SLAUGHTER AND MAY/

CLIENT BRIEFING

SAINSBURY'S v MASTERCARD – SUPREME COURT LIBERALISES RULES ON PASS-ON WHEN ASSESSING COMPETITION DAMAGES

24 JUNE 2020

Last week, the Supreme Court handed down its much-anticipated judgment in Sainsbury's v MasterCard. The Supreme Court unanimously upheld the Court of Appeal's ruling that multilateral interchange fees applicable to MasterCard and Visa card payments restrict competition. The decision is also good news for defendants to competition damages claims as the Supreme Court has liberalised the rules on when and how the pass-on of an overcharge can be taken into account in assessing the level of damages payable. The decision is likely to make it easier for defendants to establish the "defence" of pass-on than was previously thought to be the case and could be used to justify extensive requests for claimant disclosure to show how they dealt with the recovery of costs in their businesses.

Background to the appeal

Under the payment card schemes, MasterCard and Visa set multilateral interchange fees ("MIFs") which apply in respect of card payments. MIFs are charged by cardholders' banks to retailers' banks and then passed on to the retailers via a merchant service charge ("MSC").

A number of large UK retailers brought claims against MasterCard and Visa in different courts arguing that the card schemes' MIFs breached Article 101 TFEU (prohibition on anti-competitive agreements) and equivalent national laws. This resulted in different decisions at first instance. The claims were consolidated on appeal before the Court of Appeal, which ruled that the MIFs did restrict competition.

The Supreme Court's decision

The Supreme Court unanimously upheld the Court of Appeal's ruling that the MIFs restricted competition and confirmed the legal test that the card companies would need to satisfy in order to qualify for exemption. Departing from the Court of Appeal's findings, the Supreme Court adopted a more liberal approach to the so-called "pass-on defence". As a result, the decision is likely to make it easier for defendants to competition damages claims to rely on pass-on to reduce the level of damages payable. We focus on the Supreme Court's findings on pass-on in this article given their wider implications for damages actions of this nature.

The 'broad axe' issue and pass-on

The retailers claimed damages for the amount by which the MSC was higher than it would have been had the MIFs not breached competition law (the overcharge). Damages are compensatory and aim to put the claimant in the position they would have been in but for the breach of competition law. When determining the level of damages payable, the courts will take mitigation of loss, e.g. pass-on of an overcharge to suppliers or customers, into account.

The 'broad axe' approach involves using estimation where it is not possible to calculate precisely the exact amount of loss suffered. Overturning the Court of Appeal, the Supreme Court found that the 'broad axe' principle did apply to the burden on the card companies to establish the fact and amount of the overcharge passed-on by the retailers. In practice, this means that, if, as is often the case, the effects of pass-on cannot be quantified precisely, this does not prevent pass-on from being taken into account in quantifying harm.

The Supreme Court also went on to provide helpful clarification on (i) the legal rules that apply to pass-on, (ii) the burden of proof and (iii) the

degree of precision required to establish the extent of pass-on of an overcharge.

Applicable legal rules

The Supreme Court confirmed that English courts must give effect to English law rules governing claims for competition damages unless those rules conflict with the EU principle of effectiveness, which means that domestic law cannot make it practically impossible or effectively difficult to exercise EU law rights.

The Supreme Court noted that, under English law, pass-on is an element in the quantification of damages rather than a defence in a strict sense. While the UK's competition rules remain aligned to those of the EU, the pass-on of an overcharge remains a relevant factor in the assessment of damages. Pass-on also needs to be taken into account as part of the compensatory principle and in order to avoid double recovery of the same overcharge by a direct purchaser and by subsequent purchasers in a chain.

Mitigation and burden of proof

The Supreme Court confirmed that the retailers could plead the overcharge as the *prime facie* measure of their loss; they did not have to plead and prove a consequential loss of profit.

The Supreme Court referred to four principal ways in which a claimant may respond to the imposition of an overcharge: (i) do nothing, (ii) reduce discretionary expenditure (e.g. reduce its marketing and advertising budget), (iii) negotiate reduced costs with suppliers, or (iv) pass on the costs by increasing prices.

If the claimant adopted only options (i) and/or (ii), the loss would be measured by the overcharge because the claimant would have been deprived of that amount for use in its business. If there was evidence of option (iii) and/or (iv), in accordance with the compensatory principle, the court must take account of their effect in mitigating loss.

The Supreme Court's inclusion of option (iii) (reduction of costs) arguably broadens the scope of matters that can be taken into account in mitigation of loss. In contrast, the CAT had concluded that costs savings by the retailers could not be set against the overcharge, and indicated that it would be hard for any defendant to satisfy the causation requirements for costs savings to be taken into account as mitigation.

The Supreme Court also confirmed that the legal burden lay with the card companies to establish that the retailers had mitigated their loss by recovering the overcharge. However, the Supreme Court emphasised that this burden "*should not be overstated*". Once the defendants raised the issue of pass-on in mitigation, there was a "*heavy evidential burden*" on the claimants to evidence how they dealt with the recovery of costs in their business to avoid any adverse inferences being made.

Degree of precision required to establish the extent of pass-on

The Supreme Court considered the degree of precision required to establish the extent of the pass-on of an overcharge. When applying the compensatory principle, the courts must seek to avoid under and over compensating. However, the court and parties may have to forgo precision where it cannot be achieved at proportionate cost, and instead rely on estimates. English law takes a pragmatic view of the degree of certainty with which damages must be proved.

The Supreme Court took the view that there is no reason in principle why, in assessing compensatory damages, a greater level of precision should be required to quantify the amount of pass on of an overcharge merely because the legal burden is on the defendants to establish mitigation of loss.

The Supreme Court considered that it was logical that the power to estimate the effects of pass-on applied equally when used as a sword by a claimant or as a shield by a defendant. This departs from the Court of Appeal whose judgment indicated that a defendant would have a more difficult burden to discharge, which would have created a real risk of double exposure for defendants in claims brought in respect of the same overcharge by claimants at different levels of the supply chain.

The Supreme Court also confirmed that, in accordance with the compensatory principle and proportionality, English law does not require unreasonable precision when proving the *prima facie* loss that claimants have passed-on to their suppliers and customers. The loss caused by the overcharge included in the MSC was an increased cost, which the retailers would probably not treat

as an individual cost but would instead take into account along with a multiplicity of other costs when developing their annual budgets. The extent to which the retailers used pass-on or other forms of mitigation in response to an overcharge can only be a matter of estimation.

Comment

The Supreme Court's confirmation of the Court of Appeal's finding that the MIFs constituted anticompetitive conduct in breach of Article 101(1) definitively puts to bed the uncertainty that arose from the different approaches (and decisions) taken by the CAT and the High Court at first instance. This decision will be relevant for establishing liability in a large number of further claims brought by retailers that have been stayed pending the outcome of the Supreme Court's decision in this case.

In addition, the Supreme Court's decision is good news for defendants to competition claims because of its welcome guidance on the issue of pass-on when assessing competition damages. The judgment suggests a more liberal approach to the assessment of pass-on than was taken by the Court of Appeal and the CAT. The scope of matters that the courts may take into account when considering mitigation of loss in a competition damages action may be broader than previously thought to be the case (i.e. potentially including cost reductions by the claimants in addition to pass-on). The decision confirms that the courts will not require an unreasonable degree of precision in terms of the quantification of pass-on and recognises that there will often be a need to resort to estimates. The decision also makes clear that, while the legal burden rests with the defendant, this is a formality as the onus lies with the claimant to provide evidence of how they dealt with the recovery of costs in their business.

The decision is therefore likely to make it easier for defendants to establish the "defence" of pass-on of an overcharge than was previously thought to be the case. Claimants can expect this decision to be invoked by defendants in support of extensive disclosure requests against them as it is now clear that they will now be under a "heavy evidential burden" to demonstrate how they dealt with the recovery of overcharge costs in their businesses.

CONTACT

Camilla Sanger
PARTNER
T: +44(0) 20 7090 4295
E: Camilla.Sanger@SlaughterandMay.com

Elizabeth Jordan
SENIOR COUNSEL
T: +44(0) 20 7090 3946
E: Elizabeth.Jordan@SlaughterandMay.com