Briefing

December 2017

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Sainsbury's v Visa: Court of appeal set to get MIFfed



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On 30th November 2017 the High Court handed down a decision in a claim by Sainsbury's Supermarkets against Visa[1], in the long running and complex saga relating to Multilateral Interchange Fees (MIFs) in the payment card industry. Here the court found that Visa's UK MIFs were not anticompetitive in principle. This conclusion seems to stand in contrast with other recent decisions across the MIF litigation saga.

These contrasting decisions will now need to be picked through by the Court of Appeal in joint hearings together with Mastercard, scheduled to take place in April 2018.

In this particular case, Mr Justice Phillips found that Visa's UK MIFs were not anticompetitive in principle, contrasting with an earlier decision in the High Court brought by a number of retailers, including Sainsbury's, against Mastercard (the *Arcadia* case)[2], a decision on which we have briefed previously, where it was held that Mastercard's UK MIF were intrinsically unlawful restrictions of competition.

Again, in contrast to the *Arcadia* decision, Mr Justice Phillips opined that even if Visa's UK MIFs were a restriction of competition, he would not have regarded the MIFs as objectively necessary.

This decision, like Arcadia, also seems to be at odds with the decision of the Competition Appeal Tribunal (CAT) in *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* (the *Mastercard CAT case)*[3].

The counterfactual

Phillips J, consistent with Mr Justice Popplewell in *Arcadia*, departed from the approach taken by the CAT in the definition of the appropriate counterfactual – that is, what circumstance 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.

The counterfactual adopted in the Mastercard CAT case was that voluntary ex ante bilateral agreements would have been reached between the issuing and acquiring parties. In this case, the court gave short shrift to that argument, holding that the relevant counterfactual was a no-MIF world where no bilateral agreements would be reached. The absence of bilateral agreement was also a feature in Popplewell J's judgment in the Arcadia case.

Principal to this conclusion was the 'free-rider' argument: in a no-MIF world, no sensible merchant would sign up to a bilateral agreement because their competitors could achieve a better deal at their expense. Additionally, it was noted that Sainsbury's re-amended its Particulars of Claim in these proceedings to align with the *Mastercard CAT case* in 2016. The amendment argued that bilateral agreements would have been reached in the counterfactual world. The issue with this, however, was that such a conclusion contrasted with the broad consensus of economic expert witnesses heard by the High Court in this case, including previous statements given by Sainsbury's own economic expert.

The court then went on to conclude that in the absence of any bilateral agreements, in a no-MIF world there would not have been any actual competition in the acquiring market – the no-MIF situation restrains competition just as much

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as if MIFs were imposed. The court also concluded that a zero-MIF scenario is the same, in effect, as a scenario where transactions were settled at parity (i.e. no MIF was applied). The correct counterfactual therefore, according to Phillips J in this case, was a no-MIF/default settle at parity scenario.

Is the MIF a 'floor'?

Both Popplewell J and the European Commission viewed both Visa and Mastercard's EEA MIFs as constituting a 'de facto floor' for the merchant service charge, a finding that had been upheld by the Court of Justice of the EU (CJEU). Had it not been for Visa's arguments on this point, the court may have been inclined to follow this reasoning.

However, Phillips J was convinced by Visa's counsel that such a conclusion is incorrect as a matter of logic. Based on the principle that there would be no bilateral agreements as to interchange fees in the counterfactual discussed above, the court was convinced that there was somehow distinction to be made between the two counterfactuals was not correct. The European Commission's reasoning relied on the fact that bilateral agreements would have occurred in the counterfactual, a finding which Phillips J did not apply to the facts of this case in terms of Visa's UK MIFs.

Are MIFs an inherent restriction on competition?

Where Phillips J seems to have departed from the thinking applied in *Arcadia* was in the conclusion that MIFs were an inherent restriction on competition. Here, the court held that MIFs were not inherently anti-competitive. Phillips J has linked the existence of bilateral agreements in the counterfactual as essential to concluding that there would be a restriction on competition. Because the court concluded that there would be no bilateral agreements, the logical conclusion was that there could be no restriction on competition.

Are MIFs objectively necessary?

While the court held that Visa's UK MIFs were not inherently anti-competitive, when opining on whether MIFs were objectively necessary, Phillips J concluded that they are not. This is in contrast to the decision by Popplewell J in the *Arcadia* judgment.

Visa argued that MIFs were objectively necessary, as without them, they would have lost issuers to Mastercard. The court considered this to be an asymmetric counterfactual, and one where Mastercard is viewed as being unconstrained in setting MIFs.

Phillips J was more convinced in using the symmetrical counterfactual (where Visa and Mastercard are under the same competitive constraints), and also believed that it was instructive that the General Court had conducted analysis on various market factors on four-party schemes such as Visa and Mastercard, including competition with three-party schemes and the effect of regulation (in the Australian market, where it was noted that negative MIFs existed). These considerations assisted the court in reaching the conclusion that MIFs are not objectively necessary.

What now for MIF litigation?

This case appears to be another blow for Sainsbury's, and others, in the ongoing MIF litigation against the big four-party card schemes. However, given the complex and often conflicting judgments across different jurisdictions on this issue, it is far from likely that this would be the 'nail in the coffin' for these actions. Indeed, Phillips J recognises this as such at the end of the judgment in this case:

"...[it] is not strictly necessary for me to undertake the complex and detailed exercise of assessing what levels of UK MIFs (if any) would have been and would now be exempt under Article 101(3).However, given that the matter was extensively canvassed in evidence and argument before me and assuming (i) that this matter is to go further and (ii) the parties still wish me to determine the remaining issues, I propose to set out my findings on that question in a further judgment."

Given the intense confusion across different courts and bodies on this matter, we can therefore expect the saga to continue in the MIF battles. It will be up to the Court of Appeal to unpick the conflicting judgments and arguments in April 2018.

[1] *Sainsbury's Supermarkets Ltd v Visa Services LLC, Visa Europe Ltd and Visa UK ltd.* [2017] EWHC 3046 (Comm)
[2] *Arcadia & Ors v MasterCard & Ors* [2017] EWHC 93 (Comm)
[3] *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11

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