



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 6 July 2017¹

Case C-304/16

American Express Co.
v
The Lords Commissioners of Her Majesty's Treasury,
interveners:
Diners Club International Ltd,
MasterCard Europe SA

(Request for a preliminary ruling from the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom))

(Regulation (EU) 2015/751 — Card-based payment transactions — Interchange fees for card-based payment transactions — Four party payment card schemes — Three party payment card schemes — Definition of card issuer — Three party payment card scheme with a co-branding partner — Three party payment card scheme with an agent)

1. Behind such a commonplace and, on the face of it, simple transaction as payment by card for the purchase of goods and services, there lies a complex network of legal relationships which it is difficult for consumers to imagine. As a minimum, in addition to the consumer and the merchant, every transaction using a payment card involves the bank or banks of both parties and the card processing entity.

2. One of the most important aspects of that network is the fees² levied by financial institutions in return for the services they provide to consumers and merchants for facilitating the use of payment cards. After the European Commission applied the rules on the protection of free competition to 'multilateral interchange fees'³ in the MasterCard payment system, the Court had an opportunity to give a ruling on those fees.⁴

3. The Court is now seised of another issue: the distinction between the two major models of payment card scheme:⁵ the four party scheme (the most widespread, embodied by MasterCard and Visa) and the three party scheme (represented, inter alia, by American Express and Diners Club).

¹ Original language: Spanish.

² The term 'fee' is used here in the broad sense, subject to a subsequent analysis of its features and subcategories. In particular, the usual expression for referring to one of those subcategories (which is important for the purposes of the proceedings) is the so-called 'interchange fee'.

³ 'MIFs'.

⁴ Judgment of 11 September 2014, *MasterCard v Commission* (C-382/12 P, EU:C:2014:2201).

⁵ Synonyms for 'payment card schemes' include the terms 'payment card networks' and 'payment card systems'.

4. Regulation (EU) 2015/751⁶ limits interchange fees in four party schemes and allows discretion when it comes to fixing fees in three party schemes. Since the differences between the two types of scheme are not obvious in the light of that regulation, the Court is called upon to clarify them, provided that the request for a preliminary ruling submitted by the referring court is admissible.

I. Legal framework: EU law

5. Interchange fees are one of the most significant costs in card-based payment transactions. In view of the differences existing between the Member States, which adversely affected the integration of the European retail payments (other than cash) market, the EU decided to harmonise those fees with the aim of reducing their amount and improving the control of them.

6. That was the purpose behind the adoption of the regulation. Since it is a directly applicable provision, there is not, in principle, any need for national implementing measures to be drawn up (other than in relation to penalties, the determination and imposition of which has been entrusted to the Member States, pursuant to the express reference in Article 14(1) of the Regulation).

7. The Regulation took account of the two models of payment card scheme: the four party and three party schemes. As regards those schemes, the recitals transcribed below state as follows:

‘(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.

...

(32) Consumers tend to be unaware of the fees paid by merchants for the payment instrument they use. At the same time, a series of incentivising practices applied by issuers (such as travel vouchers, bonuses, rebates, charge backs, free insurances, etc.) may steer consumers towards the use of payment instruments, thereby generating high fees for issuers. To counter this, the measures imposing restrictions on interchange fees should only apply to payment cards that have become mass products and merchants generally have difficulty refusing due to their widespread issuance and use (i.e. consumer debit and credit cards). In order to enhance effective

⁶ Regulation 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; ‘the Regulation’).

market functioning in the non-regulated parts of the sector and to limit the transfer of business from the regulated to the non-regulated parts of the sector, it is necessary to adopt a series of measures, including the separation of scheme and infrastructure, the steering of the payer by the payee and the selective acceptance of payment instruments by the payee.

- (33) A separation of scheme and infrastructure should allow all processors to compete for customers of the schemes. As the cost of processing is a significant part of the total cost of card acceptance, it is important for this part of the value chain to be opened to effective competition. On the basis of the separation of scheme and infrastructure, card schemes and processing entities should be independent in terms of accounting, organisation and decision-making process.

...'

8. Article 1, in Chapter I ('General provisions'), states:

'1. This Regulation lays down uniform technical and business requirements for card-based payment transactions carried out within the Union, where both the payer's payment service provider and the payee's payment service provider are located therein.

...

3. Chapter II does not apply to the following:

- (a) transactions with commercial cards;
- (b) cash withdrawals at automatic teller machines or at the counter of a payment service provider; and
- (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.'

9. Article 2 includes a substantial list of definitions of the terms used. Of particular relevance to these proceedings are the definitions in points 2, 10 to 12, 15 to 18 and 32, which are worded as follows:

'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;
- (12) “merchant service charge” means a fee paid by the payee to the acquirer in relation to card-based payment transactions;
- ...
- (15) “payment card” means a category of payment instrument that enables the payer to initiate a debit or credit card transaction;
- (16) “payment card scheme” means a single set of rules, practices, standards and/or implementation guidelines for the execution of card-based payment transactions and which is separated from any infrastructure or payment system that supports its operation, and includes any specific decision-making body, organisation or entity accountable for the functioning of the scheme;
- (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;
- ...
- (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;
- ...

10. Article 3(1) provides:

‘Payment service providers shall not offer or request a per transaction interchange fee of more than 0.2% of the value of the transaction for any debit card transaction.’

11. According to Article 4:

‘Payment service providers shall not offer or request a per transaction interchange fee of more than 0.3% of the value of the transaction for any credit card transaction. For domestic credit card transactions Member States may define a lower per transaction interchange fee cap.’

12. In accordance with Article 5:

‘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.’

13. Article 7, which is not applicable to three party payment card schemes, governs the separation of payment card schemes and processing entities.

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

14. American Express Company (‘Amex’) is an international services company established in New York, which, with the support of its subsidiaries, provides payment, travel, exchange and loyalty rewards platform services while also carrying out activities relating to the issuing and acquisition of cards worldwide, including in the European Union.

15. That company operates the American Express payment card scheme, which is classified as a three party scheme. In the European Union, Amex has entered into a number of co-branding and service provision arrangements with other entities. In accordance with those agreements, subject to the interpretation of the Regulation, the restrictions imposed by the Regulation on four party payment card schemes are applicable to its transactions.

16. Diners Club International Limited, a subsidiary of Discover Financial Services which operates the Diners Club three party payment card scheme and supports Amex’s arguments in the proceedings before the referring court, is in a similar situation.

17. MasterCard Europe SA (‘MasterCard’), the main European subsidiary of MasterCard Incorporated, is also involved in those proceedings. That company operates four party credit and debit card schemes worldwide under the name MasterCard. Having been granted leave to intervene by the referring court, it contests Amex’s arguments.

18. Amex applied to the referring court for permission to bring a claim for judicial review of the obligation and/or intention of Her Majesty’s Treasury⁷ to enforce and apply in the United Kingdom certain aspects of Articles 1(5) and 2(18) of the Regulation.

19. The point at issue specifically concerns two of the three situations provided for in Article 1(5) and 2(18) of the Regulation, in which certain three party payment card schemes are classified as four party payment card schemes.

20. The referring court states that there is common ground between the parties and that it is in no doubt regarding the application of the first situation provided for in those provisions: when a three party scheme licenses other payment service providers to issue payment cards or to acquire card-based payment transactions, or both, it is subject to the Regulation in the same way as four party schemes.

⁷ Her Majesty’s Treasury is the administrative body responsible for applying the Regulation in the United Kingdom.

21. The uncertainty relates to the other two situations, that is, when a three party scheme issues ‘card-based payment instruments with a co-branding partner or through an agent’. The referring court asks the Court of Justice to clarify whether, in those circumstances, the activities of a three party scheme can be treated as those of a four party scheme, for the purposes of the Regulation in all cases (in other words, it is sufficient that there is a co-branding partner or agent) or only if a co-branding partner or agent is a payment service provider which issues the cards.

22. Finally, if a three party scheme becomes a four party scheme because of the involvement of a co-branding partner or agent, the referring court questions the validity of Articles 1(5) and 2(18) of the Regulation.

23. In the light of those considerations, by order of 30 May 2016, the High Court of Justice of England & Wales, Queen’s Bench Division (Administrative Court) (United Kingdom) referred 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 (1) is “no”, are Articles 1(5) and 2(18) of [that Regulation] 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?’

24. Written observations were lodged in the proceedings before the Court of Justice by Amex, MasterCard, the United Kingdom and Portuguese governments, the Commission, the Council and the European Parliament. At the hearing, held on 27 April 2017, oral argument was presented by Amex, MasterCard, the United Kingdom Government, the Commission, the Council and the European Parliament.

III. Analysis

25. The Commission, the Council and the European Parliament contest the admissibility of the questions referred for a preliminary ruling. I shall deal with their objections before I conduct any examination of the substance. If such an examination is necessary, directly or in the alternative, it must be preceded, for ease of understanding, by an explanation of the legal relationships which exist in card-based payment transactions.

A. Admissibility of the questions referred for a preliminary ruling

26. The three institutions, which have all put forward a plea of inadmissibility, rely on the following arguments: (a) there is not a genuine dispute between the parties, since the application for a judicial review of the ‘intention and/or obligation’ of the United Kingdom Government to apply the Regulation is in fact a way of circumventing the system of remedies laid down in the TFEU; (b) the question submitted is hypothetical; and (c) the referring court has not set out the relevant factual and legal aspects or the reasons which led it to question the validity of Articles 1(5) and 2(18) of the Regulation.

27. Admittedly, this reference for a preliminary ruling is unusual and contains a number of anomalies which could provide grounds for a ruling of inadmissibility, in accordance with the case-law of the Court and Article 94 of the Rules of Procedure.

28. First, the referring court does not describe the factual background of the dispute. It merely states that Amex’s action is related to ‘the defendant’s [Her Majesty’s Treasury] obligation and/or intention to implement in the United Kingdom certain aspects of Articles 1(5) and 2(18) of [the Regulation]’. The referring court does not describe how the United Kingdom authorities intend to apply the contested provisions or whether they have yet applied those provisions.

29. Second, the order for reference states that Amex, the applicant, and Her Majesty’s Treasury, the defendant, are in agreement as to what the outcome of the proceedings should be. The defendant does not in fact oppose the action brought by the applicant. Moreover, the defendant has cooperated with the applicant for the purpose of seeking a preliminary ruling.

30. Third, the referring court merely sets out the arguments put forward by the parties and does not explain its own reasons for making a reference for a preliminary ruling or state why its questions are essential to the outcome of the (alleged) dispute. In fact, the referring court has lodged with the Court the document drawn up by the parties, which it has incorporated into its order.⁸

31. A reference for a preliminary ruling made in those circumstances should not be held by the Court to be admissible.

32. There is one specific factor which might explain the referring court’s approach. The questions have arisen in the context of a judicial review of the ‘obligation and/or intention’ of the United Kingdom Government to apply a provision of EU secondary legislation. Judicial review is a *sui generis* procedure of United Kingdom law which, as used in practice, enables individuals to request an interpretation or a declaration of invalidity of a legislative measure which has not (yet) been applied to them.

33. In my opinion, the Court has been rather *generous* in ruling admissible questions referred for a preliminary ruling by United Kingdom courts in such proceedings, where they concern an issue of validity of provisions of EU law.⁹ I believe that that approach enables litigants in the United Kingdom (in contrast to those in other Member States) to contest the validity of EU legislative acts of general application even before those acts produce legal effects in national law.¹⁰ I shall return to this point later.

⁸ That document, agreed by the parties, does set out the reasons for the reference for a preliminary ruling and the questions to be referred.

⁹ Judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraphs 32 to 41); of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraphs 30 to 35); of 8 July 2010, *Afton Chemical* (C-343/09, EU:C:2010:419, paragraphs 13 to 26); of 4 May 2016, *Philip Morris Brand and Others* (C-547/14, EU:C:2016:325, paragraphs 30 to 36); and of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraphs 14 to 31).

¹⁰ That has occurred, for example, in proceedings concerning the validity or the interpretation of a number of directives before the period for transposition of those directives has expired.

34. There are, however, a number of reasons that argue in favour of admissibility. The first is the presumption of relevance which the Court confers on questions referred for a preliminary ruling, owing to the national court's discretion as to whether its reference is essential. Nevertheless, that presumption is rebuttable.¹¹

35. Furthermore, it is significant that the Court has previously answered questions referred for a preliminary ruling by United Kingdom courts in judicial review proceedings.¹² Admittedly, the majority of those precedents concerned the interpretation of directives but I do not believe there would be insurmountable difficulties in applying them to the interpretation and validity of a regulation.¹³

36. A regulation is directly applicable (second paragraph of Article 288 TFEU), which means that it cannot be the subject of legislative implementation through the adoption of legal or regulatory provisions by the Member States unless stipulated in the regulation itself.¹⁴ In many cases, regulations provide that national authorities are responsible for their administrative application and it is not unusual for that application to lead to uncertainties before national courts as to the interpretation or validity of some of their provisions.¹⁵

37. That occurs in this case, for there are at least two ways of interpreting and applying Articles 1(5) and 2(18) of the Regulation to three party payment card schemes and it is possible to put forward reasons militating against the validity of those provisions.

38. Furthermore, the case-law of the Court does not make the admissibility of questions referred for a preliminary ruling subject to the criterion that measures for the implementation of an EU act have actually been adopted in national law. It will suffice if the national court is seised of a genuine dispute in which the interpretation or validity of those measures is contested incidentally.

39. Third, the referring court allowed the original action to proceed, which means that, in its view, the proceedings were brought in accordance with the existing rules of its legal system.¹⁶ The possibility of adjudicating on the interpretation and validity of the two articles referred to above in advance of their administrative application does not appear to create procedural difficulties for that court.

11 It is settled case-law 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. Accordingly, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule 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 (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 24 and 25; of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraphs 15 and 16; of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 19; of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 54; and of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraphs 50 and 155).

12 See footnote 9.

13 The judgment of 8 June 2010, *Vodafone and Others* (C-58/08, EU:C:2010:321) provides an example of an admissible reference for a preliminary ruling concerning a regulation, which was made in United Kingdom judicial review proceedings. In that case, mobile telephone operators brought proceedings before the High Court of Justice of England & Wales, Queen's Bench Division (Administrative Court), challenging the Mobile Roaming Regulations 2007 which gave effect to certain provisions of Regulation (EC) No 717/2007 in the United Kingdom. However, it is important to point out that that case, unlike the instant case, was brought against national provisions implementing a regulation and that the case involved a genuine dispute between mobile telephone operators and the United Kingdom Government. The latter argued that the action was unfounded and opposed the reference of the questions for a preliminary ruling.

14 Article 13 of the Regulation authorises Member States to designate the competent authorities that will apply the provisions of the Regulation. In addition, it calls on Member States to require the competent authorities to monitor application of the Regulation in order to counter attempts by payment service providers to avoid compliance. Similarly, Article 14 requires Member States to adopt rules on the penalties applicable to infringements of the Regulation.

15 An example is provided by the judgment of 8 June 2010, *Vodafone and Others* (C-58/08, EU:C:2010:321).

16 The second page of the English version of the order for reference states: 'And upon permission to proceed with the claim for judicial review having been granted by the Order of Mr Justice Blake of 24 September 2015'.

40. Last, the national court's drafting technique in its order for reference could clearly be improved upon because it merely adopts as its own the explanation of the factual and legal aspects of the case supplied by the parties, and fails to provide its own account.¹⁷ Even so, taken as a whole, the order makes it possible to form a sufficient view of those factual and legal aspects¹⁸ and has provided the interested parties (the Commission, the Council, the European Parliament, the United Kingdom and Portuguese governments, Amex and MasterCard) with the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union.

41. Notwithstanding the force in those arguments, I believe that on the scales to measure inadmissibility, two of the opposing arguments carry more weight.

42. Proceedings like these provide litigants before the United Kingdom Courts with the opportunity to 'circumvent' the limitations of *locus standi* laid down for actions for annulment against EU legislative acts of general application. Use of the preliminary ruling procedure, as has occurred here, affords those litigants the not insignificant procedural *advantage* of being able to contest the lawfulness of those acts prior to their administrative application and in the light of the future, rather than current, effects on the legal position of those to whom the acts are addressed.¹⁹

43. Where requests for a preliminary ruling of this kind are allowed to proceed, it may create discrimination in the use of the preliminary ruling mechanism, to the detriment of individuals in the other Member States who must wait until they are affected by an administrative measure applying the act in question before contesting that measure and, as the case may be, seeking the annulment of the measure and of the provision of EU law on which it is based.

44. According to the rationale for the EU system of remedies, claims for annulment are reserved to applicants who have general *locus standi* or to persons who are directly and individually affected by a particular act. Since the latter are required to use, within the time limit, the (direct) action for annulment before the General Court, they are precluded from claiming, as a prior issue or in parallel, that the national court should request a preliminary ruling on the question of validity.²⁰

45. In my view, that feature of the system of remedies against EU acts could be fragmented if references for a preliminary ruling like this one became widespread. Proposing that the reference for a preliminary ruling should be ruled inadmissible is not tantamount to criticising, even indirectly, the characteristics of the judicial review procedure whose flexibility I find highly laudable. The autonomy granted to the Member States to structure their national procedural law allows them to design their system of remedies as they see fit. In relation to references for a preliminary ruling, they must comply with Article 267 TFEU and the case-law of the Court on the conditions for challenging the validity of EU acts, both directly and in preliminary ruling proceedings.

17 According to settled case-law, since it is the request for a preliminary ruling that serves as the basis for the proceedings before the Court, it is essential that the national court should set out, in that request, the factual and legal background to the dispute in the main proceedings and provide at the very least some explanation of the reasons for the choice of the provisions of EU law of which it requests an interpretation and of the link that it establishes between those provisions and the national legislation applicable to the dispute before it (see, *inter alia*, judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 115, and the order of 8 September 2006, *Google Ireland*, C-322/15, EU:C:2016:672, paragraph 18).

18 The fact that the referring court did not make certain initial findings does not necessarily mean, however, that the request for a preliminary ruling is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the case file, considers that it is in a position to provide a useful answer to the referring court (see, in that connection, order of 8 September 2016, *Google Ireland*, C-322/15, EU:C:2016:672, paragraph 24, and judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 48 and the case-law cited).

19 The Court rejected that criticism in its judgment of 8 July 2010, *Afton Chemica* (C-343/09, EU:C:2010:419, paragraphs 13 to 26).

20 According to settled case-law, where an individual definitely has legal standing to challenge an EU legislative act by means of an action for annulment, he cannot plead the invalidity of that act in the context of a preliminary ruling procedure (see, to that effect, judgments of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, paragraphs 23 to 25; of 15 February 2001, *Nachi Europe*, C-239/99, EU:C:2001:101, paragraphs 36 and 37; of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, paragraph 46; and of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 128).

46. As I have pointed out, in this case there is not a genuine dispute before the national court between Amex and the United Kingdom authorities. Both have adopted the same position and they are not in court to resolve a genuine dispute about whose outcome they differ but rather only so that the questions the parties themselves have prepared can be referred to the Court of Justice.

47. The typical (and essential) feature of any dispute is that it involves opposing, not identical, positions. However, what emerges here instead is a procedural device staged, by mutual agreement, with the sole aim of obtaining a ruling from the Court of Justice, where there is no genuine dispute between applicant and defendant. It amounts *de facto* to a request to the Court of Justice for an advisory opinion to dispel certain doubts regarding the interpretation and validity of the Regulation.

48. In those circumstances, I am in favour of proposing to the Court that the questions referred for a preliminary ruling should be ruled inadmissible. However, in case the Court does not agree with that proposal, I shall deal below with the substance of the questions referred.

B. General considerations concerning payment card schemes

49. Every purchase made using a payment card usually involves the following parties: (a) the cardholder; (b) the financial institution — normally a bank — which issues that card and supplies it to its customers ('the issuing bank');²¹ (c) the merchant who sells goods or provides services that are paid for using the card; (d) the financial institution which provides that merchant with the services that enable it to accept the card, which may also be a bank and which, in the jargon of such transactions, is called the 'acquiring bank'; and (e) the payment card scheme, such as Visa, MasterCard, American Express and Diners Club. Local card-based payment transaction processing networks may also be involved.

50. Card-based payment creates a complex web of legal relationships between those parties.²² First, there is a contract for the issue of the payment card between the cardholder and the issuing bank, pursuant to which the former usually pays a fee to the latter. Issuing banks approve the consumer's order by confirming that he has a sufficient balance in his account (debit card) or that the payment amount is covered by the available credit limit (credit card).

51. Second, there is an affiliation contract between the merchant and the acquiring bank, pursuant to which the latter provides the former with the services necessary for accepting cards as a means of payment. The merchant bears a reduction of the final sale price of his goods or services (which includes the interchange fees) as consideration for the platform provided to him by the bank (through a point of sale terminal or a payment gateway linked to the online shop) for receiving the payment order from the consumer and for making the payments for the purchase transactions presented by the shop. In addition, acquiring banks capture data from the transaction, forward that data to processing entities and remit funds to the shop after deduction of the interchange fee and merchant service charge.

52. Payment card schemes carry out clearing and settlement of payment orders, for which they receive a fee from the (issuing and acquiring) banks licensed to use their brands.

53. Last, the involvement of payment processing entities leads to the conclusion of a user licence and brand usage agreement between those entities and the card payment schemes. Those processing entities act as an instrument of collective participation by the financial entities within it and the interchange fees are usually agreed collectively.

²¹ For greater clarity, I shall refer to those parties as the 'issuing bank' although other financial institutions may be card issuers.

²² See the analysis of Guibert Echenique, S., 'Consideraciones críticas sobre la legislación de tasas de intercambio en las operaciones de pago con tarjeta de crédito y débito', *Diario La Ley*, No 8566, 22 June 2015, pp. 1 to 3.

54. Depending on the participants, payment card schemes conduct their activities in accordance with two models: four party or open schemes and three party or closed schemes.

55. Four party schemes (Visa and MasterCard) are dominant in the market. In those schemes, payments are made from the account of a payer (consumer) to that of a payee (merchant) through the payment card scheme. The consumer's card-issuing bank and the acquiring bank, which provides the technical support to ensure the merchant receives the payment, are involved.²³

56. Four party schemes are so-called because they involve four parties (the cardholder and his issuing bank, in addition to the recipient of the payment and his acquiring bank), together with the entity managing the payment scheme. They are open schemes because, in addition to the company managing the payment card scheme, they involve two financial institutions.

57. In those schemes, the card-issuing bank charges the acquiring bank a fee ('interchange fee') to compensate it for the costs it is unable to recover through the charges levied on the cardholder (such as, inter alia, those charged for delivery and annual maintenance of the card).

58. That interchange fee is, in turn, passed on by the acquiring bank to the merchant as a cost more associated with other costs resulting from the financial services provided, which make up the so-called merchant service charge. The interchange fee represents a minimum threshold and an important component of the financial costs passed on by the acquiring bank to the merchant, who, in turn, usually transfers those costs to the sale price charged to consumers.

59. The other model of payment card scheme is the three party or closed scheme, such as American Express or Diners Club, in which the consumer (cardholder) and the merchant have a direct relationship with the card-issuing scheme. That is why they are called three party schemes, because no other financial institution is involved: they are closed schemes.

60. A transaction within a three party scheme involves only one financial services provider, which acts as issuer and acquirer. Furthermore, since there is no card-issuing bank or payment-acquiring bank, there is no interchange fee. The three party scheme is free to fix individually the fees and charges it will collect from merchants for the financial services it provides to them.

61. In the European Union, three party schemes carry out a very low volume of transactions compared with four party schemes and aim to attract specific categories of consumers. Since they do not occupy a dominant position in the payment card market, merchants are effectively free to decide whether to agree to use three party schemes.

62. However, three party schemes exist which are not genuine three party schemes and do not operate in the way described above. This occurs where a scheme concludes a user licence and brand usage agreement with other financial institutions to enable the latter to act as issuers of its payment cards. In this situation the fees agreed are equivalent to interchange fees.

²³ See the description of those schemes in the judgment of 11 September 2014, *MasterCard v Commission* (C-382/12 P, EU:C:2014:2201, paragraph 4); in the judgment of 24 May 2012, *MasterCard and Others v Commission* (T-111/08, EU:T:2012:260, paragraph 17); and in 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 (Case COMP/34.579 — MasterCard, Case COMP/36.518 — EuroCommerce, Case COMP/38.580 — Commercial Cards), recitals 234 to 249.

63. There are also so-called ‘three party schemes with extensions’ which emerge when a scheme widens its activities to work with ‘third parties’, either by issuing cards ‘with a co-branding partner’ (‘the co-brand extension’)²⁴ or ‘through an agent’ (‘the agency extension’). In both cases, the amounts exchanged between the three party scheme and the other brands or agents may constitute fees equivalent to the interchange fees in four party schemes. That is the uncertainty which the referring court asks the Court of Justice to clarify.

64. Interchange fees increased the cost of provision of payment card services, to the detriment of consumers; moreover, the amount of those fees varied widely from one Member State to another.²⁵ For those reasons, the EU, first, tried to moderate the amount of interchange fees by applying rules on the protection of competition and, later, relied on the harmonisation of laws in the context of the development of common payment legislation.

65. The Commission applied the rules on competition to Visa’s²⁶ and MasterCard’s²⁷ MIFs. Those fees constituted a common cost borne by all the acquiring banks in a four party scheme, the level of which acted as a ‘minimum price’ when those banks entered into agreements with their own customers (the merchants) regarding the price of the services they provided to those customers.

66. The Commission declared that the agreements relating to the MIFs of four party schemes were contrary to EU law, in particular because the banks collectively imposed a minimum price on merchants; that declaration was subsequently confirmed by the Court.²⁸

67. Accordingly, the Commission obtained commitments to make substantial reductions in Visa’s and MasterCard’s MIFs, which amounted to 0.3% in credit card transactions and 0.2% in debit card transactions.

68. Nevertheless, that approach has proved to be insufficient to control interchange fees.²⁹ Competition between payment card schemes, which try to convince payment service providers to issue their cards, leads, paradoxically, to higher rather than lower interchange fees, in contrast with the usual price-disciplining effect of competition in a market economy.³⁰ That situation was the justification for the adoption of the Regulation, which provides for statutory control of interchange fee caps, together with other measures governing the relationships between the different parties involved in card-based payment transactions. Its aim is to ensure that interchange fees do not create an obstacle to the development of an integrated payment services market in the EU.

24 For example the Amex scheme card which is marketed under the co-brands Amex/Iberia and Amex/British Airways.

25 See the Commission Staff Working Document. Impact Assessment Accompanying the document Proposal for a directive of the European parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC and Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions SWD(2013) 288 final, pp. 96 to 108.

26 See 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 Visa’s intra-regional MIFs in the European Union were exempted for a period of five years subject to certain conditions, the main one being that those fees were to be connected to the level of certain costs and were not to exceed the threshold of those costs. On 8 December 2010, the Commission adopted a second decision relating to Visa (COMP/D-1/39.398, Visa MIF) which made the commitments proposed by Visa, including the commitment to establish a cap for its MIFs, compulsory.

27 Commission Decision C(2007) 6474 final of 19 December 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/34.579 — MasterCard, Case COMP/36.518 — EuroCommerce, Case COMP/38.580 — Commercial Cards).

28 Judgment of 11 September 2014, *MasterCard and Others v Commission* (C-382/12 P, EU:C:2014:2201, paragraph 112).

29 See Andrea Lista, *EU Competition Law and Financial Service Sector*, Routledge, 2013, pp. 145 to 188.

30 See the European Commission, *The Interchange Fees Regulation*, Competition Policy Brief 2015-3, June 2015.

C. First question: application of the Regulation to three party schemes with extensions

69. As I pointed out above, neither the referring court nor the parties have any doubts concerning the classification as a four party scheme, under Articles 1(5) and 2(18) of the Regulation, of a three party scheme which licenses other payment service providers to issue its cards, to acquire payment transactions using its cards or to carry out both tasks.³¹

70. The referring court's doubts and the views of the parties focus on the other two situations provided for in Article 1(5) and 2(18) of the Regulation: when a three party scheme issues 'card-based payment instruments with a co-branding partner or through an agent'. The Court must determine whether, in those two situations, the three party scheme with extensions should be classified as a four party scheme or whether that will be the case only if the partner or agent deals with the issuing of the card and/or the acquisition of payments.

71. The wording of Articles 1(5) and 2(18) of the Regulation is not entirely clear and its ambiguity cannot be dispelled simply by reading those provisions.

72. Amex and the United Kingdom Government support a strict interpretation of the provisions. They contend that three party schemes should be classified as four party schemes only if the partner or agent acting as an extension of those schemes issues or acquires payments. However, MasterCard, the Portuguese Government and the Commission put forward a broad interpretation of those provisions, pursuant to which all co-brand or agency extensions of three party schemes are to be classified as four party schemes.

73. The choice of one interpretation or the other of that provision has significant consequences. The strict interpretation results in the non-application to that category of three party schemes (with co-brand or agency extensions) of a number of restrictions laid down in the Regulation, in accordance with Article 1(3) and (4). In particular, fees agreed in the context of those schemes are not classified as interchange fees, which exempts those fees from compliance with the caps referred to above (0.2% for debit cards and 0.3% for credit cards). Nor are such fees affected by the prohibition of circumvention of those caps by the fixing of fees having an equivalent effect to interchange fees. Further, such fees are not subject to the obligation relating to the separation of payment card schemes and processing entities (Article 7 of the Regulation).

74. I shall reveal now that I intend to argue in favour of a broad interpretation of Articles 1(5) and 2(18) of the Regulation. As is usual, I shall rely on literal, systematic and purposive interpretations to decipher the meaning of those provisions.

1. The literal interpretation

75. The wording of Articles 1(5) and 2(18) of the Regulation is identical and it follows from that wording that four party and three party schemes are treated as equivalent in three cases:

- three party payment card schemes which license other payment service providers to issue their cards or to acquire card-based payment transactions (non-genuine three party schemes);³²
- three party schemes which issue co-branded card-based payment instruments (three party scheme with co-brand extension);³³ and

³¹ These are non-genuine three party schemes because they also include a financial services provider, which destroys the triangular nature of such schemes. The fees paid between the various parties to these schemes can readily be equated to interchange fees.

³² As I have stressed, it is not disputed that these non-genuine three party schemes (an example of which is the Banco Santander/Amex cards, where that bank acts as the issuer) are comparable to four party schemes.

³³ For example Amex/Air France or Amex/Costco cards.

- three party schemes which issue card-based payment instruments through an agent (three party scheme with agency extension).

76. The latter two categories are the most commonplace on the market. In those categories, the proprietor of the co-branded card or the agent are not, or do not act as, financial institutions. Accordingly, they do not issue cards or acquire payments and merely provide the three party scheme with access to their customer base.

77. The provisions under examination are silent regarding any requirement that third parties who enter into such arrangements with three party schemes must ‘[issue] card-based payment instruments or [acquire] card-based payment transactions, or both’. That is specifically the criterion provided for in the case of non-genuine three party schemes. If, under the co-branding or agency arrangement, the third party working with the scheme acts as issuer³⁴ or acquirer,³⁵ that agreement is not an extension arrangement but a licence arrangement.

78. The Portuguese Government rightly states that another interpretation would make no sense because it would mean that the latter two situations provided for in Article 1(5) and 2(18) of the Regulation are encompassed by the former.

79. A literal interpretation of those two provisions therefore is conducive to treating as four party schemes all three party schemes with co-brand or agency extensions, regardless of whether or not the partners or agents are payment service providers³⁶ and of whether or not they act as card issuers and/or payment acquirers.

80. The United Kingdom Government and Amex disagree with that interpretation. In their submission, Articles 1(5) and 2(18) of the Regulation refer to three party schemes which ‘issue [cards] with a co-branding partner’ and which ‘issue [cards] through an agent’. They contend that the terms ‘with’ and ‘through’ show that the co-branding partner or agent must be involved in the issuing of the card, to which end they rely on the connection between those provisions and other provisions of the Regulation.

81. As I explained above, I do not agree with that position, which is not actually based on a strictly terminological analysis but rather on a systematic approach, with which I shall deal next.

2. The systematic and teleological interpretations

82. The United Kingdom Government and Amex rely on a systematic interpretation, referring to the definitions of issuer and issuing of a payment card contained in Article 2(2) and recital 29³⁷ of the Regulation. They conclude from those definitions that, where co-branding partners and agents do not make payment cards available to the payer, do not authorise transactions at terminals or their equivalent and do not guarantee payment to the acquirer for the transactions carried out, they cannot be classified as parties with (or via) which a three party scheme issues card-based payment instruments.

³⁴ Article 2(2) of the Regulation defines ‘issuer’ as ‘a payment service provider contracting to provide a payer with a payment instrument to initiate and process the payer’s card-based payment transactions’.

³⁵ Article 2(1) of the Regulation defines ‘acquirer’ as ‘a payment service provider contracting with a payee to accept and process card-based payment transactions, which result in a transfer of funds to the payee’.

³⁶ According to Article 2(24) of the Regulation, “payment service provider” means any natural or legal person authorised to provide the payment services listed in the Annex to Directive 2007/64/EC or recognised as an electronic money issuer in accordance with Article 1(1) of Directive 2009/110/EC. A payment service provider can be an issuer or an acquirer or both’.

³⁷ That recital, transcribed in point 7, states 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.’ The last sentence of the recital states that ‘the mere distribution of payment cards or technical services, such as the mere processing and storage of data, does not constitute issuing’.

83. In that same vein, Amex and the United Kingdom Government submit that, if the co-branding partner or agent confines its activity to the distribution of cards, technical payment services or simply the processing and retention of data, it does not act as an issuer, so that arrangements for the extension of three party schemes are not covered by Articles 1(5) and 2(18) of the Regulation, which means that they cannot be considered to be the same as four party schemes.

84. The United Kingdom Government and Amex submit that that approach is supported by recital 28 of the Regulation,³⁸ which treats three party schemes as four party schemes only when the former use another payment services provider as the issuer or the acquirer. The fact that no reference is made to arrangements with co-branding partners or agents who do not act as card issuers or acquirers leads to the conclusion that there are no implicit charges equivalent to interchange fees in those cases. Therefore, there is no justification for treating three party schemes as four party schemes.

85. Amex further submits that its interpretation of Article 1(5) is consistent with the rationale for the provision because the three situations provided for therein require the involvement of a payment services provider who is an additional ‘third party’ to the three party scheme and who receives fees, leading to those situations being treated identically to four party schemes.

86. However, it is my view that that interpretation of the terms ‘issuance’ (of payment cards), ‘co-branding’, and ‘agent’ leads to an outcome incompatible with the context, the scheme and the aims of the Regulation. Those terms, unlike others, are not defined by that provision and, according to settled case-law of the Court, they must be given an autonomous and uniform interpretation throughout the Union in view of the fact that they make no express reference to the law of the Member States for the purpose of determining their meaning and scope.³⁹

87. As I have noted, Articles 1(5) and 2(18) of the Regulation do not differentiate between instances of co-brand or agency extensions where the partner or agent is a payment service provider issuing cards and/or receiving card-based payments, and instances of extension where the partner or agent merely carries out another type of activity. The Commission rightly points out that that distinction is the outcome of Amex’s interpretation, but where the provision does not make a distinction, an interpreter of that provision must not do so either.

88. That distinction is argued against by the fact that it is not referred to in the definition of ‘co-branding’ in Article 2(32) of the Regulation.⁴⁰ That provision provides instead that co-branding entails the inclusion of the payment brand (for example, Amex) and at least ‘one non-payment brand’ belonging to an undertaking which does not provide financial services.⁴¹

89. Moreover, the distinction between the two types of extension, depending on whether the co-branding partner or the agent acts as a financial institution, is based on a reading of Articles 1(5) and 2(18) of the Regulation in conjunction with recital 29 of that regulation, by which I am again not persuaded.

38 According to which, ‘[t]o 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’.

39 See, to that effect, judgments of 17 July 2008, *Kozłowski* (C-66/08, EU:C:2008:437, paragraph 42); of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346, paragraph 28); and of 18 October 2016, *Nikiforidis* (C-135/15, EU:C:2016:774, paragraph 28).

40 ‘Co-branding’ is defined as ‘the inclusion of at least one payment brand and at least one non-payment brand on the same card-based payment instrument’.

41 Paragraph 28 of the order for reference mentions the brands ‘British Airways’, ‘Nectar’ and ‘Costco’.

90. The wording of those articles refers to three party schemes which ‘[issue] card-based payment instruments with a co-branding partner or through an agent’. Therefore, the three party schemes are the issuers of the payment instruments. Nothing in either provision suggests that it is the co-branding partners or agents which must issue the payment cards and/or accept payments made using those cards.

91. As the referring court explains in paragraphs 29 to 31 of the order for reference, the typical three party schemes with co-brand or agency extensions are those concluded with undertakings which do not provide financial services.⁴² Those extensions constitute a joint marketing exercise by means of which the two entities share their customer bases with each other and encourage the consumption of the goods and services they provide. For three party payment card schemes, the use of such extensions is an important way of reaching new customers, since, unlike four party schemes, those schemes do not benefit from the cooperation of other financial institutions.

92. As the Commission points out, for the purposes of the systematic interpretation, account must also be taken of the definitions of ‘interchange fee’ and ‘net compensation’ in Article 2(10) and (11) of the Regulation, and the implicit interchange fees referred to in recital 31,⁴³ together with the prohibition of circumvention of the caps set (Article 5).

93. A systematic interpretation of those provisions leads me to suggest a broad definition of the term ‘interchange fee’. Otherwise, circumvention of the rules limiting the amount of that fee would be straightforward for three party schemes, which could get round the cap by using indirect remuneration and compensation. Article 5 of the Regulation refers to such circumvention and applies a broad definition of the term: the interchange fee includes any agreed remuneration, including net compensation, with an equivalent object or effect of the interchange fee, received by an acquirer or any other intermediary in relation to payment transactions or related activities.

94. The definition of interchange fee must, therefore, encompass the total net amount of payments, rebates and incentives paid by the scheme to the co-branding undertaking and/or agent (net compensation). In other words, it must include all charges and remuneration paid, directly or indirectly. Recital 31 of the Regulation refers to direct payments (volume-based or transaction-specific) and to indirect payments (including marketing incentives, bonuses, rebates for meeting certain transaction volumes). It mentions, in particular, issuers’ profits resulting from special programmes carried out jointly by those undertakings and payment card schemes.

95. In my view, the charges which a three party scheme may pay, directly or indirectly, to undertakings or agents with which it agrees an extension have an equivalent object and/or effect to the compensation which forms part of interchange fees in four party schemes.⁴⁴

⁴² That is confirmed by the UK Financial Conduct Authority publication, *Credit cards market study: final findings report*, July 2016, p. 252, which defines ‘affinity or co-brand partners’ as ‘typically charities, membership groups or commercial businesses not directly involved in issuing credit cards or processing transactions but [which] lend their brands and give access to their customers or members to card issuers in return for a share of revenues or profits’.

⁴³ ‘It is important to ensure that the provisions concerning the interchange fees to be paid or received by payment service providers are not circumvented by alternative flows of fees to issuers. To avoid this, the “net compensation” of fees paid or received by the issuer, including possible authorisation charges, from or to a payment card scheme, an acquirer or any other intermediary should be considered as the interchange fee. When calculating the interchange fee, for the purpose of checking whether circumvention is taking place the total amount of payments or incentives received by an issuer from a payment card scheme with respect to the regulated transactions less the fees paid by the issuer to the payment card scheme should be taken into account. Payments, incentives and fees considered could be direct (i.e. volume-based or transaction-specific) or indirect (including marketing incentives, bonuses, rebates for meeting certain transaction volumes). In checking whether circumvention of the provisions of this Regulation is taking place, issuers’ profits resulting from special programmes carried out jointly by issuers and payment card schemes and revenue from processing, licensing and other fees providing revenue to payment card schemes should, in particular, be taken into account. ...’

⁴⁴ The award by American Express of points for the airline’s loyalty programme with its co-branded cards (Amex/Alitalia, Amex/Iberia, Amex/Air France, etc.) is an example of that type of indirect charge having an equivalent effect to interchange fees.

96. In accordance with the rationale and purpose of the Regulation, where a three party scheme pays compensation to a third party which cooperates with it in carrying out its activity (as is the case of co-branding undertakings or agents), the amount of that compensation will be passed on in the price of the service and will be paid by consumers. Admittedly, it is indirect compensation which is payment for the ability to access the customer bases of those cooperating undertakings but it is still a charge having an equivalent effect to the interchange fees applied in four party schemes and non-genuine three party schemes.

97. Moreover, three party schemes with co-brand or agency extensions do not satisfy the grounds for non-application of interchange fee caps to genuine three party schemes.

98. Acting with the support of intermediaries in relation to consumers of payment card services (unlike genuine three party schemes) entails a risk of high fees being set, which co-branding partners and agents may pass on to consumers, thereby increasing the price of payment card services. This is the same risk which arises in the case of four party schemes which work with other financial institutions.

99. The rationale for reducing those implicit interchange fees is, in my view, the same in both cases. Therefore, Articles 1(5) and 2(18) of the Regulation must be interpreted as meaning that three party schemes with co-brand or agency extensions must be treated as four party schemes.

100. The same conclusion is reached if regard is had to the need to ensure fair competition between the different payment card schemes, which is another valuable criterion for the systematic and teleological interpretation of the Regulation.

101. The application of caps only to interchange fees in four party schemes, leaving three party schemes with co-brand or agency extensions completely free to allocate fees, would constitute an advantage for three party schemes, since it would enable them to attract third parties to distribute their cards under more favourable conditions.

102. If they were exempt from the caps set for four party schemes, three party schemes with extensions would have an unfair advantage because they would have more options as to paying undertakings which work with them to market their cards.⁴⁵ It is also possible to imagine a situation where a bank might act as an agent for a three party scheme without being involved in either the issuing of the card or the receipt of payments, in order to receive higher fees.⁴⁶

103. That three party schemes are less established justifies favourable treatment where they act without using an intermediary. The Regulation grants them that favourable treatment, by authorising them to negotiate fees with merchants without the restrictions imposed on four party schemes, in order to increase competition in the payment card sector. However, that competitive advantage is not justified in the case of non-genuine three party schemes involving a co-branding partner or an agent⁴⁷

⁴⁵ In its written observations, MasterCard cites as an example of that advantage the difference in treatment which, since 9 December 2015, Alitalia has applied to its co-branded MasterCard (0.5 miles per euro spent) and Amex (1 mile per euro spent) cards. MasterCard also refers to the BNL Duo payment card: although it includes the possibility of making payments with MasterCard and with Amex using the same PIN, BNL discriminates in its BNL PAYBACK loyalty programme between MasterCard payments (1 point for every 2 euros spent) and Amex payments (2 points for every 2 euros spent).

⁴⁶ The United Kingdom Government has referred to the risk that four party schemes may be restructured as three party schemes with an agency extension (the financial institution becomes an agent) in order to avoid the interchange fee caps stipulated in the Regulation.

⁴⁷ The sole permitted difference favouring non-genuine three party schemes over four party schemes is that provided for in Article 1(5) *in fine* of the Regulation, according to which, '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.'

because in those schemes there is an intermediary who must be remunerated by the scheme and the cap on interchange fees or equivalent charges must apply. The features of the two schemes are similar⁴⁸ in that respect and therefore it makes no sense to give one an advantage to the detriment of the other.

104. In short, Articles 1(5) and 2(18) of the Regulation must be interpreted as meaning that a three party payment card scheme issuing card-based payment instruments with a co-branding partner or through an agent must be classified as a four party payment card scheme, regardless of whether or not the partner or agent is involved in the issuing of cards and/or the acceptance of payments.

D. Second question: the validity of Articles 1(5) and 2(18) of the Regulation

105. The equivalent treatment I have defended above leads to the referring court's second question, submitted in that eventuality. The arguments the referring court puts forward regarding the validity of those provisions of the Regulation relate to the duty to state reasons laid down in Article 296 TFEU, the principle of proportionality, and the possibility of a manifest error of assessment on the part of the EU legislature.

106. I shall reveal now that I do not believe that any of those grounds for invalidity are well founded. In my analysis of those grounds I shall try to avoid excessive repetition of the points I have already made.

1. Failure to provide reasons

107. The referring court, which reproduces the arguments put forward by Amex, questions whether reasons were provided for in Articles 1(5) and 2(18) of the Regulation. According to those arguments, neither the enacting terms nor the recitals of the Regulation state the reasons for treating three party schemes with co-brand and agency extensions as equivalent to four party schemes.

108. In particular, a number of those recitals are said to explain why caps were set for interchange fees but not why those same caps should apply to co-branding or agency arrangements used by three party schemes. Recital 28 explains why the scope of the provisions of the Regulation governing four party schemes should be widened to include three party schemes in certain circumstances but it does not mention (even implicitly) the conclusion of co-branding or agency arrangements.

109. According to the order for reference, neither the proposal for a regulation nor the impact assessment⁴⁹ accompanying it contain reasons for the widening of the scope of those provisions. Furthermore, the *travaux préparatoires* suggested that the regulatory limits for four party schemes provided for in the Regulation should not be imposed on three party schemes with extensions, in the light of factors such as the latter schemes' limited market share, the fact that they are not expected to expand significantly and the fact that they are targeted at a specific clientele.⁵⁰

⁴⁸ MasterCard refers in its observations to cases of payment cards where a single co-branded card is used by a three party scheme and by a four party scheme. Specifically, MasterCard refers to the Virgin Atlantic White Card and the Virgin Atlantic Black Card, issued as co-branded cards by Amex and Visa with Virgin Airlines, and to the TSB Avios and Premier Avios cards, issued by Amex and MasterCard with the United Kingdom bank TSB as the co-branding partner.

⁴⁹ The proposal is set out in the document COM(2013) 550 final of 24 June 2013, Proposal for a Regulation of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions. The impact assessment is contained in the Commission Staff Working Document, SWD(2013) 288 final of 24 July 2013, Impact Assessment accompanying the document Proposal for a directive of the European parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC and Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions.

⁵⁰ See recital 22 and Articles 1(3) and 2(15) of the proposal for a regulation, in addition to point 6.2.1.5, p. 56, of the impact study and point 2.6, p. 194, of Annex 9 thereto.

110. The obligation to state reasons for EU legislative acts, referred to in Article 296(2) TFEU, has been interpreted exhaustively by the Court. According to settled case-law, although the statement of reasons must be clear and unequivocal, it is not required to go into every relevant point of fact and law. In addition, the question whether the obligation to provide a statement of 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.⁵¹

111. In the case of a measure intended to have general application, the statement of reasons may be limited to indicating, first, the general situation which led to its adoption and, secondly, the general objectives which it is intended to achieve. The Court has also repeatedly held that, if the measure of general application clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of the reasons for the various technical choices made.⁵²

112. In the light of that case-law, I do not detect a failure to state reasons in the Regulation which is liable to affect the validity of the Regulation as regards the treatment of three party schemes with extensions. The recitals (in particular, recital 28) which I cited in the examination of the first question referred for a preliminary ruling enable an understanding of the rationale for treating three party schemes with extensions as four party schemes. The Portuguese Government, the Commission, the Council and the Parliament acknowledge this in their observations.

113. The reason why the *travaux préparatoires* (impact assessment and the Commission's proposal) for the Regulation do not refer to that equivalent treatment is because it was included later, on the initiative of the European Parliament, during the procedure for adoption of the Regulation, which is entirely legitimate.

114. Those recitals explain, with reasons stated, the need to harmonise and establish caps on the interchange fees applied to card-based transactions due to the differences in the Member States and the fact that it is impossible to control those fees through the application of the competition rules.

115. Specifically, recital 28, which was inserted by the European Parliament during the procedure for adoption of the Regulation, together with the final sentence of Articles 1(5) and 2(18), explains sufficiently the difference between four party and three party schemes. After acknowledging the existence of implicit interchange fees, the recital goes on to state that three party schemes must be treated in the same way as four party schemes if they use other service providers, in order to create a level playing field.

116. The circle of reasons is closed by recital 31, which refers to the importance of preventing circumvention of interchange fee caps. The recital states that circumvention may occur if all direct and indirect payments made by a card scheme to entities working with it to carry out card-based payments are not treated as interchange fees.

117. To my mind, those reasons set out in the Regulation are adequate and comply fully with the duty, defined by the Court, to provide reasons for acts of general application. They explain the general situation which led to the adoption of the Regulation and the aims pursued. Furthermore, they refer to most of the technical choices included, while it is not essential to refer to absolutely all such choices.

⁵¹ See, to that effect, judgments of 9 November 2013, *Commission v Council* (C-63/12, EU:C:2013:752, paragraphs 98 and 99), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 70).

⁵² See, inter alia, judgments of 18 June 2015, *Estonia v Parliament and Council* (C-508/13, EU:C:2015:403, paragraph 60), and of 3 March 2016, *Spain v Commission* (C-26/15 P, EU:C:2016:132, paragraphs 30 and 31).

118. In particular, the choice made to treat four party schemes and three party schemes with a co-brand or agency extension in the same way is particularly clear from recitals 28 and 31. Accordingly, the Regulation is not vitiated by a failure to state reasons liable to render it invalid.

2. *Manifest error of assessment*

119. The referring court, again echoing the arguments put forward by Amex, raises doubts regarding the validity of the Regulation, stating that, by placing the schemes at issue on an equal footing, the EU institutions may have committed a manifest error of assessment when they adopted the Regulation.

120. The Court has consistently held that the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Thus, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.⁵³

121. In my view, the EU institutions did not commit an error (much less a manifest error) of assessment by including in the Regulation Articles 1(5) and 2(18). The arguments put forward by Amex⁵⁴ contesting the decision of the EU legislature to treat three party schemes with co-brand and agency extensions in the same way as four party schemes reflect its desire for that equivalent treatment not to occur, because it limits its opportunities to compete with Visa and MasterCard.

122. However, during the legislative procedure, the EU institutions took proper account of all the arguments, finally opting for those in favour of treating the two types of scheme in the same way. That is a legislative policy choice which, since it affects a complex economic field (interchange fees in card-based payments), can, undoubtedly, be legitimately adopted if the competent EU authorities believe that it is to be preferred to the opposing choice.

123. As the Council and the European Parliament explain, the institutions took the view that failure to apply the caps in the Regulation to three party schemes with co-brand and agency extensions would grant those schemes an unfair competitive advantage over four party schemes in situations like those where the difference between the two types of scheme becomes blurred. In addition, it would encourage the circumvention of interchange fee caps.

124. That legislative policy choice can, of course, be criticised by the persons to whom it is addressed. However, if, as here, that choice was adopted within the broad margin of discretion available to the EU legislature, following a proper assessment of the interests concerned, the arguments put forward by Amex are not sufficient to render it unacceptable and it does not follow at all from those arguments that the choice is vitiated by a manifest error of assessment.

⁵³ Judgments of 1 March 2016, *National Iranian Oil Company v Council* (C-440/14 P, EU:C:2016:128, paragraph 77); of 1 February 2007, *Sison v Council* (C-266/05 P, EU:C:2007:75, paragraph 33); of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 57); of 8 June 2010, *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 52); and of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraph 47).

⁵⁴ In its submission, there is no rational basis for considering that a three party scheme must be treated as a four party scheme simply because the three party scheme has entered into co-branding or agency arrangements, since neither of those structures alters the fundamental nature of the scheme as a three party scheme. The issuer and acquirer roles are conducted in the same way, by the same parties, as would be the case in the absence of such arrangements. The treatment of three party payment card schemes in the same way as four party payment card schemes will be harmful to consumers and to competition, as it will create a disincentive for three party payment card schemes to enter into those arrangements. The effect will be a reduction in consumer choice, and a loss of the benefits of effective competition between payment schemes.

3. Breach of the principle of proportionality

125. The referring court, again echoing the arguments put forward by Amex, expresses uncertainty as to whether three party schemes with co-brand and agency extensions should be treated as four party schemes, this time from the point of view of the principle of proportionality.

126. In Amex's submission, those extensions, negotiated by three party schemes with partners or agents, constitute a rational and proportionate means of achieving the aims of the Regulation. The treatment of three party schemes as four party schemes imposes a draconian price restriction on three party schemes without any objective reason. Amex contends that that burden is manifestly disproportionate and is neither appropriate nor necessary for the purpose of achieving the aims of the Regulation, from which it follows that it breaches the principle of proportionality (Article 5 TEU and Article 5 of Protocol No 2). It is, therefore, invalid.

127. According to settled case-law of the Court of Justice, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.⁵⁵

128. Judicial scrutiny by the Court of Justice of compliance with the requirements resulting from the principle of proportionality is limited. According to settled case-law, the EU legislature must be allowed a broad discretion in areas which entail political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. 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.⁵⁶

129. In my opinion, in treating three party schemes with co-brand and agency extensions as equivalent to four party schemes, the EU institutions have not exceeded the requirements of the principle of proportionality, as interpreted by the Court.

130. Albeit at the risk of repeating what I have said earlier, I shall point out that the aim of the Regulation was to limit the passing on to consumers of costs generated by card payments, the main such cost being interchange fees. In view of the fact that it was not possible to reduce those costs through the application of competition rules, and in view of the different amounts levied in the Member States, the EU legislature decided to impose statutory maximum amounts. Interchange fees are easily identifiable in card payments settled via four party schemes, to which the Regulation applies in its entirety, while such fees do not exist in three party schemes and therefore the Regulation did not make those schemes subject to that cap unless they satisfied other conditions stipulated therein.

131. That exclusion was confined to genuine three party schemes, that is, those schemes which do not involve a 'third party', a situation in which there are no interchange fees or equivalent charges. However, the EU legislature took the view that, where a 'third party' operator was involved, a three party scheme must provide that operator with remuneration which could have an equivalent effect to interchange fees. That situation arises in the three cases identified by Articles 1(5) and 2(18) of the Regulation: where a three party scheme operates with 'third parties', under a licence to issue or receive payments, a co-brand extension or an agency extension.

⁵⁵ See, to that effect, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 122); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 67 and 91); and of 4 May 2016, *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraphs 78 and 79).

⁵⁶ See, to that effect, judgments of 12 July 2001, *Jippes and Others* (C-189/01, EU:C:2001:420, paragraphs 82 and 83); of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 123); of 8 June 2010, *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 52); and of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 49).

132. As the Council, the Commission and the Parliament argued in their written observations, by acting in that way, the EU legislature did not adopt a measure that is manifestly inappropriate in relation to the aim pursued. The equivalent treatment of three party schemes, confined to the circumstances set out above, respects the principle of proportionality because it is a measure that is necessary to create equal conditions of competition between models of payment card scheme which use ‘third parties’ to expand their business and which pay those ‘third parties’⁵⁷ using interchange fees or charges having equivalent effect. Similarly, I believe that it is a measure that is appropriate, necessary and proportionate for the purpose of precluding circumvention of the interchange fee caps.

133. Amex claims, finally, that that equivalent treatment is a disproportionate measure in that it is in breach of the freedom to conduct a business, protected by Article 16 of the Charter of Fundamental Rights of the European Union (‘the Charter’). However, in my view, that claim cannot be accepted.

134. The rule is not incompatible with the freedom to conduct a business, interpreted in the light of Article 52(1) of the Charter. It is possible to limit the exercise of that freedom as long as that limitation is provided for by law, respects the essence of the freedom, is necessary and genuinely meets objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.⁵⁸

135. The imposition of caps on the amount of interchange fees, provided for in the Regulation, is intended to protect the interests of consumers; in other words, to prevent card payments from involving unfair price increases, as I pointed out above.

136. That limitation, like others provided for in the Regulation, does not affect the essence of the freedom to conduct a business merely because it applies to a particular category of three party schemes in the same way as it does to four party schemes. It is difficult to understand why the freedom to conduct a business is respected in the case of the latter but not in the case of the former.

137. It is, quite simply, a regulatory measure in a sector in which it is customary for the public authorities to intervene in the interests of continuing to ensure the better functioning of the market and protecting payment card users. It must further be borne in mind that the EU legislature calculated the caps on interchange fees on the basis of the so-called ‘Merchant Indifference Test’,⁵⁹ specifically to avoid any effect on the financial viability of payment card schemes.

138. In any event, it should be recalled that Articles 1(5) and 2(18) of the Regulation provide a transitional adjustment period for three party schemes, which expires on 9 December 2018.

139. In short, the foregoing analysis has not revealed the existence of any factor liable to affect the validity of Articles 1(5) and 2(18) of the Regulation.

⁵⁷ The reasoning put forward by the European Parliament at point 58 of its written observations is interesting and I agree with it: if co-brand and agency extensions do not incur any direct or indirect payment to the partners or agents of a three party scheme, the caps provided for in the Regulation will not apply because there will be no interchange fee or charges having equivalent effect.

⁵⁸ Judgments of 6 September 2012, *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54), and of 17 December 2015, *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraphs 66 and 68).

⁵⁹ According to recital 20 of the Regulation, ‘[t]he caps in this Regulation are based on the so-called “Merchant Indifference Test” developed in economic literature, which identifies the fee level a merchant would be willing to pay if the merchant were to compare the cost of the customer’s use of a payment card with those of non-card (cash) payments’. Therefore the interchange fee caps are calculated so as not to discourage the use of cards as opposed to cash or other methods of payment.

IV. Conclusion

140. In the light of the foregoing, I propose that the Court of Justice should rule that the questions referred for a preliminary ruling by the High Court of Justice of England & Wales, Queen's Bench Division (Administrative Court) (United Kingdom) are inadmissible; in the alternative, I propose that the Court should reply to the questions as follows:

- (1) Articles 1(5) and 2(18) 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 a three party payment card scheme issuing card-based payment instruments with a co-branding partner or through an agent must be classified as a four party payment card scheme, regardless of whether or not the partner or agent is involved in the issuing of cards and/or the acceptance of payments.
- (2) No factor has been revealed which is liable to affect the validity of Articles 1(5) and 2(18) of Regulation 2015/751.