, while it is not for the Court, in the context of such a review, to substitute its own (different) assessment of the complex economic situations from that of the authority that adopted the contested measure, where there can be no legal objection to the findings of that authority, the Court must none the less be satisfied that 'the evidence relied on … is capable of substantiating the conclusions drawn from it' (paragraph 101).

effective judicial protection in Article 47 of the Charter'.[103] Furthermore, in its recent judgment in *Schindler Holding and Others* v *Commission*, the Court held that that review of legality also conforms to Article 6 ECHR, on the basis of which the meaning and scope of Article 47 of the Charter must be defined, pursuant to Article 52(3) of the Charter.[104]

121. Article 6(1) ECHR, the criminal aspect of which is applicable here,[105] does not preclude the imposition of a penalty of a criminal nature by an administrative authority, provided, however, that the decision of that authority may be subject to further review by a judicial body having 'unlimited jurisdiction'. Among the characteristics of such a body are, according to the European Court of Human Rights, 'the power to vary on all points, in fact as in law, the contested decision' and also 'jurisdiction to examine all questions of fact and of law relevant to the dispute before it'.[106] Although such an assertion[107] seems to require that the body entrusted with the subsequent judicial review required by Article 6(1) ECHR be given powers going beyond those which may be exercised in a control of legality[108] and also the power to undertake a genuine examination of the case,[109] the way in which it has been applied in practice by the European Court of Human Rights is extremely flexible.[110]

122. In particular, and this is a particularly important factor in the methodological convergence between the case-law of the ECHR and that of the Union,[111] according to the European Court of Human Rights, what matters for the purpose of the application of Article 6 ECHR is not the abstract statement on the part of the court as to the type of control ('weak' or 'strong') that it is legitimate to carry out or that it intends to undertake in the particular case, but rather the fact that, by the very exercise of that review, the rights laid down in the Convention have in fact been protected. That casuistic approach was confirmed, implicitly[112] but clearly, by the European Court of Human Rights in the recent judgment in *Menarini Diagnostics Srl v. Italy*.[113] In such a context, although, as this Court implicitly asserted in *Schindler Holding and Others* v *Commission*, the review exercised by the Courts of the European Union over Commission decisions imposing fines for infringement of the competition rules seems to be capable of satisfying the requirements of Article 6(1) ECHR,[114] that depends on the way in which that review was actually exercised.

123. It is on the basis of the principles set out above that it is appropriate to examine whether, in the present case, the General Court exercised sufficient review of the Commission's findings in respect of the objective necessity of the MIF.

103 — *Chalkor* v *Commission*, paragraph 67; Case C-389/10 P *KME Germany and Others* v *Commission*, paragraph 133; and *Otis and Others* v *Commission*, paragraphs 59 to 63.

104 — Case C-501/11 P [2013] ECR, paragraphs 30 to 39. From a procedural viewpoint, the examination was based on Article 47 of the Charter and not on Article 6 ECHR: see, in particular, paragraph 32 of the judgment and the case-law cited.

105 — The criminal nature of penalties for infringements of EU competition law for the purposes of the application of the criminal aspect of Article 6(1) ECHR follows from the application of the criteria laid down by the European Court of Human Rights in its judgment of 8 June 1976 in *Engel and Others v. Netherlands* No 5100/71. The EFTA Court ruled to that effect in *Posten Norgen* v *EFTA Surveillance* Authority, paragraph 88. It also appears to have been accepted by this Court in *Schindler Holding and Others* v *Commission*, in particular paragraph 33.

106 — Judgment of the European Court of Human Rights of 27 September 2011 in *Menarini Diagnostics Srl v. Italy*, Application no. 43509/08, paragraph 59 and the case-law cited.

107 — At least in the French version of the judgments of the European Court of Human Rights, which refer to a power to vary and not merely to annul, as is the case in the English version.

108 — With respect both to the determination of the penalty and the finding of the infringement.

109 — The extent of that control and the nature of those powers are described in particularly broad terms in the dissenting opinion of Judge Pinto de Albuquerque in *Menarini Diagnostics Srl v. Italy*. If the approach advocated in that opinion were to be accepted, one might question the compatibility with Article 6 ECHR of the control exercised by the Courts of the European Union over decisions imposing sanctions for infringements of competition law, which, as regards the finding of the infringement, is limited to a review of legality.

110 — See, to that effect, my Opinion in Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, points 32 to 36.

111 — See Case C-389/10 P KME *Germany and Others* v *Commission* and *Chalkor* v *Commission*, paragraphs 136 and 82 respectively.

112 — For a more explicit assertion of that approach, which is not immune from criticism from the point of view of legal certainty, see the concurring opinion of Judge Sajò in *Menarini Diagnostics Srl v. Italy*.

113 — Cited at footnote 106.

114 — Like that exercised by the Regional Administrative Court, Latium, and the Italian Council of State with respect to decisions of the Autorità garante della concorrenza e del mercato, which was held by the European Court of Human Rights in its judgment in *Menarini Diagnostics Srl v. Italy* to be compatible with that provision.

124. In that regard, it is appropriate, first of all, to reject the Commission's objection that it was for the main appellants to prove that the MIF were objectively necessary for the operation of MasterCard in order to escape the prohibition laid down in Article 81(1) EC. Even on the assumption that such an assertion were correct, the fact remains that the General Court is required to carry out a tendentially comprehensive review of all the assessments made by the Commission, including where they are intended to reject defensive arguments put forward by the undertakings concerned.

125. It should be observed, next, that at paragraph 82 of the judgment under appeal the General Court, referring to *M6 and Others* v *Commission* and *Remia and Others* v *Commission*, recalled that the Courts of the Union exercise a limited review of the complex economic assessments carried out for the purpose of evaluating the objective necessity of an ancillary restriction. As observed above, such an abstract statement of the criteria defining the scope of the review that the General Court intends to carry out is not in itself open to criticism if it proves to be the case that that Court has in fact carried out a thorough review, both in law and in fact, in the light of the evidence adduced in support of the pleas relied on before it.[115]

126. The main appellants claim, first of all, that the General Court did not undertake a sufficient review of the Commission's assertion that the MIF could have been replaced, as a fallback rule, by a prohibition on *ex post* pricing.

127. It is true that, on that point, the General Court, at paragraphs 95 and 96 of the judgment under appeal, merely reproduced in full recital 554 to the contested decision and asserted that the reasoning set out therein did not disclose any manifest error of assessment.[116] However, it is apparent upon reading the application at first instance that the complaints raised by the main appellants related essentially to the regulatory nature of the hypothesis of a MasterCard system operating with a prohibition of *ex post* pricing, the failure to analyse the competitive context and the Commission's failure to adduce evidence that the scope of such a prohibition was less restrictive of competition than that of the MIF. The General Court addressed those various arguments at paragraphs 97 to 99 and 143 of the judgment under appeal. Conversely, those complaints did not include the one on which they now rely, alleging that a fallback rule that would prevent the issuing banks from obtaining compensation for the services which they provide for the acquiring banks is unrealistic. As I have already stated at point 105 above, and as is apparent from paragraph 19 of the judgment under appeal and recitals 146 to 155 of the decision at issue, the argument that the MIF constitute a price paid by the acquiring banks to the issuing banks for the services which the latter banks provide for them, initially put forward by the main appellants during the administrative procedure, had then been dropped in favour of their characterisation as a mechanism for balancing the demands of cardholders and merchants. HSBC, for its part, merely refers to a statement by one of its employees, annexed to its statement in intervention at first instance, in which it is claimed that the introduction of a rule on *ex post* pricing would in all likelihood have resulted in the mechanism of setting interchange fees on a bilateral basis being dropped. It does not explain, however, how such an outcome, on the assumption that it were established, would have had such an impact on the MasterCard system that a fallback mechanism based on a prohibition of *ex post* pricing could not be envisaged, or why the fact that the General Court would not have taken account of that outcome, even on the assumption that such was the case, would have affected the actual nature of its judicial review.

128. The main appellants claim, next, that the General Court did not exercise a sufficient review of the Commission's statements as to the objective necessity of the MIF as a mechanism for transferring funds to the issuing banks.

115 — See Case C-272/09 P *KME Germany and Others* v *Commission*, paragraph 63, Case C-389/10 P *KME Germany and Others* v *Commission*, paragraph 136, and *Chalkor* v *Commission*, paragraph 82.

116 — The explanation which follows that assertion at paragraph 96 is merely a statement of the principle that a restriction which is ancillary to a main operation cannot be regarded as objectively necessary when there is a less restrictive alternative.

129. In that regard, I observe that the General Court's analysis on that point, set out at paragraphs 100 to 119 of the judgment under appeal, discloses no 'deference' to a supposed margin of assessment enjoyed by the Commission and, on the contrary, is so autonomous that at the same time it forms the subject-matter, in the main appeal, of a complaint alleging that the General Court substituted its own assessment for that of the Commission. In fact, it is in the light of its own analysis of the data contained in the decision at issue relating to the economic advantages that the banks in the MasterCard system derive from their card-issuing business – which itself is not amenable to review by the Court save in the case of distortion, which has not been alleged – that the General Court considered, at paragraph 110 of the judgment under appeal, that it was reasonable to conclude that a reduction in those benefits if the MIF were eliminated would not have been sufficient to affect the viability of the MasterCard system, and it was also on the basis of an autonomous assessment of the result of the analysis of the effects of the reduction by the Bank of Australia of the level of MasterCard's interchange fees that the General Court considered, at paragraph 111 of the judgment under appeal, that that analysis reinforced the conclusion that the elimination of the MIF would not entail the collapse of the MasterCard system. [117]

130. In their arguments, both the main appellants and LBG do not, however, merely refer to 'judicial reserve' with respect to the Commission's assessments but also claim that the General Court's analysis was 'speculative and superficial', that it failed to take into account the evidence which they had adduced before it and also failed to establish that shortcoming with respect to the analysis in the decision at issue. They claim, in particular, that the General Court did not address the question whether the setting by default of interchange fees having a positive value was not necessary in the light of the two-sided nature of the market. Nor did it taken into account the restrictive effects that zero-level MIF would produce on the other side of the market, namely the issuing side.

131. In that regard, I observe that it is apparent from paragraphs 101, 181 and 182 of the judgment under appeal that the General Court considered that the arguments relating to the failure to take into account the two-sided nature of the market and also the effects of the elimination of the MIF on the 'issuing' side of that market were irrelevant in the context of the analysis under Article 81(3) EC, whether from the aspect of the objective necessity of the MIF or of the analysis of their effects on competition. At paragraphs 176 to 178 of the judgment under appeal, moreover, the General Court confirmed the classification of the issuing market as a relevant market and also the autonomous nature of that market, which, in the structure of its reasoning, justified the Commission's choice to limit its analysis of the effects of the MIF on competition to that market. The main appellants do not put forward any arguments to demonstrate that the abovementioned grounds of the judgment under appeal are vitiated by an error of law and LBG merely makes general assertions in that respect.

132. Last, the main appellants claim that the fact that the General Court relied in support of its reasoning on the Australian example, which concerns a situation involving the reduction and not the elimination of the MIF, in order to confirm its reasoning, 'highlights the deficiency' of its analysis.

133. In that regard, I shall merely observe that the General Court addressed and rejected the arguments relating to the alleged irrelevance of the Australian example at paragraphs 112 to 114 of the judgment under appeal. In that it challenges the assessment set out at those paragraphs without putting forward any argument against it, and still less a defect of distortion, the criticism under consideration must in my view be rejected.

117 — At paragraphs 113 to 119 of the judgment under appeal, the General Court also examined and rejected the arguments put forward by the main appellants and by the intervener in order to cast doubt on the relevance of the Australian example, alleging, first, that the intervention of the Australian regulatory authority had led to a reduction and not the elimination of the MIF; second, that the market conditions in Australia were not comparable with those in the EEA; and, third, that such a reduction had had negative repercussions on cardholders.

134. In the light of the foregoing, I consider that the fourth part of the first plea in law in the main appeal and, accordingly, the plea in its entirety should be rejected.

5. The application of Article 81(3) EC (third plea in the main appeal)

135. In its cross-appeal, LBG, supported by the main appellants, takes issue with the General Court for having made a number of errors of law in the application of Article 81(3) EC. The complaints put forward by LBG and the main appellants may be subdivided into three parts.

a) The standard of proof and the principle *in dubio pro reo*

136. In the first place, in LBG's submission, the General Court ought to have found that the Commission had erred in law in imposing an excessive standard of proof. The standard of proof applied in the assessment of the conditions provided for in Article 81(3) EC should be the balance of probabilities. In the present case, that assessment ought to have been carried out by reference to the whole MasterCard system, which brings significant benefits to consumers and merchants. It is not correct in law to require MasterCard to justify the precise level of the MIF instead of merely showing, on the basis of firm evidence, that the methodology which it follows in setting the MIF can be justified. In the same context, the main appellants maintain that the General Court made an error of law in concluding, without providing a sufficient explanation, that the principle *in dubio pro reo* should not apply when, as in the present case, the undertaking which invokes the application of Article 81(3) EC has provided evidence which at the very least raises doubts as to the application of that provision and the Commission has not entirely dispelled those doubts.

137. As regards, first, the complaint relating to the excessive standard of proof, it must be stated that the complaint raised by LBG in its cross-appeal is based on argument presented in a rather laconic and vague fashion. LBG does not identify the paragraphs of the judgment under appeal which are supposedly vitiated by an error, but merely claims that the standard of proof applied was excessive, without specifying which aspects of the judgment it is criticising. In order to support its arguments, LBG merely makes a general reference to the arguments developed in its statement in intervention before the General Court. In those circumstances, I have serious doubts as to the admissibility of this complaint under Article 168(1)(d) of the Court's Rules of Procedure.

138. In any event, I consider that this complaint is also unfounded.

139. First of all, as regards the argument that it was necessary to evaluate the MIF in the context of the entire MasterCard system, I observe that, at paragraph 207 of the judgment under appeal, the General Court considered that, in so far as the MIF were not ancillary restrictions, the Commission had been correct to consider whether there were appreciable objective advantages arising specifically from the MIF without taking the MasterCard system as a whole into consideration. First, it must be stated that LBG, in its cross-appeal, has put forward no factors or argument to challenge that finding of the General Court. Second, in the light of the analysis carried out at points 79 to 134 above, I propose that the complaints put forward by the main appellants against the grounds of the judgment under appeal relating to the objective necessity of the MIF should be rejected.

140. As regards, next, the argument that the standard of proof applied in the assessment of the conditions laid down in Article 81(3) EC ought to have been the balance of probabilities, it should be borne in mind, first of all, that Article 2 of Regulation No 1/2003 provides that it is for the undertaking claiming the benefit of Article 81(3) EC to prove that the conditions laid down in that paragraph are fulfilled, but does not establish the *standard* of proof required for that purpose.

141. It is settled case-law that, as the General Court correctly stated at paragraph 196 of the judgment under appeal, the person relying on that provision must demonstrate, by means of *convincing* arguments and evidence, that the conditions for benefiting from an exemption are satisfied and, in particular as regards the first condition laid down in Article 81(3) EC, that the improvement resulting from the agreement in question brings appreciable objective benefits of such a kind as to compensate for the disadvantages which the agreement entails for competition. [118] It should also be observed that in *GlaxoSmithKline Services* this Court stated that in the context of an analysis under Article 81(3) EC it is sufficient for the Commission, on the basis of the arguments and evidence in its possession, to arrive at the conviction that the occurrence of the appreciable objective advantage is sufficiently *likely* in order to presume that the agreement entails such an advantage. [119] However, it must be stated that, as explicitly follows from paragraph 93 of that judgment, that statement was made in the context of the application of the exemption provided for in Article 81(3) EC in force before the adoption of Regulation No 1/2003, which provided for a system of *prior* approvals granted by the Commission. [120] In such a context, the analysis which the Commission was required to carry out was a *prospective* and *forward-looking* analysis of the likely advantages that the agreement notified to it would entail.

142. It must be stated that in their written pleadings LBG and the main appellants have not only failed to identify the paragraphs of the judgment under appeal that are supposed to be vitiated with an error, as they have merely asserted, generally, that the standard of proof ought to be the balance of probabilities, but they have failed to specify the reasons why such a standard of proof ought to be applied in the present case, where, first, the Commission was not required to carry out a prospective analysis and, second, and conversely, it was for the main appellants to adduce *convincing* proof of the appreciable objective advantages brought by the MIF that ought to have been of such a kind as to compensate for the disadvantages identified by the Commission.

143. In those circumstances, I consider that, in the event that the Court should consider it admissible, the argument relating to an excessive standard of proof must be rejected.

144. As regards, second, the complaint alleging breach of the principle *in dubio pro reo*, on which the main appellants rely, it should be borne in mind that that principle is a corollary of the principle of innocence, [121] which applies where it is necessary to assess the evidence of an offence. [122] According to that principle, proof of the offence must be established comprehensively and any doubts and uncertainty as to that proof must operate to the advantage of the person whose conduct is impugned and therefore prevent penalties being imposed on him.

145. The main appellants' argument is directed against paragraph 237 of the judgment under appeal, where, concluding its analysis in relation to the application of Article 81(3) EC, the General Court considered that, in so far as the applicants had not adduced proof of the exception on which they relied, the allegation relating to breach of the principle *in dubio pro reo* must be rejected.

146. I consider that that assessment is not vitiated by any error. To my mind, the principle *in dubio pro reo* may be applicable in the analysis which the Commission carries out under Article 81(1) EC, when it must prove the existence of an infringement of that provision by the undertaking concerned. In that context, the principle requires that the evidence adduced by the Commission fully establish that infringement, so that no doubt remains as to the fact that it was committed.

118 — Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 92 (emphasis added).

119 — *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 93 (emphasis added).

120 — See, specifically, Articles 4, 5 and 9 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87.

121 — See point 66 of the Opinion of Advocate General Trstenjak in Case C-62/06 *ZF Zefeser* [2007] ECR I-11995.

122 — See point 70 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-150/05 *Van Straaten* [2006] ECR I-9327.

147. On the other hand, I do not believe that the principle *in dubio pro reo* may be invoked, as it is by the main appellants, in an attempt to reduce the standard of proof required for the application of the exemption provided for in Article 81(3) EC. As I observed at point 141 above, according to consistent case-law, it is for the undertaking which relies on Article 81(3) EC to demonstrate, by means of *convincing* arguments and evidence, that the conditions for benefiting from an exemption are satisfied. It is therefore not sufficient, as the main appellants appear to envisage, to adduce evidence that merely gives rise to uncertainty as to the application of Article 81(3) EC.

148. Admittedly, as the General Court observed at paragraph 197 of the judgment under appeal, in certain cases the arguments and evidence put forward by the undertaking seeking to rely on the exemption may be of such a kind as to require the Commission to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.[123] However, it must be stated that the main appellants do not dispute the conclusion which the General Court reached at paragraph 231 of the judgment under appeal, namely that the Commission had examined and properly refuted the merits of the arguments which they had developed during the administrative procedure, but they merely claim that the General Court ought to have accepted in the judgment under appeal that some uncertainty remained as to the applicability of Article 81(3) EC to the MIF. Such uncertainty is not to be found in the judgment under appeal, however, and, in particular, it does not appear in the opening sentence of paragraph 233 of the judgment under appeal, to which the main appellants refer. On the contrary, at paragraph 237 of the judgment under appeal, the General Court clearly concluded, without expressing any uncertainty, that the Commission had been properly able to conclude that the applicants had not produced proof that the conditions for the applicability of Article 81(3) EC had been fulfilled.

149. Last, in so far as the complaint at issue may be interpreted as claiming a failure to state reasons in the judgment under appeal concerning the applicability of the principle *in dubio pro reo*, in the light of the considerations which I set out at points 30 and 31 above, I consider that, in so far as it concluded that no evidence of the existence of the conditions for the exemption provided for in Article 81(3) EC had been adduced, the General Court was not required to explain further the reasons why the principle *in dubio pro reo* should not apply in the present case.

b) The supposedly incorrect approach with respect to the market on which the advantages referred to in Article 81(3) EC are created and also with respect to the categories of users concerned

150. In the second place, LBG, supported by the main appellants, maintains that the General Court adopted an incorrect approach as regards the market on which the advantages referred to in Article 81(3) should be created. LBG claims that, while recognising that, according to the case-law, those advantages may be taken into account for any market that benefits from the existence of the agreement and while accepting the link between the two sides of the relevant market (cardholders and merchants), the General Court focused exclusively on the advantages accruing for merchants. In doing so, the General Court ignored the significant advantages which the MasterCard system and the MIF themselves bring for cardholders, and also the two-sided nature of the market and the optimisation of the system which the MIF help to achieve. The main appellants claim that the General Court did not explain why the first two conditions in Article 81(3) EC could not be satisfied, relying solely on the benefits arising from the MIF for cardholders, provided that those benefits can compensate for all the alleged disadvantages resulting from the restrictive effects of the MIF for merchants. They submit that there is nothing in the wording of Article 81(3) EC to support the General Court's theory that, if two or more categories of consumers are concerned, all those categories must benefit from the same part of the profit resulting from a restriction of competition in order for the restriction to be considered to be compatible with Article 81 EC.

123 — See, to that effect, *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 83 and the case-law cited.

151. The complaints put forward by LBG and the main appellants relate to the analysis set out at paragraphs 228 and 229 of the judgment under appeal, where, after referring to its case-law, according to which the advantages referred to in the first condition in Article 81(3) EC may arise not only for the relevant market but also for every other market on which the agreement might have beneficial effects, the General Court none the less considered that, since merchants constituted one of the two groups of users affected by payment cards, it was necessary, in order for Article 81(3) EC to be applicable, that the existence of appreciable objective advantages attributable to the MIF must also be established in regard to them. On that basis, the General Court concluded that, in the absence of such proof, the argument that insufficient account had been taken of the advantages which the MIF brought for cardholders was, in all events, ineffective.

152. Those complaints relate to the application of the exemption provided for in Article 81(3) EC in a context characterised by the existence of two separate markets on which the restrictive agreement is capable of producing effects. In this instance, the markets concerned are the acquiring market and the issuing market, which, while being separate markets, to a significant extent interact and are complementary. [124] In that regard, it should be observed that, while the Commission's definition of the relevant market was approved by the General Court, that aspect of the judgment under appeal does not form the subject-matter of the appeal before the Court.

153. LBG and the main appellants claim, in essence, that the General Court erred in ignoring the advantages which the MIF provide for cardholders, direct users of the services provided on the issuing market, whereas those advantages could potentially have compensated for the restrictive effects arising from the MIF for merchants, direct users of the services provided on the acquiring market.

154. The point of law underlying that complaint is therefore whether, in order for the exemption provided for in Article 81(3) EC to be applicable in such a context, it is necessary that the fair share of the profit resulting from the advantages arising from the agreement, as provided for in Article 81(3) EC, be reserved for the direct consumers of the services provided on the market on which the restrictive effects for competition are produced – in this case, in particular, merchants – or whether it can be considered that the restrictive effects harming those consumers may be compensated by the advantages produced for consumers of the services provided on a related market, namely, in this case, cardholders.

155. It should be borne in mind, as a preliminary point, that the second condition in Article 81(3) EC requires that, in order for a restrictive agreement to benefit from the exemption provided for in that provision, consumers must be allowed a fair share of the resulting benefits.

156. In that regard, it should be observed, first, that the consumers referred to in that provision must be considered to be the direct or indirect consumers of the goods or services covered by the agreement. Second, it is apparent from consistent case-law that, in order for an agreement restrictive of competition to be capable of being exempted under Article 81(3) EC, the appreciable objective advantages created by that agreement must be of such a character as to compensate for the disadvantages which they cause for competition. [125] It may be inferred from that case-law that, in order for a restrictive agreement to be able to benefit from the exemption, the advantages resulting from that agreement must ensure that consumers are compensated in full for the actual or probable adverse effects that they must bear owing to the restriction of competition resulting from the agreement. In other words, the benefits arising from the restrictive agreement must counterbalance its negative effects.

124 — See paragraph 176 of the judgment under appeal.

125 — See Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at 348, and *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 92. See also point 141 above.

157. To my mind, however, that compensation must apply to consumers who are directly or indirectly affected by the agreement.[126] It is the consumers that suffer the harm caused by the restrictive effects of the agreement at issue that must, in principle, be allowed, as compensation for that harm, the fair share of the benefit resulting from the agreement referred to in Article 81(3) EC.

158. In fact, if it were possible to take into consideration the advantages resulting from an agreement for *one* category of consumers of certain services in order to counterbalance the negative effects on *another* category of consumers of other services on a different market, that would amount to allowing the former category of consumers to be favoured to the detriment of the latter category. However, distributive logic of that type seem to me, in principle, to have no connection with the practical scope of competition law.[127] Competition law is intended to protect the structure of the market, and thus competition, in the interest of competitors and, ultimately, consumers[128] in general. Conversely, it is not intended to favour one category of consumers to the detriment of a different category.[129]

159. In that regard, I must further observe that those considerations are not necessarily inconsistent with the settled case-law of the General Court, referred to at paragraph 228 of the judgment under appeal, according to which it is not excluded that it may be possible to take into consideration the advantages resulting from the agreement that occur on a different market from that on which the agreement produces the restrictive effects. Such advantages may be taken into consideration where, for example, the category of consumers affected by the agreement on the two separate markets is the same.[130]

160. In the present case, the General Court considered that, in order for the exemption provided for in Article 81(3) EC to be applicable, it is necessary that the existence of appreciable objective advantages arising from the MIF is, in any event, proved for merchants. In so far as merchants constitute the category of consumers that directly suffer the restrictive effects of the MIF on the market on which those effects are produced, I consider that the General Court did not err in law.

161. It follows that neither the main appellant's arguments nor LBG's argument that the General Court ignored the significant advantages flowing from the MIF[131] for cardholders can succeed. The same conclusion applies, in the absence of any challenge of the definition of the relevant market, to the argument relating to the failure to consider the two-sided nature of the market. Last, it also follows from the foregoing that, contrary to the contention of the main appellants, the General Court did not consider at paragraphs 228 and 229 of the judgment under appeal that where two or more categories

126 — On the other hand, it is not necessary that each of those consumers is allowed individually a share of the objective advantages, in so far as it is the impact on all consumers in the relevant market that must be taken into consideration. See, to that effect, *Asnef-Equifax and Administración del Estado*, paragraphs 70 and 72.

127 — These considerations are not inconsistent with the Court's assertion in *Asnef-Equifax and Administración del Estado* that in order that the condition that consumers be allowed a fair share of the benefit relating to the fact that an equitable part of the profit to be satisfied, 'the overall effect on consumers in the relevant markets must be favourable (see paragraphs 70 and 72). As is apparent from the preceding footnote, in *Asnef-Equifax and Administración del Estado* the question that arose was whether each member of the category of consumers concerned must profit individually from the objective advantages arising under the restrictive agreement and not the question whether one category of consumers may be favoured to the detriment of a different category.

128 — See, to that effect, *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 63.

129 — Those considerations do not in my view preclude outright the possibility that, in specific cases, the Commission, within the framework of the competition policy choices which it must take, might recognise an exemption to an agreement, owing to the fact that the agreement gives rise to appreciable objective and clearly proven advantages for a certain category of consumers although it produces limited negative effects for a different category of consumers in determining a considerable increase of the overall well-being. However, such a competition policy choice, which seems to me to be in any event exceptional, might possibly be taken by the Commission, but is certainly beyond the powers of the parties to the agreement when they themselves assess whether an agreement as a whole is compatible with Article 81 EC (now Article 101 TFEU).

130 — That was the position in Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, cited at paragraph 228 of the judgment under appeal. In that case the two services affected by the restrictions of competition were supplied on two distinct markets but demand for those services came from the same category of consumers, namely shippers requiring intermodal transport between northern Europe and South-East and East Asia (see, in particular, paragraphs 112 and 343 to 345 of the judgment).

131 — As for the advantages deriving directly from the MasterCard system or its optimisation, they could not in any event have been taken into consideration, since the General Court considered that the MIF did not constitute an ancillary restriction by reference to that system.

of consumers are affected, *all* those categories must benefit from *the same share* of the profit resulting from a restriction of competition in order for the restriction to be considered to be compatible with Article 81 EC. It considered only that objective advantages flowing from the MIF must be established in regard to merchants.

162. In the light of all those considerations, I therefore consider that the complaints put forward by LBG and the main appellants relating to a supposedly incorrect approach with respect to the market on which the advantages provided for in Article 81(3) EC must be created and with respect to the categories of consumers to be taken into consideration must be rejected in their entirety.

c) The approval of an over-strict test for the application of Article 81(3) EC

163. In the third place, LBG maintains that the General Court erred in approving an over-strict test for the application of Article 81(3) EC. LBG refers, in particular, to paragraph 233 of the judgment under appeal, where the General Court gave the impression that the only factor to be taken into consideration in determining that the MIF are set at an appropriate level is the compensation by merchants for the fees incurred by the issuing banks for the services provided to merchants or which are manifestly of benefit to them and that the compensation must be calculated taking into account the other revenues obtained by the issuing banks. LBG maintains that the Commission also, in more recent cases, seems to have a adopted an approach that focuses solely on merchant benefits and that it has used a restrictive methodology known as the 'tourist test'. [132] The application of such an approach is, in LBG's submission, unworkable and inappropriate and the Commission itself is unable to apply that test as it lacks the relevant data. In those circumstances, LBG wonders how MasterCard or, *a fortiori*, the licensee banks, which do not have comprehensive market data, could reasonably be supposed to apply it. The chosen methodology is also impossible to apply in practice, since it requires that precise evidence be provided to justify specific levels of MIF. However, it is unlikely that such evidence could be provided. Neither the Commission nor the General Court has provided the slightest guidance on the precise methodology that MasterCard should follow in order to set the MIF at a justifiable level. The ambiguity resulting from that approach gives rise to significant uncertainty for operators on the market and is likely to harm consumers by blocking innovation on the market.

164. To my mind, this complaint is based on a misreading of the judgment under appeal. At paragraph 233, the only paragraph of the judgment under appeal to which this complaint specifically relates, the General Court did not assert that compensation for the costs incurred by issuing banks for the services provided is the *only* factor to be taken into consideration when determining that the MIF are fixed at an appropriate level. At that paragraph of the judgment under appeal, the General Court answered the argument raised before it relating to the lack of data capable of meeting the standard of economic proof demanded by the Commission. The considerations set out at paragraph 233 of the judgment under appeal must thus be read in the light of the preceding paragraph, in which the General Court explained that the difficulty in meeting the standard of economic proof demanded by the Commission resulted from the arguments developed by the applicants during the administrative procedure.

165. With regard to the reference to the methodology described as the 'tourist test', it must be emphasised that there is no reference to that test in the judgment under appeal or in the decision at issue, and the argument based on that methodology is therefore irrelevant. Nor does LBG adduce any evidence to explain how its reference to that methodology could permit the identification of an error in the judgment under appeal.

132 — LBG explains that this test seeks to assess whether the MIF and the MSC are set at a level that a merchant would be willing to pay if he were to compare the costs of the consumer's use of a payment card with the cost of non-card (cash) payments.

166. As for the argument that the Commission and the General Court did not provide the slightest guidance as to the precise methodology that MasterCard should follow in setting the MIF, it is not capable of identifying any error of law by the General Court in the judgment under appeal and is therefore ineffective.

167. It follows from the foregoing that the third part of the plea alleging infringement of Article 81(3) EC cannot succeed and that that plea should therefore be rejected in its entirety.

III – **Conclusions**

168. On the basis of the foregoing considerations, I propose that the Court should:

(1) dismiss the main appeal and the cross-appeals;

(2) order MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe SPRL to pay the costs relating to the main appeal;

(3) order the Royal Bank of Scotland plc to pay the costs relating to its cross-appeal;

(4) order Lloyds TSB Bank plc and Bank of Scotland plc to pay the costs relating to their cross-appeal;

(5) order MBNA Europe Bank Ltd, HSBC Bank plc and the United Kingdom to bear their own costs.