How Credit Card Fee Antitrust Cases Fare In UK Versus US

By **Allison Gorsuch and Lauren Weinstein** (September 9, 2020)

Allison Gorsuch

Lauren Weinstein

The U.K. Supreme Court recently ruled against two credit card companies in Sainsbury's Supermarkets Ltd. v. Visa Europe Ltd. and Sainsbury's Supermarkets v. MasterCard Inc., holding that the companies' payment schemes had the effect of restricting competition.[1]

For many American antitrust practitioners, this case from across the Atlantic echoes the U.S. Supreme Court decision in Ohio v. American Express, which also addressed the potential restraint of trade in the credit card services market.[2]

Both high courts considered how to address two-sided platform markets under the rule of reason — and came to different conclusions.

The U.K. court took a stronger line against platform operators than the U.S. court did, holding that a platform operator that causes antitrust harm to one side of the platform cannot justify its conduct by pointing to benefits on the other side of the platform.

Comparing the two rulings suggests that corporations that operate two-sided platforms are much more likely to win an antitrust case in the U.S. than in the U.K.

The Credit Card Market

The credit card services market works similarly in both the U.K. and the U.S. Operating in what is known as a two-sided platform, credit card services companies have two sets of customers: cardholders, who choose which credit card to use for their purchases, and merchants, who choose which credit cards to accept for payment.

Financial institutions both issue credit cards to cardholders as the issuing bank and facilitate the merchants' acceptance of credit cards as the acquiring bank. Acquiring banks charge fees to issuing banks called multilateral interchange fees, or MIFs, which are passed on to merchants. Different fees are charged directly to merchants. The credit card companies provide the platform through which the banks, cardholders and merchants conduct transactions.

The U.K. Litigation

Sainsbury's Supermarkets is the second-largest chain of supermarkets in the U.K. It, along with other plaintiffs, brought separate suits in the commercial courts in the High Court of Justice, Queen's Bench Division, against Visa and MasterCard, alleging restraint of trade due to the practice of charging MIFs.

The European Commission had previously found that charging MIFs violated Article 101(1) of the Treaty on the Functioning of the European Union, or TFEU, which regulates anti-competitive behavior. The restraint of trade resulted from the fact that the MIF was, in practice, nonnegotiable and compulsory. As a result, financial institutions and credit card services companies were not competing for the business of merchants.

The European Commission had also found that there was no Article 101(3) exemption for fair share — where restraints of trade that result in consumers receiving a fair share of the benefits obtained by the corporations are allowed — concluding that benefits to cardholders could not balance out detriments to merchants.

The commercial courts concluded that Visa's and MasterCard's schemes of requiring financial institutions to pay the MIFs were not restraints of trade, and one concluded that the fair share analysis of the exemption should include the benefits to both the merchants and the cardholders. The Court of Appeal found that the credit card companies' conduct infringed competition under Article 101(1), but remanded on the question whether the Article 101(3) fair share exemption applied.

The U.K. Supreme Court affirmed that the credit card companies' conduct was an unlawful restriction of competition under Article 101(1) because the MIFs effectively set a minimum price floor for the fees paid by merchants. This made part of the merchant fees nonnegotiable, as the MIFS were not set through a competitive market process. The U.K. court also held that the Article 101(3) exemption did not apply, because an advantage to cardholders could not counterbalance the disadvantage to merchants.

The U.S. Litigation

In 2010, the U.S. and over a dozen states sued multiple firms that operated credit card platforms for antitrust violations. The defendant, American Express Co., charged higher merchant fees than other credit card companies and required its merchants to enter into an agreement containing a nondiscrimination provision.

Under the nondiscrimination provision, merchants could not steer customers toward or away from any particular credit card to purchase items. The plaintiffs challenged the nondiscrimination provisions as anti-competitive.

At issue before the Supreme Court was whether these nondiscrimination provisions unreasonably restricted competition, thus resulting in higher fees, and whether the market was correctly defined. The U.S. District Court for the Eastern District of New York had conducted the antitrust analysis using only the market for credit card services for merchants as the relevant market. The U.S. Court of Appeals for the Second Circuit reversed, holding that the relevant market included both the markets for merchant services and the market for cardholder services.

The Supreme Court agreed with the Second Circuit's market definition. Because the market included both merchants and cardholders, restraints on merchants that benefited cardholders — in this case, through increased cardholder amenities paid for by the higher fees — were not violations of the Sherman Act, because the overall impact on the market was not substantially anti-competitive. In other words, the benefits to consumers could counterbalance the disadvantage to merchants.

Comparing the Cases

While there are a host of fascinating points of antitrust analysis that arise out of the Sainsbury judgment, for American practitioners — and corporations with operations in both the U.S. and U.K. — the most important are the similarities and differences between the two jurisdictions' treatments of the restraint of trade in two-sided credit card services markets.

With the exception of cases addressing conduct that is per se unlawful, it appears that cases arising under the Sherman and Clayton Acts in the U.S. and cases arising under the TFEU in the U.K. are analyzed under some version of the rule of reason. Comparing the cases, however, reveals that the courts apply the reasonableness analysis differently, even when assessing the same two-sided market.

In Sainsbury, the U.K. Supreme Court analyzed Article 101(3) of the TFEU, which provides exemptions for otherwise anti-competitive conduct.

For example, conduct that would otherwise be a restriction on trade is exempted if it "(1) contributes to improving the production or distribution of goods or to promoting technical or economic progress, while (2) allowing consumers a fair share of the resulting benefit." The conduct must not (3) impose any restrictions which are not indispensable to the positive results, and (4) the restrictions must not eliminate competition in respect to a substantial part of the products in question. All four elements must be met for the exemption to apply.

The TFEU's exemption provision is similar to the rule of reason in the U.S., which renders unlawful only unreasonable restraints on trade.

As discussed below, the two courts ultimately analyzed the credit card services market differently under their respective restraint of trade tests. The main difference in the two analyses is the burden of proof and whether and how that burden shifts. As shown by the result in Ohio v. American Express, courts can stop the rule of reason analysis after each step of the burden-shift if one party fails to meet their burden.

But in the TFEU's approach, once an anti-competitive restraint is proven by the plaintiff under Article 101(1), all four elements of the Article 101(3) exemption must be met simultaneously, and must be proven by the defendant — not the plaintiff.

The two jurisdictions agreed that the relevant market in which an industry operates on a two-sided platform includes both sides of the platform. The credit card services market operates on a two-sided platform because the networks facilitate transactions between two distinct sets of customers — here, merchants on one side, and consumer cardholders on the other. There is necessarily interdependency between the two customer sets, which both courts agreed had to be considered in analyzing any anti-competitive effects.

The U.K. court's decision in Sainsbury's ultimately turned on the second element of the Article 101(3) test, which requires that consumers receive a fair share of the resulting benefit to the seller's restrictive conduct. The Court of Appeal had held that if the restriction causes disadvantages in one part of the market, i.e., to retailers, advantages it creates in another part of the market, i.e., to consumers, cannot compensate for those disadvantages.

The U.K. Supreme Court agreed, noting that "consideration of aggregate efficiency gains across different markets" can be used for considering the positive results of restrictions, but that aggregate gains cannot be determinative as to "whether a 'fair share' of those gains has accrued to the consumers affected by the restriction of competition."

Rather, where there is a two-sided market, courts must analyze the harmed side independently and both sides together. If the restrictive measures are felt only on one side, in this case, the merchants, then a defendant seeking an exemption must prove both that (1) the harmed consumers also received appreciable objective advantages, and (2) the objective advantages for consumers in both markets, taken together, compensate for the disadvantages.

By contrast, the U.S. Supreme Court concluded that the plaintiffs in Ohio v. American Express were required to prove anti-competitive effects across the whole market — i.e., to both merchants and cardholders — not just on one side of it.

The court held that a price increase in American Express's merchant fees by itself could not demonstrate anti-competitive conduct. Higher merchant fees also offered cardholders more benefits, the court explained, balancing out any potential harm to competition among merchants.

While the court's holding ultimately turned on a fact-based analysis of the particular merchant fees American Express charged, the underlying proposition remained that benefits to cardholders could counteract harms to merchants because the market had to be analyzed as a whole.

Notably, the dissenting justices in the U.S. decision took the position of the U.K. Supreme Court, noting that the usual antitrust analysis "looks at the product where the attacked restraint has an anticompetitive effect" and does not combine the markets for nonsubstitutable goods. In the dissent's reasoning, much as in the U.K. court's, the products sold to merchants and to consumers are not the same and should not be combined when analyzing anti-competitive effects.

Conclusion

For U.S. antitrust petitioners, the Sainsbury's case shows how similar the general antitrust principles are in the U.S. and the U.K. or any jurisdiction that adheres to the TFEU. The exemption described in Article 101(3) captures much of the substance of an American rule of reason analysis. Companies that do business in both jurisdictions can thus be reasonably certain that potentially anti-competitive conduct will be analyzed under a similar framework. But they can't be so certain that the courts will arrive at the same result.

Courts applying the TFEU will be less likely to allow defendants to justify their conduct by pointing to a benefit on the other side of the platform. And these courts will place the burden of proving reasonableness squarely on the defendant. While companies doing business on both sides of the pond will thus, nominally, face similar antitrust analysis, it seems that the risk to defendants is greater in the U.K. than in the U.S.

Allison M. Gorsuch is an associate and Lauren M. Weinstein is a partner and MoloLamken LLP.

[1] [2020] UKSC 24.

[2] 138 S. Ct. 2274 (2018).