Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

7 February 2018 *

(Reference for a preliminary ruling — Regulation (EU) 2015/751 — Interchange fees for card-based payment transactions — Article 1(5) — Three party payment card scheme treated as equivalent to a four party payment card scheme — Conditions — Issuance by a three party payment card scheme of card-based payment instruments 'with a co-branding partner or through an agent' — Article 2(18) — Concept of 'three party payment card scheme' — Validity)

In Case C-304/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 11 April 2016, received at the Court on 30 May 2016, in the proceedings

The Queen, on the application of:

American Express Company,

v

The Lords Commissioners of Her Majesty's Treasury,

intervening parties:

Diners Club International Limited,

MasterCard Europe SA,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 27 April 2017,

after considering the observations submitted on behalf of:

– American Express Company, by J. Turner QC, J. Holmes QC, and L. John, Barrister, and by I. Taylor, H. Ware and J. Slade, Solicitors,

* Language of the case: English.

– MasterCard Europe SA, by P. Harrison, S. Kinsella and K. Le Croy, Solicitors, and by S. Pitt and J. Bedford, advocates,

– the United Kingdom Government, by M. Holt, D. Robertson, J. Kraehling and C. Crane, acting as Agents, and by G. Facenna QC and M. Hall QC,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo, M. Rebelo and G. Fonseca, acting as Agents,

– the European Parliament, by P. Schonard and A. Tamás, acting as Agents,

– the Council of the European Union, by J. Bauerschmidt, I. Gurov and E. Moro, acting as Agents,

– the European Commission, by H. Tserepa-Lacombe, J. Samnadda and T. Scharf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation and validity of Article 1(5) and Article 2(18), and also the interpretation of Article 2(2), of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ 2015 L 123, p. 1).

2 The request was made in proceedings between American Express Company and the Lords Commissioners of Her Majesty's Treasury ('the national authority'), concerning the circumstances in which three party payment card schemes should be considered to be four party payment card schemes, under Article 1(5) of that regulation.

Legal context

Regulation 2015/751

3 Recitals 10, 28, 29 and 43 of Regulation 2015/751 state:

'(10) ... In addition to a consistent application of the competition rules to interchange fees, regulating such fees would improve the functioning of the internal market and contribute to reducing transaction costs for consumers.

...

(28) Card-based payment transactions are generally carried out on the basis of two main business models, so-called "three party payment card schemes" (cardholder — acquiring and issuing scheme — merchant) and "four party payment card schemes" (cardholder — issuing bank — acquiring bank — merchant). Many four party payment card schemes use an explicit interchange fee, which is mostly multilateral. To acknowledge the existence of implicit interchange fees and contribute to the creation of a level playing field, three party payment card schemes using payment service providers as issuers or acquirers should be considered as four party payment card schemes and should follow the same rules, whilst transparency and other measures related to business rules should apply to all providers. However, taking into account the specificities

which exist for such three party schemes, it is appropriate to allow for a transitional period during which Member States may decide not to apply the rules concerning the interchange fee cap if such schemes have a very limited market share in the Member State concerned.

(29) The issuing service is based on a contractual relationship between the issuer of the payment instrument and the payer, irrespective of whether the issuer is holding the funds on behalf of the payer. The issuer makes payment cards available to the payer, authorises transactions at terminals or their equivalent and may guarantee payment to the acquirer for transactions that are in conformity with the rules of the relevant scheme. Therefore, the mere distribution of payment cards or technical services, such as the mere processing and storage of data, does not constitute issuing.

...

(43) Since the objectives of this Regulation to lay down uniform requirements for card-based payment transactions and internet and mobile payments based on cards cannot be sufficiently achieved by the Member States, but can rather, by reason of its scale, be better achieved at [European] Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union …'

4 Article 1 of Regulation 2015/751, headed 'Scope', within Chapter I of that regulation, headed 'General Provisions', provides:

'...

3. Chapter II does not apply to the following:

...

(c) transactions with payment cards issued by three party payment card schemes.

4. Article 7 does not apply to three party payment card schemes.

5. When a three party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four party payment card scheme. However, until 9 December 2018 in relation to domestic payment transactions, such a three party payment card scheme may be exempted from the obligations under Chapter II, provided that the card-based payment transactions made in a Member State under such a three party payment card scheme do not exceed on a yearly basis 3% of the value of all card-based payment transactions made in that Member State.'

5 Article 2 of that regulation, headed 'Definitions', states:

'For the purposes of this Regulation, the following definitions shall apply:

...

(2) "issuer" means a payment service provider contracting to provide a payer with a payment instrument to initiate and process the payer's card-based payment transactions;

...

(10) “interchange fee” means a fee paid for each transaction directly or indirectly (i.e. through a third party) between the issuer and the acquirer involved in a card-based payment transaction. The net compensation or other agreed remuneration is considered to be part of the interchange fee;

(11) “net compensation” means the total net amount of payments, rebates or incentives received by an issuer from the payment card scheme, the acquirer or any other intermediary in relation to card-based payment transactions or related activities;

...

(17) “four party payment card scheme” means a payment card scheme in which card-based payment transactions are made from the payment account of a payer to the payment account of a payee through the intermediation of the scheme, an issuer (on the payer’s side) and an acquirer (on the payee’s side);

(18) “three party payment card scheme” means a payment card scheme in which the scheme itself provides acquiring and issuing services and card-based payment transactions are made from the payment account of a payer to the payment account of a payee within the scheme. When a three party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four party payment card scheme;

...

(24) “payment service provider” means any natural or legal person authorised to provide the payment services listed in the Annex to Directive 2007/64/EC [of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1)] or recognised as an electronic money issuer in accordance with Article 1(1) of Directive 2009/110/EC [of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ 2009 L 267, p. 7)]. A payment service provider can be an issuer or an acquirer or both;

...

(28) “processing entity” means any natural or legal person providing payment transaction processing services;

...

(30) “payment brand” means any material or digital name, term, sign, symbol or combination of them, capable of denoting under which payment card scheme card-based payment transactions are carried out;

…

(32) “co-branding” means the inclusion of at least one payment brand and at least one non-payment brand on the same card-based payment instrument;

...’

6 Articles 3 and 4 of Regulation 2015/751, within Chapter II of that regulation, headed 'Interchange fees', respectively concern interchange fees for consumer debit card transactions and interchange fees for consumer credit card transactions.

7 Article 5 of that regulation, headed 'Prohibition of circumvention', also within Chapter II, provides:

'For the purposes of the application of the caps referred to in Articles 3 and 4, any agreed remuneration, including net compensation, with an equivalent object or effect of the interchange fee, received by an issuer from the payment card scheme, acquirer or any other intermediary in relation to payment transactions or related activities shall be treated as part of the interchange fee.'

8 Articles 6 to 12 of Regulation 2015/751, within Chapter III of that regulation, headed 'Business Rules', set out obligations relating to card-based payment transactions.

9 Article 7 of that regulation, headed 'Separation of payment card scheme and processing entities', is worded as follows:

'1. Payment card schemes and processing entities:

(a) shall be independent in terms of accounting, organisation and decision-making processes;

(b) shall not present prices for payment card scheme and processing activities in a bundled manner and shall not cross-subsidise such activities;

(c) shall not discriminate in any way between their subsidiaries or shareholders on the one hand and users of payment card schemes and other contractual partners on the other hand and shall not in particular make the provision of any service they offer conditional in any way on the acceptance by their contractual partner of any other service they offer.

2. The competent authority of the Member State where the registered office of the scheme is located may require a payment card scheme to provide an independent report confirming its compliance with paragraph 1.

3. Payment card schemes shall allow for the possibility that authorisation and clearing messages of single card-based payment transactions be separated and processed by different processing entities.

4. Any territorial discrimination in processing rules operated by payment card schemes shall be prohibited.

5. Processing entities within the Union shall ensure that their system is technically interoperable with other systems of processing entities within the Union through the use of standards developed by international or European standardisation bodies. In addition, payment card schemes shall not adopt or apply business rules that restrict interoperability among processing entities within the Union.

...'

10 Chapter IV of Regulation 2015/751, headed 'Final provisions', includes Articles 13 to 18 of that regulation. Article 13, headed 'Competent authorities', provides:

'1. Member States shall designate competent authorities that are empowered to ensure enforcement of this Regulation and that are granted investigation and enforcement powers.

...

6. Member States shall require the competent authorities to monitor effectively compliance with this Regulation, including to counter attempts by the payment service providers to circumvent this Regulation, and take all necessary measures to ensure such compliance.'

11 Article 14(1) of that regulation, that article being headed 'Penalties', provides:

'Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are applied.'

12 Article 18 of that regulation, headed 'Entry into force', provides:

'1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. It shall apply from 8 June 2015, with the exception of Articles 3, 4, 6 and 12, which shall apply from 9 December 2015, and of Articles 7, 8, 9 and 10, which shall apply from 9 June 2016.'

Directive (EU) 2015/2366

13 Recitals 2 and 6 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35), are worded as follows:

'(2) The revised Union legal framework on payment services is complemented by [Regulation 2015/751] ...

…

(6) New rules should be established to close the regulatory gaps while at the same time providing more legal clarity and ensuring consistent application of the legislative framework across the Union. ...'

14 Article 1(1) of that directive, that article being headed 'Subject matter', and being within Title I of the directive, headed 'Subject matter, scope and definitions', provides:

'This Directive establishes the rules in accordance with which Member States shall distinguish between the following categories of payment service provider:

...

(d) payment institutions;

...'

15 Article 4 of that directive, headed 'Definitions', provides:

'For the purposes of this Directive, the following definitions apply:

...

(3) "payment service" means any business activity set out in Annex I;

(4) "payment institution" means a legal person that has been granted authorisation in accordance with Article 11 to provide and execute payment services throughout the Union;

...

(38) "agent" means a natural or legal person who acts on behalf of a payment institution in providing payment services;

...'

16 It is apparent from Annex I to Directive 2015/2366, headed 'Payment services', that the '[i]ssuing of payment instruments and/or acquiring of payment transactions' falls within the definition of payment services referred to in Article 4(3) of that directive.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 The order for reference indicates that American Express is an international services company, which, with the support of its subsidiaries, provides payment, travel, exchange and loyalty rewards platform services to consumers and to businesses. It also carries out activities relating to the issuing and acquisition of cards worldwide, including in the European Union. American Express operates, with its subsidiaries, the American Express payment cards scheme ('Amex'), which is a three party payment card scheme. Amex has entered into co-branding and service provision arrangements within the European Union, which might mean, depending on the Court's answer to the question concerning the interpretation of Article 1(5) and Article 2(18) of Regulation 2015/751, that a large number of transactions carried out by Amex might fall within the scope of that regulation, pursuant to the co-branding extension and the agency extension, provided for in Article 1(5) of that regulation.

18 The national authority has charge of Her Majesty's Treasury (United Kingdom). That body has ultimate responsibility for the fulfilment of the obligations imposed on the United Kingdom of Great Britain and Northern Ireland with respect to the application, enforcement or otherwise giving effect to Regulation 2015/751, including by establishing a system of penalties for infringements of the provisions of that regulation, pursuant to Articles 13 and 14 thereof.

19 American Express sought from the referring court permission to apply for judicial review of '[the national authority's] obligation and/or intention to apply, enforce, or otherwise give effect to the [co-branding extension and/or the agency extension]'. That permission was granted by the referring court.

20 The referring court seeks to ascertain whether a three party payment card scheme should be regarded as issuing card-based payment instruments with a co-branding partner or through an agent, within the meaning of Article 1(5) and Article 2(18) of Regulation 2015/751, solely because it has entered into an arrangement with a co-branding partner or an agent, irrespective of whether that partner or agent is a distinct payment service provider that issues payment cards, or whether, on the contrary, a three party payment card scheme should be regarded as so acting solely when that partner or agent is itself a payment service provider and acts within the three party payment card scheme as an issuer, within the meaning of Article 2(2) of that regulation.

21 Further, in the view of that court, in the event that Article 1(5) and Article 2(18) of Regulation 2015/751 are to be interpreted as meaning that a three party payment card scheme is to be regarded as issuing card-based payment instruments with a co-branding partner or through an agent, within the meaning of those provisions, even where the three party payment card scheme concerned remains the issuer and uses third parties to perform one or more ancillary functions that support its issuing

activity, it will then be necessary to give a ruling on the argument put forward by American Express that those provisions are invalid, on the grounds of a failure to provide reasons, a manifest error of assessment and a breach of the principle of proportionality.

22 In those circumstances, the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the requirement in Articles 1(5) and 2(18) of [Regulation 2015/751], that a three party payment card scheme issuing card-based payment instruments with a co-branding partner or through an agent is considered to be a four party payment card scheme, apply only to the extent that the co-branding partner or agent acts as the "issuer" within the meaning of Article 2(2) and recital (29) [of that regulation] (namely where that partner or agent has a contractual relationship with the payer, pursuant to which it contracts to provide the payer with a payment instrument to initiate and process the payer's card-based payment transactions)?

(2) If the answer to Question (l) is "no", are Articles 1(5) and 2(18) of [Regulation 2015/751] invalid in so far as they provide that such arrangements are considered to be four party payment card schemes, on the grounds of:
(a) failure to provide reasons in accordance with Article 296 TFEU;
(b) manifest error of assessment; and/or
(c) breach of the principle of proportionality?'

The request to reopen the oral procedure

23 By document lodged at the Registry of the Court on 27 July 2017, American Express requested the Court to order the reopening of the oral part of the procedure.

24 In support of its request, American Express argues that the analysis undertaken by the Advocate General in his Opinion is misconceived in that some relevant definitions to be found in both Regulation 2015/751 and in Directive 2015/2366 are not taken into account, although those two pieces of legislation, as is common ground between the parties in these proceeding, are complementary and form part of one legislative package. That analysis also reveals a misunderstanding of the scope of Article 5 of that regulation, in particular the scope of the concept of 'intermediary' in that regulation. Further, as regards point 98 of the Opinion, either some wording is missing, or the reasoning set out there is contradictory. Last, the effect of the interpretation of that regulation as proposed by the Advocate General would be to extend the scope of that regulation much more significantly than any other interpretation advanced by the parties to the proceedings before the Court.

25 It is a matter of settled case-law that the Court may, of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure under Article 83 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be decided on the basis of an argument which has not been debated between the parties. However, the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for parties to submit observations in response to the Advocate General's Opinion (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 41 and the case-law cited).

26 In this case, in support of its request that the oral procedure be reopened, American Express does no more, essentially, than criticise the interpretation of Regulation 2015/751 adopted by the Advocate General in his Opinion. That is not however one of the grounds that may, having regard to the case-law cited in the preceding paragraph, justify the reopening of the oral procedure.

27 In addition, the scope of the provisions of Regulation 2015/751 whose interpretation is the subject of the first question referred for a preliminary ruling was debated both in the course of the written phase of the procedure and at the hearing.

28 That being so, the Court considers, having heard the Advocate General, that it has all the information necessary to enable it to reply to the questions put by the referring court, and that all the arguments required for the decision on this case have been debated by the parties.

29 Consequently, the request for the oral procedure to be reopened must be rejected.

Consideration of the questions referred

Admissibility of the request for a preliminary ruling

30 The European Parliament, the Council of the European Union and the European Commission maintain that the request for a preliminary ruling is wholly inadmissible on the grounds that (i) there is no genuine dispute between the parties in the main proceedings; (ii) the national court does not provide in its order for reference the minimum information required, in that it does not set out the relevant facts or the reasons why it is uncertain as to the interpretation and validity of the provisions at issue in the main proceedings, and (iii) the bringing of an action in the main proceedings seeking review of the legality of the 'intention and/or obligation' of the national authority to apply or give effect to those provisions is a means of circumventing the system of legal remedies provided for by the FEU Treaty.

31 It must first be borne in mind that it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine, with regard to the particular aspects of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 24).

32 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25).

33 As regards, first, whether there is a genuine dispute in the main proceedings, it must be observed that the action brought by American Express before the referring court seeks review of the legality of the 'intention and/or obligation' of the national authority to apply or give effect to the provisions at issue. In that regard, it is apparent from the order for reference that the parties in the main proceedings hold opposing views on the substance of the action. Since the referring court has been called upon to resolve that disagreement and since it considers that there is a real point of contention between the parties in the main proceedings as to the interpretation and validity of the relevant provisions of that regulation, it is not obvious that the dispute in the main proceedings is not genuine (see, by analogy, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 36 and 38, and of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 17).

34 Further, the arguments designed to establish that the dispute in the main proceedings is artificial, relying on the claim to that there is no act or omission on the part of a national authority the legality of which could be the subject of an action for review, are based on criticism of the admissibility of the action at issue in the main proceedings and of the findings of fact made by the referring court for the purpose of applying criteria laid down by national law. It is not, however, for the Court to call those findings into question since that falls, in the context of the present proceedings, within the jurisdiction of the national courts, or to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and legal proceedings. Those arguments are therefore again not sufficient to rebut the presumption of relevance referred to in paragraph 32 of the present judgment (see, by analogy, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 26).

35 Second, as regards the argument that the referring court has not set out either the relevant facts or the reasons why it is uncertain as to the interpretation and validity of the provisions at issue in the main proceedings, it must be observed that, in accordance with Article 94(a) of the Rules of Procedure, all requests for a preliminary ruling must contain 'a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based'.

36 In that regard, it is sufficient that both the subject matter of the dispute in the main proceedings and the main issues raised for the EU legal order may be understood from the request for a preliminary ruling in order to enable the Member States and other interested parties to submit their observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union and to participate effectively in the proceedings before the Court (see judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, paragraph 41 and the case-law cited).

37 In this case, it is apparent from the order for reference that Amex is a three party payment card scheme, within the meaning of Article 2(18) of Regulation 2015/751, and that it has entered into co-branding and service provision arrangements within the European Union. As a consequence of those arrangements, a large number of transactions carried out by it might, depending on the answers given by the Court to the questions referred for a preliminary ruling, fall within the scope of Regulation 2015/751, pursuant to Article 1(5) of that regulation.

38 Accordingly, the order for reference sets out, briefly but precisely, the origin and nature of the dispute in the main proceedings, the resolution of which it regards as dependent on the interpretation and validity of those provisions. It follows that the referring court has adequately defined the factual and legal framework within which it has made its request for an interpretation of EU law so as to enable the Court to provide a useful reply to that request (see, by analogy, judgment of 7 July 2016, *Genentech*, C-567/14, EU:C:2016:526, paragraph 27).

39 As regards, further, whether the referring court has adequately set out the reasons why it is uncertain as to the interpretation and validity of the provisions at issue in the main proceedings, it does follow from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers a reply to its questions concerning the interpretation or validity of certain provisions of EU law to be necessary to enable it to give judgment (see, to that effect, judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 24 and the case-law cited).

40 It is therefore important that the national court should set out, in particular, the precise reasons that prompted it to enquire about the interpretation or validity of certain provisions of EU law and set out the grounds of invalidity which, consequently, appear to it capable of being upheld. That requirement is also stated in Article 94(c) of the Rules of Procedure (see, to that effect, judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 25 and the case-law cited).

41 In this case, in the request for a preliminary ruling, the referring court stated, reproducing some of the arguments put forward by the parties in the main proceedings in that regard, that the interpretation of some provisions of Regulation 2015/751 was uncertain. Likewise, the referring court suggested that the Court might be required, depending on the interpretation of those provisions that it adopts, to give a ruling on the grounds of invalidity relied on by American Express.

42 It follows that the referring court considers not only that the arguments submitted by the parties in the main proceedings raise a question of interpretation to which the answer is uncertain, but also that the grounds of invalidity relied on by American Express and set out in the order for reference are capable of being upheld.

43 As regards, third, the argument that the bringing of the action in the main proceedings, seeking review of the legality of 'intention and/or obligation' of the national authority to apply or give effect to Regulation 2015/751, is a means of circumventing the system of legal remedies provided for by the FEU Treaty and, more specifically, the Parliament's comment that, in this case, nothing has been done by the national authority that adversely affects Amex, it must be recalled that the Court has previously held to be admissible a number of requests for a preliminary ruling concerning the interpretation and/or validity of secondary legislation submitted in the context of such actions for review of legality, including the cases that gave rise to the judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741); of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312); of 8 July 2010, *Afton Chemical* (C-343/09, EU:C:2010:419); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324); and of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325).

44 Moreover, the opportunity open to individuals to plead the invalidity of an EU act of general application before national courts is not conditional upon that act actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly. That condition is fulfilled in the circumstances of the case in the main proceedings, as is apparent from paragraphs 21, 33, 34, 41 and 42 of the present judgment (see, by analogy, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 40; of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 29; of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 19; and of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 35).

45 In those circumstances, it is not apparent that the action in the main proceedings was brought in order to circumvent the system of remedies provided for by the FEU Treaty.

46 Last, the above findings cannot be called into question by the argument, put forward by the Parliament and the Commission, that this case, which concerns the interpretation and validity of a regulation, must be distinguished from cases that relate to the interpretation and validity of a directive, given that a regulation, unlike a directive, is directly applicable under Article 288 TFEU and, moreover, in the present case, the provisions at issue in the main proceedings involve no action by the Member States.

47 As is apparent from paragraph 37 of the present judgment, the answers given by the Court to the questions referred will determine to what extent three party payment card schemes, such as Amex, should be considered to be subject to the obligations stemming from Articles 3 to 5 and Article 7 of Regulation 2015/751, which require some action on the part of the Member States. In that regard, it must in particular be noted that, under Articles 13 and 14 of that regulation, the Member States are, on the one hand, to designate competent authorities that are empowered to ensure enforcement of the regulation and that are granted investigation and enforcement powers and, on the other, to lay down rules on penalties applicable to infringements of the regulation and to take all measures necessary to ensure that they are applied. It follows moreover from the order for reference that the

national authority is in charge of Her Majesty's Treasury, which has ultimate responsibility for the fulfilment of the obligations imposed on the United Kingdom with respect to any form of application of Regulation 2015/751, in accordance with Articles 13 and 14 of that regulation.

48 It follows from all the foregoing that the request for a preliminary ruling is admissible.

The first question

49 By its first question, the referring court seeks, in essence, to ascertain whether Article 1(5) of Regulation 2015/751 must be interpreted as meaning that, in the context of an arrangement between a co-branding partner or an agent, on the one hand, and a three party payment card scheme, on the other, it is a prerequisite of that scheme being regarded as issuing card-based payment instruments with a co-branding partner or through an agent and therefore being considered to be a four party payment card scheme, within the meaning of that provision, that the co-branding partner or agent act as an issuer, within the meaning of Article 2(2) of that regulation.

50 It must first be observed that, under Article 1(3)(c) of Regulation 2015/751, Chapter II of that regulation, Articles 3 to 5 of which lay down rules on the capping of interchange fees for consumer card transactions, does not apply to 'transactions with payment cards issued by three party payment card schemes'. Likewise, Article 1(4) of that regulation provides that Article 7 thereof, which requires the separation of payment card schemes and processing entities, does not apply to 'three party payment card schemes'.

51 However, Article 1(5) of Regulation 2015/751 provides, like Article 2(18) of that regulation, which defines the concept of a 'three party payment card scheme', that, when such a scheme 'licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four party payment card scheme'.

52 It follows that, as a general rule, a three party payment card scheme is not subject to the obligations stemming from Articles 3 to 5 and Article 7 of Regulation 2015/751, unless it falls within one of the three situations described in Article 1(5) of that regulation, namely if it has licensed another payment service provider for the issuance and/or acquiring of card-based payment instruments (the first situation), if it has issued card-based payment instruments with a co-branding partner (the second situation), or if it has issued payment instruments through an agent (the third situation). In each of those three situations, a three party payment card scheme is to be considered, pursuant to Article 1(5), to be a four party payment card scheme.

53 In this case, American Express submits that Article 1(5) of Regulation 2015/751 must be interpreted as meaning that a three party payment card scheme may be considered to be a four party payment card scheme only on the condition that at least one third party payment service provider is acting as an issuer or as an acquirer in the payment transaction, regardless of whether that is in the capacity of a licensed issuer, a licensed acquirer, a co-branding partner carrying out the issuing activity in the place of the three party payment card scheme, or an agent carrying out the issuing activity in the place of that scheme.

54 In that regard, it must be recalled that, in accordance with the Court's settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 21 September 2017, *Commission* v *Germany*, C-616/15, EU:C:2017:721, paragraph 43 and the case-law cited).

55 As regards, in the first place, the wording used in Article 1(5) of Regulation 2015/751 to describe the second and the third situations provided for, which are the subject of the first question referred for a preliminary ruling, it must be observed that the 'issuer' is defined in Article 2(2) of Regulation 2015/751 as being 'a payment service provider contracting to provide a payer with a payment instrument to initiate and process the payer's card-based payment transactions'. Recital 29 of that regulation adds, moreover, that '[t]he issuing service is based on a contractual relationship between the issuer of the payment instrument and the payer, irrespective of whether the issuer is holding the funds on behalf of the payer', that '[t]he issuer makes payment cards available to the payer, authorises transactions at terminals or their equivalent and may guarantee payment to the acquirer for transactions that are in conformity with the rules of the relevant scheme, and that, '[t]herefore, the mere distribution of payment cards or technical services, such as the mere processing and storage of data, does not constitute issuing'.

56 As regards the second situation provided for in Article 1(5) of Regulation 2015/751, namely the conclusion of an arrangement between a three party payment card scheme and a co-branding partner, it must be noted that 'co-branding' is defined in Article 2(32) of that regulation as being 'the inclusion of at least one payment brand and at least one non-payment brand on the same card-based payment instrument'. The term 'payment brand' is itself defined in Article 2(30) of that regulation as being 'any material or digital name, term, sign, symbol or combination thereof, capable of denoting under which payment card scheme card-based payment transactions are carried out'.

57 As regards the third situation provided for in Article 1(5) of Regulation 2015/751, namely the conclusion of an arrangement between a three party payment card scheme and an agent, it is true that that regulation does not define what is to be understood by the term 'agent'. However, it is stated in recital 2 of Directive 2015/2366, which is also part of the EU legal framework on payment services, that the revised legal framework is complemented by Regulation 2015/751. It is apparent moreover from recital 6 of that directive that the intention of the EU legislature was that consistent application across the European Union of the legislative framework on payment services should be guaranteed.

58 As observed by American Express, Article 4(38) of Directive 2015/2366 defines an 'agent' as being 'a natural or legal person who acts on behalf of a payment institution in providing payment services', while it should be noted that, under Article 4(3) of and Annex I to that directive, the issuing of payment instruments and/or the acquiring of payment transactions are to be classified as payment services.

59 Accordingly, it cannot be inferred from the relevant definitions of the terms 'co-branding' and 'agent' that a co-branding partner or an agent that has entered into an arrangement with a three party payment card scheme necessarily acts within that scheme as an issuer, within the meaning of Article 2(2) of Regulation 2015/751.

60 It is therefore clear, as stated, in essence, by the Advocate General in points 87 and 90 of his Opinion, that it is not expressly stated in the wording of either Article 1(5) or Article 2(18) of Regulation 2015/751 that the co-branding partner or agent must itself be involved in the issuing activity. If, however, the EU legislature had wished to restrict the scope of Article 1(5), so that that would be the case, it could have made express provision to that effect (see, by analogy, judgment of 19 March 2009, *Commission* v *Italy*, C-275/07, EU:C:2009:169, paragraph 99).

61 Moreover, while it is true that recital 28 of Regulation 2015/751 states that 'three party payment card schemes using payment service providers as issuers or acquirers should be considered as four party payment card schemes', it cannot be inferred that that situation alone falls within the scope of Article 1(5) of that regulation. In that regard, as is stated in paragraph 52 of the present judgment, Article 1(5) also covers, inter alia, the situation where a three party payment card scheme 'licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions'.

62 Further, as stated by the Advocate General in point 90 of his Opinion, it appears to follow from the wording of Article 1(5) of Regulation 2015/751, in particular from the clause 'where a three party payment card scheme ... issues card-based payment instruments', that that scheme is itself involved in the issuing activity.

63 In the second place, as regards the structure of that provision, it is undisputed that one occasion when a three party payment card scheme is to be considered to be a four party payment card scheme is in the first situation described in that provision, namely when that scheme 'licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions'.

64 It follows, as stated by the Advocate General in points 77 and 78 of his Opinion, that the situation in which a third party enters into an arrangement with a three party payment card scheme whereby the third party is to issue card-based payment instruments or acquire card-based payment transactions for that scheme corresponds to that first situation.

65 It is therefore clear that the interpretation advocated by American Express of the second and third situations described in Article 1(5) of Regulation 2015/751, namely that an arrangement with a third party falls within those situations only where that third party issues card-based payment instruments for that scheme, would be likely to deprive those situations of much of their significance.

66 Further, while the first situation expressly refers to the fact that the third party who is licensed is also to be a 'payment service provider', the second and third situations do not expressly provide that a co-branding partner or agent is necessarily such a provider. It is therefore not inconceivable that a co-branding partner may be involved in activities other than payment services and therefore other than activities consisting in the issuance of card-based payment instruments or the acquiring of card-based payment transactions.

67 In the third place, as regards the objectives pursued by Regulation 2015/751, including the provisions at issue in the main proceedings, it is stated in recital 43 of that regulation that its objectives are to lay down uniform requirements for card-based payment transactions and internet and mobile payments based on cards. More specifically, according to recital 10 of that regulation, the purpose of regulating interchange fees is to improve the functioning of the internal market and to contribute to reducing transaction costs for consumers.

68 As regards the applicability of such rules to three party payment card schemes, it is stated in recital 28 of Regulation 2015/751 that it is to acknowledge the existence of 'implicit interchange fees' and to contribute to the creation of 'a level playing field' that the EU legislature thought it necessary that, in certain circumstances, those schemes should be considered to be four party payment card schemes and should be subject to the same rules as the latter.

69 In addition, it is apparent from a number of the provisions of Regulation 2015/751, in particular from recital 31, Article 5 and Article 13(6) of that regulation, that it is also the aim of that regulation to prevent the circumvention of the rules therein, including the rules relating to the capping of interchange fees.

70 As regard an interchange fee, that is defined in Article 2(10) of Regulation 2015/751, broadly, as being a 'fee paid for each transaction directly or indirectly (i.e. through a third party) between the issuer and the acquirer involved in a card-based payment transaction', that provision adding that '[t]he net compensation or other agreed remuneration is considered to be part of the interchange fee'. The term 'net compensation' is itself defined in Article 2(11) of that regulation as being 'the total net amount of payments, rebates or incentives received by an issuer from the payment card scheme, the acquirer or any other intermediary in relation to card-based payment transactions or related activities'.

71 That being the case, as argued in essence by the Commission, it is not inconceivable that some type of consideration or benefit might be identified as constituting an implicit interchange fee, within the meaning of recital 28 of Regulation 2015/751, even though the co-branding partner or agent with which the three party payment card scheme concludes an arrangement is not necessarily involved in the issuing activity of that scheme. It might, therefore, prove difficult to achieve the objectives of Regulation 2015/751, in particular that of Article 1(5) of that regulation, of ensuring a level playing field in the market, if situations where a co-branding partner or agent does not act as an issuer, within the meaning of Article 2(2) of that regulation, were, for that reason, to be exempted from the rules laid down in Articles 3 to 5 and Article 7 of Regulation 2015/751.

72 Consequently, where a three party payment card scheme enters into a co-branding arrangement within the meaning of Article 2(32) of Regulation 2015/751, or an arrangement with an agent within the meaning of Article 4(38) of Directive 2015/2366, that scheme must be considered to be a four party payment card scheme, pursuant to Article 1(5) of that Regulation, with the result that the obligations stemming from Articles 3 to 5 and Article 7 of that regulation are applicable to it.

73 In the light of the foregoing, the answer to the first question is that Article 1(5) of Regulation 2015/751 must be interpreted as meaning that, in the context of an arrangement between a co-branding partner or an agent, on the one hand, and a three party payment card scheme, on the other, it is not a prerequisite of that scheme being regarded as issuing card-based payment instruments with a co-branding partner or through an agent and therefore being considered to be a four party payment card scheme, within the meaning of Article 1(5) of Regulation 2015/751, that that co-branding partner or agent act as an issuer, within the meaning of Article 2(2) of that regulation.

The second question

74 By its second question, the referring court seeks in essence to ascertain whether Article 1(5) and Article 2(18) of Regulation 2015/751 are invalid in so far as they provide that a three party payment card scheme is to be considered to be a four party payment card scheme for the sole reason that it has entered into an arrangement with a co-branding partner or an agent, even though that co-branding partner or agent does not act, within the framework of that arrangement, as an issuer, within the meaning of Article 2(2) of that regulation.

Whether there was a breach of the duty to state reasons

75 As regards the duty to state reasons, it must be recalled that, in accordance with the Court's settled case-law, although the statement of reasons for an EU measure, which is required by Article 296(2) TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. In addition, the question whether the duty to state reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 70 and the case-law cited).

76 Furthermore, the Court has repeatedly held that if an act of general application discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made (judgment of 3 March 2016, *Spain* v *Commission*, C-26/15 P, not published, EU:C:2016:132, paragraph 31 and the case-law cited).

77 In this case, recital 28 of Regulation 2015/751 sets out with sufficient clarity the reasoning that underlies the decision that, in certain situations, three party payment card schemes should be treated in the same way as four party payment card schemes. As has been said in paragraph 68 of the present judgment, that recital states that it is to 'acknowledge the existence of implicit interchange fees' and to 'contribute to the creation of a level playing field' that three party payment card schemes are to be considered to be four party payment card schemes and to follow the same rules, while 'transparency and other measures related to business rules should apply to all providers'.

78 Further, recital 28, the second sentence of Article 1(5), and Article 2(17) and (18) of Regulation 2015/751 indicate the differences which exist between three party payment card schemes and four party payment card schemes, and which justify treating the former in the same way as the latter only to a certain extent, for the purposes of the application of the rules relating to the capping of interchange fees and the separation of payment card schemes from processing entities.

79 It follows, as stated, in essence, by the Advocate General in point 117 of his Opinion, that, by explaining the general situation that led to the partial classification of three payment card schemes as four party payment card schemes and the general objectives pursued by that classification, those provisions enable persons concerned to understand the reasons for that classification and the Court to exercise its power of review, in accordance with the case-law cited in paragraph 75 of the present judgment.

80 That being the case, in accordance with the case-law set out in paragraphs 75 and 76 of the present judgment, the EU legislature was not required to provide, in Regulation 2015/751, a statement of reasons for each of the technical choices that it made, underlying the three situations described in Article 1(5) of that regulation.

81 It cannot therefore be held that Regulation 2015/751 is vitiated by a failure to state reasons in that regard, of such a kind as to entail the invalidity of Article 1(5) and Article 2(18) of that regulation.

Whether there was a manifest error of assessment

82 It is stated in the order for reference that the validity of Article 1(5) and Article 2(18) of Regulation 2015/751 is disputed in the main proceedings on the ground that those provisions are vitiated by a manifest error of assessment. It is claimed that they provide that, within the framework of an arrangement between a co-branding partner or an agent, on the one hand, and a three party payment card scheme, on the other, it is not a condition of that scheme being considered to be a four party payment card scheme that that co-branding partner or that agent should be involved in the issuing activity of the three party payment card scheme.

83 However, it is not apparent from the material sent to the Court in relation to the present procedure that the EU legislature, for that reason, caused Article 1(5) and Article 2(18) of Regulation 2015/751 to be vitiated by a manifest error of assessment.

84 In particular, as stated, in essence, by the Advocate General in points 121 to 124 of his Opinion, nothing has been submitted to the Court to suggest that the EU legislature erred when it decided on the extent to which three party payment card schemes and four party payment card schemes should be treated in the same way, with respect to the rules laid down in Articles 3 to 5 and Article 7 of Regulation 2015/751, to ensure that the objectives set out in paragraphs 67 to 69 of the present judgment could be achieved.

Whether there was a breach of the principle of proportionality

85 It must be recalled that, according to the Court's settled case-law, the principle of proportionality requires that acts of the EU institutions should be appropriate for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is necessary in order to achieve those objectives (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 67 and the case-law cited).

86 With regard to judicial review of compliance with those conditions, the Court has accepted that in the exercise of the powers conferred on it the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 52 and the case-law cited).

87 In this case, given that nothing has been submitted to the Court to suggest that Article 1(5) and Article 2(18) of Regulation 2015/751 are not appropriate for attaining the legitimate objectives pursued by that regulation, as described in paragraphs 67 to 69 of the present judgment, the Court must reject the argument that those provisions, in so far as they do not provide that the classification of a three party payment card scheme as a four party payment card scheme is conditional on the co-branding partner or the agent concerned acting as an issuer, are in breach of the principle of proportionality. In particular, since, as was stated in paragraph 71 of the present judgment, it is not inconceivable that some type of consideration or benefit might be identified in co-branding or agency contracts, even though the co-branding partner or agent is not necessarily involved in the issuing activity of the three party scheme concerned, it was not manifestly inappropriate, in the light of such objectives, to decide that such remuneration should also be subject to the interchange fee caps set by that regulation.

88 It follows from all the foregoing that consideration of the second question has disclosed nothing capable of affecting the validity of Article 1(5) and Article 2(18) of Regulation 2015/751.

Costs

89 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 1(5) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions must be interpreted as meaning that, in the context of an arrangement between a co-branding partner or an agent, on the one hand, and a three party payment card scheme, on the other, it is not a prerequisite of that scheme being regarded as issuing card-based payment instruments with a co-branding partner or through an agent and therefore being considered to be a four party payment card scheme, within the meaning of Article 1(5) of Regulation 2015/751, that that co-branding partner or agent act as an issuer, within the meaning of Article 2(2) of that regulation.**

2. **Consideration of the second question referred for a preliminary ruling has disclosed nothing capable of affecting the validity of Article 1(5) and Article 2(18) of Regulation 2015/751.**

Silva de Lapuerta Fernlund Bonichot

Rodin Regan

Delivered in open court in Luxembourg on 7 February 2018.

A. Calot Escobar
Registrar

R. Silva de Lapuerta
President of the First Chamber