

English Court of Appeal confirms unlawful nature of MasterCard and Visa interchange fees charged to retailers – and the law on pass-on in competition damages claims

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Unlawful interchange fees on credit and debit card payments

In a much-awaited judgment, the Court of Appeal has confirmed the unlawful nature of the multilateral interchange fees (“MIFs”) set by MasterCard and VISA and charged to retailers on UK debit and credit card transactions. The decision found the adoption by MasterCard and Visa of a default interchange fee to be an unlawful restriction of competition and follows the findings adopted by the European Commission in its Decision in 2007 following a long running investigation in relation to MasterCard fees charged on European cross-border payments.

Whilst relating to UK card fees, the court noted that the same principles should apply consistently between Member States, supporting claims made in respect of domestic interchange fees paid in other European Member States. The card schemes will now have a final opportunity to argue that, despite the unlawful nature, some part of the MIFs can still be justified in a joint hearing that has been remitted to the expert jurisdiction of the Competition Appeal Tribunal. If the schemes can't justify some or all of the fee on the basis of providing net benefits to merchants as well as to cardholders, then retailers should be entitled to receive compensation for the balance of the fees paid. The decision is welcomed as finally providing some clarity in the face of conflicting judgments over the last two years from the lower courts and is hoped will assist in resolving the claims brought by retailers for transaction fees paid back over significant periods.

No reduction of damages for pass-on in the absence of a direct causal link

The Judgment is also welcome news to claimants in confirming the approach to arguments on pass-on, with the Court of Appeal confirming that damages payable should not be reduced unless the defendant can show a direct causal link between the overcharge and a consequential increase in the claimant's price. This is an area of law regularly contested by defendants in competition damages claims and the clarity from the Court of Appeal will be helpful across the spectrum of competition damages claims.

Any retailer who wishes to discuss potential claims should contact Jessica Phillips, Nicola Boyle or Wessen Jazrawi.