

Case summary

Issue(s)

In appeal 2018/0154: Whether the Court of Appeal erred in law –

1. in finding that the multilateral interchange fees at issue amount to a restriction of competition in the acquiring market contrary to Article 101(1) TFEU;
2. in its finding as to the evidence and standard of proof required to satisfy the four conditions of Article 101(3) for exemption from the prohibition on restrictive agreements in Article 101(1); and
3. in interpreting the ‘fair share’ requirement for exemption under Article 101(3).

In appeal 2018/0156: Whether the Court of Appeal erred in law –

1. in finding that the multilateral interchange fees at issue amount to a restriction of competition in the acquiring market contrary to Article 101(1) TFEU; and
2. in holding that the evidential standard for exemption under Article 101(3) TFEU is stricter than the ordinary civil standard.

In appeal 2018/0156: Whether the Court of Appeal found, and if so, did err in law in finding that a defendant must prove the exact amount of loss mitigated in order to reduce damages.

In cross-appeal 2018/0156: Whether the Court of Appeal erred in law by declining to provide a legal remedy corresponding to its own definitive ruling that the Asda, Argos and Wm Morrison Respondents should have succeeded at trial.

Facts

MasterCard and Visa operate payment card schemes. Those schemes impose a number of rules that apply between, on the one hand, banks that issue debit or credit payment cards to their customers and, on the other, banks that contract with merchants. Those rules include rules that specify the terms on which transactions must be settled as between the banks of the customer and merchant in the absence of any different agreement between them. One such rule is the default multilateral interchange fee ("MIF"). Under both the Visa and MasterCard schemes, the MIF is payable on debit and credit card payments. When a cardholder pays in a store by card, their bank deducts the transaction value from their account and transfers it to the merchant's bank minus the MIF. The merchant's bank then transfers to the merchant the value of the transaction minus a merchant service charge ("MSC") negotiated between the merchant and its bank. Merchants' banks pass on all of the MIF to merchants through the MSC, with negotiation between merchants and their banks in respect of the MSC being limited to the amount charged by the bank in excess of the MIF. Merchants are therefore unable to negotiate with the banks on the level of the MIF, which typically accounted for some 90% of the MSC for most of the claim period.

Various retailers commenced proceedings in different courts, claiming that the schemes' MIFs infringed Article 101 TFEU. This resulted in three judgments at first instance, each of which had a different outcome, and which were consolidated for the purposes of their appeals to the Court of Appeal. The Court of Appeal determined that the MIFs do restrict

competition contrary to Article 101(1) and the equivalent national provisions and that all the cases under appeal should be remitted to the Competition Appeal Tribunal to determine whether the MIF is exempted under Article 101(3) from the prohibition in Article 101(1) on agreements restrictive of competition. The judgment of the Court of Appeal is now being appealed by three parties to the proceedings below. The Supreme Court has granted permission to appeal to Visa and MasterCard, and to Asda, Argos and Morrison in respect of their cross-appeal, but refused permission to Sainsbury's.