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Wave Or Ripple? UK Lawyers Divided Over Impact Of Visa, Mastercard Ruling

- Mastercard defence double-edged sword
- Visa class action question surfaces

The Supreme Court's ruling in favour of claimants in a long-running dispute with Visa and Mastercard (June 17) was hailed as having repercussions beyond the cases it considered, but there is no consensus among UK-based litigation lawyers if it will bring more claims from merchants or even affect the cases currently stayed.

The Supreme Court largely upheld previous decisions by the Court of Appeal, which consolidated a number of claims from lower instance courts and found that Mastercard and Visa's multilateral interchange fees (MIFs) restricted competition in the card acquiring market.

The court also determined the test for exemption under Article 101(3) of the Treaty of Functioning of European Union — that is all the conditions the card schemes would have to meet to be exempt from prohibition and liability.

The Supreme Court found the schemes restricted competition within the meaning of EU and UK law. The ruling was also the first to conclude that Visa's fees restrict competition.

As the ruling was handed down, claimants predicted it would bring many more claims for damages against the card schemes, while other observers [said](#) that the biggest impact may be the future of MIFs.

“We would expect a new wave of litigation, also against Visa,” said Joanna Christoforou, partner at Morgan Lewis. She added that a “great number of litigants were waiting for the Visa judgment” and said the ruling gave a “big push for claims that already have been filed but also new ones”.

That first-ever ruling to declare Visa's fees were a restriction of competition is expected to be the driving force behind such a "wave", as it can be used as evidence to prove a restriction of competition, reducing the burden for claimants in action for damages.

“Current claims and new claims will continue,” said Mark Falcon, director at Zephyre, who said that according to the ruling “there is not an exempt level of MIFs”, a determination he said could trigger more claims.

In 2007, after a ten-year investigation initiated by EuroCommerce's complaint, the European

Commission concluded that Mastercard's multilateral interchange fees infringe EU competition law. Many of the current claims are based on that decision.

"It was all public, everyone knew about it," said Wisking, referring to the time when the limitation period starts running.

"These MIFs do restrict competition but if you start the litigation now, how much of your claim period will have any real value?" asked Andrij Jurkiw, partner at Womble Bond Dickinson who was involved in the action against Mastercard that saw Sainsbury's awarded £68.5m. "A lot of your claim would be written off," he said, echoing Wisking's view.

Jurkiw added that the currently stayed interchange fee cases against Mastercard and Visa may not restart anytime soon: "Do you necessarily lift the stay on those cases if there are still issues to be dealt with by the CAT [Competition Appeal Tribunal]?"

"It's about effective litigation management," he said, and added that "if there are relevant issues in the stayed cases on which there is going to be a ruling, you are surely going to wait for that ruling".

Although the question of whether the fees charged by Mastercard and Visa are at an exemptible level may arise in some of the claims which have yet to be determined, Jurkiw is sceptical about it: "How are they going to convince anyone that the level of MIFs they charged was exempt when they have failed to do so to date?"

In the ruling, the court also adopted a more liberal approach to the so-called pass-on defence, making it easier for Visa and Mastercard to rely on it in their defence.

Pass-on defence relies on an argument that any overcharge that happens on one level of the market, e.g., a merchant being overcharged by an illegally high card scheme fee, is passed on to another level, such as consumers, merchants' suppliers, etc.

For Mastercard, this creates a conundrum in the context of the separate £14bn ongoing [class action](#) it faces.

"I would be surprised if Mastercard did not use this defence at the CAT as it argued for a wide interpretation of pass-on at the Supreme Court," a person familiar with this litigation told VIXIO PaymentsCompliance.

"They're stuck between a rock and a hard place," said Christoforou, who represented Sainsbury's in its claim against Visa.

Christoforou added that she "would be surprised if, given the Supreme Court's definitive ruling that Visa's UK MIFs were a restriction of competition, there would be no collective action against Visa".

"That's one of the reasons why it's so important," she said of the ruling.

The Supreme Court is expected to rule on the consumer class action against Mastercard later

this year, following a May hearing.

“Interchange fees have been found unlawful and it's inefficient to have this litigation, so there should be ex ante prohibition of interchange fees,” said Falcon, commenting on the litigation.

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