



Brussels, 5.5.2014
C(2014) 3066 final

COMMISSION OPINION

of 5.5.2014

Opinion of the European Commission in application of Article 15(1) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union)

**Interchange fee litigation before the Judiciary of England and Wales:
Wm. Morrison Supermarkets plc and Others v MasterCard Incorporated and Others
(Claim Nos. 2012/699; 2012/1305-1311)**

Only the English text is authentic

COMMISSION OPINION

of 5.5.2014

Opinion of the European Commission in application of Article 15(1) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union)

Interchange fee litigation before the Judiciary of England and Wales: Wm. Morrison Supermarkets plc and Others v MasterCard Incorporated and Others (Claim Nos. 2012/699; 2012/1305-1311)

Only the English text is authentic

1. PRELIMINARY REMARKS

- (1) Article 15(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹ (now Articles 101 and 102 of the Treaty on the functioning of the European Union, "TFEU") provides that in proceedings for the application of Article 101 or 102 TFEU, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the EU competition rules. This form of cooperation between the Commission and the courts of the Member States is addressed in the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (the Cooperation Notice).²
- (2) Paragraph 27 of the Cooperation Notice specifies that, when called upon to apply EU competition rules to a case pending before it, a national court may first seek guidance in the case law of the EU courts or in the Commission regulations, decisions, notices and guidelines applying Articles 101 and 102 TFEU. Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EU competition rules.
- (3) It is useful to recall that opinions of the Commission under Article 15(1) of Regulation 1/2003 are not binding upon the national court. Only the Court of Justice of the European Union is entitled to give a binding interpretation of the EU competition rules by way of a preliminary ruling. Article 267 TFEU provides that if a question concerning the interpretation of EU competition rules is raised before a national court, that court may, if it concerns a decision on the question that is necessary to enable it to give judgment, request the Court of Justice to give a ruling. Where such a question is raised in a case pending before a national court against whose decisions there is no appeal, that court is obliged to refer the matter to the

¹ OJ L 1 of 4.1. 2003, p.1. Since 1 December 2009, the Articles 81 and 82 of Treaty became Articles 101 and 102 TFEU respectively. References in Regulations and Notices adopted before 1 December 2009 to Articles 81 and 82 of the Treaty should be understood as references to Articles 101 and 102 TFEU respectively.

² OJ C 101 of 27.4.2004, p.54. See in particular points 27-30

Court of Justice, unless the Court has already ruled on the point or unless the correct application of the rule of EU law is obvious.³

- (4) In accordance with the Cooperation Notice, the Commission will, when giving its opinion, limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court.⁴

2. THE REQUEST FOR AN OPINION

- (5) By letter dated 18 November 2013 pursuant to Article 15 of Regulation (EC) 1/2003 you inform the Commission that you have decided, for the purposes of the above proceedings between Wm. Morrison Supermarkets plc and others on the one side and MasterCard Incorporated and others on the other, that there should be standard disclosure of documents by the MasterCard defendants. You explain that documents created in the course of the Commission's investigation in case COMP/34.579 – *MasterCard*, COMP/36.518 – *EuroCommerce* and COMP/38.580 – *Commercial Cards* ("MasterCard I case"), including the confidential version of the Commission Decision, have so far been excluded from the disclosure order, although it is your provisional view that the MasterCard defendants should be required to disclose also these documents.
- (6) By your letter you seek the Commission's view on whether your Court should order disclosure by the MasterCard defendants of documents which were created in the course of the Commission's investigation, including the confidential version of the Decision. In particular, you ask whether:
- (a) the Commission considers that the principles established by the European Court of Justice in *Pfleiderer* (Case C-360/09) extends beyond leniency materials and are applicable to the disclosure of (1) materials provided in the context of the notification of an agreement under the notification regime in force prior to Regulation 1/2003; (2) any materials that are voluntarily provided to the Commission;
 - (b) if so, the Commission considers that different considerations arise in this case in the light of the *Pfleiderer* principles; and
 - (c) if disclosure is ordered, the Commission considers that it should be subject to any conditions, such as the retention of any existing redaction (for example to protect third parties' confidential information) or that disclosure should be made subject to particular limitations (which might include the use of confidentiality rings to protect the confidentiality of the information involved).

3. THE COMMISSION'S OPINION

- (7) Before entering into the specificities of the MasterCard file, allow me to make several general remarks on the legislative framework with respect to the issues at hand and its implications for the reply to your questions.

³ Case 283/81 *CILFIT v Ministry of Health* (1982) ECR 3415.

⁴ See point 29.

Documents originating from the Commission or obtained by the parties through access to file

- (8) Article 339 of the Treaty on the Functioning of the European Union (TFEU) obliges the Commission and its staff not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. This obligation is further specified in Article 28 of Regulation (EC) 1/2003, according to which the Commission shall not disclose information acquired pursuant to the Regulation except in situations foreseen in Articles 11, 12, 14, 15 and 27 of the same regulation. As further elaborated on in the case law, the information covered by professional secrecy refers to both confidential information and business secrets.⁵
- (9) It follows from that case law that, where pursuant to national disclosure rules parties to the proceedings pending before a national court or third parties are ordered to disclose documents that originate from the Commission or were obtained through access to file (including the confidential version of the Commission decision, documents the Commission obtained during inspections or documents prepared and sent by the parties or third parties in the course of the investigation), the national court has to provide appropriate protection of business secrets or other confidential information that belong to legal or natural persons i.e. those from whom the information was obtained by the Commission.⁶
- (10) As regards information obtained by the parties through access to file during the Commission's administrative procedures, the limits and conditions on its use are set out in Article 15(4) of Regulation (EC) 773/2004⁷ which provides that documents obtained through access to the file by any of the addressees of a Statement of Objections shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU. Point 48 of the Commission Notice on Access to file⁸ reiterates that access to file is granted on the condition that the information thereby obtained may only be used for the purpose of judicial or administrative proceedings for the application of the competition rules at issue in the related administrative proceedings before the Commission.

Case law on disclosure of documents in private damages cases

- (11) As you are aware, there is some case-law of the EU courts with respect to disclosure of documents from the competition case files.⁹ It follows from this case law that, in the absence of EU rules governing the disclosure of documents for the purpose of antitrust damages actions, it is for Member States to establish and apply national

⁵ Case T-353/94 *Postbank v Commission* [1996] ECR II-921, para. 86, 87.

⁶ *Postbank*, para. 90.

⁷ Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L123, 27.04.2004, p.18.

⁸ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, Official Journal C325, 22.12.2005, p. 7.

⁹ Case C-360/09 *Pfleiderer* [2011] ECR I-5161, Case C-536/11 *Donau Chemie*, nyr (judgment of 6 June 2013).

rules on the right of access to documents relating to the national proceedings in line with principles of effectiveness and equivalence.¹⁰

- (12) The Court considered in *Donau Chemie* that the effective application of the EU competition rules and the rights conferred by those rules on individuals could be undermined by, on the one hand, a rule providing for a generalised access to documents from a competition case file, or, on the other hand, a rule under which access to any document forming part of the file relating to competition proceedings must be refused.¹¹
- (13) Therefore, the Court of Justice emphasized that, the weighing-up of interests justifying disclosure of information and the protection of that information can be conducted by the national courts and tribunals only on a case-by-case basis and taking into account all the relevant factors in the case.¹²
- (14) It is for the national court on the one hand to appraise the interest of the damage claimant in obtaining access to the relevant documents to prepare its action for damages, in particular in the light of other possibilities it may have, and on the other hand to consider the actual harmful consequences that may result from such access with regard to the legitimate interest of other parties or public interests.¹³ In this context, the Court mentioned the need to preserve the effectiveness of anti-infringement policies in the area of competition law as an interest that must be taken into account so as not to deter parties involved in infringements of Articles 101 TFEU and 102 TFEU from cooperating with the competition authorities.¹⁴

The specific questions raised in your letter

- (15) Turning therefore to how the above principles apply to the present case, the Commission considers that since the notification regime of Regulation No. 17 is no longer in force and pursuant to Article 34 of the successor regime established by Regulation 1/2003, any such notifications have long since ceased to have effect, access to such documents cannot be refused by referring to a possible negative impact on the effectiveness of competition policies.
- (16) As regards other materials voluntarily provided to the Commission in the present case, such as replies to a Statement of Objections, it is for the national courts to assess on a case-by-case basis whether there are overriding reasons for refusing the discovery of such documents. In the Commission's view, the disclosure of replies to a Statement of Objections is not liable to deter the undertakings under investigation from cooperating with the competition authorities as it is primarily in their own interest to defend themselves comprehensively.
- (17) In order not to jeopardise the investigatory powers of the Commission, national courts are asked to refrain from ordering disclosure where such disclosure could undermine an ongoing investigation concerning a suspected infringement of the EU competition rules. However, in the case at hand, the administrative procedure was closed with the adoption of the decision.

¹⁰ *Donau Chemie*, para. 25-27.

¹¹ *Donau Chemie*, para. 31.

¹² *Donau Chemie*, para. 34, with reference to *Pfleiderer*, para. 31.

¹³ *Donau Chemie*, para. 44-45.

¹⁴ *Donau Chemie*, para. 33.

- (18) As to the implications of the confidentiality of some of the material, as the Court will appreciate, it follows from the nature of the investigation in question that the *MasterCard I* case file contains information from banks, merchants and other third parties who provided evidence and information during the investigation. These documents included a substantial volume of material accepted as business secrets or other confidential information at the time of the investigation. Documents created in the course of the investigation, both by the Commission and the MasterCard defendants, quote directly such confidential information covered by the Commission's obligation of professional secrecy. It is important to note that the non-confidential versions of submissions created by third parties (for disclosure to MasterCard during the investigation) are non-confidential *vis-à-vis* the MasterCard defendants only. For the purposes of the Commission's investigation, it was unnecessary for third parties to take a position as to whether any information they supplied was confidential *vis-à-vis* other parties. In particular, in this case merchants that provided information to the Commission might object to sharing that information with the Claimants, who might be their competitors.
- (19) In this context, the fact that the MasterCard defendants might be satisfied with particular arrangements made, such as a confidentiality ring, would not necessarily satisfy third parties who submitted the information. Having said that, I trust that any disclosure order decided by you will provide a level of protection equivalent to that required by Article 339 TFEU, Article 28 of Regulation (EC) 1/2003 and Article 15(4) of Regulation (EC) 773/200.
- (20) As regards the confidential version of the Decision, the Commission has no objection against such document being disclosed to the claimants provided that adequate protection is given to business secrets and other confidential information, for example through a confidentiality ring or further redactions of the Decision to protect confidential information.¹⁵

¹⁵ See also the letter of 15 December 2010 sent by the Director General of DG Competition to the solicitors for National Grid Electricity Transmission, as quoted in paragraph 16 of the judgment of 4 July 2011 of the High Court of Justice, Chancery Division in *National Grid Electricity Transmission plc v ABB Ltd and Others* [2011] EWHC 171(Ch).

Done at Brussels, 5.5.2014

For the Commission

Alexander ITALIANER
Director-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION