

Antitrust – National Courts

Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others – 2015

First Instance Court (UK), London

Summary

In the context of a damages action about MasterCard's UK domestic interchange fees, the High Court of Justice in England and Wales asked for the Commission's opinion on the potential disclosure of documents which MasterCard received through access to the Commission file in the ongoing MasterCard II investigation.

Article 16a(3) of Regulation 773/2004 provides that documents falling within its scope shall not be used by the person having obtained them through access to file "in proceedings before national courts" until the Commission's case is closed. Articles 6(5) and 7(2) of the Directive 2014/104/EU, while not directly applicable to the litigation pending before the national court (initiated before 26 December 2014), clearly confirm the general principle that disclosure and use of evidence specifically prepared for the Commission's proceedings as long as those proceedings are still ongoing may be harmful for the effective enforcement of the EU competition rules by the Commission.

The principle of sincere cooperation as laid down in Article 4(3) TEU requires the court to give considerable weight to the considerations reflected in those legislative provisions when balancing the interests of the claimants in disclosure of documents, against the harm the disclosure may cause for the effective enforcement of Articles 101 and 102 TFEU. As regards documents specifically prepared for an investigation that is still open, in principle, concern for the harm that disclosure may cause to the effective enforcement of the EU competition rules should prevail.

Where parties to proceedings before a national court are ordered to disclose documents that originate from the Commission or were obtained through access to file, 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.

Non-confidential versions of documents created for disclosure to the defendant in the Commission's investigation are non-confidential vis-à-vis that defendant only. Any particular arrangement for the protection of confidential information put in place by the national court, such as a confidentiality ring, has to take into account the interest of third parties in the protection of their confidential information.