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The very relevant market. Case comment to the judgment of the Court of Appeals in Warsaw of 22 April 2010 - Interchange fee (Ref. No. VI ACa 607/09)

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Introduction

Although almost five years have gone by since the issue of the first decision of the President of the Polish Office for Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK) regarding multilateral interchange fees, the case is yet to be resolved. In 2010, the Court of Appeals in Warsaw annulled the judgment of the Court for Competition and Consumer Protection¹ (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK), which in turn overruled the original decision issued by the UOKiK President. The antitrust decision and following judgments reflect varying views on how to apply competition law to payment card systems. In addition, they appear to mirror the various approaches adopted by the European Commission in its subsequent decisions with respect to Visa and MasterCard.

It should be mentioned, as a way of introduction, that there is no general consensus as to the definition of the multilateral interchange fee (hereafter, MIF). For the purpose of this case comment it is sufficient to denote some of its characteristics from the description contained in its very name. First of all, the MIF is multilateral because it is set jointly and because it applies in a multi-party setting. The players in a payment card system include: cardholders, issuers (i.e. banks that issue cards), merchants and acquirers (i.e. banks which provide merchants with infrastructure and services necessary to accept payment by cards). Interactions between all these players are made possible thanks to the platform (for instance Visa or MasterCard), which intermediates between the actors and supplies technical infrastructure to settle the transactions. Secondly, MIF constitutes a fee because it consists of a transfer of monies from merchants to issuers. Finally, it is an interchange, as it relates to the functioning of a platform described above and designed to facilitate the exchange or meeting of two groups of customers and serving their respective needs.

¹ Judgment of SOKiK of 12 November 2008, XVII Ama 109/07 (not reported).

Facts

On 29 December 2006, the UOKiK President adopted a decision (hereafter, UOKiK decision)² directed at various Polish banks that issue payment cards. Anticipating the decision of the Commission in the MasterCard case³ (hereafter, the *MasterCard* decision), the Polish antitrust authority first defined the relevant market as the market for acquiring payment cards and second, considered the practice, consisting in a joint setting of the MIF by the scrutinized banks, as a restrictive agreement. The original decision was appealed by its addressees on a number of grounds, the most interesting of which included: flawed choice of addressees – it should have been directed at appropriate associations of undertakings (banks) rather than individual banks separately; incorrect delimitation of the relevant product market – a separate market for acquiring services does not exist; failure to consider the fact that the contested agreements are necessary for proper and effective functioning and development of payment card systems in Poland; failure to consider the fact that cross-subsidization is a common market practice. The decision was challenged also because the Polish antitrust authority did not conduct a sufficient analysis of the efficiency gains brought about by the contested agreements.

The appealed decision was modified by SOKiK on 12 November 2008. The first instance court annulled the original findings due to an incorrect definition of the relevant market. SOKiK asserted that since the MIF does not occur on the acquiring market, the decision should have been addressed to the organizations or associations which set the MIF rather than to individual banks. The SOKiK judgment was appealed to the Court of Appeals in Warsaw, which ruled on the case on 22 April 2010.

The Court of Appeals began by emphasizing that despite the EU character of the case, the conditions were not met for stalling the proceedings until the Court of First Instance (now the General Court) reaches its own verdict in the appeal case concerning the *MasterCard* decision⁴. Despite its ‘declaration of independence’ from the European case, the Polish Court of Appeals has come close to the position adopted by the European Commission in its *MasterCard* decision.

Key legal problems

The key legal problem of this case concerned the definition of the relevant product market since solving this controversy would, to a great extent, predetermine the outcome of the entire proceedings. Even the European Commission has reached different conclusions with respect to the definition of the relevant market at various

² Decision of the UOKiK President of 29 December 2006, DAR-15/2006, UOKiK Official Journal 2006 No. 1, item 5.

³ Commission Decision of 19 December 2007, Cases COMP/34.579 *MasterCard*, COMP/36.518 *EuroCommerce*, and COMP/38.580 *Commercial Cards* (not yet reported).

⁴ See Case T-111/08 *MasterCard and Others v. Commission*, OJ [2008] C 116/26.

points in time with respect to Visa and MasterCard. The same is true for the UOKiK President and the Polish courts.

As noted, the UOKiK President used the market definition applied later by the Commission in its *MasterCard* decision⁵, namely that the relevant product market is that for acquiring payment card transactions, i.e. the acquiring market.

SOKiK on the other hand, allegedly following the Commission decision in the *Visa* case⁶ (hereafter, *Visa* decision), took the view that defining the relevant market as that for payment card systems is more appropriate. This was not to say that the acquiring market does not exist, considering that an economic market can indeed be identified where services are bought and sold that enable merchants to receive card payments. According to SOKiK however, the MIF does not have any impact on the acquiring market because it does not influence competition between acquirers in their relation to merchants. MIF cannot be considered as compensation for services rendered by acquirers to merchants because the acquirers do not pocket the MIF themselves but transfer its full amount to the issuers instead. For SOKiK, the MIF constitutes an element of the issuers' remuneration for providing an electronic payment instrument in the form of the card. SOKiK identified particular services rendered by card issuers, which include: transaction settlement, payment warranty, deferring payment or free of charge granting of short-term credit to cardholders. Unfortunately, SOKiK did not explain why it is the merchant that should pay for this assistance by way of the MIF seeing as most of the aforementioned services are actually provided to the benefit of the cardholder. More surprisingly even, SOKiK ultimately concluded that the MIF should be viewed as a price for the joint service rendered by the entire Visa or MasterCard system. It remains unclear how can the MIF simultaneously constitute a payment for the services rendered by one of the participants of the system (i.e. card issuers) and at the same time payment for the use of the system. Further confusion is brought about by SOKiK's statement that both merchants as well as cardholders are on the demand side of the market from the perspective of card issuers and should thus be treated in a uniform manner, as consumers. Although it is true that payment card systems, as an example of two-sided markets, are characterized by the existence of two categories of consumers but both groups center around a platform, which enables their interaction. It is thus not the perspective of card issuers that should be adopted to notice the two-sidedness of the market and the balancing need resulting therefrom, but the perspective of the platform. Issuers merely enable cardholders to participate in the platform but without the Visa or MasterCard system and its second side (i.e. acquirers and merchants), they are not attractive for cardholders. Thus, although SOKiK moved in the right direction by focusing on payment card system as a whole, it did not manage to identify all the characteristics of two-sided markets and their consequences.

It is also worth presenting the position of the parties regarding the character of the MIF and their postulated definition of the relevant product market. Visa and

⁵ *MasterCard* decision, para. 316.

⁶ *Visa* decision of 24 July 2002.

MasterCard see the MIF as a balancing mechanism necessary for the system as a whole to function. The MIF ensures stability by equilibrating the costs and benefits between the beneficiaries of the system (i.e. card holders and merchants). Thus, to appreciate fully the MIF's balancing function; the relevant market should be defined as that for payment card systems.

Another important legal problem that was touched upon in the analyzed case is the potential efficiency gains brought about by MIF. Efficiencies are relevant since they could lead to an exemption on the basis of Article 101(3) TFEU or Article 8 of the Polish Act on Protection of Competition and Consumers⁷. The insufficiency of Polish antitrust authority's analysis in this respect was listed among the many appeal grounds. However, SOKiK finished its evaluation at the stage of market definition and thus did not proceed to the problem of a potential exemption.

Key findings of the Court of Appeals

Unfortunately, the Court of Appeals has not resolved the inconsistencies as to the definition of the relevant product market despite the fact that it has rejected SOKiK's approach. The Court of Appeals first contested the opinion that the Commission has assessed the MIF in its *Visa* decision on the basis of the relevant market for all payment card systems. The Court of Appeals deemed this conclusion as erroneous and resulting from an inaccurate lecture of the EU case. It is true that the *Visa* decision is not very clear in its part devoted to relevant market definition: it mentions the two different types of competition, which function in payment card systems (i.e. inter-system and intra-system competition) and it analyses in detail the substitutability of payment cards with other means of payment (such as cash, checks etc.). However, the conclusion ultimately reached by the Court of Appeals appears incorrect. It seems that the European Commission has indeed decided that the relevant product market is that for payment card systems, albeit it took into account not only the competition between different systems, such as Visa and MasterCard, (inter-system) but also among the banks within each system (intra-system). Paragraph 52 of the *Visa* decision, to which the Court of Appeals refers in order to support its assertions, does not invalidate this conclusion.

On the other hand, the Court of Appeals quite rightly noticed the different relations, streams and connections that take place inside every payment card system. Visa or MasterCard, as the owners of their platforms, interact first of all with banks (both issuers and acquirers). Second, the issuers interact with acquirers in the course of the authorization process. And finally, issuers interact with their clients – cardholders, while acquirers interact with their clients – merchants. However, the existence of these relation streams was not sufficient for the Court of Appeals to conclude that a single market for 'payment card systems' exists. The Court of Appeals agreed with the European Commission's *MasterCard* decision that, since the various services rendered within payment card systems differ, they constitute distinct relevant markets. According to the Court of Appeals the definition of the relevant product

⁷ Journal of Laws 2007 No. 50, item 331, as amended.

market adopted by SOKiK would have been appropriate only when the inter-system competition was at stake. But since this case concerned intra-system competition, the correct definition of the relevant product market should have been the acquiring market.

However, in order to avoid the potential pitfalls of identifying anticompetitive effects in a relevant market (acquiring market) distinct from the one on which the restrictive agreement took place (issuing market – the MIF was agreed upon between issuers and acquires), the Court of Appeals advanced the theory of related markets. It asserted that the MIF has a significant impact on the acquiring market (even though the court did not explain any further what the character and manifestation of this effect was) and thus these two markets are related. This assertion, coupled with the identification of a vertical element in every payment card system, that is the relation between Visa and MasterCard on the one hand and banks on the other, has allowed the Court of Appeals to detect anticompetitive effects in a relevant market distinct from the one on which the agreement was concluded.

SOKiK's failure to consider the substance of the case has led the Court of Appeals to annul the first instance judgment and refer the case back to SOKiK.

It appears that the adoption of a different relevant product market definition would have made it possible to conduct a full assessment of the competitive effects of the MIF that would encompass the special characteristics of payment card systems as an example of a two-sided market. The most apt definition would have been that the relevant product market is that for payment card systems, albeit also taking into account intra-system relations and competition. This is the only definition which makes it possible to consider the balancing function of the MIF, its meaning as a mechanism of maximizing the number of users (both cardholders and merchants) and can be a good starting point for the assessment of its potential efficiencies. An artificial separation of payment card systems into their issuing and acquiring segments gives a false idea of the market in question. It does not demonstrate what convinces customers to pay by cards and why are merchants willing to accept card payments. It also does not explain why do issuers sometimes give cards without a charge and even provide cardholders with free credit. Finally, it does not show why merchants are ready to accept card payments without requesting an additional charge.

In addition, the 'related markets' theory followed by the Court of Appeals is not entirely all-encompassing and convincing. It is true that in vertical agreements a restriction of competition can appear in a related market⁸ when undertakings under scrutiny have some degree of market power, which enables them to influence another market. The Court of Appeals has failed however to mention or identify this element. Also not clear is its understanding of the character and nature of the inter-relation between the acquiring and issuing market. Accepting that the relevant product market is that for payment card systems, with all their internal relations and two types of

⁸ See: A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009, Para. 42.

competition (inter-system and intra-system), would reflect the true nature of this market. It would also save the unnecessary trouble of proving that the conditions are satisfied for identifying restrictive effect in a distinct market from the one on which agreement is concluded.

Interestingly, the Court of Appeals has also criticized SOKiK for ignoring Article 81(3) TEC considerations (currently Article 101(3) TFEU). Unfortunately, the second instance court did not give many indications as to how should such analysis proceed. It merely reminded that the burden of proving the existence of efficiencies is to rest on the undertakings concerned and that evidence is to be supplied at the outset of the proceedings (following the principle of preclusion of evidence in economic proceedings). Finally, the Court of Appeals suggested that even if the fulfillment of the prerequisites of Article 101(3) TFEU is not proven to the requisite standard, such allegations can be taken into account at the later stage of the assessment when the correctness of the fine level is evaluated.

It should be emphasized that market definition problems will also influence the assessment of potential efficiency gains because one of the conditions that must be met for a restrictive agreement to be exempted, is the existence of counterweighing consumer benefits. These gains must, as a rule, arise *in the same relevant market* in which the anticompetitive effects occurred. It seems clear however that potential efficiencies of the MIF go to the participants of the system as a whole (cardholders and merchants) rather than being associated with consumers only. There is a risk therefore that a narrow, one-sided definition of the relevant market will lead to an unjustified disregard for these potential benefits.

Final remarks

Although neither SOKiK nor the Court of Appeals have managed to provide a workable solution to the market definition problem in this case, it appears that SOKiK was moving closer towards the most appropriate answer. However, its reasoning was not entirely consistent because it saw the MIF as an element of the issuers' fee for providing cardholders with an electronic payment instrument (payment card) but at the same time, it viewed the MIF as remuneration for the services of the system as a whole. Still, its comprehensive treatment of payment card systems, which makes it possible to assess the overall effect and influence of the MIF, should be appreciated. The Court of Appeals tried to mirror the solution adopted by the European Commission in its *MasterCard* case. Unfortunately, it has failed to demonstrate why it finds this line of reasoning convincing. Not persuasive is, in particular, its reference to the distinct character of the services rendered on the issuing and acquiring market. Indeed, the Court of Appeals struggles in the following sections of the judgment to show an inter-relation between these markets. It is precisely for this inter-relation that payment card systems should have been considered as a single relevant market.

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