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UK SUPREME COURT GIVES IMPORTANT JUDGMENT IN THE VISA/MASTERCARD 'INTERCHANGE FEE' LITIGATION

Introduction

The U.K. Supreme Court has handed victory to a group of British retailers (the "respondents") in a long-running dispute with Mastercard and Visa Europe (the "appellants") finding that the default "multilateral interchange fees" (MIFs) set by Mastercard and Visa and charged by institutions that issue debit/credit cards to customers (the "issuers") to institutions that provide payment services to merchants (here, the retailers) (the "acquirers") restrict competition.

This judgment (which we previewed in "Competition Litigation Update") could have significant consequences beyond those involved in the case, including in relation to follow-on damages actions by other claimants (and potential claimants) who may take comfort from this decision.

In its judgment, the Supreme Court dismissed three of the four issues on appeal holding, in particular, that MIFs were a restriction of competition contrary to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) not exempted under Article 101(3). This judgment ends a chapter in one of the most high profile follow-on damages disputes (and pieces of litigation) in the English Courts of recent years. Determination of the quantum of damages payable will follow (absent settlement).

Our summary and commentary on the Supreme Court's decision is below and the judgment is available here.

Background

The dispute stemmed from the scheme rules set up by Mastercard and Visa to govern payments within their networks between 1992 and 2007.

Payment service provider schemes established and run by Mastercard and Visa provided for the payment of a default interchange fee (i.e. the MIF) by the acquirer to the issuer on each cardholder transaction. Acquirers pass on the MIF to the retailers as part of their overall service charge (MSC); the negotiation of the MIF by acquirers and retailers is in practice limited.

On 19 December 2007, the European Commission adopted a decision (the "EC Decision") that, between 1992 and 2007, Mastercard's MIFs in the European Economic Area (EEA) restricted competition by inflating the base on which acquirers set charges to retailers and thereby set a floor under the MSC, without which retailer payments would have been lower.

The MIFs were found, therefore, to be to the detriment of retailers. Mastercard applied to the CJEU for annulment of the EC Decision. The annulment request was dismissed by the General Court and Mastercard's subsequent appeal to the Court of Justice resulted in the dismissal of the application finally (the "ECJ judgment"). Separately, the EC issued decisions, in December 2010 and February 2014 respectively, that made Visa Europe's commitments to significantly cut (1) its intra-EEA debit card MIFs and (2) its credit card MIFs legally binding.

The appeals before the Supreme Court related to what were originally three separate sets of proceedings. In the first, Sainsbury's had issued a claim against Mastercard in respect of its U.K. MIFs. The claim was transferred to the CAT which found that Mastercard's U.K. MIFs restricted competition by effect and awarded damages to Sainsbury's. In the second, brought by Asda, Argos, Morrisons Supermarkets and others ("the AAM"), again against Mastercard in respect of EEA, U.K. and Irish MIFs, Popplewell J in the High Court found that Mastercard's U.K. and Irish MIFs did not infringe Article 101(1) and all were exempt or exemptible under Article 101(3) in any event[1]. In the third, brought by Sainsbury's against Visa Europe, Phillips J in the High Court found that Visa's U.K. MIFs did not restrict competition but that if the MIFs did restrict competition they were not exempt under Article 101(3).

The Court of Appeal overturned the first instance findings. Its core finding on liability was that the MIFs restricted competition and therefore infringed Article 101(1) and it also overruled the findings in relation to the Article 101(3) exemption and remitted it in all three sets of proceedings to the CAT for reconsideration in light of its rulings and based on the evidence adduced in all three cases.

The Judgment

There were four issues to be determined on Visa and Mastercard's appeal to the Supreme Court — whether the Court of Appeal:

- was wrong to find that there was a restriction of competition contrary to Article 101(1) TFEU (and equivalent provisions in the U.K. Competition Act) ("the restriction issue");
- found, and if so whether it was wrong in finding, that Visa and Mastercard were required to satisfy a more onerous evidential standard than that applicable in civil litigation, in order to establish that their MIFs were exempt under Article 101(3) ("the standard of proof issue");
- interpretation of the requirements to satisfy the "fair share" requirement under the Article 101(3) exception was right ("the fair share issue");
- if so, whether it was wrong in finding, that a defendant has to prove the exact amount of loss mitigated in order to reduce damages ("the broad axe issue").

The AAM (i.e. the claimants in the second action) cross-appealed against the order for remittal to the CAT.

The Supreme Court unanimously upheld the decision of the Court of Appeal in relation to the restriction issue, the standard of proof issue and the fair share issue, and dismissed the appeal in relation to those grounds. The appeal on the broad axe issue was successful, albeit that issue did not affect the finding on liability and the Supreme Court did not itself interpret the Court of Appeal as having held that the defendants had to prove the exact amount of the loss mitigated.

The Court also allowed the AAM cross-appeal, meaning that Mastercard will not be allowed to re-argue its case on the Article 101(3) exemption before the CAT as regards those retailers (although it is anticipated that there will be a

rehearing on Article 101(3) in the CAT involving Mastercard, Visa Europe and Sainsbury's, which consented to the re-hearing).

The Restriction Issue

At the heart of the restriction issue was the question as to whether the ECJ Judgment, which found MIFs to restrict competition in breach of Article 101, was binding on the English Court. The appellants argued that the Court was not bound by the ECJ Judgment which, they said, had a different factual basis from the present claims. The Supreme Court disagreed, concluding that the essential factual basis on which the ECJ Judgment held there to be a restriction on competition was mirrored in the appeals before it. The Supreme Court said that even if it were not bound by the ECJ Judgment, it would in any event have followed it, and concluded that MIFs restricted competition because retailers had no ability to negotiate down the MIF element of the MSC. A significant portion of the MSC was thereby immunised from competitive bargaining.

The Standard of Proof Issue

The standard of proof issue related to the Article 101(3) exemption. The appellants argued that there is no specific requirement for 'robust and cogent' evidence, a more onerous standard than the normal civil standard of the balance of probabilities, to show that the exemption requirements were met.

The Supreme Court noted that there is a distinction between the *standard of proof*, which is reserved to national law, and the *nature of the evidence* that is required to meet the standard, which is a matter of EU law and EC decisional practice. The complaint made by Visa and Mastercard in truth related to the nature of the evidence required. In dismissing this ground of appeal, the Court held that a party seeking the protection of the exemption needed to identify, substantiate and evaluate the efficiencies it claimed and to verify their causal link with the anti-competitive conduct, as a pre-condition to the balancing process which was then required. As such, the party needed to produce detailed, empirical evidence and analysis.

The Fair Share Issue

Also related to the Article 101(3) exemption and the issue revolved around the condition that consumers must be allowed a fair share of the benefits resulting from the restriction on competition. In particular, the issue was the "two sided" nature of the payment exchange service market, namely, on the one hand issuers competing with each other for services to cardholders and on the other, acquirers competing with each other for the business of retailers (and other merchants). The Court of Appeal had held that if the restriction causes disadvantages overall to the 'consumers' in one market segment (here, the retailers in the acquiring market), those disadvantages cannot be compensated by advantages to consumers in the other market (i.e. cardholders), unless the two groups of consumers are substantially the same, which, in this case, clearly they were not.

The Supreme Court endorsed the Court of Appeal's decision, albeit by slightly different reasoning and dismissed the appeal on issue (iii). The Court noted that the best available guidance on the application of the fair share requirement in the context of a two-sided market is the opinion of the Advocate General Mengozzi in the ECJ Judgment, who articulated two propositions: (a) that the consumers are the direct or indirect consumers (in this case the retailers) of the goods or services covered by the measure (in this case MIFs); and (b) those consumers must be compensated in full for the adverse effects that they bear owing to the restriction of competition resulting from the measure. The Supreme Court

held that the retailers were the relevant consumers and, if not fully compensated for the harm inflicted on them, cannot be said to have received a fair share of the benefits resulting from the measure.

The Broad Axe Issue

The broad axe issue concerned the degree of precision required in the quantification of any mitigation of loss where it is claimed that a claimant has mitigated its loss through the passing on of all or part of an overcharge, to its customers.

As a matter of English law, the claims were for damages for breach of statutory duty. The retailers had claimed for the added costs which they had incurred as a result of the MSC, which the acquiring banks had charged them, being larger than it would have been if there had been no breach of competition law if the MIF had been at a lawful level.

It was common ground that, subject to the question of liability, the retailer claimants were entitled to be placed in the position which they would have been in but for the tortious acts (i.e. the MIF overcharge) which caused them loss, according to the usual measure of compensatory damages in English law. Therefore, it was important (as a matter of English law) to ensure that any damages quantification did not result in double recovery (e.g. through claims for overcharge where that overcharge has been passed-on at multiple points in the payment chain).

Mastercard submitted that, in order to establish that the retailers had mitigated their losses, it was required to prove that they passed on some of the overcharge to their customers, but the quantification of the pass-on of the MIF did not have to be precise, if precision could not reasonably be achieved.

The Court held that ascertaining the relevant degree of precision requires a balance between achieving justice by precisely compensating the claimant and dealing with disputes at a proportionate cost. The English common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved and therefore does not require unreasonable precision in the proof of the amount of the loss that the retailers passed on to suppliers and customers[2].

The Court did not interpret the Court of Appeal as having held that the defendants had to prove the exact amount of the loss that was mitigated. But, insofar as the Court of Appeal's approach involved requiring of a defendant a greater degree of precision in the quantification of pass-on than it required of a claimant, the Supreme Court held that the Court of Appeal erred. As a result, Mastercard and Visa's appeal on the broad axe issue was successful.

Comment

As noted above, the Supreme Court's judgment could have consequences for follow-on damages actions and parties beyond this case—a number of ongoing claims brought in respect of the EC Decision by smaller retailers and other businesses are ongoing and could be impacted (see, for example, claims recently lodged by hotel operators in the High Court in April 2020[3]).

There is also the continued potential for claims and class actions by other retailers. While the six-year limitation period for breach of statutory duty (or in the CAT the two-year period for claims arising before October 2015) would appear to rule out the possibility of new claims being brought on the basis of the 2007 EC Decision, the usual rules extending tortious limitation periods where the facts giving rise to the claim have been concealed may allow some new claims to

be brought, even now. Such a case has recently been remitted by the Court of Appeal for further consideration by the CAT[4].

In any event, aside from claims arising from the EC Decision, further antitrust developments in the 'MIF space' continue and could form the basis of future claims (including those whose causes of action have yet to accrue or in respect of which the limitation period is still running). For example, the EC imposed a €570 million fine on Mastercard in January 2019 for "obstructing merchants' access to cross-border card payment services," due to scheme rules obliging acquirers to apply the interchange fees of the country where a retailer is located. Mastercard and Visa also entered into legally binding commitments with the Commission in April 2019 to reduce their inter-regional MIFs (i.e. MIFs applied to payment made in the EEA with debit and credit cards issued outside the EEA) by approximately 40% on average (these commitments are applicable for five and a half years). As the payment services landscape becomes ever more global and interconnected, antitrust risks will remain a key concern for payment service companies and their network of affiliates.

More generally, at least until the status of CJEU judgments in the U.K. is eventually resolved following Brexit, the fact the ECJ Judgment was found to be binding on the Supreme Court (and would have been followed by the Court even if it was not binding) may (depending on the distinguishability of the facts in each case) limit the willingness of companies that are the subject of infringement decisions to defend liability in follow-on damages claims. It may to some extent also embolden consumers and others affected by other competition law infringements to launch follow-on claims and class actions.

Separately, the Court's finding that a defendant was not required to prove the exact amount of loss it alleges the claimant has mitigated through the passing on of an overcharge to its customers may also have implications for the related *Merricks v Mastercard* class action litigation (which is now pending before the Supreme Court):

- One of the issues in that litigation is the quality and extent of evidence on the passing on of the MIFs to consumers that is necessary for the Court to allow the class action to be 'certified' and proceed. Ironically, the fact that the Supreme Court in the interchange litigation did not require Mastercard and Visa to prove the exact amount of loss mitigated by way of "pass-on" could work against Mastercard in *Merricks*. In that case, it argued before the Supreme Court that the Court of Appeal had not sufficiently rigorously assessed the quality and extent of evidence of "pass-on" to each of the consumer claimants that is required (at the certification stage) in that case.[5]
- It will be interesting to see how the courts dealing with quantum in both *Merricks* and the interchange litigation (if they get that far) will grapple with the possibility that imprecision in the quantification of "pass-on" in both cases could (at least theoretically) result in Mastercard having to pay in total to the relevant retailers, and consumers to whom they passed on the MIF, more than 100% of the losses that result from the MIF that was charged to the retailers.

+ Footnotes

[1] Save for the EEA debit card MIF prior to June 2008

[2] *Devenish Nutrition Ltd v SanofiAventis SA* [2007] EWHC 2394 (Ch);

[3] Claim numbers: CP-2020-000010 and CP 2020-000009

[4] *DSG Retail Limited and Dixons Retail Group Limited v Mastercard Incorporated (and Others)* [2020] EWCA Civ 671

[5] Indeed, the Supreme Court implicitly recognised this tension when it said at para 224: "As the regime is based in the compensatory principle and envisages claims by direct and indirect purchasers in a chain of supply it is logical that the power to estimate the effects of passing-on applies equally when pass-on is used as a sword by a claimant or as a shield by a defendant."

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