SLAUGHTER AND MAY

Competition & Regulatory Newsletter

4 - 17 July 2018 / Issue 15

Quick Links

Main article
Other developments
Merger control
Antitrust

Court of Appeal brings UK approach to MIFs in line with the European Commission: MasterCard, Visa on the hook

On 4 July 2018 the UK Court of Appeal (the Court) issued a common **judgment** in three appeals, on whether the setting of default Multilateral Interchange Fees (MIFs) in UK transactions by MasterCard and Visa amounts to a restriction of competition under Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The Court adopted the same approach to MasterCard's UK MIFs as the European Commission had done in 2007 (as **confirmed** on appeal by the European Court of Justice (CJ) in 2014). The Court did this on the basis that the facts before it were materially indistinguishable from those considered by the CJ. In doing so, the Court overturned three previous conflicting Competition Appeal Tribunal (CAT) and High Court rulings on the subject, and held that both Visa and MasterCard's UK MIFs were anti-competitive under Article 101(1) TFEU. The Court also clarified that when analysing ancillary restraints in an Article 101(1) context, the correct test is whether the restrictive measure is essential to the survival of the main operation, without considering whether the main operation needs the restrictive measure in order to compete.

The Court has remitted all three UK cases to the CAT for reconsideration on whether there could be any lower level at which the UK MIFs generate efficiencies outweighing their restrictive effects and would therefore be exempt under Article 101(3) TFEU. The CAT will also assess the quantum of damages due to retailers on this basis, but a retrial on these issues was ruled out.

Background

MIFs are fees set by four-party card schemes such as Visa and MasterCard, and charged by a consumer's bank to a retailer's bank during a payment card transaction. The retailer's bank passes the MIF on to the retailer, along with other transaction fees as part of the merchant service charge. Because the MIFs are set by the card schemes, MIFs in effect reduce the ability of the retailer accepting the card payment to negotiate a lower service charge with its bank.

The CJ in 2014 upheld the European Commission's 2007 decision that MasterCard's cross-border EEA MIFs were restrictive of competition. In 2016 the

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

CAT ruled that the UK MIFs charged by MasterCard were anti-competitive.[1] However, the High Court held on two occasions[2], for different reasons, that the UK MIFs charged by MasterCard and Visa were not anti-competitive. The CAT and High Court judges settled on different counterfactual scenarios in reaching their decisions:

- The CAT's proposed counterfactual was that banks would have negotiated bilateral interchange fees in the absence of MIFs.
- Both High Court judges largely applied the counterfactual adopted by the CJ in 2014, namely: in a world without MasterCard and Visa MIFs, there would have been no default MIFs charged between the scheme participants (in other words, a 'zero MIF') and a prohibition on ex-post pricing (to prevent participants 'holding up' transactions by demanding a positive MIF to be paid).

Our prior briefings tracking this litigation can be found **here** and **here**.

Judgment

The Court ruled that the UK MIFs charged by MasterCard and Visa restrict competition in breach of Article 101(1) as the MIFs set a floor on the merchant service charge, limiting the pressure that retailers could exert on banks when negotiating card acceptance fees. This ultimately led to a restriction on the competitive process on the acquiring market.

In coming to this conclusion, the Court followed the Commission's decision and analysis in the 2007 MasterCard case (confirmed by the CJ on appeal in 2014). The Court considered that the counterfactual adopted by the CJ, and its finding that MasterCard MIFs were anti-competitive, were binding on UK courts as a matter of law and needed to be followed.

While the CJ's judgment applied only to MasterCard's MIFs, the Court extended its assessment to Visa's MIFs, due to the similarity between the two card schemes' MIFs. However, the Court clarified that it is not the case that all MIFs will necessarily infringe Article 101(1) and it is conceivable that different MIFs could be distinguished from those on which the CJ adjudicated.

Further, the Court clarified that the rule in *Metropole*[3] regarding the ancillary restraints doctrine, as altered by the General Court in *MasterCard*[4], continues to be good law. Therefore an ancillary restraint which has the effect of restricting competition must be essential to the survival of the main operation to be objectively necessary. It is not sufficient or appropriate to consider in the same analysis whether the main operation needs the restriction to compete with other such operations.

The Court held that the 'death spiral' argument (i.e. the argument that one card scheme lowering its MIFs, or setting zero MIFs, would lose business to a rival scheme setting high MIFs) could not be relied upon to show that the MIF was objectively necessary. The Court added that all such 'death spiral' issues relating to the pro- or anti-competitive effect of the particular scheme were considerations under Article 101(3), and were not considerations under the ancillary restraints doctrine.

---

[1] *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11.

[2] *Arcadia & Ors v MasterCard* [2017] EWHC 93 (Comm); and *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC & Ors* [2017] EWHC 3047.

[3] Case T-112/99 *Métropole télévision (M6) and Others v Commission*, judgment of 18 September 2001.

[4] Case T-111/08 *MasterCard and Others v Commission*, judgment of 24 May 2012.

The Court also endorsed the CJ's analysis that for the purposes of an Article 101(3) assessment involving a two-sided market, regard must be had to the effect of the restriction on both sides of the market. However, the disadvantages caused to consumers in one market cannot be offset by advantages to consumers in the other market, unless the two groups of consumers are substantially the same. Therefore, in this instance, an Article 101(3) analysis would need to support net advantages for both cardholders and retailers.

Next steps

The Court has remitted all three appeals to the CAT for reconsideration. Visa and MasterCard will need to show that there is a level (below the one under issue) at which their MIFs could be exemptible under Article 101(3), where the efficiencies caused by the MIFs outweigh their restrictive effects. The CAT will also consider the quantum of damages on this basis.

The Court has ruled out a retrial of the issues on the grounds that no further evidence can be adduced except in relation to quantum of damages. However, the parties can rely on generic evidence now available from parallel cases for the CAT to be able to take a holistic approach and reconcile the differences in the different proceedings.

Comment

Although interchange fees have been capped by the EU Interchange Fee Regulation since 2015[5], the Court's ruling could open the door to billions of pounds in damages claims from retailers against Visa and MasterCard in relation to losses from fees paid between December 2006 and December 2015. Visa and MasterCard could potentially appeal this decision in the UK Supreme Court, which could in turn refer the question of the correct characterisation of the CJ's judgment in *MasterCard* back to the CJ. In any event, it seems likely that there is more to come in the long-running battle as to whether MasterCard and Visa's MIFs are restrictive of competition.

Other developments

Merger control

Competition and Consumer Commission of Singapore proposes fines and remedies on Grab/Uber transaction

On 5 July 2018 the Competition and Consumer Commission of Singapore (CCCS) **announced** that it had issued a Proposed Infringement Decision (PID) against Grab and Uber to impose remedies and financial penalties in relation to Grab's acquisition of Uber's Southeast Asian business. In the PID, CCCS provisionally found that the transaction has led to a substantial lessening of competition in the

[5] Council Reg. (EC) 2015/751 (OJ 2004 L123/1, 19.5.2015).

ride-hailing platform services sector in Singapore. CCCS is now seeking public feedback on its proposed remedies and will consider them alongside the parties' representations before making its final decision.

Grab and Uber announced the transaction on 26 March 2018, and began the transfer of the acquired assets immediately. CCCS commenced an investigation into the transaction the very next day. CCCS's investigation found evidence that Uber would not have left the Singapore market in the near to medium term without the transaction. CCCS defined the market narrowly as ride-hailing platform services in Singapore, and found that taxi booking services did not pose a sufficient competitive constraint on the parties. As such, the transaction removed competition between the two closest prevailing competitors. CCCS also found that there are strong barriers to entry and expansion, in particular because Grab had imposed exclusivity obligations on taxi companies, car rental partners and some of its drivers. In CCCS's view, its intervention is necessary to ensure that potential competitors have access to drivers and vehicles to maintain sufficient competition.

CCCS's proposed remedies include the removal of exclusivity arrangements that Grab has imposed, the maintenance of Grab's pre-transaction pricing algorithm until competition is revived in the market and requiring Uber to sell Lion City Rentals (Uber's subsidiary that engages in car rental services in Singapore) to any potential competitor other than Grab, so as to prevent Grab and Uber from aligning Lion City Rentals with Grab to the disadvantage of Grab's potential competitors.

Whilst the proposed remedies are similar to the interim measures already in place, CCCS has gone further in proposing to impose financial penalties on the parties. In particular, CCCS noted that before the transaction, it had sent a letter to each party explaining Singapore's voluntary merger notification regime, under which they could seek CCCS's confidential advice prior to completing the transaction. However, Grab and Uber proceeded with the transaction, "*despite their own view that the outcome would be irreversible, thus rendering it practically impossible to restore the status quo pre-merger*". CCCS also found that Grab and Uber even had in place a mechanism to apportion eventual antitrust financial penalties.

With other antitrust investigations in relation to the transaction still pending across Asia, CCCS's PID may cause ripple effects across the region. Grab has already announced its intention to appeal the CCCS's decision.

Antitrust

European Commission issues draft passing-on guidelines to help national courts estimate the economic harm caused by antitrust breaches

The European Commission has launched a consultation on draft guidelines designed to give national courts practical guidance on how to estimate the passing-on of overcharges when considering damages actions for infringements of Articles 101 and 102 TFEU.

The Directive on Antitrust Damages Actions[6] (Damages Directive) was adopted in November 2014, and all EU Member States have since transposed its rules. The Damages Directive provides that where an infringement has caused price increases which have in turn been 'passed-on' along the distribution chain,

[6] Directive 2014/104/EU (OJ 2014 L 349/1, 5.12.2014).

those who ultimately suffered the harm are entitled to claim compensation. The Directive, however, recognises the difficulty of determining compensation levels, and therefore contains provisions for the Commission to issue guidelines on the matter.

The draft guidelines aim to provide national courts (and other stakeholders) non-binding practical guidance by (i) setting out the legal framework applicable to passing-on; and (ii) dealing with the economics of passing-on. The draft also includes details of the typical economic methods of calculating the overcharges. The Commission anticipates that the new guidelines will complement the Practical Guide on Quantifying Harm, which it issued in 2013. Moreover, the guidelines will assist with determining sources of evidence, assessing whether a disclosure request is proportionate, and assessing the parties' statements on passing-on and any economic expert opinion that may be presented to the court.

The Commission invites views and comments on the draft guidelines to be submitted by 4 October 2018.

General Court reinstates Sanitec's fine in bathroom fixtures and fittings cartel

On 3 July 2018 the European General Court (GC) issued its judgment upholding the original €57 million fine imposed on Sanitec Europe and its subsidiaries for participating in a cartel in the bathroom fixtures and fittings market. The European Commission's initial 2010 decision imposed fines collectively exceeding €622 million on 17 bathroom equipment manufacturers for participating in a cartel between 1992 and 2004 that spanned six Member States. On appeal in 2013, the GC annulled the fines imposed on two of Sanitec's subsidiaries and reduced the group's total fine to €50 million. In 2017, however, the CJ set aside the GC's ruling, finding that the latter had not properly considered the evidence or verified whether the pieces of evidence, viewed as a whole, could be mutually supporting of each other, and referred the case back to the GC.

In the latest proceedings Sanitec argued that the findings against those two subsidiaries in relation to the cartel's activity on the French market should be quashed. The allegations related to price-fixing of ceramics within a French trade association. The evidence centred on statements by Ideal Standard and Roca, two other cartel members, in their leniency applications, as well as a chart of ceramic prices that Ideal Standard drew up after a meeting where anti-competitive discussions may have been held, and statistics from the trade association on the sales trends and prices of its members.

In its reassessment of the evidence, the GC found that the chart should be viewed as part of Ideal Standard's leniency statement rather than a separate piece of evidence corroborating it, as only the information provided in the statement links the chart to the alleged infringements. However, it held that Roca's leniency statement had probative value in and of itself and that it corroborated Ideal Standard's statement in several respects. The GC further found that the statistics demonstrated regular exchanges of sensitive information over a significant time period, corroborating Ideal Standard's statement regarding price co-ordination. The GC therefore ultimately found that the evidence, taken as a whole, confirmed the Commission's conclusion.

The judgment indicates that even if there is no single compelling piece of evidence, several pieces of evidence taken together may be sufficient to prove an infringement.

Brussels
T +32 (0)2 737 94 00

London
T +44 (0)20 7600 1200

Hong Kong
T +852 2521 0551

Beijing
T +86 10 5965 0600

© Slaughter and May 2018

This material is for general information only and is not intended to provide legal advice. For further information, please speak to your usual Slaughter and May contact.