

REVIEW OF THE CREDIT CARDS (PRICE DISCRIMINATION) ORDER 1990 (SI 1990 NO 2159)

Issue

1. Under section 162 of the Enterprise Act 2002 ('EA02'), the Office of Fair Trading ('the OFT') has a duty to consider whether, by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked¹. The OFT shall give such advice to the Competition Commission ('the CC') as it considers appropriate in relation to any possible variation or revocation by the CC. Pursuant to this duty, we have reviewed the Credit Cards (Price Discrimination) Order 1990 (SI 1990 No 2159) ('the Order').²

Conclusion and recommendation

2. As a result of the coming into force of the Payment Services Directive³ ('the PSD'), which is transposed into UK law by the Payment Services Regulations 2009⁴ ('the PSRs'), we consider that there has been a change of circumstances relating to the Order, by reason of which it may be appropriate to vary or revoke the Order.
3. We conclude that that the effect of the transposition of the PSD into UK law has been to supersede the Order.⁵ We therefore recommend that the CC considers whether the Order should be varied or revoked so as to remove any duplication or conflict with the PSD.
4. This advice has been published on the OFT website, consistent with paragraph 22 of the Memorandum of Understanding between the OFT and the CC on the

¹ In this instance the OFT's duty arises under sections 88(4) and (5) of the Fair Trading Act 1973 as preserved in Schedule 24 of the Enterprise Act 2002.

² The Order was one of those orders specified for the purposes of paragraphs 15(2), 15(3)(b) and 17(1) of Schedule 24 to the EA02 in The Enterprise Act 2002 (Enforcement Undertakings and Orders) Order 2004 (SI 2004/2181) (Schedule 2)

³ Directive 2007/64/EC

⁴ SI 2009/209

⁵ Subject to certain derogations Article 86(1) of the PSD provides 'in so far as this Directive contains harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in this Directive'. Here the relevant derogation is Article 52(3) which states that 'Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments'. This is discussed further at paragraph 18 below.

variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Enterprise Act 2002⁶.

Background

5. In August 1989 the Secretary of State for Trade and Industry presented to Parliament the report of the Monopolies and Mergers Commission (MMC) on 'Credit Card Services'⁷. This report found that monopoly situations existed and that, among other things, the rule commonly used by credit card providers to ensure that merchants could not surcharge customers for making credit card transactions was 'undesirable' (paragraph 7.94). This was because the MMC found that this so-called 'No Discrimination' rule restricted the freedom of retailers to set their own prices. The MMC recommended that credit card issuers and acquirers should no longer require traders to comply with the No Discrimination rule (paragraph 7.113 (a)).
6. On 31 October 1990 the Secretary of State made the Order, which entered force on 28 February 1991.
7. The prohibition in the Order can be summarised as making it unlawful for any person to make or carry out an agreement relating to payment cards⁸ to the extent that it imposes or has the effect of imposing any prohibition, restriction or requirement falling within these categories:
 - Agreements which impose or have the effect of imposing any prohibition or restriction on the charging by any party to the agreement of prices for credit card transactions which differ from prices charged by him for other transactions with respect to goods, services, accommodation or facilities of the same description. For instance, there can be no agreements which restrict merchants' ability to surcharge consumers for credit card transactions.
 - Agreements to require or have the effect of requiring any party to the agreement to charge prices for credit card transactions which are the same as prices charged by him for other transactions with respect to goods, services, accommodation or facilities of the same description; or
 - Agreements to require or have the effect of requiring any party to the agreement to include in any other agreement made by him a prohibition or restriction falling within either of the previous two bullets.

⁶ http://www.offt.gov.uk/shared_offt/595316/595319/offt1060.pdf

⁷ Report reference Cm 718

⁸ As defined in article 2(1) of the Order. A credit card is one type of payment card.

8. There is one important difference between the recommendations included in the MMC report and the provisions of the Order as finally introduced. The MMC's report made no recommendation that agreements to limit the amount of any surcharge to the amount of the fee agreed by the merchant with the acquirer for processing the transaction should be treated differently from other surcharging agreements, whereas Article 4(b) of the Order has the effect of permitting them.
9. The effect of the prohibition means that on or after 7 March 1991 it was unlawful to make or carry out an agreement as described in paragraph 7 above and that any existing agreements must have been terminated on or before that date.

Change of circumstances

10. We believe that this Order is superseded by the provisions of the PSD, which have been transposed into UK law by the PSRs. The relevant Article is Article 52 of the PSD, which is implemented in Regulation 54 of the PSRs.
11. The PSD is a 'maximum harmonisation directive'. This means that national law cannot exceed or fall short of its provisions, save where there is an explicit derogation in the Directive. This refers to both the law transposing the Directive itself, and any other national law, even if that national law pre-dates the Directive in question. If any national law contains provisions which are inconsistent with the provisions of a maximum harmonisation directive, it is considered unenforceable if it cannot properly be interpreted in conformity with the Directive. However, if there is a transposing measure for a Directive, any other domestic measure in the field is unlawful in accordance with the EU law general principle of legal certainty. Even if a law is entirely consistent with the Directive - except where relied upon as giving effect to the Directive - it ceases to have effect when the Directive enters force, as the Directive supersedes national legislation where the European legislation 'occupies the field'.
12. The Order is a pre-existing measure which has not been relied upon to transpose any part of the Directive. Accordingly we consider that there has been a change of circumstances relating to the Order, with the coming into force of the PSD, such that it may be appropriate to vary or revoke the Order.
13. The effect of the Order is to make it unlawful to impose or have a 'no discrimination rule'. A 'no discrimination rule' prohibits merchants from charging different prices to those who pay by credit card rather than by another means of payment.

14. One effect of the PSD is that a Payment Service Provider shall not prevent merchants from requesting a charge or offering a reduction for using a given payment instrument – which includes credit cards.

Payment Services Directive

15. The PSD provides the legal foundation for the creation of an EU-wide single market for payments. The PSD aims to establish a modern and comprehensive set of rules applicable to electronic payment services within the European Union ('the EU'). The target is to make cross-border payments as easy, efficient and secure as national payments within a Member State. The PSD also seeks to improve competition by opening up payment markets to new entrants, thus fostering greater efficiency and cost reduction.
16. On 24 April 2007 the European Parliament adopted the proposal for the PSD. Member States were required to transpose the provisions of the PSD into national law by 1 November 2009. In the UK, this was done by the PSRs, which were made on 9 February 2009 and were in force in full by 1 November 2009.

Analysis of the PSD and the Order

17. Article 52 of the PSD (Regulation 54 of the PSRs) makes provision in relation to the charges which may be applied by payment service providers (a category of business that is stated to include credit, payment and electronic money institutions providing services for the execution of payments through payment cards). It also makes provision in relation to price discrimination (in the form of surcharging or discounting) by the payee (i.e. the merchant). This provision states that a payment service provider (i.e. acquirer) shall not prevent a payee (i.e. merchant) from requesting from the payer (i.e. cardholder) a charge or from offering him a reduction for the use of a given payment instrument (the definition of a 'payment instrument' is discussed at paragraph 19).
18. Article 52(3) goes on to state that Member States may forbid or limit the right to request charges. The UK elected to "not transpose the option" – that is, to not forbid or limit the right to charge. The position in UK law under the PSRs is, therefore, that merchant acquirers (or other payment service providers) may not prevent merchants (or other payees) from charging cardholders (or other payers)

as they wish for using a particular card (or other payment instrument)⁹. Merchants have unfettered freedom to charge or discount as they wish, regardless of rules or edicts from their merchant acquirer.

19. As defined in the PSD a payment instrument means “any personalised device, or personalised set of procedures agreed between the payment service user and the payment service provider, used by the payment service user in order to initiate a payment order”. And a payment order means “any instruction by a payer, or a payee, to their respective payment service provider requesting the execution of a payment transaction”.
20. Given the open texture of this definition, a particular 'payment instrument', which a merchant is free to surcharge (regardless of scheme/acquirer rules or standards), can be, for instance, a device (say a card) or set of procedures (say a payment order or mandate). The definition suggests that a merchant can surcharge discriminately (e.g. he can charge some cards but not others), since every card is a personalised device (as agreed between the cardholder and his issuer and used to initiate payments).
21. The position in the UK is that merchants are entitled to add a surcharge to any transaction made by credit card, regardless of any rules or standards their acquirers seek to impose. Unlike the position under the Order, this is now true of all types of card (and indeed all other payment instruments), not just credit cards.
22. Article 52 of the PSD (Regulation 54 of the PSRs) therefore duplicates clause 3 of the Order. However, the PSRs do not duplicate Article 4(b) of the Order which exempts requirements on merchants to limit the amount of any surcharge to the amount of the fee agreed with the acquirer for processing the transaction. Article 4(b) appears therefore to be in conflict with the PSRs. In this sense, the Order and the PSRs do not duplicate each other, and there is risk of confusion as long as the Order remains in force.

OFT’s advice to the competition commission

23. The OFT has given consideration to whether there has been a change of circumstances. Given the above, we consider that the Order has been superseded by the PSD, and as such there has been a change of circumstances. Indeed,

⁹ Regulation 54(3) The payee’s payment service provider may not prevent the payee from—
(a) requiring payment of a charge by; or
(b) offering a reduction to,
the payer for the use of a particular payment instrument.

circumstances have changed such that all payment instruments have the status previously afforded only to Credit Cards by the Order. The OFT therefore advises the CC that this Order needs to be varied or revoked so as to remove any duplication or conflict between the PSD, PSRs and the Order.

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