Introduction

On 18 September 2013, the Competition Commission of Singapore (‘CCS’) issued its public decision in relation to VISA Multilateral Interchange Fee (‘MIF’) seven years after the notification was lodged. The CCS held that the Visa’s MIF system has not infringed the prohibition of anti-competitive agreements in Singapore. This clearance decision was issued in relation to a notification of the MIF system to the CCS on 3 January 2006 which triggered an extensive review by the CCS of the potential effect of the MIF on competition in Singapore. The Rajah & Tann Competition Team acted for some applicants as well as for some parties who had received queries from the CCS on the matter. Whilst there are no novel points emerging from the decision, there are a few good points to note. We address these here.

Key Findings

CCS Confirms That Sufficient To Establish Lack Of Effect For Clearance

The CCS took the view that the agreement had no anti-competitive object, noting that:

(a) the submission by Visa that ‘the MIF is a mechanism designed to provide sufficient incentive to ensure the optimum level of issuing and acquiring among Members is achieved in the Visa Network’, and

(b) more importantly, the fact that there were no decisions from other jurisdictions that had found the MIF system to be anti-competitive by object.

Likewise, the CCS reviewed the effects of the agreement on competition and concluded that the MIF system did not result in an appreciable effect on competition in the relevant markets.
Given this, the CCS decided that it was not necessary to further review the claim by the applicants that the MIF system resulted in Net Economic Benefit and was, therefore, excluded from the Section 34 prohibition on this ground.

This is an important point to note, i.e. where parties can establish that an agreement has no anti-competitive object and that the agreement does not result in an appreciable adverse effect on competition, then there is no need to further demonstrate that the agreement would, in any event, be exempt. In other words, parties to an agreement who genuinely believe that their agreement may have anti-competitive effect, may seek guidance or a decision by the CCS, without having to establish that the agreement further results in Net Economic Benefit or is otherwise excluded.

This does not apply, however, where an agreement has an anti-competitive object. To illustrate, a number of airlines alliances which have been notified to the CCS for clearance have been held to be anti-competitive by object. In such cases, the parties had to obtain a clearance decision by the CCS on the ground of Net Economic Benefit.

**Relevant Markets**

The CCS rejected the submission by the applicants that the relevant product market was that of ‘payment systems, which is the market for the demand and supply of different payment instruments’.

Rather, the CCS’s view was that the relevant markets for reviewing the effects of the MIF system are:

(i) the provision of issuing services for card payments in Singapore;

(ii) the provision of acquiring services for Visa Card payments in Singapore, and

(iii) the provision of card scheme administration services in Singapore.

Note that the approach is slightly wider than the one adopted by the European Commission, for instance, in the MasterCard case. In the MasterCard case, the European Commission concluded that the relevant market for the purpose of its assessment of MasterCard MIF was limited to the market for acquiring payment cards, which market was viewed as national in scope.

**Agreement / Decision By An Association Of Undertakings**

At the time the notification was made, Visa Group was structured differently to what it is now. Prior to October 2007 (NB: the notification to the CCS was made in 2006), ‘Visa Enterprise (which included, inter alia, Visa International) was a membership organisation
wholly-owned and controlled by its Members. Singapore Members were members of Visa International’. Hence, the fixing of the MIF was originally notified as a decision by an association of undertakings.

However, between 2007 and 2009, Visa went through an extensive restructuring, which led to, so claimed Visa, ‘remove all banks representation and involvement from the management and governance of Visa International and that the effect of the restructuring has led to a divergence in the financial and economic interests of the Visa Worldwide and the Singapore Members, such that it is no longer an association of undertakings’.

The CCS, however, did not agree with the argument. In particular, having stated that a decision by an association of undertaking would include the constitution or rules of the association of undertakings, the CCS noted that the MIF system had not changed significantly before and after the restructuring and that ‘the rules imposed by Visa International and now Visa Worldwide on the Singapore members in respect of the MIF system serve to align the commercial conduct of these Members, and collectively to impose costs upon their merchant customers’. Further, the CCS took the view that the Visa Group MIF system ‘could constitute an agreement between undertakings and/or a concerted practice between the Singapore Members and the Visa Group’.

Concluding Words

This notification was filed with the CCS in January 2006. It was the first notification under the newly implemented Competition Act. After a seven year extensive review, the CCS held that the MIF system was not anti-competitive under the Competition Act, without the need to establish Net Economic Benefit. This is different from the views adopted in the EU where the MIF was seen as anti-competitive.

The decision further confirms that parties to an agreement which object is not anti-competitive only have to establish the lack of appreciable anti-competitive effects when seeking guidance or a clearance decision by the CCS.
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