

Competition Appeal Tribunal Sets Aside MasterCard Decision

ILARIA FILIPPI

This article presents an overview of the recent Competition Appeal Tribunal's judgment in the long running case regarding the investigation and infringement decision by the Office of Fair Trading against MasterCard.

The Competition Appeal Tribunal's (CAT) recent judgment regarding the decision by the Office of Fair Trading (OFT) against MasterCard is significant in a number of ways, particularly because the CAT was bold in asserting what it thinks are its powers when reviewing an OFT decision, in a clear attempt to encourage appellants to challenge the OFT in the future. However, this judgment does not bring the MasterCard saga to an end, since the OFT has recently announced that it has started a new investigation based on similar arguments to those used in the original decision. It will be interesting to see whether, as is appears likely, the OFT will publish a new infringement decision against MasterCard and whether the CAT will have to adjudicate on the OFT's decision for a second time.

BACKGROUND TO THE ORDER

On September 6, 2005, the OFT announced that it had decided

Ilaria Filippi is an economist and trainee solicitor in the London office of Mayer, Brown, Rowe & Maw LLP. Ms. Filippi may be reached at ifilippi@mayerbrownrowe.com.

that the collective agreement between members of MasterCard UK Member Forum Limited¹ (MMF) on the multilateral interchange fees (MIF) applicable to UK domestic transactions using MasterCard branded consumer credit and charge cards (between March 1, 2000 and November 18, 2004) infringed the Chapter I prohibition of the Competition Act 1998 and Article 81 of the EC Treaty.²

On November 10, 2005, the CAT published notices of appeals lodged by MasterCard UK Members Forum Limited (MMF), MasterCard International Incorporated and MasterCard Europe Sprl, and by Royal Bank of Scotland Group challenging the decision of the OFT. Visa Europe Limited, Visa UK Limited (Visa) and the British Retail Consortium were given leave to intervene in the MasterCard appeal.

The OFT's defense was lodged on February 28, 2006. It was apparent from the defense, and conceded by the OFT at the subsequent case management conference of March 31, 2006, that in important respects the OFT's defense was substantially different from the OFT's decision.

On February 2, 2006 the OFT announced that it had launched a new investigation into whether MasterCard's new arrangements for setting fallback interchange fees for UK transactions using MasterCard credit and charge cards infringe Article 81 of the EC Treaty and/or the Chapter I prohibition of the Competition Act 1998.³

Meanwhile, following the appellants' replies to the OFT's defense, the OFT indicated in its submission to the CAT on June 14, 2006 that it was minded to withdraw the contested decision.

On June 19, 2006 the CAT held a hearing to ascertain a) whether MasterCard's appeal should continue considering the OFT's intention to withdraw the decision and the new OFT investigation, b) if the appeal does not proceed what order the Tribunal should make to dispose of it, and c) the issue of costs. On the same date,

the CAT made an order to set aside the OFT's decision and that the appellants were given leave to serve an application for costs.

WITHDRAWAL OR SETTING ASIDE OF THE OFT DECISION?

The Royal Bank of Scotland and Visa accepted the OFT's argument that if the OFT was to withdraw its decision, then the appeal should not move forward. However, MasterCard argued that in principle it may be possible for the appeal to continue. In the alternative, if the CAT felt that the appeal should not move forward, then the CAT should set aside the OFT's decision. MasterCard argued that it was important for the CAT to adjudicate on the legality of the interchange fees and that the appellant had come to the CAT asking for a declaration to the effect that the OFT's decision was flawed and that there was no infringement of Article 81 or Chapter I of the Competition Act 1998 in this case.

MasterCard argued that the issue of whether the decision could be set aside rather than withdrawn was important also in light of the new investigation the OFT is currently pursuing in relation to the new MasterCard interchange fee scheme. The OFT indicated when it launched its subsequent investigation that the outcome of the current proceedings was going to have a potentially decisive impact on the new investigation because the OFT views the old and new arrangements as substantially similar. MasterCard argued that if the CAT was to set aside the decision and to make a declaration as to the legality of the interchange fee scheme, then it would be very unlikely that the OFT would continue with its new investigation and/or use the same arguments it used in the original decision in its ongoing investigation. If the CAT was to allow the OFT to withdraw its decision, this would result in continuing commercial and legal uncertainty and MasterCard would be faced with having to defend itself once again when the OFT was to issue a new decision. It would also encourage the OFT to withdraw

decisions in the future when it knows it might lose an appeal and embark on a new similar investigation without the constraints of abuse of power.

OFT'S POWERS TO WITHDRAW A DECISION AFTER AN APPEAL HAS BEGUN

The appellant argued that the OFT has no unilateral power to withdraw its decision once the appeal has started because there is no such power in statute for them to be able to do so. The CAT recognised that this issue had already surfaced in the *Association of British Insurers*' case⁴ and in the *Association of Convenience Stores*' case.⁵ MasterCard noted that those cases were different in that the appellants had received all the relief they had been seeking, therefore it was fair in those circumstances to allow the withdrawal of the contested decision and termination of the appeal. MMF argued instead that as a principle of administrative law the OFT was entitled to withdraw its decision, although this was susceptible to judicial review. The issue in question was whether the OFT could be considered a public body exercising prerogative powers or a statutory body, whose powers are defined by statute. If the OFT is a statutory body, there is no legal basis for it unilaterally withdrawing its decision after an appeal has been lodged. Visa argued instead that the OFT had a power to withdraw its decisions and referred to European Community law in this area, where the European Commission (Commission) withdraws its decisions once they have been appealed at the Court of First Instance, as it has done in the recent cases of *IMS Health* and *Bristol Myers Squibb*.⁶ On withdrawal of the contested decision, there is nothing left to appeal against. Visa argued that the CAT could not set aside the decision as this would be outside its powers because the CAT is an appellate tribunal, not a court of trial.

CAT'S POWERS TO SET ASIDE THE CONTESTED DECISION

MasterCard pointed out that since the CAT has exercised its powers in the past to find that there was an infringement⁷ and substituted its decision for the OFT's decision, then in principle it is within the CAT's powers to decide that there is no infringement and set aside the OFT's decision. In the *Floe Telecom's* judgment (Floe),⁸ the Court of Appeal recognized that the CAT has such powers when it said that the CAT "may feel able to decide itself what the current result should have been." The Court of Appeal in *Floe* also recognized that there may be circumstances where the setting aside of a decision does not discard of the appeal entirely so that the CAT could, in addition, come to a view as to whether the conduct of the appellants infringed Article 81 or Chapter I.

MMF pointed out that the CAT should evaluate where its powers lie in light of the *Floe* judgment where the Court discussed in which circumstances an appeal will be stripped of its substance. According to the *Floe* test, if the OFT withdraws its decision, this appears to leave nothing of substance to the appeal and the CAT is not be able to take its own decision. There would be no longer a dispute between the parties and therefore the CAT would have no jurisdiction to make a declaration. However, if the CAT was to set aside the decision, this would leave the CAT with some residual power to impose conditions or rule upon the reasons for setting the decision aside.

The OFT argued that the reason why it had to withdraw the decision was that it now had new evidence about the alleged infringement in relation to the current MasterCard scheme, and since the OFT can not adduce new evidence to the original decision, the right course of action is to withdraw the original decision and carry out a new investigation. The OFT referred to *Napp*⁹ where it was said that the OFT can not make a new case once it has further evidence, unless it withdraws the original decision. Therefore

there was a procedural obstacle to the OFT continuing with the current proceedings before the CAT.

The OFT also pointed out that the CAT's role is to hear appeals against decisions, not making declarations as to legality of a decision. Only the Commission can make a declaratory decision of non-infringement under Article 81. In the *Floe* judgment the Court of Appeal held that the outcome of an appeal at the CAT involves the possibility of "whether the relevant decision is to stand, to be varied or to be set aside." This, according to the OFT, does not involve the CAT making a new decision. However, the OFT noted that with regard to whether the decision should be withdrawn or set aside, the OFT saw no real difference in substance between the two courses of action, unless the appellants were to indicate that they would bring the case to the Court of Appeal if the decision was withdrawn, in which case it would be better for the decision to be set aside.

THE CAT'S FINDINGS

The CAT did not agree with MasterCard's argument that the appeal should continue and that the CAT should make a declaration to the effect that the OFT's decision was flawed and that there was no infringement of Article 81 or Chapter I of the Competition Act 1998. Instead the CAT found that the appeal should come to an end and the OFT's decision be set aside.

However, the CAT did not accept the OFT's argument that it would not have the power to make a declaration as to the merits of the OFT's decision. The CAT drew attention to Schedule 8, paragraph 3 (2)(e) of the 1998 Act which provides that the Tribunal may "make any decision which the OFT could itself have made." Therefore, in theory the CAT could have granted to MasterCard the relief sought in its notice of appeal by making a declaration in relation to the merits of the OFT's decision. However, the CAT

noted that in the particular circumstances of this case, whether the decision is withdrawn or set aside, the appellants would have obtained all the relief they seek in these proceedings. For the CAT in those circumstances to go on to adjudicate on the declaration sought by MasterCard would involve a substantial investigation of the merits in the light of the arguments advanced in the defense, and in the light of the replies and any further evidence submitted by the OFT in the rejoinder. The CAT considered that, in the light of the views expressed by VISA and the OFT, it was essential that a case with potentially worldwide implications should proceed on a sound procedural basis. The CAT was not satisfied that the procedural foundation for continuing with the appeal was sufficiently secure to justify the CAT doing so, particularly given the extensive new material, not contained in the decision, upon which the OFT seeks to rely.

It should be noted that in making its decision the CAT was conscious of the parallel Commission proceedings into MasterCard's interchange fees and that, following the first Statement of Objections (SO) sent to MasterCard in 2003, a supplementary SO was imminent. The CAT felt that if the appeal was allowed to continue it would run parallel to Commission's proceedings that would touch on similar issues and that may not be desirable. In fact, soon after the hearing the Commission announced that it had sent a supplementary SO to MasterCard on June 23, 2006. In its SO the Commission takes the preliminary view that MasterCard restricts competition between member banks by predetermining a minimum price retailers must pay for accepting MasterCard and Maestro branded payment cards. The Commission's preliminary view is that such behaviour is contrary to Article 81 which bans such restrictive business practices. The CAT believed that although the European proceedings are dealing with international rather than domestic interchange fees, they are likely to bear upon certain points of

principle that MasterCard wished to argue in proceedings before the CAT and such overlap would not be helpful.

As to the issue of whether the decision should be withdrawn or set aside, the CAT felt that there was no need to rule on the question of whether the OFT has unlimited power to withdraw a decision once appeal proceedings have started. The CAT was of the view that the OFT had followed the correct procedure by suggesting its intention to withdraw the decision to the CAT, while in fact not withdrawing the decision until the CAT and the parties had had an opportunity to consider the issue. As to the relative advantages of withdrawal or setting aside, the CAT was of the opinion that the end result would be more or less the same, although in the present case it recognized that there is a need for legal clarity and certainty. While the legal effect of a withdrawal is not entirely clear, an Order of the CAT setting aside the decision is “a clear and definite judicial act which avoids uncertainty and which at the same time gives the appellants the essence of the relief that they seek in this appeal.”

The CAT concluded that, overall, whether or not to hear the appeals for the purpose of determining MasterCard’s claims for declaratory relief is a discretionary matter for the Tribunal to decide and that under the circumstances the CAT had not been persuaded that it would be appropriate for it to continue to hear a case in which the competition authorities have indicated that there are ongoing proceedings.

CONCLUSION

In this case, particularly due to the fact that a parallel investigation is taking place at EU level, the CAT was reluctant to come to a conclusion as to the legality of the interchange fees. However, the CAT was not as cautious in asserting its powers. In its capacity as an appellate tribunal the CAT has decided in some past cases

that there was an infringement of competition laws and substituted its judgment for the OFT's decision. The CAT is of the view that it can make the same decisions as the OFT, including to come to a finding that there is no infringement of competition laws when considering a contested OFT decision.

It should also be noted that the CAT decided to set aside the contested decision rather than allow the OFT to simply withdraw the decision. This indicates that the CAT is not comfortable with encouraging the OFT to withdraw decisions when an appeal has been lodged, mainly due to the lack of legal certainty that is entailed in a withdrawal taking place as such a late stage in the proceedings before the CAT.

Overall, the CAT's decision is likely to have a substantial, and potentially decisive, impact on the new MasterCard investigation which has recently been launched by the OFT. In this context, on February 9, 2007 the OFT announced that it has decided to expand the scope of its current investigation into MasterCard and Visa's current UK interchange fee arrangements relating to consumer and commercial credit cards, charge cards and deferred debit cards to include immediate debit cards.¹⁰ The OFT claims that extending the scope of the investigation is consistent with the Commission's ongoing investigation into MasterCard's European intraregional interchange fees.¹¹ Moreover, in similar proceedings and following a five-year investigation, the Polish competition authority has recently fined a number of banks €42 million for jointly setting interchange fees collected on transactions made with Visa and MasterCard cards.¹²

It can be predicted that the OFT will now pursue its investigation with renewed energy since it has not been criticized by the CAT for its procedural conduct or for its findings in the previous investigation. Moreover, it will be able to use similar arguments to the previous case when and if, as it looks likely, it decides to issue

an infringement decision against MasterCard in the near future.

NOTES

- 1 Current members of MMF are Abbey National plc, AIB Group (UK) plc, Alliance & Leicester plc, Bank of Ireland, Bank of Scotland, Barclays Bank plc, Capital One Bank (Europe) plc, Goldfish Bank Limited, HFC Bank plc, HSBC Bank plc, Lloyds TSB Bank plc, MBNA Europe Bank Limited, Morgan Stanley Dean Witter Bank Limited, National Australia Group Europe Limited, National Westminster Bank plc, and The Royal Bank of Scotland plc.
- 2 Decision CA98/05/05.
- 3 OFT press release 20/06.
- 4 Case 1036/1/1/04 - Association of British Insurers v Office of Fair Trading, July 30, 2004.
- 5 The Association of Convenience Stores v Office of Fair Trading [2005] CAT 36.
- 6 By Decision 2003/741/EC of August 13, 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP D3/38.044 – NDC Health v IMS Health: Interim measures) (OJ 2003 L 268, p. 69), the Commission withdrew Decision 2002/165. In Case T-354/02: Bristol-Myers Squibb International Corporation the Commission withdrew Decision C(2002)3370 of September 9, 2002.
- 7 In ME Burgess JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) v Office of Fair Trading [2005] CAT 25 and in Cases 1002/2/1/01, 1003/2/1/01, 1004/2/1/01 – Institute of Independent Insurance Brokers v Director General of Fair Trading, 21 September 2001.
- 8 Floe Telecom Ltd (In Administration) v Office of Communications, (CA (Civ Div)) Court of Appeal (Civil Division), 15 June 2006.
- 9 Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading (*substance*) [2002] 1.
- 10 OFT Press Release 20/07, “Statement regarding expansion of OFT investigation into interchange fees.”
- 11 In addition to the ongoing MasterCard investigation, on January 31, 2007 the Commission published a final report on its inquiry into the

retail banking sector, in which it identified a number of competition concerns in relation to payment cards and payment systems and warned that both the Commission and national competition authorities will use their enforcement powers to address these concerns.

- ¹² “Unlawful practises of banks,” Press Release, January 4, 2007, Office of Competition and Consumer Protection.