BCLP. Client Intelligent

Insights

MASTERCARD OVERCHARGE COUNTERFACTUAL DECLINED – TRIBUNAL RULES IN MERRICKS CLASS ACTION

Apr 20, 2023

SUMMARY

The Competition Appeal Tribunal has handed down a judgment determining several preliminary issues in the £17 billion collective action brought against Mastercard in relation to anti-competitive multilateral interchange fees, following on from the European Commission's infringement Decision.

In this Insight, we discuss the Tribunal's rejection of Mastercard's argument that it could rely on a counterfactual scenario premised on the interchange fees having been set at a lower, lawful level, thereby limiting the claimants' recoverable losses. We consider in particular the Tribunal's ruling that this argument was precluded by the binding effect of the decision, or alternatively, by the argument constituting an abuse of process given that Mastercard did not advance it before the Commission.

On 4 March 2023, the Competition Appeal Tribunal ("**CAT**") handed down a judgment in respect of several 'preliminary issues' in the *Merricks v Mastercard* collective action. The class representative, Walter Merricks (the "**CR**"), is seeking £17 billion in aggregate damages on behalf of a class of 46 million consumers. The claim 'follows on' from the European Commission's 2007 decision against Mastercard (the "**Decision**"), which found that the cross-border EEA multilateral interchange fees ("**EEA MIF**") set by Mastercard and charged by cardholders' 'issuing' banks to merchants' 'acquiring' banks in the period from 22 May 1992 until 19 December 2007 had infringed Article 101 of the Treaty on the Functioning of the European Union ("**Article 101**"), which prohibits anti-competitive agreements.

BACKGROUND

The basis of the CR's claim is that:

- EEA MIFs were causative of domestic MIFs set in the UK payable by merchants' acquiring banks;

- the merchants' acquiring banks passed on all of the domestic MIFs to the merchants through a 'merchant service charge' ("**MSC**"); and
- the merchants then passed through all or a substantial part of the MSC by way of higher prices charged to their UK customers than would otherwise have been charged, i.e. had the EEA MIF been zero, and this constituted an **Overcharge**.

While the judgment is the first to be handed down that addresses the merits of the certified collective action, the case has a long procedural history:

- The CAT initially refused to certify the claim (2017). That decision was overturned by the Court of Appeal (2019) and this result was confirmed by the Supreme Court (2020) (read our insight, "*Merricks v Mastercard*: the Supreme Court delivers collective joy to class representatives"). The claim was remitted to the CAT and certified (2021) (read our insight, "Certified progress for the UK's Collective Actions Regime – the first opt-out class action has been approved ").
- Following certification, the CAT has handed down several judgments in 2022 and 2023 regarding pleading issues and class definition.

This latest judgment addressed several issues which had been hived off by the Tribunal for preliminary determination in advance of trial, including the question of whether Mastercard was entitled to advance a counterfactual based on an alternative, exemptible MIF, which is the focus of this Insight.

In particular, the Tribunal was grappling with Mastercard's argument that while the Decision established that it had infringed the prohibition under Article 101(1), it could nevertheless seek to establish in the proceedings that an alternative level of EEA MIF could have met the conditions under Article 101(3) that enable the exemption of an otherwise unlawful restrictive agreement. From that standpoint, Mastercard sought to argue that an alternative, exemptible EEA MIF was the appropriate counterfactual to adopt when quantifying loss – an approach that would necessarily limit the measure of any damages awarded.

The CR countered that Mastercard was precluded from running this argument. It argued this in two ways:

- First, on the basis of the binding effect of the terms of the Decision as a matter of EU law.
- Secondly, in the alternative, that Mastercard's argument was precluded by the abuse of process doctrine under English law.

THE TRIBUNAL'S DECISION

I. THE BINDING EFFECT OF THE DECISION

The Tribunal emphasised that the “critical question” was *“*what the Decision, reading the operative part in the light of the recitals which form its foundation, **actually decided**” (our emphasis).

The ‘operative part’ of the Decision, which summarises the infringement, included a finding that the EEA MIF restricted competition "by in effect setting a minimum price merchants must pay to their acquiring banks for accepting payment cards".

It was common ground that, as a matter of EU law (pursuant to Article 16(2) of EU Regulation 1/2003), the binding effect of a Commission decision applies not only to the operative part but also to the preceding recitals that explain it, insofar as they provide the 'essential basis' or the necessary support for the finding, or are necessary to understand its scope. This was what the Tribunal had held in a landmark judgment in the *Trucks* litigation (for which BCLP acted for various claimants), where the Tribunal ruled in favour of the claimants in respect of the binding effect of the Commission's decision in those proceedings (a judgment upheld by the Court of Appeal (read our Insight on this, "Bound by prior admissions: Court of Appeal upholds the CAT's abuse of process judgment against truck cartelists")).

It was on that basis that the Tribunal in *Merricks* assessed the meaning of the operative part of the Decision, reading it together with an extensive set of recitals recording the Commission's analysis of the conditions for potential exemption under Article 101(3). The Tribunal found that those recitals demonstrated that Mastercard had been invited by the Commission to submit empirical evidence that might justify its EEA MIF (or some level of EEA MIF) under Article 101(3) but it had disavowed that approach.

The Tribunal held that the operative part of the Decision clearly established that **any** EEA MIF restricted competition and that this interpretation was supported by recitals of the Decision that constituted an essential basis for that operative part. In other words, the infringement finding did not rest on the specific levels of EEA MIF.

Given the Tribunal’s view that the crux of the matter was what the Commission had actually decided, submissions as to what Mastercard would have done or how the Commission "might have made a different Decision of more limited scope if the case before it had been argued differently” were of little or no assistance, the Tribunal held.

Accordingly, the Tribunal found that Mastercard’s defence was precluded by the binding effect of the Decision.

II. ABUSE OF PROCESS

The Tribunal noted that if it was correct in its determination as to the binding effect of the Decision then it was unnecessary to consider abuse of process. However, they did so in any event, in case they were wrong.

The Tribunal referred back to how the principles of abuse of process had been applied in the *Trucks* litigation (in the same judgment referenced above – again, you can read our Insight "Bound by prior admissions: Court of Appeal upholds the CAT's abuse of process judgment against truck cartelists"), where the defendants had previously, in the context of a settlement procedure before the Commission, admitted various matters regarding the trucks cartel.

In *Trucks*, the Tribunal had applied the *Bairstow* test (from *SSTI v Bairstow* [2003] EWCA Civ 321) that if the parties to the later civil proceedings were not parties to the earlier proceedings, known as a 'different parties' case, then an abuse only arises where: (i) "it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated"; or (ii) "to permit such relitigation would bring the administration of justice into disrepute". A broad, merits-based approach is adopted when applying this test.

In *Trucks*, the claimants argued (and the Tribunal agreed) that it could be an abuse of process for the defendants to dispute before the Tribunal matters which they had admitted in the Commission settlement proceedings even though those matters were recorded in recitals that were not binding as a matter of EU law.

The Tribunal in *Merricks* acknowledged that, in contrast with the situation in *Trucks*, Mastercard had made no admissions. However, they stressed that abuse of process is a "particularly fact-sensitive" and flexible doctrine. The Tribunal therefore proceeded to consider Mastercard's conduct in the proceedings before the Commission.

As noted above, the Tribunal determined in the context of its ruling on the binding effect of the Decision that Mastercard had been invited to submit empirical evidence to justify its MIF but had disavowed that approach. After further examining available information and recitals of the Decision regarding Mastercard's defence of the Commission proceedings, the Tribunal concluded that exemption of a lower level of MIF was an issue which Mastercard "very deliberately chose not to raise at that time". This was despite it having "chosen to go through extensive proceedings with the [Commission]…and despite every opportunity to engage with the [Commission] on [that issue]".

In light of this, the Tribunal concluded that to permit Mastercard to run its defence would bring the administration of justice into disrepute (falling under the second head of abuse found in the *Bairstow* test).

The Tribunal considered that their decision was reinforced by the "close relationship" between the present case and the prior Commission proceedings given that the infringement was an essential element of the claim, putting the case in a different category to orthodox different parties cases where there are distinct private actions and the issue is whether the findings of a court in the first action should bind the court in the second action.

ANALYSIS AND PRACTICAL IMPLICATIONS

The Tribunal’s finding of an abuse of process in this type of case, where Mastercard had not made any admissions before the competition authority, breaks new ground.

Whereas in *Trucks* a key factor in the Tribunal’s ruling on abuse was the fact of the admissions made by the defendants in the formal settlement procedure – a fact that proved inescapable for the defendants – in *Merricks*, it was Mastercard’s conduct in the Commission’s investigation that rendered its attempted defence of the litigation abusive.

The Tribunal strongly emphasised the significance for its decision of its finding that Mastercard had positively and expressly “disavowed” an approach of seeking to justify a specific level of EEA MIF in the Commission proceedings, in circumstances where it was specifically invited by the Commission to address that issue. Therefore, the judgment raises the question of whether the mere omission to run an argument relevant to an infringement finding in the proceedings before the competition authority could amount to an abuse.

Take for example the defences commonly run by addressees of a cartel infringement decision as defendants in subsequent follow-on litigation that the scope of the decision should be narrowly interpreted, in terms of the specific categories of products in scope. It remains to be seen whether in particular circumstances the “flexible” abuse of process doctrine stretches so far as to prevent arguments such as these being run where the addressee did not make them in the prior proceedings.

However, standing back from the ruling on abuse, this judgment illustrates the multitude of challenges for defendants seeking to diminish the impact of a competition authority decision in subsequent litigation. Mastercard were ultimately constrained in their defence of the collective action not just by their conduct in defence of the Commission proceedings but by the binding effect of the broad terms of the Decision itself.

The judgment therefore underscores the importance for parties involved in competition authority proceedings of carefully considering not only the potential implications of the terms of an infringement decision for follow-on litigation – which will typically inform decisions taken on settlement and appealing the decision – but also their conduct of the defence of the infringement proceedings.

Read the Tribunal's judgment >

If you would like to discuss any aspect of the *Merricks v Mastercard* judgment, or collective actions more generally, please contact Ed Coulson or Sam Brown.

RELATED PRACTICE AREAS

- Antitrust Class Actions

- Class Actions

MEET THE TEAM

Edward Coulson

London

edward.coulson@bclplaw.com
+44 (0) 20 3400 4968

Samuel Brown

London

sam.brown@bclplaw.com
+44 (0) 20 3400 2607

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2024 Bryan Cave Leighton Paisner LLP.