MASTERCARD WIN OVER RETAILERS FOR "INTERCHANGE FEES"

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Mastercard has won a victory against a group of UK retailers, including Morrisons, who had brought proceedings against it for damages for breaches of European Union and United Kingdom competition law. The claimant retailers contended that since 2006 they had paid about £437 million in anti-competitive *"multilateral interchange fees"* (fees a merchant must pay to its bank for accepting the card as a means of payment).

Mr Justice Popplewell found that, taken in isolation, the *"multilateral interchange fees"* ("MIFs") in the UK and Ireland charged to the claimant retailers by Mastercard restricted competition between acquiring banks by setting a price floor. However, Popplewell J went on to find that despite this the MIFs were objectively necessary, since, had Mastercard set the MIFs at zero (or at any materially lower level than the actual level set by its main competitor, Visa), Mastercard would have lost its business and the scheme would have collapsed. The Judge also found that the MIF benefits merchants who accept payment cards, including the stealing of business from other merchants.

The Judge set various levels of debit and credit card fees that he considered exempt or exemptible, under Article 101(3) of the Treaty on the Functioning of the European Union. He found that MIFs for all UK and Irish domestic transactions, and for cross-border EEA credit card transactions, could lawfully have been set higher than the average rates actually set by Mastercard and significantly higher than the fee caps introduced in the UK under the Interchange Fee Regulation in 2015. The exemptible rate for cross-border EEA debit card transactions was, however, below the level set by Mastercard between 2006 and June 2008.

Importantly, the court took a fundamentally different approach to that previously taken by the European Commission in its December 2007 Decision concerning the lawfulness of MasterCard's EEA MIFs (which was subsequently upheld by the General Court in 2012 and the CJEU in 2014). The Court also decided that it was not bound by the recent judgment of the Competition Appeal Tribunal in *Sainsbury's v Mastercard [2016] CAT 11* in which MasterCard's UK MIFs were found to be unlawful.

There are considerable differences in approach between the CAT's decision in the Sainsbury's case and the High Court judgment, which can be found here.

The High Court held that, in a counterfactual world where the MIF was set at any materially lower level than the actual level set by its main competitor, Visa, the scheme would have collapsed, and therefore that the UK and Irish MIFs as set were objectively necessary. Conversely, the CAT had concluded that if there was no UK MIF, the Mastercard Scheme would not have undergone a significant collapse as it would have adopted a business model based on bilateral rather than multi-lateral interchange fees which would have allowed it to continue to be competitive with Visa.

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It remains to be seen what impact this may have on related cases currently before the courts. Neither is this likely to be the end of the story. MasterCard have sought permission to appeal the CAT Judgment and the retailers involved in the High Court case against Mastercard are seeking permission to appeal Popplewell J's Judgment.

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