MERRICKS JUDGMENT ON CAUSATION - WHAT'S NEXT FOR THE CAT'S FIRST COLLECTIVE ACTION?

On 26 February 2024, the UK's Competition Appeal Tribunal ("**CAT**") handed down a judgment on a preliminary issue relating to causation in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2024] CAT 14 ("**Merricks**"). Merricks is a follow-on collective action against Mastercard pursuant to the European Commission's ("**EC**") finding in 2007 that Mastercard's EEA multilateral interchange fees ("**MIFs**") breached Article 101 of the TFEU (the "**EC Decision**"). Merricks was the first claim to be certified under the CAT collective actions regime.

In a nutshell

Mr Merricks alleges that UK domestic interchange fees were higher than they would have been absent Mastercard's infringement in respect of EEA MIFs. This latest judgment considered as a preliminary issue whether, as a matter of fact, there was any causal link between EEA MIFs and UK domestic interchange fees. The CAT concluded that there was no such causal link, finding that there was no evidence to support a conclusion that EEA MIFs had in fact acted as "*a floor, guidance, benchmark, minimum price recommendation, minimum starting point, and/or minimum level*" for the UK's interchange fees.

Although the CAT highlighted that this judgment did not express any opinions as to whether the position would have been the same in the counterfactual scenario (which is still a matter to be determined), this judgment could represent a significant setback to Mr Merricks' claim. While it remains open to Mr Merricks to argue that the "*various assumptions made about that counterfactual world*" mean that the position would be different in that scenario – including, for example, whether in the counterfactual, factors such as the levels of Visa MIFs or the Eurocard/Mastercard rules would have been different – the CAT's conclusions that EEA and UK MIFs had no factual causal link are likely to severely restrict the arguments available to Mr Merricks.

Although the judgment is highly fact-specific, it highlights the difficulties that claimants may face in obtaining compensation for claims under the CAT collective actions regime. These claims tend to be lengthy and costly, and because the first liability trials have only been heard recently, they have so far led to limited recoveries despite the large amounts sought by claimants. This judgment calls into question the extent to which the CAT's factual findings will impact the fundamentals of the case. It also remains to be seen how this will impact the claim's litigation funders, Innsworth Capital, which have undertaken to pay Mastercard its costs of defending the claim up to £15 million in aggregate. Given the relevance of the judgment, we expect that Mr Merricks might consider appealing.

Further detail on the judgment is set out on next page.

Judgment

Given the complexities of the case, which covers a wide class comprising all UK residents aged 16 and above, who between 22 May 1992 and 21 June 2008, purchased goods and/or services from merchants that accepted Mastercard, the CAT opted to hear certain issues as preliminary issues. On this instance, the issue before the CAT was whether, as a matter of fact, the level of EEA MIFs over the relevant period had any causative effect on the level of UK interchange fees (whether charged bilaterally or multilaterally), as alleged by Mr Merricks. To assess this question, the CAT looked at three distinct periods of the claim.

Period 1: 22 May 1992 – 30 October 1997

This period preceded the setting of UK MIFs, which were introduced in November 1997.

Mr Merricks' case was that, during this period:

(a) in the absence of a bilateral fee agreed between banks, EEA MIFs would apply directly as a fallback rate under the relevant Mastercard rules; and

(b) where interchange fees were agreed by the banks bilaterally, the EEA MIFs operated as a "*floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level*" in the negotiations.

The CAT found, based on the evidence, that the fallback rates in this period were EEA MIFs. However, there was significant dispute between the parties as to the extent to which UK banks had reached bilateral agreements in the period. While Mr Merricks argued that 50% of domestic transactions had taken place at the default rate, Mastercard contended that in almost all cases the interchange fee had been agreed bilaterally. The CAT found, based on records from Mastercard and witness evidence, that only an "*insignificant minority*" of domestic transactions were not subject to bilateral interchange fee agreements.

The CAT went on to consider whether, as Mr Merricks alleged, the default MIFs (i.e., EEA MIFs), had acted as a floor, guidance, benchmark and/or minimum price recommendation in the bilateral agreements between banks. Mr Merricks argued that, given that both parties would have been aware of the default MIFs, bargaining theory dictated that the banks would have taken this into account in their negotiations. The CAT rejected this argument, noting that in reality negotiations were likely to have been more complex due to commercial considerations (e.g., banks' commercial relationships and the fact that banks often acted as both issuers and acquirers under different schemes) and regulatory considerations (e.g., threat of intervention). In any event, the CAT found on the facts that, even if the parties failed to reach an agreement, the dispute would likely be referred to arbitral proceedings where another reference rate (Mastercard/Europay UK Ltd's ("**MEPUK**") reference rate) would be used. Overall, the CAT found that, although the EEA rates were "*not wholly irrelevant*", they were a "*relatively minor factor*" in the bilateral negotiation of interchange fees. On the basis of witness evidence, the CAT regarded the prevailing Visa rates and the market more broadly as the greatest influence on interchange fees.

Period 2: 1 November 1997 – 18 November 2004

Following the introduction of UK MIFs in 1997, it was accepted by all parties that UK banks no longer negotiated specific bilateral agreements but instead followed the MIFs as set by MEPUK – namely, 1.3% for standard and 1% for electronic transactions. MEPUK's authority to produce these rules was contingent upon MEPUK being sufficiently representative of UK members of the Eurocard/Mastercard scheme – it needed to maintain a representation threshold of 90% (which was later reduced to 75% in 1997), failing which it was common ground that UK MIFs would revert to EEA MIFs.

Mr Merricks argued that:

(a) As acquirers wanted lower interchange fees and issuing banks wanted higher interchange fees, these conflicting interests resulted in UK MIFs being set "*by reference to*" the EEA MIFs, because banks had no incentive to accept rates above or below that benchmark.

(b) Because a significant proportion of total UK acquiring value was concentrated within a few acquiring banks, issuing banks did not seek to agree fees higher than EEA rates for fear that acquirers would withdraw from MEPUK, thus triggering the representation threshold. At the same time, MEPUK's board was heavily weighted in favour of the issuing banks, whose commercial interests were to not accept MIFs lower than the EEA MIF rate.

The CAT dismissed these arguments, noting in particular that:

(a) Although the CAT recognised the tension between acquirers and issuers' interests, it rejected the contention that this was influenced by the default EEA rates. MEPUK's reference rates were initially set higher than EEA MIFs and remained that way throughout the period, despite fluctuations in the level of EEA MIFs. By contrast, Mastercard's UK MIFs tracked changes to Visa's interchange fees. Given this trend, the CAT concluded that it was the competing Visa scheme which influenced MEPUK's decisions regarding Mastercard's UK MIFs. Indeed, the evidence suggested that domestic market considerations were particularly important in setting the appropriate level of interchange fees.

(b) Whilst the CAT also accepted that there was a possibility that the three largest acquiring banks could threaten to withdraw from MEPUK, this had not occurred and, in practice, MEPUK was able to set and sustain UK MIFs at a level higher than EEA MIFs without losing representation. Indeed, the CAT highlighted that there were many other benefits to banks (unrelated to interchange fees) associated with the MEPUK's authority to set UK domestic rules, such that withdrawing was seen as a nuclear option.

Finally, the CAT also rejected an alternative argument by Mr Merricks that the UK MIFs were in any event "*infected*" by the EEA MIFs when they were introduced as they were based on the bilateral rates agreed in Period 1. Given the CAT's finding that bilateral interchange fees in that period were not set by reference to EEA MIFs, this argument was dismissed accordingly.

Period 3: 18 November 2004 – 21 June 2009

During Period 3, MEPUK no longer had the authority to set UK MIFs and this was taken over by Mastercard on the advice of the European Interchange Committee ("**EIC**"). Mr Merricks argued that, as the body which controlled and/or set UK MIFs was now the same body that set the EEA MIFs, it followed that the UK MIFs were bound to be influenced by EEA MIFs. He also argued that, from 2006, this situation continued insofar as a member of Mastercard's management board subsequently became responsible for setting both rates.

The CAT found that Mr Merricks had failed to provide sufficient evidence that EEA MIFs influenced EIC or Mastercard's determination of UK MIFs. Instead, the CAT's conclusion on the evidence was that the largest influence on UK MIF rates was Visa's UK MIFs. More broadly, the CAT also pointed to evidence that the EIC, when setting the levels of domestic MIFs in various jurisdictions, looked at national market considerations rather than EEA MIF levels. On this basis, the CAT rejected the argument that EIC and Mastercard's involvement in setting both EEA and UK MIFs had led EEA MIFs to exert any influence on the levels of UK MIFs.

Conclusions

The judgment makes clear that, in analysing a question of fact, the CAT considered that evidence as to the actual levels of EEA and UK MIFs, and the way those levels changed throughout the relevant period, was "*much more telling*" than the economic analyses submitted by the parties. For example, the CAT noted in particular that:

(a) across five categories of EEA and UK MIFs, no example in the data existed where a change in the EEA MIF was followed by a corresponding change in the UK MIF; and

(b) when Mastercard's EEA MIF was reduced to zero in June 2008 following the EC Decision, the UK MIFs remained unchanged until up to at least June 2010, illustrating the "*striking lack of connection, whether as a benchmark or guidance, between the two sets of MIFs*".

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