Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 6 March 2025 [1]

Case C-549/23

American Express Europe SA,
American Express Carte France SA,
Visa Europe Ltd,
MasterCard Europe SA,
Autoriteit Consument en Markt,
Koninklijke Luchtvaart Maatschappij NV
intervening party
International Card Services BV

(Request for a preliminary ruling from the College van Beroep voor het bedrijfsleven (Supreme Administrative Court for Trade and Industry, Netherlands))

(Reference for a preliminary ruling – Payment services in the internal market – Regulation (EU) 2015/751 – Interchange fees for card-based payment transactions – Interchange fee cap – Remuneration received by a co-branding partner from a payment card scheme – Application of the interchange fee cap to such remuneration – Deduction of the merchant service charge – Deduction of the value of services supplied by the co-branding partner)

I. Introduction

1. In the euro area in the second half of 2023, 56% of non-cash payments were made using a bank card, with an average transaction value of approximately EUR 40. [2]

2. Competition among bank cards follows two business models. Four party payment card schemes make up the large majority of the market. [3] This model includes the cardholder (1) who pays a fee to the financial institution (2) which issues the card ('the issuer') and the merchant (3) who is paid by means of the card and who pays a service charge to another financial institution (4) which provides the merchant with the means [4] of accepting the card payment ('the acquirer'). This model is completed by a payment card scheme, such as MasterCard or Visa, which manages the

[1] Original language: French.

[2] See the European Central Bank press release of 25 July 2024 on payment statistics for the second half of 2023, available at https://www.ecb.europa.eu/press/stats/paysec/html/ecb.pis2023_1~10a5662f81.en.html. See also the annex to the press release.

[3] See Special report 01/2025 of the European Court of Auditors, *Digital payments in the EU – Progress towards making them safer, faster, and less expensive, despite remaining gaps*, available at https://www.eca.europa.eu/ECAPublications/SR-2025-01/SR-2025-01_EN.pdf, paragraph 7 (p. 8).

[4] An electronic payment terminal or a card-based payment solution by internet or by mobile phone.

clearing of transactions between the issuers and acquirers concerned in return for the payment of fees by those parties. In recognition of the fact that it is the issuer that bears a greater number of the costs and risks (including insurance and reimbursement in the event of fraud or non-payment, immediate payment even when payment by the cardholder is deferred) than the acquirer (provision of payment solutions), the acquirer pays the issuer interchange fees, which are the subject of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions. [5]

3. Then there are three party payment card schemes, which include the cardholder, the merchant and an issuer-acquirer payment card scheme which performs both issuing and acquiring functions. These are consequently not subject to the regulation on interchange fees. American Express operates one such three party payment card scheme.

4. Further economic models have been developed on the basis of three party payment card schemes, which include, in addition to the three protagonists I have just mentioned, an external party such as a licensed payment service provider, a co-branding partner or an agent. In respect of such variants of the three party payment card scheme – and it is one such contractual arrangement that the Court is now asked to address – Regulation 2015/751 provides that they are to be considered to be four party payment card schemes.

5. The present reference for a preliminary ruling offers the Court an opportunity to clarify the precise application of this classification – in accordance with which Regulation 2015/751 treats equivalently four party payment card schemes, on the one hand, and three party payment card schemes with a co-branding extension, on the other – in particular, with regard to the cap on interchange fees.

6. The Court has already had occasion to hold that it is not a condition of a three party payment card scheme with which a co-branding partner has entered into an arrangement being considered to be a four party payment card scheme that the co-branding partner act as issuer within the meaning of Article 2(2) of Regulation 2015/751. [6] The present case will enable the Court to clarify how the rules governing the capping of interchange fees in a four party scheme apply to three party schemes with a co-branding extension.

7. I shall suggest that the Court answer the questions of the College van Beroep voor het bedrijfsleven (Supreme Administrative Court for Trade and Industry, Netherlands) bearing in mind the objectives of Regulation 2015/751, which are to arrive at a consistent application of the competition rules to interchange fees, to improve the functioning of the internal market and to reduce the cost to consumers of payment transactions using payment cards.

II. European Union law

8. Recitals 10, 28, 29, 31 and 32 of Regulation 2015/751 read as follows:

‘(10) Interchange fees are usually applied between the card-acquiring payment service providers and the card-issuing payment service providers belonging to a certain payment card scheme. Interchange fees are a main part of the fees charged to merchants by acquiring payment service providers for every card-based payment transaction. Merchants in turn

[5] OJ 2015 L 123, p. 1.

[6] See judgment of 7 February 2018, *American Express* (C-304/16, EU:C:2018:66).

incorporate those card costs, like all their other costs, in the general prices of goods and services. Competition between payment card schemes to convince payment service providers to issue their cards leads to higher rather than lower interchange fees on the market, in contrast with the usual price-disciplining effect of competition in a market economy. In addition to a consistent application of the competition rules to interchange fees, regulating such fees would improve the functioning of the internal market and contribute to reducing transaction costs for consumers.

…

(28) … Many four party payment card schemes use an explicit interchange fee, which is mostly multilateral. To acknowledge the existence of implicit interchange fees and contribute to the creation of a level playing field, three party payment card schemes using payment service providers as issuers or acquirers should be considered as four party payment card schemes and should follow the same rules, whilst transparency and other measures related to business rules should apply to all providers. …

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

…

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

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

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

9. Article 1 of Regulation 2015/751, entitled 'Scope', which appears in Chapter I of the regulation, entitled 'General provisions', provides, in paragraphs 3 and 5 thereof, as follows:

'3. Chapter II does not apply to the following:

…

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

…

5. When a three party payment card scheme licenses other payment service providers for the issuance of card-based payment instruments or the acquiring of card-based payment transactions, or both, or issues card-based payment instruments with a co-branding partner or through an agent, it is considered to be a four party payment card scheme. …'

10. Article 2 of the regulation is worded as follows:

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

…

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

…

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

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

(12) "merchant service charge" means a fee paid by the payee to the acquirer in relation to card-based payment transactions;

…

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

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

…

(24) "payment service provider" means any natural or legal person authorised to provide the payment services listed in the annex to Directive 2007/64/EC [7] or recognised as an electronic money issuer in accordance with Article 1(1) of Directive 2009/110/EC [8]. A payment service provider can be an issuer or an acquirer or both;

…

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

…

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

…'

11. Article 4 of Regulation 2015/751, which appears in Chapter II of the regulation, entitled 'Interchange fees', concerns 'interchange fees for consumer credit card transactions' and provides as follows:

'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. …'

7 Directive of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1). Directive 2007/64 was repealed by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64 (OJ 2015 L 337, p. 35).

8 Directive of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ 2009 L 267, p. 7).

12. Article 5 of the regulation, entitled 'Prohibition of circumvention', which also appears in Chapter II, provides as follows:

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

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

13. American Express Europe SA and American Express Carte France SA (together and individually, 'Amex') operate a three party payment card scheme, while MasterCard Europe SA ('MasterCard') and Visa Europe Ltd ('Visa') operate a four party payment card scheme.

14. In 2010, Amex and Koninklijke Luchtvaart Maatschappij NV ('KLM') entered into a co-branding partnership for the period from 1 June 2011 to 1 June 2019. In accordance with that partnership, Amex issues co-branded credit cards to both consumers and businesses, and purchases made using those cards earn 'miles', previously purchased by Amex, under KLM's loyalty programme. That loyalty programme, which also accumulates 'miles' earned when purchasing KLM flights or making purchases from KLM's partners, can be used in the purchase of flights or other services from KLM. In addition to a signing bonus, Amex paid KLM (a) annual fees for the use of commercial brands and access to the loyalty programme, (b) a percentage of the fees received from the cardholder for the card and its ancillary benefits, (c) a percentage of the value of purchases made with the card, and (d) fees for the purchase of 'miles'.

15. In 2018, following a call for tenders, KLM again chose Amex as partner in the co-branding programme. The new agreements limited the remuneration paid by Amex to the signing bonus and the fees mentioned in points (a) and (d) above.

16. In May 2017, the Autoriteit Consument en Markt (Authority for Consumers and Markets, Netherlands) ('the ACM') had opened an investigation into the partnership and, on 6 March 2019, ordered Amex, to adhere to the cap of 0.3% of the transaction value, on an annual and per transaction basis, provided for by Regulation 2015/751, for interchange fees, failing which a periodic penalty payment would be imposed on it. In calculating the amount of the interchange fees which Amex had paid KLM, which it found to be much higher than the 0.3% cap, the ACM had added together, for each of four years of the programme, all the remuneration paid by Amex and then divided the sum by the volume of payments made using the co-branded cards. Amex and KLM challenged the decision of 6 March 2019 and sought interim relief.

17. By decision of 24 July 2019, the judge hearing the application for interim relief suspended the order and provisional penalty imposed on Amex on the ground that the method which the ACM had used did not allow for the deduction from the overall remuneration which Amex had paid to KLM of the value of the 'miles' that Amex had purchased.

18. By decision of 22 January 2020, the ACM declared Amex's and KLM's complaints against the order and provisional penalty to be unfounded on the grounds, first, that all the remuneration received by KLM had to be classified as 'net compensation', without it being necessary to

establish that that remuneration had an equivalent object or effect to the interchange fee and, second, that the value of the 'miles' that Amex had purchased could not be deducted from the overall remuneration paid to KLM.

19. By decision of 21 December 2020, the ACM recovered up to EUR 10 million in penalty payments from Amex. Although it accepted the calculation method that Amex had used, the ACM disputed the value that Amex had ascribed to the 'miles', because not all of the 'miles' had been used by the cardholders.

20. The rechtbank Rotterdam (District Court, Rotterdam, Netherlands) held the action which Amex and KLM brought to be well founded and annulled the decisions of 22 January and 21 December 2020 on the ground that three party payment card schemes with a co-branding partner were governed by the provisions of Article 4 of Regulation 2015/751 read in conjunction with Article 5 of that regulation and that, consequently, it had to be proved that the remuneration paid to a co-branding partner has an object or effect equivalent to that of an interchange fee in order for it to be regarded as an interchange fee. The court also held that it was necessary to assess that effect not upon the incentive to issue and use co-branded credit cards in the Amex-KLM relationship, as the ACM had done, but on the internal market and on transaction costs for consumers.

21. Amex, Visa, MasterCard, KLM and the ACM lodged appeals against that decision. The company International Card Services BV ('ICS'), which acts as issuer for Visa and MasterCard, was granted leave to intervene in the appeal proceedings.

22. The referring court entertains doubts regarding the principle and method of applying Articles 4 and 5 of Regulation 2015/751 to payments made by a three party payment card scheme to a co-branding partner that is not an issuer within the meaning of the regulation. In the event that those articles are applicable, it then questions whether it is possible to deduct from the total value of the sums received by KLM the 'miles' purchased by Amex and the service charges paid by KLM.

23. It was in those circumstances that the College van Beroep voor het bedrijfsleven (Supreme Administrative Court for Trade and Industry) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 2(11) of Regulation [2015/751], to be interpreted, for the purposes of the application of the substantive provisions of that regulation, as meaning that the total net amount of payments, rebates or incentives received by a co-branding partner from a three party payment card scheme in relation to card-based payment transactions or related activities is to be regarded as net compensation, even if that co-branding partner is not itself an issuer?

(2) Is Article 4 of Regulation [2015/751], read in conjunction with the second sentence of Article 2(10) [of that regulation], to be interpreted as meaning that net compensation falls directly within the scope of Article 4?

(3) Is Article 5 of Regulation [2015/751] to be interpreted as also covering remuneration, including net compensation, received by a co-branding partner from the payment card scheme, if the co-branding partner is not an issuer?

(4) (a) Is Article 5 of Regulation [2015/751] to be interpreted as meaning that remuneration, including net compensation, received by a co-branding partner in relation to payment transactions or related activities has an equivalent object to the interchange fee if the purpose of that remuneration is to expand the business of the payment card scheme?

(b) Is Article 5 of Regulation [2015/751] to be interpreted as meaning that remuneration, including net compensation, received by a co-branding partner in relation to payment transactions or related activities has an equivalent effect to the interchange fee if that remuneration has the effect of expanding the business of the payment card scheme?

(c) If the answer to [Questions 4(a) and (b)] is in the negative, the question then arises of which criteria and/or factors should be used to assess whether remuneration, including net compensation, received by a co-branding partner in relation to payment transactions or related activities has an equivalent object or effect to the interchange fee?

(5) Is Article 5 of Regulation [2015/751] to be interpreted as meaning that remuneration must already be regarded, for the purposes of the application of Article 4 of that regulation, as forming part of the interchange fee if the remuneration has an equivalent object to the interchange fee?

(6) Is Article 2(11) of Regulation [2015/751] to be interpreted as meaning that a merchant service charge paid by a co-branding partner to a three party payment card scheme may be deducted from the payments, rebates or incentives received by the co-branding partner from the payment card scheme in relation to card-based payment transactions or related activities?

(7) (a) Is Article 2(11) of Regulation [2015/751] to be interpreted as meaning that not only monetary compensation from the co-branding partner but also the costs [of] or economic consideration for a service supplied by a co-branding partner may be deducted from the total amount received by the co-branding partner from the payment card scheme?

(b) If the answer to [Question 7(a)] is in the affirmative, what criteria should be used to determine that value?'

24. Amex, KLM, the ACM, MasterCard, Visa, ICS and the European Commission have lodged written observations. Those parties also made oral submissions at the hearing held on 12 December 2024.

IV. Analysis

A. The first question referred for a preliminary ruling

25. By its first question referred for a preliminary ruling, the referring court seeks to establish, in essence, whether the sums which Amex paid to KLM as remuneration under the co-branding partnership arrangement constitute net compensation within the meaning of Article 2(11) of Regulation 2015/751, even though KLM is not an issuer.

26. It must be borne in mind that the purpose of Regulation 2015/751 is, as its title suggests, to regulate interchange fees for card-based payment transactions. The regulation defines the interchange fee as the fees paid for each transaction directly or indirectly (i.e. through a third party) between the issuer and the acquirer involved in a card-based payment transaction. The net compensation or other agreed remuneration is considered to be part of the interchange fee.[9] Thus, the characterisation of remuneration as 'net compensation' brings that remuneration into the calculation of the interchange fee, which is capped by Regulation 2015/751.[10] A three part payment card scheme is not, however, subject to that cap,[11] unless it is a three party payment card scheme with, inter alia, a co-branding extension.[12]

27. The answer to the referring court's first question can be deduced quite easily from the case-law of the Court. Indeed, in the judgment of 7 February 2018, *American Express*,[13] the Court held that Article 1(5) of Regulation 2015/751 must be interpreted as meaning that, in the context of an arrangement between a co-branding partner or an agent, on the one hand, and a three party payment card scheme, on the other, it is not a prerequisite of that scheme being regarded as issuing card-based payment instruments with a co-branding partner or through an agent and therefore being considered to be a four party payment card scheme, within the meaning of Article 1(5) of Regulation 2015/751, that that co-branding partner or agent act as an issuer, within the meaning of Article 2(2) of that regulation.[14]

28. By that judgment, the Court confirmed the classification of three party payment card schemes with a co-branding extension as four party payment card schemes including where the co-branding partner is not an issuer. It did not, therefore, agree with the analysis put forward by Amex, which, in the case that gave rise to that judgment, relied on the wording of recital 28 of Regulation 2015/751,[15] which mentions only one of the hypothetical cases provided for in Article 1(5) of the regulation, and maintained that that classification applied only in that one case, in other words where the co-branding partner is an issuer.

29. Consequently, Article 2(11) of Regulation 2015/751, which defines 'net compensation' as the total net amount of payments, rebates or incentives received by an issuer from the payment card scheme, the acquirer or any other intermediary in relation to card-based payment transactions or related activities, must be interpreted in the light of this classification.

30. In order to understand the effect of this classification where there is no issuer external to the payment card scheme, it is necessary to read Article 2(11) of Regulation 2015/751 bearing in mind the wording of that provision as well as its context and the objectives pursued by the regulation.

31. In the first place, the reference in the definition of 'net compensation' to the sums received by the issuer might suggest, on first sight, that, where there is no such issuer, as in the case of a three party payment card scheme with a co-branding extension such as that analysed by the referring court, that definition cannot apply. On the other hand, following the logic underlying classification as a four party payment card scheme, it is obvious that it is the co-branding partner

9 See Article 2(10) of Regulation 2015/751.

10 See Articles 3 (debit card transactions) and 4 (credit card transactions) of Regulation 2015/751.

11 See Article 1(3)(c) of Regulation 2015/751.

12 See Article 1(5) of Regulation 2015/751.

13 C-304/16, EU:C:2018:66.

14 See judgment of 7 February 2018, *American Express* (C-304/16, EU:C:2018:66, paragraph 73 and point 1 of the operative part).

15 Recital 28 states that, 'to acknowledge the existence of implicit interchange fees and contribute to the creation of a level playing field, three party payment card schemes using payment service providers as issuers or acquirers should be considered as four party payment card schemes and should follow the same rules'.

that is the additional party. Moreover, the definition of 'net compensation' states that it is the sums received from the payment card scheme that are to be taken into consideration. In a three party payment card scheme with a co-branding extension, for example, such a payment card scheme exists. Consequently, it seems to me that the sums received by the co-branding partner from the payment card scheme correspond to net compensation.

32. In the second place, the objectives of Regulation 2015/751 are clear. They are to arrive at a consistent application of the competition rules to interchange fees, to improve the functioning of the internal market and to reduce the cost to consumers of payment transactions using payment cards. [16] The effect of partial classification, of course, is to make certain three party payment schemes subject to the rules in Chapter II of the regulation, notably those concerning the capping of interchange fees, of which net compensation is a part.

33. Accordingly, the interpretation of the definition of 'net compensation' in the context of partial classification as a four party payment card scheme must take into account that objective of reducing the cost of card payments. The Court has already held that it is not inconceivable that some type of consideration or benefit might be identified as constituting an implicit interchange fee, as referred to in recital 28 of Regulation 2015/751, even though the co-branding partner with which the three party payment card scheme concludes an arrangement is not necessarily involved in the issuing activity of that scheme. [17]

34. All of this leads to a broad interpretation of the concept of 'net compensation' in this context, according to which it will include the total net amount of payments, rebates or incentives received by the co-branding partner from the payment card scheme.

35. Furthermore, as the ACM has pointed out, in its report on the application of Regulation 2015/751, provided for in Article 17 of the regulation, the Commission indicates that net compensation, in the context of three party payment card schemes with an extension, corresponds to the total net amount of payments, rebates or incentives received by the co-branding partner or agent. [18]

36. Consequently, I suggest that the Court's answer to the first question referred for a preliminary ruling should be that Article 2(11) of Regulation 2015/751, read in conjunction with Article 1(5) of that regulation, is to be interpreted as meaning that net compensation corresponds to the total net amount of payments, rebates or incentives received by a co-branding partner from a three party payment card scheme with a co-branding extension, even if that co-branding partner is not itself an issuer.

B. The second question referred for a preliminary ruling

37. By its second question, the referring court asks whether Article 4 of Regulation 2015/751, read in conjunction with the second sentence of Article 2(10) thereof, is to be interpreted as meaning that net compensation falls directly within the scope of Article 4 of the regulation.

[16] See recital 10 of Regulation 2015/751.

[17] See judgment of 7 February 2018, *American Express* (C-304/16, EU:C:2018:66, paragraph 71).

[18] See p. 13 of the Report of 29 June 2020 on the application of Regulation (EU) 2015/751 on interchange fees for card-based payment transactions (SWD(2020) 118 final), available at: https://competition-policy.ec.europa.eu/system/files/2021-10/IFR_report_card_payment.pdf.

38. In the definition of the 'interchange fee' given in Article 2(10) of Regulation 2015/751, the net compensation or other agreed remuneration is considered to be part of the interchange fee. Accordingly, those fall directly within the scope of Article 4 of the regulation, which limits the interchange fee to no more than 0.3% of the value of the transaction for credit card transactions.

39. Nevertheless, Amex and KLM object to that reading, arguing that it would render nugatory Article 5 of the regulation, which sets out a rule prohibiting circumvention of that limit with an express reference to net compensation.

40. Indeed, the doubt arises from the fact that the rule prohibiting circumvention provides that, in order to be treated as part of the interchange fee, agreed remuneration, including net compensation, must have an equivalent object or effect to the interchange fee.

41. Thus, while the assimilation of net compensation in the interchange fee is not subject to any condition in the definition of the interchange fee, it is, on the other hand, subject to the condition of having an equivalent object or effect in the rule prohibiting circumvention. Consequently, a merely literal interpretation does not seem to me to be sufficient for the purposes of answering the referring court's second question.

42. In the Commission's initial proposal for the regulation,[19] net compensation did not appear in the definition of the 'interchange fee' and appeared only in the rule prohibiting circumvention in Article 5, which stated that 'any … net compensation … shall be treated as part of the interchange fee', without any reference to an equivalent object or effect. By contrast, Articles 3 and 4, setting out the rules capping interchange fees, stated that 'payment service providers shall not offer or request … [an] interchange fee or other agreed remuneration with an equivalent object or effect …'.

43. Therefore, from the beginning, net compensation was assimilated in the interchange fee, albeit not in the definition thereof, but in the rule prohibiting circumvention and, in that context, without any requirement of having an equivalent object or effect. Moreover, other remuneration was envisaged that did have to have an equivalent object or effect to the interchange fee in order to enter into the calculation of the cap. Thus, a clear division was made between, on the one hand, the interchange fee, of which net compensation was a part, which was directly subject to the cap, and, on the other hand, 'other … remuneration', which was capped only if it had an equivalent object or effect to the interchange fee.

44. A teleological interpretation of Regulation 2015/751 suggests an approach along the same lines. Indeed, recital 28 of the regulation mentions the possible existence of implicit interchange fees in three party payment card schemes using payment service providers. It states that, in order to contribute to the creation of a level playing field, such schemes should be subject to the same rules as four party payment card schemes. In citing implicit interchange fees, this recital is referring to remuneration that should be capped as such, and not only if it has an equivalent object or effect to a direct interchange fee. It should be borne in mind that the Court has held that treating such three party schemes in the same way as four party schemes is also appropriate in the case of three party schemes with a co-branding extension or an agent in order to ensure compliance with the objectives of Regulation 2015/751.[20] Consequently, recital 28 of the

[19] Proposal for a regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, presented by the Commission on 24 July 2013 (COM(2013) 550 final).

[20] See judgment of 7 February 2018, *American Express* (C-304/16, EU:C:2018:66, paragraphs 71 and 73).

regulation, as interpreted by the Court, supports the view that net compensation in the case of a three party payment card scheme with an extension is directly subject to the cap provided for in Article 4 of the regulation.

45. Recital 31 of the regulation confirms that understanding. On mentioning net compensation, it states that it should be 'considered as the interchange fee', with no mention of any requirement for it to have an equivalent object or effect. The fact that this recital refers to the risk of circumvention is not sufficient, in my view, to counter the fact that the terms in which it is drafted clearly confirm that net compensation is to be regarded as part of the interchange fee.

46. I therefore suggest that the answer to the second question referred for a preliminary ruling should be that Article 4 of Regulation 2015/751, read in conjunction with the second sentence of Article 2(10) of that regulation, is to be interpreted as meaning that net compensation falls directly within the scope of Article 4.

C. The third question referred for a preliminary ruling

47. The referring court questions, in essence, whether remuneration, including net compensation, received from a payment card scheme by a co-branding partner that is not an issuer is subject to the rule prohibiting circumvention introduced by Article 5 of Regulation 2015/751.

48. Since I have suggested that the Court's answer to the second question referred for a preliminary ruling should be that such remuneration falls within the scope of Article 4 of the regulation, I shall propose only a subsidiary answer to this third question.

49. In accordance with the assimilation clause in Article 1(5) of Regulation 2015/751, three party payment card schemes with a co-branding extension are subject to the same rules as four party payment card schemes. Consequently, the rule prohibiting circumvention in Article 5 of the regulation becomes applicable to such schemes in accordance with the same reasoning as applies to Article 4 of the regulation, which is that it is the remuneration received by the co-branding partner that must be analysed in order to determine whether, having an equivalent object or effect to the interchange fee, it must be regarded as an interchange fee and thus subject to the caps in Articles 3 and 4 of the regulation.

50. It thus seems that, in this scenario, the rule prohibiting circumvention laid down in Article 5 of Regulation 2015/751 overlaps with the direct cap on interchange fees established by Article 4 of the regulation. That does not, however, mean that, in this scenario, the direct cap under Article 4 does not apply to remuneration paid to a co-branding partner. Moreover, there may be other remuneration that is not net compensation but which could have an equivalent object or effect to the interchange fee.

51. I therefore suggest that the answer to be given to the referring court is that Article 5 of Regulation 2015/751 is to be interpreted as meaning that remuneration, including net compensation, received by a co-branding partner falls within the scope of that provision, even if the co-branding partner is not an issuer.

D. The fourth and fifth questions referred for a preliminary ruling

52. By its fourth and fifth questions, which I propose to address together, the referring court asks the Court of Justice, in essence, about the detailed application of the rule prohibiting circumvention laid down in Article 5 of Regulation 2015/751.

53. As with the preceding question, the answer to these questions will be merely subsidiary, since net compensation is, in my view, directly subject to the cap imposed by Article 4 of the regulation.

54. In my view, the answer to these questions from the referring court may be deduced, in part, simply from reading Article 5 of Regulation 2015/751. Indeed, in order to be considered as part of the interchange fee, remuneration, including net compensation, must have an equivalent object or effect to the interchange fee. Moreover, that applies to both three party payment card schemes and four party payment card schemes, since Article 5 does not make a distinction between them.

55. The criterion to be applied is an alternative one: it is sufficient if the remuneration received has either an object or an effect equivalent to that of the interchange fee in order for it to be considered as such.

56. Returning to the objective of Regulation 2015/751, in so far as concerns the rule prohibiting circumvention of the established caps, as explained in recital 31 of the regulation, it is to ensure that the provisions concerning interchange fees, and the capping of interchange fees in particular, are not circumvented by alternative flows of fees to issuers. Recital 32 of the regulation adds that consumers tend to be unaware of the fees paid by merchants for the payment instrument that consumers use and that incentivising practices applied by issuers, such as travel vouchers, may steer them towards the use of payment instruments, thereby generating high fees for issuers.

57. Consequently, the capping of interchange fees, either directly by means of the application of Article 4 of Regulation 2015/751 or by means of the rule prohibiting circumvention, serves to place incentives to use one or other payment instrument within a certain framework. As the referring court suggests in its questions, expanding the business of the payment card scheme could correspond to the object or effect mentioned in Article 5 of the regulation.

58. The fear of having all activities which promote the issue of payment cards fall within the scope of Article 4 of Regulation 2015/751 seems groundless to me. Indeed, in order for Article 4 to apply, there must be, first of all, a co-branding partnership or a contract with an agent to which the promotional activity relates and, secondly, a transaction between that co-branding partner or agent and a three party payment card scheme. Consequently, the criterion of the expansion of the business of the payment card scheme is a useful criterion for verifying that there is no circumvention in the course of examining, on a case-by-case basis, the situations that are brought before a national court.

59. By contrast, the criterion of the effect on the market as it is essentially put forward in the observations lodged by Visa, KLM and Amex, which argue that it is necessary to prove a market failure equivalent to that caused by interchange fees within four party schemes, is of no relevance. Indeed, by classifying three party payment card schemes with an extension as four party payment card schemes in so far as concerns the capping of interchange fees, the EU

legislature clearly made the decision in Regulation 2015/751 to assume that the market failure is identical in both cases and to make them both subject to an objective cap, so as to remedy that market failure.

60. I therefore suggest that the answer to the fourth and fifth questions referred for a preliminary ruling should be that Article 5 of Regulation 2015/751 is to be interpreted as meaning, first, that any agreed remuneration, including net compensation, having either an equivalent object or an equivalent effect to that of the interchange fee, received by a co-branding partner from a payment card scheme, acquirer or any other intermediary in relation to payment transactions or related activities is to be considered as being part of the interchange fee and, secondly, that the criterion of the expansion of the business of the payment card scheme is relevant in the assessment of such equivalent object or effect.

E. The sixth question referred for a preliminary ruling

61. By its sixth question, the referring court seeks to establish, in essence, whether Article 2(11) of Regulation 2015/751 is to be interpreted as meaning that a service charge paid by a co-branding partner when acting as a merchant using the services of a three party payment card scheme may be deducted from the payments, rebates or incentives received by that co-branding partner from that payment card scheme in relation to card-based payment transactions or related activities.

62. The definition of 'net compensation' in Article 2(11) of Regulation 2015/751 takes account of the definition of 'merchant service charge' which is given in Article 2(12) of the regulation. This service charge is defined as a fee paid by the payee to the acquirer in relation to card-based payment transactions.

63. The difficulty arises from the facts, first, that, in a three party payment card scheme, the functions of acquirer and issuer are performed by a single entity, namely the scheme, and, secondly, that a co-branding partner, which must be regarded as the issuer in order for the interchange fee cap to apply, may also be a payee, which is to say a merchant using the services of the scheme.

64. Nevertheless, as the Commission, MasterCard, Visa and the ACM submit, the answer to this question must be in the negative. The service charge paid by the co-branding partner in fact has no connection with the partnership entered into with the payment card scheme since it could be paid to a different payment card scheme. To include it, on the other hand, in order to deduct it in the calculation of the net compensation would increase the incentive for the co-branding partner to expand the business of the payment card scheme, which is contrary to the objectives of Regulation 2015/751. [21]

65. Consequently, I suggest that the answer to the sixth question referred should be that Article 2(11) of Regulation 2015/751 is to be interpreted as meaning that a merchant service charge may not be deducted from the payments, rebates or incentives received by that merchant, in its capacity as co-branding partner, from a three party payment card scheme with a co-branding extension, in relation to card-based payment transactions or related activities.

[21] In addition, the Court of Auditors has identified three studies which indicate that service charges other than interchange fees are not negligible, and even that the former have been increasing since the latter have been capped (see the Special report cited in footnote 3 to this Opinion, Annex II and figure 9).

F. The seventh question referred for a preliminary ruling

66. The referring court seeks to establish whether Article 2(11) of Regulation 2015/751 is to be interpreted as meaning that, for the purposes of calculating net compensation, not only monetary compensation paid by the co-branding partner but also the costs of or economic consideration for a service supplied by a co-branding partner may be deducted from the total amount received by the co-branding partner from the payment card scheme and, in the affirmative, what criteria should be used to determine that value.

67. It is important to point out that, before anything else, the referring court will have to establish that the services in question relate to the card-based payment transactions or related activities.

68. The definition of 'net compensation' refers only to the total net amount of payments, rebates or incentives received by an issuer from a payment card scheme. Thus, the concepts of payment, rebate and incentive must remain the same whether it is the amounts received by the issuer or the co-branding partner or those paid to the scheme that are to be deducted from the amounts received.

69. Advocating variously a broad and a strict interpretation of those concepts, the parties highlight the risk of circumvention of the interchange fee cap. The former (KLM and Amex) suggest that leaving services out of the calculation of net compensation would encourage the parties to use such an incentive mechanism to circumvent the cap, to the benefit of issuers. The latter (Visa and the ACM) conversely submit that only monetary payments that have an objectively verifiable value should be taken into account, since the value of services can be artificially inflated so as to reduce the amount of the net compensation and thereby evade the interchange fee cap.

70. It is understandable that there should be an interest in having a rule that is simple to apply thanks to an interpretation that includes only monetary payments in net compensation. At the hearing, the ACM admitted that it was extremely time-consuming and difficult for it to verify compliance with the cap in the presence of non-monetary services. Such an interpretation is supported by the fact that, in the third sentence of recital 31 of Regulation 2015/751, it is the word 'fees' that is used to indicate what is to be deducted from the total amount of payments or incentives received by an issuer from a payment card scheme. That term clearly refers to a monetary payment and not to a service.

71. Nevertheless, such an interpretation would ultimately limit the scope of Article 4 of Regulation 2015/751. In my view, the same interpretation of the concepts of payments, rebates and incentives must be applied in the calculation of payments made both by the acquirer to the issuer and in the opposite direction. If only monetary payments were taken into account in the calculation of net compensation, all other forms of consideration, for example services, would have to come within the scope of Article 5 of the regulation and be capped only if they had an equivalent object or effect to the interchange fee.

72. I consider, however, that this apparent simplicity clashes with the wording of Regulation 2015/751, inasmuch as the definition of 'net compensation' mentions incentives generally, without implying that they should be restricted to monetary incentives. Moreover, it would be contrary to the regulation's objective to limit the cost of card payments. Indeed, if services such as the provision of 'miles' that can be exchanged for plane tickets were not to be included within net compensation, that would be tantamount to encouraging the development of such

incentivising practices. Furthermore, it would be more complex to prove the object or effect equivalent to that of the interchange fee. As a result, the simplicity of the rule for the purposes of Article 4 of the regulation would be the corollary of greater difficulty in the application of Article 5 of the regulation, since it would be necessary to prove both the value of the services in question and their equivalent object or effect.

73. In reality, the differing views of the parties concern the way in which non-monetary services should be valued, so as to avert any risk of circumvention of the cap introduced by Regulation 2015/751. The value ascribed must be the real economic value and not the contract value agreed upon by the parties. Accordingly, the referring court will have to calculate that value on the basis of the information in the case file and taking account of the objective of limiting the cost of payment card transactions.

74. Consequently, I suggest that the answer to the seventh question referred for a preliminary ruling should be that Article 2(11) of Regulation 2015/751 is to be interpreted as meaning that, for the purposes of calculating net compensation, not only monetary remuneration, but also the services – which must be valued on a case-by-case basis, taking their real economic value into account – that a co-branding partner contributes to the three party payment card scheme, may be deducted from the remuneration received by the co-branding partner from the three party payment card scheme.

V. Conclusion

75. Having regard to all of the foregoing considerations, I suggest that the Court answer the questions referred by the College van Beroep voor het bedrijfsleven (Supreme Administrative Court for Trade and Industry, Netherlands) for a preliminary ruling as follows:

(1) Article 2(11) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, read in conjunction with Article 1(5) of that regulation,

must be interpreted as meaning that net compensation corresponds to the total net amount of payments, rebates or incentives received by a co-branding partner from a three party payment card scheme with a co-branding extension, even if that co-branding partner is not itself an issuer.

(2) Article 4 of Regulation 2015/751, read in conjunction with the second sentence of Article 2(10) of that regulation,

must be interpreted as meaning that net compensation falls directly within the scope of Article 4.

(3) Article 5 of Regulation 2015/751

must be interpreted as meaning that:

– remuneration, including net compensation, received by a co-branding partner falls within the scope of that provision, even if the co-branding partner is not an issuer; and

– first, that any agreed remuneration, including net compensation, having either an equivalent object or an equivalent effect to that of the interchange fee, received by a co-branding partner from a payment card scheme, acquirer or any other intermediary in relation to payment transactions or related activities is to be considered as being part of the interchange fee and, secondly, that the criterion of the expansion of the business of the payment card scheme is relevant in the assessment of such equivalent object or effect.

(4) Article 2(11) of Regulation 2015/751

must be interpreted as meaning that:

– a merchant service charge may not be deducted from the payments, rebates or incentives received by that merchant, in its capacity as co-branding partner, from a three party payment card scheme with a co-branding extension, in relation to card-based payment transactions or related activities;

– for the purposes of calculating net compensation, not only monetary remuneration, but also the services – which must be valued on a case-by-case basis, taking their real economic value into account – that a co-branding partner contributes to the three party payment card scheme, may be deducted from the remuneration received by the co-branding partner from the three party payment card scheme.