JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

24 May 2012 (*)

(Competition – Decision by an association of undertakings – Market for the provision of debit, charge and credit card transaction acquiring services – Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement – Multilateral fallback interchange fees – Article 81(1) and (3) EC – Concept of ancillary restriction – No objective necessity – Restriction of competition by effect – Conditions for the grant of an individual exemption – Rights of the defence – Remedy – Periodic penalty payment – Statement of reasons – Proportionality)

In Case T−111/08,

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

MasterCard International, Inc., established in Wilmington,

MasterCard Europe, established in Waterloo (Belgium),

represented by B. Amory, V. Brophy, S. McInnes, lawyers, and T. Sharpe QC,

applicants,

supported by

Banco Santander, SA, established in Santander (Spain), represented by F. Lorente Hurtado, P. Vidal Martínez and A. Rodriguez Encinas, lawyers,

by

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

by

HSBC Bank plc, established in London (United Kingdom), represented by M. Coleman and P. Scott, Solicitors, and R. Thompson QC,

by

Bank of Scotland plc, established in Edinburgh, represented initially by S. Kim, K. Gordon and C. Hutton, Solicitors, and subsequently by J. Flynn QC, E. McKnight and K. Fountoukakos-Kyriakakos, Solicitors,

by

Lloyds TSB Bank plc, established in London, represented by E. McKnight, K. Fountoukakos-Kyriakakos, Solicitors, and J. Flynn QC,

and by

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

interveners,

v

European Commission, represented initially by F. Arbault, N. Khan and V. Bottka, and subsequently by N. Khan and V. Bottka, acting as Agents,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by E. Jenkinson and I. Rao, acting as Agents, subsequently by I. Rao, S. Ossowski and F. Penlington, and finally by I. Rao, M. Ossowski and C. Murrell, acting as Agents, and by J. Turner QC and J. Holmes, Barrister,

by

British Retail Consortium, established in London, represented by P. Crockford, Solicitor, and A. Robertson, Barrister,

and by

EuroCommerce AISBL, established in Brussels (Belgium), represented initially by F. Tuytschaever and F. Wijckmans, and subsequently by F. Wijckmans and J. Stuyck, lawyers,

interveners,

APPLICATION for annulment of Decision C(2007) 6474 final of 19 December 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Cases COMP/34.579 – MasterCard, COMP/36.518 – EuroCommerce, COMP/38.580 – Commercial Cards), and, in the alternative, for annulment of Articles 3 to 5 and 7 of that decision,

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich, President, I. Wiszniewska-Białecka and M. Prek (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 8 July 2011,

gives the following

Judgment

Background to the dispute

I – The applicant

1 MasterCard is an international payment organisation (‘the MasterCard payment organisation’) represented by several legal persons: the holding company MasterCard Inc., and its two subsidiaries MasterCard International Inc. and MasterCard Europe (referred to collectively as ‘the applicants’).

2 The applicants are responsible for managing and coordinating the MasterCard and Maestro card payment systems (referred to collectively as the 'MasterCard system' and 'MasterCard cards' respectively), which includes, inter alia, establishing the rules for the system and providing participating financial institutions with authorisation and compensation services. Responsibility for issuing MasterCard cards and concluding membership agreements with merchants for their acceptance of payments by means of MasterCard cards lies with the financial institutions.

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

II – The administrative procedure which led to the contested decision

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

5 On 22 May 1992, in May 1993 and on 8 September 1994, Europay submitted various notifications. They were followed by a notification, effective as from 1 July 1995, in respect of all Europay's payment systems.

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

7 On 22 November 2002, the Commission opened an *ex officio* investigation into fallback interchange fees for commercial cards within the European Economic Area (EEA).

8 On 24 September 2003, the Commission sent a statement of objections to the applicants concerning the MasterCard system rules and their decisions on fallback interchange fees.

9 On 5 June 2004, the applicants responded to that statement of objections.

10 On 21 June 2006, the Commission sent a supplementary statement of objections ('the SSO') to the applicants.

11 On 3 and 4 July and on 22 August 2006, the applicants were given access to the Commission's file.

12 On 15 October 2006, the applicants responded to the SSO ('RSSO').

13 On 14 and 15 November 2006, the applicants set out their views during a hearing.

14 On 23 March 2007, the Commission sent a letter of facts to the applicants.

15 On 16 May 2007, the applicants responded to the letter of facts.

The contested decision

16 On 19 December 2007, the Commission adopted Decision C(2007) 6474 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (COMP/34.579 – MasterCard, COMP/36.518 – EuroCommerce, COMP 38.580 – Commercial Cards) ('the contested decision'), the main elements of which are reproduced below.

I – The four-party bank card system and interchange fees

17 The Commission states that a four-party bank card system (also described as an open system), such as the MasterCard system, is different from three-party systems in that, in four -party systems, the financial institution which issues the bank card ('the issuing bank' or 'the issuer') may be different from the financial institution which provides merchants with acquiring services, that is to say, services enabling them to accept such cards as a means of settling transactions ('the acquiring bank' or 'the acquirer') (recitals 234 to 249 to the contested decision).

18 Interchange fees concern the relationship between the issuing and the acquiring bank on settlement of card transactions and correspond to a sum deducted in favour of the issuing bank. They must be distinguished from the costs charged to merchants by the acquiring bank (merchant service charge; 'MSC').

19 The Commission stated that the MasterCard payment organisation generally does not oblige issuing banks to use proceeds from interchange fees in a particular way, and that it does not verify in a systematic manner how those proceeds are used by them (recital 138 to the contested decision). It also noted that the applicants did not describe, or no longer described, interchange fees as a price or as compensation for certain services provided to merchants by the issuing banks, but as a mechanism for balancing the demands of cardholders and merchants (recitals 146 to 155 to the contested decision).

20 The contested decision does not relate to all interchange fees imposed under the MasterCard system, but only to those which the contested decision describes as multilateral fallback interchange fees which apply within the EEA or the euro area, that is excluding interchange fees agreed bilaterally between issuing and acquiring banks or interchange fees set collectively at national level ('MIF') (recital 118 to the contested decision).

II – The definition of the relevant market

21 According to the Commission, it is necessary to distinguish between three different product markets in the sphere of four-party bank card systems: first of all, an 'upstream' market, corresponding to the services provided by a bank card system to financial institutions, a market in which the various card systems compete ('the inter-systems market'); then a first 'downstream' market, in which the issuing banks compete for the business of the bank card holders ('the issuing market'); lastly a second 'downstream' market, in which the acquiring banks compete for the merchants' business ('the acquiring market') (recitals 278 to 282 to the contested decision).

22 The Commission defined the relevant market as being made up of the national acquiring markets in the Member States of the EEA (recitals 283 to 329 to the contested decision).

23 It did not accept the arguments put forward by the applicants during the administrative procedure that there is only one product market at issue, namely that in which the services offered by payment card systems at the joint demand of cardholders and merchants compete with each other and with all other forms of payment, including cash and cheques (recitals 250 to 277 to the contested decision).

III – The application of Article 81(1) EC

A – Decision by an association of undertakings

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

25 In the first place, the Commission took the view, in essence, that the MasterCard payment organisation was an association of undertakings before the IPO, and that that event had not affected the decisive factors justifying that characterisation (recitals 345 to 357 to the contested decision). The Commission noted, inter alia, that the change in the economic ownership of the MasterCard payment organisation was not a decisive factor (recital 358 to the contested decision). It also observed that governance of the association in Europe remained under the control of the banks (recitals 359 to 367 to the contested decision).

26 In the second place, the Commission noted that it was not disputed that the decisions on the MIF adopted before the IPO were decisions by associations of undertakings. That characterisation should continue to apply in respect of MIF decisions adopted after the IPO. In reaching that conclusion the Commission relied, inter alia, on the fact that there remained a commonality of interests between the MasterCard payment organisation and the banks, and on the banks' acceptance of the new form of governance (recitals 370 to 399 to the contested decision).

B – Restriction of competition

27 While noting that certain factors pointed to the existence of a restriction of competition by object, the Commission based its analysis only on the MIF's restrictive effects on competition in the acquiring market (recitals 401 to 407 to the contested decision).

28 According to the Commission, the members of the MasterCard payment organisation collectively exert market power vis-à-vis merchants and their customers. Thus, the MIF had the effect of inflating the base of the MSC, while the latter could be lower if there were no MIF and if there were a prohibition of unilateral pricing *a posteriori* of transactions by the issuing banks ('prohibition of *ex post* pricing'). It follows from this that the MIF examined by the Commission in the contested decision led to a restriction of price competition between acquiring banks to the detriment of merchants and their customers (recitals 410, 411 and 522 to the contested decision).

29 In that regard, the Commission found that the restrictive effects of the MIF did not operate only on the acquisition of cross-border transactions, but also on the acquisition of domestic transactions; it referred, inter alia, to the fact that MIFs were applied in some Member States because of the absence of bilateral or domestic interchange fees and could serve as a reference for setting domestic interchange fees (recitals 412 to 424 to the contested decision).

30 Moreover, the Commission deduced from some of the evidence that the MIF set a floor under the MSC (recitals 425 to 438 to the contested decision).

31 It also noted, in essence, that the role played by the MIF in the issuing market and in the inter-systems market aggravated its effects of restricting competition in the market at issue, since it is in the issuing banks' interest to offer their customers cards carrying a high MIF and, moreover, competition between card systems for the banks' business adversely affects systems offering a low MIF (recitals 461 to 491 to the contested decision).

32 The Commission also found that it was not in the acquiring banks' interest to exert any downward competitive pressure on the MIF since they benefit from it, directly or indirectly (recitals 499 to 501 to the contested decision).

33 As for merchants, they are not in a position sufficiently to constrain the level of the MIF (recitals 502 to 506 to the contested decision). In reaching that conclusion, the Commission took into account, inter alia, the effects of other rules of the MasterCard system and, in particular, that of the rule requiring that all cards from all banks be accepted (the Honour All Cards Rule; 'HACR') (recitals 507 to 521 to the contested decision) and also consumers' preference for that form of payment (recitals 504 and 506 to the contested decision).

C – Assessment of whether the MIF is objectively necessary for the operation of the MasterCard system

34 The Commission makes the preliminary point that, unlike restrictions which are necessary for implementing a main operation, restrictions which are merely desirable with a view to the commercial success of that operation, or offer greater efficiency, can be examined only within the framework of Article 81(3) EC (recitals 524 to 531 to the contested decision).

35 The Commission took the view that MIFs could not be regarded as ancillary restrictions in so far as they are not objectively necessary for the operation of an open payment card scheme. The scheme could function simply on the basis of the remuneration of issuing banks by cardholders, of acquiring banks by merchants, and of the owner of the scheme by the fees paid by the issuing and acquiring banks (recitals 549 to 552 to the contested decision). The Commission based its argument on the fact that five open bank card schemes had been operating in Europe without a MIF (recitals 555 to 614 to the contested decision). The Commission also referred to the cut in interchange fees imposed by the Reserve Bank of Australia and its lack of impact on the viability of the MasterCard system (recitals 634 to 644 to the contested decision).

36 With regard to the impact of the HACR, the Commission stated that the elimination of the MIF would not mean that the issuing banks could freely and unilaterally set interchange fees, since that risk could be avoided by a rule having effects less restrictive of competition, such as the prohibition of *ex post* pricing (recitals 553 and 554 to the contested decision).

37 The Commission did not accept the applicants' arguments that elimination of the MIF would lead to increased costs. Accordingly, it denied that elimination would have the effect of increasing the charges paid by cardholders to a level at which demand would be insufficient (recitals 609 to 614 to the contested decision). Similarly, it did not accept the applicants' analysis that the absence of a MIF would lead to a collective reallocation of costs in the system and would have the same effect on merchant fees as the effect of the MIF (recitals 615 to 619 to the contested decision).

38 Nor did it consider that a MIF was objectively necessary in order for the MasterCard system to be able to compete with the three-party systems (recitals 620 to 625 to the contested decision).

39 Moreover, the Commission took the view that the restrictive effect of the MIF on competition was appreciable (recitals 649 to 660 to the contested decision) and that it affected trade between Member States (recitals 661 and 662 to the contested decision).

IV – The application of Article 81(3) EC

40 According to the Commission, in essence, the economic arguments put forward by the applicants in relation to the role of the MIF in the balancing of the MasterCard system and its maximisation are inadequate for the purposes of establishing that the MIF generates

objective advantages. In the Commission's view, it did not impose an excessive burden of proof on the applicants by requiring empirical proof to be adduced. It also offered evidence to contradict the applicants' arguments, such as the considerable output of certain bank card systems operating without a MIF and the considerable revenues that banks generate from their card issuing business (recitals 679 to 701 and 729 to 733 to the contested decision).

41 The Commission also analysed the theoretical basis on which the applicants rely – the Baxter model – but rejected their arguments on account of the inherent limitations of the model (recitals 720 to 724 to the contested decision).

42 As regards the condition that consumers be allowed a fair share of the benefit, the Commission took the view that the applicants had not produced evidence to show that any objective advantages counterbalanced the disadvantages of the MIF for merchants and their customers (recitals 739 to 746 to the contested decision).

V – The operative part

43 Articles 1 and 2 of the operative part of the contested decision read as follows:

'Article 1

From 22 May 1992 until 19 December 2007 the MasterCard payment organisation and the legal entities representing it, that is [the applicants], have infringed Article 81 [EC] and, from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the [EEA], by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.

Article 2

The MasterCard payment organisation and the legal entities representing it shall bring to an end the infringement referred to in Article 1 in accordance with the subsequent Articles 3 to 5.

The MasterCard payment organisation and the legal entities representing it shall refrain from repeating the infringement through any act or conduct as described in Article 1 having the same or equivalent object or effect. They shall in particular refrain from implementing the SEPA/the Intra-Eurozone fallback interchange fees.'

44 In Article 3 of the contested decision, the Commission ordered the applicants formally to repeal the MIFs at issue within six months, to modify the association's network rules and to repeal all decisions on MIFs. In Article 4 of that decision, the applicants are ordered to communicate to the financial institutions and to the clearing houses and settlement banks concerned with transactions in the EEA, within six months, the changes made to the association's network rules. In Article 5 of the decision, the applicants are ordered to publish a summary of the contested decision on the internet. Article 6 provides that the Commission may be requested to extend the six-month period within which the applicants must comply with the orders set out in Articles 2 to 5. Finally, Article 7 of the contested decision provides that failure to comply with any of those orders will be punished by a fine of 3.5% of the applicants' daily consolidated global turnover.

Procedure

45 The applicants brought the present action by application lodged at the Registry of the General Court on 1 March 2008.

46 By order of 12 September 2008, the President of the Fifth Chamber of the General Court granted the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the form of order sought by the Commission.

47 By a first order of 9 December 2008, the President of the Fifth Chamber of the General Court granted BRC and EuroCommerce leave to intervene in support of the form of order sought by the Commission.

48 By a second order of 9 December 2008, the President of the Fifth Chamber of the General Court granted the following companies leave to intervene in support of the form of order sought by the applicants:

– Banco Santander SA;

– HSBC Bank plc (‘HSBC’);

– Bank of Scotland plc;

– Royal Bank of Scotland plc (‘RBS’);

– Lloyds TSB Bank plc (‘Lloyds TSB’);

– MBNA Europe Bank Ltd (‘MBNA’).

49 On 4 August and 5 December 2008, and on 19 February, 29 April and 23 July 2009, the applicants requested that certain confidential matters contained in the application, the defence, the reply, certain statements in intervention and the rejoinder not be communicated to the interveners. They produced a non-confidential version of those procedural documents and only those non-confidential texts were furnished to the interveners. The interveners raised no objections in that regard.

50 On 25 February 2009, RBS requested that certain confidential matters contained in its statement in intervention not be communicated to the other interveners. The following day, similar requests were made by MBNA, HSBC and Bank of Scotland in respect of their statements in intervention. A similar request was made by EuroCommerce with regard to its statement in intervention on 3 March 2009. The interveners provided non-confidential versions of their statements in intervention, and only those non-confidential texts were furnished to the other interveners who raised no objections in that regard.

51 On 8 January 2010, the applicants proposed that the Court adopt a measure of organisation of procedure pursuant to Article 64(4) of its Rules of Procedure. On 29 January and 31 March 2010, the applicants requested that certain confidential matters contained in their request for a measure of organisation of procedure and in the Commission’s reply to that request not be communicated to the interveners; they provided a non-confidential version of those procedural documents and only those non-confidential texts were furnished to the interveners. The interveners raised no objections in that regard.

52 Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

53 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 8 July 2011.

Forms of order sought

54 The applicants claim that the Court should:

– declare the application admissible;

– annul the contested decision or, in the alternative, annul Articles 3 to 5 and 7 thereof;

– order the Commission to pay the costs.

55 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

56 The United Kingdom of Great Britain and Northern Ireland, BRC and EuroCommerce contend that the Court should dismiss the action.

57 Banco Santander, RBS, Lloyds TSB and MBNA claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

58 HSBC claims that the Court should annul the contested decision.

59 Bank of Scotland claims that the Court should:

– annul the contested decision or, in the alternative, annul Articles 3 to 5 and 7 thereof;

– order the Commission to pay the costs.

Law

I – The request for measures of organisation of procedure submitted by the applicants

60 The applicants wish the Commission to be requested, by way of measures of organisation of procedure, to amend a passage in the rejoinder so as to remove references to the unilateral undertakings given by the applicants.

61 It is clear from that passage in the rejoinder that discussions between the applicants and the Commission continued after the adoption of the contested decision and culminated in undertakings concerning a new methodology for setting the MIF, undertakings on the basis of which the Member of the Commission responsible for competition matters announced that 'she saw no reason to propose to the College to open proceedings against the MIF set by that revised methodology'.

62 The applicants take the view that those references were made in violation of the agreement reached with the Commission, under which their discussions and any possible arrangement relating to the MIF were 'confidential' and 'without prejudice'. The Commission states that the reintroduction of MIFs is a matter of public knowledge, both the applicants and the Commission having issued press releases about it. The Commission also contends that the applicants' interpretation of 'without prejudice' is incorrect.

63 It has consistently been held that it is for the General Court to appraise the usefulness of measures of organisation of procedure (Case C−199/99 P *Corus UK* v *Commission* [2003] ECR I−11177, paragraph 67; Case T−1/90 *Pérez-Mínguez Casariego* v *Commission* [1991] ECR II−143, paragraph 94; and Case T−358/04 *Neumann* v *OHIM (Form of a microphone head grill)* [2007] ECR II−3329, paragraph 66).

64 In the present case, it is sufficient to observe that the references at issue concern an event subsequent to the adoption of the contested decision and thus of no relevance to its lawfulness (see, to that effect, Case T−395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II−875, paragraph 252 and the case-law cited).

65 The applicants' request for measures of organisation of procedure must therefore be refused, and there is no need to consider the precise scope of the obligations implied as a result of the reference, in correspondence between the parties, to the fact that their discussions were confidential and 'without prejudice'.

II – Admissibility of the content of certain annexes to the parties' written pleadings

66 The Commission takes the view that the arguments contained in some of the annexes to the application and to the reply must be rejected as inadmissible in accordance with the case-law of the General Court, in that the inclusion of arguments in the annexes means that the purely evidential and instrumental function assigned to annexes is exceeded.

67 In the reply, the applicants submit that those annexes simply support the arguments contained in the body of the application itself and are therefore admissible. The same cannot be said for certain annexes to the defence, which include arguments not raised in the body of the defence itself and should not, therefore, be taken into account for the purposes of the present proceedings.

68 Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law it is necessary, for an action to be admissible, that the basic matters of fact and law relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application. Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see Case T−201/04 *Microsoft* v *Commission* [2007] ECR II−3601, paragraph 94 and the case-law cited).

69 That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure also applies to the conditions for admissibility of a reply, which according to Article 47(1) of the Rules of Procedure is intended to supplement the application (*Microsoft* v *Commission*, cited in paragraph 68 above, paragraph 95).

70 Even if, having regard to the presumption of legality that exists with regard to acts adopted by the institutions of the European Union, the application and the defence each serve a different purpose and, accordingly, are subject to different requirements, the fact remains that the same approach must be taken with regard to the possibility of referring to documents annexed to the defence as that taken with regard to the application, since Article 46(1)(b) of

the Rules of Procedure states that the defence must contain the arguments of law and fact relied on.

71 The objections concerning the references to the annexes will be considered, where appropriate, in the context of the analysis of the various pleas and arguments to which they relate. The annexes will be taken into consideration only in so far as they support or supplement the pleas or arguments expressly set out by the parties in the body of their pleadings and in so far as it is possible to determine precisely what are the matters they contain that support or supplement those pleas or arguments (see, to that effect and by analogy, *Microsoft* v *Commission*, cited in paragraph 68 above, paragraph 99).

III – Substance

72 The present action consists, principally, of an application for annulment of the contested decision and, in the alternative, of an application for annulment of Articles 3 to 5 and 7.

A – The application for annulment of the contested decision

73 The applicants put forward four pleas in law in support of that application, alleging, first, infringement of Article 81(1) EC as a result of errors in the analysis of the effects of the MIF on competition; secondly, infringement of Article 81(3) EC; thirdly, infringement of Article 81(1) EC as a result of the MIF being incorrectly characterised as a decision by an association of undertakings; and, fourthly, errors vitiating the administrative procedure and errors of fact.

1. The first plea in law: infringement of Article 81(1) EC in that the Commission wrongly concluded that the setting of the MIF constituted a restriction of competition

74 This plea is expressed, in essence, in two parts. In the first part, the applicants submit that the Commission wrongly found that the MIF had the effect of restricting competition. In the second part, the applicants claim that the Commission ought to have concluded that the MIF was objectively necessary to the operation of the MasterCard system.

75 The applicants' reference to the alleged objective necessity of the MIF must be understood to mean that the Commission ought to have concluded that the MIF was an ancillary restriction in relation to the MasterCard system and that, therefore, the Commission was not entitled to consider its effects on competition independently, but should have examined it in conjunction with the effects of the MasterCard system to which it related.

76 Since the answer to be given to the second part determines whether the effects of the MIF on competition can be considered independently, it is necessary to begin by examining the second part.

a) The part of the plea in which it is alleged that the objective necessity of the MIF was incorrectly assessed

77 The concept of an ancillary restriction covers any restriction which is directly related and necessary to the implementation of a main operation (Case T−112/99 *M6 and Others* v *Commission* [2001] ECR II−2459, paragraph 104).

78 A restriction 'directly related' to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it (*M6 and Others* v *Commission*, cited in paragraph 77 above, paragraph 105).

79 The condition that a restriction be necessary implies a twofold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, secondly, whether it is proportionate to it (*M6 and Others* v *Commission*, cited in paragraph 77 above, paragraph 106).

80 As regards the examination of the objective necessity of a restriction, it must be observed that inasmuch as the existence of a rule of reason cannot be upheld, the requirement for objective necessity cannot be interpreted as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 81(3) EC. Therefore, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation (*M6 and Others* v *Commission*, cited in paragraph 77 above, paragraphs 107 and 109).

81 As regards the examination of the proportionate nature of the restriction in relation to implementation of the main operation, it is important to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under Article 81(3) EC (*M6 and Others* v *Commission*, cited in paragraph 77 above, paragraph 113).

82 Lastly, inasmuch as the assessment of the ancillary nature of a restriction in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers (*M6 and Others* v *Commission*, cited in paragraph 77 above, paragraph 114).

83 In the present case, the only point at issue is the condition relating to the objective necessity of the MIF. In essence, the applicants, supported by a number of interveners, raise two complaints. They submit that the contested decision is vitiated by an error in that the Commission applied the wrong legal criteria. They also take the view that the Commission made a manifest error of assessment in its examination of the objective necessity of that MIF.

The complaint that the wrong legal criteria were applied

84 The applicants complain that the Commission failed to analyse the MIF in its legal and economic context. They submit that the Commission erred in law in inferring from the assumption that the MasterCard system could function without the MIF that the MIF is not objectively necessary. On the contrary, it is clear from the case-law that if, without the restriction, the main operation is difficult to implement, the restriction may be regarded as objectively necessary for its implementation. The same would apply if that main operation were more difficult to implement, or if it could be implemented only under more uncertain conditions, with a lower likelihood of success.

85 The Commission disputes the merits of this complaint.

86 Having regard to the case-law cited in paragraphs 77 to 82 above, this complaint must be rejected as unfounded.

87 Admittedly, as the applicants correctly observe, it is clear from settled case-law that, in examining the restrictive effects on competition under Article 81(1) EC, account should be taken of the actual conditions in which an agreement, a decision by an association of undertakings or a concerted practice produce their effects, in particular the economic and legal context in which the undertakings concerned operate, the nature of the products or services concerned, as well as the real operating conditions and the structure of the market concerned (see Joined Cases T−374/94, T−375/94, T−384/94 and T−388/94 *European Night Services and Others* v *Commission* [1998] ECR II−3141, paragraph 136 and the case-law cited).

88 However, that does not mean that it is necessary, as the applicants seem to suggest, to take into account the advantages that the MIF represents for the MasterCard system in order to determine whether the MIF is objectively necessary for the operation of that system.

89 As the case-law cited in paragraph 77 above shows, examination of the objective necessity of a restriction is a relatively abstract exercise. Only those restrictions which are necessary in order for the main operation to be able to function in any event may be regarded as falling within the scope of the theory of ancillary restrictions. Thus, considerations relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market are not part of an analysis of the ancillary nature of the restriction (see, to that effect, *M6 and Others* v *Commission*, cited in paragraph 77 above, paragraph 121).

90 Accordingly, the fact that the absence of the MIF may have adverse consequences for the functioning of the MasterCard system does not, in itself, mean that the MIF must be regarded as being objectively necessary, if it is apparent from an examination of the MasterCard system in its economic and legal context that it is still capable of functioning without it.

91 The Commission's reasoning in inferring that the MIF is not objectively necessary from the fact that the MasterCard system could function without it is not, therefore, vitiated by any error of law.

92 Contrary to the applicants' submission, the Commission did not, therefore, apply the wrong legal criteria. The present complaint must therefore be rejected.

The complaint that the objective necessity of the MIF was incorrectly assessed

93 In so far as the MIF, on the one hand, constitutes a default transaction settlement procedure, which applies to transactions in the absence of a more specific agreement between the issuing and acquiring banks, and, on the other, represents a transfer of revenues to the issuing banks, it is necessary to examine any objective necessity of the MIF from both aspects.

– The objective necessity of the MIF as a default transaction settlement procedure

94 The applicants submit, in essence, that the MIF is objectively necessary for the MasterCard system because it constitutes a default transaction settlement procedure. Without a MIF, the HACR – entailing, as it does, the honouring of all transactions carried out with a MasterCard card – would have the effect of putting acquirers at the mercy of issuers, who would be able to determine the level of the interchange fee unilaterally, since merchants and acquirers would be bound to accept the transaction.

95 In recital 554 to the contested decision, the Commission responded to that objection in the following terms:

'[T]he possibility that some issuing banks might hold up acquirers who are bound by the HACR could be solved by a network rule that is less restrictive of competition than MasterCard's current solution that, by default, a certain level of interchange fees applies. The alternative solution would be a rule that imposes a prohibition on *ex post* pricing on the banks in the absence of a bilateral agreement between them. The rule would oblige the creditor bank to accept any payment validly entered into the system by a debtor bank while prohibiting each bank from charging the other bank in the absence of a bilateral agreement on the level of such charges. That solution to "protect" acquirers if issuers should indeed abuse their power under an HACR is less restrictive of competition than a MIF as it does not set a minimum price level on either side of the scheme.'

96 It must be observed that such reasoning does not disclose any manifest error of assessment. The fact that there are default transaction settlement procedures less restrictive of competition than the MIF precludes the latter from being regarded as objectively necessary for the operation of the MasterCard system merely on the basis of the MIF's status as a default transaction settlement procedure.

97 That conclusion is unaffected by the applicants' arguments that the Commission was not entitled to take into account the premiss of a MasterCard system operating on the basis of a prohibition of *ex post* pricing rather than on the basis of the MIF, on the ground that such a prohibition is not the product of market forces and thus constitutes a 'regulatory' type of intervention. In reasoning in this way, they submit, the Commission failed to fulfil its obligation to examine the competitive situation in the absence of any agreement.

98 These arguments are the result of a misreading of the case-law, according to which, if an agreement, a decision of an association of undertakings or a concerted practice that is in dispute is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement, decision of an association of undertakings or concerted practice at issue (see, to that effect, Case C−7/95 P *John Deere* v *Commission* [1998] ECR I−3111, paragraph 76 and the case-law cited).

99 Certainly, the terms of that comparison must be realistic. Accordingly, it was for the Commission to consider whether the premiss of a MasterCard system operating without a MIF was economically viable and could, therefore, be taken into account in the comparison. It was not, however, obliged to demonstrate that market forces would compel the issuing and acquiring banks themselves to decide to adopt a rule less restrictive of competition than the MIF.

– The objective necessity of the MIF as a mechanism for transferring funds to the issuing banks

100 It is necessary, therefore, to ascertain whether the Commission could legitimately take the view that a rule prohibiting *ex post* pricing was sufficient to enable the MasterCard system to function – in which case the MIF cannot be regarded as objectively necessary – or whether, on the contrary, the operation of the MasterCard system necessitated a mechanism for the transfer of funds to issuing banks.

101 It is not a question of making a comparison in order to determine whether the MasterCard system operates more efficiently with the MIF than on the basis of a prohibition of *ex post* pricing alone. To do so would be tantamount to taking into account the possible advantages of the MIF, which, as the Commission rightly points out, falls within the scope of an

examination under Article 81(3) EC (see the case-law cited in paragraph 80 above, and Case T−65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II−4653, paragraph 107).

102 In recitals 549 to 648 to the contested decision, the Commission took the view that the MIF was not objectively necessary, in that the MasterCard system could operate solely on the basis that the issuing banks are remunerated by cardholders, the acquiring banks by merchants, and the owner of the system by the fees paid by issuing and acquiring banks.

103 The Commission relied in support of its analysis on the fact that five open bank card schemes have been operating without MIFs in Europe. It also referred to the fact that the reduction in interchange fees imposed by the Reserve Bank of Australia had no impact on the MasterCard system in Australia ('the Australian example'). The Commission also based its analysis on the fact that MasterCard cards generated revenues or financial benefits other than just the MIF for the banks in connection with their issuing business.

104 The applicants and some of the interveners dispute the relevance of the evidence adduced by the Commission in order to demonstrate that the MIF is not objectively necessary. Their criticism is directed at the Commission's approach in examining five national systems that differ from the MasterCard system both in terms of their features and scale. They also dispute the relevance of the Australian example. In addition, a number of interveners emphasise the difficulties they would face if they were to operate in a system without a MIF on the basis of a prohibition of *ex post* pricing alone. The need to generate other revenues would mean an increase in the costs charged to cardholders, a reduction in the benefits of the services associated with MasterCard cards and a move towards alternative products or services. Those difficulties are particularly significant for small financial institutions or for those engaged only in the issuing business.

105 The Commission rejects those criticisms. It states, inter alia, that the applicants' arguments in relation to the five national schemes must be declared inadmissible, as they are contained in an annex.

106 In so far as the MIF constitutes a mechanism for the transfer of funds to issuing banks, its objective necessity for the operation of the MasterCard system must be examined in the wider context of the resources and economic advantages which the banks derive from their card issuing business.

107 In that regard, it must be noted that credit cards generate significant revenues for issuing banks, consisting, in particular, of the interest charged to cardholders. It is thus clear from recital 346 to the SSO, to which reference is made in recital 612 to the contested decision, that for the 'issuing banks the importance of lending money via credit cards may be high, especially in markets where credit cards are widely used such as in the [United Kingdom], the country with the highest number of MasterCard cards with a credit facility'. This assessment also appears in footnote 829 to the contested decision, in which it is pointed out that '[i]n the [United Kingdom], for instance issuing banks generated 90% of their revenues with income from cardholders (mainly [interest]) and only 10% from interchange fees'.

108 With regard to debit cards, the Commission contended, in essence, in recitals 347 and 348 to the SSO to which reference is made in recital 612 to the contested decision, that debit cards generated important commercial benefits for banks apart from interchange fees, by enabling them to reduce the number of cash and cheque transactions and, therefore, the costs that would otherwise arise in connection with the manual handling of such forms of payment.

109 It must be observed that the existence of such revenues and benefits makes it unlikely that, without a MIF, an appreciable proportion of banks would cease or significantly reduce their

MasterCard card issuing business or would change the terms of issue to such an extent as to be likely to result in holders of those cards favouring other forms of payment or turning to cards issued under three-party schemes, which might affect the viability of the MasterCard system.

110 In other words, while a reduction in the benefits conferred on cardholders or the profitability of the card issuing business might be expected in a system operating without a MIF, it is reasonable to conclude that such a reduction would not be sufficient to affect the viability of the MasterCard system.

111 That conclusion is reinforced by the Australian example, to which the Commission referred in recitals 634 to 644 to the contested decision. It is clear from that example that a substantial reduction in the MasterCard system's interchange fees that was imposed by the Reserve Bank of Australia had no notable impact on the system's viability and, in particular, did not lead to a move towards three-party schemes, even though such schemes were not affected by the regulations adopted by the Reserve Bank of Australia.

112 The applicants and some of the interveners take the view that the Australian example does not constitute relevant evidence because, first, it concerns a reduction and not the abolition of interchange fees; secondly, it has not been demonstrated by the Commission that market conditions in Australia and in the EEA were sufficiently similar to enable comparisons to be made; and, thirdly, that reduction had an adverse impact on cardholders.

113 It is indeed indisputable that a reduction, even a substantial one, in interchange fees does not have the same effect as that produced in the case of a MasterCard system operating without the mechanism for transferring funds from the 'acquiring' side to the 'issuing' side that is envisaged for the purposes of assessing whether or not the MIF is objectively necessary for the operation of the MasterCard system.

114 However, the fact remains that if such a mechanism were objectively necessary as claimed by the applicants, the significant reduction in interchange fees imposed in Australia could reasonably be expected to have had an adverse impact on the operation of the MasterCard system.

115 No such adverse impact was produced, however. Thus, as regards competition from three-party schemes, it is apparent from recital 636 to the contested decision that the 'combined market share of American Express and Diners Club in Australia therefore increased only slightly from 15% to 17% and then remained stable'. Likewise, the Commission noted not a reduction of activity in the MasterCard system but, on the contrary, an increase in its market share as well as its turnover. While such an increase may, as the Commission acknowledges, in part be due to the disappearance of a competing scheme, the Commission was nevertheless entitled, without thereby making a manifest error of assessment, to state in recital 641 to the contested decision that it represented a 'clear trend' that refuted the applicants' arguments regarding the collapse of a MasterCard system operating without a MIF.

116 That conclusion is not affected by the applicants' arguments that it cannot be assumed that market conditions in Australia are necessarily similar to those of the EEA and that reliable parallels can therefore be drawn.

117 It is apparent from the contested decision that the market share of Diners Club and of American Express was considerably smaller in the EEA than in Australia (their respective market shares being 17% and 19% in Australia, but only 2% and 3% in the EEA). Therefore, if there are any differences in market conditions between Australia and the EEA, these are

more likely to militate in favour of resistance by the MasterCard system in Europe to operating without a MIF.

118 With regard to the claim that the situation of cardholders in Australia worsened after the regulation of interchange fees, it is certainly true that the evidence produced by the applicants shows that the reduction in interchange fees led to an increase in the costs charged to cardholders or to the reduction of certain benefits.

119 However, the fact that the issuing banks passed – in part – the reduction in interchange fees on to cardholders is, in itself, irrelevant in the context of the examination of the objective necessity, if any, of the MIF. It would be otherwise if it appeared that the increase in costs charged to cardholders or decline in benefits previously provided were to result in a substantial reduction in cardholders' use of MasterCard cards and thus might affect the viability of that system. However, as has been pointed out in paragraph 115 above, that was not the case.

120 Having regard to all of the above, the Commission was legitimately able to conclude that the MIF was not objectively necessary for the operation of the MasterCard system.

121 That being the case, it is not necessary to consider the applicants' and interveners' complaints concerning the comparison of the MasterCard system with the five national bank card schemes operating without MIFs.

122 This part of the plea must therefore be rejected.

b) The part of the plea relating to errors of assessment in the analysis of the effects of the MIF on competition

123 The applicants, supported by several interveners, submit that the Commission's analysis of the effects of the MIF on competition is incorrect in a number of respects.

124 The Commission contends that the present part of the plea should be rejected.

125 It should be borne in mind that, in the contested decision, the Commission established the existence of effects restrictive of competition for the purposes of Article 81(1) EC on the basis that the MIF had an effect, directly or indirectly, on the level of interchange fees set by the issuing banks and that, in so far as the acquiring banks tended to pass that cost on to merchants, they were setting a floor price for the MSC. The Commission concluded from this that the MIF had the effect of restricting competition in the acquiring market (recitals 410 and 522 to the contested decision).

126 Specifically, the Commission:

– maintained that the MIF applied to cross-border transactions in the absence of more specific interchange fees (recitals 412 to 415 to the contested decision) and, moreover, either applied to domestic transactions in the absence of domestic interchange fees or served as a reference for their adoption (recitals 416 to 424 to the contested decision);

– inferred from two quantitative analyses of the effects of the MIF on the MSC (recitals 426 to 436 to the contested decision) and from statements given by merchants in a survey carried out by the Commission in 2004 ('the merchant market survey', recitals 437 and 438 to the contested decision) that the MIF constituted an obstacle to a reduction in the MSC below a certain level;

– took into account the effects of competition on the issuing market and the inter-systems market in observing that it was in the issuing banks' interest to offer cards

carrying a high MIF and, moreover, that competition between card systems for the banks' business adversely affected systems offering a low MIF (recitals 461 to 498 to the contested decision);

– noted, in essence, that it was not in the acquiring banks' interest to exert any downward competitive pressure on the MIF (recitals 499 to 501 to the contested decision);

– found that merchants were not in a position sufficiently to constrain the MIF (recitals 502 to 521 to the contested decision).

127 As observed in paragraph 87 above, in assessing an agreement, a decision by an association of undertakings or a concerted practice under Article 81(1) EC, account should be taken of the actual conditions in which it produces its effects, in particular the economic and legal context in which the undertakings concerned operate, the nature of the products or services concerned, as well as the real operating conditions and the structure of the market concerned.

128 Furthermore, as has already been pointed out in paragraph 98 above, if an agreement, a decision of an association of undertakings or a concerted practice that is in dispute is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement, decision of an association of undertakings or concerted practice at issue.

The complaints relating to the assessment of competition in the absence of the MIF

129 The applicants and a number of interveners submit that the Commission failed to fulfil its obligation to assess the competition in question within the actual context in which it would occur in the absence of the MIF. Essentially they raise two complaints.

130 In the first complaint, the applicants refer to the absence of a competitive relationship between issuing and acquiring banks in forming the view that the Commission was not entitled to conclude that the MIF restricts competition, since its absence does not mean that there is a competitive process that would result in the reduction of interchange fees. They observe that the MasterCard system could not function without a default transaction settlement procedure. The applicants also take the view that the Commission wrongly concluded that, in the absence of the MIF, bilateral negotiations would be held between issuing banks and acquiring banks and that such negotiations would in due course lead to the disappearance of interchange fees, and, moreover, that the Commission took the prohibition of *ex post* pricing into account in its reasoning.

131 This complaint must be rejected.

132 First, for the reasons mentioned in paragraphs 94 to 120 above, the fact that the premiss of a MasterCard system operating without a MIF – solely on the basis of a rule prohibiting *ex post* pricing – appears to be economically viable is sufficient to justify its being taken into consideration in the context of the analysis of the effects of the MIF on competition.

133 Secondly, as regards the criticism relating to the reference in the contested decision to bilateral negotiations between issuing and acquiring banks, it should be noted that although the Commission referred to such negotiations in recital 460 to the contested decision, it did so essentially in order to point out that in a MasterCard system operating without a MIF acquirers accepting interchange fees on a bilateral basis would risk failing to remain competitive in the acquiring market, and that, therefore, in the absence of a MIF, it was to be

expected that interchange fees would in due course cease to be charged on the settlement of transactions.

134 It must be held that this analysis is not manifestly incorrect. The view might reasonably be taken that by allowing transparency between acquiring banks as to the level of interchange fees applied to transactions, the MIF helps to ensure that all, or at least a substantial portion, of those fees are passed on to merchants, the acquiring banks being assured that the resulting increase in the amount of the MSC will not affect their competitive position. However, the view might reasonably be taken that no such assurance would be available in a system operating without a MIF, and that, therefore, the passing on to merchants of an interchange fee accepted bilaterally would be likely to affect the competitive position of the acquiring bank in question.

135 In the second complaint, the applicants and a number of interveners complain that the Commission failed to establish that the elimination of the MIF would raise the level of competition between acquirers. That complaint can be divided into four sets of objections.

136 In the first place, it is maintained that the Commission wrongly took inter-system competition into account, whereas such competition is not germane to the assessment of the effects of the MIF on competition between acquirers. It is also submitted that in so far as the Commission explicitly relied on a restriction of competition by effect, the recitals to the contested decision relating to the object of the MIF, such as its description as a 'recommended minimum price', are not to be taken into account.

137 First, it must be observed that the fact – noted by the Commission in recitals 461 to 498 to the contested decision – that competition between the MasterCard system and the other bank card schemes for the banks' business resulted in upward pressure on the levels of the MIF is a relevant aspect of the economic context within the meaning of the case-law cited in paragraph 127 above. Accordingly, the Commission was legitimately able to take it into account in its examination of the effects of the MIF on competition.

138 Secondly, it should be noted that, in recitals 401 to 407 to the contested decision, the Commission stated that the MIF 'may, by its very nature, have the potential of fixing prices' (recital 405 to the contested decision). It also, correctly, refuted the applicants' arguments based on the MIF's pursuit of legitimate objectives or on the absence of an intention to restrict competition. It nevertheless decided, in recital 407 to the contested decision, not to 'reach a definite conclusion as to whether the [MIF of the MasterCard payment organisation] is a restriction by object within the meaning of Article 81(1) [EC]', on the ground that it was clearly established 'that the [MIF of the MasterCard payment organisation] [had] the effect of appreciably restricting and distorting competition to the detriment of merchants in the acquiring markets'.

139 The anti-competitive object and effect of a decision by an association of undertakings are not cumulative but alternative conditions for assessing whether such a decision comes within the scope of the prohibition laid down in Article 81(1) EC. The alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the decision, in the economic context in which it is to be applied. Where, however, the analysis of the content of the decision does not reveal a sufficient degree of harm to competition, the consequences of the decision should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent. It is not necessary to examine the effects of a decision once its anti-competitive object has been established (see, to that effect, Joined Cases C−501/06 P, C−513/06 P, C−515/06 P and C−519/06 P *GlaxoSmithKline Services and Others* v *Commission* [2009] ECR I−9291, paragraph 55).

140 In that regard, it is helpful to point out that Article 81(1)(a) EC expressly provides that measures which directly or indirectly fix purchase or selling prices constitute restrictions of competition, and that, according to the case-law, the purpose of Article 81(1)(a) EC is to prohibit undertakings from distorting the normal formation of prices on the markets (Case T−13/89 *ICI* v *Commission* [1992] ECR II−1021, paragraph 311).

141 However, in so far as the Commission did not expressly rely on there being a restriction of competition by object, under the case-law cited in paragraph 98 above, in order to ascertain whether the MIF constitutes a restriction of competition by effect, the competition in question should be assessed within the actual context in which it would occur in the absence of that MIF.

142 In the second place, the applicants submit, in essence, that the fact that the MIF had an impact on the level of the MSC does not affect competition between acquirers, because the MIF applies in the same way to all acquirers and operates as a cost that is common to all of them. Thus, the prohibition of *ex post* pricing would effectively impose a MIF set at zero which, from a competitive aspect, would be equivalent to and just as transparent as the current MIF, the only difference being the level at which it is set.

143 This line of argument cannot be accepted. Since it is acknowledged that the MIF sets a floor for the MSC and in so far as the Commission was legitimately entitled to find that a MasterCard system operating without a MIF would remain economically viable, it necessarily follows that the MIF has effects restrictive of competition. By comparison with an acquiring market operating without them, the MIF limits the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of prices dropping below a certain threshold.

144 In the third place, an intervener states that the Commission has not demonstrated that the MIF set a floor for the MSC, since the MIF is not necessarily passed on in full to merchants.

145 First of all, before assessing the merits of that line of argument, it is appropriate to respond to the applicants' complaints, formally submitted in connection with the second part of their fourth plea in law, criticising certain evidence used by the Commission in the context of its submissions.

146 The applicants challenge, on the one hand, the reference in recital 438 to the contested decision to the statements of a petroleum company, a supermarket chain based in the United Kingdom, an airline and a furniture shop, according to which the MIF represents the limit to the competitive pressure they are able to exert on the acquiring banks. The applicants take the view that the Commission relied selectively on the only statements by merchants that accorded with its own assessment, and omitted important statements to the contrary which are mentioned in the RSSO.

147 It is certainly apparent from the statements mentioned in the RSSO that there is competition between acquirers for merchants' business. However, there is no contradiction with the statements highlighted in recital 438 to the contested decision or, more generally, with the Commission's reasoning. The fact that there is competition on price of the MSC up to a limit attributable to the existence of the MIF does not in any way preclude the Commission from finding that the MIF falls within the scope of Article 81(1) EC.

148 The applicants maintain, on the other hand, that the merchant market survey is flawed evidence that cannot be used to substantiate the Commission's conclusions.

149 It must be noted that the merchant market survey was essentially used by the Commission to substantiate three conclusions. First of all, as has been pointed out in paragraphs 146 and 147 above, the Commission relied on the statements of merchants questioned in the context

of that survey in order to demonstrate that the MIF represented a limit to the competitive pressure they were able to exert on the acquiring banks.

150 Next, the Commission concluded from that survey that merchants were unable sufficiently to constrain the level of the MIF because an essential factor in merchants' acceptance of card payments was the consumers' preference for them and that, therefore, to refuse that form of payment or to discriminate against it could have a negative impact on their custom. The Commission used that second conclusion, along with other factors, in defining the product market (recitals 289 and 290 to the contested decision), in establishing that the MIF had effects restrictive of competition (recitals 506 and 513 to the contested decision) and in order to refute the merits of the economic theory put forward by the applicants to explain the contribution of the MIF to technical and economic progress within the meaning of the first condition of Article 81(3) EC (recital 704 to the contested decision).

151 Lastly, for the sake of completeness, in its analysis of whether the methods of setting the MIF satisfy the second condition laid down under Article 81(3) EC, the Commission also referred to the merchant market survey to make the point, in essence, that it was doubtful that merchants benefited from the free funding period for purchases included with credit and charge cards (recital 742 to the contested decision).

152 In their RSSO, the applicants were critical of the method used by the Commission to conduct the merchant market survey and of the conclusions drawn from it. They also produced two studies relating to merchants' acceptance of payment cards. The Commission responded to the applicants' comments and explained its objections to the studies submitted by them in Annexes 2 and 3 to the contested decision, respectively. The Commission's analysis is summarily challenged in the application, which contains a reference in that respect to Annex A.15 to the application ('Merchant acceptance of payment cards – a rebuttal of the Commission's critique').

153 The applicants' criticisms appear to relate both to the reliability of the merchant market survey and to the merits of the conclusions which the Commission drew from it.

154 In order to assess the reliability of evidence, regard should be had, in particular, to the circumstances in which it came into being, the person to whom it was addressed and its content (see, to that effect, Joined Cases T−44/02 OP, T−54/02 OP and T−56/02 OP, T−60/02 OP and T−61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II−3567, paragraph 121 and the case-law cited).

155 It must be observed that Annexes 2 and 3 to the contested decision and Annex A.15 to the application do not reveal anything that would call into question the reliability of the merchant market survey.

156 More specifically, the fact that the Commission proceeded by means of requests for information under Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), thereby disclosing its identity to the merchants surveyed, cannot be regarded as undermining the objectivity of the answers obtained. As for the criticism relating to the overrepresentation of large merchants in the sample used by the Commission, it is sufficient to point out that the decision to concentrate on those merchants most likely to be in a position to exert pressure on the level of the MIF does not appear to be the product of manifestly erroneous reasoning on the Commission's part, given the circumstances of the present case.

157 As regards the merits of the conclusions which the Commission drew from the merchant market survey, other than what has already been mentioned in paragraphs 146 and 147

above, all that is significant at this stage is the criticism expressed in relation to the finding that merchants are unable to constrain the level of the MIF sufficiently. It must be observed that it was reasonable for the Commission to reach that conclusion on the basis of the answers which merchants gave to its requests for information. Thus it is clear from paragraph 22 of Annex 2 to the contested decision that the vast majority (91%) of merchants stated that they had never refused to accept a card as a means of payment. The merchants also stated that the main reasons why they accepted cards were not related to the transactional benefits so much as to the fact that most customers carried a particular card (90%) and to the need to maintain an image as a customer-friendly company (67%).

158 Indeed, as the applicants essentially submit, it cannot be denied that the risk of merchants refusing or discouraging the use of cards may represent a constraint for the applicants when setting the amount of the MIF. However, the Commission was entitled, without thereby making a manifest error of assessment, to describe it as insufficient in so far as the constraint arises only above a maximum merchants' tolerance threshold, when the cost of the transaction becomes more significant than the negative effects on merchants' custom of a refusal to accept such means of payment, or of discrimination in that regard. In essence the applicants themselves acknowledge that, when they explain that in the context of the method used to determine the level of the MIF for credit and charge cards, they '[try] to answer the question: "How high could [MIFs] go before we would start having either serious acceptance problems, where merchants would say: we don't want this product anymore, or by merchants trying to discourage the use of the card either by surcharging or discounting for cash"' (recital 175 to the contested decision).

159 Secondly, with regard to the arguments put forward by an intervener to the effect that the Commission wrongly found that the MIF set a floor price for the MSC and that a number of factors contradicted that conclusion, it is necessary to dismiss at the outset the contention that no decrease in the level of the MSC or in retail prices was identified after the adoption of the contested decision, since that contention is based on a state of affairs that existed after that adoption, which therefore cannot have any bearing on the lawfulness of the act adopted.

160 The intervener also refers, first, to the fact that in the case of 'on-us' transactions it is open to the bank not to pass the amount of the interchange fee on to the merchant. Next, it points to the fact that the examples used by the Commission in the contested decision show that MIFs are not always passed on to merchants. Lastly, it notes that a comparison in Spain over several years shows that MSCs are, on average, lower than the MIF.

161 As regards, first of all, the reference to 'on-us' transactions (internal transactions), it must be borne in mind that in those cases a bank is acquiring transactions effected with cards which it has itself issued. It is true that the bank is not then liable to another bank for the amount of the interchange fee and that it is therefore, as a rule, much easier for it not to pass it on to the MSC. However, in view of the very large number of financial institutions participating in the MasterCard system, it must be observed that such 'on-us' transactions are likely to constitute only a fraction – and one that is difficult to predict – of all transactions carried out in a merchant's business. It is doubtful, therefore, that 'on-us' transactions can genuinely have an impact on the amount of the MSC charged in a scheme on the scale of the MasterCard system.

162 Next, as regards the matters on which the Commission relied in the contested decision in connection with its second quantitative analysis, summarised in recitals 432 to 436 to the contested decision, it must be noted that a comparison was made of the share of the MIF in the MSCs which 17 acquirers charged to their smallest and largest merchants. It is clear from this that, from a total of 17 acquirers, 12 charged MSCs that were higher than the MIF, even to their largest merchants. In the case of the smallest merchants, the MSC was always

higher than the MIF. It was also observed that the average share of the MIF in the MSCs was 84.27% for large merchants and 45.97% for small merchants.

163 It is apparent from this analysis that the Commission could legitimately conclude, in recital 435 to the contested decision, that 'the [MIF of the MasterCard payment organisation] sets a floor to MSCs for both small and large merchants'. The validity of that conclusion is, moreover, reinforced by the statements of merchants mentioned in paragraph 146 above.

164 The various examples of MSCs that are lower than the MIF do not invalidate that conclusion. As the Commission correctly pointed out in recital 450 to the contested decision, the fact that an acquiring bank is prepared to 'absorb' a portion of the MIF does not prevent the MIF from affecting the price of the MSC. First, that applies only in regard to a proportion of merchants: those with particularly significant negotiating power. Secondly, the view may legitimately be taken that, even in the case of those merchants, the price charged would still be lower if there were no MIF, since the acquiring banks would then be in a position to offer larger reductions.

165 Lastly, as regards the argument relating to the situation in Spain, it must be noted that it is in fact clear from the documents provided by the intervener in the annex to its statement in intervention that the MSCs charged were equivalent to, or even lower than, the MIF. However, such an argument cannot in itself demonstrate that the Commission's conclusion regarding the effect of the MIF on the MSC is wrong. In so far as the matters mentioned in paragraphs 162 and 163 above tend to show that in other Member States of the European Union the MIF sets a floor for MSCs, the Commission's arguments in recitals 452 and 453 to the contested decision, to the effect that the situation in Spain may be explained by factors specific to that country, is not, therefore, manifestly erroneous. In addition, even in such a case, the banks could reasonably be expected to be in a position to offer lower MSCs in the absence of a MIF.

166 Lastly, in the fourth place, the Court must also reject the applicants' arguments concerning the Commission's failure clearly to establish the effect of the MIF on the prices paid by the end user. First, it is reasonable to conclude that merchants pass the increase in the amount of the MSC, at least in part, on to final consumers. Secondly, such arguments are, in any event, entirely irrelevant since the fact that the MIF is capable of restricting the competitive pressure which merchants are able to exert on acquirers is sufficient to show that there are effects restrictive of competition for the purposes of Article 81(1) EC.

167 Having regard to all of the foregoing, this second complaint must also be rejected.

The complaints relating to the examination of the product market

168 The applicants and a number of interveners complain, in essence, that the Commission failed to take the two-sided nature of the market into account in its reasoning, and challenge the Commission's definition of the product market.

169 In the first place, as regards the criticism relating to the Commission's definition of the product market, first, it should be borne in mind that it has consistently been held that inasmuch as it involves complex economic appraisals on the part of the Commission, the definition of the relevant market is amenable to only limited review by the Courts of the European Union (see, to that effect, Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 64, and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 26).

170 Secondly, it should be pointed out that the market to be taken into consideration comprises the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with

other products (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 37). More specifically, the Court of Justice has held that the concept of the product market implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 28).

171 It must also be noted that the definition of the relevant market differs according to whether Article 81 EC or Article 82 EC is to be applied. For the purposes of Article 82 EC, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position on a given market, which presupposes that such a market has already been defined. For the purposes of applying Article 81 EC, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. That is why, for the purposes of Article 81(1) EC, the objections to the definition of the market adopted by the Commission cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing of competition. It has also been held that the objection to the definition of the relevant market is of no consequence provided that the Commission has rightly concluded, on the basis of the documents referred to in the contested decision, that the agreement in question distorted competition and was liable to have an appreciable effect on trade between Member States (see Case T−61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II−5349, paragraph 27 and the case-law cited).

172 As mentioned in paragraphs 21 to 23 above, the Commission took the view that four-party bank card systems operated in three separate markets: an inter-systems market, an issuing market and an acquiring market, and relied on the restrictive effects of the MIF on the acquiring market.

173 It must be held that such a definition is not manifestly erroneous and that the applicants' and interveners' objection to it is unconvincing.

174 The applicants submit, in essence, that the Commission erred in finding that there was a distinct acquiring market, as the four-party system provides a single service at the joint demand of cardholders and merchants.

175 Those arguments must be rejected, as the Commission did not make any manifest error of assessment in concluding, in recitals 260 to 265 in the contested decision, that there was no provision of a single service in response to the joint demand of merchants and cardholders.

176 It is indeed the case that there are certain forms of interaction between the 'issuing' and 'acquiring' sides, such as the complementary nature of issuing and acquiring services, and the presence of indirect network effects, since the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other.

177 However, it must be pointed out that despite such complementarity, services provided to cardholders and those provided to merchants can be distinguished, and, moreover, cardholders and merchants exert separate competitive pressure on issuing and acquiring banks respectively.

178 That conclusion is not affected by the fact – noted by some interveners – that issuing banks provide services to merchants, such as a payment guarantee in the event of fraud, payment default or insolvency. While such services are actually provided by issuing banks, they are

provided via acquiring banks. In other words, merchants do not exert competitive pressure for the provision of those services on the issuing banks directly.

179 One intervener also complains that the Commission failed to take other forms of payment into account in its analysis of the restrictive effects of the MIF on competition, either in the context of a single market with bank card schemes or, in any event, as exerting competitive pressure.

180 Such arguments must also be rejected. Admittedly, the competitive pressure of other methods of payment affects the amount of the MIF in that it is neither in the applicants' nor in the banks' interest that the MIF be set at a level that would result in merchants favouring other methods of payment. However, as stated in paragraphs 157 and 158 above, the Commission was entitled, without thereby making a manifest error of assessment, to find in recitals 504 and 506 to the contested decision that the effect of that pressure was insufficient, having regard to consumers' preference for card payments and to the risk of losing transactions that discrimination in favour of other methods of payment might entail.

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

182 Such criticisms have no relevance in the context of a plea relating to infringement of Article 81(1) EC, in that they entail a weighing-up of the restrictive effects of the MIF on competition, legitimately established by the Commission, with any economic advantages that may ensue. However, it is only within the specific framework of Article 81(3) EC that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, *Van den Bergh Foods* v *Commission*, cited in paragraph 101 above, paragraph 107 and the case-law cited).

The complaint relating to the examination of the economic evidence submitted during the administrative procedure

183 The applicants object to the Commission's failure to examine or respond to the economic evidence which they presented during the administrative procedure. Contrary to the Commission's contention, that objection, which is included in their application, should be deemed admissible. The same applies to the evidence annexed to the application, in so far as it relates to issues of fact, unlike the Commission's arguments contained in the annex to the defence, which are not mentioned in that pleading.

184 According to the case-law cited in paragraphs 68 to 70 above, whilst the text of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential elements in the application.

185 It must be noted that the applicants' complaint is set out in particularly succinct terms in the application and that the arguments in support of it are in fact developed in Annexes A.13

('Comments on "the economic aspects of the European Commission's decision on [the] interchange fees [of the MasterCard payment organisation] for cross-border transactions, notified on 19 December 2007"'), A.14 ('Comments on Annex 4 of the Commission Decision') and A.15 ('Merchant acceptance of payment cards – a rebuttal of the Commission's critique') drawn up by the various experts behind the economic evidence submitted during the administrative procedure and to which the applicants make a general reference.

186 Thus, in paragraphs 52 to 54 of the application, the applicants merely state that they provided substantial economic arguments during the administrative procedure which have not been followed or which have been misrepresented by the Commission, and that '[their] economists' conclusions' sustain their legal analysis, according to which the Commission 'was wrong [i]n concluding that the interchange fee [was] a restriction of competition; [t]o focus on the impact of the interchange fee (or differences in its level) on MSCs without considering the effect on cardholder charges; [and in] denying that the scheme [had] to set an interchange fee level that maximises the volume of transactions and ignoring that this would promote consumer welfare'.

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

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

189 It follows that it is not for the Court to search within Annexes A.13 to A.15 for any arguments the applicants may have advanced in support of that complaint and, moreover, that that complaint must be rejected as inadmissible under Article 44(1)(c) of the Rules of Procedure, as it does not include the essential elements that would enable the Court to exercise its power of review and the Commission to provide its defence.

190 Moreover, it must be pointed out that inasmuch as the present complaint seems to criticise the Commission for having failed to take into account the economic arguments that demonstrate the advantages of the MIF for the MasterCard system, cardholders or consumers in general, it is of no relevance in the context of a plea relating to infringement of Article 81(1) EC. Such considerations, even if adequately supported, could in any event be taken into account only within the framework of a review of the Commission's examination of the MIF under Article 81(3) EC.

The complaint relating to the statement of reasons in the contested decision

191 Certain interveners object that the contested decision is vitiated by a failure to state reasons, in that the Commission did not justify its change of approach as against the earlier decision on the effects of MIFs: the decision of 24 July 2002 relating to a proceeding under Article 81 [EC] (Comp/29.373 – Visa international) ('the Visa II decision'). They recall that the Commission had admitted in that decision that a MIF was a remuneration paid between banks who must deal with each other for the settlement of a card payment transaction and thus have no choice of partner and, moreover, that an issuer provided services to the benefit of the merchant, via the acquirer. In the present case, the Commission recognises the need for a default mechanism by referring to the prohibition of *ex post* pricing, but raises a presumption against all MIFs.

192 There is, in any event, no need to address the admissibility of such a complaint; it is sufficient to note that it is based on a false premiss. Whilst, in the Visa II decision, the Commission took the view that Visa's MIF qualified for an exemption under Article 81

(3) EC, it did so after concluding that the MIF restricted competition, in particular, between acquirers (recital 68 to the Visa II decision). The Commission also took the view that the MIF was not objectively necessary for the operation of the Visa scheme (recitals 58 to 60 to the Visa II decision). That is, in essence, the analysis adopted by the Commission in the contested decision in relation to its examination of MasterCard's MIF under Article 81 (1) EC. Thus, the present complaint is based on a comparison of recitals that do not concern the same subject-matter, that is to say, the analysis, on the one hand, of the restrictive effects on competition of the applicants' MIF for the purposes of Article 81(1) EC in the case of the contested decision and, on the other, of compliance with the conditions of Article 81(3) EC, in the case of the Visa II decision.

193 Consequently this complaint must be rejected, as also, therefore, must the plea in law in its entirety.

2. The second plea in law: infringement of Article 81(3) EC

194 The applicants present this plea as comprising two parts. In the first part, they complain that the Commission imposed an excessively high burden of proof on them in relation to the proof that the conditions of Article 81(3) EC had been satisfied. In the second part, the applicants submit that the Commission's analysis of those conditions is vitiated by manifest errors of assessment.

195 In the first part of the plea, the applicants maintain, in essence, that the Commission was required to analyse the arguments and the evidence adduced by reference to the balance of probabilities alone. Thus, the arguments advanced by the applicants during the administrative procedure ought to have caused the Commission – failing the provision of any explanation or justification – to conclude that the applicants had established that the MIF satisfied the conditions of Article 81(3) EC. They also maintain that the principle *in dubio pro reo* applies and that, accordingly, if there was any doubt, the Commission was required to decide in their favour. Lastly, some of the interveners submit, in essence, that the contested decision effectively requires the applicants to justify setting the MIF at a particular level rather than to establish that the methodology used to set it is reasonable, which imposes an excessively high burden of proof.

196 As stated in Article 2 of Regulation No 1/2003, the undertaking or association of undertakings claiming the benefit of Article 81(3) EC is to bear the burden of proving that the conditions of that paragraph are fulfilled. Consequently, a person who relies on Article 81(3) EC must demonstrate that those conditions are satisfied, by means of convincing arguments and evidence (see Case T−168/01 *GlaxoSmithKline Services* v *Commission* [2006] ECR II−2969, paragraph 235 and the case-law cited).

197 The Commission, for its part, must adequately examine those arguments and that evidence, that is to say, it must determine whether they demonstrate that the conditions for the application of Article 81(3) EC are satisfied. In certain cases, those arguments and that evidence may be of such a kind as to require the Commission to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof borne by the person who relies on Article 81(3) EC has been discharged. In such a case the Commission must refute those arguments and that evidence (see *GlaxoSmithKline Services* v *Commission*, cited in paragraph 196 above, paragraph 236 and the case-law cited).

198 Since it is not possible to analyse in the abstract whether the Commission failed to have regard to the case-law cited in paragraph 197 above, the two parts of the present plea should be considered together.

199 Any decision by an association of undertakings which restricts competition, whether by its effects or by its object, may in principle benefit from an exemption under Article 81(3) EC (see, to that effect, *GlaxoSmithKline Services* v *Commission*, cited in paragraph 196 above, paragraph 233 and the case-law cited).

200 The application of that provision is subject to certain conditions, satisfaction of which is both necessary and sufficient. First, the decision or the category of decisions by associations of undertakings must contribute to improving the production or distribution of the goods in question, or to promoting technical or economic progress; secondly, consumers must be allowed a fair share of the resulting benefit; thirdly, it must not impose on the participating undertakings any restrictions which are not indispensable; and, fourthly, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products in question (see, to that effect, *GlaxoSmithKline Services* v *Commission*, cited in paragraph 196 above, paragraph 234 and the case-law cited).

201 It must be borne in mind that the Court dealing with an application for annulment of a decision applying Article 81(3) EC carries out, in so far as it is faced with complex economic assessments, a review confined, as regards the merits, to verifying whether the facts have been accurately stated, whether there has been any manifest error of appraisal and whether the legal consequences deduced from those facts were accurate (see *GlaxoSmithKline Services* v *Commission*, cited in paragraph 196 above, paragraph 241 and the case-law cited).

202 It is nevertheless for the Court to establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether it contains all the information which must be taken into account for the purpose of assessing a complex situation and whether it is capable of substantiating the conclusions drawn from it. On the other hand, it is not for the Court to substitute its own economic assessment for that of the institution which adopted the decision the legality of which it is requested to review (*GlaxoSmithKline Services* v *Commission*, cited in paragraph 196 above, paragraphs 242 and 243).

203 With regard to the Commission's examination of the first condition of Article 81(3) EC, the applicants complain that the Commission focused on the question whether technical and economic progress arose specifically from the MIF, whereas it should have taken all the advantages of the MasterCard system into account. They maintain that the first condition is satisfied in any event, even if it were appropriate to consider the MIF separately, in view of the fact that it serves to maximise MasterCard system output. In that regard, they claim that the Commission failed to take into account the positive effects of the MIF on the issuing market and imposed an excessive burden of proof on them, even though it acknowledges that the MIF can contribute to improving economic and technical progress.

204 Some of the interveners highlight the objective advantages, both direct and indirect, that may be attributed to the MIF. With regard to direct advantages, merchants benefit from the processing of transactions by the issuer and are the main beneficiaries of the payment guarantee borne by issuers and funded by the MIF. It is observed that alternative forms of payment entail large costs for merchants, which are also passed on to all consumers. With regard to indirect advantages, reference is made to the free funding period included with charge cards and credit cards, which encourages and increases the volume of purchases. Also highlighted is the difference of approach between the contested decision and the Visa II decision in that respect. The absence of an explanation for that difference of approach constitutes a failure to state reasons.

205 The Commission contends that the present plea should be rejected. Some of the parties intervening in support of the form of order sought by the Commission deny that the MIF can be regarded as the counterpart of the advantages enjoyed by merchants.

206 Under the first condition laid down under Article 81(3) EC, agreements that may be exempted must '[contribute] to improving the production or distribution of goods or to promoting technical or economic progress'. It is clear from the case-law of the Court of Justice and of the General Court that the improvement cannot be identified with all the advantages which the parties obtain from the agreement in their production or distribution activities. The improvement must in particular display appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition (see *Van den Bergh Foods* v *Commission*, cited in paragraph 101 above, paragraph 139 and the case-law cited).

207 This Court must, at the outset, reject the applicants' criticism that the Commission was wrong to examine the MIF alone without taking into account the contribution of the MasterCard system as a whole to technical and economic progress, while recognising the existence of that contribution. In so far as the MIF is not an ancillary restriction in relation to the MasterCard system, the Commission correctly considered whether there were appreciable objective advantages arising specifically from the MIF. Thus, the fact that the Commission admits in recital 679 to the contested decision that payment card schemes such as the MasterCard system represent technical and economic progress is of no relevance to whether the MIF satisfies the first condition laid down under Article 81(3) EC.

208 It is apparent from recitals 674 to 677 to the contested decision, the relevance of which is not disputed by the applicants, that their arguments, as submitted during the administrative procedure, are based on the role of the MIF in balancing the 'issuing' and 'acquiring' sides of the MasterCard system.

209 That line of argument presupposes, in essence, that issuing banks and acquiring banks provide a joint service involving joint costs (first assumption) and that the issuing banks bear the majority of the costs of the system (second assumption). Therefore, in order for them to be able to continue to promote payment cards and to provide services that make such cards attractive, a transfer from the 'acquiring' side of the system would need to be made in their favour. That transfer would enable a balance to be reached at the level at which the MasterCard system reaches maximum system output (third assumption). It is that maximisation of the MasterCard system which accounts for the economic and technical progress it represents. The methods of setting the MIF applied by the applicants allow the best possible allocation of costs between the 'acquiring' and 'issuing' sides of the system.

210 With regard to the first assumption, for reasons similar to those mentioned in paragraphs 175 to 177 above, it is sufficient to point out that in spite of the interaction between the card issuing business and the business of acquiring transactions carried out, the Commission did not make a manifest error of assessment when, in recitals 681 and 682 to the contested decision, it rejected the applicants' characterisation of joint costs as being associated with a joint service.

211 With regard to the second assumption, as the Commission has pointed out, in essence, in recital 686 to the contested decision, it is sufficient to note that it is based on a partial presentation of the issuing and acquiring business, taking into account only the costs borne by the issuing banks and omitting the revenues or other economic advantages they obtain from their card issuing business, notwithstanding the latter's importance, referred to in paragraphs 106 to 108 above.

212 Lastly, with regard to the third assumption, it must be noted that the Commission did not confine itself to rejecting the evidence adduced by the applicants on the ground that it was not sufficiently conclusive, but also stated in recitals 702 to 708 and 709 to 724 to the contested decision that both the functioning of the MasterCard system and the methods of

setting the MIF departed significantly from the theoretical model – the Baxter model – on which the applicants' arguments are based.

213 Thus, as regards the comparison of the MasterCard system with the Baxter model, the Commission pointed, inter alia, to a fundamental difference in the reasons for merchants' acceptance of payment cards. In essence, whereas the Baxter model implies merchants' willing acceptance of such cards in view of the advantages that the services associated with that form of payment represent for them, that acceptance is, in practice, also motivated by the constraints of consumer demand for that form of payment and the risk of losing transactions associated with any refusal or discrimination in that regard.

214 With regard to the methods adopted in setting the MIF, the Commission pointed to the differences between the applicants' practice and the Baxter model.

215 So far as concerns the method applied in respect of credit and charge cards (MasterCard Standard Interchange Methodology, recitals 710 to 718 to the contested decision), the Commission's fundamental criticism concerns the weakness of the analysis of changes in demand from cardholders and merchants for this form of payment, even though that is one of the essential elements of the Baxter model. Thus, merchants' demand is simply estimated by reference to what it might cost to establish a store card scheme. The Commission notes the limits of that analysis, as not every merchant either wishes or is able to establish a store card scheme. As regards the analysis of demand from cardholders, the Commission contends that the applicants are not assessing the changes in demand but relying solely on information given by the issuing banks.

216 As regards the method applicable to debit cards (Global MasterCard Debit Interchange Fee Methodology, recitals 719 to 724 to the contested decision), the Commission, while acknowledging that it is closer to the Baxter model in that it simultaneously takes into account the costs on the issuing side but also costs on the acquiring side of the scheme, states, in essence, that that method proceeds on the basis of an inflated view of the costs associated with the issuing side by including costs inherent in any form of payment, such as the costs of maintaining a current account.

217 In view of the foregoing, it must be held that the Commission was entitled, without thereby making a manifest error of assessment, to reject the arguments put forward by the applicants to show that the objective advantages which may arise from the MasterCard system are attributable to the role played by its MIF.

218 More specifically, it is apparent from paragraphs 210 to 215 above that the applicants' approach tends to overestimate the costs borne by the issuing banks and, moreover, inadequately to assess the advantages which merchants derive from that form of payment.

219 That conclusion is not affected by the applicants' arguments that they have provided abundant economic evidence to demonstrate the merits of their arguments. The applicants refer in that context to the relevant passages of their RSSO and to the economic evidence annexed to it, as well as to Annexes A.13 and A.14. They also recall the Commission's finding in recital 83 to the Visa II decision, according to which 'the more merchants in the system the greater the utility to cardholders and vice versa', which they interpret as an acknowledgement of the merits of their arguments.

220 In that regard, as the Commission essentially asserted in one of the annexes to the contested decision, which is devoted to a rebuttal of the economic evidence adduced by the applicants (paragraph 10 of Annex 4 to the contested decision), it should be pointed out that, even on the assumption that it can be inferred from that evidence that the MIF contributes to

increasing the output of the MasterCard system, that is not sufficient to establish that it satisfies the first condition laid down under Article 81(3) EC.

221 It must be observed that the primary beneficiaries of an increase in MasterCard system output are the MasterCard payment organisation and participating banks. However, as the case-law cited in paragraph 206 above shows, the improvement, within the meaning of the first condition of Article 81(3) EC, cannot be identified with all the advantages which the parties obtain from the agreement in their production or distribution activities.

222 As regards merchants, while an increase in the number of cards in circulation may increase the utility of the MasterCard system as far as they are concerned, it also has the effect of reducing their ability to constrain the level of the MIF and, therefore, of increasing the applicants' market power. It is reasonable to conclude that the risk of adverse effects on merchants' custom of a refusal to accept this method of payment, or of discrimination in that respect, is higher the greater the number of cards in circulation.

223 That reasoning can be found, in essence, in recitals 729 and 730 to the contested decision. While it is admitted in recital 729 'that, in principle, in a payment card system characterised by indirect network externalities, interchange fees can help optimise the utility of the network to its users', it is also stated in recital 730 that a MIF may be used by banks in order to 'achieve efficiencies as well as to extract rents'.

224 With regard to the reference in recital 83 to the Visa II decision, it must be observed that although the Commission admitted that the utility of the Visa scheme for each category of user depended on the number of users belonging to the other category, it also pointed out that it was difficult to determine the average marginal utility of a Visa card payment to each category of user, and referred to the need to find an acceptable proxy which met its concerns, including its concern that the MIF is set at a 'revenue-maximising' level (recital 80 to the Visa II decision). Accordingly, while Visa's MIF was granted an exemption, this was not only on the basis of its contribution to the increase in system output but because it was determined by reference to three categories of costs corresponding to services that could be regarded as being provided, at least in part, for the benefit of merchants: the cost of processing transactions, the cost of providing the 'payment guarantee' and the cost of the free funding period (recitals 84 and 85 to the Visa II decision).

225 However, while the applicants submit in a footnote to the application that 'the uncontested evidence submitted to date demonstrates that the interchange fee is a little more than two thirds of the cost of the payment guarantee, the interest-free period and processing costs … and does not even include a charge for the many other benefits, such as incremental sales and cash flow benefits, that merchants also receive', it should be pointed out that that assertion is not accompanied by anything that might enable its veracity to be established.

226 It must be concluded therefore that, in the absence of proof of a sufficiently close link between the MIF and the objective advantages enjoyed by merchants, the fact that the MIF may contribute to the increase in MasterCard system output is not, in itself, capable of establishing that the first condition laid down under Article 81(3) EC is satisfied.

227 The applicants also criticise the Commission for failing to take into account the advantages to cardholders that arise from the MIF and, moreover, for acting as a 'price regulator' in respect of the MIF.

228 With regard to the first criticism, it is indeed settled case-law that the appreciable objective advantages to which the first condition of Article 81(3) EC relates may arise not only for the relevant market but also for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or

efficiency of which might be improved by the existence of that agreement (Case T−86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II−1011, paragraph 343, and *GlaxoSmithKline Services* v *Commission*, cited in paragraph 196 above, paragraph 248). However, as merchants constitute one of the two groups of users affected by payment cards, the very existence of the second condition of Article 81(3) EC necessarily means that the existence of appreciable objective advantages attributable to the MIF must also be established in regard to them.

229 Therefore, in the absence of such proof, the applicants' criticism that insufficient account was taken of the advantages of the MIF for cardholders is, in all events, ineffective.

230 With regard to the second criticism – which reproduces the arguments developed in the first part of the present plea – the applicants and a number of interveners essentially submit that the arguments developed during the administrative procedure had the effect that the burden of refuting them was transferred to the Commission. They also complain that the Commission required them to justify the setting of the MIF at a particular level. Lastly, the applicants and some of the interveners refer to the fact that, after the adoption of the contested decision, the Commission launched a call for tenders for a study on '[c]osts and benefits to merchants of accepting different payment methods', in order to emphasise, in essence, the lack of data capable of meeting the standard of economic proof demanded by the Commission.

231 It must be observed that the Commission did not fail to fulfil the obligation set out in the case-law cited in paragraph 197 above, since it examined and properly refuted the merits of the arguments developed by the applicants during the administrative procedure.

232 So far as concerns the allegation relating to the lack of data capable of meeting the standard of economic proof demanded by the Commission, even if that were established, it does not mean that the burden of proof is eased, or even reversed, as the applicants seem to suggest. It must be observed that such a difficulty might be regarded as having resulted from the arguments developed by the applicants during the administrative procedure.

233 Thus, inasmuch as it is not possible to establish precisely the extent of the advantages that can be deemed to justify some financial compensation from merchants for the costs incurred by issuing banks, it is reasonable to conclude that it was for the applicants – in order to prove that the MIF satisfied the first condition laid down in Article 81(3) EC – to identify the services provided by the banks issuing debit, charge or credit cards capable of constituting objective advantages for merchants. It was also for them to establish that there was a sufficiently clear correlation between the costs involved in the provision of those services and the level of the MIF. As regards the last point, it must be noted that those costs cannot be determined without taking into account other revenues obtained by issuing banks on the provision of those services or by including costs which are not directly linked to them.

234 Since, for the reasons mentioned in paragraphs 214 to 218 above, the Commission was entitled, without thereby making a manifest error of assessment, to conclude that neither the method applicable to credit and charge cards nor that relating to debit cards had established that the first condition of Article 81(3) EC was satisfied, the fact, mentioned by a number of interveners, that the MIF operates as the counterpart to certain advantages for merchants does not, in the circumstances of the present case, establish that the MIF satisfies the conditions of that provision.

235 Likewise, the Commission cannot be accused of having departed without explanation from the position it adopted in the Visa II decision regarding the analysis of MIFs for the purposes of Article 81(3) EC, since the exemption in the Visa II decision was granted on the

basis of a method of calculation that limited the level of the MIF to certain specific advantages for merchants, which distinguishes the circumstances in which that decision was adopted from those of the present case.

236 In the light of the foregoing considerations, it must be concluded that the applicants have not established that the Commission's reasoning in relation to the first condition of Article 81(3) EC was unlawful. Since the conditions set out in that article must be met if that article is to apply, the second part of the plea must be rejected, and there is no need to examine the applicants' objections concerning the other aspects of the Commission's analysis pursuant to that article.

237 Consequently, the first part of the plea, relating to the excessively high burden of proof imposed on the applicants, must also be rejected. It is clear from the explanations given above that the Commission examined the arguments and the evidence put forward by the applicants and, in the circumstances of the case, was properly able to conclude that they did not establish that the conditions for the application of Article 81(3) EC were fulfilled. In so far as the Commission was properly able to conclude that the applicants had not produced proof of the exception on which they were relying, the allegation relating to infringement of the principle *in dubio pro reo* must also be rejected.

3. The third plea in law: infringement of Article 81(1) EC on account of the erroneous characterisation of the MasterCard payment organisation as an association of undertakings

238 The applicants, supported by the interveners, complain that the Commission found, wrongly, that there was an association of undertakings within the meaning of Article 81 (1) EC, while failing to take into account the changes made by the IPO to MasterCard's structure and governance, even though it is clear that the banks no longer control it and that it determines the MIF unilaterally. They submit, inter alia, that whether or not the banks exercise control is a relevant factor. The Commission was also wrong to take the view that, after the IPO, the European banks had remained in charge of the business of the MasterCard payment organisation in Europe through the European Board.

239 In addition, both the applicants and a number of interveners are critical of the criterion applied by the Commission concerning the existence of a commonality of interests between the MasterCard payment organisation and the banks in relation to the setting of the MIF. It is claimed that the Commission failed to establish that the MasterCard payment organisation was continuing to act in the interests of the banks or on their behalf, rather than on behalf of MasterCard shareholders, in setting the MIF. One intervener also states that that criterion is not based on any legal authority. A number of interveners submit that they are not in a position to exert any influence over the MasterCard payment organisation and that they are treated as customers by that organisation.

240 The Commission contends that this part of the plea should be rejected.

241 It has consistently been held that Article 81 EC applies to associations in so far as their own activities or those of the undertakings belonging to them tend to produce the results to which that provision refers (see Case T−193/02 *Piau* v *Commission* [2005] ECR II−209, paragraph 72 and the case-law cited).

242 It should also be borne in mind that the definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves (Case C−8/08 *T−Mobile Netherlands and Others* [2009] ECR I−4529, paragraph 23).

243 With regard, specifically, to the definition of 'decisions by associations of undertakings', as Advocate General Léger pointed out in his Opinion in Case C−309/99 *Wouters and Others* [2002] ECR I−1577, point 62, this seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article 81(1) EC covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body.

244 Accordingly, it is necessary to ascertain in this instance whether, in spite of the changes made by the IPO, the MasterCard payment organisation continues to be an institutionalised form of coordination of the banks' conduct.

245 In the first place, while it is common ground that, since the IPO, decisions relating to the MIF have been taken by the bodies of the MasterCard payment organisation and that the banks do not take part in that decision-making process, it is nevertheless apparent from the matters of fact and of law obtaining at the date of the contested decision, which is the relevant date for examination of its lawfulness under the case-law cited in paragraph 64 above, that the banks continued, collectively, to exercise decision-making powers in respect of the essential aspects of the operation of the MasterCard payment organisation after the IPO, both at a national and at a European level.

246 First, as regards the operation of the MasterCard payment organisation at a national level, the Commission found, in recitals 58 to 62 to the contested decision, to which reference is made in recital 359, that the banks were entitled to adopt specific national rules applying to a given market and partly replacing the global network rules. Those include 'fallback rules applicable to all intra-country transactions, including those acquired by members outside the country' (recital 60 to the contested decision). The most emblematic example of that decision-making power exercised at a national level is the setting of domestic interchange fees to be applied in preference to the MIF. The Commission also noted, in recital 61 to the contested decision, that such national rules did not need to be endorsed or certified by the applicants.

247 Secondly, it was reasonable for the Commission to highlight, in recitals 50 to 57 and 364 and 365 to the contested decision, the continued existence, following the IPO, of the European Board composed of representatives of the European banks, and its power to decide on 'key issues' which include the review of applications for membership, fines, intraregional operating rules, assessments and fees to the extent that such assessments and fees do not have an exclusionary effect, intraregional products and enhancement development 'to the extent that the development initiatives do not relate to competitively sensitive matters', the annual expense budget, surplus funds, and affinity and co-branding rules (recital 52 to the contested decision).

248 Admittedly, as the applicants observe in their written pleadings, the European Board was obliged to follow the Global Board's guidelines and could have its decision-making powers withdrawn. However, the possibility that the Global Board might issue guidelines detailing, for example, the limits of the European Board's powers, does not alter the fact that the European Board has decision-making powers. The same applies to the possibility that the Global Board might itself exercise the powers of the European Board or relieve the latter of its powers, given the particularly strict conditions governing its implementation, recalled in recitals 55 and 56 to the contested decision.

249 It must be observed that the retention of decision-making powers at both European and national levels by the banks within the MasterCard payment organisation means that the conclusions to be drawn from the IPO are very much to be set in perspective. At the date of

adoption of the contested decision, the MasterCard payment organisation seemed instead to be continuing to operate in Europe as an association of undertakings, in which the banks were not merely customers for the services provided but participated collectively and in a decentralised manner in all essential elements of the decision-making power.

250 In the second place, the Commission could properly conclude that the MIF essentially reflected the banks' interests even though they no longer controlled MasterCard after the IPO or participated in the setting of the level of the MIF, because there was a commonality of interests between the MasterCard payment organisation and the banks on that point.

251 First, it follows from the case-law of the Court of Justice that the existence of a commonality of interests or a common interest is a relevant factor for the purposes of assessing whether there is a decision by an association of undertakings within the meaning of Article 81(1) EC (see, to that effect, Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 29).

252 Secondly, the Commission was entitled to find that the banks, including those which were active on the acquiring market, had an interest in the MIF being set at a high level.

253 Those banks, as the Commission rightly pointed out in recital 383 to the contested decision, benefit, by virtue of the MIF, from a minimum price floor which readily enables them to pass on the MIF to merchants, for the reasons mentioned in paragraph 134 above. Thus, in the context of the banks' acquiring business, the MIF represents a cost for the banks only if they decide to absorb it themselves. However, it is apparent from paragraphs 162 to 164 above that that is the exception rather than the rule.

254 In addition, even if that were the case, it is reasonable to conclude that the MIF remains a source of revenue for the banks in so far as they also have an issuing business. In that regard, it must be observed that nothing has been put forward either by the applicants or the interveners to challenge the merits of the Commission's observation in recital 385 to the contested decision regarding the fact that, owing to the existence until 31 December 2004 of a rule of the MasterCard system – the NAWIR (No Acquiring Without Issuing Rule) – which obliged banks wishing to acquire transactions also to have a card issuing business, virtually all banks engaged in the acquiring business were also card issuers and benefited, to that extent, from the MIF.

255 Thirdly, the Commission was also properly able to find, in recital 386 to the contested decision, that the MasterCard payment organisation also had an interest in high rates of MIF being set, 'as the membership fees [MasterCard and its consolidated subsidiaries] charge[d] to banks in exchange for their co-ordination and network services [were] transaction related' (recital 386 to the contested decision). The number of transactions and, therefore, the revenues of the MasterCard payment organisation depend essentially on the willingness of the banks to promote MasterCard cards to their customers. It is therefore in the interest of the MasterCard payment organisation to set the MIF at a level that the banks deem attractive, which underlines the fact, noted by the Commission in recitals 461 to 498 to the contested decision, that inter-system competition operates to the detriment of card schemes offering a lower level of MIF.

256 Fourthly, it is apparent from the applicants' written pleadings that they do not dispute the truth of the finding in recital 389 to the contested decision that '[d]evelopments after the IPO also indicate that [the MasterCard payment organisation] takes into account concrete [banks'] interests in setting the level of [MIFs]'. Instead they argue that they merely acted as a supplier of services trying to satisfy the needs of its customers: issuing banks, acquiring banks and merchants.

257 However, it must be stated that grouping banks and merchants together is hardly convincing, since, with regard to merchants, what is sought is essentially the maximum threshold of their tolerance to the price of card transactions, as indicated in paragraphs 212 to 217 above.

258 The applicants' arguments that, since MasterCard's IPO, the MasterCard payment organisation has merely been taking into account the interests of its only public shareholders is no more convincing. In so far as the setting of a high MIF contributes to a larger number of transactions and therefore has a favourable impact on the revenue of the MasterCard payment organisation, it is reasonable to conclude that there is no conflict of interests between MasterCard's shareholders and the banks.

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

260 The third plea in law must, therefore, be rejected, and there is no need to examine the applicants' objections concerning the other matters identified by the Commission as supporting its conclusion or, in particular, the banks' acceptance of the new mode of governance in respect of the MIF (recitals 394 to 396 to the contested decision).

4. The fourth plea in law: that the contested decision is vitiated by procedural errors and errors of fact

261 The present plea is in two parts, alleging, first, infringement of the applicants' rights of defence and, secondly, errors of fact that vitiate the contested decision.

a) First part of the plea, alleging infringement of the applicants' rights of defence

262 The applicants submit four complaints concerning, first, unlawful recourse to a letter of facts; secondly, a lack of clarity in that letter; thirdly, the inclusion of new evidence in the contested decision; and, fourthly, the manner in which the Commission informed certain national competition authorities.

The first complaint, relating to unlawful recourse to a letter of facts

263 The applicants criticise the Commission for having had recourse to a letter of facts instead of a second SSO. That letter of facts went beyond the mere presentation of additional evidence and contained new legal arguments and essential facts.

264 The Commission contends that this complaint should be rejected.

265 It has consistently been held that the proper observance of the rights of the defence requires that the undertaking concerned be afforded the opportunity, from the stage of the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents relied on by the Commission in support of its allegations of an infringement of the Treaty (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10, and Case C−310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I−865, paragraph 21).

266 Article 27(1) of Regulation No 1/2003 reflects that principle in so far as it provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the procedure (see, to that effect, Joined Cases C−204/00 P, C−205/00 P, C−211/00 P, C−213/00 P, C−217/00 P and C−219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I−123, paragraph 67), to enable the parties concerned properly to identify the conduct complained of by the Commission and to defend themselves properly before the Commission adopts a final decision. That obligation is satisfied if the final decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of stating their views (see, to that effect, Case T−213/00 *CMA CGM and Others* v *Commission* [2003] ECR II−913, paragraph 109 and the case-law cited).

267 However, that may be done summarily and the final decision is not necessarily required to be a replica of the statement of objections (see, to that effect, *Musique Diffusion française and Others* v *Commission*, cited in paragraph 265 above, paragraph 14), since the statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see, to that effect, Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 70). Thus, it is permissible for the Commission to supplement the statement of objections in the light of the response of the parties, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (see, to that effect, *Compagnie générale maritime and Others* v *Commission*, cited in paragraph 228 above, paragraph 448, and Case T−310/01 *Schneider Electric* v *Commission* [2002] ECR II−4071, paragraph 438).

268 Thus, communication to the parties concerned of further objections is necessary only if the result of the investigations leads the Commission to take new facts into account against the undertakings or to alter materially the evidence for the contested infringements (*Aalborg Portland and Others* v *Commission*, cited in paragraph 266 above, paragraph 192).

269 Lastly, it should be recalled that, according to the case-law, the rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission might have been different as a result of an error committed by it. An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see, to that effect, Case C−194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I−10821, paragraph 31 and the case-law cited, and Case C−407/08 P *Knauf Gips* v *Commission* [2010] ECR I−6375, paragraph 28).

270 In the present case, it must be pointed out that although the Commission relied in recitals 202 to 213 to the SSO on the features of the MasterCard payment organisation as it was before the IPO in concluding that it constituted an association of undertakings within the meaning of Article 81(1) EC, it can be inferred from other passages of that statement of objections that the Commission took the view that the IPO of MasterCard that had been announced would not alter the substance of its conclusion regarding the existence of an infringement of Article 81 EC. Thus, in recital 25, it was stated that the documents submitted by the applicants did not demonstrate that the European Board would lose the power to set MIFs after the IPO. In recital 28 to that SSO, the Commission provided an account of the changes to be introduced by the IPO, indicating that the banks would continue to play a role in the new structure.

271 Although one of the matters to which the Commission referred in the SSO proved to be different from what was ultimately decided in the context of the IPO, in that the European Board did not retain the power to set MIFs, the fact remains that the SSO allowed the applicants to state their views on the Commission's complaint concerning the characterisation of the MasterCard system as an association of undertakings within the meaning of Article 81(1) EC and, more particularly, on the lack of impact of the IPO on that characterisation. It follows logically that they were in a position to be heard by the Commission in regard to that aspect at the hearing which took place after their RSSO.

272 That opportunity for the applicants to state their views during the administrative procedure is confirmed by the fact that a significant part of their RSSO was devoted to the effects of the IPO on the applicability of Article 81(1) EC.

273 Therefore, in the circumstances of the case, it must be held that the recourse to a letter of facts instead of to a statement of objections does not amount to an infringement of the applicants' rights of defence, since the Commission was obliged only to highlight the evidence which it intended to use in order to refute the arguments put forward by the applicants during the administrative procedure.

274 The present complaint must, therefore, be rejected.

The second complaint, relating to a lack of clarity in the letter of facts

275 According to the applicants, the content of the letter of facts was not sufficiently clear to enable them to understand how the Commission proposed to use the documents to which it referred, despite the requests for clarification which they had sent both to the Commission and to the hearing officer, which the Commission admitted in the defence. They refer to Annexes A.8.2 and A.20, in which their correspondence with the Commission on that issue is reproduced. That lack of clarity resulted in an infringement of their rights of defence.

276 As regards the admissibility of that complaint, they maintain that it is explained in the application why the letter of facts was inadequate and that the annexes simply provide the evidence.

277 The Commission takes the view that the present complaint is inadmissible.

278 It must be observed that the applicants' arguments are included in their application only in particularly succinct terms. Thus, in paragraph 122 of the application, the complaint is made in general terms that the Commission failed to provide the applicants 'with all the necessary clarifications which would allow [them] to understand how the Commission proposed to employ the materials it cited in the [letter of facts]'. In paragraph 123 there is mention of the fact that the applicants were faced 'with great difficulty in providing a meaningful response'. Lastly, in paragraph 124, it is maintained that the applicants 'identified at least 20 examples in the [letter of facts] where the Commission had failed to indicate how the evidence referred to by the Commission would be relied on'. No example is given in the application itself, however. Similarly, the application contains nothing that would enable the 'difficulty' to which the applicants refer to be assessed.

279 Moreover, the references made to Annex A.8.2 to the application ('Set of correspondence between [the applicants'] legal counsel and the Commission') and Annex A.20 to the application ('Correspondence from 17 April … to 12 July 2007 between [the applicants'] legal counsel and the Commission regarding the inadequacy of the letter of facts') do not make up for the deficiencies of the application in that respect.

280 It must be noted that the applicants merely make a general reference to Annex A.20. For the reasons set out in paragraphs 68 to 70 above, no account can therefore be taken of that annex.

281 With regard to Annex A.8.2, the applicants can be considered to have referred to a specific passage in that annex – a letter from the applicants dated 13 April 2007 – and, therefore, its content can be taken into account. However, a reading of that letter reveals only a list of the passages in the letter of facts which the applicants regard as being 'not clear' and with regard to which they sought clarification from the Commission. Consequently, it cannot be concluded on a reading of that list alone and in the absence of more precise arguments from the applicants on that point that the lack of clarity alleged could have resulted in an infringement of the applicants' rights of defence.

282 In the light of the foregoing, it must be held that the present complaint must be rejected as inadmissible under Article 44(1)(c) of the Rules of Procedure, as it does not contain the essential elements that would enable the Court to exercise its power of review and the Commission to provide its defence.

The third complaint, relating to the presence of new material in the contested decision

283 The applicants claim that the contested decision contains, first, new arguments; secondly, new reasoning; and, thirdly, additional or more precise explanations of the evidence, which they have not had an opportunity to contest. They refer, in that regard, to Annex A.21 ('The Commission's breach of [the applicants'] rights of defence – arguments, reasoning and evidence regarding the IPO'). In that respect also, according to the applicants, there has been an infringement of their rights of defence.

284 In the applicants' submission that complaint is admissible; Annex A.21 simply identifies the differences between the SSO and the contested decision.

285 The Commission takes the view that the complaint is inadmissible and, in any event, unfounded.

286 In the first place, with regard to the objections concerning the presence of new arguments in the contested decision, it is sufficient to note that those objections do not concern those aspects of the contested decision on the basis of which it was concluded that the Commission was legitimately entitled to maintain the characterisation of a 'decision by an association of undertakings' after the IPO.

287 Thus, as regards the finding that the banks continued, collectively, to exercise decision-making powers in respect of the essential aspects of the MasterCard payment organisation, both at a national and at a European level, the allegedly new matters mentioned in Annex A.21 to the application do not include the power of the banks to adopt specific national rules applying to a given market and partly replacing the global network rules (paragraph 246 above), or indeed the continuing power of the European Board to decide on 'key issues' (paragraph 247 above).

288 As regards the finding as to the existence of a commonality of interests between the MasterCard payment organisation and the banks in the setting of a high MIF, there is nothing in Annex A.21 to indicate any challenge to the arguments suggesting that the banks had an interest in the MIF being set at a high rate (paragraphs 253 and 254 above). Nor is there anything in that annex to indicate that the argument in recital 386 to the contested decision, to the effect that the MasterCard payment organisation also had an interest in high rates of MIF being set (paragraph 255 above), appears for the first time in the contested decision. Lastly, the finding in recital 389 to the contested decision, that the MasterCard

payment organisation takes into account the concrete interests of the banks when setting the level of the MIF, is unchallenged (paragraph 256 above).

289 In the second place, the same applies to the objections concerning the presence of 'new reasoning' in the contested decision. The only potentially relevant allegation is that concerning the drafting of recital 360 to the contested decision, in relation to the existence of horizontal cooperation between the banks within the MasterCard payment organisation. It must, however, be observed that the difference highlighted by the applicants concerns a particularly minor aspect of the Commission's reasoning and not the thrust of the finding to which it led.

290 In the third place, as regards the objections concerning the fact that the contested decision contains additional or more precise explanations of the evidence, it must be pointed out that only two objections included in Annex A.21 to the application relate to relevant aspects of the Commission's reasoning and that its analysis is, on those points, supported by other evidence which has not been challenged by the applicants. That is the case as regards the observation, made in recital 59 to the contested decision, that the management of the MasterCard payment organisation was encouraging horizontal decision making between the banks. The same applies with respect to the finding in recital 354 to the contested decision that the European banks had remained in charge of the business in Europe, except in respect of issues that were perceived as sensitive from an anti-trust perspective.

291 The present complaint must, therefore, be rejected.

The fourth complaint, that certain national competition authorities were inadequately informed

292 The applicants note that the Commission acknowledges that the RSSO was not sent to all the national competition authorities in the same way, some of them having received it only one working day before the hearing. The applicants state that if they had been aware of the delay in sending it, they would have requested that the hearing be postponed. There had been a breach of the principles of good administration and of their legitimate expectations and rights of defence, as the contested decision could not have been taken on the basis of a full appreciation of their defence.

293 The Commission contends that the present complaint should be rejected.

294 Under Article 14 of Regulation No 1/2003, the Commission is to consult an Advisory Committee composed of representatives of the competition authorities of the Member States prior to the taking of a decision such as that at issue in the present case.

295 Indeed, since Article 14(3) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123 p. 18) provides that '[t]he Commission shall invite the competition authorities of the Member States to take part in the oral hearing', it is desirable that the competition authorities, or at least those wishing to take part in the hearing, should be aware of the parties' written observations within a reasonable period before that hearing.

296 However, the fact that some national competition authorities were sent the RSSO just one working day before the hearing does not amount to an infringement that could lead to the annulment of the contested decision.

297 It is apparent from Article 14 of Regulation No 1/2003 that the essential role of the Advisory Committee is to deliver a written opinion on the preliminary draft decision. The delay in sending the RSSO had no bearing on the validity of the consultation of the

Advisory Committee, since the competition authorities were able to peruse the RSSO before being consulted under the auspices of that committee.

298 Moreover, as the Commission correctly maintains, the delayed dispatch of the RSSO did not prevent the applicants from setting out their views during the hearing.

299 This complaint must therefore be rejected, as also, therefore, must the first part of the plea in its entirety.

b) Second part of the plea, relating to errors of fact

300 The applicants claim, in essence, that certain factual errors made by the Commission are so significant as to invalidate the contested decision. They raise three complaints in that context, relating, first, to the manifestly erroneous nature of the comparison of the MasterCard system with the five national schemes identified by the Commission; secondly, to the Commission's selective analysis of the merchants' statements obtained during the administrative procedure; and, thirdly, to the fundamentally flawed nature of the merchant market survey.

301 The second and third complaints have already been addressed in paragraphs 145 to 158 above. As regards the first complaint, it must be borne in mind that the merits of the finding as to the lack of objective necessity of the MIF are sufficiently supported by evidence or arguments other than the comparison with those five national schemes. That complaint must therefore be rejected as being, in all events, ineffective.

302 The second part and, therefore, the present plea must accordingly be rejected, and the application for annulment of the contested decision must be dismissed.

B – The application for annulment of Articles 3 to 5 and 7 of the contested decision

303 In the alternative, the applicants seek annulment of Articles 3 to 5 and 7 of the contested decision.

304 In Article 3 of the contested decision, the Commission ordered the applicants formally to repeal the MIFs at issue within six months, to modify the association's network rules and to repeal all decisions on MIFs. In Article 4, the applicants are ordered to communicate to the financial institutions that are members of the MasterCard system and to the clearing houses and settlement banks concerned with transactions in the EEA, within six months, the changes made to the association's network rules. In Article 5, the applicants are ordered to publish a summary of the contested decision on the internet. Finally, Article 7 of the contested decision provides that failure to comply with any of the orders set out in Articles 2 to 5 will be punished by a fine of 3.5% of the applicants' daily consolidated global turnover.

305 It must be observed that while the heading of the applicants' claim refers to the annulment of Articles 3 to 5 and 7 of the contested decision, the applicants' arguments, submitted in the single plea relied on in support of that claim, relate only to Articles 3 and 7 of the contested decision.

306 Article 7(1) of Regulation No 1/2003 provides:

'Where the Commission … finds that there is an infringement of Article 81 [EC] or of Article 82 [EC], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective

behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy …'

307 According to Article 24(1)(a) of Regulation No 1/2003, '[t]he Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them … to put an end to an infringement of Article 81 [EC] or Article 82 [EC] in accordance with a decision taken pursuant to Article 7'.

308 By the first part of their plea, the applicants submit that the contested decision is vitiated by a failure to state reasons in respect of the remedy imposed by the Commission under Article 3 of the contested decision and the periodic penalty payment provided for in Article 7 of that decision.

309 It must be borne in mind that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C−367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I−1719, paragraph 63 and the case-law cited).

310 With regard to the complaint concerning a failure to state reasons for the orders in Article 3 of the contested decision, it must be pointed out that the legal basis for the obligation imposed on the applicants formally to repeal the MIFs at issue within six months, to modify the association's network rules and to repeal all decisions on MIFs is specified in recital 756 to the contested decision. Its justification is apparent from recitals 759 and 761 to that decision, where it is presented as a consequence of the orders issued to the applicants to cease determining in effect a minimum price for MSCs.

311 It must be held that that statement of reasons, albeit in summary form, enabled the applicants to ascertain the reasons for the Commission's orders and the General Court to exercise its power of review of their lawfulness.

312 It is indeed the case that the contested decision does not include an explanation of the proportionality of the obligation imposed under Article 3 of the contested decision, unlike the proportionality of the obligations laid down under Articles 4 and 5 and the periodic penalty payment provided for in Article 7 of the contested decision.

313 However, in so far as the obligation to modify the association's network rules and to repeal all decisions on MIFs is to be regarded as a direct consequence of the finding that the MIF is unlawful, the Commission was not required to produce an explicit statement of reasons on that point.

314 That conclusion is not affected by the applicants' arguments that the Commission has, in the past, recognised that MIFs can be compatible with Article 81 EC or has acknowledged the principle that MIFs might satisfy the first condition of Article 81(3) EC. As those

arguments are irrelevant to the determination of the remedy, the Commission was not obliged to provide a statement of reasons on that point. Moreover, as observed in paragraph 192 above, Visa's MIF was exempted on the basis of a modified proposal for a MIF that limited the level of the MIF to the costs incurred by the issuing banks in the provision of certain specific advantages to merchants, which distinguishes them from the MIF at issue in the present case.

315 The complaint relating to a failure to state reasons for Article 3 of the contested decision must therefore be rejected.

316 With regard to the reasons for the periodic penalty payment referred to in Article 7 of the contested decision, it must be pointed out that the legal basis for it is explicitly referred to in recital 773 to the contested decision. Its justification is covered in recital 774, in which the Commission states that the existence of a 'serious risk that [the] MasterCard [payment organisation] continues to apply [MIFs] or that it attempts to take measures which will effectively circumvent the remedy is sufficient ground for considering it necessary to impose periodic penalty payments on the [applicants] to ensure compliance with the remedy'.

317 Lastly, the choice of the amount of the periodic penalty payment is explained in recitals 775 and 776 to the contested decision. The Commission referred to the need 'to set periodic penalty payments at a level which reinforces the incentive to comply with a decision … by rendering it economically rational for the undertaking concerned to comply with such a decision rather than to reap the benefits of non-compliance'. It also mentioned the substantial size of the MasterCard payment organisation and the past attempt to hamper the application of competition law through the IPO of MasterCard. On that basis, it decided to set the periodic penalty payment at 70% of the maximum amount of 5% of MasterCard's average daily turnover in the preceding business year.

318 As that statement of reasons enabled the applicants to ascertain the reasons for the periodic penalty payment provided for in Article 7 of the contested decision and the General Court to exercise its power of review of the lawfulness of that payment, the complaint concerning a failure to state reasons for Article 7 of the contested decision must also be rejected.

319 That conclusion is not affected by the arguments of one intervener to the effect that Article 7 must be annulled for failure to state reasons because the Commission did not explain in that provision why it considered MasterCard to be an autonomous undertaking in imposing a periodic penalty payment based on its turnover, while claiming to be penalising a decision by an association of undertakings.

320 It should be pointed out that Article 24(1)(a) of Regulation No 1/2003 specifically refers to the possibility of imposing periodic penalty payments on associations of undertakings.

321 MasterCard International and MasterCard Europe are wholly-owned subsidiaries of MasterCard; therefore it must be held that the Commission, in taking into account MasterCard's turnover, merely applied Article 24(1)(a) of Regulation No 1/2003 to the circumstances of the case. It was not, therefore, obliged to provide a specific explanation on that point.

322 By the second part of their plea, the applicants challenge the proportionality of the remedy provided for in Article 3 of the contested decision.

323 It should be borne in mind that the principle of proportionality, which is among the general principles of European Union law, requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice

between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C−180/96 *United Kingdom* v *Commission* [1998] ECR I−2265, paragraph 96, and Case C−189/01 *Jippes and Others* [2001] ECR I−5689, paragraph 81).

324 As regards, more specifically, the proportionality of the contested remedy, it will be recalled that Article 7 of Regulation No 1/2003 expressly indicates the extent to which the principle of proportionality applies in situations covered by that article. Under that provision, the Commission may impose on the undertakings concerned any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end (Case C−441/07 P *Commission* v *Alrosa* [2010] ECR I−5949, paragraph 39).

325 In the present case, the obligation formally to repeal the MIFs, to modify the association's network rules and to repeal all decisions on MIFs that is set out in Article 3 of the contested decision is a direct consequence of the finding that those MIFs are unlawful. It is not disproportionate therefore, as it is confined to bringing the infringement at issue to an end.

326 That conclusion is not affected by the applicants' arguments that, since the Commission acknowledges that the MIF could potentially satisfy the requirements of Article 81(3) EC, a remedy requiring the MIF to be repealed or set at zero is disproportionate in that the Commission ought instead to have determined the methodology by which the MIF should be calculated in order to make it compatible with Article 81 EC.

327 It must be held that such arguments are based on flawed reasoning. It was for the applicants, in the context of proving compliance with the conditions of Article 81(3) EC, to put forward a method of setting the MIF that would, where appropriate, make it compatible with that provision. In the absence of such proof, the Commission must ensure that the infringement of Article 81 EC which it has properly identified is brought to an end.

328 The applicants also submit that the six-month time-limit is equally disproportionate. They refer to the fact that Visa had, in the Visa II decision, been 'given some five years in which to phase in a much less radical change, and [that] no enforcement measure was imposed'.

329 As stated in paragraphs 192 and 314 above, the Visa II decision was adopted in a context that is not comparable to that of the contested decision. In any event, the period which a person who has committed an infringement is allowed in order to bring it to an end cannot reasonably be compared to the period of an exemption.

330 As regards the time-limit of six months, the applicants do not put forward anything to suggest that it was particularly difficult for them to implement the remedy within that period. Furthermore, it must be pointed out that Article 6 of the contested decision provided for the applicants to be able to ask the Commission for that time-limit to be extended.

331 Accordingly, the second part of the plea must be rejected, as, therefore, must the plea in its entirety.

332 In the light of all of the foregoing, all the applications made in the present action must be dismissed.

Costs

333 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

334 As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission. As BRC and EuroCommerce made no application in that regard, they shall bear their own costs.

335 As the Commission did not request that Banco Santander, HSBC, Bank of Scotland, RBS, Lloyds TSB and MBNA be ordered to pay the costs which it incurred in connection with their intervention, those interveners shall bear only their own costs.

336 The first subparagraph of Article 87(4) of the Rules of Procedure provides that the Member States which intervened in the proceedings are to bear their own costs. Accordingly, the United Kingdom of Great Britain and Northern Ireland shall bear its own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders MasterCard, Inc., MasterCard International, Inc., and MasterCard Europe to bear their own costs and to pay those incurred by the European Commission;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs;

4. Orders British Retail Consortium and EuroCommerce AISBL to bear their own costs;

5. Orders Banco Santander, SA, Royal Bank of Scotland plc, HSBC Bank plc, Bank of Scotland plc, Lloyds TSB Bank plc and MBNA Europe Bank Ltd to bear their own costs.

Dittrich Wiszniewska-Białecka Prek

Delivered in open court in Luxembourg on 24 May 2012.

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b) Second part of the plea, relating to errors of fact

B – The application for annulment of Articles 3 to 5 and 7 of the contested decision

Costs

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* Language of the case: English.