Court of Justice of the European Union
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Press and Information

Judgments in Case C-304/16 and C-643/16
The Queen, on the application of American Express Company v The Lords Commissioners of Her Majesty's Treasury

A three party card scheme involving a co-branding partner or an agent is subject to the same restrictions as those applicable to four party schemes with respect to interchange fees

However, the mere fact that a three party payment card scheme uses a co-branding partner does not necessarily mean that it is subject to the access obligation

In the context of card payments, two models exist: four party schemes and three party schemes. Four party schemes involve the participation of four parties: payments are made from the account of the consumer to the account of the merchant through the intermediation of the bank that issued the consumer's card, and of the acquiring bank which provides the merchant with card acceptance services.

In four party schemes, card-based payment transactions are made from the payment account of a payer to the payment account of a payee through the intermediation of the scheme, an issuer (on the payer's side) and an acquirer (on the payee's side). In contrast, in three party schemes, the acquiring and issuing services are provided by the scheme itself and card-based payment transactions are made from the payment account of a payer to the payment account of a payee within the scheme. American Express operates a three party payment card scheme.

An 'interchange fee' is a fee paid directly or indirectly (i.e. through a third party) for each transaction between the issuer and the acquirer involved in a card-based payment transaction. An EU regulation restricts the amount of interchange fees.[1]

That regulation provides that, when a three party payment card scheme, such as American Express, issues card-based payment instruments with a co-branding partner ('the co-branding extension') or through an agent ('the agency extension'), it is considered to be a four party payment card scheme. In Case C-304/16, after American Express brought an application for judicial review, the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) asks the Court of Justice whether it is a prerequisite of a three party payment card scheme being considered to be a four party payment card scheme and, as a consequence, subject to the interchange fee caps laid down by the regulation, that a co-branding partner or an agent act as an issuer.

Case C-643/16 concerns the directive on payment services,[2] which provides, inter alia, that the rules governing the access of payment service providers to payment systems must be objective, non-discriminatory and proportionate and that payment systems must not impose on payment service providers restrictive rules on effective participation in other payment systems, discriminatory rules, and restrictions on the basis of institutional status. In that case, the High Court asks whether, in the event that a three party payment system such as American Express enters into co-branding arrangements or makes use of an agent, that system is subject to the access obligation laid down by the directive, where the co-branding partner does not itself provide

[1] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ 2015 L 123, p. 1).
[2] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35).

payment services within that system or where the agent acts on behalf of the system in providing payment services.

In today's judgments, the Court answers first, in Case C-304/16, that it is not apparent from either the wording or the structure of the regulation that a co-branding partner or agent must itself be involved in the issuing activity for the three party payment card scheme to be considered to be a four party payment card scheme. The Court states that, if the EU legislature had wanted to restrict the scope of the regulation so that that would be the case, it could have expressly done so.

Further, the Court notes that the aim of regulating interchange fees is to improve the functioning of the internal market and to contribute to reducing transaction costs for consumers. The Court holds that it is not inconceivable that some type of consideration or benefit might be identified as constituting an implicit interchange fee, even though the co-branding partner or agent with whom the three party payment card scheme concludes an arrangement is not necessarily involved in the issuing activity of that scheme. Consequently, the Court considers that it might prove difficult to achieve the objectives of the regulation, in particular that of ensuring a level playing field in the market, if situations where a co-branding partner or agent does not act as an issuer were, for that reason, to be exempted from the rules laid down by that regulation with respect to interchange fees.

The Court therefore holds that, **where a three party payment card scheme enters into a co-branding arrangement or an arrangement with an agent, that scheme must be considered to be a four party payment card scheme, and consequently the interchange fee caps laid down by the regulation are applicable to it.**

In Case C-643/16, the Court considers that a three party payment card scheme that has entered into a co-branding arrangement is not subject to the access obligation laid down by the directive in a situation where that co-branding partner is not a payment services provider and does not provide payment services within that scheme with respect to the co-branded products. However, a three party payment card scheme that makes use of an agent for the purposes of supplying payment services is subject to the access obligation laid down by the directive.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the judgments C-304/16 and C-643/16 is published on the CURIA website on the day of delivery.

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