SLAUGHTER AND MAY

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European Commission accepts commitments offered by Visa and Mastercard

On 29 April 2019 the European Commission **made binding** the commitments offered by Visa and Mastercard to address its concerns relating to inter-regional interchange fees (inter-regional MIFs) for payments in the European Economic Area (EEA) with consumer cards issued elsewhere. The Commission is the first competition authority in the world to intervene on inter-regional MIFs.

Background and Commission's concerns

Mastercard and Visa act 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 - even to those who use alternative payment methods.

These fees are either set bilaterally between individual banks or multilaterally (MIFs). Inter-regional MIFs are the fees charged on payments made with cards issued outside the EEA for purchases within the EEA. These payments are typically made by tourists and travelers, e.g. where a US tourist uses a card to pay a restaurant bill in Belgium.

The Commission, in **July 2015** and **August 2017**, sent a Statement of Objections (SO) to Mastercard and Visa, respectively, setting out its preliminary view that *inter alia*, Mastercard's and Visa's interchange fees for transactions in the EU using Mastercard and Visa cards issued in other regions of the world breach European antitrust rules (Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement) by setting an artificially high minimum price for processing these transactions. In particular, the Commission was concerned to ensure that the cost for retailers of accepting inter-regional Mastercard and Visa consumer card payments does not exceed the costs they face for accepting alternative payment means, such as through cash and digital wallet transactions.

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

The commitments

Making use of a process governed by Article 9 of Regulation 1/2003, both Mastercard and Visa separately offered the same commitments to address the Commission's concerns. On 4 December 2018 the Commission **invited comments** on the proposed commitments, which the Commission accepted following market testing.

Visa and Mastercard (separately) agreed to reduce the level of inter-regional interchange fees to or below the following binding caps:

- For in-store transactions: to 0.2 per cent of the value of the transaction for debit cards and 0.3 per cent of the value of the transaction for credit cards; and
- For online transactions: to 1.15 per cent of the value of the transaction for debit cards and 1.5 per cent of the value of the transaction for credit cards.[1]

The parties also committed to refrain from circumventing these caps through any measure equivalent in object or effect to inter-regional MIFs and to publish all inter-regional interchange fees covered by the commitments in a clearly visible manner on their websites. These fee caps represent a significant fee reduction of around 40 per cent (on average).

The commitments will apply for a period of five years and six months. A trustee will be appointed by the Commission to monitor their implementation.

Non-compliance with the commitments may result in a fine of up to 10 per cent of worldwide turnover.

Commissioner Margrethe Vestager **welcomed** the decision, and noted that the fee caps will "*reduce the costs borne by retailers for accepting payments with cards issued outside the EEA*" and lead to "*lower prices for European retailers to do business, ultimately to the benefit of all consumers*".

Previous action taken by the Commission

The Commission has taken many actions to reduce card fees for retailers, which have focused on Mastercard and Visa:

- In December 2007 the Commission found that Mastercard's MIFs on cross-border transactions in the EEA restricted competition between banks, a finding which was later confirmed by the Court of Justice in September 2014. Following this decision, Mastercard reduced its intra-EEA cross-border interchange fees applied by member banks to maximum weighted averages of 0.2 per cent for debit cards and 0.3 per cent for credit cards.

[1] The commitments will apply to inter-regional interchange fees applied to payments made with the Mastercard, Maestro, Visa, Visa Electron and V-PAY credit and debit card brands.

- Following a similar investigation, the European Commission accepted commitments offered by Visa Europe to cap cross-border interchange fees in the EEA at the same levels as those implemented by Mastercard. In addition, Visa Europe's 2014 commitments also addressed the Commission's concerns regarding rules on "cross border acquiring", 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 certain card types issued and used in Europe.

- On 22 January 2019 the Commission fined Mastercard €570 million in connection with scheme rules that obliged acquiring banks to apply the interchange fees applicable in the country where the retailer was located, such that cross-border customers would not be able to benefit from lower interchange fees available in other Member States. Those rules applied prior to 9 December 2015, when the EU Interchange Fee Regulation introduced caps. (For more details, see a previous edition of our **Newsletter**.)

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. Also, following on from the 2007 Commission decision, collective proceedings have been proposed in the UK against Mastercard, as covered in the previous edition of the **Newsletter**.

Implications in other jurisdictions?

The Commission is the first competition authority in the world to intervene on inter-regional MIFs. As there is an increasing move to non-cash transactions, the Commission sets an important precedent in this case. It will be interesting to see whether these decisions signal an increased impetus for other competition authority intervention in the interchange fees charged by Mastercard and Visa.

Other developments

Merger control

CMA consults on draft guidance for interim measures in merger investigations

The Competition and Markets Authority (CMA) has powers to impose interim measures on merging parties to prevent or unwind pre-emptive action. Pre-emptive action is "*action that might prejudice the outcome of a reference or impede the taking of any appropriate remedial action*". Depending on the nature of the business, such action could include: closing or selling sites, failing to retain key employees, discontinuing competing products or sharing commercially sensitive information. Interim measures can take three forms: (i) an initial enforcement order (IEO), which is imposed at Phase 1; (ii) an interim order (IO), which

is imposed at Phase 2 and replaces any IEO; and (iii) interim undertakings, which are agreed with the merging parties at Phase 2 and which replace any IEO.

On 1 May 2019 the CMA published a **summary of responses** to a consultation on draft new **guidance** on the use of interim measures in merger investigations. The CMA has decided to run a further consultation on a revised version of the guidance before finalising it. Since the last version of the draft guidance, the CMA has become increasingly aware of poor compliance with interim measures, which, it argues, is undermining the effectiveness of the UK's voluntary, non-suspensory merger filing regime. The CMA has therefore taken enforcement action where appropriate. The new version of the draft guidance reflects this recent action.

Interested parties can **respond** to the consultation until 29 May 2019.

Antitrust

CMA secures disqualification of two former directors in construction cartel

On 26 April 2019 the CMA **announced** it had secured legally binding disqualification undertakings from two directors of CPM Group Ltd. The directors have each given a disqualification undertaking not to act as a director of a UK company for 7 ½ years and 6 ½ years respectively.

The undertakings follow the CMA's **statement of objections**, issued on 13 December 2018, alleging that three suppliers (Stanton Bonna Concrete Ltd, CPM Group Ltd, FP McCann Ltd) engaged in a cartel to fix and coordinate prices and share out the market for certain pre-cast concrete drainage products in Great Britain for 7 years from 2006 onwards. CPM Group and Stanton Bonna admitted to participation in the alleged cartel and agreed to pay fines (which will be determined at the end of the CMA's investigation). Investigations remain ongoing with respect to other directors and FP McCann Ltd.

The CMA can apply to the court to disqualify a director from holding directorships or performing certain corporate roles, if a company, which he or she is a director of, has breached competition law. The CMA can also accept a disqualification undertaking from a director, as in this case, instead of bringing proceedings. The CMA recently published new **guidance** on competition disqualification orders and undertakings. These latest undertakings suggest that the CMA will continue to use this tool in its fight against cartels.

Hong Kong Competition Commission publishes Cooperation and Settlement Policy

On 29 April 2019 the Hong Kong Competition Commission (HKCC) **published** a Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (Cooperation Policy). The existing Leniency Policy, in place since November 2015, provides that the first company that reports a cartel and cooperates with the HKCC may be granted immunity. Supplementing this, the Cooperation Policy now provides a framework in which companies which do not benefit from immunity under the Leniency Policy can now opt to cooperate and settle an investigation with the HKCC.

In return for cooperation, the HKCC may discount up to 50 per cent of the pecuniary penalty it would otherwise recommend to the Competition Tribunal. The Cooperation Policy sets out three bands of discounts that may apply depending on the order in which companies express their interest to cooperate. The HKCC states that it will ordinarily indicate Band 1 (between 35 per cent and 50 per cent) to the first company and Band 2 (between 20 per cent and 40 per cent) or Band 3 (up to 25 per cent) to later ones depending on their order. The HKCC may decide, on a case by case basis, to include more than one company in each band, but the three bands are intended to incentivise companies to come forward swiftly in order to benefit from the highest possible discount.

The Cooperation Policy also provides that current and former employees, officers, partners and agents of the company may be granted immunity, provided that they fully and truthfully cooperate with the HKCC. Overall, the Cooperation Policy is a welcome and important development to strengthen the incentives for companies to cooperate with the HKCC in cartel investigations. Please see our separate **Client Briefing** for further details and analysis.

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