SLAUGHTER AND MAY

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High Court finds that Visa's UK card charges do not restrict competition

On Thursday 30 November 2017 the High Court handed down its judgment in ***Sainsbury's Supermarkets Ltd v Visa Europe Services LLC & Ors***.[1] This is the latest in a series of damages claims against MasterCard and Visa in the UK, following findings by the European Commission in 2007 that MasterCard's cross-border EEA multilateral interchange fees (MIFs) were in breach of what is now Article 101 of the Treaty on the Functioning of the European Union (TFEU). Similar European Commission proceedings against Visa were concluded in 2010 with a decision accepting commitments.

This case concerns the MIFs set by Visa for transactions in the UK (which are similar to, but distinct from, the cross-border EEA MIFs considered by the Commission). It raises substantially similar issues on the appropriate counterfactual to use in competition damages claims to those addressed in the conflicting decisions of the Competition Appeal Tribunal (CAT) on 14 July 2016 in *Sainsbury's Supermarkets Ltd* v *MasterCard Incorporated and others*,[2] and the High Court in *Asda Stores Limited & Ors* v *MasterCard*.[3] In this latest decision the overall conclusion of Phillips J, that the Visa's UK MIFs did not restrict competition, is consistent with that of Popplewell J in *Asda*, but much of his conclusion has in fact been reasoned on quite a different basis.

Background to the Visa scheme

Sainsbury's, in common with all merchants accepting Visa credit and debit cards (Merchants), accepts Visa cards pursuant to an agreement with a bank or financial institution known as an Acquirer who is a member of the Visa scheme. Merchants pay a per transaction fee to the Acquirer for its services known as a Merchant Service Charge. The aspect of the Merchant Service Charge at issue in this case was the interchange fee charged by the issuer of the debit or credit

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

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[1] [2017] EWHC 3047 (Comm).

[2] [2016] CAT 26.

[3] [2017] EWHC 93 (Comm). For a fuller discussion of the facts of these cases and the previous approach of the courts, please see Slaughter and May's previous client publication, **here**.

card (the Issuer) to the Acquirer. Whilst the regulations of the Visa Europe System permits Issuers and Acquirers to negotiate a bilateral interchange fee (BIF), in practice in the UK the interchange fee that is used is the MIF that is set by Visa as the default for the relevant type of transaction.

Sainsbury's claim was that the MIF unlawfully restricted competition on the acquiring market, by: (i) removing the uncertainty amongst Acquirers about what their competitors are paying Issuers and dramatically reduced the scope for them to compete on price; and (ii) acting as a "floor" on the Merchant Service Charge.

Approach to the analysis of anticompetitive effects

Phillips J first set out his overall approach to the analysis of anticompetitive effect under Article 101 and, in particular, considered an argument that the mere fact that an agreement results in higher prices than if the agreement had not been made is sufficient to entail a restriction of competition by effect contrary to Article 101 TFEU. He noted at the outset that:

- The restrictive effects of an agreement do not fall to be considered in absolute terms, but in comparison to the state of competition that would exist in the absence of that agreement. It is therefore necessary to identify a realistic hypothetical "counterfactual" in which the market would be appreciably more competitive;
- Article 101 TFEU is expressly concerned with agreements that prevent, restrict or distort competition. The effect of the agreement on competition and not just on prices therefore needs to be examined; and
- An agreement that increases prices without restricting competition may be an abuse of a dominant position contrary to Article 102 TFEU, but it is not on that ground alone a breach of Article 101.

The relevant counterfactual

It was common ground amongst the parties that the appropriate counterfactual involved: (i) the absence of the restrictive provision, with parties free to negotiate BIFs; and (ii) a default rule that in the absence of a BIF transactions would be settled at par, with a restriction on ex-post pricing (i.e. any bilateral agreements would need to be reached before a transaction was concluded). All parties agreed that a scheme without such a default rule would be unworkable in practice.

In examining the relevant counterfactual the court first considered whether there would be BIFs in the no MIF counterfactual. The High Court in *Asda* and the CAT in *Sainsbury's* v *MasterCard* had disagreed on this point, with the CAT concluding that in a counterfactual scenario, BIFs probably would be agreed. However, Phillips J took a similar approach on this point to Popplewell J in *Asda*, focusing on the lack of the previous existence of BIFs in the UK market. As such the High Court required clear evidence, which had not been presented, that BIFs would emerge.

The second question that the court addressed was whether, in the absence of BIFs, there would be a greater degree of competition between acquirers in the no MIF counterfactual. Phillips J found that the degree of competition that takes place in a no MIF counterfactual is no different to that which takes place where there is a non-zero default MIF level. In both cases, the market will not deviate from the default settlement rule imposed by the scheme. The court considered whether there was an inconsistency

between this finding and the European Commission's original decision in relation to Mastercard's EEA MIFs (which had been upheld by the CJEU), but concluded that the difference was explained by an underlying difference in the findings of fact as the Commission had found that in the absence of the EEA MIF there would be bilateral negotiations.

The High Court then turned to whether the MIF infringed Article 101 TFEU as it acted as a "floor" for the Merchant Service Charge. In *Asda*, Popplewell J had found that a MIF acted as a de facto "floor" and restricted competition as it interferes with the ability of Acquirers to compete for Merchants' business. Phillips J disagreed with this conclusion; rather than characterising the MIF as a floor, the court approached the MIF as a default price, which would be present even in the no MIF counterfactual (i.e. the zero MIF would also be a "floor").

What assumptions should be made about Mastercard in the counterfactual scenario?

Although the court found that Visa's MIFs do not restrict competition under Article 101(1) in any event, Phillips J also considered the question of what assumptions, if any, should be made about the behaviour of MasterCard in the counterfactual. In *Sainsbury's* v *MasterCard* and *Asda*, both courts had assumed that in a counterfactual scenario other schemes would be able to continue to set MIFs on the historic basis, but had gone on to reach conflicting conclusions as to the implications of this. For Phillips J this conflict demonstrated the "*inherent difficulty (if not absurdity) in attempting to analyse the competitive effects of one or other of the two major four-party schemes on the hypothetical basis that one of them is, in the counterfactual, deemed to be subjected to markedly different restraints than the other*."[4] As a matter of law and logic, the court therefore considered that the counterfactual should use symmetrical assumptions about MasterCard and Visa's behaviour.

Conclusion

The High Court found that Visa's MIFs do not restrict competition contrary to Article 101 TFEU. In its approach the High Court has put forward yet another way, in addition to those taken in *Sainsbury's* v *MasterCard* and *Asda*, and also that by the European Commission in 2007, of analysing the effect on competition of Visa and MasterCard's MIFs.

The Court of Appeal will hear appeals in both of the MasterCard cases in April 2018. Sainsbury's has until 21 December 2017 to decide whether to appeal this decision.

Other developments

Merger control

CMA fines Hungryhouse for failure to comply with information request

On 1 December 2017 the Competition and Markets Authority (CMA) published a **notice** imposing a penalty of £20,000 on Hungryhouse Holdings Limited. The penalty relates to Hungryhouse's alleged failure to

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[4] Para. 163.

properly comply with an initial information request under section 109 of the Enterprise Act 2002 during the CMA's Phase II review of its acquisition by Just Eat plc.[5] The CMA has identified 49 unique documents (subsequently submitted by Hungryhouse in response to later information requests) that were responsive to the initial information request but were not submitted in response to that request. Among these documents are material emails between the CEO of Hungryhouse's parent company and major investors, and a key substantive document.

In finding that Hungryhouse had no reasonable excuse for its failure to comply properly with the initial information request, the CMA criticised Hungryhouse's decision to narrow the search terms used to identify relevant documents and noted that Hungryhouse should have ensured that it had sufficient resources to properly comply with the request, engaging external advisers if necessary. The CMA highlights that Hungryhouse should have raised with the CMA any concerns it had about the scope of the initial information request or the practicality of responding to it within the given timeframe, especially as it had been given the opportunity to comment on a draft version.

The CMA considers that the fine is appropriate and proportionate as the failure to comply properly was significant, both in terms of the number and key nature of the documents. It also had an adverse impact on the inquiry, notably (i) obliging the CMA to carry out significant further information gathering and (ii) risking a decision being taken on the basis of incomplete evidence had the CMA not noticed the omission of responsive documents.

MOFCOM's conditional clearance of ASE/SPIL sees return of "hold-separate" remedy

On 24 November 2017 the Ministry of Commerce of the People's Republic of China (MOFCOM) conditionally **cleared** the proposed acquisition of Siliconware Precision Industries Co., Ltd. (SPIL) by Advanced Semiconductor Engineering Inc. (ASE). Due to MOFCOM's concerns that the proposed deal may have the impact of eliminating or restricting competition in the market for original equipment manufacturer (OEM) services for semiconductor assembly and testing, the parties had to withdraw and refile the notification, such that MOFCOM's conditional approval was eventually obtained 15 months after the notification was initially submitted to MOFCOM.

The parties had fairly significant horizontal overlaps, with combined market shares ranging from 25% to 30% globally and in China. To address MOFCOM's concerns, the parties offered, amongst other commitments, to hold the businesses separate for 24 months. This rather exceptional remedy requires ASE and SPIL to operate independently, for 24 months post-merger, in relation to management, finance, personnel, pricing, sales, production capacity, and procurement, so as essentially to prohibit integration and coordination between the parties in relation to their overlapping business of OEM services for semiconductor assembly and testing. The parties would have to report to MOFCOM every six months on their compliance with the conditions. The other conditions imposed by MOFCOM are also behavioural in nature for a duration of 24 months. They include providing services for customers in a non-discriminatory manner, not restricting customers from selecting other providers and not exercising certain shareholder rights.

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[5] The CMA cleared the deal unconditionally on 16 November 2017. For further details, see this **edition** of the Competition & Regulatory Newsletter.

It was reported that MOFCOM considers the "hold-separate" remedy an appropriate measure to address competition concerns in problematic mergers and it is a way of avoiding an outright prohibition of a deal. The "hold-separate" remedy was first accepted by MOFCOM in 2011 in its conditional approval of Seagate's acquisition of Samsung's hard disk business, requiring the parties to remain independent for 12 months; and we last saw the use of the remedy four years ago in MediaTek's merger with fellow Taiwanese chip maker MStar, which was subject to a 36-month hold-separate remedy. Generally, parties may apply to MOFCOM for the condition to be removed after its expiry, but MOFCOM's review process for such removal may be lengthy. The process took more than two years in Seagate's case, and as regards *MediaTek/MStar*, although the companies reportedly applied for the lifting of the condition on its expiration in August 2016, MOFCOM has still not published any decision regarding revising the conditions it imposed on the deal. The *ASE/SPIL* decision avoids this uncertainty, as the final remedy proposal submitted by the parties states that the conditions imposed by MOFCOM would automatically expire after 24 months.

The deal has otherwise received unconditional approval from the U.S. Federal Trade Commission and Taiwan Fair Trade Commission in May 2017 and November 2016 respectively.

Antitrust

FCA issues first statement of objections under its competition powers

On 29 November 2017 the Financial Conduct Authority (FCA) announced that it had issued a statement of objections to four asset management firms, namely Artemis Investment Management LLP, Hargreave Hale Ltd, Newton Investment Management Limited and River & Mercantile Asset Management LLP, setting out its provisional finding that the firms have breached competition law by sharing sensitive information in relation to Initial Public Offerings (IPOs) and a placing. Specifically, the firms are alleged to have shared price information regarding the shares to be issued via the IPOs and the placing shortly before the share prices were set. The sharing, which was generally bilateral in nature, took place in 2014 and 2015 and allowed the firms to be aware of each other's plans during the IPO or placing process when instead they should have been competing to purchase the shares.

The four firms will be permitted to make representations (both in writing and orally) in relation to the statement of objections prior to the FCA taking an infringement decision. This is the first case brought by the FCA using its competition enforcement powers under the Competition Act 1998, which it was granted on 1 April 2015 and holds concurrently with the CMA. Those powers enable the FCA to enforce UK (and EU) competition law prohibitions against anti-competitive agreements and conduct where such prohibitions are breached by parties involved in the provision of financial services. The FCA previously used its concurrent powers to make a market investigation reference to the CMA in relation investment consultancy and fiduciary management services.

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