

The High Court sets the CAT among the pigeons

A win for MasterCard in the High Court



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The High Court has handed down a surprising decision in a claim by a number of retailers against MasterCard.¹ The High Court decided in MasterCard's favour holding that its multilateral interchange fees (MIF) were not anticompetitive. Mr Justice Popplewell found that if MasterCard's MIFs had dropped to zero the scheme would not have survived in the UK. As such, the MIFs were not restrictive of competition and were objectively necessary. This decision is at odds with the very recent decision of the Competition Appeal Tribunal (CAT) in *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others*.²

The High Court decision relates to twelve separate actions brought by a number of retailers, including the Arcadia Group, Asda and Next, against MasterCard. MasterCard sets the default level of fees to be charged for its credit and debit card transactions (such fees are known as the MIFs). The central issue in the cases is whether the MIFs set by MasterCard are anticompetitive and in breach of UK and EU law.³

High Court v CAT – What's the counterfactual?

Mr Justice Popplewell's key departure from the approach taken by the CAT in *Sainsbury's* is in the definition of the appropriate counterfactual – that is, what circumstances would have existed in the absence of the allegedly infringing agreement. The counterfactual is used to determine whether the agreement restricts competition by comparison with those circumstances.

In *Sainsbury's*, the counterfactual that the CAT adopted was that voluntary *ex ante* bilateral agreements would have been reached between the issuing and acquiring parties.⁴ The CAT determined that the average bilateral interchange fee which would have been negotiated would be 0.5% for credit cards and 0.27% for debit cards. Sainsbury's damages represented the difference between this putative negotiated fee and the actual MIF set by MasterCard.

In the High Court case, it was common ground between the parties and the experts that the CAT's counterfactual

was unrealistic. Mr Justice Popplewell agreed, finding that the counterfactual adopted by the CAT was not one which would, or even might arise. It would require a sufficient volume of merchants to voluntarily agree to pay an interchange fee to keep the MasterCard system alive despite being able to transact without paying any fee. The Claimants (all major retailers) did not put forward any evidence that they were prepared to do so.

The fundamental premise of this counterfactual is that merchants would choose to pay an interchange fee in order to avoid a Visa monopoly. However, the Court found that there was no evidence to support a conclusion that merchants would have had, or perceived, an incentive to keep the MasterCard scheme going. In fact, the Court pointed to the fact that when MasterCard (Maestro) lost almost all of the debit card market to Visa, there was no move from merchants to help MasterCard stay.

The Court was also not persuaded by the CAT's finding that '*substantially all UK domestic MasterCard*



transactions could be caught by relatively few bilateral agreements'. The evidence before Mr Justice Popplewell was quite the opposite. For example, in 2015 1,579 bilateral agreements would have been required for the UK market alone, and these would have had to be renegotiated at regular intervals. Those required for the EEA market would have been much greater in number. Mr Justice Popplewell concluded that such a volume of necessary agreements made the counterfactual adopted by the CAT unrealistic.

After an assessment of the remaining possible counterfactuals, the High Court found that the only potentially realistic ones were, a MIF set at zero⁵ or a positive but lower MIF.

Is the MIF a restriction on competition?

The Court had to determine, among others, two key questions. Firstly, whether the MIFs restricted competition on the acquiring market, and secondly whether such a restriction was objectively necessary under the ancillary restrictions doctrine. Both questions must be answered by comparison to the counterfactuals.

Subject to the question of whether the MasterCard scheme would have collapsed in the counterfactual worlds (the colourfully termed 'death spiral' argument), the Court found that the MIFs did amount to a restriction on competition on the acquiring market. This is because by setting a default MIF, MasterCard imposed a floor below which the fee could not fall. Setting such a floor restricts competition because it prevents acquirers from competing for merchants' business by offering fees below that floor. This view is consistent with the approach taken by the European Commission⁶ and by the CJEU.⁷

The Death Spiral

Zero MIF World

The Court went on to examine what would have happened to the MasterCard scheme in the UK in the counterfactual world where the MIF was set at zero and Visa's MIF was unconstrained. The Court found that in this world the MasterCard scheme in the UK would have entered a 'death spiral' and collapsed.

As such, the Court found that compared to that counterfactual, the MIF did not restrict competition on the acquiring market. This was because the counterfactual world contained no MasterCard acquiring market at all. It cannot therefore be said that the MIF posed a greater restriction on competition than in the counterfactual world. In any event, Mr Justice Popplewell concluded that the

death spiral argument applied equally to the restriction of competition argument and the ancillary restraint argument because of its effect on the acquiring market. Under the ancillary restraints argument, the MIFs would be objectively necessary to the main operation of the MasterCard scheme as a whole. This is because in the counterfactual worlds the MasterCard scheme would collapse.

Lower MIF World

The Court found that the MIFs were set below the level that would be exempt or exemptible by Article 101(3) (see below). As such, there is no lower level of the MIF that could be used in a counterfactual world.

Interestingly, the 'death spiral' argument was not raised in relation to the EEA MIFs and the High Court confirmed that these constitute a restriction of competition (albeit that the EEA credit card MIFs were at exemptible levels).

Exempt and Exemptible MIFs

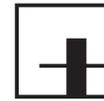
Another significant difference between the CAT's decision in *Sainsbury's* and the High Court decision is in relation to the approach to Article 101(3) TFEU. This provision recognises that some restrictive agreements may nevertheless result in pro-competitive effects in the form of efficiency gains. The effect of Article 101(3) is that a restriction on competition that would otherwise be prohibited can be exempt from prohibition if it meets certain criteria.

The CAT found that the MIF (as set) was not exempt since it did not meet any of the criteria. It also did not consider it necessary to determine the level at which the MIF would have been exemptible. The High Court disagreed with this conclusion, holding that the criteria were met and it also calculated the levels at which the MIF would be exemptible. The MIFs as set by MasterCard were below the calculated exemptible levels and as such were exempt.¹⁰

Significance

The decision is a heavy blow to the retailers' case and a surprise victory for MasterCard since it is at odds with the CAT's decision in *Sainsbury's* and parts of the CJEU's Decision. Like the CAT, the CJEU concluded that the MIFs were not objectively necessary (and could therefore not be regarded as ancillary restrictions) and the conditions for the application of Article 101(3) did not apply.⁹

This portion of the High Court decision relates only to



liability. A separate trial is set to determine the level of damages so the full impact is yet to be seen. However, since damages will only need to be assessed in respect of the EEA debit card MIF from the earliest part of the claim until June 2008, the great majority of the potential damages have been excluded.

The High Court underlined the fact that, while it was not bound by the CAT's decision, it accorded it '*considerable respect*'. However, the High Court had the benefit of hearing argument that specifically addressed the CAT's judgment which '*inevitably resulted in...refinements of*

the legal arguments from those which were presented to the CAT'.

It is unclear what impact this decision will have on the actions pending against MasterCard (and Visa) in both the High Court and the CAT, particularly the £14 billion consumer class action filed in the CAT. The direct split in approach between the High Court and the CAT makes an appeal to the Court of Appeal inevitable. MasterCard is already seeking permission from the Court of Appeal to appeal the CAT decision (the CAT having already refused such permission).

Endnotes

1. *Arcadia & Ors v MasterCard & Ors* 2017 EWHC 93 (Comm)
2. [2016] CAT 11
3. It also extended to Irish competition law but those issues are outside the scope of this article.
4. When a cardholder "pays" for goods or services provided by a merchant by card, the acquirer (usually a bank) provides the "acquiring" service to the merchant which allows it to receive card payments, and pays the merchant for the goods and services, less a discount. The acquirer obtains payment from the issuer (also usually a bank), who charges the cardholder for the transaction. The MIF serves as a default fee paid by the acquirer to the issuer.
5. The Court found that a zero MIF was equivalent to a counterfactual with no MIF but with a prohibition against ex post pricing.
6. Case No COMP/29.373 — Visa International; Case No COMP/34.579 – MasterCard.
7. Case C-382/12 P - *MasterCard and Others v Commission*, para 195.
8. Save for the EEA debit card MIF for the earliest part of the claim period prior to June 2008.
9. The CJEU's Decision was concerned with the EEA MIFs between 1992 and 2007. The High Court's decision concerned the UK, Irish and EEA MIFs from 2006 onwards.
10. Case 1266/7/16 – *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*

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