SLAUGHTER AND MAY

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Mastercard fined €570 million for obstructing retailers' access to lower interchange fees

On 22 January 2019 the European Commission **fined** Mastercard €570 million for rules that prevented retailers from accessing lower interchange fees offered by banks in other Member States, breaching Article 101 of the Treaty on the Functioning of the European Union.

Background

Mastercard acts as a platform through which issuing banks provide cardholders with payment cards and ensure that funds are transferred to the retailer's bank. When a consumer uses a debit or credit card in a shop or online, the retailer's bank pays a per-transaction charge, known as an "interchange fee", to the cardholder's bank. This charge is passed on to the retailer, and ultimately may be passed on to consumers.

Prior to 9 December 2015, when the **Interchange Fee Regulation** introduced caps on fees in the EEA, interchange fees varied significantly across Member States. However, Mastercard's rules obliged retailers' banks to apply the interchange fees of the country where the retailer was located, with the result that retailers in Member States with high interchange fees could not benefit from lower interchange fees offered by banks in other Member States.

The Commission found that Mastercard's rules led to higher prices for consumers, lower cross-border competition between banks and artificial segmentation of the Single Market. It therefore imposed a fine of €570 million.

Cooperation with the Commission

The Commission granted a 10 per cent reduction in the fine imposed, in return for Mastercard's cooperation in the investigation. In particular, Mastercard acknowledged the facts and the infringement of EU competition rules. This is the

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fourth time that the Commission has rewarded such cooperation in its antitrust procedures.[1]

Previous action taken by the Commission

Mastercard's fine represents the latest instalment in a series of actions taken by the Commission to reduce card fees for retailers, which have focussed on Mastercard and Visa:

- In December 2007 the Commission **found** that Mastercard's interchange fees on cross-border transactions in the EEA (e.g. where a French citizen uses a card in a shop in Germany) restricted competition between banks, a finding which was later **confirmed** by the European Court of Justice in September 2014. Following the Commission's decision, Mastercard reduced cross-border interchange fees in the EEA to maximum weighted averages of 0.2% per cent for debit cards and 0.3 per cent for credit cards.
- In December 2010 and February 2014, the Commission made legally binding commitments offered by Visa Europe to cap cross-border interchange fees in the EEA at the same levels. Visa Europe's 2014 commitments also addressed the Commission's concerns regarding rules on "cross-border acquiring" (i.e. the same rules as those at issue in the Commission's latest decision against Mastercard), by allowing retailers' banks to apply reduced cross-border interchange fees for cross-border clients.
- In April 2015 the EU adopted the Interchange Fee Regulation, which from 9 December 2015 capped interchange fees for cards issued and used in Europe.

Ongoing investigation against Mastercard

The Commission is continuing to investigate whether Mastercard's interchange fees for payments made in the EEA with debit and credit cards issued outside the EEA may breach EU competition rules (e.g. where a US tourist uses a card to pay a restaurant bill in Belgium). The Commission is concerned that such fees may increase prices for European retailers accepting payments from cards issued outside the EEA, in turn leading to higher prices for goods and services in the EEA.

The Commission has **invited** comments from interested parties on commitments offered separately by Mastercard and Visa to address the Commission's competition concerns.

Separately, Mastercard and Visa continue to face a number of private claims brought by retailers in UK courts in relation to interchange fees in the EEA prior to 2015.

[1] The Commission previously rewarded such cooperation in the **ARA case**, the **four consumer electronics cases** (Asus, Denon & Marantz, Philips and Pioneer) and the **Guess case**.

Other developments

Antitrust

Singapore hotels fined SGD 1.5 million by the CCCS for exchanging commercially sensitive information

On 30 January 2019 the Competition and Consumer Commission of Singapore (CCCS) issued an **infringement decision** against the owners/operators of four hotels in Singapore, namely Capri Fraser Changi City Singapore, Village Hotel Changi, Village Hotel Katong and Crowne Plaza Changi Airport Hotel. The hotels were fined a total of SGD 1.5 million (around £850,000) for infringing the prohibition on anti-competitive agreements. The infringement decision follows the publication, reported in the **August 2018** edition of our newsletter, of a proposed infringement decision on 2 August 2018.

The CCCS commenced its investigation in November 2013, following enquiries into the hospitality sector conducted on its own initiative. Dawn raids and same-day interviews with key personnel were conducted in June 2015. The investigation revealed that Capri's sales representatives had exchanged commercially sensitive information with the Village Hotels and Crowne Plaza relating to their corporate customers, including the confidential corporate room rates that had been negotiated with specific customers, future price-related strategies such as their proposed price increases for the following contractual year, their proposed bid prices in response to customer requests, and whether or not they intended to agree to a particular customer's price reduction request in the course of corporate rate negotiations.

The CCCS concluded that the exchange of this information is likely to have influenced the hotels' subsequent conduct in the market, and/or placed them in a position of advantage over their corporate customers in contract negotiations, thereby reducing competitive pressure on rates and/or terms offered to corporate customers.

During the investigation, the Village Hotels and Crowne Plaza applied to the CCCS for leniency and received a reduced penalty of SGD 286,610 (around £160,000) and SGD 225,293 (around £130,000) respectively. Capri was fined SGD 1 million (around £570,000). In the CCCS's **press release**, the Chief Executive of CCCS reminded businesses to distance themselves immediately and clearly from any exchange of commercially sensitive information with competitors, and to report such conduct to CCCS.

UK Court of Appeal dismisses air cargo claimants' appeal

The UK Court of Appeal has **confirmed** that a claimant seeking damages from airlines arising out of an alleged air cargo cartel cannot claim for breaches of EU competition law affecting transactions before the relevant EU competition rules came into effect in May 2004, in the absence of a finding of infringement by the European Commission or a national competition authority.

The claims were initially brought by shippers of air freight for damages against British Airways. The claims at issue in the appeal were based on the airline's alleged infringement of Article 101(1) of the TFEU in respect of alleged overcharges for air freight services on routes between the EU and third countries for

transactions entered into prior to 1 May 2004. In 2017 the High Court ruled in favour of the airline, striking out these claims and holding that a transitional regime applied to the period in question and that under that regime, in the absence of the decision of a competent authority (i.e. the Commission or a national competition authority), there could be no claim for flights between the EU/EEA and third countries which took place before 1 May 2004 for the EU, or 19 May 2005 for the EEA; i.e. the date on which the EU/EEA competition rules were implemented.

On 29 January 2019, when issuing its judgment in *La Gaitana Farms SA and others v British Airways plc and others*, the Court of Appeal confirmed the 2017 ruling of the High Court. The Court, rejecting the claimants' alternative argument, also held that Regulation 1/2003 should not be given retroactive effect, as the provisions that the claimants sought to rely on were held to be substantive in nature and EU case law consistently established that substantive rules do not have retroactive effect, unless it is clear from their terms, objectives or general scheme that they were intended to do so. The Court also rejected further submissions from the claimants, based on the recent European case of O'Brien, that the future-effects principle applied to the case, holding that the "*the relevant legal situation had arisen and become definitive under the transitional regime*". The Court agreed with the airline that it should not delay the judgment pending the decision of the Amsterdam Court whose judgment on the same issue is due at the end of February.

Slaughter and May acts for British Airways as the respondent in the case. The case is led by dispute resolution partner Richard Swallow (Head of Competition Litigation), assisted by associate Kathryn Hernandez. Slaughter and May have instructed Jon Turner QC & Michael Armitage (Monckton Chambers).

General competition

European Commission publishes report on competition enforcement in the pharmaceutical sector post-2009

On 28 January 2019 the European Commission published the **final report** on its pharmaceuticals sector inquiry. Drafted in close cooperation with the EU national competition authorities (NCAs), it focuses on the period since 2009 when the Commission carried out an initial inquiry into the sector. The report responds to allegations that patients' access to medicines are endangered by anti-competitive practices and examines the role of enforcement in ensuring competitive pricing, innovation and increased choice.

Following Chief Commissioner Vestager's emphatic statements on the subject in 2018, the final report makes clear that effective enforcement of EU competition rules in the pharmaceutical sector is a high priority for the Commission. Since 2009, the Commission and NCAs have investigated over 100 cases and adopted 29 decisions against unlawful practices, imposing fines totalling over €1 billion. The Commission identified competition concerns in 19 of its 80 merger investigations due to risks of increased prices, in particular for generic or biosimilar products, and the possibility the mergers might compromise R&D efforts to launch new medicines or extend the therapeutic use of existing medicines.

The Commission states that its recent investigatory successes demonstrate the efficacy of competition law enforcement as a control on excessive pricing in the sector. However, it also acknowledges the parameters of its mandate and remit, which is necessarily limited to the regulation of anti-competitive

agreements, abuse of dominance and monopolies. As such, it exhorts the continuous efforts of all stakeholders to operate ethically to ensure sustainable access to affordable and innovative medicines.

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600