IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Neutral Citation Number: [2026] EWHC 64 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 January 2026

Before:

MR JUSTICE CAVANAGH

- -

Between:

Claim No. AC-2025-LON-000751

THE KING on the application of MASTERCARD EUROPE SA — **Claimant**

- and –

PAYMENT SYSTEMS REGULATOR — **Defendant**

-and-

VISA EUROPE LIMITED — **Interested Party**

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Claim No. AC-2025-LON-000727

THE KING on the application of VISA EUROPE LIMITED — **Claimant**

-and-

PAYMENT SYSTEMS REGULATOR — **Defendant**

-and-

MASTERCARD EUROPE SA

Interested Party

****

Claim No. AC-2025-LON-000759

THE KING on the application of
REVOLUT BANK UAB

Claimant

-and-

PAYMENT SYSTEMS REGULATOR

Defendant

-and-

(1) VISA EUROPE LIMITED
(2) MASTERCARD EUROPE SA

Interested parties

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Javan Herberg KC and Daniel Cashman (instructed by **Freshfields LLP**) for **Visa Europe Limited**
Tim Otty KC and Will Bordell (instructed by **Jones Day**) for **Mastercard Europe SA**
Brian Kennelly KC and Tom Coates (instructed by **A&O Shearman**) for **Revolut Bank UAB**
Jessica Simor KC, Nicholas Gibson and **Suzanne Rab** (instructed by **Bevan Brittan LLP**) for the **Payment Systems Regulator**

Hearing dates: 11 and 12 November 2025

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JUDGMENT

Mr Justice Cavanagh:

1. These three claims for judicial review raise similar and overlapping issues. In an order dated 21 March 2025, Chamberlain J ordered that the applications for judicial review in these claims would be heard together, and that they would be listed as a "rolled-up" hearing, on the basis that if the Claimants' applications for permission to apply for judicial review are granted, the court will proceed immediately to determine their claims. The rolled-up hearing took place before me over two days, 11 and 12 November 2025. I heard full argument. Counsel for the parties are listed in the heading to this judgment. I am grateful to all counsel for their very helpful submissions, both oral and in writing.

2. The central issue in these proceedings is whether the Defendant, the Payment Systems Regulator ("PSR"), has the power, pursuant to section 54 of the Financial Services (Banking Reform) Act 2013 ("FSBRA"), to give a general direction which has the effect of imposing caps upon the maximum default Interchange Fees ("IFs") that Visa Europe Limited ("Visa") and Mastercard Europe SA ("Mastercard") can set in their scheme rules for a certain category of transactions. The PSR has made a decision in principle to impose such caps (which, for shorthand, I will call "price caps") by means of a general direction, though the level of the price caps, and the date of implementation, have yet to be decided. All parties are agreed, and I, too, agree, that this does not mean that the claims are premature, or otiose.

3. The challenge is solely a *vires* challenge. The three Claimants contend that, on the true interpretation of section 54, taking into account its statutory context, the wider statutory framework, and the legislative purpose as disclosed in the secondary materials, the PSR has no power under section 54 to impose the proposed price caps. Mastercard and

Revolut Bank UAB ("Revolut") have a second ground of challenge. This is that, even if section 54 permits price capping of IFs by means of a general direction, the power cannot be exercised as intended by the PSR in respect of Mastercard, because such an exercise would be prohibited by section 108 of FSBRA. For reasons that will be explained, this second argument does not concern Visa.

4. It must be emphasised at the outset that the only issue that I am required to decide is whether, as a matter of statutory interpretation, the PSR has the power to impose price caps on IFs by means of a general direction made under section 54 of FSBRA. There is no challenge in these proceedings to the PSR's decision to do so on any other public law grounds, such as irrationality or procedural unfairness. I should record that Visa, Mastercard, and Revolut have made clear that they consider that, even if the PSR has the power to do so, the imposition of price caps on IFs for the relevant transactions by means of a general direction would be unnecessary and ill-advised. They have made representations to the PSR to that effect. The PSR takes a different view. However, as I have said, the judicial review proceedings do not require me to consider the competing arguments or to decide on the merits of the decision to give a general direction which will impose price caps on IFs. Furthermore, as I will explain, no final decision has been made in relation to the level of the price caps and so, at present, any challenge in relation to the proposed level would be premature.

THE FACTUAL BACKGROUND

The parties

5. In recent years, as other methods of payment, such as card payments, have overtaken cash, the importance of the payment systems industry to the operation of the economy in the UK has become ever more significant. As its name suggests, the PSR was

established as the sector regulator, with responsibility for the regulation of the payment systems industry. The PSR was established pursuant to section 40 of FSBRA and became fully operational in April 2015. The functions, duties, and powers of the PSR are set out primarily in Part 5 of FSBRA. The objectives of the PSR are to advance competition and innovation and to ensure that payment systems are operated and developed in the interests of the people and businesses that use them. These objectives are enshrined in FSBRA itself, at sections 49-52 (set out, in relevant part, below).

6. Many other regulatory schemes, such as those that apply to utilities, make use of licensing as a means of regulation. The Government decided, after widespread consultation, that it would adopt a different approach in relation to payment systems regulation. The PSR has been vested by FSBRA with two broad sets of powers. First, the PSR has regulatory powers in relation to "regulated payment systems", as defined in FSBRA. Second, the PSR has concurrent competition powers. These powers are concurrent in the sense that they are concurrent with some of the powers that are possessed by the Competition and Markets Authority ("CMA") in relation to all sectors of the economy, including the payment systems sector. The PSR has power under the Enterprise Act 2002 ("EA02") to carry out market studies, and, if a potential adverse effect on competition is found in a market study, to make a market investigation reference to the CMA. The PSR does not have the power to carry out market investigations, or to order enforcement measures. These are the responsibility of the CMA. The PSR also has power to enforce the prohibition in the Competition Act 1998 ("CA98") on anti-competitive behaviour in relation to participation in payment systems. These powers are granted pursuant to provisions in FSBRA. I will set out the regulatory and competition powers in greater detail, later in this judgment.

7. As I have said, so far as its regulatory powers are concerned, the PSR can only exercise those powers in relation to payment systems that have been designated as regulated payment systems by HM Treasury (known as "regulated payment systems"). A total of eight payment systems are currently so designated by HM Treasury. These include Mastercard and Visa. The others are Bacs, CHAPS, Cheque and Credit, FPS, LINK, and the Sterling Fnality Payment System. These proceedings are concerned only with Mastercard and Visa.

8. The PSR's concurrent competition powers apply to any payment system that is active in the United Kingdom: they are not limited to the regulated payment systems.

9. I should add that in March 2025 the Prime Minister announced that the PSR will be abolished. HM Treasury launched a consultation on 8 September 2025, in which it was indicated that the proposal is to consolidate the PSR within the Financial Conduct Authority. It is common ground that this proposal has no relevance to these proceedings.

10. Visa and Mastercard are the operators of the only four-party card payment systems that are designated as a "regulated payment system" under section 43 of FSBRA. The third Claimant, Revolut, is a bank established in the Republic of Lithuania, authorised and regulated by the Bank of Lithuania and the European Central Bank, which operates as a card issuer and payment systems provider in the EEA. Cards issued by Revolut may be used in the Visa and Mastercard payment systems in the UK either in person or as online transactions.

The four-party card payment system

11. The four-party card payment system operates as follows, in broad summary: A customer uses a credit or debit card to purchase goods or services from a merchant. The customer ("the cardholder") uses a card issued by a bank or financial institution ("the issuer") which has been licensed by Visa or Mastercard to provide such cards to cardholders. The merchant uses another bank or financial institution which has been licensed by Visa or Mastercard to process the transaction on the merchant's behalf ("the acquirer"). The customer's payment to the merchant goes from the issuer to the acquirer via the card payment system operator (Visa or Mastercard). In simple terms, therefore, Visa and Mastercard are the middlemen who arrange for the transfer of payments from the issuer to the acquirer. Visa and Mastercard also manage the scheme rules on card payments and set certain of the terms on which issuers, acquirers, merchants, cardholders, and other parties participate in the card payment system. (The four parties from which the system takes its name are the issuers, acquirers, merchants, and cardholders, respectively).

12. As part of this process, a number of fees pass from one participant to another. First, both issuers and acquirers pay scheme and processing fees to the card payment system operator, i.e. Visa or Mastercard. Second, Visa and Mastercard provide rebates and incentives to issuers, and occasionally to acquirers. Third, the acquirer pays a fee, known as the Interchange Fee, the IF, directly to the issuer. Fourth, the merchant pays a fee, known as the merchant service charge, to the acquirer for the service that the acquirer provides. The acquirer may use the merchant service charge to pass on the cost of the scheme and processing fees and the IFs to the merchant, and to recover its own fee for the service that it provides.

IFs

13. Visa and Mastercard have described IFs as representing a mechanism to distribute the cost of the payment services across the two sides of the card scheme. In a response to the Treasury Select Committee on cross-border interchange, in August 2022, Visa described the purpose of IFs as being;

> "… [to support issuers'] ability to issue and manage cards and digital credentials. It enables those players to fortify security against bad actors trying to steal information or commit fraud; and it supports innovation, including the development of new products and services, making it easier for consumers to manage their financial lives safely and securely."

14. It will be noted that IFs are not paid to Visa or Mastercard themselves. They are paid by the acquirer to the issuer. The reason why, nevertheless, Visa and Mastercard have an interest in the level of the IFs (and so an interest in whether there is a price cap on the IFs) is because IFs provide a financial incentive to issuers to use and to promote Visa and Mastercard's payment systems, rather than competitor payment systems. Though Visa and Mastercard are the only companies that provide a designated four-party card payment system in the UK, there are other, alternative, payment systems that a bank or other financial institution might use or might encourage its customers to use in preference to the four-party card payment system.

15. Subject to any price cap that is imposed externally, the level of the IF that is to be paid to an issuer is almost invariably set by the terms of the agreements between the issuer and acquirer, on the one hand, and the card payment system operator, on the other. The standard terms and conditions used by both Visa and Mastercard provide for a default level of IFs to be paid by acquirers to issuers, unless the issuer and acquirer reach a different bilateral agreement about the level of the IFs. In practice, bilateral agreements are very rare, and so the IF that applies to the vast majority of transactions is the default IF set by Visa or Mastercard.

16. IFs vary according to whether the transaction is by means of a debit card or a credit card. The IF is higher if a credit card is used. They also vary according to whether the transaction is a Card Present transaction, such as an in-store purchase, where the purchase is made via chip and pin or a contactless payment, or a Card Not Present ("CNP") transaction, which includes online purchases and phone orders. The IF will be higher for a CNP transaction. There is also a variation in the IF depending on whether the card is a consumer card or a commercial card.

The type of IFs with which these proceedings are concerned: outbound CNP EEA-UK cross-border IFs in consumer transactions

17. These proceedings are only concerned with CNP consumer transactions where the merchant is in the UK, and the issuer is in the European Economic Area (EEA). In such transactions, generally speaking, the acquirer will also be in the UK and the cardholder will be in the EEA, although this is not always the case. In this judgment, where I refer to the acquirer being in a location (UK or EEA), I refer to a situation where the merchant (or the "card acceptance location") is also in the same location as the acquirer. The IFs in these transactions are known as "outbound cross-border IFs", because the IFs generally go from the acquirer in the UK to be received by the issuer in the EEA. (I will use the phrase "cross-border IFs" to refer to such IFs where the issuer is in the EEA: these proceedings are not concerned with cross-border IFs where the issuer or acquirer is outside the EEA.)

18. Outbound cross-border IFs can be distinguished from two other types of IFs. These are, first, domestic IFs, where the issuer and acquirer are both in the UK, and, second, inbound cross-border IFs, where the issuer is in the UK and the acquirer is in the EEA. (There are also cross-border IFs where the issuer or acquirer is outside the UK and the EEA but, as I have said, these proceedings are not concerned with them.)

19. Transactions involving outbound cross-border IFs constitute a very small proportion of all transactions with UK merchants. Most transactions will be wholly domestic.

20. Until December 2020, the EU Regulation which imposed price caps on IFs for all transactions within the EEA also applied to the UK. Accordingly, as the UK was then included in the EEA, the same price caps applied across the board to IFs in all consumer card transactions in which the issuer and the acquirer were within the UK and any other EEA state. Therefore, the Regulation applied to domestic IFs and to outbound and inbound cross-border IFs within the EEA. This was Regulation (EU) 2015/751 of April 2015 ("the EU IFR"). The EU IFR applied a price cap of 0.2% on IFs for debit card transactions within the UK and across the rest of the EEA, and a price cap of 0.3% for IFs for credit card transactions.

21. As part of the legislative arrangements for Brexit, the EU IFR was incorporated into UK law by section 3(1) of the European Union (Withdrawal) Act 2018, and amended by the Interchange Fee (Amendment) (EU Exit) Regulations 2019. This assimilated and modified version of the EU IFR is commonly referred to as the "UK IFR". Among other things, the UK IFR provides for the same price cap as in the EU IFR (0.2% for CNP debit card transactions, 0.3% for CNP credit card transactions) but only in relation to domestic consumer card transactions, where the issuer, acquirer and point of sale are in the UK. The UK IFR Regulations were revoked by section 1(1) of the Financial Services and Markets Act 2023, but the UK IFR continues to apply as modified (see section 1(4) of the Financial Services and Markets Act 2023).

22. This means that, since December 2020, there have been no UK rules governing IFs for cross-border transactions (where the issuer is in the UK and the acquirer in the EEA, or vice-versa). However, so far as inbound cross-border IFs are concerned (issuer in the

UK and acquirer in the EEA), these are subject to price caps that were agreed between Visa and Mastercard and the European Commission. In 2019, in response to a competition law investigation by the European Commission into inter-regional IFs, Visa and Mastercard offered to commit to price caps on IFs on transactions involving non-EEA issuers and EEA acquirers. These offers were agreed by the European Commission. In accordance with these commitments, Visa and Mastercard submitted to price caps of 1.15% and 1.5% for consumer CNP transactions for debit and credit cards respectively, where the issuer is outside the EEA and the acquirer within the EEA, until November 2024. On 5 July 2024, Visa and Mastercard agreed to continue to observe these price caps for at least a further five years.

23. At the time when these commitments were originally given, they had no impact upon IFs for transactions between the UK and the rest of the EEA, because the UK was still in the EEA, and so the EU IFR applied to them. The commitments between Visa and Mastercard and the European Commission now apply for inbound CNP transactions where the issuer is in the UK and the merchant is in the EEA, as a UK-based issuer is now a non-EEA issuer. This means that the price caps of 1.15% and 1.5% apply to inbound cross-border transactions. The default IFs used by both Visa and Mastercard for such transactions are the same as the price caps agreed with the European Commission, 1.15% and 1.5%.

24. In contrast to the position with domestic IFs and with inbound cross-border IFs, there are currently no rules or commitments which apply to the IFs payable on outbound cross-border UK-EEA CNP transactions. In October 2021, Visa set its default IFs for outbound cross-border UK-EEA CNP transactions using consumer debit and credit cards at 1.15% and 1.5%, respectively. In April 2022, Mastercard adopted the same

default IF levels. This means that the default figures for IFs for outbound cross-border transactions where the acquirer is in the UK and the issuer is in the EEA are the same as apply to inbound cross-border transactions where the acquirer is in the EEA and the issuer is in the UK (the latter being set in accordance with the commitments given by Visa and Mastercard to the European Commission, referred to above). The default figures are, however, substantially higher than for domestic consumer CNP transactions, where both acquirer and issuer are in the UK. Prior to the changes, the default figures for outbound cross-border transactions had been the same as for domestic transactions and for intra-EEA transactions, namely 0.2% for debit cards and 0.3% for credit cards.

The market review into outbound IFs, and its outcome

25. Beginning in 2022, the PSR conducted a market review of outbound consumer IFs (that is, where the acquirer is in the UK and the issuer in the EEA). This was undertaken in accordance with the PSR's powers under FSBRA.

26. The main objectives of the review were to understand (1) the rationale for and impact of the increases in outbound IFs since Brexit; (2) whether the increases in outbound IFs were an indication that aspects of the market were not working well for all service users, including organisations that accept cards and their customers; and (3) to determine what, if any, regulatory intervention was appropriate to ensure, in particular, that the PSR meets its service-user objective. A key issue that was considered in this review was whether price caps should be imposed on cross-border IFs.

27. The June 2022 PSR Consultation Paper which published draft terms of reference for the market review set out, at paragraph 2.7, the possible outcomes of the review. These included, amongst other possible outcomes:

(1) Making new general directions;

(2) Making new specific directions;

(3) Carrying out an investigation into a potential breach of the CA98; and

(4) Making a market investigation reference to the CMA.

28. The PSR conducted consultations with interested parties, including Visa, Mastercard, and issuers, including Revolut. An interim report was published in December 2023, and the "Market review of UK-EEA consumer cross-border interchange fees: Final Report" ("the XBIF Final Report") was published in December 2024. On the same day that the XBIF Final Report was published, the PSR issued a consultation on the price cap remedy ("the Remedies Consultation").

29. In their consultation responses, Visa and Mastercard had contended that the imposition by the PSR of price caps on cross-border IFs would be *ultra vires*, as the PSR has no power under sections 54 or 55 of FSBRA to do so.

30. In the XBIF Final Report, the PSR set out its conclusion that, in increasing default UK-EEA CNP outbound IFs, Mastercard and Visa were not subject to effective competitive constraints on the acquiring side of the network. As a result, the PSR said, the two card schemes have raised the default outbound IFs to a level that is higher than they would have done if competitive constraints were effective. The XBIF Final Report said that Mastercard and Visa could and did increase outbound IFs without needing to have regard to the potentially detrimental consequences for service users, namely organisations that accept cards and their customers. The PSR said that, whereas increased IFs are in the interests of issuers (and, so, indirectly, Visa and Mastercard themselves), merchants and acquirers are unable to respond to increased IFs in such a

way as to exert competitive constraints on Visa and Mastercard. The PSR also said that the schemes were unable to show that they had undertaken any specific assessment when deciding to increase the outbound IFs and had not shown that they had any regard for the interests of organisations that accept cards (i.e. acquirers) and their customers. The PSR said that the benchmarks used by Visa and Mastercard, namely the price caps that were agreed with the European Commission for IFs in inbound EEA-to-non-EEA transactions at a time when the UK was a part of the EEA, were not relevant to the question of the appropriate level of IFs for outbound UK-EEA transactions. Those price caps had been set by reference to means of payment that were funded via non-SEPA (Single Euro Payments Area) bank transfers. These do not apply to UK-EEA transactions, because both the UK and EEA remain members of SEPA. Non-SEPA bank transfers are more expensive than SEPA bank transfers. The PSR took the view that the reasoning underpinning the decision to agree IF caps of 1.15% and 1.5% with the European Commission where the acquirer was in the EEA and the issuer was outside the EEA therefore did not apply to circumstances in which the acquirer is in the UK and the issuer is in the EEA.

31. The PSR estimated that the increases to outbound IFs were costing service-users approximately £150 million to £200 million per year.

32. The conclusions reached by the PSR, and the proposed remedy, were summarised at paragraphs 1.12 to 1.15 of the XBIF Final Report, as follows:

> "1.12 We conclude that the increases to the current levels result from aspects of the market that are not working well, that they are contrary to UK service users' interests and that the situation requires regulatory intervention.
>
> 1.13 On the grounds of administrative priority, we have decided to close our review of IFs for consumer debit and credit CNP

> transactions for UK cards at EEA merchants (UK-EEA CNP inbound IFs, or simply 'inbound IFs').
>
> **Actions we are taking**
>
> 1.14 We have considered potential remedies to address or at least mitigate the harm that outbound IFs are causing end-users. We have looked at all the evidence in the round and considered alternative forms of remedy. We conclude that restricting the maximum level of outbound IFs by introducing a price cap is the only effective form of remedy open to us.
>
> 1.15 We recognise that a price cap would not address the underlying cause of the harm we have identified – the lack of effective competition on the acquiring side. However, we have concluded that alternative actions related to UK-EEA CNP transactions – that did not cap directly the outbound IFs – would result in a continuous unnecessary cost to UK merchants and their customers, while such a price cap remedy would materially mitigate its adverse impacts."

33. It was made clear by the PSR in the XBIF Final Report and the Remedies Consultation that, contrary to the submissions that had been made by Visa and Mastercard, the PSR considers that it has the power under section 54 of FSBRA to impose price caps on outbound IFs by means of a general direction. At paragraph 9.166 of the XBIF Final Report, the PSR said:

> "…. we consider that section 54 of FSBRA is drafted with the intention to give us wide-ranging powers to intervene in respect of payment systems if we think it appropriate. This includes the power to direct participants in regulated payment systems to take, or not take, specified actions under section 54 of FSBRA. The UK IFR is based on a European regulation which did not preclude further interventions by domestic or European authorities if deemed appropriate. We therefore conclude that we have the power to impose a price cap in relation to outbound IFs if we conclude that this is appropriate."

34. I pause to point out that, as paragraph 1.13 of the XBIF Final Report indicated, the proposal of the PSR was that price caps should be implemented only for outbound IFs, not for inbound IFs (which would remain covered by the commitment made by Visa and Mastercard to the European Commission to cap default inbound IFs at 1.15% and

1.5% for credit and debit transactions respectively). This was stated to be for reasons of administrative priority.

35. In the Remedies Consultation document, issued at the same time as the XBIF Final Report, the PSR proposed that a phased approach should be adopted to the price caps. The first phase, Stage 1, would involve the introduction of interim price caps, with a duration of up to 30 months. This would be put in place whilst an appropriate methodology for determining the most appropriate level of the price caps was developed and implemented. The Remedies Consultation proposed that the Stage 1 remedy would impose a price cap of 0.2% on IFs for outbound debit card transactions and a cap of 0.3% on IFs for outbound credit card transactions. These are the same levels that apply to wholly domestic transactions. The PSR said that, at Stage 2, once the appropriate methodology was developed and implemented, longer-lasting price caps would be implemented which might be higher, lower, or at the same rate as the Stage 1 price caps.

36. In the Remedies Consultation, the PSR said that it intends to introduce the Stage 1 remedy through a general direction given to Mastercard and Visa, pursuant to the PSR's power to give general directions under section 54 of FSBRA.

37. In the event, no Stage 1 price caps have yet been imposed. On 10 October 2025, the PSR announced that it has decided not to proceed with the interim Stage 1 price caps, in light of the delay caused by these judicial review proceedings, and in light of responses to the Remedies Consultation. On the same day, the PSR published a consultation on an appropriate methodology for determining the price cap remedy, which ran until 5 December 2025.

38. The current position, therefore, is that the PSR has taken a decision to impose price caps on outbound IFs by means of a general direction, given under FSBRA, section 54, but the date of implementation, and their level, has yet to be determined. As I have said, all parties to these proceedings are in agreement that this does not make these proceedings premature: the issue in the proceedings is whether the PSR has the power to impose a price cap on IFs by means of a general direction under section 54 of FSBRA, and the PSR has already decided to do so.

39. I stress again that these proceedings do not consist of a challenge to the merits of the decision to impose a price cap on outbound IFs. This is a pure *vires* challenge. For that reason, I have not attempted, in this judgment, to set out the competing views of the parties as regards whether such a price cap is desirable or necessary (and this was not dealt with in detail in the evidence before me).

40. Finally, I should mention that, wholly unconnected with these proceedings, there is litigation in the Competition Appeal Tribunal ("CAT"), known as the Merchant Interchange Fee Umbrella Proceedings (1517/11/7/22 (UM)), in which there is a challenge to the legality of domestic and interregional IFs for consumer and commercial debit and credit cards, both at historic and current levels.

The statutory framework

41. As all parties are in agreement that the exercise of statutory interpretation that is at the heart of this case must take account of the broader statutory context, it is necessary to refer to a considerable number of provisions within FSBRA and related legislation.

(1) The creation of the PSR, and the definition of regulated payment systems

42. Sections 40(1) to (3), in Part 5 of FSBRA, require the FCA to establish a body corporate to exercise the functions conferred on the body by or under Part 5, to be called the Payment Systems Regulator, and to take such steps as are necessary to ensure that the PSR is, at all times, capable of exercising these functions.

43. Section 41, which it is not necessary to set out here, defines payment systems, and section 42 defines "operator" and "payment service provider". An "operator" is a person with responsibility under the payment system for managing or operating it (s42(3)). Visa and Mastercard are operators. A "payment service provider" is any person who provides services to persons who are not participants in the system for the purposes of enabling the transfer of funds using the payment system (s43(5)). Revolut is a payment service provider.

44. Section 43(6) provides that:

> "(6) A payment service provider has "direct access" to a payment system if the payment service provider is able to provide services for the purposes of enabling the transfer of funds using the payment system as a result of arrangements made between the payment service provider and the operator of the payment system."

45. Revolut has direct access, as defined.

46. Section 43(1) provides that HM Treasury may by order designate a payment system as a regulated payment system for the purposes of Part 5. Section 44(1) provides that HM Treasury may make a designation order in respect of a payment system only if it is satisfied that any deficiencies in the design of the system, or any disruption of its operation, would be likely to have serious consequences for those who use, or are likely to use, the services provided by the system.

47. The designation of a payment system as a regulated payment system is of great importance, because the sectoral regulation powers that are granted to the PSR in Part 5 of FSBRA apply only to regulated payment systems. This is in contrast to the concurrent competition powers, which apply to all payment systems, whether they are regulated payment systems or not.

48. The payment systems operated by Visa and Mastercard have been designated as regulated payment systems. As stated above, they are the only designated four-party card payment system operators.

(2) The general duties of the PSR

49. Section 49 of FSBRA sets out the regulator's general duties in relation to payment systems:

> "49. **Regulator's general duties in relation to payment systems**
>
> (1) In discharging its general functions relating to payment systems the Payment Systems Regulator must, so far as is reasonably possible, act in a way which advances one or more of its payment systems objectives.
>
> (2) The payment systems objectives of the Payment Systems Regulator are—
>
> (a) the competition objective (see section 50),
>
> (b) the innovation objective (see section 51), and
>
> (c) the service-user objective (see section 52).
>
> (3) In discharging its general functions relating to payment systems the Payment Systems Regulator must have regard to—
>
> (a) the importance of maintaining the stability of, and confidence in, the UK financial system,
>
> (b) the importance of payment systems in relation to the performance of functions by the Bank of England in its capacity as a monetary authority, and

> (c) the regulatory principles in section 53.
>
> (4) The general functions of the Payment Systems Regulator relating to payment systems are—
>
> (a) its function of giving general directions under section 54 (considered as a whole),
>
> (b) its functions in relation to the giving of general guidance under section 96 (considered as a whole), and
>
> (c) its function of determining the general policy and principles by reference to which it performs particular functions."

50. Sections 49(4)(a) and (c) therefore make clear that the PSR must, so far as is reasonably practicable, act in a way that advances one or more of the three objectives, the competition objective, the innovation objective, and the service-user objective, in exercising the PSR's function of giving general directions under section 54 (considered as a whole), and in exercising the PSR's function of determining the general policy and principles by reference to which it performs particular functions.

51. The competition objective is set out in section 50. Section 50(1) provides that:

> "(1) The competition objective is to promote effective competition in—
>
> (a) the market for payment systems, and
>
> (b) the markets for services provided by payment systems,
>
> in the interests of those who use, or are likely to use, services provided by payment systems."

52. The matters to which the PSR may have regard in considering the effectiveness of competition in a market mentioned in section 50(1) are set out in a non-exhaustive list in section 50(3). 14 matters are listed. These include, at (a), the needs of different persons who use, or may use, services provided by payment systems; at (k), the level and structure of fees, charges, or other costs associated with participation in the payment systems; and, at (l), the ease with which new entrants can enter the market.

53. The innovation objective is defined in section 51(1), which states:

> "(1) The innovation objective is to promote the development of, and innovation in, payment systems in the interests of those who use, or are likely to use, services provided by payment systems, with a view to improving the quality, efficiency and economy of payment systems."

54. The service-user objective is defined in section 52, as follows:

> "The service-user objective is to ensure that payment systems are operated and developed in a way that takes account of, and promotes, the interests of those who use, or are likely to use, services provided by payment systems."

55. Section 53 sets out a number of general regulatory principles that must be observed by the PSR (as referred to in section 49(3)(c)). These include the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction (s53(b)), and the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term (s53(c)). Other principles set out in section 53 include an expectation that resources are used in the most efficient and economical way, and that the PSR should exercise its functions as transparently as possible.

(3) Sections 54 and 55

56. Sections 54 and 55 are the key elements of the "regulatory toolkit" that is available to the PSR for the purposes of its sectoral regulation responsibilities in respect of regulated payment systems.

57. Section 54 is the provision around which the argument in these proceedings revolves.

58. Section 54 grants the PSR powers to give directions in writing to participants in regulated payment systems. These directions may be general, in other words directed at all relevant participants in regulated payment systems or at relevant participants in regulated payment systems of a specific description, or they may be specific directions, that is, directed at specified persons or persons of a specified description.

59. Section 54 provides:

> **"54. Directions**
>
> (1) The Payment Systems Regulator may give directions in writing to participants in regulated payment systems.
>
> (2) A direction given to a participant in a regulated payment system may—
>
> (a) require or prohibit the taking of specified action in relation to the system;
>
> (b) set standards to be met in relation to the system.
>
> (3) A direction under this section may apply—
>
> (a) generally,
>
> (b) in relation to—
>
> (i) all operators, or every operator of a regulated payment system of a specified description,
>
> (ii) all infrastructure providers, or every person who is an infrastructure provider in relation to a regulated payment system of a specified description, or
>
> (iii) all payment service providers, or every person who is a payment service provider in relation to a regulated payment system of a specified description, or
>
> (c) in relation to specified persons or persons of a specified description.
>
> (4) The Payment Systems Regulator must publish any direction given under this section that applies as mentioned in subsection (3)(a) or (b).

> (5) A direction under this section that applies as mentioned in subsection (3)(a) or (b) is referred to in this Part as a "general direction".

60. The PSR says that the power under section 54(2)(a) is the power that enables the PSR to impose price caps on IFs.

61. The PSR has, so far, issued five general and 20 specific directions under section 54. The Claimants do not contend that any of these directions were *ultra vires* the powers granted to the PSR under section 54.

62. Section 55 enables the PSR to require the operator of a regulated payment system to establish rules for the operation of the system, to change the rules in a specified way or so as to achieve a specified purpose, or not to change the rules without the approval of the PSR. Section 55 also enables the PSR to require the operator of a regulated payment system to notify the PSR of any proposed change to the rules. These requirements may be generally-imposed requirements (applying to all operators or every operator of a regulated payment system of a specified description) or they may be specific requirements.

63. FSBRA does not lay down any statutory process for appealing the decision of the PSR to give general directions under section 54, or to impose generally-imposed requirements about scheme rules under section 55. These are expressly excluded from the statutory right of appeal that is granted in section 76, which applies, inter alia, to specific directions under section 54 and specific requirements under section 55 (see s76(1) and (2), below). Accordingly, any challenge to such general directions or requirements must be made by way of an application for judicial review. As I will explain, the Claimants say that this is significant.

(4) <u>Sections 56-58</u>

64. Sections 56 and 57 grant certain "on application" powers to the PSR, that is, powers that can only be exercised if a person has applied for them to be exercised. As with sections 54 and 55, these powers apply only to regulated payment systems.

65. Section 56 applies where a person applies for an order under the section (s56(1)). Where such an application is made, the PSR may by order require the operator of a regulated payment system to enable the applicant to become a payment service provider in relation to the system. Accordingly, this section is concerned with access to a regulated payment system.

66. Similarly, the powers in section 57 can only be exercised where a party to an agreement to which the section applies makes an application to the PSR for the PSR to exercise its powers under this section. Upon such an application, the PSR may vary any of the fees and charges payable, inter alia, under any agreement made between the operator of a regulated payment system and a payment service provider, and may vary any agreement concerning fees or charges payable in connection with participation in a regulated payment system, or the use of services provided by a regulated payment system (s57(1)(a) and (b) and s57(2)(a)). The PSR also has power under this section to vary other terms and conditions of relevant agreements (s57(2)(b)).

67. In accordance with section 57, therefore, if a party to a relevant agreement makes an application to the PSR, the PSR can order the variation of fees and charges payable under the agreement. It is common ground that these powers would permit the PSR to impose price caps on the IFs payable from acquirers to issuers in a payment system (subject to section 108, dealt with in Ground 2). However, as I have said, this power exists only if an application has been made by a party to the agreement.

68. Section 58 grants the PSR a power to require a person who has an interest in the operator of a regulated payment system, or in an infrastructure provider in relation to such a system, to dispose of all or part of that interest. There is no precondition that an application has been made for this to be done. This power may be exercised only if the PSR is satisfied that, if the power is not exercised, there is likely to be a restriction or distortion of competition in the market for payment systems, or a market for services provided by payment systems.

(5) Appeal rights

69. In contrast to the position in relation to general directions and general requirements under sections 54 and 55, respectively, FSBRA provides a statutory right of appeal in relation to the exercise of the PSR's powers to make specific directions and specific requirements under sections 54 and 55, and in relation to the exercise of the PSR's powers under sections 56-58. This right is set out in section 76(1), which provides as follows:

> "(1) A person who is affected by any of the following decisions of the Payment Systems Regulator may appeal against the decision—
>
> (a) a decision to give a direction under section 54 (other than a general direction),
>
> (b) a decision to impose a requirement under section 55 (other than a generally-imposed requirement),
>
> (c) a decision to exercise its power under section 56, 57 or 58,
>
> (d) a decision to impose a sanction."

70. There are two types of appeal rights against decisions made by the PSR under the powers granted to the PSR under FSBRA. The first applies to a "CAT-appealable decision", in respect of which the appeal must be made to the CAT in accordance with

section 77 or 78 of FSBRA. CAT-appealable decisions include a decision to give a specific direction under section 54, and a decision to impose a requirement under section 55 (s76(4)). Appeals to the CAT, brought under section 77, are determined in accordance with the same principles as would be applied by a court on an application for judicial review (s77(4)). The other type of appeal rights applies to a "CMA-appealable decision", in respect of which the appeal must be made to the CMA in accordance with section 79. CMA-appealable decisions include a decision to impose a requirement to grant access to a payment system under section 56, a decision to vary an agreement under section 57, and a decision to impose a requirement to dispose of an interest in a regulated payment system under section 58 (s76(7)). Accordingly, a decision made, on application, to vary IFs under section 57 would be a CMA-appealable decision.

71. When a party seeks to appeal a CMA-appealable decision, the permission of the CMA is required. Permission may be refused only if the appeal is made for reasons that are trivial or vexatious, or the appeal has no reasonable prospect of success (s76(8) and 76(9)).

72. Further provision in relation to appeals to the CMA is made in section 79, which states, in relevant part:

> "**79. Appeals to Competition and Markets Authority**
>
> (1) This section applies where a person is appealing to the Competition and Markets Authority ("the CMA") against a CMA-appealable decision.
>
> (2) In determining the appeal the CMA must have regard, to the same extent as is required of the Payment Systems Regulator, to the matters to which the Payment Systems Regulator must have regard in discharging its functions under this Part.
>
> (3) In determining the appeal the CMA—

> (a) may have regard to any matter to which the Payment Systems Regulator was not able to have regard in relation to the decision, but
>
> (b) must not, in the exercise of that power, have regard to any matter to which the Payment Systems Regulator would not have been entitled to have regard in reaching its decision had it had the opportunity of doing so.
>
> (4) The CMA must either—
>
> (a) dismiss the appeal, or
>
> (b) quash the whole or part of the decision to which the appeal relates.
>
> (5) The CMA may act as mentioned in subsection (4)(b) only to the extent that it is satisfied that the decision was wrong on one or more of the following grounds—
>
> (a) that the Payment Systems Regulator failed properly to have regard to any matter mentioned in subsection (2);
>
> (b) that the Payment Systems Regulator failed to give the appropriate weight to any matter mentioned in subsection (2);
>
> (c) that the decision was based, wholly or partly, on an error of fact;
>
> (d) that the decision was wrong in law.
>
> (6) If the CMA quashes the whole or part of a decision, it may either—
>
> (a) refer the matter back to the Payment Systems Regulator with a direction to reconsider and make a new decision in accordance with its ruling, or
>
> (b) substitute its own decision for that of the Payment Systems Regulator.
>
> (7) The CMA may not direct the Payment Systems Regulator to take any action which it would not otherwise have the power to take in relation to the decision."

73. There are major differences between this appeal jurisdiction, and a challenge to a general direction made under section 54. As I have said, there is no statutory right of appeal against general directions made under section 54, or against generally-imposed requirements under section 55, and this means that challenges must be made by way of

judicial review. First, and most obviously, the decision-maker in respect of CMA-appealable decisions is the CMA, an expert body, rather than the Administrative Court. An appeal to the CMA concerning a decision of the PSR will be dealt with by a panel ("the CMA Panel") consisting of three persons who have been appointed by the Secretary of State to membership of the CMA Panel, at least one of whom has been appointed to the CMA Panel for the purposes of being available for selection as a member of a "specialist payment systems group" constituted to carry out functions on behalf of the CMA with respect of an appeal made in accordance with section 79 of FSBRA (FSBRA, Schedule 5, paragraph 1, and Enterprise and Regulatory Reform Act 2013, Schedule 4, paragraph 35(1)(ca)).

74. Second, whilst the grounds upon which an appeal can be allowed that are set out in sections 79(5)(a) and (d) mirror the grounds upon which judicial review may be granted, the ground in section 79(5)(b) undoubtedly goes further, in that the CMA can allow an appeal if the CMA takes a different view from that taken by the PSR on the weight to be given to a relevant matter. Also, the ground in section 79(5)(c) goes further, as the scope for quashing a decision in a judicial review on the grounds of a challenge to findings of fact is limited. Furthermore, section 79(6) enables the CMA to substitute its own decision for that of the PSR, if the CMA quashes a decision of the PSR.

75. Visa and Mastercard referred in their skeleton argument to this type of appeal as being "merits-based" and "merits-focused". This is not, however, a full merits appeal, in the sense of a full, fresh, reconsideration of the PSR's decision by the CMA Panel. The CMA's Guide to Regulation Payment Systems Appeals states, at paragraph 3.2, that:

> "The CMA will not consider afresh the decision made by the Authority. The CMA's function is to hear an appeal and it will review the challenged decision for error on the grounds of appeal put forward by the appellant. The CMA will not allow an appeal merely because it would not have reached that decision had it been the regulator. The CMA will only allow an appeal where it is satisfied that the appellant has shown on the balance of probabilities that the Authority's decision was wrong on one or more of the grounds set out in the Act."

76. Appeal decisions of the CMA Panel in this context may themselves be challenged by means of an application for judicial review.

(6) Concurrent competition powers

77. In addition to the PSR's sectoral regulatory powers in relation to regulated payment systems, as described above, the PSR has competition powers which are concurrent with those of the CMA, and which apply to all payment systems, whether regulated or not. The PSR is one of a number of sectoral regulators which have concurrent competition powers with the CMA. The others are the Office of Communications; the Gas and Electricity Markets Authority; the Water Service Regulation Authority; the Office of Rail and Road; the Northern Ireland Authority for Utility Regulation; the Civil Aviation Authority; and the Financial Conduct Authority. The nature of the PSR's concurrent powers is, broadly speaking, similar to the concurrent powers enjoyed by the other sectoral regulators.

78. There are two strands to the PSR's concurrent competition powers: those conferred by section 59 of FSBRA and the EA02, and those conferred by section 61 of FSBRA and the CA98.

EA02 powers

79. Section 59(2) confers upon the PSR certain of the competition functions that are also conferred upon the CMA under section 5 and Part 4 of EA02, so far as those functions relate to participation in payment systems. The CMA's competition functions under Part 4 include the power to conduct a market study and to conduct a market investigation in the payment systems sector if it so chooses, and, if appropriate, take enforcement measures. The PSR may conduct a market study into payment systems but may not conduct a market investigation or take enforcement measures.

80. A market study, undertaken pursuant to Part 4 of the E02, is an examination into the causes of why particular markets may not be working well. The purpose of a market study is, amongst other things, to consider the extent to which a matter in relation to participation in payment systems used to provide services in the United Kingdom has or may have adverse effects on the interests of consumers. One potential outcome of a market study is to make a reference for a market investigation. Put another way, a market study can be the gateway to a more in-depth market investigation (although the CMA has the power to conduct a market investigation without first undertaking a market study). The PSR may not, however, conduct a market investigation. Only the CMA has the power to do this (this is the effect of FSBRA, s59(2)(a), which states that the PSR can only exercise functions exercisable by the CMA Board: market investigations are conducted by a CMA Group, not by the CMA Board). Rather, having conducted a market study, the PSR can then refer the relevant market to the CMA, which then has the power to conduct a market investigation.

81. A market investigation is a detailed examination of whether there is an adverse effect on competition. As I have said, a market investigation is conducted after a market investigation reference has been made. Such a reference can be made, either by the

CMA or by the PSR exercising concurrent powers after a market study, to the Chair of the CMA, if, but only if, the CMA or the PSR have reasonable grounds for suspecting that any feature or combination of features of a market in the UK for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK (EA02, section 131(1)). Such a feature may, amongst other things, consist of the structure of the market concerned, or any aspect of the structure, or the conduct of one or more than one person who supplies or acquires goods or services in the market concerned. Once a market investigation reference has been made, the Chair of the CMA will set up a CMA Group to conduct a detailed market investigation. The CMA Group then has 18 months to complete its investigation, extendable by six months (EA02, s137).

82. A Note prepared by the CMA to describe CMA market investigations summarises them as follows:

> "A market investigation by the CMA is an in-depth investigation led by a group drawn from the CMA's panel of members. The CMA's panel comprises individuals from a variety of backgrounds (economics, law, public sector, business), all eminent in their field. The market investigation is undertaken independently of the CMA Board and the group are the sole decision-makers in the Investigation. The group of members is supported by a team of staff, including specialists providing advice on economic, legal and accounting matters.
>
> ….
>
> Although it will take account of the work carried out previously within the terms of the reference, the Group will make its own decisions on what it should focus on in the Investigation, based on its judgement and having regard to the representations its receives. This will therefore be a new independent investigation which looks at the market with a "fresh pair of eyes". None of the group members will have played any part in the decision to refer the market or investigation. The CMA publishes a large amount of material during a typical investigation including submissions, summaries of hearings, as well as a number of working papers explaining the Group's latest thinking on

> particular aspects of the market. The Group will invite comments and submissions from all interested parties at a number of points in the process, as well as holding hearings with a number of parties.
>
> Formally, Market Investigations consider whether there are features of a market that have an adverse effect on competition (AEC). If there is an AEC, the CMA has the power to impose its own remedies but it can also make recommendations to other bodies such as sectoral regulators or the government - when legislation might be required for example.
>
> The CMA has wide powers to change the behaviour of firms, such as governing the way a product is sold in a particular market and the information that is available to customers buying that product. The CMA also has the power to impose structural remedies which can require companies to sell parts of their business to improve competition."

83. The CMA Group may take enforcement measures if it has decided, on a market investigation reference, that there is an adverse effect on competition, that is, if any relevant feature of a relevant market prevents, restricts or distorts competition (EA02, sections 134(2) and (4)). Pursuant to s.138 of the EA02, where a report that has been produced following a market investigation reference contains a decision that there is an adverse effect on competition, the CMA Group shall, in relation to each adverse effect on competition, take such action under s.159 or s.161 as it considers to be reasonable and practicable to remedy, mitigate or prevent the adverse effect on competition concerned, and to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition. Section 159 provides for the acceptance of final undertakings. Section 161 provides that the CMA Group may make a final order containing one or more of a wide range of remedies that are set out in Schedule 8 to the EA02. These remedies include the power to regulate prices (Schedule 8, paragraphs 7 and 8). The parties are agreed that this power, in the context of four-party card payment systems, would extend to a power for the CMA Group to impose a price cap on IFs.

84. So far as the concurrent functions are concerned, before the CMA or the PSR first exercises any of them, it must consult the other, and neither may exercise any of the concurrent functions if they have already been exercised by the other (section 60).

85. Section 179 of the EA02 provides a right of review to the CAT for any person who is aggrieved by a decision by the CMA in connection with a reference or a potential reference under Part 4 of the EA02. Such a review is to be determined according to judicial review standards.

86. In summary, therefore, whilst the PSR has concurrent powers with the CMA in relation to undertaking a market study into adverse effects upon competition in the payment systems sector, the PSR does not have concurrent powers to take the further and more significant step of conducting a market investigation, or of imposing enforcement remedies upon market participants, including imposing price caps upon IFs. In accordance with the regime set out in FSBRA, section 59, and the EA02, only the CMA Group can do that.

CA98 powers

87. The PSR has also been given concurrent powers with the CMA to exercise the competition functions in Part 1 of the CA98, insofar as they relate to participation in payment systems (save in so far as they are specifically excluded). These powers are conferred by FSBRA, section 61.

88. Part 1, Chapter 1, of the CA98 prohibits anti-competitive agreements, and Part 1, Chapter 2, prohibits the abuse of a dominant position. Pursuant to Chapter 3 of the CA98, the PSR may conduct a formal investigation and may take enforcement action, which may include the imposition of fines under section 36.

89. A full merits-based appeal to the CAT is available against enforcement decisions that are taken by the CMA, or by the PSR, under Part 1 of the CA98 (s46, and Schedule 8, paragraph 3).

The PSR's duty, in certain circumstances, before exercising sectoral regulatory powers, to consider whether it would be more appropriate for the PSR to exercise its competition powers under the CA98

90. Section 62 of FSBRA provides as follows:

> "**62. Duty to consider exercise of powers under Competition Act 1998**
>
> (1) Before exercising any power within subsection (2), the Payment Systems Regulator must consider whether it would be more appropriate to proceed under the Competition Act 1998.
>
> (2) The powers referred to in subsection (1) are—
>
> (a) its power to give a direction under section 54 (apart from the power to give a general direction);
>
> (b) its power to impose a requirement under section 55 (apart from the power to impose a generally-imposed requirement);
>
> (c) its powers under sections 56, 57 and 58.
>
> (3) The Payment Systems Regulator must not exercise the power if it considers that it would be more appropriate to proceed under the Competition Act 1998."

91. Accordingly, section 62 does not impose upon the PSR a requirement to consider whether it would be more appropriate to proceed under the CA98 when the PSR is considering whether to make a general direction under section 54, or a generally-imposed requirement under section 55.

Exclusion of section 49 general duties when exercising competition powers

92. Section 65 of FSBRA provides:

> **"65. Exclusion of general duties**

> (1) Section 49 (the Payment Systems Regulator's general duties) does not apply in relation to anything done by the Payment Systems Regulator in the carrying out of its functions by virtue of sections 59 to 63.
>
> (2) But in the carrying out of any functions by virtue of sections 59 to 63, the Payment Systems Regulator may have regard to any of the matters in respect of which a duty is imposed by section 49 if it is a matter to which the Competition and Markets Authority is entitled to have regard in the carrying out of those functions."

93. Accordingly, section 49 does not apply to the PSR's concurrent competition powers.

THE GROUNDS OF JUDICIAL REVIEW

GROUND 1: DOES THE PSR HAVE THE POWER UNDER SECTION 54 OF FSBRA TO IMPOSE PRICE CAPS ON IFS?

The submissions on behalf of the Claimants

94. The submissions on behalf of the Claimants on this ground were advanced in three parts:

(1) It is clear from the words of section 54, when read in the statutory context, and in accordance with general principles of statutory interpretation, that section 54 cannot be used by the PSR to impose price caps on IFs;

(2) This conclusion is reinforced by consideration of secondary materials to which, in accordance with the applicable rules of statutory construction, the court may refer; and

(3) The interpretation advanced by the Claimants will not give rise to any "regulatory gap". This third argument was advanced to meet a point that is relied upon by the PSR.

95. Mr Herberg KC made the primary submissions in support of part (1), and Mr Otty KC made the primary submissions in support of parts (2) and (3). Each adopted the other's submissions, and, on behalf of Revolut, Mr Kennelly KC adopted all of the submissions on Ground 1 that were made on behalf of Visa and Mastercard.

Construction of section 54 in accordance with general principles of statutory interpretation

96. Mr Herberg KC accepted that, read in isolation and given a literal meaning, section 54(2)(a) could be interpreted so as to confer upon the PSR a power to give a general direction to participants in a regulated payment system which imposed price caps on the level of IFs for outbound cross-border transactions. However, the modern approach to statutory interpretation requires the courts to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision (see **Centrica Overseas Holdings Ltd v Revenue and Customs Commissioners** [2024] UKSC 25; [2024] 1 WLR 3391, at paragraph 48, per Lady Simler JSC, below). When such an approach is adopted, he submitted, it is clear that any purported exercise of the power in section 54(2)(a) to give general directions in order to impose price caps on IFs would be *ultra vires*.

97. Mr Herberg KC said that there are three primary "drivers" which support the construction of section 54 that he urged the Court to adopt. These are the words that are used and that are not used in section 54 itself; the express references to price capping and other specific powers in sections 56-59; and the contrast between the enhanced appellate rights which have been granted by Parliament where the powers given to the PSR by Part 5 of FSBRA are particularly intrusive, and the absence of any such enhanced appellate rights in circumstances in which the PSR exercises its power to give

general directions under section 54 (or to impose general requirements under section 55).

The words that are used and that are not used in section 54 itself

98. As for the first point, Mr Herberg KC pointed out that there is no express reference to directions about fees or charges in section 54. Rather, he said, the language in section 54 is all about the system and the operation of the system. Mr Herberg KC said that the references in section 54(2) to directions which may require or prohibit the taking of specific action in relation to the system and to set standards to be met in relation to the system are inapt to cover a power to impose price caps on IFs. He said that the power to give general directions in section 54 should be read so as to be limited to a power to give directions on "operational" matters, which would not extend to powers related to pricing, such as price caps on IFs. Directions in relation to pricing would not be concerned with the operation of the regulated payment system, or with the imposition of a standard in relation to the system.

99. Mr Herberg KC emphasised that this does not mean that the power to give general directions under section 54 would be deprived of any purpose or content. If the Claimants' interpretation is applied to section 54, the PSR still has wide powers to give general directions on matters such as technical standards and the monitoring of compliance. This could include directions that touch on pricing, such as a requirement to publish prices. He pointed out that, as I have mentioned, there are five current general directions (and some 20 specific directions), all of which the Claimants accept the PSR had jurisdiction to make. Each of the general directions was made and issued in March 2020, replacing earlier general directions that had been made in 2015. General Direction 1 deals with co-operative relationships with the PSR. It requires

participants and regulated persons to deal with the PSR in an open and co-operative way and requires them to notify the PSR of anything relating to them of which the PSR would reasonably expect notice. General Direction 2 requires operators of a regulated payment system which is not subject to regulation 103 of the Payment Services Regulations 2017 to have publicly disclosed access requirements which meet certain directions set out in the General Direction. General Direction 3 imposes access requirements on regulated payment systems which are subject to regulation 103 of the 2017 Regulations. General Direction 4 requires that the operator of a regulated interbank payment system must actively ensure that it takes the views of each relevant service-user into account in setting its strategy and making decisions, including those relating to the payment system's design and rules. General Direction 5 relates to the avoidance of conflicts of interest between directions of operators of regulated interbank payment systems and directors of that system's central infrastructure provider.

The express references to price capping and the other specific powers in sections 56-59

100. Mr Herberg KC submitted that, in accordance with well-recognised principles of statutory interpretation, guidance on the meaning and scope of section 54 can be obtained from a comparison between section 54 and other provisions in the same Part of FSBRA. He submitted that these show that where Parliament intended to grant a particularly intrusive power to the PSR to regulate the activities of payment systems operators, Parliament has set it out specifically. So, in section 56, Parliament granted a power to the PSR by order to require the operator of a regulated payment system to grant access to the payment system to enable an applicant to become a payment service provider. Such a power can be exercised where a person applies for an order under that section. Section 57 grants the PSR a power to vary the agreements that have been

entered into between the operator of a regulated payment system and a payment service provider, upon the application of a party to such an agreement.

101. Mr Herberg KC said that the Claimants derive further support for their interpretation of section 54 from section 58, because that is another example of the grant of an intrusive power to the PSR by Parliament by means of a specific and targeted statutory provision. Section 58, which can be exercised without a prior application, permits the PSR to require a person who has an interest in the operator of a regulated payment system or an infrastructure provider in relation to such a system to dispose of such an interest. This power may only be exercised if the PSR is satisfied that, if the power is not exercised, there is likely to be a restriction or distortion of competition in the market for payment systems or a market for services provided by payment systems.

102. The Claimants rely, in particular, however, upon section 57(2) and (4), which expressly enables the PSR, on the application of a party to such an agreement, to vary the agreement by varying any of the fees or charges payable under the agreement. The Claimants say that this shows that, where Parliament intended to grant the PSR a power to control and specifically to cap fees or charges (which would include price caps on IFs), that power has been set out expressly. Moreover, such an express power only exists in specific circumstances, namely where a party to a relevant agreement has made an application for the power to be exercised. It follows, the Claimants say, that the apparently broad words in section 54(2)(a) cannot be interpreted so as to confer a general power to impose limits on fees and charges, such as IFs, upon all regulated payment systems of a particular type. As Mr Herberg KC put it, the general gives way to the specific. Mr Herberg KC relied on **R v Liverpool City Council, ex parte Baby Products Association** [2000] LGR 171, at 178, in which Lord Bingham CJ said, "A

power conferred in very general terms plainly cannot be relied on to defeat the intention of clear and particular statutory provisions", and **R(W) v Secretary of State for Health** [2015] EWCA Civ 1034; [2016] 1 WLR 698, in which the Court of Appeal said, at paragraph 67, ".... if Parliament has enacted specific provisions to govern a particular subject matter then it is to be taken to have intended that the same subject matter will not be governed by other more general provisions."

103. Mr Herberg KC said that it is hard to see what purpose is served by the specific power to vary fees and charges in regulated payment systems, on application, if the PSR has a general power to do so under section 54. The use of section 54 in these circumstances would bypass the statutory safeguards (the appeal rights) which exist in relation to the exercise of the PSR's powers under section 57. Mr Otty KC said that, if the PSR's submissions were correct, its powers under section 57 would be entirely subsumed within the PSR's powers under section 54.

104. Mr Herberg KC further submitted that, if and when the PSR considered that action may need to be taken across-the-board in relation to fees or charges such as IFs, the correct approach is for the PSR to make use of its concurrent competition powers under section 59 to undertake a market study. Then, if the market study lends support to the PSR's concerns, a market investigation can be undertaken by a CMA Group which may ultimately lead to the exercise of enforcement powers in accordance with Schedule 8 to the EA02. Those enforcement powers specifically include a power to regulate prices, which could include price caps on fees and charges such as IFs. Mr Herberg KC submitted that it is clear from the structure of Part 5 of FSBRA, and from the express power given to a CMA Group to regulate prices after a market investigation, that Parliament has decided that this would be the right course of action to take if the PSR

was concerned about fees or charges in regulated payment systems. He said that this makes sense, because the CMA Group is an independent body which can bring a fresh, but still expert, pair of eyes to the issue. Mr Herberg KC said that, whilst he was not casting aspersions on the PSR, the involvement of a CMA Group would avoid confirmation bias.

105. Mr Herberg KC submitted that Part 5 is a very carefully-drawn scheme, and it is not by accident that express powers are granted to the PSR, by section 57, to regulate fees and charges and prices in narrow and specified circumstances, and, by section 59, to trigger the process that may result in the regulation of prices, including IFs, by the CMA Group after a market investigation, but no such express powers are granted in section 54. This protected participants in the market, as intrusive intervention affecting pricing would only take place after a very full consideration of the matter, involving a market study, followed by an independent market investigation by a CMA Group, and then followed by a decision by the CMA to take enforcement measures which affect pricing. Parliament did not intend that the PSR could circumvent this process by imposing restrictions on pricing by means of a general direction in section 54.

106. In his reply, Mr Herberg KC emphasised that the PSR's three objectives and their regulatory principles were not excluded or irrelevant when the PSR exercised its concurrent competition powers under section 59. This is because section 49(4) states that the PSR's general functions, which must be used to advance the three objectives, and to which the regulatory principles apply, include not only the PSR's function of giving general directions under section 54, but also, at subsection (c), the PSR's function of determining the general policy and principles by reference to which it

performs particular functions. This is wide enough to cover decisions and actions under section 59.

Appeal rights

107. Mr Herberg KC submitted that it is also clear from the statutory framework that, where Parliament has granted particularly intrusive powers to the PSR, those are accompanied by broad appeal rights which go very much further than the scope for challenge which exists where the only route for challenge is an application for judicial review. Protection in relation to the intrusive powers granted by sections 56-58 of FSBRA is granted by the right to mount a merits-based, albeit not full-merits, appeal to a specialist body, the CMA, as provided for by sections 76 and 79 of FSBRA. This is in contrast to the position in relation to the power to give general directions under section 54. There is no specific statutory right of appeal against this power, and any challenge would have to be on the relatively limited grounds permitted in an application for judicial review.

The secondary materials

108. Mr Otty KC relied upon two types of secondary materials to support the interpretation of section 54 that is put forward on behalf of the Claimants. These were, first, papers published by HM Treasury and other Government departments before FSBRA was enacted, and, second, the explanatory notes which accompanied FSBRA. He said that these materials were useful in that they demonstrated the purpose of FSBRA and the mischief that it was designed to address; they showed how the scheme was designed to operate in an interlocking and coherent way; and they showed that it was a deliberate choice that powers of price-capping should be accompanied by rigorous appeal rights.

HM Treasury documents

109. Mr Otty KC submitted, and I accept, that the court may, when interpreting legislation, refer to Government reports which precede the legislation and which are part of the enacting history (see **Fothergill v Monarch Airlines** [1981] AC 251, at 181 per Lord Diplock, and the cases cited at Bennion, Bailey and Norbury on Statutory Interpretation, 8th Ed, 2023, at paragraph 24.9). However, this is subject to the cautionary words of Lord Hodge DPSC in **R(O) v Secretary of State for the Home Department** [2022] UKSC 3; [2023] AC 255**,** referred to below, to the effect that this is only if there is room for doubt about the true interpretation of the relevant statutory provision.

110. The first document to which I was referred was a joint Treasury/BIS White Paper from June 2012, entitled "Banking reform: delivering stability and supporting a sustainable economy." It was this White Paper which proposed the creation of a regulator for the payments industry, which became the PSR. The White Paper made clear that the trigger for the decision to create a new regulatory structure was the banking crisis in 2008. The White Paper also made clear that a key consideration was the promotion of effective competition. The Government sought to prevent the domination of the sector by a small number of large and powerful banks. At this stage it was anticipated that the new regulator would be built on a similar model to other regulated sectors, such as gas, electricity and water, with providers being licensed and the regulator enforcing licence conditions to ensure that open access to payments systems was maintained, pricing was transparent and effective, industry governance was adequate, and fair trading principles were respected.

111. Further publications emphasised the shortcomings of the payment systems industry's in-house regulatory body, the Payments Council, and stated that reform was required

to avoid domination by large banks and to improve access and competition in the sector. The Government conducted a consultation process. Mr Otty KC relied in particular upon a HM Treasury document dated October 2013, entitled "Opening Up UK Payments", in which the Government addressed themes arising in the responses to consultation. By this stage, the Government's plans had firmed up, and the proposals that are set out in this document reflect what was enacted in FSBRA. The response document explained that the Government had decided not to proceed with a licensing approach, but that the PSR would be created with a range of statutory powers.

112. At paragraphs 2.80 to 2.84, the response document stated:

> "2.80… As explained above, the Government has decided to pursue a designation, rather than licensing, approach, and powers originally defined based on proposed licence conditions have been re-drawn to reflect this. The Payment Systems Regulator will have the following generally stated powers:
>
> • powers over requirements regarding system rules – to require the establishment of, or changes to, the rules for the operation of the system; and to require an operator not to change the rules without regulatory approval; and
>
> • powers to give directions to operators, infrastructure providers, indirect access providers and other participants. The Regulator can therefore require or prohibit the taking of action in the operation, management, development or provision of infrastructure, provision of access, or any other matter concerning a designated payment system. These directions can be made to individual persons – meaning they can be tailored and kept relevant – or to categories of person i.e. sector-wide, generally applicable directions.
>
> 2.81 The content of these requirements and directions will be subject to whatever the Payment Systems Regulator determines is required to meet its objectives.
>
> 2.82 In addition to these two generally stated powers, the Payment Systems Regulator will also be given the following specific regulatory powers:
>
> • a power to amend commercial agreements governing service levels, access prices and other fees; this includes a power to

> amend contracts, including prices; a power to exercise ex-ante price setting; a power to stipulate minimum service or access levels, and to set the price charged by the operator or indirect access provider for membership of the scheme or indirect access to the system;
>
> • a power to order the provision of direct and indirect access to payment systems;
>
> and,
>
> • a power to carry out investigations and issue reports.
>
> 2.83 As noted above, the Payment Systems Regulator will also have concurrent competition powers.
>
> 2.84 Further, the Government has decided to provide for the following powers of enforcement for the Regulator:
>
> • a power to publish details of compliance failure;
>
> • a power to impose financial penalties in respect of a compliance failure;
>
> • a power to require owners of payment systems to dispose of their interests in them – subject to the satisfaction of certain pre-conditions and subject to HM Treasury approval."

113. Mr Otty KC relied in particular upon paragraphs 2.99 to 2.105 of this response document, which dealt with appeals. These paragraphs stated:

> "2.99 A few respondents saw judicial review as an inadequate remedy in all cases, with particular concerns about only having judicial review principles on, for example, pricing methodology decisions. Several of the incumbent banks and payment scheme companies called for appeals on competition matters to be full merits to a specialist court such as the Competition Appeals Tribunal (CAT). One of the charities that answered this question also identified the CAT as best placed to hear major areas of dispute.
>
> 2.100 Smaller industry players tended to accept the proposed appeals processes. Like many of the larger banks, they saw the mirroring of existing utility regulatory processes as an appropriate solution. Their reservations tended to focus on the risk of protracted appeals stringing-out and delaying regulatory compliance and unfairly burdening small enterprises. Some respondents argued that consumers and other end-users should have access to effective appeals processes, without the need to

> resort to judicial review; and for this to cover decisions by the Regulator not to act as well as to act.
>
> **Government response**
>
> 2.101 Given the broad endorsement of the proposed appeals provisions, there have been no significant changes in the Government's final position. The decision to adopt designation rather than licensing of participants naturally removes the need for a specific appeals process for licence modification decisions.
>
> 2.102 Decisions to impose requirements concerning system rules and to give directions will be subject to appeal to the CAT, to a judicial review standard rather than full merits-based appeal.
>
> 2.103 For actions and decisions taken under the specific regulatory powers, appeals will be made to the CMA, and the level of scrutiny will be a full merits review. This will include the exercise of price-setting, access-ordering and divestment powers by the Regulator.
>
> 2.104 On actions and decisions relating to the Regulator's concurrent competition function, appeals will be made to the CAT on the same basis as provided for appeals of the CMA's decisions under the Enterprise Act and Competition Act.
>
> 2.105 A finding of an infringement under the Competition Act 1998 and the level of any penalties will be subject to a full merits appeal to the CAT."

114. Mr Otty KC submitted that paragraph 2.103 made clear that any exercise by the PSR of its price-setting power would be accompanied by a right of appeal to the CMA. Such a right exists in relation to the CMA's exercise of its price-setting power under section 57 of FSBRA but, conspicuously, there is no appeal to the CMA against the PSR's exercise of its power to give general directions under section 54.

Explanatory Notes

115. Explanatory Notes to an Act may be used to understand the background to and context of the Act and the mischief at which it is aimed (see **R (Kaitey) and Secretary of State for the Home Department** [2021] EWCA Civ 1875, at paragraph 109, and Bennion,

paragraph 24.14). Once again, this is only if there is scope for doubt about the correct interpretation of the legislative provision.

116. Mr Otty KC referred me to paragraph 235 of the Explanatory Notes to FSBRA, which deals with the powers of the PSR under sections 54-58. This paragraph states:

> "235. Sections 54 to 58 set out the regulatory powers of the Payment Systems Regulator. The Payment Systems Regulator has the following powers: to give directions to participants in regulated payment systems (section 54); to impose certain requirements on the operator of a regulated payment system concerning the rules of the system (section 55); to order the provision of access to a regulated payment system (section 56); to vary the fees and charges payable under, and other terms and conditions of, an agreement concerning access to a regulated payment system (section 57); and to require the disposal of an interest in the operator of a regulated payment system (section 58). The powers to order the provision of access to a payment system and to vary agreements can only be exercised where an application has been received by the Payment Systems Regulator. The power to order the disposal of an interest in a regulated payment system can only be exercised if the Payment Systems Regulator is satisfied that, if the power were not exercised, it is likely that there would be a restriction or distortion of competition in the market for payment systems or for services they provide (section 58(2)). The exercise of this power is subject to the consent of the Treasury (section 58(3))."

117. Mr Otty KC pointed out that the only reference to a power to vary fees and charges is in relation to the powers under section 57, not section 54.

The Claimants say that their interpretation will not give rise to a regulatory gap

118. The Claimants recognise that it might be a factor against their interpretation of section 54 if it meant that the PSR would be unable to take any price-capping action in response to concerns that there was an adverse effect on competition on a market-wide basis. The Claimants also accept that the PSR cannot take such action by exercising its powers under section 57, because those powers are aimed at resolving a concrete issue that has arisen in the context of a particular agreement. However, the Claimants say that there

is no regulatory gap, because section 59 of FSBRA, read with Part 4 of the EA02, provides a route via which the PSR can take action to address concerns about pricing levels and competition. Mr Otty KC submitted that Parliament has made a deliberate choice not to give the PSR the power to carry out its market investigation reference itself, nor to exercise the EA02, Schedule 8, enforcement powers. He submitted (as Mr Herberg KC had done) that this was because Parliament wanted to ensure that drastic steps to promote competition, such as price caps, would only be implemented following a thorough, robust, and independent market investigation by a separate body, the CMA. Mr Otty KC submitted that the original (though now withdrawn) proposal by the PSR, to impose interim price caps for 30 months or so pending the design and implication of a suitable methodology for determining the appropriate levels for price caps for IFs for outbound cross-border transactions cannot possibly be what Parliament envisaged that the PSR would have power to do. He submitted that this proposal graphically illustrates that the PSR's interpretation of its powers under section 54 was overreach and did not align with Parliament's intentions for the checks and balances in Part 5 of FSBRA.

119. The Claimants accepted that there was some overlap between the PSR's powers under section 54, and the powers of the CMA Group under EA02, Part 4 and Schedule 8. Some of the remedies that a CMA Group might consider it fit to impose at the conclusion of a market investigation reference might overlap with remedies that the PSR could impose in the exercise of its regulatory powers under section 54. However, the Claimants submitted that a market-wide price cap is a particular example where the remedy exists only in the former and not in the latter. It is not to be expected that the regulator can do everything under both sets of powers.

120. Mr Otty KC addressed in reply the point made on behalf of the PSR that section 65 of FSBRA prohibited the PSR from taking account of the three s49 objectives or its regulatory principles when performing its concurrent competition functions under section 59. Mr Otty KC said that this overstated the significance of section 65, which was just there to make concurrence work, and section 25(3) of the Enterprise and Regulatory Reform Act 2013 creates a similar obligation to promote competition for the CMA. Moreover, when taking decisions on enforcement following a market investigation reference in which the CMA Group has found there to be an adverse effect on competition, the CMA Group is required, by section 134(5) of the EA02, to consider whether action should be taken to remedy, mitigate or prevent a detrimental effect on customers, arising from higher prices, lower quality, less choice of goods or services, or less innovation. It follows, he submitted, that the considerations that the CMA Group must take into account include the considerations that the PSR must take into account under FSBRA, section 49. It follows in turn, he submitted, that the same considerations will be taken into account if the PSR proceeds down the competition route as would be required to be taken into account for functions that are governed by section 49.

121. Mr Otty KC also said that it cannot be right that the PSR should be entitled under section 54 to take action in relation to the competition objective even if there is no adverse effect on competition which would trigger enforcement action if the matter were dealt with via the competition route.

The submissions on behalf of the PSR on Ground 1

122. In summarising the submissions of Ms Simor KC on behalf of the PSR, I will adopt the same structure as I adopted in relation to the Claimants' submissions on ground 1. Therefore, I will sub-divide my summary of her submissions into three parts, addressing

(1) the construction of section 54 in accordance with general principles of statutory interpretation; (2) the secondary materials; and (3) whether the Claimants' interpretation will give rise to a regulatory gap.

(1) The construction of section 54 in accordance with general principles of statutory interpretation

General overview

123. Ms Simor KC submitted that it is clear from the statutory framework that the PSR's powers to give general directions under section 54 are not as narrowly constrained as the Claimants contend and encompass a power to give a general direction that would impose price caps on outbound cross-border IFs.

124. Ms Simor KC submitted that assistance can be obtained, in interpreting the scope of the PSR's powers under section 54, from a general overview of the role and functions of the PSR, as set out in FSBRA. The starting point is that the PSR is a specialist economic regulator. In creating the PSR, Parliament created a new economic regulation regime for payment systems, which enables the PSR to intervene where appropriate in order to improve the market in the sector, and to benefit the economy more widely.

125. Sections 54 to 58 of FSBRA grant special and wide-ranging powers to the PSR that can be exercised only in relation to payment systems designated as regulated payment systems, such as those operated by Visa and Mastercard. It is significant that payment systems can be designated by HM Treasury as regulated payment systems if the Treasury is satisfied that, in light of the number and value of transactions processed by the system or likely to be processed, any deficiencies in the design of the system, or any disruption in its operation, would be likely to have serious consequences for users

or likely users (s44(1)). As I have said, Visa and Mastercard are the only four-party card payment system operators in the UK (i.e. facilitating the use of debit and credit cards). The XBIF Final Report noted that UK Finance has calculated that, in 2023, 61% of transactions used these payment systems, and the British Retail Consortium said that these covered 86% of transactions by value over the same period. I was told that 97% of the population have a debit card, and 61% have a credit card. Ms Simor KC said that the ubiquity of debit and credit cards means that these payment systems are as important as cash, but, unlike cash, the payment systems are controlled by commercial entities with commercial objectives, and that is why strong economic regulation powers were considered to be essential.

126. Ms Simor KC said that a major part of the purpose of the powers given to the PSR, as laid down in FSBRA, is to enable the PSR to intervene so as to mimic the market, because some players in the payment systems market are so powerful that the market would not otherwise operate efficiently. In her witness statement, Ms Alex Olive, the General Counsel for the PSR, said:

> "In the case of the PSR, the known competition and market power problems in the payment systems sector (along with the implications for innovation and service users) were front-and-centre at the PSR's inception. This is reflected, for example, in the language of the PSR's statutory objectives, which include the promotion of competition, innovation and the interests of service users, while also requiring the PSR to have regard to the importance of maintaining the stability of and confidence in the UK financial system, the importance of payment systems in relation to the performance of the functions of the Bank of England in its capacity as a monetary authority, the desirability of sustainable growth, and a number of other relevant statutory regulatory principles."

127. The PSR is required by section 49 to discharge its function of giving general directions under section 54 in a way which, so far as possible, advances one or more of the

payment systems objectives set out in sections 50-52, namely the competition objective, the innovation objective, and the service-user objective.

128. Ms Simor KC said that there is no valid basis for inferring that the only way in which price caps on IFs can lawfully be imposed upon regulated payment systems, unless an application has been made under section 57, is by means of the s59 concurrent competition powers, involving a market study by the PSR, followed by a market investigation by a CMA Group and enforcement action by the CMA Group. Ms Simor KC said that this was far too narrow an interpretation of the role granted to the PSR by FSBRA. Ms Simor KC said that the Claimants are wrong to submit that the only tool in the PSR's toolkit that can be used to promote competition is the PSR's concurrent power to undertake a market study pursuant to section 59 of FSBRA and the EA02. The PSR can also advance the competition objective by means of a general direction under section 54. There are good reasons why the PSR might wish to proceed by way of a general direction, rather than by undertaking a market study which might, eventually, result in enforcement action consisting of price caps on IFs.

129. The PSR's position as regards the benefits of using the power to give general directions, rather than using concurrent competition powers, to address competition problems and related problems, were summarised at paragraphs 16-19 of Ms Olive's statement:

> "16. The ability, alongside other powers, to intervene on pricing, fees or charges (and other commercial terms) is a common feature among the sectoral regulators. This is reflective of the fact they are designed to address (inter alia) risks that arise from markets characterised by market power, barriers to entry and access issues.
>
> 17. As explained by the CMA [in the CMA Baseline Annual Report on Concurrency, 2014, at paragraph 29]: "[t]hese sectors are subject to direct regulation (sometimes called 'ex ante regulation') under which, because it has been thought that the normal protections for consumers that are offered by a

competitive market – such as downward pressure on prices, upward pressure on quality, spurs to efficiency and innovation – were not available or at least not sufficient, those kinds of protection for consumers have been achieved, at least in part, by a statutory regulatory regime."

18. In addition to regulatory powers, those sectoral regulators have competition law enforcement and markets powers (in relation to the application of the Competition Act 1998 ("CA98") and the Enterprise Act 2002 ("EA02"), shared or "concurrent" with the CMA). The provision for sectoral regulators to enforce competition law concurrently with the CMA maximises deterrence against competition law infringements and enables sector specialists to tackle issues in their area of expertise. The expert role of sectoral regulators is equally a valuable feature of the EA02 markets framework.

19. An important benefit of an economic regulator having recourse to both sectoral regulatory powers as well as concurrent competition law enforcement and markets powers is the availability of a range of regulatory tools, which may in certain cases be used to address the same (or similar) issues, with similar or overlapping powers, but which offer important choices to the regulator. They are complementary in this regard. This is because a key aspect of sectoral regulation is that it enables the regulator to use its own specialist knowledge and sectoral toolkit: (i) to anticipate and correct behaviours before they happen (unlike CA98 enforcement, that concerns existing or past conduct by businesses in breach of the CA98 prohibitions of anticompetitive agreements and abuse of dominance), and also (ii) to responsively tackle market practices without pursuing a CA98 infringement investigation (a discretion the CMA also has in respect of the tools available to it, as explained below). It is generally accepted that CA98 enforcement alone is not a sufficient tool to achieve the policy goals of sectoral and competition regulation. While concurrent regulators are required to consider whether it would be more appropriate to proceed under CA98 rather than using certain sectoral powers [see FSBRA, section 62, above], there is no presumption in favour of CA98.

….

Sectoral regulators are not precluded from using their sectoral powers solely because the CMA would have recourse to the same or substantially similar powers in the event of a market investigation reference. There is no general expectation of exclusivity over remedies in that sense."

130. Ms Simor said that there is nothing unusual in a specialist regulator having its own power to regulate the relevant sector market, in addition to the concurrent powers with the CMA under the EA02. This is a common model.

131. The PSR says that price caps on IFs are also capable of advancing the service-user objective, by promoting growth.

132. Whilst there is no challenge, on rationality or other judicial grounds, apart from *vires*, to the proposed exercise by the PSR of a power to give a general direction that imposes price caps on IFs, Ms Simor KC said that it is instructive to look at the reasons why the PSR intends to do so, because they show that the PSR is acting in keeping with the spirit and purpose of the regime in FSBRA as a whole, and section 54, in particular. The reasons why the market review into cross-border UK-EEA card payments was begun in 2022 were set out in the Terms of Reference document ("ToR"). Paragraph 1.1 of the ToR stated that:

> "The aim of our market review is to understand the rationale behind the increases in interchange fee (IF) rates for Mastercard and Visa's consumer debit and credit card-not-present (CNP) transactions between the UK and the EEA, since the UK's withdrawal from the European Union (EU). We also want to understand the impact of these increases."

133. These IFs had increased approximately five-fold, from 0.2% and 0.3% for debit and credit card transactions, respectively, to 1.15 and 1.5%. The ToR said that various stakeholders had raised concerns about these increases and the ToR continued, at paragraph 1.17:

> "Given these concerns, we are conducting a market review into UK-EEA consumer cross-border interchange fees using our powers under FSBRA. We can use market reviews to investigate how well markets (or aspects of markets) for payment systems, or services provided by payment systems, are working in line

> with our statutory competition, innovation and service-user objectives."

134. Ms Simor KC said that this showed that the concerns that led to the decision to impose general directions were broader than simply concerns about an adverse effect on competition (which is what the EA02 is for) and extended to the potential impact upon service-users, including merchants and cardholders. This fell squarely within the section 49 objectives, which were to be taken into account when decisions were taken by the PSR about general directions under section 54.

135. Ms Simor KC further submitted that the existence of a power to make a general direction to impose a price cap on outbound cross-border IFs in order to advance the competition objective is borne out by section 50(3)(k) of FSBRA, which specifically provides that, in relation to the competition objective, the PSR may have regard to the level and structure of fees, charges or other costs associated with participation in payment systems.

The words that are used and are not used in section 54 itself

136. Ms Simor KC said that if the court applied the normal canons of statutory construction, by first reading section 54 literally, and then by considering whether the literal interpretation aligns with the statutory purpose, and by asking whether there is anything elsewhere in the statute that by necessary implication precludes the literal meaning, then the only conclusion is that the power to give general directions in section 54 extends to a power to impose price caps on IFs.

137. Ms Simor KC pointed out that Mr Herberg KC accepted that, if read literally, the ordinary language of section 54 is wide enough to include a power to intervene by giving a general direction to participants in regulated payment systems which would

have the effect of imposing price caps on IFs. Section 54(2) provides that a general direction may "require or prohibit the taking of specified action in relation to the system." Parliament has not confined "specified action" in any way. A general direction that affects the cost of fees that are an integral part of the system is action in relation to the system.

138. Ms Simor KC submitted that there is no basis for implying a limitation on those general words. In particular, there is no valid basis for limiting the powers to give general directions so that they apply only to the giving of directions on operational matters. The word "operational" does not appear in section 54. In any event, Ms Simor KC said, it is hard to see what "operational" would mean in this context. Why would price caps on IFs not have an impact on operations? Pricing rules, such as price caps, are part of the rules and conditions that apply to the payment systems, and so are part of the operational structure. They are part of how the system operates. Ms Simor KC relied upon section 42(3) of FSBRA, which defines "operator" in relation to a payment system to mean "any person with responsibility under the system for managing or operating it, and any reference to the operation of a payment system includes a reference to its management". This, she says, shows the breadth of "operational matters" in this context.

The authorised push payments scams

139. Ms Simor KC submitted that the provision that has been made in relation to authorised push payment scams, which the Claimants accept is *intra vires*, shows that the powers granted to the PSR by sections 54-57 of FSBRA extend to powers which impose significant financial costs on payment service providers, including by way of amendments to scheme rules. Authorised push payments scams are fraudulent schemes

in which the service user has (mistakenly) authorised a fraudulent payment. Section 72(11) of the Financial Services and Markets Act 2023 inserted new sub-paragraphs (6) and (7) into regulation 90 of the Payment Services Regulations 2017 (SI 2017/752, "the PSR 2017") which made clear that a direction given under section 54 of FSBRA may require a payment service provider to reimburse service users who were defrauded as a result of such scams. The PSR subsequently gave such directions, in Specific Directions 19-21, under section 54, and Specific Requirement 1, under section 55. The Claimants do not contend that these Directions were *ultra vires*. The PSR says that the enactment of section 72(11) is a recognition by Parliament that the PSR has *vires*, under section 54, to give directions to payment systems participants which require changes to scheme rules and which impose a significant cost upon service providers.

140. The Claimants say that these Specific Directions deal with something completely different from price caps on IFs. The Specific Directions concern a public policy issue of the highest order relating to standards and how the system operates, whilst price capping is an interference with commercial freedom and the transactional prices charged by users. Ms Simor KC said that this is a distinction without a difference.

The argument that the specific excludes the general: section 57

141. Ms Simor KC submitted, whilst there are specific powers to vary fees and charges (and so, to impose price caps) under section 57, such powers only arise if a party to the relevant payment system agreement makes an application to vary the agreement, and, even then, they will only apply to the particular agreement. The existence of such a specific power to impose price caps in section 57 does not mean that the different and more general power in section 54 must be interpreted so as to exclude such a power. There is no general rule of construction that where a power is referred to expressly in

one statutory provision, it cannot also exist in a different part of the statute, in a different context, even though it is not spelt out expressly. Section 54 did not have introductory words, such as are sometimes found in statutes, saying, "Subject to the other provisions of this Act…".

142. Ms Simor KC referred me to two authorities on this issue, **Cusack v Harrow London Borough Council** [2013] UKSC 40; [2013] 1 WLR 2022, and **R (British Bankers' Association) v Financial Services Authority and another** [2011] EWHC 999 (Admin); [2011] Bus LR 1531. I will deal with these authorities later in this judgment, when I set out my conclusions on Ground 1.

143. Ms Simor KC further submitted that the Claimants are wrong to contend that the powers under section 57 would be otiose if a wide interpretation is given to the general powers set out in sections 54 and 55. The powers in section 57 are essentially dispute resolution rights and serve a different purpose from the general direction powers in section 54.

Appeal rights

144. Ms Simor KC said that no inferences can be drawn as regards the scope of section 54 from the fact that the exercise of powers under section 57 are CMA-appealable (and so, to some extent at least, an appeal can be merits-based), whereas the exercise of the section 54 powers to give general directions are subject to challenge only by way of judicial review. As the PSR's skeleton argument put it, "Different appeal mechanisms are neither here nor there." Ms Simor KC submitted that there is an obvious explanation as to why the section 54 general directions powers are subject only to judicial review: Parliament considered it appropriate for a general direction/requirement to be made by an expert regulator following significant public consultation. There is no statutory presumption that regulatory decision-making with

significant financial implications for the regulated entity entitles that entity to a merits-based appeal. Decisions under general powers under section 54 are qualitatively different from decisions that are effectively dispute-resolution decisions under section 57. Moreover, before deciding to give a general direction under section 54, the PSR carries out a detailed market review, applying its sectoral expertise, as it did in this case. As a public authority, the PSR complies with a suite of consultation, transparency and other requirements. The duty of transparency is also enshrined as a regulatory principle in section 53(h) of FSBRA. These regulatory principles must be taken into account when considering whether to give general directions under section 54 (s49(3)(c)).

145. In addition, Ms Simor KC submitted that judicial review has some advantages over a merits-based appeals process, in that there is a public interest in administrative decisions, which have widespread effects, being subject to limited and expeditious challenge by those affected.

(2) The secondary materials

146. Ms Simor KC submitted that the October 2013 document published by HM Treasury in response to the consultation process makes clear that the intention was that PSR would be a specialist body with broad regulatory powers, in addition to its concurrent competition powers. Paragraph 2.11 of the response document said that "The problems identified in the market for UK payments require a regulatory regime with specialised objectives, powers and skills…. It is also important that it has the freedom to develop its own strategy for meeting the payments objectives." Ms Simor KC said that paragraph 2.80 of the response document, set out above, makes clear that the general powers, which were to be set out in sections 54 and 55, were intended to include powers to require changes to scheme rules and the taking of action not only in relation to

operational and managerial matters but also "any other matter" concerning a designated payment scheme.

147. Ms Simor KC further referred me to the earlier Treasury consultation document from March 2013. Although, at this early stage, the intention had been to introduce a licensing-based regulatory regime, Ms Simor KC said that passages in this document are relevant, because they indicate that the Government intended that the regulator would have a direct role in ensuring efficient and transparent pricing, without the need to go via the EA02 route. She relied, in particular, on paragraph 4.16 of the March 2013 consultation document, which states:

> "4.16. On efficient and transparent pricing, the requirement will be that prices are set at the appropriate level to benefit current and future end-users of the payment system. Licence-holders will be required to ensure that their pricing structures are transparent to their users, and that they are derived through a fair and transparent methodology. This will apply both at the level of payment system operators and their direct members and direct participants, where they offer indirect access to the payment system to third parties. The Government envisages that each licence-holder will, when requested, present its pricing methodology to the regulator, who will then review it and require amendments as appropriate. Where the regulator is not satisfied that the licence-holder is using an acceptable pricing methodology, and having given it sufficient opportunity to remedy the situation, the regulator will have the power to intervene to directly set prices for (1) direct access to a payment system, (2) indirect access to a payment system via an agency relationship and (3) interchange fees."

148. Ms Simor KC said that the sections of the October 2013 response document that deal with appeals, at paragraphs 2.101 to 2.104, do not support the Claimants' case: they simply set out the position in relation to appeals that was later set out in FSBRA itself.

149. As for the Explanatory Notes that are relied upon by the Claimants, Ms Simor submitted that they lend no support to the Claimants' case.

(3) Will the Claimants' interpretation give rise to a regulatory gap?

150. Ms Simor KC submitted that the interpretation of section 54 that is contended for by the Claimants would, indeed, create a regulatory gap, in that the powers of the PSR would be so severely undermined that it would be impossible for the PSR to meet the statutory objectives that the PSR is required to advance, in exercising its general functions, under section 49.

151. As for the powers under section 57, these do not cover the same ground as the powers to give general directions under section 54, because the former cannot be exercised of the PSR's own motion: they must be triggered by an application by a party to a contract.

152. As for the concurrent competition power to undertake a market study (but not to undertake a market investigation or to take enforcement action) under section 59 and the EA02, this does not provide the PSR with the flexibility to take "*ex ante*" action, or to make full use of its sectoral expertise to deal with problems in the market. Also, the powers under section 59 only apply to competition, and not to the other two objectives, the innovation and service-user objectives. The concurrent powers under the CA98 do not support an argument that the section 54 powers are limited as the Claimants contend, because the CA98 powers deal only with two specific issues, anti-competitive agreements and abuse of a dominant position.

153. Ms Simor KC further submitted that the existence of a regulatory gap is clear from the following: the competition objective, laid down in section 50 of FSBRA, cannot be met solely by the exercise by the PSR in appropriate cases of its concurrent power under the EA02 to undertake a market study, which might lead to a market investigation and then, if there is an adverse effect on competition, to enforcement action. She said that this cannot be the case because section 65 of FSBRA expressly prohibits the PSR from

taking account of its section 49 objectives, including the competition objective, when deciding to act under its concurrent competition jurisdiction in section 59. Also, Ms Simor KC submitted, under the EA02, when a CMA Group carries out a market investigation, the CMA Group cannot take account of the section 49 objectives. Those objectives apply to the PSR, in certain circumstances, but not to the CMA when the CMA is acting under the EA02.

Discussion and conclusion in relation to Ground 1

154. In my judgment, applying the principles of statutory construction, the PSR has the power, pursuant to section 54 of FSBRA, to impose price caps upon IFs, by means of a general direction. I prefer the Defendant's submissions on this issue to the Claimants' submissions. This is for the following reasons.

(1) The general principles of statutory construction

155. There was no significant dispute between the parties as regards the relevant general principles. They have been set out in a large number of authorities.

156. In **R (Quintavalle) v Secretary of State for Health** [2003] UKHL 13; [2003] 2 AC 687, at paragraph 8, Lord Bingham of Cornhill said:

> "8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted

> to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

157. In **R (O) v Secretary of State for the Home Department**, Lord Hodge DPSC said:

> "28. Having regard to the way in which both parties presented their cases, it is opportune to say something about the process of statutory interpretation.
>
> 29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': **Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG** [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (**R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd** [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in **Spath Holme**, p 397 : 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> "30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal

> ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), section 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.
>
> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in **Spath Holme**, p 396 , in an important passage stated: 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House … Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning'."

(See, also, **Centrica Overseas Holdings Ltd v Revenue and Customs Commissioners** [2024] UKSC 25; [2024] 1 WLR 3391, at paragraphs 48-50, per Lady Simler JSC.)

158. It is clear, therefore, that the object is to discern the intention of Parliament, as expressed in the language of the statute. The focus must be on the words of the relevant statutory provision, read in context with the statutory scheme set out in the wider group of sections, and in the historical context in which the statute was enacted. The latter is relevant in so far as it sheds light upon the statutory purpose and the mischief that the provision was intended by Parliament to address. If the words produce a meaning,

against that background, that is clear and unambiguous, then secondary, external, materials cannot displace that meaning. However, the secondary materials may place the statutory language in context and may thereby assist the court in resolving ambiguity and uncertainty, or may even bring ambiguity and uncertainty to light.

(2) The wording of section 54 itself

159. The starting-point is that, as Mr Herberg KC rightly accepted on behalf of the Claimants, a literal interpretation of section 54(2)(a) of FSBRA would permit the PSR to make use of its power to give general directions to impose price caps on IFs on outbound cross-border transactions. Such a general direction would "require or prohibit the taking of specified action in relation to the system": section 54(2)(a).

160. I do not accept Mr Herberg KC's submission that, reading section 54 as a whole, the power in section 54(2)(a) is limited to a power to give general directions affecting "operational" matters in a narrow sense, such as technical standards or compliance monitoring, and that this power does not therefore extend to the imposition of price caps for IFs. The word "operational" does not appear in section 54(2)(a), or elsewhere in section 54, as a word of limitation. It is true that the word "operator" is used in section 54(3)(b)(i), but, as Ms Simor KC pointed out, the definition of "operator" in section 42(3) of FSBRA provides that reference to the operation of a payment system includes a reference to its management. It follows that, in this context, "operation" has a wide meaning, to include any aspect of the management of the system, and "operator" has a similarly wide meaning. It follows, in turn, that it is not possible to infer, from the use of the word "operator" in section 54, that the power to give general directions is limited to the power to do so only in relation to "operational" matters, as narrowly defined.

161. Section 55(1)(a) of FSBRA provides that the PSR may, as part of its general regulatory duties, require the operator of a regulated payment system to establish rules for the operation of the system, but, once again, I do not think that it is possible to draw an inference from this use of language that Parliament used "operator" or "operation" in some undefined but narrow sense that would not extend to pricing, including the level of fees.

162. Accordingly, in my judgment, the suggested distinction, for the purposes of section 54, between actions of an operational nature and actions affecting pricing, is a false dichotomy.

163. Section 54(2)(a) permits general directions to be given which require or prohibit the taking of specified action "in relation to the system". Pricing decisions are part of the operation and management of a payment system, and directions which require action to be taken on pricing are directions requiring action to be taken in relation to the system. They are not directions in relation to anything else. Pricing is an integral part of the operational structure of a payment system. Price caps on IFs will require changes to the terms and conditions of the schemes, as will most, if not all, actions that are within the scope of section 54.

164. The conclusion that, on a literal reading, section 54(2)(a) permits the imposition by the PSR of price caps on IFs by means of a general direction is not, of course, the end of the matter. But it is a strong point in favour of the PSR's proposed interpretation. The remaining questions for the court are whether an implied limitation should be placed on section 54(2)(a), so as to prevent the use of the power to give general directions in order to impose price caps on IFs, because of an inference that must be drawn from the statutory framework, including the other powers given to the PSR in Part 5 of FSBRA

and the appeal rights; and/or from the statutory purpose (including as demonstrated by the secondary materials). I bear in mind that the arguments advanced by the Claimants in relation to the statutory framework and the statutory purpose overlap: the Claimants say that the way in which the PSR's various powers and functions are laid out in Part 5 of FSBRA sheds light on the scope and purpose of the power to give general directions under section 54.

(3) The fact that price caps on IFs will have commercial and/or costs consequences

165. I mention one point to dispose of it. The fact that a general direction imposing price caps on certain IFs will have commercial and/or costs consequences is not a reason why it would fall outside the scope of section 54(2)(a). The Claimants did not contend otherwise. As Ms Simor KC pointed out, pretty well any direction requiring action to be taken in relation to the payment system will have financial consequences, and so the fact that a direction about IFs will have costs consequences does not mean that it is not a direction requiring action to be taken in relation to the system.

(4) The statutory framework and the significance, for the interpretation of section 54(2)(a), of the other powers given to the PSR in Part 5 of FSBRA

(4)(a) The payment systems objectives in FSBRA, sections 49-52

166. Sections 49 to 52 of FSBRA are important, because they set out the objectives that the PSR must bear in mind when exercising its general regulatory duties, which include the exercise of its power to give general directions under section 54. These objectives shed light on the scope of the section 54 power.

167. In my judgment, the nature and scope of the statutory payment systems objectives support the PSR's case that the power to give general directions under section 54 extends to a power to give directions which impose price caps on IFs.

168. In discharging its power to give general directions under section 54 of FSBRA the PSR is required by section 49 to act, so far as is reasonably possible, in a way which advances one or more of the three payment systems objectives set out in sections 50-52. These are the competition objective, the innovation objective, and the service-user objective. The PSR must also have regard to the matters set out in section 49(3). These include the importance of maintaining the stability of, and confidence in, the UK financial system, and the regulatory principles in section 53.

169. These provisions are relevant to an understanding of the scope of the power to give general directions in section 54. This part of the statutory context makes clear that the legislative purpose behind the general power in section 54 is, at least in large part, to advance the payment systems objectives. Put another way, as a matter of statutory interpretation, if a general direction which requires or prohibits the taking of specific action in relation to the regulated payment system is intended to advance one or more of the payment systems objectives, then this provides strong support for the conclusion that it will be within the scope of the power under section 54(2)(a).

170. It is clear, on the basis of the evidence before me, summarised above, that in deciding to give a general direction to impose price caps on IFs, the PSR was seeking to act in accordance with the payment systems objectives and, in particular, in accordance with the competition and service-user objectives. Paragraphs 1.1 and 1.17 of the ToR for the market review (paragraphs 132 and 133, above) said that the purpose of the market review was to understand the rationale behind the increases in cross-border CNP IFs,

and to investigate how well markets (or aspects of markets) for payment systems, or services provided by payment systems, are working in line with the PSR's statutory competition, innovation and service-user objectives. The conclusion reached at the end of the market study was that the increases to the current levels result from aspects of the market that are not working well, and that they are contrary to UK service users' interests (XBIF Final Report, paras 1.12-15, paragraph 32, above). The same paragraphs stated that the level of cross-border IFs was distorted by the lack of effective competition on the acquiring side. The PSR concluded, after the market study, that there was such a lack of effective competition. The same paragraphs show that the PSR decided to give a general direction in order to impose price caps on IFs because to do so would mitigate the adverse impact upon service-users of the identified lack of effective competition. I accept Ms Simor KC's submission that the decision to impose price caps on IFs was, therefore, founded on the competition objective, and also upon the service-user objective. The price caps would ameliorate the adverse effects of the lack of effective competition, and they would also promote the interests of service-users and, particularly, acquirers and merchants.

171. It follows from this, in my judgment, that in proposing a general direction to impose price caps on IFs, the PSR was acting squarely in accordance with the legislative intention that it would make use of its general regulatory powers to advance the competition and service-user objectives. Put bluntly, the PSR is intending to use the power in section 54(2)(a) in support of the objectives that it was intended by Parliament to advance.

172. The Claimants submitted that the PSR's argument placed too much reliance upon the payment systems objectives, for the purposes of interpreting the general regulatory

powers in section 54 of FSBRA. They said that, whilst a statutory objective may inform how a particular statutory power is exercised, it does not widen the *vires* that is granted. I agree. But, in the present case, the argument on behalf of the PSR on this issue, which I have accepted, is not that sections 49-52 widen the *vires* granted to the PSR by section 54(2)(a). Rather, it is that the payment systems objectives in sections 49-52 serve to support and confirm the literal interpretation of section 54(2)(a), to the effect that the imposition of price caps on IFs by means of general directions is within the scope of the power granted to the PSR by section 54(2)(a). The use of the section 54 power to give a general direction of this nature, and for this reason, advances two of the objectives that the PSR is required to advance by sections 49-52.

173. The Claimants further submitted that the PSR's reliance on the payment systems objectives as support for their interpretation of section 54 was, as the Claimants put it, "overreach". They point out that section 49(4)(a) provides that the payment systems objectives must be taken into account for the purposes of the PSR's function of giving general directions under section 54 "(considered as a whole)". The Claimants submitted that the words in parentheses have a qualifying effect. The Claimants said that whilst the objectives, including the competition objective, can be taken into account in general terms in relation to the general directions power, i.e. considered as a whole, it does not follow from the fact that the regulator has a broadly framed "competition objective" that the regulator must have the specific power to exercise price capping powers as part of their general regulatory functions. There are other remedies that could be adopted that do not include price regulation.

174. I am unable to accept this argument. With respect to the Claimants, I do not understand how it can be that the PSR is entitled, indeed obliged, to have the advancement of the

competition objective in mind for the purposes of the overall exercise of its general regulatory functions, but not for the purposes of a decision to give a general direction to impose price capping. Decisions to give a particular general direction to operators involve the exercise of the PSR's general regulatory function. I do not think that the words "(considered as a whole)" in section 49(4)(a) can bear the weight that the Claimants seek to place upon them. Those words do not limit the scope of the section 54 power. What, then, do the words in parentheses mean? The words "considered as a whole" refer back to the general directions, not to the function that is referred to in section 49(4)(a). This is borne out by section 49(4)(c) which refers to another function, the function of determining general policy and principles, but does not have the same words in parenthesis. All the words mean, I think, is that the general directions, taken as a whole, rather than looked at separately and in isolation, must advance the payment systems objectives. Therefore, if a single general direction, looked at on its own, does not advance those objectives but, when considered together with other general directions, it will help to advance those objectives, the direction will be consistent with section 49. The same interpretation makes sense of section 49(4)(b) which refers to the functions in relation to giving general guidance "(considered as a whole)".

175. In my view, this part of the Claimants' argument strayed into an argument that the decision to impose price caps on IFs was misguided because there are other ways in which the stated competition concerns could have been addressed. This is not an issue before me in these proceedings. The only ground of challenge in these judicial review proceedings is the statutory interpretation point, not a challenge to the reasonableness of the PSR's decision, if they are entitled as a matter of statutory interpretation to take it. This part of the Claimants' argument also overlapped somewhat with the argument that the statutory context shows that competition concerns on the part of the PSR can

only be addressed by a market investigation reference under section 59. I will deal with this argument below.

176. For these reasons, I agree with the PSR that sections 49-52 support the PSR's argument that the proposed use of section 54 general directions to impose price caps on IFs are within the scope of the PSR's powers under that section. The breadth of the payment systems objectives in those sections also supports a broad interpretation of the scope of the PSR's powers to give general directions under section 54.

(4)(b) FSBRA, section 50(3)(k)

177. Further support for the PSR's argument is to be found, in my view, in section 50(3)(k), which states that the matters to which the PSR may have regard in considering the effectiveness of competition in a payment systems market include the level and structure of fees, charges or other costs associated with participation in payment systems. It is clear, therefore, that Parliament recognised that the PSR might wish to make use of its general regulatory powers to address the adverse effect upon fees and charges, such as IFs, of a lack of effective competition in the market. This is a short point, but an important one.

(4)(c) The concurrent competition powers, and FSBRA, ss 62 and 65

178. There is no doubt that, under the statutory framework, the PSR can address competition concerns in other ways, apart from giving a general direction under section 54(2)(a). The PSR can make use of its concurrent competition powers. These are the power under FSBRA, section 59(2), and the EA02, to undertake a market study into adverse effects on competition in the payment systems sector, which may result in a market investigation and then enforcement action by the CMA, and the power under FSBRA,

section 61, to exercise the competition functions under Part 1 of the CA98, which enable the PSR to conduct a formal investigation into anti-competitive agreements or abuse of a dominant position and, in appropriate cases, to take enforcement action.

179. The question therefore arises whether these other specific statutory powers to address competition concerns mean that, on its true interpretation, section 54(2)(a) does not extend to permitting the PSR to use its power under that provision to give general directions which are aimed, wholly or mainly, at promoting effective competition, and which are different in nature from the powers granted to the PSR under the concurrent competition powers.

180. In my judgment, the answer is "no", for four main reasons.

181. First, it is clear from the terms of section 49 itself, that, when exercising its general functions relating to payment systems (which include the function of giving general directions under section 54), the PSR must, so far as is reasonably possible, act in a way that advances the competition objective (see section 49(1), (2)(a), and (4)(a)). As I have said, I cannot see any way in which section 49 can be read so as to exclude a power to give general directions which are intended to promote effective competition. There is an obvious policy benefit in addressing competition concerns (and concerns for service-users) by way of general directions rather than by use of the concurrent competition powers. I will return to the policy and statutory purpose arguments later in this judgment.

182. Second, the position is made all the clearer by section 65 of FSBRA (see paragraph 92, above). Section 65(1) provides that section 49 (which imposes the duty to advance the payment systems objectives, including the competition objective) does not apply in relation to the carrying out of the PSR's functions by virtue of FSBRA, sections 59-63.

The concurrent competition functions are set out in those sections. It follows that it is not possible to interpret the statutory framework in such a way as to mean that the PSR is only entitled to promote the competition objective by using its concurrent competition functions, and not by giving general directions under section 54. The payment systems objectives have no application to the concurrent competition powers, but they do apply to the section 54 general powers.

183. Third, I consider that the Defendant's argument receives some further, albeit perhaps limited, support from the terms of FSBRA, section 62 (see paragraph 90, above). This provides that, before exercising certain powers, the PSR must consider whether it would be more appropriate to proceed under the concurrent competition powers in the CA98 and must not exercise the power if it considers that it would be more appropriate to proceed under the CA98. Section 62 does not apply to the power to give a general direction under section 54 (see section 62(2)(a)), though it does apply to the power to give a specific direction under section 54. The significance of section 62, for present purposes, is that Parliament has specifically considered and addressed the potential overlap between the PSR's power to give general directions under section 54 and the concurrent competition powers under the CA98, but Parliament did not say that the power to give general directions for competition purposes was in any way limited by the availability of these concurrent competition powers, or by the availability of the other concurrent competition powers in the EA02.

184. Fourth, in my view the wider statutory purpose, and inferences that can be drawn as regards Parliament's intentions in relation to the role and function of the PSR, strongly support the conclusion that the PSR is entitled to promote effective competition by

making use of the power to give general directions under section 54. I will return to this issue when I deal with the statutory purpose, later in this part of the judgment.

(4)(d) The express power to vary fees and charges in section 57(2)(a)

185. On behalf of the Claimants, Mr Herberg KC placed considerable reliance on the existence, in FSBRA, section 57(2)(a), of the express power that is granted to the PSR to vary an agreement by varying any of the fees and charges payable under the agreement. He said that the existence of specific provision for such a power, in the same part of the Act as section 54, means that there is an implied limitation in the scope of the power to give general directions under the latter provision. He said that, where Parliament intended to give the PSR the power to vary fees and charges (which would include price caps on IFs: see section 57(4)), Parliament expressly said so. As he put it, the general gives way to the specific.

186. I am unable to accept this submission. Section 57 deals with powers that are completely different from the powers given to the PSR by section 54. The power under section 57 applies only in relation to a specific agreement and, crucially, it is a power that can only be exercised on the application of a party to the agreement in question. In contrast, the power under section 54(2)(a) is a general power, which applies either across the board to all regulated payment systems, or to all operators, infrastructure providers, or payment serve providers of regulated payments of a specified description. The power under section 54(2)(a) can, therefore, be used for all payment systems, or for all payment systems of a particular type, such as four-party card payment systems. It can be used to address a systemic problem which affects all regulated payment systems of a particular type, in order to advance one or more of the payment systems objectives. The PSR could not make use of its limited, by invitation, power under section 57(2)(a)

to address such a problem, because the power in section 57(2)(a) can be used only for a specific problem affecting only a particular payment system agreement.

187. The role of the PSR under section 57 is essentially a dispute resolution role. It makes complete sense that, in that context, the section should be specific about what power the PSR has to vary the agreement that is the subject of the dispute, and, in particular, should spell out that the power extends to a power to vary fees or charges. On the other hand, it would make no sense for the statutory provision which sets out a power to give general directions under section 54 to contain a list of the specific types of subject-matter that a general direction might cover. It would have been impossible and (with respect) foolhardy, for Parliament to have anticipated or to have listed all of the potential topics that might be dealt with in a general direction. There would be no point in setting out a long shopping list of topics for general directions in section 54, whereas it was helpful, for the avoidance of doubt, to make clear that the power to vary an agreement in section 57 included the power to vary fees and charges: as the level of fees and charges are likely to be sensitive, there might otherwise have been room for disagreement as regards whether the dispute-resolution power in section 57 extended that far.

188. It follows, in my judgment, that there is nothing illogical or inconsistent in the power to vary fees and charges being spelt out in section 57 but not in section 54. Similarly, the power to vary fees and charges in section 54 is not rendered otiose by a much narrower power to do so on application in section 57. It follows, also, that no inferences or conclusions can be drawn about the scope of the section 54 power from the express reference to a power to vary fees and charges in section 57.

189. Mr Herberg KC also relied upon sections 56 and 58 of FSBRA and submitted that these show that where specific powers are given to the PSR in Part 5 of the Act, they are spelt out. However, in my judgment, neither provision assists the Claimants. Section 56 gives the PSR the power, where an application has been made to the PSR by an applicant, to make orders which will have the effect of enabling the applicant to become a payment service provider. Once again, this deals with a completely different type of power from the power to give general directions under section 54, and it cannot be the basis for any implied limitation upon the latter power. The section 56 power, like the section 57 power, can only be exercised on application and is equivalent to a dispute resolution power. I note in passing, however, that section 56 is a power, outside the concurrent competition powers, which enables the PSR to take active steps to promote effective competition. Section 58 gives the PSR the power to require the disposal of an interest in a payment system. This power may only be exercised if the PSR is satisfied that, if the power is not exercised, there is likely to be a restriction or distortion of competition in the market for payment systems or a market for services provided by payment systems. This power does not require an application to trigger it. Nonetheless, it is a specific and specialist power. It is a highly intrusive power, and it is not surprising that Parliament saw fit to set it out separately. I do not consider that the existence of this power in section 58 impliedly restricts the scope of the general power to give general directions to promote the competition and other objectives in section 54. Section 58 again serves to reinforce that the PSR's powers, outside the concurrent competition powers, include a power to take steps to promote competition.

190. Both sides have drawn my attention to authorities that they rely upon in relation to this issue. The Claimants relied on authorities in support of the proposition that the general gives way to the specific, but, in my judgment, they can be distinguished. I do not

consider that the authorities require me to draw the conclusion that the Claimants invite me to draw from the express reference in section 57 to a power to vary fees and charges.

191. As I have said, Mr Herberg KC relied on the statement of Lord Bingham CJ in **R v Liverpool City Council, ex parte Baby Products Association**, at 178, that "A power conferred in very general terms plainly cannot be relied on to defeat the intention of clear and particular statutory provisions", and upon the explanation by the Court of Appeal in **R (W) v Secretary of State for Health**, at paragraph 67, that ".... if Parliament has enacted specific provisions to govern a particular subject matter then it is to be taken to have intended that the same subject matter will not be governed by other more general provisions." Mr Herberg KC also relied upon the comment in Bennion at paragraph 21.4 that:

> "… Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision …"

192. In my judgment, these principles, which I fully accept, do not assist the Claimants in the particular exercise of statutory interpretation with which the court is currently engaged. As the Claimants acknowledged, whilst there are common principles, their application will depend on the facts of the case, and each statute must be considered on its own terms: see **R (British Bankers' Association) v Financial Services Authority** [2011] EWHC 999 (Admin); [2011] Bus LR 1531, at paragraph 259, per Ouseley J. In the present case, section 57 of FSBRA does not govern the same subject matter as section 54. One is a power to vary fees or charges if a party to an agreement makes an application for this to happen, whereas the other confers upon the PSR a broad power to give general directions to advance the payment systems objectives. It is a power to

do something different, in different circumstances. Accordingly, the use by the PSR of a general direction under section 54 to impose a price cap on IFs is not a way of evading safeguards that are laid down for such a course of conduct in section 57 or in any other provision of the Act.

193. Still further, to address the principle set out in Bennion, the literal meaning of section 54 does not cover the same situation as that for which specific provision was made in section 57. To repeat, section 57 is engaged where the PSR has been asked by a party to an agreement to resolve a dispute about its terms. That is not the same situation as arises when the PSR wishes to give a general direction.

194. I accept Ms Simor KC's submission that there is no general rule of construction that where a power is referred to expressly in one statutory provision, it cannot also exist in a different part of the statute, in a different context, even though it is not spelt out expressly.

195. In the **Liverpool City Council** case, Lord Bingham CJ, sitting as a judge of the Queen's Bench Division, found that the general power given to local authorities to issue press releases under sections 111 and 142(2) of the Local Government Act 1972 did not permit the Council to issue a press release stating that certain models of baby-walkers had failed to meet standard safety tests, when such a press release had the inevitable effect of causing the suspension of supply of those products. That was because the same Act contained a detailed and carefully crafted code for the suspension of supplies of products, which included rights and safeguards for their manufacturers. The use of the general power in section 27 had deprived the manufacturers of the protections of the statutory code. This case is plainly distinguishable, because in that case, unlike this, the statutory regime had laid down detailed rules and protections for something to

be done in the particular circumstances, which the Council had sidestepped by purporting to exercise its general powers.

196. In the **British Bankers' Association** case, the Claimant contended that the Financial Services Authority ("FSA") did not have statutory power to issue a Policy Statement for the providers of financial services, in order to address mis-selling of payment protection insurance (PPI), when there was a specific statutory procedure for addressing wide-spread mis-selling, contained in section 404 of the Financial Services and Markets Act 2000. Ouseley J rejected this argument, finding that, although there were similarities in the scope and aim of a section 404 scheme and the provisions implemented by the Policy Statement, the latter did not have the same degree of compulsion or regulatory oversight as a section 404 scheme would have. Therefore, the Policy Statement was not a device for evasion of the protective requirements of section 404: judgment, paragraphs 228-263.

197. The issue before Ouseley J was similar to that before me, in that he had to consider whether or not the provision for a scheme in section 404 carried with it the necessary implication that what the FSA had done in its Policy Statement was excluded from the FSA's general powers as regulator (see paragraph 248). At paragraph 250, Ouseley J said that, in construing a regulatory provision in an Act, it would require clear indications in the language that the greater the problem, the more Parliament intended to restrict the flexibility of the way in which the regulator can deal with it. I respectfully agree. In the present case, the fact that, in narrow circumstances, following an application, the PSR is given express statutory powers to vary fees and charges does not mean that the wider regulatory powers in section 54 are restricted in the way contended for by the Claimants. It would not make sense that the PSR's powers to

deal with a serious issue relevant to the competition and service-user objectives would be constrained in such a way. Also, there is no reason to think that the PSR is intending to make use of section 54 in this manner in order to evade protective requirements that are found elsewhere in the legislation.

198. In the **British Bankers' Association** case, at paragraph 252, Ouseley J said that "If a statute is to have the effect, on its true construction, of making a single lawful act unlawful if done one hundred times, I would expect that to be made very clear." Similarly, in the present case, as the PSR has power, pursuant to section 57, to vary fees and charges in a single regulated payment services agreement, it would require clear words for the statute to make clear that the PSR has no power to do so by means of a section 54 general direction across the board in the relevant part of the regulated sector. There are no such clear words here.

199. Still further, in **British Bankers' Association**, at paragraph 259, Ouseley J noted a point of distinction between that case and the **Liverpool City Council** case, which applies equally to the present case. In the **Liverpool City Council** case, the local authority was relying on very general statutory enabling powers to circumvent the protections surrounding a specific power. The power relied upon by the PSR in section 54 is not such a broad general power, but a specific remedial part of the same regulatory framework (as was the position in the **British Bankers' Association** case).

200. The next case is **Cusack v Harrow LBC** [2013] UKSC 40; [2013] 1 WLR 2022, relied upon by Ms Simor KC. A local authority erected bollards to prevent vehicles from crossing a footway outside the Appellant's property. The question was whether, as the Respondent local authority contended, it had power to do so under section 80 of the Highways Act 1980, which gave the local authority power to put up and maintain fences

or posts without paying compensation, or whether, as the Appellant contended, the local authority could only act under section 66 of the same Act, which gave the local authority as highway authority the power to erect posts or fences where necessary for the safety of highway users, but on the basis that compensation had to be paid.

201. The Supreme Court held that the local authority was entitled to proceed under section 80 and so did not have to pay compensation. The Court said that sections 66 and 80 were different provisions concerned with overlapping aims and applications and it was not possible to regard either provision as more specific or less general than the other (see judgment, paragraph 61, per Lord Neuberger PSC, with whom Lords Sumption and Hughes JJSC agreed).

202. In my judgment, **Cusack v Harrow** is of limited assistance for present purposes, because the Supreme Court's decision was based upon the interpretation of the particular statutory provisions under consideration. However, it is a helpful indication that a public authority is not invariably prohibited from relying on its powers on one section of an Act if those powers overlap with the powers in another section of the same Act, even if the other section provides for safeguards for third parties that the first section does not have.

203. The final case that was cited to me on this issue was the case of **R (W) v Health Secretary**. The Health Secretary had given Guidance to health authorities, informing them that they should notify the Health Secretary if an overseas patient had unpaid debts of at least £1,000. This was so that the Health Secretary could inform the Home Secretary, as such a debt would, under a Statement of Changes in Immigration Rules, mean that the patient would be refused leave to enter or remain in the United Kingdom. One of the issues for the Court of Appeal in that case was whether the Secretary of State

was entitled to use his power under section 48 of the National Health Service Act 2006, as amended, to require NHS Bodies to provide him with such information as he considered it necessary to have for his purposes and functions in relation to the health service, in order to compel that this information be provided to him. The Appellants contended that he could only compel this information to be given to him if he exercised his broad discretion under section 251 of the Act to make Regulations about how patient health information should be processed.

204. The Court of Appeal held that the power under section 48 was not cut down by the section 251 power (see judgment, paragraphs 60-63). At paragraph 63, the Court said:

> "The result is, in our view, that neither section 251 nor section 48 confer powers in a manner which excludes the other section, as the source of the power to do exactly what each section expressly authorises. We recognise that there may be situations where a particular objective might be achieved by the use of either power, and this case may indeed be one of them. But the general thrust of the two sections is distinct, in the way which we have described, and the Secretary of State therefore had power under section 48 simply to require the provision of the Information to himself without making Regulations under section 251 for that purpose, provided that the requirements of section 48 were satisfied in relation to the information requested."

205. In my judgment, in the present case, the general thrust of sections 54 and 57 of FSBRA are similarly distinct and so, for the reasons I have given, the existence of an express power to vary fees and charges in section 57 does not mean that there is no power to do so by way of general direction in section 54.

206. There is one final point that was made by Mr Herberg KC on this topic that I should deal with. This was really another way of making a submission that I have already addressed. He said that if the PSR has a power under section 54 to issue general directions to vary fees and charges, this would make section 57 otiose. It would not.

As I have found, section 57 is about something else entirely, namely dispute resolution following an application by a party to the agreement.

(4)(e) The lack of appeal rights

207. Mr Herberg KC pointed out that where a provision in Part 5 of FSBRA gives the PSR specific powers to take action which will have a major impact upon a participant in a payment services scheme, provision is made for a right of appeal. This applies to the intrusive powers granted by sections 56-58 of FSBRA, and to the specific directions and specific requirements for rules changes in sections 54 and 55. Sections 76 and 79 give a right of appeal to the CMA, a specialist body. Moreover, the appeal is not limited to the same grounds of challenge as would be available in a judicial review: the appeal is merits-based. Mr Herberg KC submitted that the absence of any right of challenge to the giving of a general direction under section 54, apart from a right to challenge by way of judicial review, was a clear sign that Parliament did not intend to permit the PSR to take such intrusive action as the imposition of price caps on IFs, by means of a general direction.

208. Once again, I am unable to accept this submission. The interpretation of section 54 for which the PSR contends is consistent with the literal interpretation of section 54 itself. For the reasons I have given, I do not think that there is any reason in the statutory framework or the other provisions in Part 5 of FSBRA to imply the limitation that the Claimants say should be implied. As I will explain shortly, I do not think that there are any good reasons of public policy to imply such a limitation upon the section 54 power. This means that the question is, starkly, whether, on its own, the feature that there are statutory rights of appeal in respect of the exercise of other powers under Part 5, but no such statutory rights of appeal in relation to section 54 powers, is sufficient

reason to infer the limitation that the Claimant proposes. In my judgment, the answer is plainly no, for two main reasons. First, there is nothing unusual about the exercise of intrusive powers by a public authority being subject to challenge only by way of judicial review. That is the norm. The statutes and the law reports are replete with examples of highly intrusive powers that are, nonetheless, only subject to judicial review. Second, it is perfectly logical that Parliament should have decided that the exercise by a statutory regulatory body of its general regulatory powers should be subject to challenge only by way of judicial review, rather than by way of an appeal, let alone by way of an appeal to another statutory body, the CMA or CAT, which are the appeal bodies for specific directions and for rules changes and under sections 56-58. There would be no reason to think that the CMA or CAT is better placed to rule upon the rights and wrongs of general regulatory decisions than the Administrative Court. The fact that the CMA's appeal powers enable it, at least to some extent, to consider the merits of the PSR's decisions is a further reason why it would make no sense for such appeal rights to extend to the PSR's general regulatory functions. On the other hand, it does make sense that there be a right of appeal against decisions taken under the other powers in sections 54 and 55 and under sections 56-58. Each of those sections is concerned with the exercise of powers by the PSR which affect only one or two (or a very few) specific participants in regulated payment systems. In the case of sections 56 and 57, the PSR's role is effectively in dispute resolution. It makes sense that there should be a further appeal where a decision has been made on the outcome of the dispute.

209. In other words, there is nothing odd or surprising that the general decisions that are taken by the PSR are subject only to judicial review, whereas specific decisions

affecting specific participants are subject to appeal. There is no basis for inferring from this that general directions cannot have effects that are intrusive.

(4)(f) Legislation in response to authorised push payments scams

210. I agree with Ms Simor KC that the enactment by Parliament of section 72(11) of the 2023 Act, which require a payment service provider to reimburse service users who were defrauded as a result of an authorised push payment scam, supports the wider interpretation of the PSR's powers in section 54 of FSBRA that the PSR contends for. The Claimants say that these Specific Directions deal with something completely different from price caps on IFs. The Specific Directions concern a public policy issue of the highest order relating to standards and how the system operates, whilst price capping is an interference with commercial freedom and the transactional prices charged by users. That is so, but the point is that they show that Parliament understands and intends that a general direction under section 54 may have intrusive and costly consequences, notwithstanding that there is no right of appeal beyond a claim for judicial review.

(5) The statutory purpose and the secondary materials

(5)(a): General statutory purpose

211. I have already found that there is no basis, either in the language of section 54 itself, or arising from the other provisions of Part 5 of FSBRA, or from the statutory framework generally, to imply a limitation to the clear words of section 54 which would have the effect of preventing the PSR from imposing price caps on IFs by means of a general direction. I now come on to consider whether there is anything in the statutory purpose that would have that effect. It would have to be a very clear indication, in order to

override the interpretation that I have arrived at from the statutory language and the statutory framework.

212. In fact, however, I think that it is the wider interpretation of its powers for which the PSR contends, rather than the restricted interpretation put forward by the Claimants, which makes most sense in light of the statutory purpose and the mischief which the relevant part of FSBRA was enacted to deal with.

213. The point can be stated quite shortly. Parliament has set the PSR up as the statutory regulator for payment systems. It is an expert body, with unique experience and expertise in the sector. I cannot see any reasons of public policy why the expert regulator should be restricted in the type of general directions that it can give, in the way that the Claimants suggest.

214. The Claimants submitted that it was clear as a matter of statutory purpose and, indeed as a matter of interpretation of the wider statutory context, that Parliament did not intend for the PSR to take intrusive steps under section 54 to promote competition. Rather, its role in that regard should be limited to the concurrent competition powers. The Claimants accepted that the PSR does indeed have a role in relation to competition, and that it was lawful for the PSR to conduct the market review into cross-border IFs that it had undertaken. But, the Claimants say, when the PSR identified in the market review what the PSR considered to be a problem with competition and cross-border IFs, the only option that was available to the PSR (outside action under the CA98) was to make a market investigation reference to the CMA and then to leave it to a CMA Group to conduct an investigation and, if the CMA Group considered it to be merited, to take enforcement action. The Claimants said that it would be contrary to the plain statutory

interpretation and purpose for the PSR to take action of its own by way of general directions.

215. I do not accept this submission. It is, of course, true that one option for the PSR at the end of the market review would have been to make a market investigation reference to the CMA, but I do not accept, in light of the statutory purpose, and the reasons why this Part of FSBRA was enacted by Parliament, that this was the only option that the PSR could lawfully consider. There are several obvious public policy reasons why the PSR might properly have decided, consistent with the statutory purpose and Parliament's intention, that it was better to take action itself, rather than to make a market investigation reference. A market investigation reference would have taken at least 18 months and could have taken longer. The PSR would not have been in control of it. The decision whether to impose remedies at the end of the process would not have rested with the PSR. The PSR is, after all, the regulatory body to which Parliament has given responsibility for the regulation of regulated payment systems. I do not accept the point made by the Claimants that there are obvious benefits in competition matters being dealt with by independent experts in the CMA Group. Only one member of the CPA panel (from which the CMA Group would be drawn) would be required to have experience in payment systems. I do not see why Parliament would not have preferred for such matters to be dealt with by the body that was set up as the expert sector regulator. The PSR is able to move more swiftly and is able to take *ex ante* action. The PSR is able, through general directions, to anticipate and correct behaviours before they happen (see the passage from Ms Olive's statement set out at paragraph 129, above). Moreover, the PSR has greater flexibility, through the use of general directions, to respond to problems that may affect not only the competition objective but also the service-user objective. The CMA has no role in relation to the service-user objective.

216. Another way of putting this is to say that I accept the PSR's submission that to adopt the interpretation of section 54 that is advanced by the Claimants would give rise to a regulatory gap. If the Claimant's interpretation were correct, then the expert regulatory body, charged by Parliament with regulating the payment systems sector, would not be in a position to react nimbly and speedily to problems that it identified with the sector, as Parliament plainly intended. There would be an important missing tool in the sectoral regulatory toolkit.

217. In their submissions, the Claimants accepted that some of the remedies that a CMA Group could decide to impose at the conclusion of a market investigation reference might overlap with remedies that the PSR could lawfully impose in the exercise of its regulatory powers under section 54. In my view, this concession was rightly made. However, if that is the position, then it means that the PSR is not necessarily required to wait in all circumstances for enforcement action from the CMA following a market investigation, if a competition problem has arisen. That being so, there does not appear to me to be any reason or principle, or any reason derived from the statutory purpose or Parliament's intention, why one of the overlapping remedies that the PSR can impose by means of a general direction should not be a price cap on IFs.

5(b) Secondary materials (1): Do the secondary materials have a part to play in statutory interpretation in this case?

218. In the **R (O)** case, referred to at paragraph 157 (above), Lord Hodge DPSC, said that secondary materials could have a role to play in statutory interpretation, but it is a secondary role. Lord Hodge said that "none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

219. In my judgment, for the reasons given above, the meaning of section 54, even after consideration of the statutory context, is clear and unambiguous and does not produce absurdity. It follows that, in my view, consideration of the secondary materials consisting of the HM Treasury documents and the Explanatory Notes is not capable of displacing the interpretation that I have placed on section 54. However, in case I am wrong, and to test my conclusion, I will go on to consider the secondary materials.

5(c) HM Treasury documents published before FSBRA was enacted

220. Mr Otty KC relied in particular on paragraphs 2.102 and 2.103 of the HM Treasury response document dated October 2013, entitled "Opening Up UK Payments" (see paragraph 113, above). In the first of these paragraphs, HM Treasury said that decisions to impose requirements concerning system rules and to give directions will be subject to an appeal to the CAT. In my judgment, this paragraph is of no particular relevance, as the Government did not proceed with this proposal. Decisions of general application under sections 54 and 55 are not subject to an appeal to the CAT, but are subject to challenge only by way of judicial review.

221. In paragraph 2.103 the response document said that there would be an appeal to the CMA, on a full-merits review basis, for actions and decisions taken under specific regulatory powers, "including the exercise of price setting, access-ordering and divestment powers by the Regulator." Once again, I do not think that this paragraph assists the Claimants. This paragraph was not stating, in clear terms, that the Government intended to provide a right of appeal to the CMA in any circumstances in which the PSR exercised its powers to set prices. The reference to "price-setting" was in the context of a reference to "specific regulatory powers". All this paragraph was saying was that there would be an appeal to the CMA in relation to specific (as opposed

to general) regulatory decisions. Price-setting was given as one example of such decisions. It reads too much into this paragraph to interpret it to amount to a statement of intention that the PSR would have no power to set prices or to control fees and charges, by means of its power to make general directions.

222. In fact, in my view, other parts of the 2013 response document support the PSR's interpretation of section 54. In particular, paragraph 2.80, set out at paragraph 114, above, says that the PSR's general powers – plainly a reference to section 54 and 55 powers – include powers to give directions on "any other matters concerning a designated payment system". This is a broad and open-ended power. Paragraph 2.82 refers to "these two generally stated powers."

5(d) The explanatory notes

223. Mr Otty KC referred me to paragraph 235 of the Explanatory Notes to FSBRA (paragraph 116, above). This contains a very high-level and general summary of the contents of sections 54-58. In my view, no relevant inferences can be drawn from it. The reason why there is a reference to a power to vary fees and charges only in relation to powers under section 57, not section 54, is because section 57 is the only provision that specifically refers to such powers.

6 Conclusion on Ground 1

224. For these reasons, I have concluded that the PSR has power under section 54 of FSBRA, on its true construction, to impose price caps on cross-border IFs.

GROUND 2: IS THE PSR PRECLUDED FROM USING ITS SECTION 54 POWER TO IMPOSE PRICE CAPS ON IFS FOR MASTERCARD, BY REASON OF SECTION 108, FSBRA?

The issue, and the parties' respective submissions

225. In light of my conclusion on Ground 1, it is necessary to go on to consider the second ground in this application for judicial review. Ground 2 is relied upon by Revolut and by Mastercard. It has no application to Visa. The submissions on behalf of the Claimants in relation to this ground were made by Mr Kennelly KC. This ground is, again, a *vires* challenge.

226. Section 108 of FSBRA prohibits the PSR from exercising any power under section 54 for the purposes of enabling a person to obtain or maintain access to, or participation in, a payment system in circumstances in which regulation 103 of the PSR 2017 applies in relation to access to, or participation in, the payment system by the person. Regulation 103 applies to rules or conditions governing access to, or participation in, a payment system.

227. The argument by Revolut and Mastercard, in summary, is that, even if I am right on Ground 1, the PSR is prohibited by section 108 from making use of its powers under section 54 to impose the proposed price caps on IFs, in relation to Mastercard.

228. Mr Kennelly KC submitted that price caps on IFs will affect rules or conditions governing access to or participation in Mastercard's payment system, because issuers and acquirers are required to agree to IFs as a condition for joining and taking part in Mastercard's four-party card payment system. Issuers and acquirers cannot join or participate in Mastercard's payment system unless they agree to IFs. Also, Mastercard sets default levels for IFs in its agreements with issuers and acquirers, which, in almost all cases, the issuers and acquirers adopt. The price caps on IFs will, therefore, amount to a change by the PSR of a rule relating to the price for access to or participation in Mastercard's payment system. This means, Mr Kennelly KC submitted, that price caps

on IFs would be a variation of the "rules or conditions" governing access and participation by issuers (and acquirers), and, that being so, the price caps would be imposed for the purposes of enabling relevant persons to obtain or maintain access to, or participation in, a payment system. Accordingly, section 108 and regulation 103 apply, and so section 54 cannot be relied upon.

229. Mr Kennelly KC further submitted that both section 108 and regulation 103 should be given a broad interpretation, because regulation 103 was introduced to implement the UK's obligations under the Payment Systems Directive, which was a maximum harmonisation measure, meaning that the UK was debarred from introducing any measures that went further than it. Section 108 of FSBRA was designed to ensure that there was no overlap between section 54 (and sections 55 to 58), and rule 103 of the PSR 2017.

230. Revolut and Mastercard say, in addition, that the conclusion that the effect of section 108 and regulation 103 is to prohibit the imposition of price caps on IFs pursuant to the PSR's power in section 54 is supported by the reasoning of Sweeting J in his judgment in **R (Notemachine UK) v Payment Systems Regulator** [2023] EWHC 1522 (Admin); [2024] 1 WLR 1591 ("**Notemachine**"). They say that the issue in the present case cannot be distinguished from the issue that arose in **Notemachine**. Indeed, they say that, in the **Notemachine** case, the PSR contended for the same broad interpretation of section 108 and section 103 which Revolut and Mastercard now invite me to adopt.

231. On behalf of the PSR, Ms Simor KC submitted that section 108 has no application to the proposal to impose price caps on IFs. She said that the PSR's purpose in imposing the price caps is not to widen or improve access to, or participation in, the four-party card payment systems. Rather, as the XBIF Final Report made clear, the purposes are

to advance the competition and service-user objectives. There is no challenge by Mastercard and Revolut to the reasons given in the XBIF Final Report for the decision to impose price caps on IFs, and so it is not open to Revolut and Mastercard to contend that the PSR's purposes in imposing those price caps were different from those that were stated by the PSR to be its purposes in the XBIF Final Report. Furthermore, Ms Simor KC submitted that it is not the case that any step which will result in an impact on the terms and conditions between payment systems operators, on the one hand, and issuers and acquirers, on the other, will necessarily be for the purposes of enabling a person to obtain or maintain access to, or participation in, a payment system. She said that the argument on behalf of Revolut and Mastercard proves too much, in that it would denude the PSR of much of its ability to act under sections 54 to 58 of FSBRA. Ms Simor KC said that **Notemachine** can be distinguished, because, in that case, the PSR's purpose had been to maintain and to widen access to the payment system in question (ATMs).

The legislative framework

(1) Section 108 and regulation 103

232. The current version of section 108 of FSBRA is the result of an amendment to the FSBRA which was introduced by paragraph 4 of Schedule 8 to the PSR 2017.

233. Section 108 provides:

> "The Payment Systems Regulator may not exercise any power under ss. 54 to 58 for the purposes of enabling a person to obtain or maintain access to, or participation in, a payment system in circumstances in which regulation 103 (prohibition on restrictive rules on access to payment systems) or 104 (indirect access to designated payment systems) of the Payment Services Regulations 2017 applies in relation to access to, or participation in, the payment system by the person."

234. The circumstances in which regulation 103 applies are circumstances relating to rules or conditions governing access to, or participation in, a payment system by authorised or registered payment service providers. The requirements of regulation 103 are, in short summary, that rules or conditions which govern access to, and participation in, payment systems must meet what are known as the "POND" criteria (proportionate, objective, and non-discriminatory). Regulation 104 has no relevance to the argument in the present case. We are only concerned with regulation 103.

235. Regulation 103 of the PSR 2017 provides:

> "103. **Prohibition on restrictive rules on access to payment systems**
>
> (1) Rules or conditions governing access to, or participation in, a payment system by authorized or registered payment service providers must—
>
> (a) be objective, proportionate and non-discriminatory; and
>
> (b) not prevent, restrict or inhibit access or participation more than is necessary to—
>
> (i) safeguard against specific risks such as settlement risk, operational risk or business risk; or
>
> (ii) protect the financial and operational stability of the payment system.
>
> (2) Paragraph (1) applies only to such payment service providers as are legal persons.
>
> (3) Rules or conditions governing access to, or participation in, a payment system must not, in respect of payment service providers, payment service users or other payment systems—
>
> (a) restrict effective participation in other payment systems;
>
> (b) discriminate (whether directly or indirectly) between
>
> (i) different authorized payment service providers; or
>
> (ii) different registered payment service providers;

> in relation to the rights, obligations or entitlements of participants in the payment system; or
>
> (c) impose any restrictions on the basis of institutional status."

236. "Payment service providers" are defined in regulation 2 and Schedule 1 to the PSR 2017 to include institutions such as card issuers and merchant acquirers participating in the Visa and Mastercard schemes. Parts 2 and 3 of the PSR 2017 make provision for the registration and authorisation of payment service providers. "Payment service providers" do not include the general public, as customers.

(2) PSD II

237. The PSR 2017 was introduced in order to transpose Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (the "Payment Services Directive II" or "PSD II"). PSD II set a common legal framework for payment services in the internal market in the EU, by providing a consistent set of rights and obligations for businesses and consumers making and receiving payments. PSD II sought to create a level playing field between all categories of payment providers, in turn increasing the choice, efficiency, transparency and security of payments.

238. The purpose of regulation 103, specifically, was to transpose Article 35.1 of PSD II into UK law. Article 35.1 states:

> "1. Member States shall ensure that the rules on access of authorised or registered payment service providers that are legal persons to payment systems are objective, non-discriminatory and proportionate and that they do not inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk and business risk and to protect the financial and operational stability of the payment system.

> Payment systems shall not impose on payment service providers, on payment service users or on other payment systems any of the following requirements:
>
> a restrictive rule on effective participation in other payment systems;
>
> b rule which discriminates between authorised payment service providers or between registered payment service providers in relation to the rights, obligations and entitlements of participants;
>
> c restriction on the basis of institutional status."

(3) The PSR's enforcement powers under Part 10 of the PSR 2017

239. If the PSR is prohibited by section 108 of FSBRA from making use of its powers under sections 54-58 because its purposes are to enable a person to obtain or maintain access to, or participation in, a payment system in circumstances in which regulation 103 of the PSR 2017 applies, that does not mean that the PSR is deprived of any power to act. Rather, it means that the PSR must make use of the powers granted to it by Part 10 of the PSR 2017 to enforce requirements for access to, and participation in, payment systems, instead of its powers under sections 54-58 of FSBRA. The Part 10 powers include a wide power to give directions under regulation 125 of the PSR 2017 in order to remedy or prevent a failure to comply with the requirements. Directions may require or prohibit the taking of specific action, or may set standards to be met in relation to the system, and may apply to all regulated persons or to every regulated person of a specified description (in which case they are called "general directions"), or in relation to a specific regulated person or specific regulated persons.

240. The PSR also has a power under regulation 125 to give a direction for the purpose of obtaining information about compliance with a qualifying requirement.

241. The PSR has additional powers in respect of compliance failures in relation (inter alia) to breaches of regulation 103. Regulation 127(1) permits the PSR to require a regulated person to pay a penalty in respect of a compliance failure. Regulation 126 permits the PSR to publish details of a compliance failure and of any penalty. Regulation 129 empowers the PSR to apply to the court for an injunction to restrain conduct amounting to a compliance failure, and to require the regulated person, and anyone else who appears to have been knowingly concerned in the failure, to take such steps as the court may direct to remedy it. Regulation 133 requires the PSR to make arrangements that are designed to enable persons to submit complaints that a qualifying requirement has been breached. Such a complaint may trigger a decision by the PSR to take action under regulation 125.

242. It will be seen that there are obvious similarities between the powers in Part 10 of the PSR 2017, and the powers in sections 54-58 of FSBRA, in their respective contexts. For example, the opportunity for persons to ask the PSR to take action in relation to breaches of qualifying requirements, under regulation 133, has echoes of section 57. The reason why there is a separate enforcement regime for compliance failures that are within the scope of the PSR 2017 is that, as has been stated, PSD II is a maximum harmonisation measure and so EU member states, as the UK was at the time of its introduction, are prohibited from taking any measures that go beyond it, in relation to the subject matter of PSD II.

243. The PSR has exercised its powers under regulation 125 by giving a general direction in relation to access. This is General Direction 3. Payment systems operators who are subject to regulation 103, including Mastercard, are obliged to report to the PSR each year about their compliance with the access obligation contained in regulation 103.

(4) The reason why Ground 2 has no relevance for Visa, or for issuers and acquirers for whom Visa is the payment systems operator

244. Regulation 102(1)(a) of the PSR 2017 provides that regulation 103 does not apply to "designated" payment systems. A "designated" payment system is defined in regulation 2 of the PSR 2017 as meaning a system that is a "designated" system for the purposes of regulation 2(1) of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979, "the 1999 Regulations"). Regulation 2(1) of the 1999 Regulations defines a "designated" system to be one that has been declared to be a designated system by a designation order made under regulation 4 of the 1999 Regulations. Visa, unlike Mastercard, is subject to a relevant designation order and is therefore a designated system for the purposes of the 1999 regulations, and so for the PSR 2017. As a result, neither section 108 nor regulation 103 applies to Visa. The exclusion in regulation 102(1)(a) gives effect in domestic law to an exclusion in Article 35.2(a) of PSD II. It is not necessary to take time to explain the reason for this difference between Visa and Mastercard. It is not in dispute that Visa is a designated system and Mastercard is not.

245. Though Visa is not subject to General Direction 3, as regulation 103 does not apply to it, Visa has been made subject to General Direction 2, which imposes a similar annual reporting obligation in relation to access requirements. General Direction 2 was made under section 54 and applies to payment systems operators who are not subject to regulation 103.

(5) The impending repeal of section 108 and of regulation 103

246. Provision has been made in the Financial Services and Markets Act 2023 (in Part 2 of Schedule 1 to that Act) for the repeal of the PSR 2017. Commencement will take place by means of regulations made by HM Treasury. No such regulations have yet been laid

before Parliament. In August 2023, HM Treasury stated that the Government intends to repeal section 108, and, at the same time, to give effect to the repeal of regulations 102-104. That has not happened yet, and I must, of course, consider Ground 2 on the basis of the law as it currently stands. This does mean, however, that if Revolut and Mastercard were to be successful with Ground 2, it might well turn out to be a temporary victory.

Discussion

247. In my judgment, section 108 of FSBRA does not prohibit the PSR from making use of its powers under section 54 to impose price caps on IFs for Mastercard, its issuers and acquirers, as the PSR proposes to do.

248. I will first set out my own reasoning on the meaning and effect of section 108, and I will then go on to consider **Notemachine**.

The meaning of "for the purposes of" in the context of section 108

249. The phrase "for the purposes of" does not admit of a single, nice, hard-edged, meaning in all statutory contexts. It is a somewhat vague expression. It might, in the appropriate context, mean, "with the motive of", or "with the objective of", or "with the intention of", or "in order to", or even, "with the effect of". The phrase is, to an extent, a blank slate which takes its particular meaning from its particular statutory context. This has been made clear in the authorities. For example, in **Chandler v DPP** [1964] AC 763, the House of Lords had to consider the meaning of section 1(1) of the Official Secrets Act 1911, which provides that a person who, for any purpose prejudicial to the safety or interests of the state, enters, etc, any prohibited place, shall be guilty of felony. At

813, Lord Pearce said that the words "any purpose prejudicial to the safety or interests of the state" must be construed in their statutory context.

250. No real assistance, therefore, is to be gained from statements in the authorities on similar wording in different statutory contexts, save in so far as the courts have emphasised that the meaning of the words depends on their statutory context. It was for that reason, no doubt, that my attention was not drawn by counsel to the meaning of this phrase in other statutory contexts.

251. In my judgment, the key to understanding the meaning of "for the purposes of" in section 108 is to be found in the function that section 108 is intended by Parliament to perform. This is to ensure that, where the PSR is taking steps to enforce or to give effect to the prohibition on restrictive rules on access to payment systems in circumstances in which regulations 103 or 104 apply, the PSR does so by exercising its powers under Part 10 of the PSR 2017, rather than by exercising its powers under sections 54-58 of FSBRA. It is clear that this is what is behind section 108, because regulation 103 gives effect to Art 35.1 of PSD II, which, as all parties agree, is a maximum harmonisation measure. Section 108 is designed to ensure that the UK Government and quasi-Governmental bodies such as the PSR do not make use of powers derived from domestic law to trespass on the ground that is covered by the Art 35.1 of PSD II, so as to impose or enforce rules or restrictions that go beyond Art 35.1.

252. That being the case, it follows that the effect of section 108 is to prohibit the PSR from using its powers under sections 54-58 ***in order to*** ensure that the rules for access to, and participation in, payment systems meet the criteria in regulation 103. Put another way, section 108 applies if the objective of the PSR, in taking the relevant step, is to do something in respect of access or participation that is covered by regulation 103. At

the highest level, the question is: why is the PSR taking the particular step? If it is to give effect to the prohibition on restrictive rules on access to payment systems, then section 108 will apply, and the PSR is barred from making use of sections 54-58 of FSBRA to take the step.

253. Though, as I have said, it is not possible to derive much assistance from considering the views expressed in other statutory contexts about the meaning of the phrase "for the purposes of", it is worth noting that in a recent criminal case, **R v Casserly** [2024] EWCA Crim 25, [2024] 1 WLR 2760, albeit in a wholly different context, the Lady Chief Justice said that the word "purpose" in that context connoted "a motivating objective". The relevant issue in that case was whether at least one of the purposes of an electronic communication was to cause stress or anxiety, as was required by section 1(1)(b) of the Malicious Communications Act 1988, in order for an offence to be committed under that Act. As I have said, the statutory context was completely different, not least because the Court of Appeal decided that a narrow interpretation of the word "purpose" was appropriate in that case because of the need, imposed by section 3 of the Human Rights Act 1998, to interpret section 1(1)(b) of the 1988, so far as it is possible, in accordance with the rights to freedom of speech granted by Article 10 of the European Convention on Human Rights. Nevertheless, I respectfully borrow the phrase "motivating objective" as a helpful phrase to explain what "for the purposes of" means in the very different context of FSBRA, section 108.

254. Mr Kennelly KC submitted that the PSR's purposes are not the same as its purely subjective motives. In a narrow sense, that is plainly right. Motive will often be different from purpose. This is certainly the case in the criminal law. In **DPP v Chandler**, at 813, Lord Pearce said that, in section 1 of the Official Secrets Act 2011:

> "The word "purpose" although it has some subjective content is used in an objective sense. If the purpose was in fact prejudicial, the offence is committed, no matter how benevolent the motives of the spy or saboteur that led him to essay the purpose."

255. This reflects the well-known distinction between "motive" and "intention" which exists in criminal law. A jury is not required to be sure of the motive behind a defendant's actions, if the jury is satisfied so that it is sure that the defendant committed the necessary act, with the necessary intention, in order for the offence to be committed. In a murder case, the intention is the intention to kill or to cause really serious harm. The motive may be revenge, or robbery, or to steal drugs.

256. In this particular statutory context, however, I do not think that it is fruitful to consider whether requirement as to "purposes" in section 108 gives rise to a subjective or an objective test. As in **Chandler v DPP**, it has aspects of both. The court must consider the PSR's motivating objective, and this must be determined by reference to the PSR's stated intentions, though that is not the only relevant consideration. I do not agree with Mr Kennelly KC that the focus on the motivating objective of the PSR is a threat to the maximum harmonisation of PSD II.

Alternative meaning of "for the purposes of"

257. Even if I am wrong in my reading of section 108 as being intended to prevent the use of sections 54-58 in circumstances that overlap with the territory covered by regulation 103 in relation to access and participation by payment service providers, the fact remains that there is a requirement that the PSR must be acting for the purposes of enabling a person to obtain or maintain access to, or participation in, a payment system, in order for section 108 to apply. That must be the motivating objective. It is not sufficient, in my view, that the actions of the PSR may have an impact upon access or participation.

Conclusions on the interpretation of section 108

258. In my judgment, the following conclusions can be drawn as regards the scope of the restrictions upon the use of sections 54-58 that are imposed by section 108:

259. The PSR may not make use of its powers under sections 54-58 if the PSR is doing so in order to give effect to the prohibition on restrictive rules on access to, or participation in, payment systems by payment service providers which is set out in regulation 103 of the PSR 2017 (or, which means the same thing, the PSR has that as its "motivating objective");

260. The stated reasons given by the PSR for the exercise of its powers are highly relevant, but not necessarily conclusive. If the PSR stated that it was exercising its powers for a purpose that was unrelated to the enforcement or protection of restrictive rules on access to, or participation in, payment systems, in circumstances in which regulations 103 or 104 applied, but there was other evidence to show that this was, in fact, the PSR's purpose, then the PSR's bare assertion would not be finally determinative; and

261. The fact that the measure proposed by the PSR would have some impact upon access to, or participation in, a payment system by a payment service provider, for example because it would make participation more expensive for payment service providers and others, does not, of itself, mean that section 108 applies. A further question would still be what was the PSR's purpose, its motivating objective. Simply because the measure has that side-effect does not bring section 108 into play.

Applying this interpretation, the imposition of the price caps on IFs will not be for the purpose of enabling a person or persons to obtain or maintain access to, or participation in, a payment system in circumstances in which regulation 103 applies in relation to access to, or participation in, the payment system by the person

262. In my judgment, the requirements of section 108 are not met. There is no evidence that the purpose (or motivating objective) behind the proposal to impose price caps on IFs is to enable a person or persons to obtain or maintain access to, or to participate in, Mastercard's payment system, or that it is to do so in circumstances covered by regulation 103. Rather, it is clear from the evidence that the purpose of the PSR in proposing the price caps on IFs is to improve competition (and thereby to advance the competition objective) and to advance the service-user objective.

263. In her witness statement, the PSR's General Counsel, Ms Olive, said that the market review into IFs arose out of a concern on the part of the PSR about how well the market was working and a concern about problems stemming from insufficient competition, resulting in detrimental effects for service users (see her statement, paragraphs 58, 60, 62, 65, 69). This is consistent with the stated purpose of the market review which led to the decision to impose price caps on IFs and it is consistent with what was said in the XBIF Final Report (see paragraphs 26 and 30-32, above).

264. As I have said, the assertion by the PSR as to what its purposes were is not definitively conclusive. However, as Ms Simor KC pointed out, there is no challenge in these judicial review proceedings to the conclusions that were expressed, and the statements that were made, by the PSR in the XBIF Final Report. Also, as one would expect, Revolut and Mastercard have not challenged the good faith of the PSR or suggested that the PSR has not been truthful in saying that the purposes of the price caps, from the PSR's perspective, are to advance the competition and service-user objectives. In those circumstances, I agree with Ms Simor KC that, to put it bluntly, Revolut and Mastercard are stuck with the assertion of the PSR, backed up by evidence, that the price caps on IFs are not being imposed with the purpose of enabling acquirers (who

pay the IFs) or any other persons to obtain or maintain access to, or participation in, a payment system.

265. Mr Kennelly KC's response was that this misses the point. What matters is not what he described as the "subjective purpose" of the PSR. Rather, what matters is that the PSR's purpose is to vary the pricing structure for payment systems. The pricing structure is part of the rules or conditions governing access and participation, and so will have an impact on whether acquirers and others will be prepared to join the scheme. Whenever the PSR's purpose is to do something that will affect the terms on which participants can access and participate, the PSR's purpose will be to enable persons to obtain or maintain access to, or participation in, a payment system.

266. I am unable to accept this submission. What it boils down to is a submission that any enforced change by the PSR which might affect the decision by a person to join or to continue to participate in a payment system will come within the scope of section 108 and so will be outside the scope of section 54. In my judgment, that is an overly broad construction of section 108. I will deal in the next part of this judgment with the PSR's contention that the price caps on IFs will not, in fact, have any effect upon anyone's willingness to join or remain with the Mastercard payment scheme, but even if Revolut and Mastercard are right that it might, this does not trigger section 108. The question is not whether the proposed measures might have an impact upon any person's willingness to join Mastercard's payment scheme, but whether the purposes of the PSR were to widen access or maintain participation in circumstances in which section 103 applies. Mr Kennelly KC's submission confuses purpose with means or effect. He said that the purpose was to change the scheme rules, but that is the means or the effect of the change, not the objective.

267. I agree with Ms Simor KC that Mr Kennelly KC's submission in this regard proves too much. Following the logic of his submission, any measure adopted by the PSR which the PSR was aware might influence a relevant person in its decision to join or to remain in the Mastercard payment scheme would fall within the scope of section 108, even if the PSR's objective was not to affect access or participation. If this were right, then, following Mr Kennelly KC's logic, anything that resulted in a change to the terms and conditions of the payment scheme would come within s108 because there would always be a possibility that any such change might affect a person's decision to join or remain in a payment scheme, in circumstances to which regulation 103 applies. It follows that, if Mr Kennelly KC's argument were right, then sections 54-58 would be denuded of pretty well all of their content. For example, section 57(2)(a) of FSBRA permits the PSR, on the application of a party, to vary any fees and charges in connection with participation in a regulated payment system. If Mr Kennelly KC was right, then this power could never be exercised, because the PSR would know that if fees or charges were varied, then this might impact upon a payment service provider's decision to join or to continue participation in the scheme. Such an interpretation of section 108 would go far beyond the statutory intention of ensuring that measures taken to enforce regulations 103 and 104 make use of Part 10 of the PSR 2017, rather than sections 54-58 of FSBRA.

In any event, the proposed measures will not have an impact upon access or participation

268. As stated above, I have come to the conclusion that the mere fact that the PSR is aware that a measure may have an impact upon access or participation does not mean that this is its purpose and does not bring it within the scope of section 108. However, even if I am wrong about this, the proposed price caps on IFs will not come within the scope

of section 108, because the PSR is proceeding on the basis that the price caps will not have any impact upon access or participation.

269. In the XBIF Final Report, the PSR came to the conclusion that the price caps on IFs would not affect the ability of an acquirer, or any other relevant person, to obtain or maintain access to, or to participate in, a four-party card payment system such as the one that Mastercard operates. This was because of the "must-take" status of Mastercard and Visa cards for merchants. So, for example, at paragraph 4.17 of the XBIF Final Report, the PSR said:

> "As we set out in more detail in Annex 1, acquirers told us they were and are very unlikely to leave either card scheme in response to the outbound IFs increases. As already stated, not providing acquiring services to merchants would entail significant business losses for acquirers. Some acquirers and merchants summed this up as the 'must-take' status of the Mastercard and Visa cards to merchants."

At paragraph 4.35, the report stated:

> "….given the near ubiquity of Mastercard and Visa in the UK, their 'must-take' status, and the HAC rules, the vast majority of merchants could not and cannot respond to the fivefold outbound IF increases by declining Mastercard- and Visa-branded cards. We know of no UK merchant who decided to decline to accept Mastercard or Visa as a result of the increase."

270. As Ms Simor KC has pointed out, there has been no judicial review challenge to any of the conclusions reached in the XBIF Final Report, including this one. I must proceed on the basis that this conclusion was correct. This means that the pricing change that is proposed will have no impact on access or participation for payment service providers, and so, even if Mr Kennelly's interpretation of section 108 is correct, the proposed price caps will be outside the scope of the section.

The IF Regulations

271. Ms Simor KC submitted, and I accept, that further support for the conclusion that the proposed price caps on IFs will not come within the scope of section 108 can be found in consideration of the relationship between PSD II and the EU IFR.

272. Recital (2) to PSD II states that:

> "The revised Union legal framework on payment services is complemented by Regulation (EU) 2015/751 of the European Parliament and of the Council [the EU IFR]. That Regulation introduces, in particular, rules on the charging of interchange fees for card-based transactions and aims to further accelerate the achievement of an effective integrated market for card-based payments."

273. This Recital therefore makes clear that PSD II and the EU IFR complement each other. The point made by Ms Simor KC is that the EU IFR permit member states to impose price caps on domestic IFs that are lower than the maximum IFs set out in the Regulations, and this shows that price caps on IFs will not come within the scope of Article 35.1 of PSD II, and so, as regulation 103 of the PSR 2017 was implemented in order to give effect to Article 35.1, price caps on IFs will not come within the scope of regulation 103 or, therefore, of section 108 of FSBRA.

274. Ms Simor KC drew my attention to the following parts of the EU IFR:

Recital (14):

> "The application of this Regulation should be without prejudice to the application of Union and national competition rules. It should not prevent Member States from maintaining or introducing lower caps or measures of equivalent object or effect through national legislation."

Article 3.1 provides, in relevant part, that :

> "1. Payment service providers shall not offer or request a per transaction interchange fee of more than 0,2 % of the value of the transaction for any debit card transaction.

> 2. For domestic debit card transactions Member States may either:
>
> (a) define a per transaction percentage interchange fee cap lower than the one provided for in paragraph 1 and may impose a fixed maximum fee amount as a limit on the fee amount resulting from the applicable percentage rate; …."

Article 4 provides:

> "Payment service providers shall not offer or request a per transaction interchange fee of more than 0,3 % of the value of the transaction for any credit card transaction. For domestic credit card transactions Member States may define a lower per transaction interchange fee cap."

275. In my view, this assists the PSR in that it shows that the EU legislation upon which section 108 and the PSR 2017 are based did not assume that any measure that imposes price caps on IFs will necessarily come within the scope of the EU provision which has been implemented into domestic law as regulation 103.

Notemachine

276. The **Notemachine** case was concerned with a different type of payment system, the system of Automatic Teller Machines, or ATMs, commonly known as cash machines, which dispense cash in various locations, such as inside or outside banks, shops or petrol stations. Notemachine installs, owns, and manages ATMs at locations across the United Kingdom. Notemachine participates in the LINK network, a regulated payment system for the purposes of FSBRA. Almost all ATMs in the United Kingdom are connected to LINK. In this system, Notemachine is the acquirer and the bank that issued the customer's card is the issuer. LINK is the payment system operator. Both the issuers and the acquirers are parties to the LINK Network members' agreement. Pursuant to the LINK Network members' agreement, Notemachine receives an IF from the relevant card issuer whenever a customer inserts their card into one of

Notemachine's free-to-use ATMs and makes a cash withdrawal, balance inquiry, or PIN number change. One component of the IF is the "interchange rate", set by LINK, pursuant to the members' agreement (as with the four-party card payment system, in theory issuers and acquirers can agree their own IFs, but this hardly ever, if ever, happens). In 2018, LINK announced that it was going to reduce the interchange rates for free-to-use ATMs over the next four years. Notemachine applied to the PSR under section 57 of FSBRA, seeking a variation of the IF payable under the LINK Network members' agreement. The PSR said that it had no power to act under section 57, because section 108 applied. Notemachine sought judicial review of the decision. The High Court (Sweeting J) dismissed the application for judicial review.

277. The proposal to reduce the level of IFs would reduce the income received by Notemachine, as the acquirer, and would reduce the cost of ATMs for the banks, the issuers. The reason given by Link for doing so was a concern about the continued viability of the LINK network, in the face of a declining demand for cash amongst the general public. LINK took the view that, unless IFs were reduced, a trend in which ATMs became concentrated in busy urban areas, where demand is higher, and were less available in rural or quieter areas where consumer demand is lower would continue and, indeed, that, if nothing was done, there was a risk of the LINK network collapsing altogether. The proposed reduction in IFs did not apply to certain ATMs, known as Protected ATMs, which were situated at least a kilometre from the nearest ATM. The reason why the reduction in IF rates would, in LINK's view, make a positive difference, was that it would limit the incentive for acquirers (the owners of ATMs), like Notemachine, to concentrate their ATMs in very busy areas, in which there was an oversupply. The PSR shared LINK's concerns, both in relation to the continued reduction in availability of ATMs in less highly populated areas unless IFs were

reduced, and also in relation to the risk of collapse of LINK altogether if nothing was done.

278. When responding to Notemachine's request to make use of its powers under section 57, the PSR said:

> "We are unable to consider this matter as an application under section 57 FSBRA. This is because we consider Regulation 103 Payment Services Regulations 2017 ("Prohibition on restrictive rules on access to payment systems") applies to this situation, and section 108 FSBRA precludes us from exercising our access powers under section 57 FSBRA where that is the case."

279. The relevant ground of challenge by Notemachine for present purposes was that the PSR had misinterpreted section 108 and had been wrong to take the view that it applied to this situation. Both the PSR and Link also pointed out that there was no difference in substance between the approach to be followed by the PSR under section 57 and under regulation 103. The PSR proceeded to consider Notemachine's application under section 108 and rejected it. The PSR therefore said that this ground was academic, and that the judicial review challenge should be dismissed, pursuant to section 31(2A) of the Senior Courts Act 1981, as it was highly likely that the outcome would have been the same whether the PSR had considered the application under section 57 or regulation 103. Sweeting J accepted this submission and held that section 31(2A) applied to this ground: judgment paragraphs 72-74.

280. Notwithstanding this conclusion, Sweeting J also considered the s108 argument on its merits. Mr Kennelly KC submitted that Sweeting J's reasoning supported his argument about the applicability of section 108 to the present case, and, moreover, that the argument advanced by the PSR in **Notemachine** was wholly contrary to the argument advanced by the PSR in the present case. He said that, applying the arguments put forward by the PSR in **Notemachine** to the present case, the only possible conclusion

was that the PSR was barred by section 108 from making use of its section 54 powers to impose price caps on IFs for Mastercard and its customers.

281. It is necessary, therefore, to look at Sweeting J's conclusion and reasoning in some detail.

282. Notemachine advanced two main arguments in support of its contention that section 108 did not apply. First, Notemachine said that it was the applicant for a measure to be taken by the PSR under section 57, but Notemachine's own access to and participation in the LINK Network was never in doubt, and so section 108 did not apply: the measure that Notemachine was inviting the PSR to take was not for the purposes of enabling Notemachine to obtain or maintain access to, or participation in, a payment system. Second, Notemachine said that section 108 only takes effect in circumstances to which regulation 103 applies. Regulation 103 applies to prohibit restrictions on access to payment systems by authorised or registered payment systems providers. Notemachine was not such a "payment systems provider" as defined in the PSR 2017, and so, Notemachine submitted, regulation 103 had no application to it. Indeed, Notemachine contended that it would have had no standing to ask the PSR to exercise its powers under Part 10 of the PSR 2017 to deal with a breach of regulation 103. Accordingly, Notemachine submitted, as regulation 103 had no application, therefore section 108 could not apply.

283. It is helpful to look at Sweeting J's reasoning, at paragraphs 43-51 of his judgment. He held:

(1) Section 108 will not apply to every rule change or direction (paragraph 44);

(2) Section 108 will only apply to the exercise of powers under sections 54-58 where the exercise of powers is carried out in respect of a person for the purposes identified in section 108 (paragraph 44);

(3) Where the trigger for the exercise of the PSR's power is an application under section 57, the PSR's purposes do not depend upon the subjective intention of the person making the application (paragraph 44). I interpose here to emphasise that Sweeting J was not saying that the subjective intention or objective of the PSR has no relevance to section 108, but, rather, that the subjective intention of the third party who made the section 57 application (in that case, Notemachine) is of no relevance;

(4) The requirement in section 108 as regards the PSR's "purposes" is satisfied if the object of the exercise of the powers is a person, regardless of whether the person concerned is the person who has asked the PSR to exercise its powers, and regardless of whether the person concerned is a payment services provider, as defined in the PSR 2017 (paragraphs 43 and 44);

(5) Therefore, in the **Notemachine** case, this condition was satisfied even though Notemachine was not itself someone whose right of access and participation was in any doubt (paragraph 45). It is clear, in my judgment, that Sweeting J meant that the "purposes" requirement was satisfied because the PSR intended that the measure would enable access and participation in the LINK ATM network by issuers, who are payment service providers, and by the general public. LINK's evidence was that the changes made to rates and the rate setting mechanisms were intended to ensure the viability of the network, and so would enhance participation by all other participants (paragraph 48);

(6) The requirement that the circumstances must be such that regulation 103 applies can be satisfied even if the exercise of the PSR's powers is directed at other participants in a payment system as well as payment system providers (paragraph 44). The IF change would affect payment service providers (the banks who were issuers). The fact that the IF change would affect Notemachine and the general public, who were not payment systems providers, as well as the issuers (banks), who were, does not mean that the regulation 103 condition could not be met (paragraph 49). The purpose of PSD II was not solely to protect the interests of payment service providers;

(7) Section 108 may apply if it makes possible access or participation, whether or not the exercise of the power may have an adverse or beneficial effect on any participant (paragraph 45);

(8) In **Notemachine** itself, on any view, payment of the IF in accordance with the fee-setting mechanism is a condition of access and participation in the LINK scheme by payment service providers, i.e the issuer banks. Such a rule or condition is subject to regulation 103, which requires that it meets the POND requirement, guards against operational business risks and protects the financial and operational stability of the payment system (paragraph 47);

(9) If section 108 and regulation 103 apply, then the PSR has no choice but to exercise its powers under Part 10 of the PSR 2017, rather than sections 54-58 of FSBRA (paragraph 50); and

(10) Notwithstanding Notemachine's submissions to the contrary, Notemachine had standing to apply to the PSR to ask the PSR to exercise its powers under the PSR 2017, even though Notemachine was not itself a payment services provider.

284. In my judgment, there is nothing in the reasoning of Sweeting J in **Notemachine** which conflicts with my conclusion to the effect that the purposes condition in section 108 is not satisfied in the present case. The central issues in **Notemachine** were whether the fact that the access and participation in the payment system by Notemachine, the party who applied for the PSR to exercise its power under section 57, was never in doubt, and that Notemachine was not itself a payment service provider, meant that section 108 could not apply. These issues do not arise in the present case. The **Notemachine** case did not require consideration of the meaning of "for the purposes of" in section 108, save to the extent that Sweeting J held that the persons for whom the PSR is seeking to obtain or maintain access to, or to participate in, a payment system need not be limited to payment services providers as defined in the PSR 2017. I have been dealing with arguments in relation to the interpretation of section 108 which simply did not arise in **Notemachine**.

285. Furthermore, the outcome in **Notemachine** is consistent with the conclusion which I have reached in the present case. In **Notemachine**, the purposes of the PSR in considering whether or not to block the proposed reduction in IFs for the LINK network were to do what was best in order to enable issuers and the general public to obtain or maintain access to or participate in the payment system. The question was how best to protect the LINK network from collapse and to provide access and participation for less well-populated areas. Therefore, unlike in the present case, the purposes of the PSR in taking the proposed steps in **Notemachine** were to enable persons to obtain or maintain access to, or participation in, the payment system in circumstances in which, as Sweeting J found, regulation 103 applies in relation to access to, or participation in, the payment system by the person.

286. It is true that, at paragraph 47 of his judgment, Sweeting J said that payment of the IF in accordance with the fee-setting mechanism is "on any view" a condition of access to and participation in the LINK scheme by payment service providers. But that was in the context of a finding that the purpose of the change to the IF was to enhance access and to maintain participation by issuers and the general public. This is consistent with the views that I have expressed in this judgment. On the facts of **Notemachine**, therefore, the rule relating to IFs was indeed a condition of access and participation that was within the scope of regulation 103. Moreover, Sweeting J said in terms that section 108 will not necessarily apply to every rule change or direction (paragraph 44). It does not follow, therefore, that the same will apply to IFs in every scheme. In the present case, the PSR has decided that the proposed price caps on IFs will not have any effect at all on access or participation. There has been no challenge to this by way of judicial review. This is a key distinction between the present case and **Notemachine**, and means that there is no inconsistency in outcomes between the two cases. Still further, and as I have said, in **Notemachine**, the purpose of the PSR in acting as it did was to enable persons to obtain access to, and to continue to participate in the payment scheme, which is not the position in the present case.

287. In his submissions, Mr Kennelly KC relied in particular upon the following sentence in paragraph 44 of Sweeting J's judgment:

> "The statutory scheme therefore required that the exercise of a power by the PSR to intervene in relation to access to and participation in a payment system should be under regulation 103 where it affected the terms on which payment service providers can access and participate."

288. However, in my judgment this was not intended to be a sweeping and general statement to the effect that any measure that affects terms and conditions in a payment services

agreement necessarily came within the scope of regulation 103. Rather, he was dealing with, and rejecting, an argument by **Notemachine** to the effect that regulation 103 has no application where the changes would affect other participants in payment schemes, as well as payment service providers. Earlier in the same paragraph, Sweeting J had said that section 108 will not necessarily apply to every rule change or direction.

289. For these reasons, I do not consider that either the outcome or the reasoning in **Notemachine** assists Revolut or Mastercard. Morevover, I do not think that there is any significant inconsistency in the approach taken by the PSR in **Notemachine**, compared to in the present case. Each case raised very different issues.

CONCLUSION

290. In my judgment, the PSR has power under section 54 of FSBRA to impose the price caps upon IFs that it is proposing to impose. So far as Mastercard and Revolut are concerned, the PSR is not prohibited from doing so by section 108 of FSBRA.

291. The applications for judicial review gave rise to arguable grounds and I have heard full argument on them. I therefore grant leave to apply for judicial review on both grounds. However, after giving them full consideration, I have rejected them. These claims for judicial review are dismissed.