



Neutral Citation Number: [2018] EWHC 412 (Ch)

Case No's: HC-2012-000196  
HC-2014-000636

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTIES COURTS**  
**OF ENGLAND AND WALES**  
**COMPETITION LIST (Ch Div)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Friday 9<sup>th</sup> March 2018

**Before :**

**THE HONOURABLE MR JUSTICE BARLING**

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**Between :**

**Deutsche Bahn AG & Others**

**Claimants**

**- and -**

**(1) MasterCard Incorporated**

**Defendants**

**(2) MasterCard International Incorporated**

**(3) MasterCard Europe SA (formerly known as**

**MasterCard Europe SPRL)**

**(4) MasterCard/Europay UK Limited**

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**Mr Kieron Beal QC & Mr Tristan Jones** (instructed by **Hausfeld & Co LLP**) for the  
**Claimants**

**Mr Mark Hoskins QC, Mr Matthew Cook & Mr Hugo Leith** (instructed by **Jones Day**) for  
the **Defendants**

Hearing dates: 10<sup>th</sup> May – 16<sup>th</sup> May 2017  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE BARLING

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## GLOSSARY OF TERMS

<b>TERM</b>	<b>PARA WHERE DESCRIBED</b>	<b>DESCRIPTION</b>
“MSC”	7	Merchant Service Charge
“MIF”	7	Multilateral Interchange Fee
“the Scheme”	7	The worldwide MasterCard payment scheme
“Europay”	7	Europay International S.A.
“the 2015 Order”	7	Order dated 11 November 2015 (as amended by an Order dated 26 April 2017) directing this trial of a preliminary issue
“the test country claims”	7	The claims in the present proceedings relating to four sample countries: Germany, Italy, Poland and the United Kingdom
“Issuing Banks”	7	A bank or other financial institution licensed under the Scheme to issue MasterCard credit, charge or debit cards to Cardholders
“Acquiring Banks”	7	A bank or other financial institution who is licensed under the Scheme and who enters into a contractual relationship with a Merchant enabling the latter to accept a MasterCard card at that Merchant’s point of sale
“Cardholder”	7	A holder of a MasterCard credit, charge or debit card pursuant to a contractual arrangement with an Issuing Bank allowing for the use of it by the holder
“Merchant”	8	An establishment that accepts a MasterCard at the point of sale pursuant to a contractual relationship with an Acquiring Bank
“Scheme Rules”	8	Various rules and requirements laid down by the Defendants (whether mandatory or voluntary, or in some cases via default) in respect of the operation of the Scheme
“Interchange Fee”	8	The fee retained by the Issuing Bank before forwarding to the Acquiring Bank the balance of the sum referable to the Cardholder’s transaction with the Merchant.
“EEA MIF”	9	A MIF which is applicable to cross-border transactions within the European Economic Area and to certain other transactions as specified in the Scheme Rules
“domestic MIFs”	9	These apply in certain circumstances to transactions within a particular country. They are set either by the Defendants or by the MasterCard licensees (banks and other financial institutions) in a particular country
“CAR”	10	Central Acquiring Rule

“Central Acquirer”	<b>10</b>	An Acquiring Bank established in country A which offers acquiring services to a Merchant in country B
“Rome II”	<b>10</b>	Regulation 864/2007/EC
“the 1995 Act”	<b>10</b>	The Private International Law (Miscellaneous Provisions) Act 1995
“the 2007 Decision”	<b>10</b>	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
“the Defence”	<b>11</b>	Defendants’ Re-Amended and Consolidated Defence
“P/C”	<b>18</b>	Amended and Consolidated Particulars of Claim
“IPO”	<b>21</b>	Initial Public Offering
“the Europay Board”	<b>22</b>	Board of Directors of the Third Defendant
“European Board”	<b>22</b>	The regional board of Europe comprised of member banks
“EIC”	<b>22</b>	European Interchange Committee
“the 1984 Act”	<b>38</b>	The Foreign Limitation Periods Act 1984

**MR JUSTICE BARLING:**

**Introduction**

1. The Claimants are some 1,300 retailers, comprising 7 corporate groups who operate in 18 European countries (17 EEA countries and Switzerland). They contend that, in breach of EU/EEA and domestic competition rules, the merchant service charges (“MSCs”) which they have paid to so-called “acquiring” banks in respect of MasterCard credit card and Maestro debit card transactions were higher than they should have been, in consequence of the multilateral interchange fee (“MIF”) paid by the Claimants’ acquiring banks to card issuing banks in respect of each transaction, and that as a result they have suffered loss.
2. The Defendants are part of the MasterCard group of companies which owns and/or operates the worldwide MasterCard payment scheme (“the Scheme”). The First Defendant is a company incorporated in the State of Delaware. The Second Defendant is a company incorporated in the State of Delaware, and is a subsidiary of the First Defendant. The Third Defendant is a company incorporated in Belgium. It is a subsidiary of the First Defendant, and the legal successor to Europay International S.A. (“Europay”). The Third Defendant is based in Waterloo, Belgium, and has operated as the European head office for the Scheme. The Fourth Defendant is a company registered in England. The claim against this Defendant is only in respect of one of these consolidated claims (HC-13-CO5455) and UK domestic MIFs. The status of this claim is not clear in the light of the decision of the Court of Appeal in *Arcadia Group Brands Limited and Ors v Visa Inc and Ors* [2015] EWCA Civ 883.
3. This trial of a preliminary issue has taken place pursuant to paragraphs 1 and 3(a) of my order dated 11 November 2015, as amended by an order dated 26 April 2017 (“the 2015 Order”). Pursuant to the 2015 Order, the Court is to determine *inter alia* the applicable law in respect of those claims relating to four sample countries (Germany, Italy, Poland and the United Kingdom) (“the test country claims”).

**The MasterCard Scheme**

4. It is appropriate briefly to outline<sup>1</sup> the nature of the payment system with which the claims are concerned.
5. The Scheme is a world-wide payment scheme managed and represented by the Defendants. The Scheme operates as a network, whose licensees are banks or other financial institutions. Essentially, licensees are able to participate in the Scheme – assuming they are licensed by the Defendants – as issuing banks (“Issuing Banks”) and/or as acquiring banks (“Acquiring Banks”). Specifically:

- (1) Issuing Banks are those banks that have a contractual relationship with the holder of a MasterCard credit, charge or debit card, allowing for the provision of the card to, and use of it by, the cardholder (“Cardholder”).

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<sup>1</sup> For this account I have drawn on the parties’ skeleton arguments and also on the description of the Scheme set out by the Competition Appeal Tribunal in *Sainsbury’s Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11.

- (2) Acquiring Banks are those banks that have a contractual relationship with a merchant (“Merchant”) that allows for the acceptance of a MasterCard card at that Merchant’s point of sale. Card transactions can be accepted in a variety of ways. Generally speaking, the two most significant ways are by “chip PIN” and “on-line”. Chip PIN transactions occur where the Cardholder is physically present at the Merchant’s point of sale, the transaction being validated by the entry by the Customer of a “personal identification number” into the Merchant’s card-reading terminal. On-line transactions are transactions that occur over the internet.
6. Issuing and Acquiring Banks participate in the Scheme through various rules and requirements laid down by the Defendants (“Scheme Rules”). Pursuant to the Scheme Rules, Issuing Banks and Acquiring Banks are, as licensees, authorised to issue and/or accept MasterCard cards. The Scheme Rules are in some cases mandatory and in some cases voluntary or applicable by default (i.e. a licensee can “contract out” by entering into bilateral arrangements with another licensee).
7. When a Cardholder makes a purchase from a Merchant using a MasterCard card, the process by which the transaction is completed involves the following steps:
- (1) Prior to the transaction taking place:
    - (i) the Defendants will have licensed the Issuing Bank to issue a card to the Cardholder, and the Issuing Bank will have done so, on terms agreed between the Cardholder and the Issuing Bank;
    - (ii) the Defendants will have licensed the Acquiring Bank to equip the Merchant with the necessary equipment and authority to process MasterCard card transactions in accordance with the Scheme.
  - (2) The Cardholder presents the card issued to him or her by the Issuing Bank in offer of payment to the Merchant. The Merchant transmits information concerning the transaction and the Cardholder’s card details to the Acquiring Bank.
  - (3) The Acquiring Bank transmits information to the Issuing Bank to obtain authority for the transaction to proceed.
  - (4) Upon the authorisation of the transaction, the Issuing Bank collects the full payment for the transaction from the Cardholder’s account with the Issuing Bank (in the case of a debit card transaction) or extends credit to the Cardholder (in the case of a credit or charge card transaction).
  - (5) The Issuing Bank forwards to the Acquiring Bank the full transaction amount minus the so-called interchange fee (“Interchange Fee”), which is retained by the Issuing Bank. The amount of the fee is determined either by the Scheme Rules or by specific bilateral agreement between the Issuing Bank and the Acquiring Bank.
  - (6) The Acquiring Bank forwards the transaction amount to the Merchant, after deducting from that amount a charge for its services. Together, the Interchange



Fee and the additional charge of the Merchant comprise the MSC. Thus, the MSC includes:

- (i) The Interchange Fee retained by the Issuing Bank.
  - (ii) A fee charged to the Merchant by the Acquiring Bank for the provision of its services.
8. The Interchange Fee retained by the Issuing Bank is understood to constitute the vast majority of the MSC, at least for some merchants. The cost of the Interchange Fee is borne by the Merchant, for unless the Merchant chose to “surcharge” the Cardholder for paying by card, the Cardholder would pay the same price for the goods or services he or she purchased irrespective of the mode of payment.
9. Where Interchange Fees are specifically agreed between two banks, those fees only apply to transactions between those two banks. More common are MIFs, which apply to all banks in the absence of bilateral Interchange Fees. The “EEA MIF” is a MIF set by the Defendants which is applicable to various cross-border transactions within the EEA. There are also “domestic MIFs” which apply in certain circumstances to transactions in particular countries. For example, there has been a UK domestic MIF. Domestic MIFs are set either by the Defendants or by the MasterCard licensees in a particular country. For a certain period, the EEA MIF was also applied as a default domestic MIF in a number of EEA Member States, including Italy.
10. The MasterCard licensees – i.e. the banks and other financial institutions participating in the Scheme – must comply with the Scheme Rules. Those rules determine the applicable Interchange Fee. In summary:
  - (1) For cross-border transactions (where a card issued in one Member State is used to purchase something from a Merchant in another Member State):
    - (a) First, any bilateral Interchange Fee agreed between the two banks will apply.
    - (b) Otherwise, if there is no such agreement, the EEA MIF set by the Defendants will apply.
  - (2) For domestic transactions (where a card issued in one Member State is used to purchase something from a Merchant in the same Member State – the large majority of transactions):
    - (a) First, any bilateral Interchange Fee agreed between the two banks will apply.
    - (b) If there is no bilateral Interchange Fee, any domestic MIF set by the Defendants for that country will apply.
    - (c) If the Defendants have not set a domestic MIF for that country, any domestic MIF set by the licensees in that country will apply.
    - (d) If the licensees have not set a domestic MIF for that country, the EEA MIF will apply.

11. The Scheme Rules also include the Central Acquiring Rule (“CAR”). An Acquiring Bank established in country A which offers services to a Merchant in country B is called a “Central Acquirer”. Pursuant to the CAR, transactions processed by a Central Acquirer are treated as domestic transactions for the purposes of the Scheme Rules – in other words, they are subject to the same Interchange Fee as would apply if the Acquiring Bank was located in the Merchant’s country.

### **The claim periods**

12. By virtue of paragraph 3(a) of the 2015 Order, the applicable law for each of the four test country claims must be determined separately by reference to the following three periods:
- (i) *11 January 2009 to date*: for this period, the applicable laws are governed by Regulation 864/2007/EC (“Rome II”);
  - (ii) *1 May 1996 to 10 January 2009*: for this period, the governing provision is the Private International Law (Miscellaneous Provisions) Act 1995 (“the 1995 Act”);
  - (iii) *22 May 1992 to 30 April 1996*: for this period, the applicable laws are to be determined by reference to English common law principles.

### **The claims**

13. In very general terms, the claims are for *inter alia* damages for breach of Article 101 TFEU and/or Article 53 of the EEA Agreement and/or the various domestic laws giving effect to those provisions in each of the relevant countries and/or the domestic competition rules of each of the relevant countries. As already indicated, the claims relate to events which occurred from 1992 to the present time. They appear to comprise three categories of claims: (i) claims based, directly or indirectly, on the EEA MIF; (ii) domestic MIF standalone claims; and (iii) claims based on the CAR. Some further explanation of these categories, between which there is admittedly some overlap with respect to the damages sought thereunder, is appropriate.

#### *EEA MIF claims*

14. The EEA MIF claims involve a contention that the Defendants acted unlawfully in setting the EEA MIF. These claims, which rely to some extent upon the findings in the Commission Decision of 19 December 2007 (“the 2007 Decision”),<sup>2</sup> can be further divided as follows:
- (a) *Cross-border claims*: these relate to cross-border credit or debit card transactions, in most of which the EEA MIF was applied directly, pursuant to the Scheme Rules.
  - (b) *Domestic default claims*: these relate to purely domestic transactions, in respect of which, pursuant to the Scheme Rules, the EEA MIF was applied

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<sup>2</sup> 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.

by default, because no domestic MIF had been set by the Defendants or their licensees.

(c) *Domestic “floor” claims*: these relate to domestic transactions in which the applicable domestic MIF set by the licensees in that country (or a bilateral Interchange Fee agreed between an Acquiring Bank and an Issuing Bank) is alleged to have been inflated by the EEA MIF acting as a *de facto* price floor.

*Domestic MIF standalone claims*

15. Domestic MIF standalone claims relate to domestic credit or debit card transactions in respect of which it is alleged that the Defendants behaved unlawfully in setting the domestic MIFs which were applied to those transactions.

*CAR claims*

16. CAR claims allege that the Defendants acted unlawfully in adopting and implementing the CAR. By requiring a Central Acquirer (based outside the Merchant’s country) to pay to the Issuing Bank the same MIFs as those paid by Acquiring Banks in the Merchant’s country, the CAR is alleged to have unlawfully partitioned the EEA market along national boundaries and prevented a Central Acquirer from basing the MSC upon the (potentially lower) EEA MIF.

**Limitation defence**

17. In their Re-Amended and Consolidated Defence (“the Defence”), along with other pleaded defences, the Defendants indicate that, subject to identifying the proper law(s) of the claims and the applicable limitation provisions, limitation defences to the claims are relied upon, and that an early ruling of the court on proper law and limitation would be sought, so that the period(s) covered by the claims can be determined.<sup>3</sup>
18. To this end, the 2015 Order also directed to be tried as a preliminary issue the question whether the claims relating to relevant transactions in the four sample countries were barred by limitation – a question which depends on the applicable law. However, following a hearing before me on 26 April 2017, the present trial of a preliminary issue has been confined to the issue of applicable law, with limitation issues to be determined at a later date.

**The witness evidence**

19. The issues with which I am required to deal are, for the most part, legal rather than factual. There were, in the event, few if any real disputes of fact between the parties. Notwithstanding this, three witnesses were called by the Defendants, and cross-examined by the Claimants. This oral evidence was given over the course of a single day, in each case by videolink. The witnesses, who also provided witness statements, were Mr Roberto Tittarelli, who has worked for the Third Defendant since 1995 and is currently Global Products and Solutions Regional Lead (Europe); Mr Jurgen Uthe, who has been involved in the German payments industry since 1984 and is currently

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<sup>3</sup> Paragraph 5 of the Defence.

Account Lead for German Cooperative Banks with the Third Defendant; and Mr Bartosz Ciolkowski, who has worked for the Third Defendant since 2005 and has been its Country Manager responsible for Poland since December 2013. In addition, the Defendants put in evidence a redacted witness statement of Mr Bart Willaert, which was before the Competition Appeal Tribunal in the *Sainsbury's* case.<sup>4</sup> Mr Willaert had been head of the Defendants' Interchange Fee team from 2010 until early 2012. His statement dealt mainly with the process of setting the EEA MIF in that period. Mr Willaert did not give oral evidence in the present matter.

20. The cross-examination of Messrs Tittarelli, Uthe, and Ciolkowski by Mr Beal QC, appearing for the Claimants, was essentially an exercise in which, quite properly, Mr Beal put to each witness his clients' case as to: (1) the process by which, (2) the personnel by whom, and (3) the locations in which, the EEA MIF and the relevant domestic MIFs were set in the various periods under discussion. These matters of fact, as distinct from their interpretation and significance in relation to the legal issues, were not substantially in dispute except in one respect. For this reason, I do not propose to rehearse the content of the witnesses' evidence. I will refer to aspects of it as appropriate when describing the evolution of the MIF setting process, and when dealing with specific issues.

**Applicable law for the period 11 January 2009 to date**

21. It is common ground that the governing provision for this period is Rome II, Article 6(3) of which provides:
- “(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
- (b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.”
22. By the stage of closing submissions, the parties had reached agreement that the country “where the market is, or is likely to be, affected” is the country in which the Merchant was based at the time of the transaction upon which an MSC was paid by the Merchant to the Acquiring Bank. In his closing submissions, Mr Beal made clear that, contrary to his earlier intimation, for present purposes he did not propose to argue for a different answer where the Merchant received acquiring services elsewhere than in the country of its establishment, there being no evidence on that issue nor any other reason for this court to determine it.
23. It was also common ground that in this period, for practical reasons all UK transactions in respect of which a claim is made should be treated as having occurred in England, so that the applicable law under Rome II for the purposes of such claim

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<sup>4</sup> See footnote 1 above.

will be the law of England and Wales. The same was agreed in respect of the applicable law for the other two relevant time periods.

24. As to the temporal scope of Rome II, Article 31 provides that the Regulation applies
- “to events giving rise to damage which occur after its entry into force.”
25. Article 32 states that it applies from 11 January 2009. It is common ground that, in light of Case C-412/10 *Homawoo v GMF Assurances SA* [2011] ECR I-11603, Rome II applies to *events* occurring on or after 11 January 2009.
26. The question of what is a relevant “event” in the present context was not ordered to be determined as a preliminary issue, although it will presumably have to be decided in due course. The parties are therefore content that I should rule that, for events, as defined under Rome II, occurring on or after 11 January 2009, the applicable law will be determined by reference to the place of establishment of the Merchant concerned in the transaction in question.
27. It follows that, so far as this preliminary issue trial is concerned, there is no issue which has not been resolved by agreement.
28. Nevertheless, Mr Beal emphasised that I should be careful not to “roll back” the Rome II analysis to the 1995 Act period, which was governed by a different set of legal principles. He submitted that Rome II was a conscious departure from the broader approach adopted under the 1995 Act. Rome II focussed on the location of loss, which in competition cases corresponded with the place where the market is affected. It was therefore a very different approach from the multi-factorial approach applied by the 1995 Act, with its focus on events giving rise to the tort. This change, he submitted, was part of a balancing exercise reflected in Article 6(3)(b), which gave a claimant the means of avoiding a “patchwork quilt” of applicable laws by suing a defendant in his home jurisdiction and choosing the law of that jurisdiction as the single applicable law.
29. I now turn to consider the position in respect of the period governed by the 1995 Act.

**Applicable law for the 1995 Act period: 1 May 1996 to 10 January 2009**

*The relevant provisions of the 1995 Act*

30. The relevant provisions of the 1995 Act are sections 11 and 12.
31. Section 11 of the 1995 Act provides:
- “11. Choice of applicable law: the general rule.
- (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
- (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being -

- (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
- (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
- (c) in any other case, the law of the country in which the most significant event or elements of those events occurred.”

32. Section 12 of the 1995 Act provides:

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

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

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

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

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

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

33. Mention should also be made of section 14(1) of the 1995 Act, which provides:

“Nothing in this Part applies to acts or omissions giving rise to a claim which occur before the commencement of this Part.”

The Part commenced on 1 May 1996.

34. The decision of David Richards J (as he then was) in *In re T & N Ltd (No.2)* [2006] 1 WLR 1792 establishes that section 14(1) is directed at the acts and omissions of the defendant, and not the damage resulting from them.<sup>5</sup> In the light of this decision, it is common ground that if and in so far as the acts or omissions of the defendant occurred before 1 May 1996, the 1995 Act will not apply, irrespective of the date of the resulting damage.

*The parties' basic contentions*

35. The primary submission of the Claimants is that the applicable law under section 11(2)(c) in respect of all claims relating to this period is the law of Belgium. The primary submission of the Defendants is that the applicable law under section 11(2)(c) is that of the country in which the Merchant was based at the time of event which caused the MSC to be higher than it would otherwise have been. In other words, for claims by Merchants based in Germany, the applicable law of the tort is German law.

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<sup>5</sup> Paragraphs 28-31.

36. However, each side argues, in the alternative, that if its primary contention were not to succeed, then whatever the court determined to be the applicable law under the general rule in section 11(2)(c), should be displaced under section 12, so as to produce the outcome for which that party contended in its primary submission.
37. I will therefore first consider the application of section 11.

*The correct approach to section 11*

38. The parties agree that the correct approach to the application of section 11 of the 1995 Act is that set out by Lloyd LJ, giving the judgment of the Court (the other members being Rimer and Aikens LJ), in *VTB Capital v Nutritek* [2012] EWCA Civ 808, [2012] 2 CLC 431. In a passage at paragraph 148 of the judgment, expressly approved by the Supreme Court,<sup>6</sup> and applied by the Court of Appeal,<sup>7</sup> the Court stated:

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

39. In Dicey, Morris and Collins, *The Conflict of Laws*, 15<sup>th</sup> ed, at 35-145, the approach to be adopted by the court is described as follows:

“Application of the statutory formula will, first, involve identifying the various elements which, together, constitute the alleged tort, e.g. the acts or omissions involved, the damage suffered, and the various countries in which the various elements occurred. It will then be necessary to assess the “significance” of those elements. To do this it will be necessary, it is suggested to identify the ingredients of the alleged liability in tort which it is claimed has arisen and then to identify the country in which the events which constitute the most significant ingredients of that liability have occurred.”

40. In the light of this guidance, it is clear that in applying section 11 the task for the court is threefold: first, to identify all the (English law) elements of the events constituting the alleged tort, then to identify the countries in which those elements and/or events took place, and finally to decide, on the basis of a value judgment, in which one of those countries occurred the element(s) which was the most significant in relation to the tort in question.

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<sup>6</sup> [2013] 2 AC 337, per Lord Clarke at paragraphs 198-199.

<sup>7</sup> *Fiona Trust & Holding Corporation & Ors v Skarga* [2013] EWCA Civ 275, at paragraphs 11-12, 15 and 25.

41. In relation to “significance”, it is clear that the correct approach is for the court to consider the significance of the relevant events in the light of the facts of the case before it.<sup>8</sup> In *Protea Leasing v Royal Air Cambodge* [2002] EWHC 2731 (Comm) Moore-Bick J stated that the 1995 Act contains a “much more flexible principle and one which might yield different answers in different cases even in relation to the same kind of tort”.<sup>9</sup>

*Application of section 11 to the facts of this case*

*(i) The elements of the events constituting the alleged tort*

42. The first task is to identify all the elements of the events constituting the tort. The causes of action relied upon in this case (breaches of Article 101 TFEU/Article 53 EEA and of kindred domestic provisions) are akin to breaches of statutory duty as understood in English law terms.<sup>10</sup> There appeared to be a measure of agreement between the parties that the principal elements of the tort are: (a) the adoption of the relevant MIFs and the CAR by means of a decision by an association of undertakings, including the Defendants; (b) the decision must have the object or effect of restricting competition within the EU; (c) loss or damage is caused to the claimant. In addition, in so far as concerns the claims based on Article 101 TFEU and Article 53 of the EEA Agreement, the decision must be capable of affecting trade between Member States.
43. However, Mr Beal, while acknowledging that the adoption of the MIFs and the transactions which caused loss to the Merchant were relevant “events” for the purposes of the section 11 analysis, did not accept that the “restriction of competition” was a separate “event” for that purpose, even if it was a necessary “element” in the tort. In so far as the Claimants were relying upon an infringement of Article 101 by “object”, as distinct from by “effect”, he submitted that “object” infringements do not involve any actual restriction of competition capable of being characterised as an event within the 1995 Act. In that regard, there was no distinction to be drawn between the Defendants’ conduct in setting the MIF and any restriction of competition, for the restrictive object of the Defendants’ conduct was inherent in the conduct itself. Further, in relation to the Claimants’ “effects” case, Mr Beal submitted that here the restriction of competition did not constitute a separate “event” with its own country of occurrence: the events which caused loss to the Claimants were the setting and implementation of the MIFs/CAR, together with the fact that the Claimants then paid higher MSCs than they would otherwise have paid; there was no additional event “sandwiched” between the Defendants’ unlawful conduct and the payment of the excessive MSC. The restriction of competition was a legal/economic phenomenon to be identified by comparing the factual state of affairs to a counterfactual state of affairs.
44. Mr Beal prayed in aid Case C-352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* [2015] ECLI: EU: C: 2015: 335, [2015] QB 906, CJEU (“CDC”). In that case the CJEU was considering where the “harmful event” had occurred for the purposes of Article 5(3) of Regulation No 44/2001, in order to determine which court had jurisdiction in an action for damages for breach of Article

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<sup>8</sup> Dicey & Morris (*op. cit.*), at 35-156.

<sup>9</sup> Paragraph 78 of the judgment.

<sup>10</sup> *Crehan v Inntrepreneur Pub Co* [2004] EWCA Civ 637, at paragraph 156.



101 TFEU committed by defendants who were domiciled, agreed the cartel, and implemented it, in various Member States. The Court noted that the place where the “harmful event” occurred “is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued... in the courts for [sic] either of those places...” As to the place of the causal event, the Court drew a distinction between those cases in which all the cartel agreements/concerted practices took place in one Member State, and those where the relevant agreements took place in two or more jurisdictions, so that it was not possible to identify a single place where the cartel was concluded. In the former case, it would be consistent with the aims of Article 5(3) (i.e. the sound administration of justice and the efficacious conduct of proceedings), for the courts of that single place to have jurisdiction. (See paragraphs 34-45 of the judgment in that case.)

45. Mr Beal pointed to the fact that it was the act of concluding the cartel which the Court regarded as the causal event giving rise to loss, and as determining the place of the “harmful event”, rather than focusing exclusively on the market in which the particular loss was suffered as a result of a restriction of competition in that market. He submitted that *CDC* provides a strong indication that the events associated with the restriction of competition are wrapped up either in the unlawful conduct itself, which is the causative event, or in the events constituting loss, and have no separate existence.
46. In my view Mr Beal’s analysis is not correct. First of all, I make the obvious point that without a restriction of competition (whether by object or effect) there can be no infringement and no tort. As I understand it, it is common ground that the setting of a MIF is not *ipso facto* unlawful – it depends on the level at which it is set. In any event, to allege coordinated conduct in setting a MIF, together with resultant loss, would be insufficient; a restriction on competition – actual or presumed - must be pleaded and established.
47. I consider that the Claimants are mistaken in drawing a distinction for this purpose between a restriction by “object” and one by “effect”. First, such a distinction opens up at least the potential for a different applicable law for each allegation, which would be counter-intuitive. More fundamentally, the distinction is not a valid one. In Case C-67/13 P *Groupement des Cartes Bancaires v Commission* [2014] ECR, the ECJ explained, at paragraphs 49-51 of the judgment, that
- “...[C]ertain types of coordination between undertakings reveal a sufficient degree of harm to competition that ...there is no need to examine their effects...
- ...[C]ertain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition...
- ...[C]ertain collusive behaviour ...may be considered so likely to have negative effects, in particular on the price, quality of the goods and services, that it may be considered redundant... to prove they have actual effects on the market... Experience shows that such behaviour leads to falls in production and price increases... ”
48. Therefore, as Mr Hoskins QC, appearing for the Defendants, submitted, the reason that the actual effects on competition do not have to be examined in the case of a restriction by “object”, is because those effects are so likely to have occurred given the nature of the conduct, that they can be presumed. In those circumstances, the

distinction sought to be drawn by the Claimants does not assist them, because the presumed effects on competition would be the same, occurring in the same manner and on the same market, as any actual effects established.

49. This is supported by the way both limbs are pleaded by the Claimants in, respectively, paragraphs 68 (object) and 69 (effect) of the Amended and Consolidated Particulars of Claim (“P/C”), in relation to the EEA MIF. There is little if any difference in the substance of what is pleaded under each head. Essentially the allegation in each case is that the EEA MIF restricted competition in the relevant national product and geographic markets by (absent a bilateral agreement) fixing the level of the Interchange Fee for all Acquiring Banks alike, thereby inflating the basis on which Acquiring Banks levied MSCs on the Claimants, in circumstances where the MSCs set by Acquiring Banks would be lower in the absence of the EEA MIF. Further, in relation to the restriction on competition alleged for the CAR (paragraph 70), and the domestic MIFs set by the Defendants (paragraph 71), the restriction by “object” and by “effect” are not separately particularised.
50. Nor do I agree that the restriction of competition should be regarded as indistinguishable from the events alleged to have caused loss to the Claimants, and incapable of having a location of its own. A restriction on competition, actual or presumed, is the result of a combination of circumstances which manifest themselves on the relevant market, in the form of, for example, higher prices, poorer quality, fewer competitors etc etc. As the Claimants themselves have stated, the restriction of competition is identified by comparing a *factual* state of affairs with a counterfactual. The fact that this process involves the use of a legal/economic formula is nothing to the point. The factual state of affairs constituting the outward manifestations of the competitive restriction represents an “event” or “events” for the purposes of section 11, no less than does any recoverable loss established by the Claimants. I see no justification for discounting these events which constitute a restriction on competition, simply because they may also have a role in the causation of any loss allegedly incurred by the Claimants.
51. *CDC* does not, in my view, support the Claimants’ argument. That was a case about jurisdiction under the Brussels Regulation, and did not concern the determination of applicable law under the 1995 Act. The practical policy considerations inherent in Article 5(3) (eg proximity to relevant events and ease of taking evidence), which seek to identify a single appropriate jurisdiction to entertain proceedings, clearly have no bearing on the meaning and application of section 11, which requires *all* countries in which relevant events occurred to be identified. As explained by Aikens J (as he then was) at paragraph 87 of his judgment in *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm), and by Mance LJ (as he then was) at paragraph 18 of his judgment in *Morin v Bonhams & Brookes Ltd* [2003] EWCA Civ 1802, such cases are not helpful in the context of s.11(2)(c) of the 1995 Act.

*(ii) The countries in which the elements and/or events took place*

52. The next task is to identify the country in which each of the elements/events described at (a), (b), and (c) in paragraph 42 above occurred. (Neither side has suggested that the element of a potential effect on intra-EU trade needs to be addressed.)

Location of the restriction on competition

53. As to the location of the alleged restriction on competition, I have already rejected the Claimants' argument that this is not a separate relevant "event" capable of having its own location for the purposes of section 11. Other than in that regard, there appeared to be little, if any, dispute between the parties on this element of the tort alleged. The Claimants accept that the relevant product market is the market for acquiring payment cards,<sup>11</sup> and that the relevant geographic markets are national in scope.<sup>12</sup>
54. In his closing submissions, Mr Hoskins took me through the P/C<sup>13</sup> in some detail to indicate why it is clear that the Claimants should also be taken to have accepted that the alleged restrictions of competition took place in each of the relevant product and geographic markets. He pointed out that, in paragraph 68, two elements or events in particular are identified by the Claimants as constituting or resulting in a restriction of competition: (1) the fact that in each national market there is a common Interchange Fee paid by all Acquiring Banks and (2) the inflationary effect of that fee on the MSCs paid by the Claimants in each acquiring market. Thus, he stated, both elements are said to take place in the national acquiring market, and both are clearly "events". He continued the analysis of the P/C, pointing out that the same applied to each category of claim pursued by the Claimants, including: those where the EEA MIF applied directly or by default (cross-border and some purely domestic transactions), those where bilateral Interchange Fees were influenced by the EEA MIF, those where the EEA MIF applied through operation of the CAR, and those where the EEA MIF strongly influenced the rate at which domestic MIFs were set. In all such cases it was alleged that the MSCs charged by Acquiring Banks to the Claimants would have been lower but for the anti-competitive effect of the EEA MIF in each of the relevant national product and geographic markets.
55. In these circumstances, I conclude that the alleged restriction of competition in relation to each category of claim, including the CAR claim, took place in each of the product and geographic markets where the relevant Claimant(s) operated its retail business.

Location of the loss

56. It is common ground that in the present circumstances the suffering of loss by the Merchant is a relevant "event" for the purposes of section 11(2)(c) of the 1995 Act, and that it occurred in the country where the transaction took place, i.e. the country in which the Merchant was based at the time of the transaction upon which an MSC was paid.

The location of the setting of the MIFs/the CAR

57. There are certain factual issues between the parties relating to where the MIFs and CAR were set. The Claimants' case is that all relevant events relating to setting of the MIFs and the relevant Scheme Rules took place in Belgium, where the Third Defendant is based. The Defendants do not agree with that submission. However, Mr

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<sup>11</sup> P/C, paragraph 63.

<sup>12</sup> P/C, paragraphs 64 and 65.1.

<sup>13</sup> P/C, paragraphs 68, 68.7, 69, 70 and 71.

Hoskins submitted that, even if one assumed that it was correct, it would not alter the result under section 11(2)(c) of the 1995 Act. He contended that the significance of the alleged restriction of competition and of the Claimants' loss, taken together, clearly outweighed the significance of the adoption of the relevant rules, with the result that the applicable law under section 11 is that of the country where each Merchant is based.

*A pleading point*

58. The Claimants have submitted that, in the light of the pleadings, it was not open to the Defendants to challenge the Claimants' contention that the relevant MIFs and the CAR were set wholly or mainly in Belgium. The Claimants referred to the Defendants' assertion in their Choice of Law and Limitation pleading that the applicable law was "Belgian law (since Belgium was the place that the wrong (if any) was committed)". (A similar averment is made in paragraph 46 of the Defence.) However, that contention has been abandoned by the Defendants and the relevant passage was deleted in an amended Choice of Law and Limitation pleading served two or three weeks prior to the trial. It was a contention that related to the period when the applicable law is governed by common law rules, rather than the 1995 Act.
59. The Claimants also rely upon an averment, pleaded in the alternative by the Defendants in the same pleading, that Belgian law is the applicable law for cross-border transactions and the CAR because "throughout this period [ie the period relevant to the 1995 Act] MasterCard's operations in Europe have been centred in Belgium". In that regard, I note that the Defendants have not sought to resile from the *factual* contention that the centre of their operations in Europe in the period in question was Belgium. However, at the hearing the Defendants applied to re-amend to remove the reference to Belgian law in that part of their pleading. They argue that the Claimants themselves have recognised in their own Choice of Law and Limitation pleading<sup>14</sup> that the place where the Defendants' operations in Europe were centred is distinct from the place where the Defendants "adopted and/or implemented and/or managed the relevant rules and fees". They also emphasise that in the main pleadings both sides have pleaded their respective cases as to where the EEA and domestic MIFs were allegedly set, including the role of the First Defendant in the US.
60. The Claimants submit that I should place some weight on the recently abandoned assertion by the Defendants that the wrongful conduct occurred in Belgium, which the Claimants submit was correct. They also submit that the Defendants' *volte face* has created unfairness, in that they would have sought more extensive disclosure had they known in good time that the location of the wrongdoing was an issue. In addition, the exiguous nature of the witness statements on the location of the setting of the MIFs was unsurprising only because that was not apparently an issue. They submit that either the Defendants should be held to their original case that the wrongdoing was in Belgium, or alternatively, insofar as there is any incompleteness in the evidence as to the location of the wrongful conduct, this Court should draw inferences in the Claimants' favour. They refer, in particular, to what is said to be the paucity of evidence on the nature of the decision-making process in the US, which they say was no more than a rubber-stamping exercise.

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<sup>14</sup> Paragraphs 7(a) and (c).

61. Although the complaints of the Claimants are not without substance, I do not consider that it would be right to hold the Defendants to their abandoned averment as to the location of the wrongdoing. The Defendants' change of course is chiefly a matter of legal interpretation of factual events which, for the most part, are not really disputed or capable of being disputed. In my view, the Claimants have not been significantly prejudiced by this change. There is no reason to believe that there is any further disclosure which would throw a different light on the relevant events. Nor does the witness evidence seem obviously deficient. I also note that the Defendants did not in their pleadings identify what they considered to be the "wrongdoing". Although it is difficult to see to what they could have been referring if not the setting of MIFs, they have not expressly alleged that the relevant MIFs or the CAR were set in Belgium, and have pleaded their case on the setting in a manner which is not inconsistent with their present stance. In any event, even if I were to hold the Defendants to their abandoned pleading, it would not affect my decision under section 11, for reasons set out later in this judgment.
62. In the circumstances, I would grant the application to re-re-amend the pleadings in the manner referred to above.

*The decision-making structures relevant to the setting of MIFs and rules*

63. In considering the background facts relating to this aspect, it is appropriate for me to give an account of the evolution of both the structure of the MasterCard organisation, particularly in so far as it affects its operations in Europe over the claim period, and the procedures for reaching decisions on the various MIFs and the CAR. In setting out the factual position, I have had regard to the documentary material, to the evidence of the witnesses, and to the written and oral submissions of the parties. As I said earlier, most, if not all, of the basic facts relating to these areas are non-controversial. The parties' dispute is essentially about how the facts should be interpreted, and their significance, for the purposes of section 11.
64. If I do not specifically refer to an item of evidence or to a submission, that does not mean that I have not taken it into account. In this section, and generally in this judgment, I mention only such matters as are necessary to explain my conclusions.
65. The material before me indicates that the Defendants' legal and decision-making structures evolved over the period of the claim, so that three principal periods are discernible: (1) Pre-2002; (2) 2002 until 25 May 2006 - the date of the Initial Public Offering ("IPO") of the First Defendant's shares; (3) From 25 May 2006 onwards.
66. *In period (1)*, there existed two separate businesses: that of the Second Defendant, which owned the MasterCard brand, and that of the Third Defendant (then Europay International), which owned the Eurocard brand. The Second Defendant was owned and controlled by the banks which participated as principal members in its business worldwide. The Third Defendant was owned and controlled by the European banks which participated in its business. There was a "strategic alliance" between the Second and Third Defendants in respect of credit cards, whereby the latter benefited from an exclusive license for the MasterCard brand in Europe. For debit cards, there was a joint venture between the same parties to develop the Maestro debit card brand, through a jointly owned Delaware company.

67. In this period, decisions on the EEA MIF, on domestic MIFs in Europe (save where they were set by national licensees) and on some of the Scheme Rules applicable in Europe, were made by the Board of Directors of the Third Defendant (“the Europay Board”). Amendments to the Scheme Rules (such as the introduction of the CAR) were required to be agreed with the Second Defendant. I was shown a document, by way of example, indicating that membership of the Europay Board primarily consisted of representatives of the company’s member banks, with representatives from Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, Switzerland and the United Kingdom, as well as two representatives from the Second Defendant in the US and two executive officers of the Third Defendant itself. The evidence indicates that Europay Board meetings were generally held in Waterloo, Belgium, although on several occasions they were held elsewhere, including in Hungary, Switzerland and Austria.
68. *Period (2)*: At the end of 2001, a merger of the two businesses was agreed, with the First Defendant being incorporated in the US as a holding company to own the Second and Third Defendants. The First Defendant itself was owned by the former shareholders of the Second and Third Defendants, i.e. by their respective member banks. Thereafter, until the IPO in 2006, the Mastercard payment organisation operated in a de-centralised manner, with its brand and product strategies managed by regional boards composed of member banks, grouped in regions. One such region was Europe. The regional board of Europe, which was not a MasterCard corporate entity, was called the “European Board”.
69. Like the Europay Board, the European Board generally met in Waterloo, Belgium, but it occasionally met elsewhere, including in France, Portugal and Japan. Again, by way of example, I was shown a document identifying the membership of the European Board as comprising bank representatives from Austria, France, Germany, Greece, Hungary, Israel, Italy, Netherlands, Norway, Russia, Spain, Switzerland, Turkey, UK, plus one representative from the Second Defendant and one from the Third Defendant. The European Board had the power to set the EEA MIF, domestic MIFs (save where set by national licensees) and cross-border rules within Europe, such as the CAR. It follows that when set by the European Board MIFs were set by a non-corporate regional board composed of member banks, and not by any of the three Defendants.
70. In August 2003, a European Interchange Committee (“EIC”), consisting of MasterCard employees from all parts of MasterCard’s business, was set up and given responsibility for drawing up proposals to be considered by the European Board. The majority of members of the EIC were employees of the Third Defendant, but a number of employees of the Second Defendant also attended EIC meetings.
71. In November 2004, the Second Defendant took over the setting of the UK domestic MIF for credit cards from its UK licensees. This change involved the adoption of a new procedure for approval of the UK MIFs, with proposals being first considered by the EIC in Waterloo, Belgium and being then passed to the CEO of the Second Defendant in the US for a final decision. This new procedure for the UK MIF heralded a change of process which would be introduced for other MIFs, after the IPO.

72. *Period (3)*: On 25 May 2006 the shares of the First Defendant were publicly traded for the first time on the New York Stock Exchange. In September 2006, “the Global Board [of the First and Second Defendants] resolved to empower the President and CEO of MasterCard, or his designee (the COO), to define all of the global, intra-regional and domestic MIF programs, to establish the level of such interchange fees, promulgate all rules and determine all practices and procedures relating to the establishment of interchange fees, and make other decisions as are necessary for or convenient to the administration of the interchange fees, including permitting member banks that do business in a particular country to set, and establishing the manner in which they may set, domestic MIFs in that country.”<sup>15</sup>
73. By this time the member banks had abolished all regional boards except for the European Board, which retained most of its decision-making powers except for setting MIFs. The EIC remained in being, supported by the Third Defendant’s “Interchange Team”. This meant that once a need for a change had been identified by the Defendants’ employees, (including those in a particular country, if the issue concerned that country’s domestic MIF), the EIC would decide whether to recommend the proposal. If the EIC did, then the recommendation would be put, not to the European Board as before, but to the COO of the Second Defendant in the US for final approval.
74. In the 2007 Decision, the Commission stated: “The banks were a driving force behind the IPO.... They agreed to it as they knew that the new management on the Global Board would continue to act in their common interest. While the European banks were aware that they would lose control over the body setting [EEA MIFs], they consented to the change in the organisation’s governance with the expectation that the independence of the Global Board would reduce each individual bank’s exposure to regulatory scrutiny and antitrust litigations...”<sup>16</sup>
75. Therefore, from September 2006, formal authority to set the EEA MIF and European domestic MIFs (save where they were being set by licensees) was vested in the senior management of the Second Defendant in the US, adopting in respect of the EEA MIF and European domestic MIFs (when set by MasterCard rather than domestic licensees) the procedure introduced from 2004 in relation to UK MIFs.

*Relevant decision-making: the dispute about the effect of the IPO*

76. Although there are other differences between the parties, these are mainly matters of emphasis or degree. The main dispute relates to the change of procedure following the IPO. The Claimants contend that the fact that the final decision on the EEA MIF and other Interchange Fees was made by management in the US after 2006 (after 2004 in relation to the UK MIF) made no real difference to the place where the MIFs should be regarded as having been set, since the decision by the COO in the US was merely a rubber stamping of what had already been decided in Belgium. The Defendants submit that, after 2006 (or November 2004 in relation to the UK MIF), insofar as MIFs were set by the Defendants, the court should proceed on the basis that the final decision on setting them was taken in the US.

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<sup>15</sup> The 2007 Decision, recital 98.

<sup>16</sup> The 2007 Decision, recital 99.

77. In support of their submission the Claimants rely, in particular, upon the 2007 Decision. There the Commission found that, for the period from 22 May 1992 until 19 December 2007, the Defendants infringed what is now Article 101 of the TFEU and Article 53 EEA by “in effect setting a minimum price merchants must pay to their acquiring banks for accepting payment cards in the [EEA], by means of the [EEA MIF] for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.” The Commission required the Defendants, *inter alia*, to repeal all relevant “decisions taken by MasterCard’s European Board and/or by MasterCard’s Global Board and/or its delegate the President and CEO of [the First Defendant] and/or his designee the Chief Operating Officer....”
78. The Claimants point to the fact that in the 2007 Decision (upheld on this point by the General Court and the CJEU) the Commission rejected the Defendants’ argument that the changes in decision-making which took place after the IPO meant that the Defendants were no longer an association of undertakings for the purposes of Article 101.
79. The Claimants contend that it is clear from the 2007 Decision that the Commission considered little of substance had changed with the IPO. They point out that the Commission recorded that all EEA MIFs were set by the European Board until 25 May 2006 and that most of the rates continued in effect after that time. The Commission had also noted that the powers of the European Board were the same after the IPO, save for the delegation of authority to set the MIFs.
80. As to the reasons why the IPO had not affected the Commission’s assessment that the Defendants constituted an association of undertakings for antitrust purposes, the Claimants point out that the Commission had found that post-IPO MasterCard still operated in a de-centralised manner in Europe, with European banks still coordinating behaviour through the European Board, whose powers were largely preserved.
81. The Claimants refer to a number of passages in the 2007 Decision:
- “By approving the IPO the banks effectively resolved to continue using the Global Board of [the First Defendant] as “common structure or body” for the co-ordination of their policies regarding the pricing of MasterCard and Maestro payment card acceptance. Decisions of the Global Board remain the “faithful expression of the association’s resolve to coordinate the commercial conduct of its members” as they reflect the common interest of the organisation’s 2,600 European member banks.”<sup>17</sup> “...[T]he Global Board still takes decisions on a MIF virtually “on behalf of the banks”. MasterCard’s Global Board now offers member banks several “interchange management options”. This concept implies that banks decide themselves on how they wish their competitive behaviour to be co-ordinated: by the COO or directly by themselves. Banks can multilaterally agree on interchange themselves or have the COO set the interchange fees for them.” The rationale for the latter was the protection they hoped for in relation to regulatory action.<sup>18</sup> “Developments after the IPO also indicate that MasterCard’s management takes into account concrete banks’ interests in setting the level of [MIFs].”<sup>19</sup>

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<sup>17</sup> The 2007 Decision, recital 380.

<sup>18</sup> The 2007 Decision, recital 388.

<sup>19</sup> The 2007 Decision, recital 389.



82. I do not consider that the Claimants' case on where the EEA MIF was set is supported by the Commission's rejection of the Defendants' plea that, post-IPO, they no longer constituted an association of undertakings within Article 101. In my view, Mr Hoskins is correct in arguing that those are two fundamentally different questions, and the Commission was not addressing the location of rate setting. The case which the Defendants were apparently putting to the Commission was not that Article 101 did not apply because the final decision on Interchange Fees was made in the US, but that there had been a significant change in the MIF decision-making, in that decisions had previously been taken multilaterally by the member banks, whereas they were now being taken unilaterally by MasterCard, which was no longer owned by its member banks, and therefore took such decisions independently. The location of the decisions would have been irrelevant to that argument.
83. As the above extracts from the 2007 Decision show, the Commission rejected the argument on the basis that the members' commercial conduct was still being coordinated through the Global Board, which effectively took decisions on their behalf, so as to continue to engage Article 101. There is nothing in the Commission's reasoning which suggests that the final decision by the COO was merely a rubber stamp or a "tick box" exercise. The Commission's reference to the member banks' awareness that the IPO meant they would "lose control"<sup>20</sup> of relevant decision-making, indicates something more substantive.
84. Further, when it was put to Mr Tittarelli in cross-examination that the final decision on a MIF was simply a "tick box exercise" in respect of the work done by the EIC, he did not accept that characterisation, and made the point that the COO "had the last word" and that if, having read the explanatory papers, the COO did not approve the proposal, then it would not be adopted. I see no justification for doubting the correctness of that proposition.
85. Nor do I consider that the following affect the position: the absence of evidence that the COO ever queried or rejected a recommendation of the EIC; the fact that the COO's approval was sometimes given the same day or soon after it was sought; the fact that the explanatory documents known as "pre-reads" put to the COO were brief; the fact that the spadework on proposals was done by the Interchange Team; the fact that within the EEA it was the EIC who drove policy; and the fact that the EIC could decline to endorse a proposal of the Interchange Team, with the result that no recommendation would be made to the COO. Such factors do not mean that the final approval process was merely a formality. In any large organisation there would be nothing unusual in considerable work being done in working up a proposal, in order to bring the matter before a final decision-maker with a view to a simple approval decision. Experienced and able executives would be well aware that it is not worth spending time and effort on a proposal which is of a nature that it might well be rejected by the decision-maker at the final stage. The fact remains that the COO had final authority. There is no evidence to suggest anything other than that he would only approve a change if he was satisfied that it was appropriate.

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<sup>20</sup> Paragraph 74 of this judgment.

*My conclusion on the IPO dispute*

86. Despite these and other arguments ably presented by Mr Beal, I am not persuaded that the final approval of the COO can properly be treated as merely a rubber stamp so that it can, in effect, be ignored in deciding where the relevant decision-making took place in the period after the IPO. I therefore proceed on the basis that, in so far as MIFs were set after 2006 (November 2004 in the case of the UK MIF) by means of the CEO/COO-approval procedure, the final decision to adopt the MIF in question was taken in the US.

*My conclusions on the location of setting the MIFs and the CAR*

87. I will now express as briefly as possible my conclusions as to the location(s) of the setting of the MIFs in question and the CAR during the relevant periods.
88. *EEA MIF*: The material before me shows that, between 1992 and the IPO in 2006, with minor exceptions when meetings were held in other countries, the EEA MIF was set in Belgium, first by the Europay Board and then from 2002 by the European Board (see paragraphs 67-69 above). In my view the exceptions were not significant and I conclude that for present purposes the EEA MIF should be treated as having been set in Belgium in this period. However, from 2006 this conclusion cannot apply. Thenceforth, while the work of preparing a recommendation was carried out in Belgium, the final decision was always taken by senior management of the Second Defendant in the US. In those circumstances, I do not consider that it can legitimately be said that the MIF was set in Belgium. It was set in the US.
89. *The UK MIF*: The material before me indicates that for the UK it is necessary to distinguish between credit and debit cards. In relation to credit cards, it is also necessary to distinguish between the periods pre- and post-November 2004. As I have already stated, in November 2004 the Second Defendant took over from its UK licensees the power to set the UK MIF for credit cards, adopting the new procedure in which proposals were first considered by the EIC in Waterloo, and were then passed to the senior management of the Second Defendant in the US for a final decision. I was told that the first time this procedure was used for the UK MIF was in June 2005.<sup>21</sup> For the same reasons as for the EEA MIF, I consider that the UK MIF for credit cards was set in the US in the period after November 2004.
90. Before November 2004, UK MIFs for credit cards were set by licensees (banks) in the UK. These MIFs, too, form part of the Claimants' claim, because it is alleged that their level was inflated by the unlawful level at which the EEA MIF was set and also by the operation of the CAR, with consequent increase in MSCs paid by the Claimants. It would seem to follow that it is the location of the setting of the EEA MIF and the CAR which is relevant to the claim in respect of UK MIFs for credit cards prior to November 2004.
91. The position of UK MIFs for *Maestro* debit cards is a little more straightforward. As I understand it, throughout the period governed by the 1995 Act, MIFs for these cards were set by the licensees in the UK. Again, as with the UK credit cards, the allegation is that their level was inflated by the level of the EEA MIF and also by the operation

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<sup>21</sup> Schedule to the Defendants' closing submissions, paragraph 57.

of the CAR. Therefore, here too, it is the location of the setting of the relevant EEA MIF and the CAR which is material to this aspect of the claim.

92. In about April 2007, the Defendants launched in the UK *Debit MasterCard*, a new debit card. From the outset the procedure for setting the MIF for this card was the same as for credit cards in the UK in the period post-November 2004 (see above). For the same reasons as before, I find that the UK MIF for *Debit MasterCard* was set in the US throughout the period for which the 1995 Act is relevant.
93. *The German MIF*: As with the UK, in Germany MasterCard credit cards and Maestro debit cards were treated differently. Mr Uthe described in his evidence how prior to 1997 there were no Interchange Fees for domestic transactions using MasterCard credit cards, as there was effectively only a single Issuing Bank and Acquiring Bank, known as “GZS”. From about 1997 the number of issuers began to grow, and German licensees, through GZS’s board, began to set domestic MIFs for these cards. In 2003, an association was formed in Germany, which I shall call “the Verein” for convenience. (Its full name is much longer.) The Verein appears to have had a key role in the setting of German MIFs and domestic rules for MasterCard credit cards (but not debit cards) from then on, although it did not have the power to set them on its own.
94. Mr Uthe explained that the Verein was founded by the Third Defendant together with a number of German banking interests. Its board of 15 members contained two nominees of the Third Defendant, and 12 nominees of the German banking industry plus another member. In practice, the process for setting domestic MIFs for credit cards was that the Third Defendant, through its German representative office in Frankfurt, would submit a proposal to the Verein’s board. If the proposal was adopted by the requisite two thirds majority of the board, the Third Defendant would then seek the approval of German Issuing Banks and Acquiring Banks representing 75% of the volume of issuing and acquiring.
95. This procedure remained applicable until about the end of 2014. It is therefore clear that, throughout the period referable to the 1995 Act, the German domestic MIF for credit cards was set in Germany. However, this claim too is framed on the basis that the German MIF was inflated by the unlawful EEA MIF and/or the CAR. Thus, it appears to be the location of the setting of the relevant EEA MIF and (so far as relevant) the CAR which is material to this element of the claim.
96. As for the German MIF in respect of debit card transactions, Mr Uthe explained that prior to January 2008 there was no German MIF for Maestro cards, with the result that the EEA MIF applied by default to domestic transactions using Maestro. Since the Claimants’ allegation in this respect is essentially that the level of the EEA MIF was unlawful, with consequent increase in MSCs paid by them, it follows that, here too, it is the location of the setting of the relevant EEA MIF and (if relevant) the CAR which is material to this element of the claim.
97. With effect from 15 January 2008, the Defendants introduced a domestic Maestro MIF for Germany. The procedure for setting the German MIF was that after consideration by the EIC in Waterloo, the proposal was passed to the senior management of the Second Defendant in the US for a final decision. For the reasons

given earlier, I consider that from this date in January 2008 German domestic MIFs for debit cards were set in the U.S.

98. *The Italian MIF*: In his evidence, Mr Tittarelli states that until April 2007 there were in Italy no domestic MIFs for MasterCard credit cards or Maestro debit cards, and so under the Scheme Rules the EEA MIF applied by default to domestic Italian transactions using these cards. The Claimants' allegation in respect of this period is essentially that the level of the EEA MIF was unlawful, with consequent increase in MSCs paid by them. Therefore, once more, it is the location of the setting of the relevant EEA MIF and (if relevant to this head of claim) the CAR which is material to this element of the claim.
99. With effect from April 2007, the Defendants set a domestic Italian MIF for both MasterCard credit cards and Maestro debit cards. The procedure was the same as that adopted from January 2008 for German domestic MIFs for debit cards. The procedure remained the same until the coming into force of Rome II. Accordingly, from April 2007 until the 1995 Act ceased to apply, Italian domestic MIFs on both credit and debit cards were set in the US.
100. *The Polish MIF*: According to the evidence of Mr Ciolkowski, the story in Poland began in 1994 when a forum ("the Forum") was formed by five Polish banks, to create a platform for dealing with issues arising under what he describes as "the Europay payment card system in Poland." The Forum, which was not a legal person, grew as more licensees of MasterCard joined it. Although the Defendants were not members of the Forum, and did not have voting rights in the process of adopting resolutions of the Forum, it is clear from Mr Ciolkowski's evidence that the Third Defendant, through its Warsaw office, was involved in its administration from before the merger of the Europay and MasterCard businesses in 2002, and that the Warsaw office acted as the Forum's secretariat.
101. The evidence shows that from November 1994 until about mid-2007, Polish domestic MIFs for both MasterCard credit and Maestro debit card transactions were set by the Polish licensees in Poland, through the Forum. However, since it is not alleged that the Polish domestic MIFs set by the licensees through the Forum were themselves unlawful, but rather that the unlawful conduct of the Defendants in setting the EEA MIF and/or the CAR had inflated the Polish domestic MIFs set in Poland, leading to higher MSCs imposed on Polish retailers, it is once more the location of the setting of the relevant EEA MIF and (if relevant) the CAR, which is material here.
102. From about mid-2007, the Defendants took over the setting of domestic Polish MIFs for both credit and debit card transactions. The procedure was the same as that adopted from January 2008 for German domestic MIFs for debit cards. The procedure remained unchanged until the coming into force of Rome II. Accordingly, from about mid-2007 until the 1995 Act ceased to apply, Polish domestic MIFs on both credit and debit cards were set in the US.
103. *The CAR*: As to the arrangements for the CAR, again it is necessary to distinguish between credit and debit cards, as each had specific rules which were adopted at different times.

104. Dealing first with debit cards, the Defendants submit that there is only one relevant decision concerning such cards, which is the decision to introduce the CAR for Maestro with effect from 1 April 2005. That decision is said to have been made by the European Board in France in February 2005. I do not understand this to be disputed.
105. As for credit cards, the Claimants submit that the CAR rule was initially adopted in a meeting of the Third Defendant's Board in Belgium in 1995. However, Mr Cook, who undertook the closing submissions for the Defendants on these factual issues, submitted, in my view correctly in the light of the documentary material relied upon, that the CAR was originally approved in respect of airlines, car rentals and hotels by the Third Defendant's Board at a meeting in Lausanne, Switzerland in June 1993. At a later Board meeting of the Third Defendant in December 1994 at Waterloo, reference was made to the fact that central acquiring was already being carried on by licensees in respect of airlines. That Board meeting apparently put in place detailed rules covering central acquiring for airlines. Following meetings of the Third Defendant's Board in Waterloo, the rules were later extended to international car companies with effect from April 1996, to hotels and cruises in 1997 and to all international Merchants in 1999. Various amendments to the rules were then approved by the Third Defendant's Board in Austria in 1997, and in Belgium in 1998 and 2000, and by the European Board in Waterloo in 2003.
106. It is correct, as Mr Cook submitted, that in relation to the CAR for credit cards, the evidence indicates rather more decision-making activity outside Belgium than is the case with the setting of the EEA MIF. Nevertheless, the preponderance of the decisions relating to the CAR for those cards, appear to have been taken in Belgium, including the ostensibly important decision in 1999 which extended the CAR to international merchants generally.
107. The factual matrix available to me, and the submissions which have been made, do not enable me to judge whether any particular extension or amendment to the CAR is relevant to any particular head of claim and/or to a particular time frame. If, for example, the CAR applied to a certain transaction only by reason of the general extension of the rule's scope in 1999, that would indicate the location of the relevant decision-making to be Belgium. However, if, *ex hypothesi*, for a particular claim reliance was only able to be placed upon the CAR by reason of the amendment decided upon in Austria in 1997, it is difficult to see why Austria should not be the relevant location of that element for section 11 purposes.
108. However, in view of my conclusion on the relative significance of elements in the tort, these potential complexities relating to the location of decisions affecting the CAR, do not affect the applicable law under the section 11 of the 1995 Act.

*(iii) The relative significance of the elements/events of the tort*

109. The third of the court's tasks is to decide, on the basis of what is admittedly a value judgment, in which one of the countries identified by reference to the discussion above, did the most significant element(s) in relation to the tort in question occur. As already noted, the court should consider the significance of the relevant events/elements in the light of the facts of the particular case, rather than in the abstract.

110. The Claimants submit that the most significant events were those which constituted the wrongful conduct engaged in by the Defendants i.e. the setting of MIFs and relevant rules, their implementation and application. That conduct is what the Defendants actually did; the other elements – the restriction of competition, and the loss to the Claimants – flowed from that unlawful conduct. In their submission, the mischief at which Article 101 itself is aimed is the coordination of commercial behaviour by persons coming together to make an agreement or reach a decision - here to set the MIFs at particular levels. It is, the Claimants argue, not the MIFs which are inherently unlawful, but the fact that various undertakings have collaborated in fixing them.
111. In support of this argument, the Claimants referred to a number of cases concerning other types of tort where the court found, on the facts of those cases, that the most significant events were those associated with the defendant's actions and not the loss suffered by the claimant. In *Trafigura Beheer v Kookmin Bank* (above) a Korean bank brought a claim in tort against a Dutch company in respect of a dispute relating to the provision of a letter of credit by the bank in favour of the company. It was agreed that relevant elements of the tort had occurred in different countries. Having considered the facts of the case, Aikens J held that, although the loss was a significant element, the most significant events were:
- “those that took place in Singapore. That is because the acts on which [the bank] principally relies occurred there. Although the loss is also significant, it is not the most significant element in this case. In a sense, [the bank] was out of pocket from the moment it reimbursed [the advising bank] in Tokyo. What really made the difference, on its case, was [sic] the actions of [the company] in Singapore.”
112. Also referred to by the Claimants was *Protea Leasing v Royal Air Cambodge* (above). There, the wrong alleged consisted in the defendant improperly managing its client's business, so that the client defaulted on leases of the claimant's aircraft, causing the claimant loss. The alleged wrongful management took place in Cambodia, where all relevant management decisions were taken. Moore-Bick J held that the location of the economic consequences of the alleged wrong was “entirely fortuitous and of no real significance at all”, because under the aircraft leases rental payments were due to be made to bank accounts in France.
113. In *White Sea & Onega Shipping v International Transport Workers' Federation* [2001] 1 Lloyds' Rep. 421 (QBD), the tort involved an allegation that the defendants had instructed or encouraged dockers to break their contracts of employment in Denmark. The claimants, who operated from Russia, would suffer loss in Russia. Tomlinson J indicated that he regarded the place “where all the relevant action is taking place”, namely Denmark, as governing the applicable law under section 11, and not the place of loss.
114. The Claimants contend that here, although the Defendants' wrongful conduct had ripple effects across the EEA, it reflected the fact that the conduct in the EEA affected the entire payment scheme operated in that region. One EEA MIF was set in Belgium for all the EEA states. In addition, the CAR was set on a pan-EEA basis, having a like effect on each EEA market. In those circumstances the Claimants submit it would be odd to describe the effects in any particular country as the most significant events. The common factor in every case is the Defendants' conduct setting the EEA MIF. That was the causal event, and the key event.

115. The Claimants also point out that, whilst loss is a necessary element of the tort, it is not a necessary element of the infringement of Article 101 TFEU. A breach of Article 101 which takes place on a pan-EEA basis is intrinsically capable of affecting any national market in which relevant transactions in fact take place, and even if no transactions in fact take place there. Thus, it is submitted, the more significant events are those which made the Defendants' conduct unlawful, not the loss. In this connection the Claimants emphasise that, in section 11 of the 1995 Act, Parliament has made a deliberate decision to treat the location of loss as determinative in cases involving personal injury and damage to property, but not in other cases.
116. The Claimants therefore contend that the law applicable under section 11 is the law of Belgium, where the most significant events occurred, viz the Defendants' wrongdoing.
117. Notwithstanding the skill with which Mr Beal presented his submissions, I do not accept them.
118. The cases relied upon, although interesting, provide only limited assistance here. As we have seen, the significance of elements of a tort may differ even as between cases involving the *same* type of tort. In each of the three cases referred to above the alleged tort was a different one from the present, and it is not difficult to see why the court in each case selected as the applicable law that of the place "where all the relevant action is taking place", rather than the place where loss was suffered. In at least two of the cases, the place of loss appears to have been a matter of pure happenstance, unrelated to the real meat of the case. In the present case, by contrast, the location of the alleged loss is not fortuitous. The alleged loss of each of the Claimants is suffered in the country in which they are established, and it occurs there because that is the home of the market affected by the alleged restriction of competition.
119. A case in which the outcome was different is *VTB Capital plc v International Corp & Ors*, [2012] EWCA Civ 808. There, the claimant was a bank incorporated and regulated in England. It entered into a facility agreement in London with a Russian company, RAP, for a loan to purchase certain companies. RAP defaulted on the loan. The claimant bank brought an action for damages in deceit and conspiracy, alleging that it had been induced to enter the facility agreement by the misrepresentations of the defendants. The Supreme Court held that English law was the applicable law under section 11(2)(c). Lord Mance JSC, at paragraph 7 of his judgment, stated:
- "Both the alleged misrepresentations on which VTB relies originated in Russia, but they reached VTB in London (very probably via VTB Moscow), and were relied upon by VTB there when it gave formal agreement to the facility agreement and interest rate swap there. Further, VTB sustained its loss by disbursing money in and from London, although, as will appear, it was in fact covered by VTB Moscow against any loss which it might otherwise make on the loan."
120. In that case, the most significant element in the tort of deceit for the purposes of section 11 did not occur where the false representation originated, but where it was relied upon by the claimant bank and where it caused loss. A similar analysis has been adopted in order to identify the *lex loci delicti* in a claim for defamation where the offending article was written in one country and published in another (see paragraph 146 below).

121. In my view, based on the value judgment I am required to make, the most significant elements/events in the tort alleged in the present case is not the loss allegedly suffered by the Claimants, significant though that element undoubtedly is. Nor is it the setting/management of the MIFs and the adoption of the CAR, though these also have significance. It is the restriction of competition. Although, as the Claimants have pointed out, loss is not a necessary element of an infringement of Article 101, a restriction of competition *is* necessary and, indeed, is at the heart of such an infringement. The same applies to the tort alleged here, based as it is on that Article (and kindred EEA and domestic provisions). If there is no restriction of competition, there is no tort. The mischief at which Article 101 is aimed, or to put it more positively, the beneficial aim of that provision is the protection of the competitive process. Competition does not occur in the abstract, but on a market. Here, it is not in issue that the material markets are each of the national markets for providing “acquiring” services. It is those separate markets which are alleged to have been subjected to the restriction of competition. Those markets are the theatres of the wrong allegedly done by the Defendants.
122. On the facts of this case outlined earlier, I do not regard the setting of the MIFs or the CAR as of equivalent significance. First, setting a MIF is not inherently unlawful, as the Claimants acknowledge. The unlawfulness depends on other factors, including the need for a multilateral (as distinct from a unilateral) decision, an agreement or a concerted practice. Even then, the unlawfulness probably depends on the level of the MIF. Further, as the facts of the present case amply demonstrate, precisely where a MIF is set/managed or where a rule is adopted is just as fortuitous as the place of the occurrence of the loss in *Protea Leasing* (above). For similar reasons, the element of setting of the MIF has somewhat diminished significance in this case. It could have occurred anywhere, and occurring in this place rather than that place would not have made the slightest difference to where, and to what extent, national markets were affected by the restriction of competition, or to who suffered loss as a result.
123. I note the Defendants’ argument that to attribute the most significance to the setting of the MIF would allow cartelists effectively to choose which law would apply to their infringement. Whether or not this would be true (and it is now mainly an academic question), I do not consider that this can properly affect the “significance” of this element of the tort. Similarly, I doubt whether the “lack of practicality” of the Claimants’ approach, in eg. a case where meetings between cartelists in an ongoing cartel have taken place in various locations around the world, would be a relevant factor in assessing “significance”.
124. In summary, I find that the most significant elements/events of the tort in this case relate to the restriction of competition alleged to have occurred in each of the relevant national markets for “acquiring”. The fact that any loss alleged to have been suffered by each of the Claimants would also have occurred in the same country as the relevant restriction of competition, reinforces that conclusion.
125. It follows that I have accepted Mr Hoskins’ submission that, even if all setting of MIFs etc took place in Belgium (which I have found it did not), the applicable law under the general rule in section 11(2)(c) for the period in which the 1995 Act applied is not Belgian, but the law of each of the nations where a Claimant/Merchant was based at the time the MSCs imposed were higher than they would have been absent the restriction of competition affecting the market in question.



126. It also follows that it was not necessary for me to make findings as to the location(s) of the acts of setting/managing the MIFs and adopting/amending the CAR. I have done so in case the matter goes further and my findings may be of assistance.

*The Claimants' alternative case under section 12 of the 1995 Act*

127. As noted earlier, the Claimants argue, in the alternative, that if the applicable law by reference to the general rule in section 11(2)(c) is not Belgian law, it should be displaced under section 12, in favour of Belgian law.

*Correct approach to section 12*

128. Section 12 is set out at paragraph 32 above. It is common ground that, as with section 11, the correct approach to the application of section 12 is laid down in the judgment of the Court of Appeal in *VTB Capital plc v International Corp & Ors*, (above), at paragraph 149, in a passage cited in full and endorsed by the Supreme Court<sup>22</sup> in the same case:

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

129. Dicey, Morris and Collins (op. cit.), at 35-148, describes the approach to be adopted as follows:

“The application of the displacement rule in s.12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the tort with the country the law of which would be applicable under the general rule and the significance of any factors connecting the tort with another country. Secondly, it then has to be asked, in the light of that comparison, whether it is “substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues,” to be the law of the other country.

The provisions of s.12 have been applied to displace the law applicable under s.11 on very few occasions. The following points in particular are to be noted. First.... Secondly, it would seem that the case for displacement is likely to be the most difficult to establish in cases falling within s.11(2)(c), because the application of that provision of itself requires the court to identify the country in which the most significant element or elements of the tort are located. Thirdly s.12 envisages displacement of the general rule not only in relation to the case as a whole, but also in

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<sup>22</sup> See [2013] 2 AC 337, per Lord Clarke, at paragraph 203. See also per Longmore LJ in *Fiona Trust & Holding Corporation and others v Skarga* [2013] EWCA Civ 275, at paragraph 15.

relation to a particular issue or issues. Fourthly...Fifthly, the factors to be taken into account include, but are not limited to, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events. Sixthly, the relevant connection may be to the territory of a particular country, or to its legal system...Finally, it has been emphasised that “substantially” is the key word in determining whether displacement of the general rule should be permitted and that the general rule should not be dislodged easily, lest it be emasculated. The general rule in s.11 is not displaced simply because on balance, when all factors relating to a tort are considered, those that connect the tort with a different country prevail. Accordingly, the party seeking to displace the law which applies under s.11 must show a clear preponderance of factors declared relevant by s.12(2) which point towards the law of the other country. Whether that is the case will depend on the facts of the case and on the particular issue or issues which arise for decision. If, however, in addition to the other factors to which the general rule in s.11 refers, there are other significant factors connecting the tort to the country whose law applies under that rule (such as the fact that it is the national law or country of residence of at least one party), this will make it much more difficult to invoke the rule of displacement in s.12.”

130. The Claimants did not challenge this exposition of the law, save for the final sentence. That passage appears to be based on the following statement at paragraph 20 of the judgment of Waller LJ in *Harding v Wealands* [2005] 1 WLR 1539:

“But where the general law, by virtue of section 11 being the law where the tort occurred, is also the national law of one of the parties, it will, I suggest, be very difficult to envisage circumstances that will render it substantially more appropriate than any issue could be tried by reference to some other law.”

131. Mr Beal submitted that *Harding v Wealands* has no bearing on the present case, as Waller LJ was referring to displacement under section 12 in a section 11(1) situation, where all of the elements of the tort were constituted in New South Wales and the law of New South Wales was the law of the tort, rather than a section 11(2)(c) case such as the present, with elements of the tort occurring in different states. He also submitted that the statement of Waller LJ was *obiter*, as the issue in that case was whether or not a claim for damages was procedural or substantive.

*The Claimants’ submissions and my conclusion on section 12*

132. The Claimants point out that section 12 permits the displacement of the applicable law determined by the general rule in favour of the law of another country, where the latter is “substantially more appropriate” for deciding the issues in the case “*or any of those issues*”. The Claimants submit that the relevant issue in the present case is the limitation issue, and that Belgian law is substantially more appropriate for the determination of that issue than the law of the country where the transaction (which is the subject of a claim in the proceedings) occurred.
133. The Claimants emphasise that Belgium was admittedly the centre of the Defendants’ operations in Europe. They also submit that it was the place where virtually all the Defendants’ wrongful conduct, in the form of the setting and management of the various MIFs and the CAR, occurred. In relation to this last point, I have found that by no means all those acts took place in Belgium, and that, depending upon the period and the particular MIF, significant acts took place outside Belgium, including in the US, where two of the Defendants were based.
134. Next, the Claimants argued that Third Defendant had engaged in unlawful conduct in its home jurisdiction, Belgium, and therefore could not complain of unfairness if it is

subject to Belgian limitation law. This point has little weight in my view. It may be true that the Third Defendant would have no cause to complain, but it is not clear what relevance that has. In any event, the home jurisdiction of both the First and Second Defendant is in the US.

135. The Claimants also prayed in aid the legal policies underlying limitation provisions, in particular, the need to avoid unfairness to a defendant by ensuring that he does not have a claim hanging over him for an indefinite period, and the corresponding need to ensure that claimants do not sit on their rights, but act promptly to seek redress; they also refer to the need, in the interests of the efficient, timely and fair administration of justice, to avoid proof of a claim becoming more difficult with the lapse of time, when documentary evidence is more likely to have been destroyed and the memories of witnesses to fade. The Claimants submit it is not unfair to subject a company which is centred in and carries out conduct in Belgium to Belgian limitation laws, for any company engaged in such conduct would naturally proceed on the basis that it is exposed to the prospect of claims at least in Belgium, and to which Belgian limitation rules will apply.
136. Further, in the Claimants' submission, policy considerations in the present case indicate that all these claims should be subject to one and the same limitation provision, which should be that of the country of the wrongdoing and of the Third Defendant's European head office. This would avoid the prospect of the parties having to apply 18 different limitation laws. The Claimants point to the fact that at an earlier stage in these proceedings the Defendants themselves contended that the applicable law was Belgian, which they still maintain to be so in relation to any losses arising in Belgium. It follows, the Claimants argue, that the Defendants would have known that they needed to preserve documents in a manner sufficient to comply with Belgian limitation law.
137. As far the policy reasons for time limits on claims are concerned, these are uncontroversial but do not assist the Claimants: the policies apply to all limitation provisions of whatever country. Nor, in my view, does it help the Claimants to suggest that the Defendants should have anticipated a claim in respect of Belgian losses, and acted accordingly to ensure compliance with the Belgian limitation laws. Again, this may be correct, but one is tempted to say "so what!"
138. As to the convenience of having a single limitation provision instead of having to apply 18 different limitation laws, that too may be true, but it is not the basis of the statutory test under section 12.
139. Without intending any disrespect to the arguments so ably presented on behalf of the Claimants, in my view they do not get off first base in seeking to displace the applicable law determined under the general rule. The hurdle is admittedly a high one ("substantially more appropriate"). In the comparison of connecting factors required by section 12, the Claimants have not succeeded in tipping the balance in their favour whether in relation to the issue of limitation or generally, let alone tipping it so substantially that the "clear preponderance" of factors point to the law of Belgium.
140. The Claimants start from the disadvantageous position that the most significant elements/events of the tort, i.e. the restriction of competition in each relevant national market, are connected to the country where each Claimant was established and where

each Claimant paid inflated MSCs at the material time, rather than to Belgium (save in so far as claims are brought by Merchants based in Belgium). In addition, that same law is also associated with the place where recoverable loss was allegedly suffered by each such Claimant. As against that, a proportion (but by no means all) of the less significant elements/events relating to the tort, viz the decisions of setting and managing the MIFs and the CAR, were carried out in Belgium, at the headquarters of one of the Defendants. Those, essentially, are the rival connecting factors which fall to be compared under section 12. They admit of only one answer: that the Claimants have not succeeded in displacing the applicable law under the general rule in section 11, whether generally or in respect of the limitation issue.

141. As far as the latter issue is concerned, if a Claimant's knowledge (actual, constructive or imputed) of factors indicating that a wrong had been committed were to be relevant to that issue in the present case, then one would expect the inquiry and any relevant evidence to be focussed more on circumstances related to information available to the Claimant in the location where it was based and where it operated at the material time. Any connection with Belgium in that regard would be purely coincidental. This consideration, if anything, renders Belgian law even less appropriate for resolving the issue of limitation.

**Applicable law by reference to common law: 22 May 1992 to 30 April 1996**

142. The parties agree that the third of the claim periods (the earliest in time) is governed by the English common law choice of law rules, which include the so-called rule of "double actionability." A helpful description of the history and apparent evolution of the double actionability rule is contained in the judgment of David Richards J in *In re T & N Ltd* (above), at paragraphs 36-39:

"36. There was undoubtedly a shift in the understanding of the double actionability rule, which is well reflected in the changes to the rule as expressed in successive editions of *Dicey & Morris, The Conflict of Laws*. In the 8<sup>th</sup> ed (1967), pp 919-920, rule 1 58 stated:

"An Act done in a foreign country is a tort and actionable as such in England, only if it is both (1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and (2) not justifiable, according to the law of the foreign country where it was done."

This reflected the law as stated in *Phillips v Eyre* LR 6 QB 1. Owing to the different views expressed in the speeches in *Boys v Chaplin* [1971] AC 356, there was uncertainty as to the correct formulation of English law on this question, but in *Dicey & Morris* the rule was restated as follows in the 9<sup>th</sup> ed (1973), p 938:

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

37. At this stage there are three significant points to note about this formulation. First, to be actionable as a tort in England, an act done in a foreign country must be "actionable" according to the law of the foreign country where it was done, not the lesser test of being "not justifiable" according to the foreign law. Secondly, while it must be actionable as a tort in England, it is sufficient that it is actionable in the foreign country, not necessarily a tort. Thirdly, the exception in para (2) would permit the English court to apply the law of either country to the exclusion of

the other, whereas in *Boys v Chaplin* [1971] AC 356 the House of Lords applied English law to the exclusion of Maltese law, the *lex loci delicti*; it was uncertain whether the English court would exclude English law in favour of foreign law.

38. The issue, in effect, in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 was whether the reformulated rule in *Dicey & Morris* was a correct statement of English law. The Privy Council held that it was: see p 199E-F (para (1)) and pp 206-207 (para (2)). The only refinement was that under para (2) it was open in an appropriate case to apply the foreign law to the whole case, rather than to a particular issue only.

39. Although *Red Sea Insurance Co Ltd v Bouygues SA* was a decision of the Privy Council on appeal from Hong Kong, English law applied in Hong Kong to the issues raised (see p 198E) and I take it as an authoritative statement of English law.”

143. I understand both parties to be content with the formulation of the rule in the 9<sup>th</sup> edition of *Dicey & Morris*, quoted at paragraph 36 of the above judgment. The formulation in the current edition of that work is not materially different, although it is framed in a way which focuses on actions for defamation, in respect of which the common law rules still apply instead of Rome II.<sup>23</sup>

144. The exception to the double actionability rule is relied upon by the Claimants in the present case. In *Boys v Chaplin* [1971] AC 356, Lord Wilberforce referred to the need for a “general well-understood rule covering the majority of normal cases” in the interests of “certainty and simplicity in the law”. In a statement which was expressly approved by the Privy Council in *Red Sea Insurance v Bouygues S.A* [1995] 1 AC 190, Lord Wilberforce went on:

“The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from that other rule, should be preferred.”

145. Lord Slynn of Hadley, delivering the judgment of the Privy Council in *Red Sea Insurance* (above), confirmed that the exception could be invoked in order to disapply the *lex fori* in favour of the *lex loci delicti*, as well as the other way round. He also confirmed that the exception would be applied “only in exceptional cases”.<sup>24</sup> However, *Dicey, Morris & Collins* (op. cit.) state, at 35-008, that it is uncertain whether both *lex fori* and *lex loci delicti* could be displaced in favour of the law of a third country, but consider that it should be possible “in a suitable case”.<sup>25</sup>

#### *The parties’ contentions*

146. The position of the parties on this complex aspect of the case became a little clearer during oral argument. The Defendants submit that the double actionability rule is in principle applicable to some of the individual claims in these proceedings. The logic of the Defendants’ arguments would appear to be that the rule would not apply in respect of claims by Merchants based in the UK, as in those cases English law would be both the *lex fori* and the *lex loci delicti*. The Defendants submit that the latter is the law of the country in which the Merchant was based at the time of the harmful event, and where the wrong took effect. (On the Defendants’ approach, this would presumably include Belgium, but only to the extent that the Claimants include Merchants based in that country.) For that purpose, the Defendants rely, in particular,

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<sup>23</sup> Op. cit. at 35R-099.

<sup>24</sup> Page 207 of the judgment of the Privy Council.

<sup>25</sup> 35-115.

on the discussion and analysis in Dicey, Morris & Collins (op. cit), at 35-118/9, of where the tort of defamation is treated as having taken place. The learned authors refer to *Church of Scientology of California v Commissioner of Police* (1976) 120 S.J. 690 CA, in which it was accepted that the defamation in question had been committed, not where the offending article was written, but where it was published.

147. The Defendants also submit that, in so far as it does apply, the rule on double actionability is satisfied in the circumstances of these proceedings, in that an action in tort based on a breach of Article 101 TFEU and/or on national competition rules to similar effect, is actionable as a tort in both England (*lex fori*) and also under the law of any of the countries where the wrong relied upon took place (*lex loci delicti*).
148. The Claimants' position is more nuanced. They derive no comfort from the Defendants' ready acceptance that the double actionability rule applies and is satisfied in the present case. The problem relates to the effect of the Foreign Limitation Periods Act 1984 ("the 1984 Act"), subsections 1(1) & (2) of which provide:

"(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter – (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings [subject to] [sections 1A and 1B]; and (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

149. The Defendants submit that the effect of subsections 1(1) and (2) is that, in so far as the double actionability rule applies to the present claims, those claims are subject to the limitation periods prescribed by both the laws of England and the law of the country in which the wrong took place. Had the claims not been subject to the double actionability rule, then by virtue of subsection 1(1) only the law of limitation of the other country would apply.
150. The Claimants apprehend that under English limitation rules (the Limitation Act 1980) they are in a worse position than under the limitation law of Belgium, which they submit constitutes the "other country" within the meaning of section 1 of the 1984 Act as, in their submission, Belgium is the *locus delicti*, where the substance of the tort was committed for the purposes of the double actionability rule. Hence the Claimants argue that English law should be disapplied in favour of Belgian law.

#### The *lex loci delicti*

151. As the above discussion indicates, the parties are not *ad idem* as to the identity of the foreign country for the purposes of the double actionability rule, namely the place of commission of the wrong. Before considering the Claimants' proposed solutions to the problem posed by the 1984 Act, it is appropriate to identify the *lex loci delicti* for the purposes of the rule.
152. The arguments deployed by the parties in this regard are very similar, if not identical, to those used in their respective submissions under section 11 of the 1995 Act as to which of the elements of the tort was "the most significant". These have already been

summarised at paragraphs 109ff above, and I do not repeat them here. For the reasons expressed there, I concluded that the restriction of competition in each of the national markets for the provision of acquiring services was, in the circumstances of this case, the most significant element of the tort, reinforced by the allegation that loss was incurred by each Claimant/Merchant established and operating in that market. By contrast, I did not regard the setting of the MIFs or the CAR as of equivalent significance to the events/elements alleged to have occurred in each of the relevant product and geographical markets (see paragraphs 121-4 above).

153. In the context of the double actionability rule, the Claimants submit, in addition to the other arguments deployed, that the law of the foreign country where the relevant “act was done” is the law of Belgium, the “act” being the setting and implementation of the Scheme Rules/MIFs. They point to the words “act done” as clearly suggesting that the focus should be on an act done by the defendant, rather than on the suffering of loss.
154. I am not convinced by these points. First, I place little weight on the words “act done”. The rule is not enshrined in a statute, and the words in which it has been expressed in case law should not be treated as though it were a statutory enactment. I consider that the words used are intended to cover in a general sense the commission of the tort. Second, I have already found that by no means all the setting activity was carried out in Belgium (see paragraphs 87-107 above). Third, even if it had been, I would not agree that Belgium should be treated as the place where the tort was committed for the purpose of the double actionability rule. For the reasons already rehearsed in the context of the section 11 criteria, in my view the *lex loci delicti* should be treated as the place where all those effects arise which Article 101 is aimed at preventing, and in particular the restriction on competition, that place being the marketplace where each Merchant operated. That is also the place where recoverable loss was allegedly suffered by each such Claimant, and, to adopt Mr Hoskins’ phrase, is “the centre of gravity” of the tort. The location where one or more of the Defendants happened to be when the relevant decisions were adopted is of little real significance. If the decisions do not *take effect* on the markets in question, there is no tort. I consider that the defamation case and the misrepresentation case (paragraphs 119 and 120 above, respectively) are helpful analogies to the present case.

*The effect of the 1984 Act*

155. Having identified the country which should be treated as the home of the *lex loci delicti*, I turn to consider the effect of the 1984 Act. The Claimants present the following submissions as solutions to the problem created for them by that statute.
156. The first relates to the effect of subsection 1(2) of the 1984 Act. Mr Beal submitted that the subsection should be read as meaning that once you have satisfied the double actionability rule you no longer need to consider the question of whether or not the claim is actionable, and therefore do not need to consider limitation, as the only reason to do that would be to see whether the claim was time-barred and therefore not actionable. He argues that, since the Defendants had accepted that the claim was actionable in English law and therefore that the rule was satisfied, there could be no common law objection to the claim, and the subsection was, in effect, *functus*. He contended that the consequence of the Defendants’ construction of the clause is that whenever a foreign law claim was brought in respect of the period governed by the

common law choice of law rules, one would have to satisfy both the English law limitation period and any foreign law limitation period. That, he contended, could not be right, and if it were right, it would contravene EU law.

157. I do not agree with Mr Beal's construction of the 1984 Act. The effect of subsection 1(1) is to make clear that where the determination of a matter in the English court requires foreign law to be taken into account, then only the foreign, and not the English, law of limitation is to be applied. Subsection 1(2) contains an exception where both countries' laws are to be taken into account in determining the matter in question. In Dicey, Morris and Collins (op.cit.) at 35-129, the authors touch on the effect of the 1984 Act, stating:

“By virtue of the Foreign Limitation Periods Act 1984, the defendant may allege that the claim is barred after the expiry of the shorter of the limitation periods of the *lex fori* and the *lex loci delicti*. For although the Act generally excludes the application of the English statute of limitation where the matter falls to be determined by a foreign law, that exclusion does not extend to cases where both English law and foreign law have to be taken into account in the determination of any issue before the court, as will be the situation where the court is applying clause (3) of the Rule. On the other hand, if English law is alone applicable to the case through the operation of the exception contained in clause (4) of the Rule, the English statute will apply to the exclusion of that of the *lex loci delicti*. And if the *lex loci delicti* is alone applicable by reason of clause (4) of the Rule, that country's statute will apply to the exclusion of the English statute.”

158. In my view it is clear that, subject to Mr Beal's argument that the exception to the double actionability rule applies, and subject to his reliance on EU principles of effectiveness and equivalence, the 1984 Act means that both relevant countries' limitation periods apply, so that, for example, the shorter of the two periods (if different) would be applicable.

*The exception to the double actionability rule*

159. Mr Beal submits that in the present case the exception to the double actionability rule disapplies English law (the *lex fori*) in favour of Belgian law. The Claimants contend Belgian law to be the *lex loci delicti* and to be in any event the law of the country which, with respect to the issue of limitation, has the most significant relationship with the occurrence and the parties.
160. I have already concluded that (1) the *lex loci delicti* in the present case is not the law of Belgium (save where the market affected in relation to a particular Claimant's claim is in Belgium), and (2) subject to the same exception, Belgium law is not the law which, either with respect to the issue of limitation or generally, has the most significant relationship with the tort and the parties.
161. The Claimants have *pleaded* an alternative case, that if the claims and/or the limitation issues are not solely governed by Belgian law, they are solely governed by the law of “the country in which the relevant merchant was based at the time of the transaction...”<sup>26</sup> However, Mr Beal did not appear to refer to this alternative case in his written or oral submissions, restricting his argument to the disapplication of English law in favour of *Belgian* law alone.

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<sup>26</sup> The Claimants' Re-amended Choice of Law and Limitation pleading, paragraph 10.



162. In support of the disapplication of English law under the exception, the Claimants argue that in the present case there is no engagement of the policy which the double actionability rule is designed to protect, namely to avoid an English court being required to “give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed”.<sup>27</sup> Here, the claims centre upon an infringement of Article 101 TFEU and equivalent domestic laws, which are applicable throughout Europe. In these circumstances, the Claimants submitted that the correct approach is that followed by the Court of Appeal in *Pearce v Ove Arup Partnership Ltd* [2000] Ch. 403. There, the claimant’s action was for infringement of Dutch copyright. The Court of Appeal noted that the action would fail the *lex fori* limb because copyright law was strictly territorial, and therefore an act which infringed a Dutch copyright, if it occurred in England, would not be treated as unlawful by the English courts. In those circumstances, the Court of Appeal disapplied the *lex fori*, applying the exception to the double actionability rule, on the ground that this was appropriate given that the claim was not “in respect of some wrong which is conceptually unknown in English law” (see per Roch LJ at p. 444G-H).
163. The Claimants argue that, as in *Pearce*, so in the present case there is no principled reason why English law should prevent the Claimants from enforcing their rights under a foreign law, which they contend would happen if English law is applied, because English limitation law would provide an additional defence to the Defendants. The Claimants state that the parties are agreed that as English limitation law goes back six years from the dates of issue of proceedings, if applicable it will bar the claims in the common law period.
164. I do not agree that the situation in *Pearce* is comparable to the present case. It is fundamentally different, because in *Pearce* the plaintiff’s claim would have foundered *in limine* if the court had not applied the exception, not because the Dutch copyright claim was in any way inimical to or incompatible with English law, but simply because copyright is territorial. In the present case, as all parties accept, the Claimants’ claims would not be defeated by the double actionability rule, as the wrong in question is equally justiciable in England as in the *locus delicti*. The fact that the double actionability rule is satisfied cannot, in my view, be a justification for applying the exception to it. Nor does the application of English law, including the law of limitation, prevent the Claimants from enforcing their rights. English law provides at least 6 years from the accrual of the cause of action (and longer in certain circumstances) in which to enforce them.
165. In those circumstances, subject to the matters discussed below, the “clear and satisfying grounds” which Lord Wilberforce stated were required, do not exist. Nor has this been shown to be an “exceptional” case, so as to justify the disapplication of English law in favour of Belgian or any other country’s law.

#### *EU principles*

166. Finally, the Claimants invoke EU law in order to apply the exception to the double actionability rule and/or to justify the disapplication of the 1984 Act, so as to exclude English limitation rules.

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<sup>27</sup> *The Halley* (1867-1869) L.R. 2 P.C. 193, at p.204 per Selwyn LJ.

167. The arguments are essentially threefold: To the extent that the application of the *lex fori* has the effect of time-barring a claim which would not be time-barred under the *lex loci delicti*, (i) it is inconsistent with and impairs the effectiveness of the Brussels Recast Regulation;<sup>28</sup> (ii) it fails to comply with the general EU law principle of effectiveness; and (iii) it fails to comply with the general EU law principle of equivalence.

(i) *Brussels Recast Regulation*

168. The background to this argument is that the parties agreed that the courts and tribunals of England and Wales would have exclusive jurisdiction to address the present claims. Article 25 of the Brussels Recast Regulation provides that if the parties have agreed that the courts of a Member State are to have jurisdiction to settle any disputes which have arisen, those courts shall have jurisdiction, unless the agreement is null and void under the law of that Member State. The validity of that agreement has been the subject of a challenge before the Competition Appeal Tribunal by the Defendants, but this was not pursued.<sup>29</sup>

169. The Claimants submit that if they have actionable claims under Belgian law (which, as seen, they contend to be the *lex loci delicti*), then they are entitled by virtue of the Brussels Recast Regulation to pursue those claims in the English courts, and that the Brussels Recast Regulation does not envisage their then being faced with an additional hurdle in the form of the English limitation rules in addition to the limitation rule under the *lex loci delicti*. In their submission a rule such as the double actionability rule and/or the 1984 Act, which imposes the English limitation period, is a clear impediment to the proper operation of the Brussels Recast Regulation.

170. Once more the Claimants pray in aid the *Pearce* case (above). For this argument they refer to the judgment of Lloyd J at first instance:<sup>30</sup>

“My conclusion on this point is that the Convention does require an English court to accept jurisdiction where an action is brought against an English domiciled defendant (with or without other defendants) for breach of a Dutch copyright, and to hear that action on the merits, and thus overrides, so far as is necessary for that purpose, both rule 203 and the *Moçambique* rule, even though neither of them is a rule as to jurisdiction. Each of them, to the extent that they would preclude the English court from hearing such an action, would in my judgment impair the effectiveness of the Convention by frustrating the operation of the basic rule in article 2, and must therefore give way in order to allow the jurisdictional rules of the Convention to have their proper effect. The position is quite different from other exclusionary rules, such as acts of state, because both rule 203 and the *Moçambique* rule proceed on the clear premise that the English courts are not a suitable forum for such an action whereas the courts of another country are appropriate. It seems to me that, where that other country is another contracting state, this is a position which subverts the policy and provisions of the Convention.”

171. The Claimants draw an analogy with that case and contend that the Defendants cannot invoke English limitation rules to time bar a foreign law claim which is properly brought in this court pursuant to the Brussels Recast Regulation.

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<sup>28</sup> Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ [2012] L No 351, 20.12.2012, p. 1.

<sup>29</sup> *Deutsche Bahn and others v. MasterCard* [2016] CAT 13.

<sup>30</sup> *Pearce v Ove Arup Partnership Ltd* [1997] Ch 293, at p.308F-H.

172. Mr Beal submitted that, in order to resolve this problem, either the exception to the double actionability should be applied in favour of Belgian law (as, *ex hypothesi*, the *lex loci delicti*) and/or section 2 of the 1984 Act should be used to disapply subsection 1(2) of that Act, thereby removing the requirement to apply the English limitation rules as well as the foreign rules.
173. Section 2 of the 1984 Act provides (so far as relevant):
- “(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.
- (2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.”
174. Mr Beal contends that, in circumstances where the application of English limitation periods would have the effect of barring legitimate claims brought under Belgian law which would not be time barred under Belgian limitation rules, disapplication of subsection 1(2) of the 1984 Act would be justified on the basis of the need to comply with EU law, and/or by virtue of section 2 on public policy grounds and/or as preventing hardship to the Claimants.
175. I do not accept these contentions. In principle it is difficult to see how the applicability of the English or any particular limitation period which is not in itself objectionable in EU law (by being, for example, unreasonably short), could be said to impair the effectiveness of Article 25 of the Brussels Recast Regulation, which gives effect to what the parties to an exclusive jurisdiction agreement have agreed. The effect of the double actionability rule and subsection 1(2) is that the English court is required to apply whichever limitation period is shorter. In any given case it will be a matter of pure chance whether the English limitation rules are more or less favourable to a claimant than those of the *lex loci delicti*, and in either case there will be no impediment to the effectiveness of Brussels Recast Regulation.
176. In the present case, the Claimants have made clear that they consider the English rules to be less favourable to them than the Belgian rules (which in any event I have found *not* to be the *lex loci delicti*, save perhaps in the case of claims by Merchants based and operating in Belgium). However, the court has not yet dealt with limitation, and it is common ground that under the terms of the jurisdiction agreement between the parties each is free to raise whatever arguments on limitation as they see fit.
177. The dicta of Lloyd J in *Pearce* does not assist the Claimants. The provisions of English law under challenge in that case would have frustrated the Convention by preventing the English court from accepting jurisdiction and hearing the case on the merits, as the Convention required. The application of a limitation period which is not in itself objectionable, cannot sensibly be compared with such measures. It is well-established that reasonable limitation periods are not in any way inconsistent with EU law.<sup>31</sup>

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<sup>31</sup> Case C-452/09 *Iaia* [2011] ECR I-4045, at paragraphs 16-17

178. Whether or not the shorter of the two potential limitation periods in respect of any of the Claimants' claims is the period imposed by English law, there is no impairment of the parties' exclusive jurisdiction agreement or of the Brussels Recast Regulation. Equally, the effect of the double actionability rule and the 1984 Act cannot in my view be regarded as contrary to public policy, nor does it result in undue hardship to the Claimants, who have chosen to commence proceedings in England.

(ii) *Principle of effectiveness*

179. The Claimants raise a similar argument based on the general principle of effectiveness of EU law in the context of Article 101 TFEU. Relying upon Case C-295/04 *Manfredi* [2006] ECR I-6619,<sup>32</sup> Case C-268/06 *Impact* [2008] ECR I-2483,<sup>33</sup> and Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297,<sup>34</sup> the Claimants submit that the application of an additional (English) limitation period over and above that which applies under the domestic law of the Member State where the tort based on Article 101 was committed, would render the vindication of EU law rights under Article 101 practically impossible or excessively difficult. The tortious claims in question are already subject to a limitation period by virtue of the *lex loci delicti*. The effectiveness of the prohibition laid down in Article 101(1) TFEU would be put at risk if it were not open to any individual to claim damages for loss caused to him by prohibited conduct which is not time-barred under the governing law of the other Member State whose rules implement Article 101 TFEU. It is therefore impermissible, by virtue of the general principle of effectiveness, to impose the additional limitation period.

180. In my view this argument fares no better than the previous one. The paragraph of *Courage v Crehan* relied upon<sup>35</sup> simply states that the practical effectiveness of the prohibition in Article 101 would be compromised "if it were not open to any individual to claim damages for loss caused" by a breach of that Article. The Court went on to say that, therefore, there should not be "any absolute bar to such an action".<sup>36</sup> None of this applies to reasonable limitation periods which, as the Court of Justice has made clear

"are not by their nature liable to make it virtually impossible or excessively difficult to exercise the rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought..."<sup>37</sup>

181. In *Manfredi* (above) the Court of Justice identified features of national limitation rules which could be inimical to the principle of effectiveness. None of these apply (or are alleged to apply) here. The Court of Appeal has made clear that the application of English limitation rules to claims based on EU law does not infringe the effectiveness principle: see *Arcadia v Visa* [2015] Bus LR 1362, per Sir Terence Etherton C at paragraphs 73-75. Nor in my view does the application of such rules in conjunction with a foreign limitation rule infringe that principle. In any particular case only one limitation period (the shorter one) will in effect apply. The Claimants have

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<sup>32</sup> Paragraph 62.

<sup>33</sup> Paragraphs 47-55.

<sup>34</sup> Paragraph 26.

<sup>35</sup> Paragraph 26.

<sup>36</sup> Paragraph 28.

<sup>37</sup> Case C-452/09 *Iaia* [2011] ECR I-4045, at paragraphs 16-17.

chosen to bring a claim in the English court. There is no obstacle whatsoever to any claimant commencing proceedings so as to comply with English limitation rules.

182. It follows that the effective application of the prohibition in Article 101 TFEU is not compromised by the application of the double actionability rule and/or the 1984 Act, and that the principle of effectiveness is not infringed in this respect.

(iii) *Principle of equivalence*

183. The Claimants also argue that the application of English limitation rules in conjunction with the limitation rule of another Member State which is, *ex hypothesi*, the *lex loci delicti*, also offends the principle of equivalence. Again reference is made to *Manfredi* (above),<sup>38</sup> although that case was more concerned with the principle of effectiveness.
184. The Claimants' argument, as I understand it in the light of paragraph 208 of their written closing submissions, runs as follows: In their claims in this court the Claimants rely upon Belgian law to give effect to their Article 101 TFEU rights. Belgian law attracts its own limitation period, which the Claimants accept will have to be applied to their claims. If the Claimants were bringing a claim in this jurisdiction on the basis of English law, there would be no requirement to apply the law of another Member State in addition to English law. Accordingly, the common law rule of double actionability (preserved in a case such as this by the 1984 Act) requires two limitation periods to be applied only where the tort in question is a tort based on the law of what is here another Member State. That infringes the principle of equivalence, since additional restrictions are imposed on the bringing of EU law claims based on the laws of another Member State which are not imposed on purely domestic actions. In Mr Beal's words, you have to go through two gates rather than one.
185. I consider this argument, too, to be misconceived. The principle of equivalence "requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar..." See Case C-78/98 *Preston* [2000] ECR I-3201.<sup>39</sup> The relevant difference in treatment is therefore between a claim based on domestic law and a claim based on EU law. However, the Claimants' argument is apparently based on a comparison between a claim made under English law and a claim under the law of another Member State (*in casu* Belgium). The principle of equivalence is simply not engaged.
186. Further, the Claimants are not comparing like with like. Any difference in treatment results, not from the fact that a claim is based on EU law rather than domestic law, but from the fact that a tort is alleged to have occurred outside this jurisdiction rather than within. Where a tort based on infringement of EU rights occurs within the jurisdiction, it will be treated in precisely the same way as one which is based on laws of purely domestic origin. Thus, there is no breach of the principle of equivalence.

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<sup>38</sup> Paragraphs 77-79.

<sup>39</sup> Paragraph 55.

*Conclusion: disapplication of the double actionability rule and/or the 1984 Act*

187. It follows that there is no justification on EU grounds or generally for applying the exception to the double actionability rule in favour of Belgian or any other country's law. Nor is it possible or appropriate on any of these grounds to disapply subsection 1(2) of the 1984 Act.

**Applicable Law: Summary of main conclusions**

*Applicable law for the period 11 January 2009 to date*

188. For events, as defined under Rome II, occurring on or after 11 January 2009, the applicable law of the alleged tort will be determined by reference to the place of establishment of the Merchant concerned in the transaction in question.

*Applicable law for the 1995 Act period: 1 May 1996 to 10 January 2009*

*(a) Under the general rule in section 11(2)(c) of the 1995 Act*

189. Even if all setting of MIFs and the CAR took place in Belgium (which I have found not to be the case), the applicable law under the general rule in section 11(2)(c) of the 1995 Act for the period in which that Act applied is the law of each of the countries where a Claimant/Merchant was based at the time the MSCs imposed were higher than they would have been absent the alleged restriction of competition affecting the market in question.

*(b) The Claimants' alternative case under section 12 of the 1995 Act*

190. There is no justification for displacing by reference to section 12 of the 1995 Act the applicable law under the general rule in section 11, whether generally or in respect of the limitation issue.

*The period governed by the common law: 22 May 1992 to 30 April 1996*

*(a) The lex loci delicti*

191. For the purpose of the double actionability rule, the *lex loci delicti* is the law of the country in which those effects arise (in particular the restriction on competition) which Article 101 is aimed at preventing, namely the country containing the market on which each particular Claimant/Merchant operated at the material time. That is also the place where recoverable loss was allegedly suffered by each such Claimant, and is "the centre of gravity" of the alleged tort.

*(b) Disapplication of the double actionability rule and/or subsection 1(2)*

192. No justification has been shown for disapplying English law in favour of Belgian (or any other country's) law under the exception to the double actionability rule (where that rule is applicable), nor for disapplying (whether pursuant to section 2 of that Act or otherwise) that rule and/or subsection 1(2) of the 1984 Act by reference to the principles of EU law relied upon by the Claimants.

**Next steps**

193. The parties are requested to agree an order reflecting the conclusions I have reached.