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COMMISSION OPINION

of 29.10.2015

Opinion of the European Commission in application of 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 Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union)

CT.00928 - Interchange fee litigation before the High Court of Justice, Chancery Division:

**Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others
(Claim No HC 2012-000063)**

Only the English text is authentic

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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, the "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) Opinions of the Commission under Article 15(1) of Regulation (EC) No 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. 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

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, as amended, see OJ C 256, 5.8.2015, p. 5. See in particular points 27-30.

matter to the 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 9 October 2015 pursuant to Article 15 of Regulation (EC) No 1/2003 you informed the Commission that in the proceedings between Sainsbury's Supermarkets Ltd v MasterCard Incorporated and others you have ordered the parties to provide disclosure of documents which are relevant to the issues in the litigation, other than documents that were created for the purpose of the Commission's or the United Kingdom's Office of Fair Trading investigations.
- (6) At a hearing on 7 October 2015 MasterCard informed the Court that, as a result of the access to the Commission's investigative file in Case AT.40049 – *MasterCard II*, it had been provided with documents which relate to surveys carried out by Deloitte, EIM and Moore Stephens in relation to the Commission's "Cost of Payments Survey"⁵. MasterCard stated that it considers some of these documents relevant to the issues in the litigation and it would, under standard English procedural rules, have disclosed the documents to the Claimant in the case, but sought directions from the Court.
- (7) You concluded that these documents should be disclosed, subject to appropriate safeguards to protect confidential information and to receiving any views from the Commission.

3. THE COMMISSION'S OPINION

Disclosure of documents obtained by parties through access to file

- (8) As regards information obtained by the parties through access to file during the Commission's administrative procedures, the limits and conditions on the use of such information are set out in Article 16a of Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty⁶. Article 16a(1) of Regulation (EC) No 773/2004 provides that information obtained through access to the file shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU. Moreover, according to Article 16a(3) of Regulation 773/2004 information that was specifically prepared for the proceedings of the Commission, either by other natural and legal persons, or by the Commission and sent to the parties, shall not be used by parties in proceedings before national courts until the Commission has closed proceedings against all parties under investigation by adopting a decision pursuant to Article 7, 9 or 10 of Regulation (EC) No 1/2003 or has otherwise

³ Judgment in *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, C-283/81, EU:C:1982:335.

⁴ See point 29.

⁵ Survey of merchants' costs of processing cash and card payments, Final Results, March 2015.

⁶ OJ L123, 27.04.2004, p. 18.

terminated its proceedings.⁷ This latter provision reflects the Commission's long standing position that disclosure of information obtained through access to the file whilst Commission proceedings are still open could seriously undermine a pending investigation concerning a suspected infringement of the EU competition rules.⁸

- (9) Furthermore, as you are aware, the Union recently adopted a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("the Damages Directive")⁹. The Directive *inter alia* regulates the disclosure of certain categories of information in actions for damages before national courts where the cause of action is a breach of national or EU competition rules. As regards the disclosure of documents from the Commission's file whilst its proceedings are still ongoing, Article 6(5) of the Damages Directive stipulates that disclosure of certain categories of evidence, including "*information that was prepared by a natural or legal person specifically for the proceedings of a competition authority*" and "*information that the competition authority has drawn up and sent to the parties in the course of the proceedings,*" can be ordered only after a competition authority has closed its proceedings.¹⁰ Furthermore, Article 7(2) of the Damages Directive provides that if evidence falling under Article 6(5) and which is obtained solely through access to the file of a competition authority is used, it is either deemed inadmissible in actions for damages before national courts or otherwise protected to ensure the full effect of the limits on the disclosure of evidence. These rules all provide for a protection against disclosure and use of evidence specifically prepared for the Commission's proceedings as long as those proceedings are still ongoing.¹¹

The Commission's opinion on the Order for disclosure

- (10) Turning now to the question raised by you about the intended disclosure of documents that form part of the Commission's file in the open Case AT.40049 – *MasterCard II*, I would like to make the following remarks.
- (11) The documents at issue were prepared for the Commission's investigation in – and are part of the investigative file in – cases still pending before the Commission. The

⁷ See also Point 48 of the 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, as amended, see OJ C256, 5.8.2015, p.3,

⁸ See for example, the Commission's letter quoted in Roth J's judgment in *National Grid v ABB* [2011] EWHC 1717 (Ch) at [16] and the Commission's opinion under Article 15(1) of Regulation 1/2003 in *Wm Morrison Supermarkets plc and Others v MasterCard Incorporated and Others*, at paragraph 17 (available at: http://ec.europa.eu/competition/court/antitrust_requests.html) .

⁹ Directive 2014/104/EU, OJ L 349, 5.12.2014, p.1.

¹⁰ In this respect, the Damages Directive implements principles recognised by the Union Courts; see Order in *J. J. Zwartveld a.O.*, C-2/88, EU:C:1990:440, para. 10, 11; judgment of 18 September 1996 in *Postbank NV v. Commission*, T-353/94, EU:T:1996:119, para. 93. These cases accept that information requested by a national court should not be disclosed where such transmission would be capable of interfering with the functioning of the EU institutions, in particular by jeopardising the accomplishment of the tasks entrusted to them. This principle is stated in general terms in the Cooperation Notice, Point 26, second sentence, and has been implemented in more specific terms by the Damages Directive.

¹¹ Consistent with those provisions, the Commission amended on 5 August 2015 the Cooperation Notice (OJ C 256, 5.8.2015, p. 5) . Paragraph 26b of the Notice as amended provides that the Commission will not transmit "*information that was prepared by a natural or legal person specifically for the proceedings of the Commission*" and "*the information that the Commission has drawn up and sent to the parties in the course of its proceedings*" before it has closed its proceedings

elaboration of the methodology of the data collection and the collection of underlying data for the 'Cost of Payments Survey' was carried out with the help of external contractors (EIM, Moore Stephens for the former and Deloitte for the latter purpose). However, as appears from the Tender Specifications for the ('auxiliary') broad merchant payment acceptance survey¹² and the Tender Specifications for the ('large') merchants' costs of processing cash and card payments survey¹³ the Survey was carried out in context of the Commission's investigations into MIFs. The Cost of Payments Survey is thus an integral part of the investigative files of Case AT.40049 – *MasterCard II* (as well as Case AT.39398 – *Visa MIF*¹⁴), in line with the Hearing Officer's decision of 13 June 2013¹⁵. As you note in your letter, the proceedings in *MasterCard II* is still open.¹⁶

- (12) MasterCard has obtained the relevant documents solely through access to the Commission's file in the case AT.40049 – *MasterCard II*. 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 the file] *in proceedings before national courts until the Commission has closed its proceedings against all parties under investigation by adopting a decision pursuant to Article 7, 9 or 10 of Regulation (EC) No 1/2003 or has otherwise terminated its proceedings*".
- (13) It is true that, as you state in your letter, the rules of the Damages Directive do not apply to the litigation pending before the Court as the litigation was initiated before 26 December 2014 and the Directive has not yet been implemented in the United Kingdom. Therefore, none of the rules quoted above directly prohibits the Court itself from ordering the disclosure of the requested documents.
- (14) On the basis of the case-law of the Court of Justice, when ordering the disclosure of evidence included in the file of a competition authority, the national court must, on the one hand, 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 to obtain evidence, and on the other hand, consider the actual harmful consequences that may result from such access with regard to the legitimate interest of other parties or public interests.¹⁷ In this context, the Court of Justice specifically 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.¹⁸

¹² http://ec.europa.eu/competition/calls/2012_04_tender_specifications_en.pdf.

¹³ http://ec.europa.eu/competition/calls/2012_003_tender_specifications_en.pdf,

¹⁴ Whilst the Commission proceedings were still open against Visa Europe, Visa Europe referred to the Hearing Officer a refusal by DG Competition to give access to the study documents. The Hearing Officer held that, since the cost study tender specifications referred to the proceedings against Visa Europe, the documents drawn up in the framework of the Cost of Cash Study formed part of the Commission's file in those proceedings.

¹⁵ See Final Report of the Hearing Officer, Visa MIF (AT.39398), OJ C 147, 16.05.2014, p. 5-6.

¹⁶ The Cost of Payments Survey was also carried out within the context of the investigation concerning MIFs set by Visa. Although the proceedings against Visa Europe Limited were closed in December 2010 and February 2014 by decisions making Visa Europe's commitments binding upon it, the proceedings against Visa Inc. and Visa International Service Association ("Visa Int.") are still open.

¹⁷ Judgment in *Bundeswettbewerbshörde v. Donau Chemie AG a.O.*, Case C-536/11, EU:C:2013:366, para. 44-45.

¹⁸ *Donau Chemie*, para. 33.

- (15) Therefore, when ordering the disclosure of the documents in question, the Court should balance the interests that the claimants have in disclosure of these documents, against the harm disclosure may cause for the effective enforcement of Articles 101 and 102 TFEU by the Commission. The Commission respectfully submits that as regards documents specifically prepared for investigation of the Commission 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.
- (16) The reason for this is, that Articles 6(5) and 7(2) of the Damages Directive as well as Article 16a(3) of Regulation (EC) No 773/2004 clearly indicate that the EU legislator considers such disclosure to be harmful for the effective enforcement of the EU competition rules by the Commission. Although the rules of the Damages Directive are not, in the context of the present proceedings, a bar to the Court ordering the disclosure provided for in your Order, in the Commission's view, 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 carrying out its balancing test.
- (17) Therefore, the Commission respectfully requests the Court to reconsider ordering the disclosure of the documents in question.

Confidentiality of the information

- (18) It follows from case law¹⁹ on the Commission's professional secrecy obligations²⁰ that where, pursuant to national disclosure rules, 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.²¹
- (19) In the case AT.40049 – *MasterCard II*, following the adoption of the Statement of Objections on 9 July 2015, MasterCard was granted access to the non-confidential information in the Commission's file on two CD ROMs sent to it.
- (20) With respect to the Commission's Cost of Payments Survey, the information to which MasterCard has to date been granted access includes a variety of documents which are partly public information and partly documents regarding the data collection process in general. These latter documents are confidential, but non-confidential versions were prepared by the data providers specifically for the purpose of their disclosure to MasterCard. These documents (which are not classified as 'internal' and are thus available through access to file in non-confidential form) include for example the non-confidential published reports, certain correspondence between the Commission and contractors including tender documents and final reports, documents concerning the consultation of stakeholders on the methodology and non-confidential replies to that consultation, as well as correspondence with merchant organisations and letters sent by the Commission to potential survey participants to encourage their participation. In addition, these documents include, within the context of the EIM survey, an online questionnaire and the non-confidential results as well as anonymised interviews with sample merchants in the

¹⁹ *Postbank*, para. 86-87.

²⁰ Article 339 TFEU and Article 28 of Regulation (EC) No 1/2003.

²¹ *Postbank*, para. 90.

United Kingdom, Hungary and the Netherlands, and within the context of the Deloitte Survey, requests for information sent to a sample of acquirers to collect data that may be relevant to estimate acquirers' margin (one of the parameters relevant for the calculation of a MIT) and non-confidential replies hereto.²²

- (21) However, other information in the file, including in particular the data collected from the participants in the surveys carried out by Moore Stephens and Deloitte is highly sensitive. It has not been possible to prepare anonymised versions of this information that fully respect the data providers' legitimate interests in protection the confidentiality of the information. The CD ROMs sent to MasterCard for the purpose of granting it access to the file accordingly therefore did not include any data collected by the external contractors from the participants in the surveys, information which is used as the basis for the Commission's assessments in the Cost of Payments Survey. Subject to the agreement of the data providers, the Commission may grant MasterCard's external counsels access to such confidential data at DG Competition's premises under the strictly controlled so-called 'Data Room procedure'. The Commission is still in discussions with the data providers about their consent in such a disclosure process.
- (22) The information on the Commission's Cost of Payments Survey currently in MasterCard's possession on the basis of the access to file process therefore only comprises the above mentioned
- (a) public documents
 - (b) and documents regarding the data collection process in general which are otherwise confidential but with respect to which non-confidential versions have been prepared by the data providers specifically for the purpose of their disclosure to MasterCard in the framework of its access to the file.

It does not comprise the data collected from the participants in the surveys itself.

- (23) As to the implications of the confidentiality of the information mentioned in paragraph 22(b) it is important to note that the non-confidential versions created for disclosure to MasterCard during the investigation are non-confidential *vis-à-vis* MasterCard only. For the purposes of the Commission's investigation, it was unnecessary to take a position as to whether any information was confidential *vis-à-vis* other parties. Third parties who provided the information might object to sharing that information with the Claimant. In this context, the fact that MasterCard might be

²² The Commission obviously does not object to the disclosure of any of the documents that are public. This includes all documents that are to be found on the Commission's website (http://ec.europa.eu/competition/sectors/financial_services/enforcement_en.html), notably public tender documents, the merchant questionnaire used for collection of data, the Commission's presentation in February 2014 of the preliminary results of the data collection concerning the Costs of Payments Survey, as well as DG Competition's final report, Deloitte's 'Cost of Payment Survey' and Deloitte's 'Broad Merchant Payment Acceptance Survey'. Document ID1346 listed in Annex A to your letter of 9 October 2015 is such a public document available through the Commission's website (http://ec.europa.eu/competition/calls/2012_003_award_notice_en.pdf). Moreover, this also includes documents that have been made public following a request for access to documents under Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Notably, DG Competition's 'Consultation Paper on the methodology to be applied by DG Competition to collect data and carry out the merchant indifference test', which together with EIM's draft report 'Costs and benefits to merchants of accepting different payment methods methodology' of 20 October 2011 and Moore Stephens' 'Recommendations from the pilot study' of August 2011, have been disclosed to the requesting party (GestDem 2012/4040).

satisfied with particular arrangements made, such as a confidentiality ring, would not necessarily satisfy third parties who submitted the information.

Done at Brussels, 29.10.2015

For the Commission

Johannes LAITENBERGER

Director-General

