

Claiming damages for anti-competitive agreements: the Competition Appeal Tribunal orders MasterCard to pay £69.3 million to Sainsbury's supermarkets

Commentary on the UK Competition Appeal Tribunal's judgment
in case number 1241/5/7/15 (Sainsbury's Supermarkets Ltd. v MasterCard Incorporated
and others) of 14 July 2016

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1. Introduction

In 2012, the British supermarket chain Sainsbury's filed a claim for damages against MasterCard, arguing that it had incurred losses as a result of having to pay unlawful overcharges in respect of payment credit and debit card transactions. Sainsbury's claimed that the multilateral interchange fees (MIFs) implemented by MasterCard in the UK were in breach of art. 101 of the Treaty on the Functioning of the European Union (TFUE) and/or the prohibition set out in Chapter I of the UK Competition Act 1998. Although a 'stand-alone' action - rather than a 'follow-on' one that relies on a competition authority's previous finding of anti-competitive conduct - it did refer to certain findings of fact made by the European Commission, in a 2007 decision addressed to MasterCard, which concluded that the intra-EEA MIF set by MasterCard pursuant to the MasterCard Scheme infringed art. 101 TFEU. In 2014, the Court of Justice of the European Union dismissed MasterCard's appeal against the decision and affirmed the Commission's findings.

2. Analysis of the judgment

On 14 July 2016, the Competition Appeal Tribunal upheld Sainsbury's claim and ordered MasterCard to pay damages in the amount of £69.3 million (approx. €81 million) plus interest.

2.1. *Binding nature of findings of fact made in previous Commission decisions*

The Competition Appeal Tribunal confirmed that the Commission's findings of fact were not binding inasmuch as the 2007 decision related to a different Interchange Fee (the intra-EEA MIF) that was applicable to different transactions occurring (for the most part) in a different period of time. The Tribunal did state, however, that the conclusions of law expressed by the Court of Justice or the General Court, where based on facts that were materially indistinguishable from those before the Competition Appeal Tribunal, would be considered binding and in Sainsbury's case there was one such instance - namely the question of whether the setting of a MIF by MasterCard was a decision as an association of undertakings and/or was an agreement between undertakings.

2.2. *Characterisation of the conduct*

The Competition Appeal Tribunal concluded that the setting of the UK MIF was an agreement between undertakings implemented through the MasterCard Scheme Rules between MasterCard and its licensees pursuant to the provisions of such rules. In particular, the Tribunal pointed out that, although the agreement was not anti-competitive by object,

the setting of interchange fees under MasterCard's card payment scheme was anti-competitive by effect.

The main argument was that MasterCard could have implemented its card payment scheme without setting interchange fees. The Competition Appeal Tribunal analysed a counterfactual (or alternative) hypothesis where MasterCard's interchange fees did not exist and concluded that, in their absence, bilaterally agreed interchange fees would have been agreed in place of the UK MIF. These bilaterally agreed interchange fees would have been 0.50% (rather than the 0.90% interchange fee set by MasterCard) for credit card transactions and 0.27% (rather than the 0.36% fee set by MasterCard) for debit card transactions.

Furthermore, the Competition Appeal Tribunal held that the UK MIF as set was not exemptible under art. 101(3) TFEU. Although it was admittedly possible for some level of UK MIF to be exemptible under such article, on the facts of this case that level would inevitably be lower than the bilaterally agreed interchange fees

2.3. *Calculation of damages*

The Competition Appeal Tribunal calculated the amount of damages by reference to the overcharge, i.e., by subtracting the amount Sainsbury's should have paid pursuant to the estimate of bilaterally agreed fees from the amount it actually paid under the existing interchange fees. Moreover,

the Tribunal was of the opinion that MasterCard's 'pass on' should fail because no identifiable increase in retail price had been established, still less one that was causally connected with the UK MIF, nor could MasterCard identify any purchaser or class of purchasers of Sainsbury's to whom the overcharge had been passed who would be in a position to claim damages.

3. **Conclusion**

The decision analysed by the Competition Appeal Tribunal is a landmark for future claims for damages arising from anti-competitive conduct in the UK, due not only to the high amount of damages awarded but also to the depth and rigor with which the judgment dealt with the legal issues raised in the case, such as the use of the counterfactual hypothesis to determine the unlawfulness of the contested conduct or the requirements for the 'pass on' defence to succeed.

Claims for damages arising from anti-competitive conduct are currently less frequent in Spain than in other jurisdictions. However, they could increase following the transposition of the Directive on antitrust damages actions (which must be transposed by 27 December 2016). This directive introduces important changes with respect to bringing actions for damages for infringement of competition law. Furthermore, some of these changes are already being put to use by the Supreme Court (2013 Supreme Court judgment in an action for damages against a sugar cartel), meaning that the expected increase in the number of such actions could take place even before the directive is transposed.