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US Court Rules That Confidential European Commission Documents Are Not Discoverable in US Antitrust Litigation

On August 27, 2010, the Hon. John Gleeson, a judge in the United States District Court for the Eastern District of New York, (the "District Court") ruled that certain confidential documents prepared by the European Commission (the "Commission") in its competition cases are not discoverable in US antitrust litigation.

In private US antitrust litigation against Visa and MasterCard, plaintiffs sought to compel production of two documents prepared by the Commission in EU competition law proceedings, namely a Statement of Objections issued to Visa and a recording of a MasterCard Oral Hearing. Overturning a magistrate judge's decision compelling production, the District Court ruled that, under the principle of international comity, it would bar the disclosure of the documents sought by the plaintiffs. The District Court held that requiring the disclosure of the requested documents would seriously undermine the Commission's enforcement of EU competition law.

I. FACTUAL BACKGROUND

Visa and MasterCard. Visa and MasterCard process payments made with the credit cards issued through banks that are tied to the Visa or MasterCard payment processing network. In any given commercial transaction, a bank will either be an "Issuing Bank" (*i.e.*, the consumer's bank) or an "Acquiring Bank" (*i.e.*, the merchant's bank). An "interchange fee" is charged by the Issuing Bank for its role in the transaction.

Alleged Violation. The interchange fee is determined on the basis of rules set by Visa and MasterCard. In these proceedings, Visa and MasterCard were sued for an alleged agreement to inflate the price of the interchange fee in violation of US antitrust laws.

European Proceedings. The conduct of Visa and MasterCard was also investigated by the European Commission.[1] As a consequence of its investigations, the Commission prepared two documents related to Visa and MasterCard. These two documents were requested by the US plaintiffs under the broad US discovery rules,

[1] Visa and MasterCard have, since 1999, both been subject to more than one Commission investigation.

which generally enable litigants to obtain disclosure of all non-privileged information that is reasonably calculated to lead to the discovery of admissible evidence.

The Requested Documents. During its investigation, the Commission addressed a Statement of Objections[2] to Visa, and prepared a recording of a MasterCard Oral Hearing.[3] The Commission filed an amicus brief objecting to the disclosure of the two documents (which under EU law are strictly confidential), as, in the Commission's view, doing so would seriously undermine the effectiveness of its antitrust enforcement. The Commission noted that the documents were prepared solely for the purpose of the EU competition law proceedings.

Following objections to disclosure from Visa and MasterCard, a Magistrate Judge ordered Visa and MasterCard to disclose the documents. Visa and MasterCard appealed to the District Court.

II. DISTRICT COURT RULING

In Visa and MasterCard's appeal, the Commission intervened as *amicus curiae*, represented by Cleary Gottlieb. The Distruct Judge framed the issue as follows: did the need for deference to a foreign sovereign, the European Union, override the normal US discovery rules?

The Principle of International Comity. According to this principle, where the rules or interests of a foreign sovereign nation are affected by the rules of the nation where the matter is being heard, deference may be given to the rules of the foreign nation or, at a minimum, foreign rules will be taken into consideration. In applying this principle, the Second Circuit has held that US courts *"should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures"*.[4]

The Test for Comity. The US Supreme Court has outlined a five-part test that is applicable where international comity is balanced against discovery requests:[5]

1. How important is the requested information to the US litigation?

2. How specific is the request?

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2 The Statement of Objections is the document in which the Commission informs parties of the objections raised against them.

3 The Oral Hearing is a hearing in which parties subject to a Commission investigation are given the opportunity to be heard before an independent Hearing Officer (who is also a Commission official). The Oral Hearing takes place following the receipt of the Statement of Objections.

4 *Ings v. Ferguson*, 282 F.3d 149, 152 (2nd Cir 1960).

5 *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 (1987).

3. Did the information originate in the US?

4. Are there alternative means of securing the information?

5. How much would refusing the request undermine important US interests, and how much would complying with the request undermine important foreign-sovereign interests? (This balancing requirement is regarded as the most important of the five.)

The *Rubber Chemicals* Precedent. The District Court followed the approach taken in a previous decision involving the Rubber Chemicals industry.[6] In *Rubber Chemicals*, a discovery request was made for certain communications between an EU leniency applicant and the Commission in a competition case. The court applied the five-factor test and ruled for the Commission in circumstances similar to those in this case. Notably, the *Rubber Chemicals* case involved communications to and from the Commission in the context of a leniency application.

The District Judge noted that in *Rubber Chemicals* the conspiracy sought to restrain trade in Europe (factor 1), that the document requests were fairly specific (factor 2), and that the documents were created, transmitted, and used only in Europe in relation to European proceedings (factor 3). Furthermore, the relevant information contained in the requested documents could be obtained from the public versions of the Commission's findings (factor 4). Finally, the court accepted that the disclosure of the documents would undermine the Commission's ability to carry out investigations by giving companies a disincentive to cooperate with the Commission (factor 5). Therefore, the *Rubber Chemicals* court ruled against the disclosure of the confidential documents.

The District Judge's Application of the Test for Comity. The District Judge applied the five-factor test and ruled that *"the Commission has strong and legitimate reasons to protect the confidentiality of Statements of Objections and Oral Hearings as a general matter […] Most importantly, confidentiality encourages third parties to cooperate with the Commission's investigations […] The Commission's interests would be significantly undermined if its confidentiality rules were disregarded by American courts in this case and others like it".*[7]

The geographic origin of the documents also favored denying the motion to compel production as, *"[granting] the motion to compel would amount to requiring the*

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6 *In Re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007).

7 *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No 05-MD-1720 slip op. at 19 (E.D.N.Y., August 27, 2010).

European Commission to turn over the fruits of its own labors in the service of the plaintiffs' American case".[8]

The District Judge also found that the plaintiffs had other means by which to obtain information on Visa and MasterCard's European activities. In addition, it was relevant that "*it is the defendant's European business practices, rather than the Commission's investigation itself, that may be directly relevant to this litigation. The Statement of Objections and Oral Hearing, though they may be helpful to the plaintiffs, are secondary to any unlawful conduct alleged to give rise to a cause of action. And the plaintiffs are entitled to discovery of the defendants' existing business documents, including those that were disclosed to the European Commission".*[9]

III. CONCLUSION

This ruling may make it more difficult for US antitrust plaintiffs to obtain in discovery confidential documents prepared in the course of EU proceedings.

We note, however, that this particular case related to confidential documents prepared by the Commission and not documents submitted by companies to the Commission. While the *Rubber Chemicals* decision protected from discovery certain leniency documents produced to the Commission, defendants will nonetheless need to remain careful regarding the content of any submission to the Commission pending further US court rulings on such material.

Finally, it should be noted that there are two cases pending before the European Courts regarding the access to the Commission's file (in both cases, greater access to the Commission's file is requested by the European private plaintiffs).[10] Along with the cases regarding US discovery, these cases should be watched carefully.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the "Practices" section of our website at http://www.clearygottlieb.com.

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8 *Ibid.*

9 *Ibid*., at 20-21.

10 Case T-237/05 *Éditions Odile Jacob SAS v. Commission*; Case T-380/08, *Kingdom of the Netherlands v Commission.*

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