Biog box

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fall into line. The Commission is now investigating Visa Europe's credit card fees. The story between the European Commission and bank card fees is therefore far from over.

The *MasterCard* case is not, however, an isolated one. In fact, similar to its decision of July 2011 as regards interbank commissions linked to bank card transactions[20], the French competition authority has just agreed to close its action against banks in return for commitments to phase out commissions applied to non-cash payment transactions other than bank cards and cheques[21]. ■

1 T-111/08, *MasterCard and others v European Commission*, 24 May 2012.
2 Decision C(2007) 6474 final of 19 December 2007 relating to a proceeding under Art 81 [EC] and Art 53 of the EAA Agreement (Cases COMP/34.579 – MasterCard, COMP/36.518 – EuroCommerce, COMP/38.580 – Commercial Cards).
3 T-111/08, Points 82 and 202.
4 See for example T-111/08, point 258, regarding the characterisation of Mastercard as an association of undertakings after the IPO : "it is reasonable to conclude that there is no conflict of interests between MasterCard's shareholders and the banks". In addition, the court deducts loosely a commonality of interests from a lack of conflict of interests and the latter from the very fact that setting a higher MIF contributes to a larger number of transactions.
5 C-389/10, *KME v Commission* and C-386/10, *Chalkor AE Epexergasias Metallon v Commission*, both dated 8 December 2011.
6 ECHR, *A. Menarini Diagostics SRL v Italy*, n°43509/08, 27 September 2011.
7 C-185/95, *Baustahlgewebe GmbH v Commission*, 17 December 1998, point 58.
8 C-27/76, *United Brands v Commission* (Chiquita Bananas), 14 February 1978, point 265.
9 COMP/29.373 – Visa International, 24 July 2002, in which the Commission took the view that Visa's MIFs qualified for an exemption under Art 81(3) EC.
10 T-111/08, point 177.
11 COMP/29.373 – Visa International, Commission Decisions dated 9 August 2001 and 24 July 2002.
12 COMP/29.373 – Visa International, 24 July2002, point 43 and 44.
13 Richard Whish & David Bailey, *Competition Law*, OUP, 2012, 7th ed, p11.
14 T-111/08, point 222.
15 T-111/08, point 35.
16 Guidelines on the application of Art 101(3) TFEU, OJ C 101 of 27.4.2004
17 Case T-112/99 *M6 and Others v Commission* [2001] ECR II-2459, para 149.
18 IP/07/1959 dated 19 December 2007.
19 T-111/08, point 104.
20 Decision n°11-D-11 of 7 July 2011.
21 Decision n°12-D-17 of 5 July 2012.

Hotel control

MCKILLEN V MISLAND (CYPRUS) INVESTMENTS LTD AND OTHERS [2012] EWHC 2343 (CHANCERY DIVISION, COMPANIES COURT) (DAVID RICHARDS J) (10 AUGUST 2012)

FACTS

This case concerned the battle for control of three of London's leading hotels – Claridge's, The Connaught and The Berkeley. Patrick McKillen was one of a consortium of investors who purchased the hotels in 2004. He had a 36% interest in the company which headed the group of companies owning the hotels. A company controlled by Sir David and Sir Frederick Barclay acquired indirectly a 28% interest in the company. The remaining shares were owned by Derek Quinlan and these shares were fully charged to secure debts owed to companies controlled by the Barclay brothers. The judgment covered many interesting company law issues so due to limited space this report highlights only certain aspects.

CONCLUSION

Mr McKillen's claim failed. The alleged breaches of the pre-emption and other provisions in the shareholders agreement and the alleged breaches of duty by the directors were not established (save in one case).

Directors duties were now largely codified in ss 170 to 177 of the Companies Act 2006. Mr McKillen made a series of allegations that directors appointed by the Barclay interests acted in breach of their duties. For example, they failed to disclose to the company that a Barclay interest was in negotiations with NAMA to acquire the NAMA debt on the hotels. Of the many allegations, only one was found: that two of the directors were in breach of duty under s 175. However, failure to disclose this conflict of duties had no adverse impact on the company and caused no prejudice to Mr McKillen.

The jurisdiction of the court to grant relief in respect of unfairly prejudicial conduct in relation to a company was entirely statutory (ss 994–999 of the Companies Act 2006). There was no room for equitable considerations as the company was formed by a group of highly sophisticated and experienced business people. Mr McKillen's right to participate in the management of the company was defined by his right to appoint a director (being himself). There was no interference in his right to attend board meetings. The fact that Barclay interests and Mr Quinlan took a position different to that of Mr McKillen did not involve any exclusion or unfairness.

In order to make a case of the alleged shadow directorship of the company by Sir David Barclay, it would have to be established that a majority of the directors of the company were accustomed to act in accordance with his directions and those instructions affected their decisions. There was no such evidence and indeed Sir David had no knowledge of most of the alleged issues.

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