RETAILER INTERCHANGE LITIGATION: THE SUPREME COURT AND BEYOND

Christopher Brown

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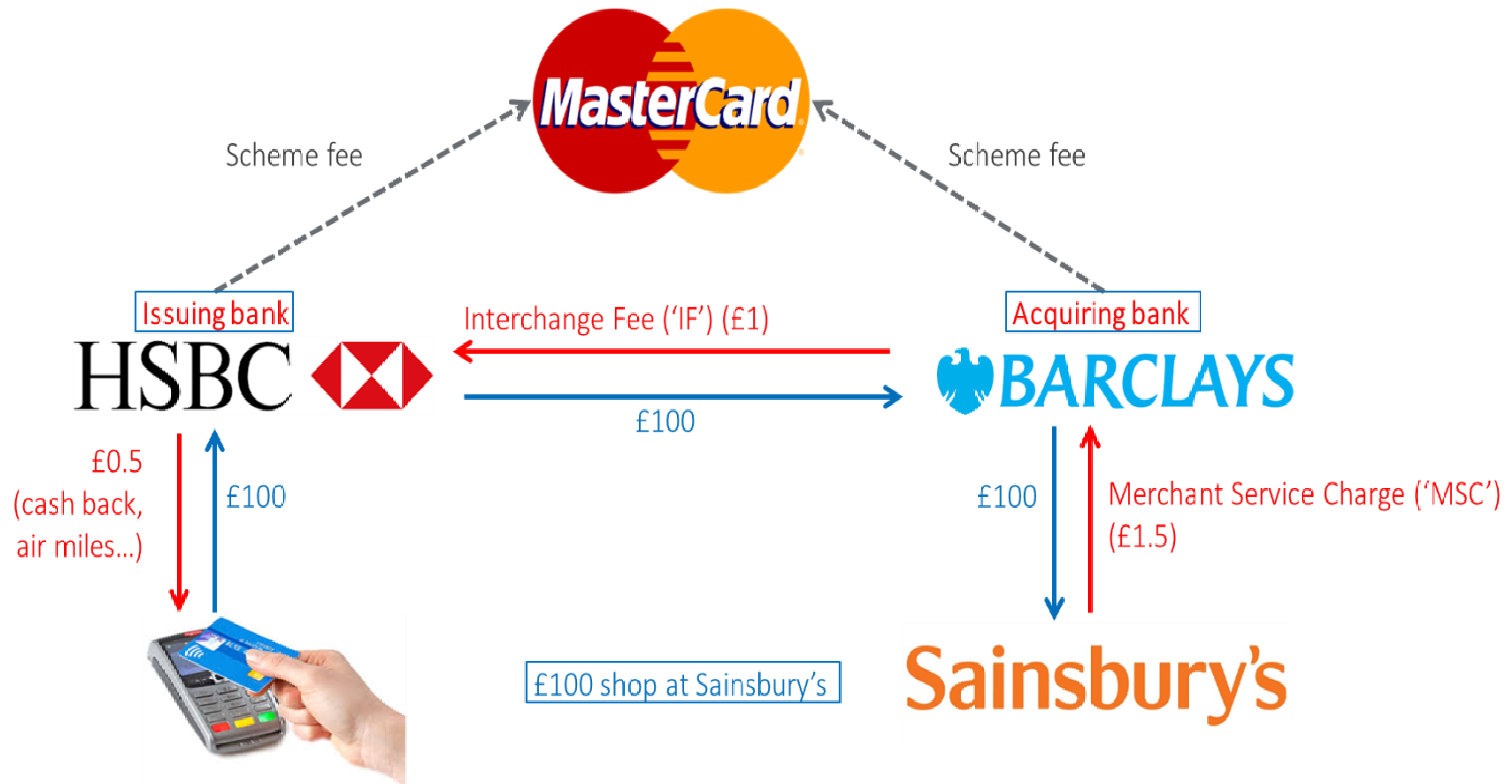
matrix@matrixlaw.co.uk +44 (0)20 7404 3447

matrix chambers

BACKGROUND

THE INTERCHANGE FEE IN OUTLINE



Numbers in the above example are purely illustrative

matrix@matrixlaw.co.uk +44 (0)20 7404 3447

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RECAP OF THE ‘LEAD’ RETAILER LITIGATION

- Three sets of proceedings went to trial – all before separate tribunals
  - *Sainsbury’s v MasterCard*: heard early 2016; judgment in July 2016
  - *AAM v MasterCard*: heard June-Oct 2016; judgment in Jan 2017
  - *Sainsbury’s v Visa*: heard Nov 2016-Feb 2017; judgments in Nov 2017 (Art 101(1)) and Feb 2018 (Art 101(3))
- Different conclusions and reasoning in all three cases:
  - CAT found an infringement, but based on a counterfactual of its own construction and with very little reasoning on Art 101(3), and awarded substantial damages
  - High Court in *AAM* found no infringement of Art 101(1) because of a ‘death spiral’ in the counterfactual; and in any event MC’s MIFs were exempt
  - High Court in *Visa* found no infringement of Art 101(1) because the counterfactual was no more competitive than the ‘factual’ (but rejected Visa’s ‘death spiral’ argument); but V’s MIFs would not have been exempt
- Court of Appeal essentially upheld all of the appeals and remitted to CAT
- Schemes appealed to the UKSC (NB not ‘death spiral’); AAM cross-appealed disposal of their appeal

SUPREME COURT JUDGMENT

FIRST ISSUE: RESTRICTION OF COMPETITION

- Schemes' argument at first instance/Court of Appeal:
  - the acquiring market in the counterfactual (settlement at par) is no more competitive than in the real world of MIFs: either way, there is a collusive agreement (no reduction of uncertainty with MIFs); and either way, acquirers compete just as vigorously over the 'acquirer margin'
  - There is no 'magic' in the number zero – it is just the midpoint on a scale
  - The Commission's *MasterCard* decision turned on a factual finding that there would be greater uncertainty without the EEA MIF; here, the Court was entitled (indeed, obliged) to reach a different factual finding: *Crehan*
- Court of Appeal found (§§126ff):
  - The 'magic of zero' is that the agreements to impose default MIFs are absent
  - The factual and counterfactual situations were materially the same as in the Mastercard EEA MIF case before the Commission and EU Courts
  - The EU Courts had found the MC EEA MIF to be restrictive compared to the CF in that they limited the pressure merchants could exert on acquirers
  - The GC/CJ findings were ones of law, based on a materially identical fact pattern to the UK litigation (contrast *Crehan*)
  - The schemes' arguments had already been rejected by the EU Courts

RESTRICTION OF COMPETITION: UKSC JUDGMENT

- The narrow legal question was whether the court was bound by the *Mastercard* judgment of the CJEU
- The UKSC held that it was, because the factual findings in both cases were the same
  - The (non-negotiable) MIF is determined by a collective decision between undertakings, rather than by competition
  - It has the effect of setting a minimum price floor for the MSC
  - The counterfactual is settlement at par (prohibition on *ex post* pricing)
  - In the counterfactual there would be no bilaterally agreed IFs
  - In the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower
- UKSC rejected the Schemes' argument that the Mastercard Commission decision, upheld by the EU Courts, was based on a determination that the competitive pressure placed on acquirers by merchants was stronger in the counterfactual because of the possibility of bilateral agreements: this was a misinterpretation of the Commission decision and subsequent judgments

RESTRICTION OF COMPETITION: UKSC JUDGMENT

- Further question: even if not binding, should the court follow the CJEU judgment?
- Answer: yes (§§95-104)
  - The price-fixing prohibition in Art 101(1) extends to the fixing of part of the price
  - The price here is the MSC (the price on the acquiring market)
  - The effect of the collective decision to set the MIF is to fix a minimum price floor for the MSC
  - That minimum price is non-negotiable and immunised from competitive bargaining: acquirers have no incentive to compete over that part of MSC
  - Whilst settlement at par also sets a price floor, it is a floor which reflects the value of the transaction: it involves no charge resulting from a collective decision
  - Therefore, there is a “clear contrast” in competition terms between the real world and the counterfactual

SECOND ISSUE: EXEMPTION

- The CA's seven principles relating to Art 101(3) (CA, §§83-109):
  - Relevant benefits must be causally linked to the restriction (the MIF)
  - Causal link must be sufficiently direct
  - Here, it must be shown that (1) the MIFs incentivise issuers to take steps they would not otherwise have taken to stimulate card usage and (2) the steps taken did indeed increase card usage or increase efficiencies of 'always card' transactions
  - Where a restriction affects 2+ markets, consider its effect on all of them
  - Fair share condition: the adversely impacted consumer group must be left no worse off as a result of the restriction
  - Indispensability condition: schemes must show that the particular level of MIF is necessary for achieving the relevant benefit
  - Cogent factual and empirical evidence is needed to satisfy Art 101(3); economic theory is insufficient

EXEMPTION (2)

- Visa unsuccesfully appealed both the ‘quality of evidence’ and ‘fair share’ points; Mastercard just the standard of evidence point
- On the quality of evidence point, the UKSC observed at §116 that:

  > “Article 101(3) is founded on the notion that notwithstanding the existence of a restriction on competition and its likely negative effect on competition and consumers, efficiencies and benefits arising from the conduct which gave rise to the restriction may, nevertheless, justify exemption from the prohibition in article 101(1). This is an inherently empirical proposition and necessarily requires the authority or court addressing the issue to carry out a balancing exercise…involving weighing the procompetitive effect against the anti-competitive effect of the conduct in question. Cogent empirical evidence is necessary in order to carry out the required evaluation of the claimed efficiencies and benefits. To the extent that objective efficiencies caused by a restriction cannot be established empirically, they cannot be balanced with the restrictive effects…”

- On the fair share point, the UKSC agreed with the CA’s interpretation of the *Mastercard* CJEU judgment, observing at §170 that:
  - If both the first and second conditions of Art 101(3) could be satisfied by aggregating the benefits on both sides of a two sided market, the second condition would be redundant
  - But they are different: the fair share condition adds a <u>fairness</u> requirement

THIRD ISSUE: PASS-ON

- The Court of Appeal held that:
  - The burden is on the defendant asserting pass-on
  - Sums received which have diminished the loss are only to be taken into account if there is a sufficiently close causative link between them and the wrong committed by the defendant
  - The “broad axe” principle does not apply
  - It is for the judge to decide whether, on the evidence, D can show (by empirical fact and economic opinion evidence) such a close link between an overcharge and an increase in the direct purchaser’s own prices
  - Mastercard had failed in the *Sainsbury’s* case to show that there was an identifiable increase in prices attributable to the unlawful MIF
- Mastercard appealed successfully on the broad axe issue: UKSC held that the broad axe principle applied on both sides of the ‘ledger’
  - No reason in principle why, in assessing compensatory damages, there should be a requirement of greater precision in relation to mitigation
  - The regime envisages claims by direct and indirect purchasers, so pass-on is not just a defendant weapon

PASS-ON (2)

- UKSC made various other comments about the pass-on issue:
  - There is no exclusion of pass-on as an element in the calculation of damages: the normal rule of compensatory damages applies
  - It is a question of fact in each case whether an overcharge resulting from a breach of competition law has caused the claimant to suffer loss or whether all or part of the overcharge has been passed on or otherwise mitigated
  - Where a retailer responds to the imposition of a cost by (a) seeking to reduce its costs by negotiation with its suppliers and/or (b) passing on that cost by increasing the prices which it charges its own customers, then the court must take that/those into account
  - Relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the overcharge?
  - Legal burden is on the defendants to plead and prove mitigation
  - But there is a heavy evidential burden on the claimants to provide evidence as to how they have dealt with the recovery of their costs in their business

AAM'S CROSS-APPEAL

- The two Sainsbury's cases inevitably had to be remitted by the CA
- CA decided to remit *AAM v Mastercard* for reconsideration of exemption
  - various paras of the CA judgment indicated that MC should simply have lost (it had failed to make out exemption at any level): see §§255-259
  - But it was "*not certain that, had Popplewell J had the benefit of this judgment and thus been fully aware of the need for empirical data and facts in order to prove an exemption, MasterCard's case on article 101(3) would have failed in its entirety*" – it was possible that the judge would have found a lower level, bearing in mind Sainsbury's concession in its Visa case
  - Court worried about the possibility of an "*unjustified windfall*" for AAM, and hopeful that the CAT would reach a "*consistent conclusion in all three cases*"
- UKSC held that the CA had erred in remitting the AAM in this way
  - it was contrary to the principle of finality in litigation
  - No question of an unjustified windfall, even if CAT decides in *Sainsbury's* that there is some level of MIF which is justifiable under Art 101(3)

WHAT NEXT?

matrix@matrixlaw.co.uk +44 (0)20 7404 3447

THE CURRENT POSITION

- CMC took place in December 2020 in all three ‘lead’ cases
- Each is now set down for trial
- Further CMC in *AAM* on 11.2.21, adjourned to 3.3.21
- Further CMC in *Sainsbury’s v Mastercard* listed for 24.2.21
- Further CMC in *Sainsbury’s v Visa* listed for 29.3.21
- Joint CMC to consider whether to hold a ‘common preliminary issues’ trial involving two or all three cases, concerning the ‘shape of the market’ absent MIFs, listed for 31.3.21
- Numerous other cases sitting behind the lead cases (e.g. *Dune* – CMC held on 2.2.21)