

Sainsbury's Supermarkets Ltd v (1) Visa Europe Services LLC (2) Visa Europe Ltd and (3) Visa UK Ltd

Conor McCarthy, Barrister, Monckton Chambers

Introduction

1. In a much-anticipated decision, the High Court (Phillips J.) has delivered judgment in *Sainsbury's Supermarkets Ltd v. (1) Visa Europe Services LLC and ors*. The Court dismissed Sainsbury's Claim. This case follows two earlier conflicting decisions of the High Court and Competition Appeals Tribunal in respect of the same subject-matter: *Asda Stores Ltd v. MasterCard Inc* [2017] 4 C.M.L.R. 32 and *Sainsbury's v. MasterCard* [2016] CAT 11.
2. The factual background to this litigation is complex. But some explanation is necessary at the outset. Briefly stated, Sainsbury's, like many other merchants, accepts Visa payment cards, issued to customers by banks or financial institutions ("**Issuers**"). Sainsbury's accepts such cards pursuant to an agreement with an acquiring bank or financial institution ("**Acquirer**") which participates in the Visa scheme ("**the Scheme**"). This scheme is operated in accordance with licensing arrangements issued by Visa Europe. Upon purchase of an item by a customer, the acquiring bank or financial institution charges the Issuing bank a Merchant Service Charge ("**MSC**") which is a sum covering several items: the fee the Acquirer must pay Visa; a fee charged by the Issuer to the Acquirer ("**the Interchange Fee**"); and the Acquiring bank's own fee ("**the Acquirer's Margin**"). Under the Visa Scheme Issuers and Acquirers are at liberty to negotiate the level of interchange fee to be applied in a transaction or class of transaction (a "**Bilateral Interchange Fee**"). However, such bilateral arrangements are almost unknown in the United Kingdom. In the absence of agreed BIFs, the Visa Scheme provides for a default Multilateral Interchange Fee ("**MIF**") set by Visa itself. Acquirers pass on all of the MIF to Merchants through the MSC, with negotiations between Acquirers and Issuers being limited to the level of the Acquirer's Margin. The imposition of, *inter alia*, the MIF by Visa is said by Sainsbury's and other claimants to constitute an anti-competitive restriction on trade contrary to Article 101 (1), TFEU.

Earlier Cases

3. The High Court's Judgment in Sainsbury's case follows two earlier conflicting decisions of the High Court and Competition Appeal Tribunal in

the interchange litigation. In *Sainsbury's v. MasterCard* [2016] CAT 11 the Competition Appeal Tribunal decided that the UK Multilateral Interchange Fees imposed by MasterCard constituted a restriction on competition by effect (but not by object) for purposes of Article 101 (1) and that these MIFs could not benefit from exemption under Article 101 (3). The CAT further found that but for the UK MIF, bilaterally agreed Interchange Fees would have been agreed in place of the UK MIF. The CAT defined the levels at which these would have been set: the equivalent of 0.5% (rather than 0.9%) in respect of MasterCard credit card transactions and the equivalent of 0.27% (rather than 0.36%) in the case of MasterCard debit card transactions. Sainsbury's were held to be entitled to recover an amount equivalent to the extent to which the UK MIF paid by Sainsbury's in the claim period exceeded the amount that Sainsbury's would have been charged absent the UK MIF.

4. In *Asda v. Mastercard* [2017] EWHC 93 (Comm) (Poplewell J) the court's approach was different. The High Court also found that the MIFs set by MasterCard constituted a restriction on competition by effect. The Court found that this occurred through imposition of a floor through which the MSC could not fall, because acquiring banks had to pay at least that much to issuing banks who had to recoup it from the merchants. This, the court found, in turn led to higher prices charged by acquirers to merchants through the MSC than if the MIF were lower or zero. The Court found that such a floor restricted competition because it interfered with the ability of acquirers to compete for merchants' business by offering MSCs below such floor. This reasoning was emphatically rejected by Phillips J in *Sainsbury's v. Visa* [§§ 152-161].

The High Court's Analysis in *Sainsbury's v. Visa*

5. The question considered by the Court in its judgment was, first, whether the default UK MIF imposed by Visa restricted competition in breach of Article 101 (1) TFEU. Second, the Court was also tasked with considering whether, if so, the UK MIF was objectively necessary (and therefore justified under Article 101) for the operation of the Visa Scheme (provided the Scheme did not itself infringe Article 101).
6. As to the first overarching question, in line with well-established jurisprudence, the Court compared the competitive situation which, in fact, existed with the competitive situation in a hypothetical scenario where the alleged restriction on competition was absent (Judgment [§ 98 – 151]). Analysis was then undertaken of the scope and effect of competition in each scenario. In determining this question, the Court considered whether the hypothetical counterfactual should be treated as “symmetrical” or “asymmetrical”; in other words, if it is assumed that MasterCard is equally

constrained in the counterfactual not to set MIFs (symmetrical) or whether it is assumed that MasterCard is free to continue to do so. The Court further considered whether the default MIF acted as a “floor” for the MSC thereby reducing competition (Judgment [§§ 152 – 160]). Finally, the Court considered the question of objective necessity.

Comparison between Actual Scheme and Counterfactual Scheme

7. The starting point for the Court’s analysis was to challenge the proposition (which it described as “heretical”) that the mere fact that an agreement between competitors results in higher prices than if the agreement had not been made in itself sufficient to mean that such an agreement restricts competition for purposes of Article 101 (1) such that a restriction on competition is to be assumed or inferred based on the adverse effect the agreement has on prices. The Court rejected this analysis. The Court emphasised that Article 101 is expressly concerned with competition and that whilst agreements contrary to Article 101 (1) will usually be identified by their adverse effects on prices, such an effect is the result of the prohibited activity and not the prohibited activity itself. Phillips J went on to emphasise that for an agreement to fall within the scope of Article 101 (1) the agreement must reduce competitive intensity in the relevant market (Judgment [§ 97]). The Judgment noted [§ 83] the Commission’s Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements which provide that an agreement which affects the decision-making independence of a party, by regulating or influencing its conduct on the market, falls within the scope of Article 101. Analysis of what the concept of decision-making independence entails was, however, relatively limited.
8. Having made this point, the Court considered the parameters of the counterfactual scenario it would use to conduct the analysis of whether a default MIF restricted competition. The elements of this scenario were largely agreed between the parties.
 - a. First, the restrictive provision regarding the setting of a default MIF by Visa would be absent in the counterfactual leaving Issuers and Acquirers free to agree the payment of an interchange fee bilaterally. There would therefore be no default MIF in the counterfactual.
 - b. Second, the Scheme would continue to provide that transactions would be settled at par. In other words, that the Issuer would have to pay the Acquirer 100 % of the value of the value of the transaction between merchant and customer. In the presence of an Honour All Cards Rule, Issuers would have the ability and incentive to demand high interchange fees to the detriment of all scheme participants or

to hold out for such fees. This was not workable in practice and so the rule requiring settlement between Issuer and Acquirer at par was essential to the operation of the Scheme and would remain in the counterfactual.

9. The Court then considered whether BIFs would come to exist in the no-MIF/default SAP counterfactual situation. The CAT Sainsbury's judgment and the High Court's ASDA judgment differed on this issue. The CAT concluded that in the counterfactual scenario Issuers and Acquirers would probably reach bilateral agreements regarding the Interchange Fees payable. In *ASDA v. MasterCard* Popplewell J reached the opposite conclusion. Popplewell J found that in the counterfactual Merchants and Acquirers would insist on the best settlement terms available: settlement at par with no interchange fee. As a result he concluded that there would be no bilateral agreements in the counterfactual. The same position exists in the real world.
10. The Court then considered the evidence before it. The expert witnesses unanimously agreed that, owing to free-rider issues, bilateral agreements on interchange were unlikely to emerge even if such agreements made merchants collectively better off. The Court drew from this that the competitive situation in the counterfactual scenario (symmetrical or asymmetrical) would be exactly the same as in the real world. In both cases, the court observed, there would be no incentive to depart from the default, regardless of the level at which the default was set. The Court also found that at trial no witness of fact had given evidence which supported the proposition that bilateral agreements would be reached in the no-MIF/default SAP counterfactual. Several gave evidence that no such agreements would emerge (Judgment [§122]). In light of the evidence the Court found that bilateral interchange fees would not emerge in the counterfactual.
11. The analysis proceeded to consider whether, in the absence of bilaterally negotiated BIFs, there would be "competition" in the no-MIF/default settlement at par counterfactual. In many ways this issue went to the core of the case. Sainsbury's case was that even if, in the counterfactual scenario, the result was settlement at par with no interchange fee that outcome was the result of a competitive process which is absent where there is a MIF. This competitive process was altered by the imposition of the MIF. In contrast, the MIF is not the result of a competitive process but is imposed by VISA.
12. The Court rejected this argument. It found that there is no difference in the competitive process in the two scenarios in the absence of bilateral agreements. In either case, the market will not deviate from the default

settlement rule set by the Scheme notwithstanding that the market participants are free to do so. In either scenario, the process drives the price to the default setting. In addition, the Court found [§135] that it was erroneous to regard the default MIF as “imposed” whereas the MIF/default rule is not imposed. Both are, in substance, default provisions mandated by the Scheme regulations.

The Relevance of Commission’s MasterCard Decision and CJEU’s MasterCard Judgment

13. The Court went on to address Sainsbury’s argument that the Commission had decided that MasterCard’s IntraEEA MIF restricted competition by reference to the no-MIF/default SAP counterfactual concluding that it had amounted to a restriction on competition Sainsbury’s. That decision, Sainsbury’s pointed out, was upheld by the General Court and the CJEU in their respective MasterCard decisions. Sainsbury’s submitted that the High Court was bound by these decisions. Visa argued that whilst the legal principles established by the MasterCard CJEU judgment were binding, its rejection of MasterCard’s appeal did not amount to a finding that MIF’s were, as a matter of legal principle, an infringement of Article 101. The Court examined the Commission’s MasterCard decision in some detail as well as the General Court’s decision in MasterCard. It found that it was not bound to follow the Commission’s Decision in MasterCard in the case before it as it was based “on a determination of fact by the Commission” [§ 148]. The CJEU did not decide that MIFs are, as a matter of law, a restriction on competition.

Whether MIF’s Function as an Anti-competitive “Floor” for the MSC

14. The Court then considered whether setting a MIF infringes Article 101 (1) because it acts as a “floor” for the MSC. In *Asda v. MasterCard* the Court found that MasterCard’s MIF had amounted to a restriction on competition because it acted as a floor which restricted competition by interfering with the ability of acquiring banks to compete for merchant’s business by offering a merchant service charge below the floor set by the level at which the MIF had been set.
15. Phillips J accepted that the findings of the High Court on this question were to be treated as “highly persuasive” authority but ultimately rejected the conclusion reached. According to the Court the situation created by the imposition of a MIF is “exactly the same at any lower level of MIF” or in the counterfactual situation of a no-MIF/default SAP. The counterfactual also gives rise to a “floor” the court held, both in economic terms and as a matter of logic. It prevents the possibility of market forces driving the MIF to a negative level. In addition, the court found that the argument

that the MIF creates a “floor” beneath the MSC “ultimately equates” to the argument that a MIF restricts competition simply because it raises interchange fees above the level they would be at in the counterfactual world. The Court rejected this argument, inter alia, on the same grounds that it rejected the argument that the actual MIF is anti-competitive when viewed against the counterfactual scenario before the Court. The Court concluded that “once it has been accepted or determined that there would be no bilateral agreements as to Interchange Fees in the counterfactual, the inevitable conclusion is that a MIF does not restrict competition any more than does a no-MIF/default SAP rule.

Objective Necessity

16. Finally, the Court considered the question of objective necessity finding that if it had found that Visa’s UK MIFs constituted a restriction on competition within Article 101 (1) such a restraint was not “objectively necessary” (Judgment § 191). In considering this issue the Court had to consider the judgment of the Court of First Instance in *Metropole Television and ors. v. Commission* [2001] 5 CMLR 33 in which the CFI had held [§ 109] that in considering the question of objective necessity the analysis to be conducted is “relatively abstract” and does not require analysis of whether the restriction is essential “in light of the competitive situation on the relevant market”. In addressing the issue of objective necessity, it was also necessary to consider the treatment of this case by Poplewell J in *Asda v. MasterCard*, where the Court found that *Metropole* had been overruled by the CJEU in its decision in *MasterCard*. In *Sainsbury’s Phillips J* rejected the conclusion that *Metropole* had been overruled by the CJEU finding no inconsistency between the CJEU’s approach in *MasterCard* and that of the CFI in *Metropole*. On the contrary, the Court found that *Metropole* had been followed.
17. In argument Visa did not assert that the setting of MIFs was essential to the operation of the Scheme (since such schemes operate in other jurisdictions absent MIFs). Instead it asserted that the commercial realities of its business in the UK market meant that they were required. Having rejected the view that it was permissible to take such factors into account, the court found that it followed that the default MIF’s were not “objectively necessary” for the operation of the Scheme for purposes of Article 101 (1). This, of course, did not prevent the Court finding in Visa’s favour more generally, as the Court had found that the UK MIF did not constitute a restriction on competition for purposes of Article 101 (1).

Comment

18. The differences in approach between the three interchange decisions

will evidently require resolution by the Court of Appeal. Much, of course, may turn on differences in the evidence before the various tribunals, in particular, the economic and industry-specific evidence adduced in the three cases. Beyond the purely evidential and factual issues in play, the case raises an interesting question of legal principle regarding the circumstances in which an agreement can materially affect the competitive process so as to fall within the ambit of Article 101 (1). In the European Commission's *Guidelines on the Applicability of Article 101 to Horizontal Cooperation Agreements*. The Commission explains that an agreement may appreciably restrict competition by reducing "the parties' decision-making independence, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives". In the event Phillips J's analysis of the economic and industry evidence is accepted, it may be that the concept "independent-decision making" and how this applies in the context of a default MIF scheme, merits further consideration at appellate level.

Mark Brealey QC acted for Sainsbury's Supermarkets Ltd in the claim.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.